



Northern Ireland  
Assembly

Advice of the Examiner of Statutory Rules to the  
Committee for the Economy on delegated powers:

The Small-Scale Green Energy Bill

19 January 2022

## **The Small-Scale Green Energy Bill**

1. I refer to the request for advice of the Committee for the Economy (the Committee) of 14 October 2021 in relation to the Small-Scale Green Energy Bill Integrated Education Bill (the Bill).
2. This advice is limited to consideration of whether the provisions of the Bill inappropriately delegate legislative power, and whether the exercise of legislative power provided for is subject to an inappropriate degree of scrutiny by the Northern Ireland Assembly (the Assembly).
3. For ease of reference, a brief description of scrutiny procedures to which subordinate legislation before the Assembly may be subject is set out in the Appendix hereto.
4. The Bill contains a number of powers, each delegated to the Department, under which subordinate legislation may be made.
5. The Committee will note that the regulation making powers provided for in the Bill are subject to the affirmative resolution procedure.
6. The Committee will wish to consider whether, in every case, the exercise by the Department of those powers to make legislation are subject to an appropriate level of Assembly scrutiny.
7. Further, I refer the Committee to my comments in paragraphs 39 to 44 below in relation to the drafting of clause 4 of the Bill.

### **Background**

8. The stated policy objectives of the Bill are as follows: -
  - a) to place a requirement on major electricity providers and suppliers to provide an obligatory minimum price tariff for exporting microgenerated renewable power into the grid.
  - b) to establish a small scale green energy micro-generation scheme with powers that include setting this minimum price tariff, and to alter it depending on relevant economic conditions (e.g. broader macroeconomic conditions, the unit price of renewable energy and the financial stability of the providers themselves etc.).
  - c) to create a power to determine what providers are eligible for the scheme by setting a minimum threshold for market share.
9. Clause 1 of the Bill makes provision in relation to the establishment of a small-scale green energy scheme for Northern Ireland by regulations to be made by the Department for the Economy (the Department).

10. Clause 2 of the Bill makes supplementary provision in relation to scheme regulations, including provision in relation to consultation.
11. Clause 3 of the Bill makes provision in relation to review and revision of the operation of the scheme, including by making new scheme regulations when the Department considers revision necessary or appropriate.
12. Clause 4 of the Bill provides that scheme regulations must make provision enabling any aspect of the scheme to be suspended or revoked, whether or not by the making of amending or revoking scheme regulations, where it appears to the Department that any aspect of the scheme is having or is likely to have unintended and harmful consequences or urgent action needs to be taken to control the operation of the scheme for any other reason. This provision is discussed further below.
13. Clause 5 of the Bill makes provision in relation to guidance. The Department may give guidance about the operation of the small-scale green energy scheme and about the pursuit of the small-scale green energy objectives (as defined in clause 1(6) of the Bill). This guidance is not required to be laid before the Assembly.
14. Clause 6 of the Bill makes interpretive provision.
15. Clause 7 of the Bill provides for Commencement.
16. Clause 8 provides for the short title of the Bill.

### **Scheme Regulations**

17. Clause 1(1) of the Bill provides that the Department must make regulations establishing a small-scale green energy scheme for Northern Ireland.
18. Sub-clauses 1(2) – 1(5) of the Bill makes provision in relation to those matters which must be set out in the scheme regulations.
19. Sub-clause 1(6) of the Bill provides that in making scheme regulations the Department must have regard to *'the small-scale green energy obligations'* as defined in subclause 1(6).
20. Sub-clause 1(7) of the Bill provides that, in making scheme regulations, the Department must in particular ensure that the scheme is compatible with and reflects the Single Electricity Market in Northern Ireland and Ireland, as provided for by the Electricity (Single Wholesale Market) (Northern Ireland) Order 2007 and the Renewables Obligation Order (Northern Ireland) 2009.
21. Clause 2 of the Bill makes supplementary provision in relation to scheme regulations including in relation to consultation.

22. Clause 2(4) of the Bill provides that scheme regulations (regulations made under clause 1(1) of the Bill as per clause 6) are subject to the affirmative resolution procedure.
23. Sub-clause 2(2)(a) of the Bill provides for the amendment of primary legislation. Subclause 2(2)(a) provides that regulations under clause 1(1) of the Bill may amend or modify, or apply with or without modification, a provision of the Electricity (Northern Ireland) Order 1992 or any other Northern Ireland legislation.
24. ‘*Northern Ireland legislation*’ is not defined in the Bill. However, it is defined in the Interpretation Act (Northern Ireland) 1954 which applies to the Bill.
25. Section 46(3) of the Interpretation Act (Northern Ireland) 1954 provides:
- “In any enactment passed or made after the day appointed for the commencement of Parts II and III of the Northern Ireland Act 1998, the following expressions shall have the same meaning as in that Act—*
- “The Belfast Agreement”;*  
*“cross-community support”;*  
*“excepted matter”;*  
*“Northern Ireland legislation”;*  
*“reserved matter”;* and  
*“transferred matter”.*
26. ‘*Northern Ireland legislation*’ is defined in section 98 of the Northern Ireland Act 1998.
27. Section 98 of the Northern Ireland Act 1998 provides that ‘*Northern Ireland legislation*’ means—
- (a) Acts of the Parliament of Ireland;
  - (b) Acts of the Parliament of Northern Ireland;
  - (c) Orders in Council under section 1(3) of the Northern Ireland (Temporary Provisions) Act 1972;
  - (d) Measures of the Northern Ireland Assembly established under section 1 of the Northern Ireland Assembly Act 1973;
  - (e) Orders in Council under Schedule 1 to the Northern Ireland Act 1974;
  - (f) Acts of the Assembly; and
  - (g) Orders in Council under section 85.
28. Accordingly, regulations made under clause 2(2)(a) of the Bill may amend legislation including primary legislation.
29. A power to amend primary legislation by secondary legislation is known as a Henry VIII power and is a significant delegation of legislative power. It should

not be used merely to provide for flexibility or convenience and should be subject to a higher level of Assembly scrutiny procedure.

30. Clause 2(4) of the Bill provides that scheme regulations (made under clause 1(1) of the Bill) are subject to the affirmative resolution procedure.
31. Where a regulation amends primary legislation, it is most appropriate (except in very particular circumstances, such as providing for inflationary increases in amounts, that such regulations are subject to affirmative resolution procedure or to draft affirmative relation procedure.
32. Sub-clause 2(2)(c) of the Bill provides that scheme regulations may confer *'enforcement functions (which may include a power or duty to impose financial penalties) on the Northern Ireland Authority for Energy Regulation or any other specified person with regulatory responsibilities in connection with the energy sector.'*
33. It is noted that delegated powers should be sought only when their use can be clearly anticipated and defined and that broad or vague powers are inappropriate.<sup>1</sup> There is a balance to be struck between flexibility and certainty and the use of delegated powers, rather than placing the detail of any given policy on the face of a Bill, may have the unintended consequence of reducing opportunities for scrutiny. This risk can be mitigated by the selection of the appropriate level of Assembly scrutiny procedure.
34. It is my view that regulations, made under clause 1(1) of the Bill which amend primary legislation or are otherwise of significant substance should be subject to the affirmative or to the draft affirmative procedure.
35. A statutory rule which is subject to the affirmative resolution procedure is made by the Department and laid before the Assembly. It shall not come into operation unless and until affirmed by a resolution the Assembly.
36. A statutory rule which is subject to the *draft* affirmative procedure is laid in draft before the Assembly by the Department. It may not be made unless and until affirmed by a resolution the Assembly.
37. The Committee may wish to consider whether, in every case, regulations made under clause 1(1) should be subject to the affirmative resolution procedure or whether in any particular case, such regulations should be subject to the draft affirmative procedure.
38. Further, the Committee will be aware that subordinate legislation before the Assembly is not subject to amendment by the Assembly. A regulation subject to Assembly procedure will instead be affirmed or rejected by the Assembly in its entirety.

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<sup>1</sup> The Legislative Process: The Delegation of Powers, HL Paper 225

39. Clause 4 of the Bill provides that scheme regulations must include provision enabling any aspect of the scheme to be suspended or revoked (whether or not by the making of amending or revoking scheme regulations) where it appears to the Department that any aspect of the scheme is having or is likely to have unintended and harmful consequences or urgent action needs to be taken to control the operation of the scheme regulations for any other reason.
40. Sub-clause 4(2) provides that provision under clause 4 must require the provision of information to the Assembly and may make provision for scrutiny “*before or after suspension or revocation*”.
41. Clause 4 refers to ‘*scheme regulations*’ which is defined in clause 6 of the Bill as having the meaning given in clause 1(1). Accordingly, ‘*scheme regulations*’ are those made under clause 1(1) of the Bill. These ‘*scheme regulations*’ are subject to the affirmative resolution procedure as per clause 2(4) of the Bill.
42. It is noted that where an enactment confers a power to make regulations, the power is to be construed as including the power, exercisable in the like manner and subject to the like consent and conditions, to amend, alter, rescind or revoke those regulations.<sup>2</sup>
43. Accordingly, the exercise of the power to amend or to revoke ‘*scheme regulations*’ is subject to the affirmative resolution procedure under clause 2(4) of the Bill.
44. If it is the drafter’s intention to make provision for the amendment or revocation of scheme regulations other than by the Assembly procedure set out in clause 2(4) of the Bill this should be clearly stated on the face of the Bill.
45. No other matters are drawn to the attention of the Committee in this regard.

Angela Kelly  
Examiner of Statutory Rules

19 January 2022

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<sup>2</sup> Section 17(2), Interpretation Act (Northern Ireland) 1954

## **Appendix:**

### **Assembly procedure in relation to statutory rules**

Statutory rules which are laid before the Assembly may be subject to one of the following Assembly procedures. The procedure to which any statutory rule is subject will be set out in the parent legislation.

#### **Rules Subject to Negative Resolution**

A statutory rule that is subject to the negative resolution procedure is made by the rule making body, often a Department, and laid before the Assembly. It will have effect when its 'comes into force' date is reached.

It can be annulled by resolution of the Assembly within the 'statutory period'.<sup>3</sup> It is then void from the date of that annulment.

The statutory period is set out in the Interpretation Act (Northern Ireland) 1954. It is 30 calendar days or ten days on which the Assembly has sat after the date on which the statutory rule was laid before the Assembly, whichever is the longer.<sup>4</sup>

#### **Rules Subject to Confirmatory Resolution**

A statutory rule which is subject to confirmatory procedure is made by the rule making body, often a Department, and laid before the Assembly.

It ceases to have effect within a specified period provided for in the parent legislation unless approved by a resolution of the Assembly within that time.

#### **Rules Subject to Affirmative Resolution**

A statutory rule which is subject to the affirmative resolution procedure is made by the rule making body, often a Department, and laid before the Assembly.

It shall not come into operation unless and until affirmed by a resolution the Assembly.

#### **Rules Subject to Draft Affirmative Resolution**

A statutory rule which is subject to the draft affirmative procedure is laid in draft before the Assembly by the rule making body, often a Department. It may not be made unless and until affirmed by a resolution the Assembly.

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<sup>3</sup> Section 41(6) [Interpretation Act \(Northern Ireland\) 1954](#)

<sup>4</sup> Section 41(2) [Interpretation Act \(Northern Ireland\) 1954](#)