

Circular Economy (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 Circular Economy (Scotland) Bill (“the 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 31–EN);
- a Financial Memorandum (SP Bill 31–FM);
- a Policy Memorandum (SP Bill 31–PM);
- statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 31–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 Bill introduces measures that require primary legislation to transition to a circular economy and modernise Scotland’s waste and recycling services. Building a more circular economy requires all parts of Scottish society to play their part. This Bill addresses that by placing requirements on, or enabling further action by, central and local government, businesses and householders. The Bill will primarily deliver enabling powers that will set a framework for taking action into the future. The Bill contains the following provisions:

- Section 6 gives the Scottish Ministers a power, by regulations, to impose targets on themselves relating to developing a circular economy.
- Section 8 gives the Scottish Ministers a power to make regulations prohibiting or restricting the disposal of unsold consumer goods.

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- Section 9 amends the Climate Change (Scotland) Act 2009 to give the Scottish Ministers a power to make regulations requiring the suppliers of goods to charge for certain single-use items.
- Section 10 amends section 34 of the Environmental Protection Act 1990 (“the 1990 Act”) to make a breach of the householder duty of care a criminal offence, and inserts a new section 34ZC to provide for a fixed penalty regime in relation to this offence.
- Section 11 inserts five sections into the 1990 Act, creating new enforcement provisions relating to the collection of household waste including a civil penalty regime and fixed penalty regime.
- Section 12 amends the 1990 Act to introduce a statutory code of practice for local authorities in relation to the collection and recycling of household waste.
- Section 13 inserts a new section 47B into the 1990 Act to give a power to the Scottish Ministers to make regulations imposing targets on local authorities in relation to their waste management functions, insofar as they relate to the recycling of household waste.
- Section 14 amends the 1990 Act to give the Scottish Ministers a power to make regulations to establish a civil penalty regime that will make the registered keeper of a vehicle liable if a littering offence is committed from the vehicle.
- Section 15 amends the Environment Act 1995 to grant additional enforcement powers to the Scottish Environment Protection Agency (SEPA), local authorities and constables in relation to the search and seizure of vehicles reasonably believed to have been, or being, or about to be, used in a waste offence.
- Section 17 amends the Regulatory Reform (Scotland) Act 2014 to add a further purpose for which provision may be made under the regulation-making power conferred by section 18 of that Act so that the power can be used to impose requirements in relation to publicly reporting on waste and surpluses on persons other than householders.
- Section 18 confers a power on the Scottish Ministers to make ancillary provision by regulations for the purpose of, or in connection with, or for giving full effect to the Bill or any provision made under it.
- Section 19 is a commencement provision and confers a power on the Scottish Ministers to bring those provisions of the Bill that are not to come into force following Royal Assent into force on a day specified by the Ministers in regulations.

Rationale for subordinate legislation

5. In deciding whether provisions should be set out on the face of the Bill or dealt with by means of subordinate legislation, the Scottish Government has carefully considered the need to:

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- achieve the appropriate balance between the importance of the issue and the need to provide flexibility to respond to changing and unforeseen circumstances quickly, in light of experience, without the need for primary legislation;
- ensure the proper use of parliamentary time is made; and
- deal with the unexpected, which might otherwise frustrate the purpose of provisions passed by the Parliament.

6. The relevant provisions are described in detail below. For each provision, the 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 provision; and
- the parliamentary procedure to which the exercise of the power to make subordinate legislation is to be subject, if any.

Delegated Powers

Section 6(1): Circular economy targets

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

7. Section 6(1) gives the Scottish Ministers the power to make regulations to impose targets on themselves relating to developing a circular economy. Regulations may provide for targets in relation to reducing the consumption of materials, increasing reuse, increasing recycling or reducing the creation of waste, and may also provide for targets to be reviewed. In considering the imposition of targets, the Scottish Ministers must have regard to the desirability of the economy being in which there is sustainable consumption and increased reuse and recycling, as set out in more detail in section 6(2). The Scottish Ministers must consult the public and such persons as they consider appropriate before making regulations. Section 6(6) provides that the regulations may make different provision for different purposes and may also make incidental, supplementary, consequential, transitional, transitory and saving provision.

Reason for taking power

8. The Scottish Government recognises that sustainable consumption and production together with increased recycling and reduced waste creation are essential for our transition to a low-carbon and green economy, to tackle the climate emergency

and the biodiversity crisis. By including this power within the Bill, the Scottish Government's intentions are to ensure that Scotland can monitor its journey towards developing a circular economy at a national level and ensure that progress is being made. Although a number of methodologies and metrics exist for measuring both baseline and progress towards developing a circular economy, no consensus has yet been reached as to their robustness and comparability. For example, both the Circularity Gap Report¹ and the Zero Waste Scotland Material Flow Accounts² conclude that Scotland's consumption of materials is unsustainable, but use different methodologies, arriving at different headline figures. It is therefore appropriate for the Bill to take powers to set targets in subordinate legislation to allow further work to be carried out to determine the appropriate targets to be set and the methodologies for measuring progress. It is considered to be more appropriate to set out this level of detail in regulations, rather than in the Bill itself. This is particularly the case in relation to the methodologies for measuring progress. In addition, if this level of detail on methodologies were to be set out in the Bill, this would be quite inflexible as there could be a need to change those details and therefore it is more appropriate to have these provisions in secondary legislation.

Choice of procedure

9. Regulations under section 6(1) will be subject to the affirmative procedure. The Scottish Government considers this close form of parliamentary scrutiny to be appropriate principally because the regulations will set the level of targets against which Scottish Government performance towards developing a circular economy will be measured. It is likely that the targets will set the trajectory of Scotland's progress towards sustainable consumption and production, as well as towards increased recycling and reduced waste creation. The impact of the targets is intended to be significant, with the aim of encouraging behaviour change by both businesses and individuals. The affirmative procedure is also considered appropriate due to the potential socio-economic impacts the targets may have on Scotland.

Section 8(2) (inserting new section 78A into the Climate Change (Scotland) Act 2009): Restrictions on the disposal of unsold consumer goods

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

10. Section 8(2) inserts a new section 78A into the Climate Change (Scotland) Act 2009 ("the Climate Change Act") to give the Scottish Ministers the power to make regulations to make provision prohibiting or restricting the disposal of unsold consumer

¹ [Circularity Gap Report December 2022 | Zero Waste Scotland](#)

² [Material Flow Accounts \(MFA\) | Zero Waste Scotland](#)

goods, if they consider it appropriate to do so for the purpose of reducing waste. “Consumer” is defined in subsection (4) of the new section 78A. Consumer goods are “unsold” if they have not been sold to, or have been returned by, a consumer. The regulations may make provision about the persons to whom prohibitions or restrictions apply, the meaning of “disposal” or “unsold”, for exemptions and for enforcement. The Scottish Ministers may also issue guidance to any enforcement authority on whom the regulations confer functions and the enforcement authority must have regard to that guidance.

Reason for taking power

11. The disposal, often by means of destruction, of unsold consumer goods represents both wasteful practice and unsustainable behaviour, given the desire to advance a circular economy in Scotland. The policy intention is to bring forward new targeted provisions to address such destruction or other disposal of unsold consumer goods by various different actors in the supply chain, namely manufacturers, brand owners, distributors and retailers.

12. It is considered that a policy of imposing a blanket ban on the disposal of all types of unsold consumer goods, whether by destruction or otherwise, would be likely to be disproportionate and difficult to enforce. Any prohibitions or restrictions which are introduced, by means of regulations, will need to have the flexibility to target specific product categories, for example restrictions in respect of textiles, and they would be informed by sector/product specific data.

13. To be effective, any prohibitions or restrictions that are brought in would need to be underpinned by knowledge of how producers/retailers currently destroy and/or redistribute goods. There would also need to be an understanding of capacity within the system, including the third sector, to handle an increased influx of goods along with the requisite skills and training. As such, any restrictions would require further stakeholder engagement and consultation, including detailed impact assessments. It is also considered to be more appropriate for these provisions to be made by secondary legislation, as the detail of the provisions required would be more suitable for regulations and any prohibitions or restrictions imposed may need to change in response to changes in the markets or sectors affected. This will provide necessary flexibility.

Choice of procedure

14. By virtue of section 96(4) of the Climate Change Act, regulations made under this power in the new section 78A will be subject to the affirmative procedure. The Scottish Government considers that such scrutiny is appropriate, given the impact that such prohibitions or restrictions may have on business. However, it should be noted that in accordance with section 96(7)(d) of the Climate Change Act, regulations made under section 89(4) of that Act to provide only for enforcement authorities to levy charges to recover the reasonable costs incurred by them in exercising their functions under any regulations made under the new section 78A will be subject to the negative procedure.

Section 9(4) (inserting new section 87A into the Climate Change (Scotland) Act 2009): Power to require imposition of charges for single-use items

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

15. Section 9(4) modifies the Climate Change Act to insert new section 87A. Subsection (1) of that new section gives the Scottish Ministers powers to make regulations to require suppliers of goods to charge for single-use items, as further described in the regulations. Regulations may also require suppliers of goods to apply the net proceeds raised by the charges to the advancement of environmental protection or improvement or to any purposes as may be regarded as analogous. The regulations may make provision about the circumstances in which a requirement to charge applies, the suppliers to whom it applies, the minimum amount to be charged, ascertaining net proceeds of the charge, for record-keeping and for enforcement. The regulations may only specify items which are manufactured, provided as container or packaging for goods or used in the consumption or use of goods, and likely to be used only once or for a short time. The Scottish Ministers may also issue guidance to any enforcement authority on whom the regulations confer functions and the enforcement authority must have regard to that guidance. Section 9(7) amends section 88A(2) of the Climate Change Act to include reference to new section 87A. That has the effect of enabling regulations under section 88A(3) to cover fixed penalty notices under section 87A as well as under existing section 88.

Reason for taking power

16. The purpose of the provision is to incentivise a reduction in the consumption of such single-use items, and accordingly to reduce their environmental harm. As part of the Programme for Government (2017-18), the Scottish Government established the Expert Panel on Environmental Charges and Other Measures (the “Panel”) to advise on measures to help tackle Scotland’s throw-away culture. In its first report, focusing on single-use disposable beverage cups (published in July 2019), the Panel considered that there was strong evidence that a separate charge for single-use disposable beverage cups should be put in place in Scotland. The Scottish Ministers have accepted the recommendation of the Panel in relation to charging for single-use beverage cups; however, they also wish to address other single-use items likely to have a harmful impact upon the environment for which there may not yet be a sufficient evidence base.

17. Whilst the intention is to use this power firstly to apply minimum charges to single-use beverage cups, Scottish Ministers intend to consider using the power to apply similar charges to other items likely to have a harmful impact on the environment. This provision will provide a framework for powers to charge, in the future, for other

types of disposable products for which there may not yet be the evidence base to specify in primary legislation. Using primary legislation to introduce charges on a specific item every time, would be very time and resource intensive and significantly hamper Ministers' ability to effectively intervene once in relation to single-use items when there is a need to take action. It is, therefore, considered to be more appropriate for these provisions to be made by secondary legislation, as the detail of the provisions required would be more suitable for regulations and provisions may need to change in response to changes in the market or changes in behaviour of the public or businesses.

Choice of procedure

18. By virtue of section 96(4) of the Climate Change Act, regulations made under this power in the new section 87A will be subject to the affirmative procedure. However, if they specify a new category of item chargeable for the first time or modify the description of an item that has been made chargeable (either to widen or narrow the description of chargeable items or to remove the requirement to charge for an item previously made chargeable), then the newly inserted section 97(1)(c) in the Climate Change Act makes the regulations subject to the pre-laying procedure set out in section 97(2) to (8) of that Act. Section 97(2) requires the Scottish Ministers to lay before the Parliament a copy of proposed regulations and a statement setting out their reasons for proposing to make those regulations. Section 97(3) and (4) requires the Scottish Ministers, when laying such a copy of proposed regulations, to allow a period of at least 90 days during which representations on the proposed regulations may be made to them. Where an additional requirement is added to the affirmative procedure in this way, it is sometimes referred to as super-affirmative procedure.

19. Making a new type of item chargeable, or changing description of that item, is a significant step. Before taking it, the Scottish Government should have to demonstrate why a charge should be imposed on a single-use item and carry out a proportionate level of consultation. In the Scottish Government's view, the pre-laying procedure provided by section 97 of the Climate Change Act will therefore ensure an appropriate enhanced level of scrutiny of such changes (noting that it will operate in addition to the other consultative steps normally taken in preparing policy, such as the preparation of impact assessments).

20. The Scottish Government notes that in relation to the existing power to require charges to be imposed for carrier bags (see section 88 of the Climate Change Act), the Parliament made the first exercise of the power subject to the pre-laying procedure under section 97 of the Climate Change Act, with all subsequent exercises of the power subject to the affirmative procedure alone. The Scottish Government's approach in relation to the new power in section 87A is not to confine the pre-laying procedure to the first exercise of the power under new section 87A. The power under section 88 can only be used to require charges to be imposed for carrier bags, and Parliament considered that it was appropriate to require the pre-laying procedure for the first set of regulations laying down a regime for carrier-bag charges, and the affirmative procedure was then seen to be appropriate for regulations that amend or refine that regime. As noted in the preceding paragraph, the power under the new section 87A is broader in that it can be used, within the parameters laid down, to require charges to be imposed on different

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types of item. In the Scottish Government's view it would therefore seem appropriate to require the pre-laying procedure for any regulations which specify (or modify) the description of items which are to be subject to a charge.

21. For any subsequent changes to a charging regime for specific items (e.g. regulations adjusting the level of charge, or making provision about the records that the suppliers of goods need to keep in connection with the imposition of any charge), regulations under section 87A will be subject to the affirmative procedure in accordance with section 96(4) of the Climate Change Act.

22. It should also be noted that, by virtue of section 9(7) of the Bill, section 88A(3) of the Climate Change Act will allow the Scottish Ministers to make regulations in relation to fixed penalties for enforcement of any offences under regulations made under the new section 87A. Any such regulations will be subject to the affirmative procedure in accordance with section 96(4) of the Climate Change Act. However, it should be noted that in accordance with section 96(7)(d) of the Climate Change Act, regulations made under section 89(4) of that Act only to provide for enforcement authorities to levy charges to recover the reasonable costs incurred by them in exercising their functions under any regulations made under the new section 87A will be subject to the negative procedure. The Scottish Government considers this rigorous level of parliamentary scrutiny to be appropriate for regulations that potentially have a significant bearing on business in Scotland and notes that this approach is broadly consistent with the approach taken by the Parliament in relation to the analogous power to require charges be imposed for carrier bags.

Section 10(3) (inserting new section 34ZC(9) into the Environmental Protection Act 1990): Householder's duty of care

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

23. Section 10(2) modifies section 34 of the 1990 Act to make a breach of the householder duty of care in section 34(2) of the 1990 Act a criminal offence. Section 10(3) inserts new section 34ZC which allows a fixed penalty notice to be issued by a constable or an authorised officer of a local authority to a person who has failed to comply with the duty relating to the transfer of household waste in section 34(2) of the 1990 Act. Subsection (9) of new section 34ZC gives the Scottish Ministers the power to substitute a different amount for the amount specified as the amount of the fixed penalty in section 34ZC(8).

Reason for taking power

24. The policy intention behind the new provision in section 34(2) of the 1990 Act is to ensure that householders are clearer about their duties in regard to household waste

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and failure to comply with it will be a new criminal offence. Local authorities are given additional enforcement powers to enforce breaches of the householder's duty of care obligation by means of fixed penalty notices. The aim is to prevent the fly-tipping of household waste by addressing the source of fly-tipped household waste, and also assist in the enforcement of fly-tipping where fly-tipped waste is traced back to a particular household. The power in the new section 34ZC(9) to amend the amount of the fixed penalty notice is being taken in order to provide the Scottish Ministers with the flexibility to increase that amount (not exceeding level 2 on the standard scale) by regulations, rather than by primary legislation, should an increase in the penalty be necessary. It would not be a good use of Parliamentary time to require such changes to be made via primary legislation.

Choice of procedure

25. By virtue of section 160A(1) of the 1990 Act, regulations under the new powers in section 34ZC(9) will be subject to the negative procedure. The Scottish Government considers that, as the regulations may change the amount of fixed penalty payable only to a level not exceeding level 2 on the standard scale as specified in the Bill, the level of scrutiny is appropriate since the Parliament will have already approved in principle that fines can be up to a maximum of level 2 on the standard scale and therefore it would not be a good use of Parliamentary time to require changes up to that amount to be made via primary legislation. The negative procedure is the applicable procedure in relation to similar powers to increase fixed penalty amounts in 33A(10) (fly tipping) and section 88(7) (littering) of the 1990 Act and therefore is considered to be appropriate for analogous new powers to increase fixed penalty amounts.

Section 10(3) (inserting new section 34ZC(16) into the Environmental Protection Act 1990): Householder's duty of care

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

26. Section 10(2) modifies section 34 of the 1990 to make a breach of the householder duty of care in section 34(2) of the 1990 Act is a criminal offence. Section 10(3) inserts new section 34ZC which allows a fixed penalty notice to be issued by a constable or an authorised officer to a person who has failed to comply with the duty relating to the transfer of household waste in section 34(2) of the 1990 Act. Subsection (15) of new section 34ZC defines "authorised officer" for the purposes of the new section (namely, officers of local authority or of the Loch Lomond and The Trossachs National Park Authority who are authorised in writing); subsection (16) of new section 34ZC gives the Scottish Ministers powers to make regulations to add another category of persons to the definition of "authorised officer" in section 34ZC(15) and for making any necessary modifications they consider appropriate in connection with a change to that definition.

Reason for taking power

27. The policy intention behind the new provision in section 34(2) of the 1990 Act is to ensure that householders are clearer about their duties in regard to household waste and failure to comply with it will be a new criminal offence. Local authorities are given additional enforcement powers to enforce breaches of the householder's duty of care obligation by means of fixed penalty notices. The aim is to prevent the fly-tipping of household waste by addressing the source of fly-tipped household waste, and also to assist in the enforcement of fly-tipping where fly-tipped waste is traced back to a particular household. The powers in the new section 34ZC(16) provide the flexibility to modify the definition of authorised officer to add other enforcement officers by means of regulations, rather than by primary legislation. Requiring primary legislation to make such minor amendments to definitions would not be a sensible use of resources. The power to add another category of persons to the definition of authorised officer might be used, for example, to add enforcement officers from another National Park so that they have similar powers to officers of Loch Lomond and The Trossachs National Park Authority.

Choice of procedure

28. By virtue of section 160A(1) of the 1990 Act, regulations under the new power in section 34ZC(16) will be subject to the negative procedure. The Scottish Government considers this is the appropriate level of scrutiny for this kind of minor modification of a definition of an authorised officer for enforcement purposes. The negative procedure is the applicable procedure in relation to similar powers in section 33A(13) (fly-tipping) and section 88(10) (littering) of the 1990 Act and therefore is considered to be appropriate for analogous new powers.

Section 11(2) (inserting new section 46ZC into the Environmental Protection Act 1990): Household waste requirements

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

29. Section 11 of the Bill inserts five sections into the 1990 Act, creating new enforcement provisions relating to the collection of household waste. Local authorities in Scotland are designated as waste collection authorities for the purposes of the 1990 Act: their principal function in that capacity is to arrange for the collection of household waste in their areas and, if requested by the occupier of premises in their areas, to arrange for the collection of any commercial waste from those premises.

30. Section 46 of the 1990 Act makes provision in relation to receptacles for household waste, placing certain obligations on householders in relation to recycling of household waste and use of receptacles. New section 46ZA will allow an authorised officer of a waste collection authority to issue written warnings to householders for failure to comply with a requirement under section 46(1), (3)(c) or (d) or (4) of the 1990

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Act. New section 46ZA(3), (4) and (5), being inserted by section 11(2), allow an authorised officer of a waste collection authority who has already given a written warning to a person to issue of a civil penalty charge notice in certain circumstances.

31. New section 46ZC, as inserted by section 11(2), gives a power to the Scottish Ministers to make regulations setting out various aspects of the penalty charge scheme, including the amount of penalty charge, discounts and surcharges, procedure, form and content of notices and the periods for payment, and other procedural matters such as appeals.

Reason for taking power

32. Currently large quantities of recyclable materials are still sent for disposal when they could be recycled. There is evidence to suggest that rates of non-participation by householders in separating recyclable waste properly is high. SEPA data shows that just under a fifth of everything put out for recycling by householders is non-recyclable. Contamination makes managing recycling collections more costly and in extreme cases, can mean the whole load has to be taken for incineration or landfill.

33. There are currently limited powers for local authorities to ensure that households are properly using their recycling containers or to prevent recycling being placed in non-recyclable containers. Given these concerns about non-participation rates and increased contamination of recyclate that is collected from householders, the current policy intention is also to strengthen local authorities' enforcement powers in relation to household recycling by creating a statutory basis for local authorities to issue written warnings and civil penalty charges to householders who do not comply with existing obligations in relation to household recycling. It is considered to be more appropriate for the detailed provisions setting out the penalty charge scheme to be set out in regulations, rather than in the Bill. If these provisions are contained in secondary legislation this will also provide more flexibility to make changes to the details; while any initial use of the power will set out important details regarding civil penalty charges, later uses of the power could be relatively minor such as changes to the form and content of civil penalty notices and it would not be a good use of Parliamentary time to make these small changes to provisions in primary legislation.

Choice of procedure

34. Regulations under the new section 46ZC are made subject to the affirmative procedure by virtue of section 11(3) of the Bill which inserts reference to them into section 160A(2) of the 1990 Act, which lists regulations which are subject to affirmative procedure. The Scottish Government considers this close form of parliamentary scrutiny to be appropriate principally because the regulations will set the detail of the amounts of civil penalty charges, discounts and surcharges, the procedure in relation to requiring payment, the form and content of a penalty charge notice, making representations to the authority, period for payment, withdrawal of a penalty charge notice and appeals.

Section 11(2) (inserting new section 46ZD into the Environmental Protection Act 1990): Household waste requirements

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

35. As set out above, section 11 of the Bill inserts five sections into the 1990 Act, creating new enforcement provisions relating to the collection of household waste. Local authorities in Scotland are designated as waste collection authorities for the purposes of the 1990 Act: their principal function in that capacity is to arrange for the collection of household waste in their areas and, if requested by the occupier of premises in their areas, to arrange for the collection of any commercial waste from those premises.

36. Section 46 of the 1990 Act makes provision in relation to receptacles for household waste, placing certain obligations on householders in relation to recycling of household waste and use of receptacles. New sections 46ZA and 46ZB, as inserted by section 11(2) of the Bill, allow an authorised officer of a waste collection authority to issue written warnings and civil penalty charges to householders for failure to comply with a requirement under section 46(1), (3)(c) or (d) or (4) of the 1990 Act.

37. Section 46ZD, as inserted by section 11(2) of the Bill, also makes provision for the issue of a fixed penalty notice where an authorised officer of a waste collection authority has reason to believe that a person has committed an offence under section 46(6) of the 1990 Act. New section 46ZD(6) gives a power to the Scottish Ministers to make regulations to specify the amount of the fixed penalty (not exceeding level 2 on the standard scale) payable under section 46ZD and to specify the form of notice to be used by the authorised officer.

Reason for taking power

38. The Bill already makes provision for local authorities to issue written warnings and civil penalty charges to householders who do not comply with existing obligations in relation to household recycling under section 46 of the Act. But it is also necessary to give local authorities the power to issue fixed penalty notices where a person commits an offence under section 46(6) of the 1990 Act by failing to comply with a requirement under section 46(1), (3)(c) or (d) or (4). It is considered to be appropriate for the provisions setting out the amount of the fixed penalty, which cannot exceed level 2 on the standard scale, and the form of the notice to be set out in regulations, rather than in the Bill.

Choice of procedure

39. By virtue of section 160A(1) of the 1990 Act, regulations under the new section 46ZD(6) will be subject to the negative procedure. The Scottish Government considers that, as the regulations may specify the amount of fixed penalty payable only

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to a level not exceeding level 2 on the standard scale as specified in the Bill, the level of scrutiny is appropriate since the Parliament will have already approved in principle that fines can be up to a maximum of level 2 on the standard scale and therefore it would not be a good use of Parliamentary time to require changes up to that amount to be made via primary legislation. The negative procedure is the applicable procedure in relation to similar powers to increase fixed penalty amounts in 33A(10) (fly tipping) and section 88(7) (littering) of the 1990 Act and therefore is considered to be appropriate for analogous new powers to increase fixed penalty amounts.

Section 11(2) (inserting new section 46ZE into the Environmental Protection Act 1990): Household waste requirements

Power conferred on: the Scottish Ministers

Power exercisable by: guidance

Parliamentary procedure: no procedure

Provision

40. As set out above, section 11 of the Bill inserts five sections into the 1990 Act, creating new enforcement provisions relating to the collection of household waste. Local authorities in Scotland are designated as waste collection authorities for the purposes of the 1990 Act: their principal function in that capacity is to arrange for the collection of household waste in their areas and, if requested by the occupier of premises in their areas, to arrange for the collection of any commercial waste from those premises.

41. Section 46ZE, as inserted by section 11(2) of the Bill, gives the Scottish Ministers a power to issue guidance to waste collection authorities on the operation of the new sections 46ZA to 46ZD and the waste collection authorities and their authorised officers must have regard to any guidance issued.

Reason for taking power

42. As explained above, currently large quantities of recyclable materials are still sent for disposal when they could be recycled. There is evidence to suggest that rates of non-participation by householders in separating recyclable waste properly is high. SEPA data shows that just under a fifth of everything put out for recycling by householders is non-recyclable. Contamination makes managing recycling collections more costly and in extreme cases, can mean the whole load has to be taken for incineration or landfill. The new enforcement powers being given to local authorities are intended to drive behaviour change and lead to considerable improvements in recycling of household waste. It is therefore important for the Scottish Ministers to have powers to issue guidance on the operation of the new sections 46ZA to 46ZD in order to assist waste collection authorities with the exercise of these comprehensive new enforcement powers.

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Choice of procedure

43. Guidance made by the Scottish Ministers under the new section 46ZE is not subject to any Parliamentary procedure. It is considered that this is appropriate for a power to make guidance.

Section 12(2) (inserting new section 44ZZA into the Environmental Protection Act 1990) : Code of practice on household waste recycling

Power conferred on: the Scottish Ministers

Power exercisable by: code of practice

Parliamentary procedure: laid, none

Provision

44. Section 12(2) of the Bill amends the 1990 Act by inserting a new section 44ZZA which introduces a statutory code of practice about the collection and recycling of household waste. New section 44ZZA(1) requires the Scottish Ministers to prepare and publish a code of practice, which sets out the standards expected of, and steps to be taken by, local authorities in carrying out their household waste collection and recycling functions. Section 44ZZA(2) sets out various topics under the umbrella of household waste and recycling about which the code may make provision. Sections 44ZZA(3) to (7) provide the procedure for the publication and revision of the code. Section 12(3) amends section 44ZA(2) of the 1990 Act to require that local authorities' integrated waste management plans must set out how the local authority in question intends to perform its functions, so far as they relate to the collection and recycling of household waste, consistently with the last published code of practice under the new section 44ZZA.

Reason for taking power

45. The code of practice will be a highly detailed and technical document. For the purposes of comparison, most local authorities have so far agreed to the current voluntary Scottish Household Recycling Charter³ and its associated code of practice consists of 43 pages. There is also a need to keep the code of practice up to date, which may require regular changes. Such changes are likely to be points of detail, for example about the receptacles to be used for household waste collection, the frequency of household waste collection, the items of household waste that are to be recycled or composted, managing the contamination of household waste that is capable of being recycled or composted, or communicating with the public about the collection and recycling of household waste. In view of the detail and need for regular change, it is not felt appropriate to set out this level of detail on the face of the Bill. Desired practice will

³ <https://www.zerowastescotland.org.uk/content/charter-household-recycling>

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continue to be to develop the code of practice in partnership with COSLA to ensure that the practical measures contained in the code reflect operational requirements.

Choice of procedure

46. A code of practice made under the Bill on collection and recycling of household waste is considered to be a matter of technical and practical detail, but the Scottish Government expects that the Parliament will want to scrutinise the code. Before publishing the first version of the code, or any revised version, the Scottish Ministers must consult local authorities and SEPA, and they may not complete their preparation of a version of the code until after the expiry of the period of 40 days beginning with the day that a draft of that version of the code is laid before the Parliament and the Scottish Government considers it appropriate that this is not subject to any Parliamentary procedure.

Section 13(2) (inserting new section 47B into the Environmental Protection Act 1990): Targets for waste collection authorities relating to household waste recycling

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

47. Section 13(2) of the Bill amends the 1990 Act by inserting a new section 47B. Subsection (2) of that new section gives the Scottish Ministers the power to make regulations to impose targets on waste collection authorities in relation to their waste management functions in so far as they relate to the recycling of household waste.

Reason for taking power

48. The Scottish Ministers are increasingly concerned about the slower than required pace of progress towards Scotland's recycling targets and consider that we need a step change in some aspects of how we collect and manage household recycling. The policy intention is to move away from the voluntary approach to Scotland's Household Recycling Charter, and associated Code of Practice, towards a more mandated approach. This will be achieved by (1) enabling the Scottish Ministers to replace the current voluntary charter and code of practice for local authorities with statutory guidance regarding household collection services, which they are bound to comply with when exercising their duties as waste collection authorities, set out in section 12 of the Bill (as referred to above), and (2) enabling the Scottish Ministers to impose recycling targets upon local authorities in relation to the recycling of household waste. Regulations under section 47B may specify the targets to be achieved by local authorities, make further provision about the meaning of recycling, specify indicators by which achievement of targets can be measured, and, where targets are not met, impose liability on local authorities to pay a penalty, as well as providing for enforcement and

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other procedural matters, including conferring functions on SEPA. New section 47B(4) requires the Scottish Ministers to consult local authorities and SEPA. New section 47B(5) provides that the regulations may make different provision for different purposes, areas or local authorities, modify an enactment and make incidental, supplementary, consequential, transitional, transitory and saving provision.

49. It is considered to be appropriate for the Bill to take powers to set targets in subordinate legislation to allow further work to be carried out to determine the appropriate targets to be set and the indicators for measuring progress. It is considered to be more appropriate to set out this level of detail in regulations, rather than in the Bill itself. This applies particularly in relation to the indicators for measuring progress. In addition, if this level of detail in relation to measuring progress were to be set out in the Bill, this would be quite inflexible as there could be a need to change those details and therefore it is more appropriate to have these provisions in secondary legislation.

Choice of procedure

50. Regulations under the new section 47B will be subject to the affirmative procedure by virtue of section 13(3) of the Bill which inserts reference to them into section 160A(2) of the 1990 Act, which lists regulations which are subject to affirmative procedure. Given the nature of the obligations that will be placed on local authorities by regulations made under this provision, and the potential for penalties, regulations made under the new section 47B, as inserted by section 13(2), it is considered appropriate that the affirmative procedure is appropriate to allow for sufficient Parliamentary scrutiny of the obligations to be imposed on local authorities.

Section 14(2) (inserting new section 88C into the Environmental Protection Act 1990) :– Littering from a vehicle

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

51. Section 14(2) modifies the 1990 Act to insert new section 88C. That section allows a civil penalty charge to be imposed on the registered keeper of a vehicle from which an offence of leaving litter has been committed. Subsection (5) of new section 88C gives the Scottish Ministers a power to make regulations about the detail of the penalty charge regime, including provision about: the amount of a fixed penalty charge, discounts and surcharges, what sums received should be used for and procedural issues including the form and content of penalty charge notices, appeals and the cancellation of penalty notices.

Reason for taking power

52. The National Litter Strategy, *Towards a litter-free Scotland*, was published in 2014⁴ and recognises the important role of enforcement alongside a focus on prevention in changing littering behaviours. Existing offence and fixed penalty notice provisions for littering require the person leaving the litter to be identified, and the criminal burden of proof to be met before enforcement action can be taken. It is often difficult to ascertain the identity of the person committing a littering offence when the litter is dropped from a vehicle. This creates a gap in current enforcement powers. The new power will provide for a fully civil penalty regime in relation to littering from vehicles and allow for the imposition of a penalty charge on the registered keeper of a vehicle from which littering occurs. This will increase the deterrent effect and the options available to enforcement officers in tackling roadside litter.

53. Taking a power to set out the detail of a civil penalty regimes in regulations is a fairly typical legislative strategy. The detail of the regime requires to be set out and may need to be refined from time to time to ensure that it works properly on the ground throughout Scotland. The Scottish Government considers that it would be a poor use of Parliament's time if primary legislation were required every time a minor, but practically worthwhile, change needed to be made to the operation of the scheme.

Choice of procedure

54. Regulations under the new section 88C(5) will be subject to the affirmative procedure by virtue of section 14(3) of the Bill which inserts reference to them into section 160A(2) of the 1990 Act, which lists regulations which are subject to affirmative procedure. The Scottish Government considers this close form of parliamentary scrutiny to be appropriate principally because the regulations will set the detail of the civil penalty regime, including the level of penalty charges, discounts and surcharges, the purposes for which the sums received may be used, form and content of a penalty charge notice, procedures in relation to service and cancellations of a penalty charge notice, accounting requirements, exemptions from liability and appeals.

Section 15(2) (inserting new section 110C into the Environment Act 1995): Powers to search and seize vehicles, etc.

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

55. Section 15(2) of the Bill modifies the Environment Act 1995 to insert new sections 110A to 110D. New section 110A will allow constables and officers of SEPA and

⁴ Available online: <https://www.gov.scot/publications/towards-litter-free-scotland-strategic-approach-higher-quality-local-environments/> (accessed March 2020).

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Scottish local authorities to search vehicles and to seize vehicles, and their contents, where the constable or officer reasonably believes that the vehicle has been, is being or is about to be used in the commission of relevant offences. An offence is a “relevant offence” if an Act of the Scottish Parliament, or an instrument made under it, states that the powers conferred under the new section 110A may be exercised in relation to that offence. Any vehicles seized under that power will fall into the custody of SEPA or the local authority.

56. New section 110C gives the Scottish Ministers a power to make regulations about how SEPA and Scottish local authorities are to handle seized property that falls into their custody under the new search and seizure powers.

Reason for taking power

57. The rules around the handling of seized property may need to differ depending on the type of property seized and the circumstances of its seizure (including where in the country it is seized). It would be difficult to make detailed provision of that sort in primary legislation and therefore it is considered to be appropriate to give the Scottish Ministers a power to make regulations for this purpose. Requiring a Bill to make minor refinements to the rules in relation to handling of seized property would not be a sensible use of resources.

Choice of procedure

58. New section 110C(4) provides that regulations under the new section 110C(2)(a) will be subject to the affirmative procedure. The Scottish Government considers this form of close parliamentary scrutiny to be appropriate for regulations concerned with how SEPA or the local authorities will deal with citizens’ private property seized under their new enforcement powers.

Section 15(2) (inserting new section 110D into the Environment Act 1995): Powers to search and seize vehicles, etc.

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

59. As set out above, section 15(2) of the Bill modifies the Environment Act 1995 to insert new sections 110A to 110D. These new sections will allow constables and officers of SEPA and local authorities to search vehicles and to seize vehicles, and their contents, where the constable or officer reasonably believes that the vehicle has been, is being or is about to be used in the commission of relevant offences. An offence is a “relevant offence” if an Act of the Scottish Parliament, or an instrument made under it, states that the powers conferred under the new section 110A may be exercised in relation to that offence. Section 16 of the Bill sets out a number of offences for which the

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powers conferred under the new section 110A may be exercised, for example section 1 of the Control of Pollution (Amendment) Act 1989 (offence of transporting controlled waste without registering).

60. New section 110D, as inserted by section 15(2) gives the Scottish Ministers a power to make regulations to provide for an offence to be, or cease to be, a relevant offence for the purposes of the new powers of search and seizure in section 110A in order to be able to extend, or narrow, the range of offences in respect of which the powers can be exercised. The power includes a power to modify any enactment.

Reason for taking power

61. As the nature and types of environmental crimes are always evolving, it may emerge that there are further offences in respect of which it would be useful for SEPA and local authorities to have the enforcement powers that the new sections of the Environment Act 1995 provide. It would seem unduly burdensome and time-consuming to require primary legislation to extend the operation of those powers to allow them to be used in relation to conduct which either the Scottish Parliament or UK Parliament has already chosen to make a criminal offence; and therefore a power for Scottish Ministers to make the necessary provision by regulations is considered to be appropriate. It is necessary to include a power to modify any enactment in case any minor consequential amendments are required to be made, for example, to the legislation creating the offence to which the new search and seizure powers are to apply.

Choice of procedure

62. New section 110D(3) provides that regulations under the new section 110D(1) will be subject to the affirmative procedure. The Scottish Government considers this form of close parliamentary scrutiny to be appropriate for regulations which will add new offences, most likely related to waste or environmental offences, for which the powers of search and seizure in the new section 110A can be used.

Section 17(2) (inserting new paragraph 14A into schedule 2 of the Regulatory Reform (Scotland) Act 2014) : Duty to make information publicly available

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative if modifying primary legislation, otherwise negative

Provision

63. Section 17(2) of the Bill adds a new purpose for which provision can be made under the regulation-making power conferred on the Scottish Ministers by section 18 of

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the Regulatory Reform (Scotland) Act 2014 (“the Regulatory Reform Act”). Section 18 of the Regulatory Reform Act allows the Scottish Ministers to make a wide range of provision by regulations for environmental purposes, as set out in schedule 2 of the Regulatory Reform Act. Schedule 2 already includes the purpose in paragraph 14 of requiring that people provide information in relation to waste to designated enforcement authorities. Section 17(2) of the Bill adds a relatively modest adjustment to purposes for which provision can be made under section 18 by adding a new paragraph 14A to schedule 2 so that regulations can impose duties on persons of any specified description to make publicly available specified information about anything stored or disposed of by them, or on their behalf, except in relation to domestic activities. This is to allow duties to be imposed so that information is published in respect of waste and surplus.

Reason for taking power

64. In order to promote the better use of resources, information needs to be available about how resources are currently being used and, in particular, what resources are being disposed of as waste and what surplus resources are being consigned to long-term storage. What constitutes waste and surplus will vary from sector to sector (for example, while it is relatively easy to identify the point at which food starts to be at risk of going to waste, it is harder to identify when a store of textiles is at risk of going to waste). In order to make rules requiring persons to report on their waste and surplus, the Scottish Government will therefore need to consult with each sector to find workable definitions of those concepts and it is likely that these definitions will need to be refined over time. For these reasons, the flexibility of the regulation-making process makes subordinate legislation preferable to primary legislation for these provisions and will allow for minor amendments to be made without requiring primary legislation.

Choice of procedure

65. The new provision inserted by section 17(2) of the Bill does not materially change the character or breadth of the power that section 18 of the Regulatory Reform Act confers as section 19(2) simply adds an additional purpose to schedule 2 of that Act. The Scottish Government considers that the negative procedure under section 58(5) of the Regulatory Reform Act, which currently applies to any new regulations made under section 18, is equally appropriate for regulations which might be made using the new power under paragraph 14A. Section 18 is already a broad power to make regulations for the purposes set out in schedule 2 and Parliament considered that the negative procedure was appropriate; therefore the Scottish Government also considers the same procedure should apply to the new additional purpose being added to schedule 2. It is also considered appropriate that if any regulations made for the purposes of the new paragraph 14A were to contain provisions that add to, replace or omit any part of the text of an Act, then they would, by virtue of the existing provision in section 58(4) of the Regulatory Reform Act, be subject to the affirmative procedure.

Section 18(1) – Ancillary provision

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative if modifying primary legislation, otherwise negative

Provision

66. Section 18 provides that the Scottish Ministers may by regulations make incidental, supplementary, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, or in connection with, or for giving full effect to the Bill's provisions or any provision made under it. Regulations under section 18 may make different provision for different purposes and may modify any enactment (including the Act resulting from the Bill).

Reason for taking power

67. Section 18 follows the now standard model for the power to make ancillary provision. Any new law may give rise to the need for a range of ancillary provisions. This power is necessary to allow flexibility when commencing provisions in the Bill or otherwise to address unforeseen circumstances which may arise. Without the power to make that provision by regulations it would be necessary to return to the Parliament with another Bill to deal with minor matters to properly give effect to a Bill that Parliament has already passed. That would not be an effective use of either the Parliament's or the Scottish Government's resources. The power is restricted in that it can only be used to make provision ancillary to the Bill's provisions or any provision made under it. While the Scottish Government has given careful consideration to the provisions of the Bill, this power is considered necessary to ensure that any unexpected issues which require further changes can be dealt with effectively and so that the purpose of the Bill is not inadvertently obstructed.

Choice of procedure

68. Regulations under section 18 will be subject to the affirmative procedure if they add to, replace or omit any part of the text of primary legislation. Otherwise, they will be subject to negative procedure. This is the standard approach in relation to the scrutiny of regulations made under ancillary powers and the Scottish Government sees no special reason to depart from it in this case.

Section 19(2) – Commencement

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: laid, no procedure

Provision

69. Sections 18, 19 and 20 come into force on the day after Royal Assent. Section 19(2) of the Bill confers a power on the Scottish Ministers to bring the other sections of the Bill into force on a date they appoint by regulations, and regulation 19(3) allows the Scottish Ministers to include transitional, transitory and saving provision in those regulations, and to make different provision for different purposes.

Reason for taking power

70. It is typical for the coming into force date of a Bill's substantive provisions to be appointed by regulations as it is considered to be appropriate for the provisions of the Bill not coming into effect on Royal Assent to be commenced at such a time as the Scottish Ministers consider to be suitable. This means that the Scottish Government can appoint a date having ensured that everyone who needs to prepare for the law changing has made the necessary preparations.

71. In the course of preparing for any change to the law, it may emerge that there are some ongoing situations in relation to which the application of the new law will need to be adjusted. As is also fairly standard, section 19 therefore allows the Scottish Government to include transitional, transitory and savings provisions in the regulations bringing the new law into force and to make different provision for different purposes.

Choice of procedure

72. As is usual for commencement regulations, the default laying requirement will apply, as provided for by section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010. The Scottish Government considers this appropriate because the policy behind the provisions will already have been considered by the Parliament during the passage of the Bill.

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Circular Economy (Scotland) Bill

Delegated Powers Memorandum

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