

# Circular Economy (Scotland) Bill

## As amended at Stage 2

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### Supplementary Delegated Powers Memorandum

#### Introduction

1. This Supplementary Delegated Powers Memorandum has been prepared by the Scottish Government in accordance with Rule 9.7.9 of the Parliament's Standing Orders in relation to the Circular Economy (Scotland) Bill ("the Bill"). This memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. It should be read in conjunction with the Delegated Powers Memorandum published to accompany the Bill on introduction.

2. 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.

#### Provisions conferring power to make subordinate legislation introduced or amended at Stage 2

3. The amended or new delegated powers in the Bill are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate.

#### Delegated powers

##### Section 6(1): Circular economy targets

Power conferred on: Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Revised or new power: revised

#### Provision

4. When the Bill was introduced, section 6(1) gave the Scottish Ministers the power to make regulations to impose targets on themselves relating to developing a circular

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economy. This amendment makes the setting of circular economy targets by Scottish Ministers a statutory duty, rather than a power. The Scottish Ministers are therefore now required to make regulations to set targets. As introduced, the Bill set out that 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. This has been amended to set out that targets may provide for increasing refurbishment and repair, and may also prioritise sectors and systems. In considering the imposition of targets, the Scottish Ministers must have regard to the desirability of the economy being one in which there is sustainable consumption and increased reuse and recycling, as set out in more detail in section 6(2). Section 6(2) has also been amended to refer to goods, products and materials rather than things. Section 6(4) makes regulations under section 6(1) subject to the affirmative procedure, although new section 7A requires the first exercise of the statutory duty in section 6(1) to be subject to a pre-laying procedure. The details of this amendment are set out in relation to section 7A below. 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 amending power

5. 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 making it a requirement for the Scottish Ministers to make regulations to set targets, it makes clear that 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. This will still allow further work to be carried out to determine the appropriate targets to be set and the methodologies for measuring progress before any regulations are made.

## Choice of procedure

6. 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 the Scottish Government's 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. However, new section 7A of the Bill requires that the first regulations which are made under section 6(1) are subject to a pre-laying procedure. The details of this amendment are set out in relation to section 7A below.

## Section 7A: Circular economy targets: pre-laying procedure for first regulations

Power conferred on: Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative, subject to a pre-laying procedure

Revised or new power: revised

### Provision

7. Section 6(1) places a statutory duty on the Scottish Ministers to impose targets on themselves relating to developing a circular economy. Section 7A requires the first exercise of the statutory duty in section 6(1) to regulations subject to the pre-laying procedure set out in section 7A. Section 7A(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 7A(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.

### 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 making it a requirement for the Scottish Ministers to make regulations to set targets, it makes clear that 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. This will still allow further work to be carried out to determine the appropriate targets to be set and the methodologies for measuring progress before any regulations are made.

### Choice of procedure

9. While regulations under section 6(1) will be subject to the affirmative procedure, the first regulations made will be subject to a pre-laying procedure, often referred to as a super-affirmative procedure. This responds to a recommendation made by the Net Zero, Energy and Transport Committee in its Stage 1 Report. The Scottish Government considers this enhanced form of parliamentary scrutiny to be appropriate principally because the regulations will set the level of targets against which the Scottish Government's performance towards developing a circular economy will be measured. It is likely that the first set of 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 pre-laying procedure for the first regulations made under section 6(1) is also considered

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appropriate due to the potential socio-economic impacts the targets may have on Scotland.

## Section 9A: Fixed penalty notices for fly-tipping offences

Power conferred on: Scottish Ministers

Power exercisable by: order made by Scottish statutory instrument

Parliamentary procedure: negative

Revised or new power: revised

### Provision

10. New section 9A modifies section 33A of the Environmental Protection Act 1990 (the 1990 Act) to increase the maximum amount at which the fixed penalty for a fly-tipping offence can be set by the Scottish Ministers from level 2 to level 3 on the standard scale, thereby increasing the maximum fixed penalty amount that may be set by way of secondary legislation from £500 to £1000.

11. Additionally, it gives the Scottish Ministers the ability to provide for different penalty amounts in different cases, for example, a higher penalty amount where a previous fixed penalty notice (FPN) has been issued to the same person, with the maximum amount not exceeding level 3 on the standard scale, which is currently £1,000.

### Reason for taking power

12. Section 33(1)(a) and (c) of the 1990 Act make it an offence to deposit waste without a waste management licence and in accordance with the licence (commonly referred to as fly-tipping) or to keep or manage controlled waste in a manner likely to cause pollution of the environment or harm to human health. As an alternative to prosecution a person can be issued with an FPN under section 33A(1) which offers the possibility of discharging any liability to criminal conviction for section 33(1)(a) and (c) offences by payment of a fixed penalty (currently £500). The FPN procedure is intended to be used to address more minor fly-tipping incidents normally investigated by the local authorities. Serious incidences of fly-tipping, or situations of significant repeat offending, should be reported for prosecution rather than being addressed by way of FPN.

13. Following the recent increase in the FPN amount in section 33A(9) to £500 (the current level 2 amount on the standard scale), no further increase to the fixed penalty amount would be possible by way of secondary legislation in the absence of this amendment. This provision will also enable the fixed penalty amount to be set at different levels in different circumstances as prescribed by the Scottish Ministers, for example where there has been a previous FPN issued to the same person. Any future increase to the fixed penalty amount would be dependent on evaluation of the recent FPN increase.

## Choice of procedure

14. The provision amends the order-making power in section 33A(10) of the 1990 Act, which is subject to the negative procedure. While section 160A(7) of the 1990 Act allows an order under the 1990 Act which is subject to the negative procedure to be subject to the affirmative procedure, it seems unlikely that the Scottish Ministers would consider that it would be appropriate for any order under section 33A (10) to be subject to the affirmative procedure. It is therefore expected that any order under the amended provisions would be subject to the negative procedure.

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

Power conferred on: Scottish Ministers

Power exercisable by: guidance

Parliamentary procedure: no procedure

Revised or new power: revised

## Provision

15. Section 11 of the Bill inserts five sections into the 1990 Act relating to the collection of household waste. Existing section 46 of the 1990 Act makes provision in relation to receptacles for household waste, enabling local authorities as designated waste collection authorities to impose certain requirements on householders in relation to the use of household waste receptacles and makes a failure to comply with non-compliance with these requirements an offence. Sections 46ZA to 46ZD as inserted by section 11(2) of the Bill give waste collection authorities new enforcement powers in relation to non-compliance with section 46 requirements. Section 46ZE, as inserted by section 11(2) of the Bill as introduced, gives the Scottish Ministers a power to issue guidance to waste collection authorities on the operation of the new sections 46ZA to 46ZD and required the waste collection authorities and their authorised officers must have regard to any guidance issued. This amendment places a statutory duty on the Scottish Ministers to issue guidance on the operation of new sections 46ZA to 46ZD and new section 46ZE(1A) requires the Scottish Ministers to consult waste collection authorities in preparing the guidance in section 46ZE(1).

## Reason for amending power

16. 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 show 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 considered appropriate to require the Scottish Ministers to issue guidance on the operation of the new sections 46ZA to 46ZD in order to assist waste collection

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authorities with the exercise of these comprehensive new enforcement powers. The power is further amended to require the Scottish Ministers to consult with waste collection authorities given that they will be exercising the enforcement powers and it is considered appropriate to impose a statutory duty to consult them.

### Choice of procedure

17. 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 13(2): Targets for local authorities relating to household waste recycling

Power conferred on: Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Revised or new power: revised

### Provision

18. In the Bill as introduced, section 13(2) inserts new section 47B into the 1990 Act, which provides that the Scottish Ministers may make regulations imposing targets on local authorities in relation to their waste management functions in so far as they relate to the recycling of household waste. Subsection (3) of new section 47B specifies what regulations made under subsection (1) of new section 47B may include. The Bill has been amended at Stage 2 to remove the power for the Scottish Ministers, in making regulations under section 47B, to impose a financial penalty on a local authority that does not achieve its household waste recycling targets (section 47B(3)(d) of the Bill as introduced).

19. This removal requires a consequential change to remove in turn the provision which would have enabled regulations to make provision for local authority appeals against the imposition of a penalty for not having met its target (section 47B(3)(h) of the Bill as introduced).

### Reason for amending power

20. There was opposition at Stage 1 of the Bill to the Scottish Ministers having a power to impose financial penalties and the Convention of Scottish Local Authorities publicly criticised the provisions. In its Stage 1 Report the Net Zero, Energy and Transport Committee expressed mixed views and suggested that an alternative approach that also incentivised local authorities be found.

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## Choice of procedure

21. Section 13(3) of the Bill amends section 160(2) of the 1990 Act to make the new power in section 47B(1) subject to the affirmative procedure.

## Section 16A: Offences relating to the use etc. of injurious articles or substances: fixed penalty notices.

Power conferred on: Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: choice of negative or affirmative

Revised or new power: new

## Provision

22. Section 16A modifies section 140 of the 1990 Act to give the Scottish Ministers the power to enable the use of a fixed penalty notice procedure in relation to offences created in regulations prohibiting or restricting the use, storage or supply of environmentally harmful items. This adds to the existing powers in section 140 of the 1990 Act.

## Reason for taking power

23. At present the only enforcement option for local authorities is to report any offences under regulations made using the powers in section 140 of the 1990 Act for prosecution. This provision responds to requests from local authorities, as the enforcement authority for a number of the regulations made using the section 140 power, for powers to issue fixed penalty notices in relation to such offences in respect of the supply of environmentally harmful items. Existing regulations made using the powers in section 140 include the Environmental Protection (Cotton Buds)(Scotland) Regulations 2019,<sup>1</sup> the Environment Protection (Microbeads)(Scotland) Regulations 2018<sup>2</sup> and the Environmental Protection (Single-use Plastic Products)(Scotland) Regulations 2021.<sup>3</sup> Draft regulations under section 140 creating an offence of supplying single-use vapes have been laid before the Parliament.<sup>4</sup>

## Choice of procedure

24. The provision amends the regulation-making power in section 140 of the 1990 Act, which is subject to negative procedure. However, section 160A(7) of the 1990 Act allows regulations made under the 1990 Act which are subject to the negative procedure instead to be subject to the affirmative procedure.

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<sup>1</sup> S.S.I. 2019/271.

<sup>2</sup> S.S.I. 2018/162.

<sup>3</sup> S.S.I. 2021/410.

<sup>4</sup> [The Environmental Protection \(Single-use Vapes\) \(Scotland\) Regulations 2024 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

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