

Natural Environment (Scotland) Bill

Delegated Powers Memorandum

Introduction

1. This Delegated Powers Memorandum has been prepared by the Scottish Government in accordance with Rule 9.3.3B of the Parliament's Standing Orders in relation to the Natural Environment (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 59–EN);
 - a Financial Memorandum (SP Bill 59–FM);
 - a Policy Memorandum (SP Bill 59–PM);
 - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 59–LC).
3. This Memorandum has been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Parliament.

Outline of Bill provisions

4. The Natural Environment (Scotland) Bill ("the Bill") is being introduced with measures to:
 - establish statutory targets for improving biodiversity;
 - provide Scottish Ministers with a new delegated power to modify or restate Environmental Assessment Legislation and Habitats Regulations;
 - modernise the aims and powers of National Parks and provide Scottish Ministers with a power to set up a fixed penalty notice regime by secondary legislation for contravention of national park byelaws; and
 - reform deer management legislation.
5. The Bill is in 5 parts:
 - Part 1 – Targets for improving biodiversity.

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- Part 2 – Power to modify or restate environmental impact assessment legislation and habitats regulations.
- Part 3 – National Parks.
- Part 4 – Deer management.
- Part 5 – Miscellaneous and general.

6. Further information about the policy objectives and changes being made by the Bill can be found in the Policy Memorandum for the Bill. Further information about the costs associated with the measures included in the Bill can be found in the Financial Memorandum for the Bill.

Rationale for subordinate legislation

7. The Bill contains a number of provisions conferring delegated powers. In deciding whether provisions should be specified on the face of the Bill or left to subordinate legislation, the Scottish Government has considered the importance of each matter against:

- The need to allow detailed operational arrangements to be set out in secondary legislation, in line with the basic structures and principles set out in the primary legislation;
- The need to ensure sufficient flexibility in the future to respond to changing circumstances and to make changes quickly without the need for primary legislation;
- The need to ensure proper use of parliamentary time;
- The possible frequency of amendment;
- The contextual history, as further described in this Memorandum, in terms of which secondary and certain primary legislation proposed to be modifiable by secondary legislation was able to be so amended prior to exit from the European Union (EU); and
- The need to anticipate the unexpected, which might otherwise impact on the purpose of the legislation.

8. The relevant provisions are described in detail below. For each provision, this memorandum sets out:

- The person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;
- Why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each such provision; and
- The parliamentary procedure to which the exercise of the power to make subordinate legislation is to be subject, if any.

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9. Subordinate legislation is required to implement the Scottish Government’s policy and some form of parliamentary procedure is appropriate. For the decision on negative or affirmative procedure, the Scottish Government has carefully considered the degree of Parliamentary scrutiny that is thought to be required for the instrument, balancing the need for the appropriate level of scrutiny with the need to avoid using up Parliamentary time unnecessarily. The balance reflects the views of the Government on the importance of the matters being delegated by the Parliament.

Delegated powers

Part 1: Targets for improving biodiversity

Section 1: Targets for improving biodiversity - Inserted section 2C: duty to set targets

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative (with additional preconditions amounting to ‘super-affirmative’)

Provision

10. Section 1 of the Bill inserts section 2C into the Nature Conservation (Scotland) Act 2004 (“the 2004 Act”) and places a duty upon the Scottish Ministers to set targets for the purpose of supporting and measuring progress being made in respect of the implementation of the Scottish Biodiversity Strategy and the duty under section 1 of the 2004 Act to further the conservation of biodiversity.

11. The power states that Scottish Ministers may, by regulations, make provisions for and in connection with targets in relation to the following three topics:

- the condition or extent of any habitat;
- the status of threatened species; and
- the environmental conditions for nature regeneration.

12. Inserted section 2C(1)(b) also provides for the Scottish Ministers to make provisions for and in connection with targets in relation to any other matter relating to the restoration or regeneration of biodiversity that they consider appropriate.

13. While the power to set targets in section 2C(1) is permissive, inserted section 2C(2) specifies that Scottish Ministers must set at least one target in respect of each of the topics, as described above, and specify the manner in which, or indicators against which, progress toward and achievement of the target being set is to be measured.

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14. Inserted section 2C(3) requires that the Scottish Ministers must lay draft regulations for at least one target for each topic described in subsection (1)(a) before the Scottish Parliament within 12 months of the provisions coming into force.

15. Section 1 of the Bill inserts section 2D into the 2004 Act, which imposes a duty on the Scottish Ministers to ensure that the targets set are met and provides for what is to happen if a target is not met or it becomes apparent to them that it will not be possible to meet the target. If a target has not been met or is not likely to be met, Scottish Ministers must lay draft regulations revoking the target and setting a new one. They must also lay a statement before parliament on their views as to why the target has not or will not be met and the steps they intend to take in consequence of the target not being or being unable to be met.

16. Section 1 of the Bill also inserts section 2F into the 2004 Act, and sets out the process for setting or amending targets under the power in section 2C or adjusting topics under the power in section 2E(5).¹

17. When setting or amending targets or topics, section 2F sets out a requirement to seek and have regard to scientific advice in relation to the targets or topics to be set or amended from such persons as the Scottish Ministers consider to be independent and have relevant expertise. It also requires that Scottish Ministers are satisfied that any targets set or amended can be met. The requirement to seek independent expertise does not apply if advice has already been sought in consequence of a review under section 2E(1) and Scottish Ministers are satisfied that this advice is sufficient. Environmental Standards Scotland (ESS) must assess and provide a report on the manner in which Scottish Ministers seek independent advice when setting or amending targets or target topics.

18. Scottish Ministers must also at the same time as laying regulations under section 2C(1), which amend a target, or under section 2E(5) lay a statement before parliament setting out why they consider it appropriate to amend the target or topic. This requirement does not apply if Scottish Ministers have already laid a statement under section 2D(4)(a) before parliament setting out why a target has not or will not be met and the steps they intend to take alongside draft regulations that revoke the target and set a new one.

19. Inserted section 2F(5) provides that existing targets in regulations can only be revoked or diminished if:

- the target has not been met or the Scottish Ministers believe it is no longer possible for a target to be met and therefore must revoke the target and set a new one.
- the Scottish Ministers are satisfied that the existing target would have no significant benefit compared with not meeting the target or meeting a diminished target. This covers situations where it becomes apparent that

¹ This sections also sets out the process for amending topics, which is covered below.

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even if the target is fully met it is not making the intended contribution to the overall purpose of preventing a decline in biodiversity or restoring or regenerating it.

- changes in circumstances or scientific knowledge mean that the target or the manner in which progress toward it is measured is no longer appropriate. This reflects that long-term targets, or geographically specific targets may sometimes be overtaken by events and that all targets may be impacted by scientific discoveries which change the understanding of what is the best approach.

Reason for taking power

Setting targets

20. The introduction of statutory nature restoration targets must address the fact that biodiversity is a complex set of inter-connected systems and that there is no globally agreed, single quantifiable apex target – like the equivalent to Net Zero emissions for climate targets. The complexity of nature also means that it is not feasible to construct a quantifiable pathway to meeting targets, as you can with emissions targets.

21. Given the complexity of putting nature restoration targets on a statutory footing, careful consideration is needed as to how to set targets within legislation (i.e. which elements are set out in primary and secondary legislation). Statutory targets set the long-term commitment of government and if they are going to drive the transformational change needed to tackle the biodiversity crisis, then it is essential they provide clear focus and are ambitious. In addition, for targets to be effective they must also be able to adapt as knowledge and technology develop. Given the complexity and inter-relatedness of nature, and the uncertainty that impacts such as climate change will have, it is difficult to predict with confidence the overall effect of nature restoration actions in the future. Putting nature restoration targets on a statutory footing therefore requires a considered, robust and transparent approach.

22. The Scottish Government's proposal is that the Bill should establish the framework for targets, which will include the high-level topics against which specific targets will be set. The actual targets, such as the detail of the quantitative figures, will then be provided in secondary legislation. This approach allows for targets to be adapted in light of circumstances whilst ensuring that parliamentary scrutiny is maintained.

23. Inserted section 2E(1) requires Scottish Ministers to carry out reviews in relation to targets section under section 2C(1) as they consider appropriate. Section 2E(1) also requires Scottish Ministers to prepare a report on the progress being made towards meeting the targets at least once every 3 years and to review the suitability of the topics, and the targets themselves, at least once every 10 years. ESS must review and report on each report prepared by Scottish Ministers under section 2E(1).

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24. Setting the detail of the targets in secondary legislation allows the Scottish Government to respond quickly to any findings from these reporting requirements without the need for recourse to primary legislation.

Amending targets

25. It is important that the Scottish Ministers are reactive and flexible to developing and changing circumstances in relation to the restoration or regeneration of biodiversity. The initial setting of targets will be based on the best available scientific information. However, as discussed above, given the complexity of interrelatedness of nature and the uncertainty that impacts such as climate change will have, it may be difficult to predict with confidence the overall effect of nature restoration actions in the future. Therefore, to ensure that the outcomes of the Scottish Biodiversity Strategy are achieved, it may be required to amend targets within the secondary legislation.

26. If Scottish Ministers are of the view and have evidence that a target can no longer be met, a statement must be laid before parliament setting out why targets were not met or are thought no longer possible to be met and the steps they intend to take to address the issues identified. Scottish Ministers must also lay before Parliament draft regulations which revoke the existing target and set a new one. ESS must assess and provide a report on the manner in which Scottish Ministers seek independent advice when amending targets or target topics. The ESS report must be laid before parliament.

27. The laying of the draft regulations, Scottish Ministers' statement and ESS report when a target is amended provide a means for the Scottish Parliament to scrutinise the proposed amendment to targets and the reasoning behind it. This approach allows for targets to be agile and adapt to unforeseen circumstances while ensuring that scientific, stakeholder and parliamentary scrutiny is maintained.

Choice of procedure

28. Regulations made using the new power will be subject to a super-affirmative procedure as, where additional requirements are added to affirmative procedure, as described below, they are described as super-affirmative. This additional procedure will ensure that the Scottish Parliament is able to closely scrutinise, and determine whether to approve, any such draft regulations before they can be made having had the benefit of the additional information provided by the Scottish Ministers and review of the manner in which the Scottish Ministers sought the advice.

29. Before making regulations under inserted section 2C(1), section 2F sets out that the Scottish Ministers must seek and consider independent expert advice in relation to targets being set or amended and, if the regulations set or amend a target, be satisfied that the target being set can be met. The Scottish Ministers must also, at the same time as laying regulations which amend a target, lay a statement before the Parliament setting out why they consider it appropriate to amend the target. ESS must assess and provide a report on the manner in which Scottish Ministers seek independent advice when setting or amending targets or target topics and their report must be laid before parliament.

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30. While the form of such advice to be sought is not specified in the legislation, as set out in the policy memorandum for the Bill, in order to inform the development of the Bill, the Scottish Government had convened a Biodiversity Programme Advisory Group of independent academics (PAG) on a voluntary and non-statutory basis with quality assurance provided by a sub-group of the Scientific Advisory Committee of NatureScot.

31. Further information about the role of the PAG is set out in paragraphs 35 to 36 of the Policy Memorandum for the Bill.

Section 1: Targets for improving biodiversity - Inserted section 2E: Reviewing progress and power to adjust topics

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

32. Inserted section 2E(5) enables the Scottish Ministers to adjust the topics in inserted section 2C so as to add or amend the topics under which Scottish Ministers must set targets.

33. This means that the three topics in section 2C(1) for which targets must be set cannot be removed, although they can be added to or changed.

34. Inserted section 2F(1) states that before making regulations to amend the topics, Scottish Ministers must seek and have regard to independent and expert scientific advice in relation to the topics. Environmental Standards Scotland (ESS) must assess and provide a report on the manner in which Scottish Ministers seek independent advice when amending target topics and their report must be laid before parliament. This requirement does not apply if the regulations are being made in consequence of a review under section 2E(1) and the Scottish Ministers are satisfied that this advice is sufficient.

35. Inserted section 2F(3) places a duty on Scottish Ministers to lay a statement before the Scottish Parliament, at the same time regulations are made to amend the topics, setting out why it is appropriate to amend the topics. This requirement does not apply if a statement has already been laid under section 2D(4)(a) on Scottish Ministers views as to why a target was not met or is no longer possible to meet.

Reason for taking power

36. This power is required for future proofing and being adaptable to changes in circumstances or scientific knowledge. For nature restoration targets to be effective they must be able to adapt as evidence bases change and overall knowledge and technology develop. Given the complexity and interrelatedness of nature, and the

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uncertainty that impacts such as climate change will have, it may be difficult to predict with confidence the overall effect of nature restoration in the future. Therefore, being able to allow for targets topics to be adapted in light of changing circumstances may be necessary.

37. As set out in paras 65 to 81 of the policy memorandum for the Bill, when determining the target topics for inclusion in the Bill, consideration was given to the inclusion of further target topics. While the decision was made not to include these additional topics at introduction, the policy memorandum for the Bill notes that two of these topics have merit but that “the PAG acknowledged there is not currently an established approach to assessing how targets made under these topics could be measured.” Having a power to be able to add to or amend target topics would mean that if a way of measuring such topics became available and the targets were considered suitable, such targets could be added without the need for primary legislation.

38. It is therefore considered that a power to amend the target topics should be included to enable new target topic(s) to be added (with corresponding targets and indicators set under them).

39. It is also reasonable to assume that as our scientific understanding grows and new methodologies for measuring the impacts of biodiversity loss and nature restoration measures are developed some refinement of target topics may be necessary.

40. A power to amend the target topics will also ensure that the Scottish Government can respond quickly and with flexibility to the recommendations of any future statutory review of the target topics without the need for recourse to primary legislation.

Choice of procedure

41. As this provision enables amendment of a provision of primary legislation, the Scottish Government believes that it is appropriate that this power is subject to the affirmative procedure. The additional procedural steps also give the Scottish Parliament the ability to consider the Scottish Ministers reasons for making the changes and have the benefit of the independent report. This additional scrutiny is considered appropriate to assist the Scottish Parliament in its consideration of regulations which influence what future targets may be set.

42. Before making regulations under inserted section 2E(5) the Scottish Ministers must seek and consider independent expert advice. ESS must also assess and provide a report on the manner in which Scottish Ministers seek independent advice when amending target topics and their report must be laid before parliament.

43. Scottish Ministers must also lay before the Scottish Parliament a statement setting out why they consider it appropriate to amend the topic.

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Section 1: Targets for improving biodiversity - Inserted section 2G: Independent review

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

44. Section 1 inserts section 2G into the 2004 Act. Inserted section 2G(1) provides for Environmental Standards Scotland (ESS) to act as an independent review body with the following functions:

- review each report prepared by Scottish Ministers on monitoring progress towards meeting targets (3 yearly progress report);
- review each report prepared by the Scottish Ministers reviewing all targets and target topics (10 yearly full targets review);
- assess the manner in which Scottish Ministers seek and use independent advice in compliance with carrying out reviews for targets and target topics (both ad hoc and 10 yearly reviews);
- prepare a report on the above matters and submit this to Scottish Ministers to then be laid in parliament.

45. Inserted section 2G(4) provides that the Scottish Ministers may, by regulations, change who is to act as the independent reviewing body.

Reason for taking power

46. ESS is an independent public body that was established to ensure the effectiveness of environmental law, and prevent enforcement gaps arising from the UK leaving the European Union.

47. Their remit is to independently scrutinise and investigate public authorities' compliance with environmental law, the effectiveness of the law and how it is implemented and applied in Scotland.

48. As set out in paras 56 to 61 of the policy memorandum, given the complexity of nature restoration, interpreting relevant data can be challenging and there is a possibility of multiple and competing narratives emerging, potentially creating a confused discourse, leading to diminished accountability. The designation of an Independent Review Body, able to provide independent and expert assessment, will provide mitigation for these identified risks.

49. The power to specify a different body as the independent review body is considered necessary if, for example, changes were to be made to the remit of ESS at a future date which meant it was no longer appropriate for it to undertake this role. The

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power is therefore taken for the purpose of future-proofing, ensure accountability and transparency of the process to meeting statutory targets through independent and expert assessment.

50. In addition, it gives the Scottish Ministers the flexibility to respond to any change in circumstances which may lead to ESS being unable to carry out this function or where another body is deemed to be better placed to undertake this role.

51. The provisions do not curtail or otherwise amend the existing powers and functions ESS have to scrutinise the work of the Scottish Government regarding environmental law.

Choice of procedure

52. The designation of an Independent Review Body, able to provide expert scrutiny and assessment, independent of government, is an important element of the Bill. The Scottish Government, therefore, believes it is appropriate that any proposed change to the Independent Review Body is subject to the affirmative procedure, ensuring it goes through a higher degree of parliamentary scrutiny. The affirmative procedure is also considered appropriate given that the power would entail the modification of primary legislation.

Part 2: Power to modify or restate environmental impact assessment legislation and habitats regulations

Section 2: Power to modify or restate EIA legislation and habitats regulations

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative or Affirmative

Provision

53. The Conservation (Natural Habitats, &c.) Regulations 1994 (the “1994 Habitats Regulations”) and the Environmental Impact Assessment regime (“EIA regime”) are core aspects of the environmental protection legal framework in Scotland.

54. Section 2(1) confers a power on the Scottish Ministers to modify or restate provisions in the legislation making up Scotland’s EIA regime (so far as within devolved competence) and the 1994 Habitats Regulations through secondary legislation for a limited set of purposes. The relevant EIA legislation, as defined in section 4, that is within the scope of the power includes certain aspects of primary legislation, for example the provisions of the Harbours Act 1964 which relate to the environmental assessment of projects concerning ports and harbours.

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55. The power may be used to modify, or restate, any provision of the relevant EIA legislation or the 1994 Habitats Regulations. For example, it may be appropriate to make a small change in just one EIA sector, or an adjustment to the EIA processes of several or even all sectors. The power to restate enables the Scottish Ministers to rewrite a provision without changing its legal effect.

56. Section 3 sets out the purposes for which the power can be used. The explanation and rationale for these purposes is set out in paragraphs 126 to 134 of the policy memorandum.

57. Section 2(5) provides that before making any regulations under section 2(1) the Scottish Ministers must consult anyone who may have an interest in, or otherwise be affected by, the changes being proposed.

Reason for taking power

58. Both the 1994 Habitats Regulations and the legislation making up Scotland's EIA regime originated in European Union ("EU") directives, were implemented in domestic law and later amended, using the section 2(2) power in the European Communities Act 1972 ("the 1972 Act"). The section 2(2) power allowed amongst other things for the modification of primary legislation. Since the UK's exit from the EU, the power in section 2(2) of the 1972 Act has been lost which significantly limits the Scottish Ministers' ability to amend these key bits of legislation given that, in this legislative context, there are limited alternative powers available.

59. As set out in the policy memorandum, there are some existing powers available to Scottish Ministers to amend the relevant legislation, however, these powers can only be exercised for specific, or limited, purposes and do not provide Scottish Ministers with the flexibility that may be required in future to ensure the legislation remains fit for purpose. Additionally, some of these available powers are expected to 'sunset' at a given date, meaning they will only be available for a limited time.

60. The Scottish Ministers consider that it is vital to have the ability to ensure that the 1994 Habitats Regulations and the relevant EIA legislation remain fit for purpose over time. The purpose of the enabling power is therefore to allow for future amendments to the relevant legislation in light of evolving circumstances, or to address existing issues or inefficiencies. This power will provide the flexibility to adapt to future requirements, while ensuring the legislative frameworks continue to effectively underpin environmental protection and assessment processes in Scotland. The power can be used to modify specified primary legislation which is required because certain elements of the EIA regime, principally in the transport sector, are found in the Harbours Act 1964, the Roads (Scotland) Act 1984 and the Transport and Works (Scotland) Act 2007.

Limits on the use of the power

61. Section 2(2) of the Bill sets out the limitation that the power to modify or restate the relevant legislation may be used only if the Scottish Ministers consider that it would

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be in accordance to do so with one, or more, of the purposes set out in section 3. These purposes are:

- a) to maintain or advance standards in relation to—
 - i. restoring, enhancing or managing the natural environment,
 - ii. preserving, protecting or restoring biodiversity,
 - iii. environmental assessments,
- b) to facilitate progress toward any statutory target relating to the environment, climate or biodiversity that applies in Scotland (including, in particular, the net zero emissions target set by section A1 of the Climate Change (Scotland) Act 2009),
- c) to ensure consistency or compatibility with other legal regimes (either domestic or international),
- d) to take account of changes in technology or developments in scientific understanding,
- e) to resolve ambiguity, remove doubt or anomaly, facilitate improvement in the clarity or accessibility of the law (including by omitting or repealing anything which is legally unnecessary),
- f) to improve or simplify the operation of the law.

62. Because of its origination in implementing EU law as mentioned, much of the relevant EIA legislation has the status of assimilated law (the new name for retained EU law) but none of it is direct assimilated legislation (that is to say EU Regulations or Decisions forming part of Scots law) and so the powers cannot be used to modify or restate any direct assimilated legislation.

63. Certain aspects of the statutory wording employed in the Bill (section 2(4), section 3(d) and (e)) have been influenced by wording from the UK Retained EU Law (Revocation and Reform) Act 2023 (“REUL Act”). Whilst the Scottish Government continues to oppose that Act, which was enacted without the legislative consent of the Scottish Parliament, on a purely technical level REUL Act provisions were considered to be a relevant precedent for the development of the Bill and the framing of powers, to help ensure assimilated law continues to operate effectively. In the particular case of legally unnecessary provisions, Scottish Government policy is that repealing or revoking redundant assimilated law can be justified where it is possible to determine that it is redundant and there will be no adverse effect if it is revoked.²

64. For further information about the Scottish Government’s reasons for seeking this power, see paragraphs 87 to 122 of the Policy Memorandum for the Bill.

² Further detail on the Scottish Government position on the REUL Act is set out in bi-annual reports to the Parliament linked to at [Europe - Assimilated law \(Retained EU law\) | Scottish Government](#).

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Choice of procedure

65. Section 2(6) and (7) of the Bill sets out the procedure which is attached to this power.

66. Given the wide range of matters that will potentially be taken forward using this power, it is to be exercisable 'either way', which means the Scottish Ministers can choose in each case whether regulations are to be subject to the affirmative or the negative procedure. However, section 2(6) of the Bill identifies certain uses of the power which are considered by the Scottish Government to involve decisions of significance requiring that the affirmative procedure always be used when making such provision. Any regulations which contain provisions which do the following, are subject to the affirmative procedure:

- Creates an offence;
- Amends an existing offence in a manner that widens its scope;
- Confers a power to arrest a person, search a person, enter and search a vehicle/premises/land, inspect, seize or detain any thing, or widens the scope of an existing power of this sort;
- Imposes, or confers on a Scottish public authority the power to impose, a fee or charge or alters the amount of an existing fee or charge (excluding provision that alters the amount of existing fees to reflect inflation);
- Textually amends an Act.

67. Where the provision in regulations made under section 2(1) does not fall under the categories noted above, section 2(7) sets out that any other regulations, if not subject to the affirmative procedure, are subject to the negative procedure (i.e. the power is exercisable 'either way').

68. In recognition of the wide range of purposes for which an amendment to the relevant EIA legislation and the 1994 Habitats Regulations may be sought and the many legislative demands on Parliamentary time as a consequence, the Scottish Government considers that the procedures chosen for the power, as set out in section 2(6) and (7), to represent a balance between allowing for effective and thorough scrutiny of the use of the power in section 2(1) whilst also ensuring there is sufficient flexibility in the system.

69. Before making regulations under this section, the Scottish Ministers must consult such persons as they consider may have an interest in, or otherwise be affected by, the regulations. This is likely to include both statutory bodies and organisations which represent the various industries that may be affected.

70. Allowing for a choice of procedure represents a sensible, pragmatic and efficient approach.

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71. Many uses of the power may be mechanistic and/or minor in nature and therefore appropriate for the negative procedure where it would be disproportionate to require the affirmative procedure to be used. For example, moving away from the submission of paper copies of EIA reports (where legislation requires this) to electronic submissions, which would reduce costs and the administrative burden of processing and storing paper records.

72. The policy intention is that any regulations which make substantial changes to the legislation being modified, and therefore require greater levels of scrutiny, would be subject to the affirmative procedure.

Part 3: National Parks

Section 8: meaning of local authority for the purpose of access rights

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

73. Section 8 of the Bill makes adjustments to the Land Reform (Scotland) Act 2003 (“the 2003 Act”) and the National Parks (Scotland) Act 2000 (“the 2000 Act”) to allow new National Park authorities to be local authorities for the purposes of land access rights.

74. Part 1 of the 2003 Act sets out land access rights and section 32 (interpretation of Part 1) makes the National Park authorities which existed at the time of commencement local authorities for land access purposes. This means that any new National Park which was designated after the commencement of the section would not be able to be the local authority for access rights purposes and this would instead fall to the local council.

75. Section 8(2) amends the 2003 Act to add new National Park authorities which have been specified in the designation order as being the local authority for the purpose of this Part to the section 32 definition of “local authority”.

76. Section 8(4) amends section 7 of the 2000 Act to add to the information required in a designation order to require that a designation order must specify whether the National Park authority is a local authority for the purposes of Part 1 of the 2003 Act. Section 34(5) of the 2000 Act provides that designation orders are subject to the affirmative procedure and section 6(3) provides that Scottish Ministers must provide local authorities within the area in the Order to be designated as a national park with a copy of the draft Order and determine a period of at least 12 weeks where this should be available for public inspection.

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77. Scottish Ministers must also consult every local authority and community council within the area to be designated; such persons as appear to them to be representative of the interests of those who live, work or carry on business in the proposed National Park area; and such other persons as they think fit. A specification as a local authority for the purposes of the 2003 Act may also be added to a designation order using section 30 of the 2000 Act. The 2000 Act is therefore also amended in subsection (5) to include the specification as a local authority in the information which cannot be modified or revoked without additional process in section 30(2)(a)(iii).

Reason for taking power

78. As noted above, under section 32 of the 2003 Act, the existing National Park authorities in Loch Lomond & the Trossachs and Cairngorms are regarded as local authorities for the purposes of access rights within their national park area.

79. Part 1 of the 2003 Act sets out the duties and powers which enable existing National Park authorities to uphold access rights and manage access in their areas. The 2003 Act does not, however, provide for any future National Park to become an access authority for its area. Given that the Scottish Government is proposing to establish a new National Park in Scotland (subject to legal conditions being met and taking into consideration the outcome of the reporter investigation and public consultation), the Bill amends the 2003 Act and the National Parks (Scotland) Act 2000 to enable any future National Park to become the access authority for its area, should it be considered appropriate.

Choice of procedure

80. Section 8(4) of the Bill amends section 7 of the 2000 Act, which states what a designation order for a new national park must include. This amendment provides that, if a new National Park were to be designated, the designation order must specify whether the National Park authority is a local authority for the purposes of Part 1 of the Land Reform (Scotland) Act. Section 34(5) of the 2000 Act already provides that designation orders are subject to the affirmative procedure. This requirement would continue to apply, irrespective of the proposed amendment to section 7 of the 2000 Act.

Section 9: Power to make regulations for the issuing of fixed penalty notices

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative unless subject to negative procedure

Provision

81. Schedule 2, paragraph 8 of the National Parks (Scotland) Act 2000 (the “2000 Act”) gives National Park authorities the ability to create byelaws in order to protect the natural and cultural heritage of the National Park, prevent damage to the land, and

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securing public enjoyment and safety. Paragraph 8(5) provides that sections 202 to 204 of the Local Government (Scotland) Act 2003 apply to byelaws made by National Parks, and section 203 provides that contravening a byelaw is an offence which is liable on summary conviction to a fine not exceeding level 2 on the standard scale.

82. Section 9(2) inserts section 26A into the 2000 Act. Inserted section 26A confers a power on the Scottish Ministers to be able to make provision by regulations for, or in connection with, the issuing of fixed penalty notices (FPNs) by national park authorities in relation to certain national park byelaws made under paragraphs 8 and 9 of Schedule 2, of the 2000 Act.

83. Inserted section 26A(13) defines an FPN as “a notice specifying a sum of money that may or must be paid as an alternative to prosecution for an offence.”

84. Inserted section 26A(2) makes it clear that the regulations must include certain things including:

- the byelaws in respect of which fixed penalty notices may be issued; and
- the persons (or categories of persons) who may issue fixed penalty notices.

85. Inserted section 26A(4) lists the information which must be included in a fixed penalty notice provided for by regulations.

86. Inserted section 26A(5) provides a non-exhaustive list of other things that the regulations may provide for. For example, creating offences relating to obstruction of a person who is exercising functions in relation to fixed penalty notices and failure to provide information requested in connection with fixed penalty notices.

87. Inserted section 26A(6) sets out that the maximum penalty for the creation of any offences under the regulations is, on summary conviction, a fine not exceeding level 2 on the standard scale. This penalty is the same as provided for contravention of a byelaw.

Reason for taking power

88. National Park Authorities have the power to create byelaws in order to protect the natural and cultural heritage of the area, to prevent damage to the land and to ensure public safety and enjoyment in the National Park. The purpose of these byelaws is to prevent irresponsible behaviours with formal enforcement being a last resort.

89. With the exception of littering and fly-tipping offences in Loch Lomond & the Trossachs National Park (where authorised officers can issue FPNs through powers under the Environmental Protection Act 1990 (the “1990 Act”), the only way to enforce byelaws in National Parks presently is through prosecution i.e. reports to the Crown Office and Procurator Fiscal Service (COPFS).

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90. FPNs are considered to be an effective and efficient means of addressing minor and technical breaches of legislation, including byelaws. Extending the ability of national park authorities to issue FPNs for when certain national park byelaws are breached will be an important additional enforcement tool and will help to provide a safe and protected environment for both residents and visitors to the parks.

91. Provision to enable national park authorities to issue FPNs in relation to such offences, and to accept the payment of such fixed penalties as an alternative to prosecution, will provide an additional route to securing compliance.

92. Further information about the types of offences that are likely to benefit from the use of FPNs are set out in 190 to 204 of the policy memorandum for the Bill.

93. The level of administrative detail required for this, and the flexibility to amend it, is at a level not deemed appropriate for primary legislation.

94. Any FPN regime established using the new power is likely to require updating and refinement in the creation of new byelaws or changes to existing ones or the creation of a new national park authority. An enabling power is therefore thought to be the most prudent approach, striking the right balance between the importance of the issue and providing sufficient flexibility to respond to changing circumstances (including the creation of byelaws and the amendment of existing byelaws) without the need for primary legislation.

Limits on the use of the power

95. Strict limits are placed on the power. The power may only be used to make provision for FPNs in relation to offences relating to national park byelaws, which are created under schedule 2 of the 2000 Act.

96. The power cannot itself be used to create any new offences (except insofar as it may create offences relating to obstruction of a person who is exercising functions in relation to fixed penalty notices or a failure to provide information requested in connection with a fixed penalty notice).

97. When a fixed penalty notice is issued, inserted section 26A(4), sets out that any FPN must state, amongst other things, the byelaw to which it relates and specify the particulars of the circumstances alleged to constitute the offence.

98. The FPN must also state the date on which it is issued, the amount of the fixed penalty, the person to whom payment may be made and their address, the period for payment, the method of payment, the effect of paying the fixed penalty within the payment period and the consequences of not doing so, and the details of any procedure for challenging or appealing the FPN.

99. Before making regulations under inserted section 26A, the Scottish Ministers must consult with such persons as they consider to be interested in or affected by the

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issuing of fixed penalty notices for National Park byelaw offences. Scottish Ministers can delegate their consultation requirements to the national parks but only in relation to whether it would be appropriate for a byelaw or proposed byelaw to be subject to a fixed penalty notice. Scottish Ministers can also require the National Park to provide them with a report on the consultation in such terms as they specify in the delegation.

100. The option to refer a case to COPFS for consideration of prosecution instead of offering a fixed penalty would continue to be available for use as appropriate.

Choice of procedure

101. Regulations made using the new power will be subject to the affirmative procedure, except in circumstances, set out in inserted section 26A(11)(a), where they are either a) removing a byelaw which has been revoked or b) specifying a byelaw which replaces a byelaw (with or without modification) and has substantially the same effect, where it is considered to be disproportionate to require affirmative procedure. This could include modest adjustments to; speed limits, boundaries of restriction zones, and dates of application for existing byelaws. For example, an existing National Park byelaw may state “the Master of a Power-driven vessel shall not permit their Power-driven vessel to travel at a speed greater than 11 kilometres per hour or on the plane within 150 metres off all shorelines, both mainland and island.” Where that existing byelaw is being revoked and replaced, the negative procedure could be used to update any reference to the byelaw being revoked and replaced and modestly amend the speed limit, area this is applied to, or the time in which this applies.

102. A replacement of a byelaw that substantially modifies its effect will not fall under inserted section 26A(11)(a) and would be subject to the affirmative procedure.

103. This approach is deemed to strike the right balance. It ensures that the Scottish Parliament is able to closely scrutinise, and determine whether to approve, any such draft regulations before they can be made in relation to the application of fixed penalty notices to existing, new or modified byelaws, while allowing for the minor technical amendments set out in inserted section 26A(11)(a) to be dealt with by negative procedure.

Part 4: Deer

Section 12: Code of practice on deer management

Power conferred on: Scottish Natural Heritage

Power exercisable by: Scottish Natural Heritage must draw up a code of practice for the purpose of providing practical guidance in respect of deer management. SNH must submit the proposed code of practice to the Scottish Ministers for approval. The code of practice must also be laid before the Scottish Parliament.

Parliamentary procedure: Subject to parliamentary control equivalent to the negative procedure.

Provision

104. Section 5A of the Deer (Scotland) Act 1996 (the “1996 Act”) requires SNH to prepare and establish a code of practice on deer management. In conjunction with the addition of new grounds for when SNH may intervene in the deer management of an area, the Bill amends section 5A of the 1996 Act to require SNH to set out the circumstances in which SNH will intervene. However, the substantive power contained in section 5A is not in itself, altered by the Bill.

Reason for taking power

105. To help owners and occupiers of land to understand and anticipate when SNH may decide to intervene, section 12(2) of the Bill requires SNH to include the circumstances in which it will intervene in the Code of Practice on Deer Management.

Choice of procedure

106. The amendment made to section 5A does not alter the procedure set out in section 5A(3) to (8). Subsections (3) to (8) set procedural requirements for the preparation and entry into force of the code as well as its replacement or revision. These include requirements for public consultation, approval by Scottish Ministers and parliamentary procedure. Subsection (9) of section 5A sets out that any revision to the code of practice must be laid before the Scottish Parliament and specify the date on which it is to come into effect with such date to be at least 40 days after it has been laid, disregarding any period during which Parliament is dissolved or in recess. Subsection 10 provides that the Scottish Parliament may, before such revision comes into effect, resolve that it is not to come into effect.

Section 16: Control schemes

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Provision

107. Section 16(3) replaces Schedule 2 of the Deer (Scotland) Act 1996 (“the 1996 Act”). Part 2 of the new schedule 2 deals with the process to be followed for making, varying or revoking a control scheme (“the proposal”). Although Scottish Natural Heritage (known as NatureScot) lead the process, the Scottish Ministers have a role in considering objections and deciding whether to give approval to a scheme being made, varied or revoked. As part of this process, they may appoint an expert or experts to provide advice on objections (paragraph 9). Paragraph 9(3) provides for regulations to be made about the terms and conditions of appointees.

Reason for taking power

108. The reason for providing the Scottish Ministers with the power to appoint an expert or experts to provide advice on objections, is because the Scottish Government recognises that objections to control schemes may be made on substantive grounds, and may relate to the scientific or evidential basis of that control scheme. It may therefore be necessary for the Scottish Government to seek expert advice, and in some circumstances to seek advice from more than one person. It is considered to be reasonable for the Scottish Government to be able to set out the details of appointees’ terms and conditions in regulations if this is deemed appropriate in the future.

Choice of procedure

109. Section 47(1) of the 1996 Act provides that subject to section 21(4), any orders or regulations made under the 1996 Act are subject to the negative procedure. After consideration, the Scottish Government believes this power should also be subject to negative procedure because the power simply enables the Scottish Government to set out terms and conditions of appointees. The purpose of this is to allow the Scottish Government to appoint an expert or convene a small group of experts to consider one or more control schemes, if in future this was deemed appropriate. If this was to become a standing arrangement for consideration of control schemes, then the Scottish Government thinks it is appropriate to set out details of the appointees’ terms and conditions in regulations made by the Scottish Ministers. At present, it would not be feasible or appropriate to do so as we have not had to seek external advice on a control scheme to date. While it recognises that the Scottish Parliament may have an interest in the scope of any such group, the Scottish Government is able to set out the terms and conditions of appointment to any expert the Scottish Government seeks advice from, and an exercise of this regulation making power would simply be a formalisation of that process.

Section 28: Register of authorised persons

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Provision

110. Section 17A of the 1996 Act contains a regulation making power to establish a register of persons competent to shoot deer. Section 28 of the Bill amends section 17A of the 1996 Act to enable regulations to also provide for the registration of authorisations for specified activities. Section 28(2)(a) allows for the establishment and operation of a register of persons, who are (either or both) competent to shoot deer in Scotland, and authorised to carry out one or more of the specified activities.

111. A “specified activity” is defined in inserted section 17A(8), added by section 28(4). A specified activity is an activity which requires authorisation under sections 5, 17ZA, 18 or 19. The definition is by reference to the need for permission from Scottish Natural Heritage (SNH) to carry out the activity via an authorisation, rather than by reference to the criteria for determining whether the authorisation should be granted (or lack thereof).

112. The effect of the amendment in section 28(2)(a) of the Bill is that once the register is set up, a person will be able to apply to SNH for inclusion on the register for two things: (a) for being fit and competent to shoot deer and (b) for authorisation to carry out one or more of the specified activities. During the application process, a person can indicate what they want to be registered for (e.g. being fit and competent to shoot deer, or being fit and competent to shoot deer as well as to carry out night shooting and shooting during close seasons, or all of the specified activities).

Reason for taking power

113. The purpose of establishing a register of persons competent to shoot deer in Scotland is to ensure that all persons are suitably qualified or experienced and have a baseline level of competence before shooting deer. This will be demonstrated through deer management qualifications. Authorisations to undertake any of the specified activities (shooting female deer during the close seasons, night shooting, using a vehicle to drive deer or use of a shotgun to shoot deer) are necessary due to the specific welfare concerns about these activities.

114. By registering persons as competent to carry out the specified activities (as well as their fitness and competence to shoot deer generally) greater flexibility will be afforded to the individual when it comes to undertaking the specified activity as they will not be as bound by the restrictions placed on individual authorisations which currently exist. The administrative burden on NatureScot will also be reduced as, once registered, an individual will be able to carry out deer management activities which they deem appropriate (as long as they are carried out in accordance with the terms of their

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authorisations). This will reduce the number of applications processed by NatureScot for authorisation to carry out these activities.

Choice of procedure

115. The amendments made to section 17A of the 1996 Act do not alter the parliamentary procedure to which regulations made under section 17A are currently subject. Section 47(1) of the 1996 Act provides that subject to section 21(4), any orders or regulations made under the 1996 Act are subject to the negative procedure. The Scottish Government has considered whether this power should still be subject to negative procedure. After consideration, the Scottish Government believes it should still be subject to negative procedure because the regulations will create the register. Section 17A already sets out, in detail, examples of what the regulations may include and requires consultation of organisations and people with an interest. Section 17A was inserted by the Wildlife and Natural Environment (Scotland) Act 2011, and while the Scottish Government is making amendments with the aim of bringing this register into effect, the changes to the enabling power are not significant. The Scottish Government is therefore of the view that the rationale for these to be laid under negative procedure has not changed.

Part 5: General

Section 35: Ancillary provisions

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative procedure if amending primary legislation, otherwise negative procedure

Provision

116. This provision enables the Scottish Ministers to make any incidental, supplementary, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of or in connection with the Bill, or for giving full effect to it. The regulations may make different provision for different purposes and modify any enactment.

Reason for taking power

117. As with any new body of law, the Bill may give rise to a need for a range of ancillary provisions. The power is needed to ensure that the policy intentions of the Bill are achieved if further changes are found to be necessary as a result of provisions in the Bill. Such provision is common in Bills to provide flexibility to make any adjustments that may arise in light of experience in relation to the operation of the Act as timeously as possible.

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118. The power will also allow the Scottish Ministers to make further changes should there be any unforeseen issues with the operation of the new legislation. Without the power, it may be necessary to make further primary legislation to deal with a technical, operational or implementation matter which is clearly within the scope and policy intentions of the Bill. The Scottish Government considers that this would not be an effective use of resources by the Scottish Parliament or the Scottish Government.

119. The Scottish Government recognises the potentially broad application of this power, which includes the power to modify primary legislation, and to alter the provisions of the Bill. However, it is limited to the extent that it can only be exercised by the Scottish Ministers for the purposes of, in connection with, or for giving full effect to any provisions of the Bill.

Choice of procedure

120. Section 35(3) requires regulations made under section 35 to be subject to affirmative procedure if they contain a provision which adds to, replaces or omits any part of an Act. Any other regulations made under this section are subject to negative procedure. These procedures are typical for ancillary powers.

Section 36: Commencement

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Laid, no procedure

Provision

121. This provision allows the Scottish Ministers to commence provisions in this Bill (other than section 34 (Regulations) section 35 (Ancillary Powers), section 36 (Commencement), and Section 37 (Short Title) which come into force on the day after Royal Assent)) on such day as they may appoint by regulations. The regulations may include transitional, transitory or saving provision and may make different provision for different purposes.

Reason for taking power

122. It is standard practice for the Scottish Ministers to have control over the commencement of a Bill so that it can be brought into force at a suitable time. This allows for any practical measures necessary for the implementation of the Bill to be put in place in good time in advance of the provisions coming into effect.

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Choice of procedure

123. As is usual for commencement regulations, the default laying requirement applies (as provided for by section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010). This is considered appropriate because the policy behind the provisions will have already been considered by the Parliament during the passage of the Bill.

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Natural Environment (Scotland) Bill

Delegated Powers Memorandum

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