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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Delegated powers in the Circular Economy (Scotland) Bill at Stage 1



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



dplr.committee@parliament.scot



0131 348 5212

Committee Membership



Stuart McMillan
Scottish National Party



Bill Kidd
Scottish National Party



Jeremy Balfour
Scottish Conservative
and Unionist Party



Oliver Mundell
Scottish Conservative
and Unionist Party



Mercedes Villalba
Scottish Labour

Introduction

1. At its meetings on 3ⁱ and 31 Octoberⁱⁱ 2023, the Delegated Powers and Law Reform Committee considered the delegated powers contained in the [Circular Economy \(Scotland\) Bill](#) ("the Bill") at Stage 1.
2. The Committee submits this report to the lead Committee for the Bill under Rule 9.6.2 of Standing Orders.

ⁱ Rona Mackay MSP substituted for Stuart McMillan MSP

ⁱⁱ Oliver Mundell MSP submitted apologies for this meeting.

Overview of the Bill

3. This Scottish Government Bill was introduced on 13 June 2023. The Lead Committee is the Net Zero, Energy and Transport Committee.
4. The Scottish Government has stated that the Bill seeks to set a framework that will allow Scottish Ministers to drive forward a circular economy in Scotland. It is explained that this is intended to lead to more sustainable consumption and production to meet Scotland's obligations to tackle the twin climate and nature emergencies, to cut waste, carbon emissions and pressures on the natural environment, to open up new market opportunities and strengthen communities. The Bill will primarily deliver enabling powers that will set a framework for taking action into the future.
5. The Scottish Government previously undertook a consultation on "Developing Scotland's circular economy: proposals for legislation" between 7 November 2019 and 19 December 2019 with plans for legislation to be brought forward at that time. However, this was delayed due to the COVID-19 pandemic. This consultation is said to have informed the development of this Bill with further consultation taking place between May 2022 and August 2022 which included a number of stakeholder events. The Scottish Government also consulted on proposals for a "Waste Route Map: Delivering Scotland's circular economy: A Route Map to 2025 and beyond" at the same time. There was a general level of support for the Bill's proposals, however, there were also significant differences in the level of support for specific provisions, with some suggesting the Bill could go further.

Delegated powers

6. The Bill confers sixteen delegated powers on the Scottish Ministers.
7. The Scottish Government has prepared a [Delegated Powers Memorandum](#) (“DPM”) which sets out the reasons for taking the delegated powers in the Bill and for the procedure chosen.
8. At its meeting on 3 October, the Committee indicated that it was content with 12 of the delegated powers:
 - Section 8(2) inserting new section 78A into the Climate Change (Scotland) Act 2009: Restrictions on the disposal of unsold consumer goods;
 - Section 9(4) inserting new section 87A into the Climate Change (Scotland) Act 2009: Power to require imposition of charges for single-use items;
 - Section 10(3) inserting new section 34ZC(9) into the Environmental Protection Act 1990: Householder’s duty of care;
 - Section 11(2) inserting new section 46ZC into the Environmental Protection Act 1990: Household waste requirements;
 - Section 11(2) inserting new section 46ZD into the Environmental Protection Act 1990: Household waste requirements;
 - Section 12(2) inserting new section 44ZZA into the Environmental Protection Act 1990): Code of practice on household waste recycling;
 - Section 14(2) inserting new section 88C into the Environmental Protection Act 1990): Littering from a vehicle;
 - Section 15(2) inserting new section 110C into the Environment Act 1995: Powers to search and seize vehicles, etc;
 - Section 15(2) inserting new section 110D into the Environment Act 1995: Powers to search and seize vehicles, etc;
 - Section 17(2) inserting new paragraph 14A into schedule 2 of the Regulatory Reform (Scotland) Act 2014) : Duty to make information publicly available;
 - Section 18(1) Ancillary provision; and
 - Section 19(2) Commencement.
9. However, the Committee agreed to write to the Scottish Government to raise questions on the following delegated powers:
 - Section 6(1) Circular economy targets;
 - Section 10(3) inserting new section 34ZC(16) into the Environmental Protection Act 1990: Householder’s duty of care;

- Section 11(2) inserting new section 46ZE into the Environmental Protection Act 1990: Household waste requirements; and
 - Section 13(2) inserting new section 47B into the Environmental Protection Act 1990: Targets for waste collection authorities relating to household waste recycling.
10. The Committee's [questions](#) and the [response](#) received from the Scottish Government are set out in the **Annex**. The Committee's consideration of this, and the other delegated powers contained in the Bill, are set out in the next section of the report.

Review of relevant 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

11. Section 6(1) enables the Scottish Ministers, by regulations, to impose targets on Scottish Ministers in relation to developing a circular economy. Section 6(2) specifies that Scottish Ministers must have regard to the desirability of the economy being one in which for example, processes and delivery of services are designed to reduce consumption, and the maximum value is extracted from things by those using them. Section 6(3) states that regulations made under this power may provide targets reducing consumption of materials and waste as well as increasing reuse and recycling and can make different provision for different purposes and may also make incidental, supplementary, consequential, transitional, transitory and saving provision.
12. The Scottish Ministers must consult the public and such persons as they consider appropriate under section 6(5) before making regulations under this section.
13. Regulations made under section 6(1) are subject to the affirmative procedure.

Committee consideration

14. The Committee asked for further information on how this power would be exercised and also whether this should be a duty to set targets. The response from the Scottish Government explains the context in which the Bill is made, which is that the detail on the face of the Bill is complemented with a framework for future action supported by the delegated powers. It is further explained that the use of the delegated powers will be underpinned by a co-design process with stakeholders including local authorities, businesses and householders to allow for flexibility in the implementation of the Bill's provisions and to complement the principal policies and structures set out on the face of the Bill.
15. The response outlines that there is a non-exhaustive list of potential areas that the targets could cover and before any targets are set it is intended to develop and consult upon the appropriate monitoring and indicator framework. The Scottish Government considers further work requires to be done for the methodology to be developed which will be significant for businesses and households and framing this as a power rather than a duty provides a level of flexibility to take account of the range of factors that would need to be considered in advance of setting a particular target.
16. The Bill confers a power for Scottish Ministers to set targets on themselves relating to the creation of a circular economy in Scotland, which is the principal aim of this Bill. The Bill is described by the Scottish Government as a framework Bill that would

be complemented by the delegated powers and be a product of co-design with various stakeholders.

17. Given the creation of a circular economy is fundamental to the Bill it is important to have a way of being able to measure and monitor the Bill's effectiveness. The Bill creates a discretionary power to do this, however, in the Climate Change (Scotland) Act 2009 targets were set out within the primary legislation with duties incumbent upon Scottish Ministers in relation to those targets.
18. The Scottish Government explains that it considers a power to set such targets provides additional flexibility as there requires to be further work done to be able to allow the Scottish Government to determine the appropriate methodology for the setting of targets and that will require consultation and engagement with various stakeholders. The power as it is presently drafted does not set a requirement to set targets, this is drafted as a discretionary power.
19. Whilst the supporting documentation suggests that targets will be set once the additional work on methodologies and engagement with stakeholders is carried out, as the power currently stands there is no requirement to set any targets, it is discretionary. Further, whilst it may be the intention of the Scottish Government at the present time to set these targets, future Governments will not be bound to do so.
20. The Committee considers that the power appears fundamental to the effective implementation of the Bill and the delivery of its aims. Other climate related primary legislation creates duties on Scottish Ministers with regards to climate targets.

21. The Committee highlights this provision to the lead committee.

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

22. Section 8(2) amends the Climate Change (Scotland) Act 2009 by inserting a new section 78A which confers power on Scottish Ministers, by regulations to make provision prohibiting or restricting the disposal of unsold consumer goods if they consider appropriate for the purpose of reducing waste. Definitions are provided for "consumer goods" in section 78A(2), "unsold" in section 78A(3) and "consumer" in section 78A(4).
23. Regulations made under this provision may include provision about the persons whom the prohibitions or restrictions apply, further provision about the meaning of "disposal" and "unsold" and may also make provision about enforcement of the regulations. Guidance may be issued by Scottish Ministers to any enforcement authority on whom the regulations confer functions, and the enforcement authority

must have regard to that guidance.

24. Regulations made under section 8(2) are subject to the affirmative procedure.

Committee consideration

25. The DPM states that this power is intended to target and address unsustainable behaviour with regards to the destruction and disposal of unsold consumer goods. The power provides for restrictions or prohibitions to be put in place to address this behaviour but does not allow for a blanket ban as that was considered to be disproportionate to the issue, and would be challenging to enforce.
26. The Scottish Government notes that further stakeholder engagement will be necessary to gain an understanding of how unsold goods are currently destroyed or redistributed and about capacity within the system to handle an increased influx of goods along with the skills and training necessary.
27. The Scottish Government considers secondary legislation to put in place such measures appropriate to allow greater flexibility to take account of changes in the markets or sectors that would be affected.
28. The Bill provides definitions of “consumer goods” and “unsold” to which any regulations will apply. The power also outlines at section 8(5) what regulations may include and at section 8(6) what enforcement provisions may do. The power is hemmed in by these provisions and so can only be exercised in a manner within these parameters. Further, section 8(7) provides that the Scottish Ministers must consult with appropriate persons before laying regulations and section 8(8) provides that any enforcement authority must have regard to guidance issued in relation to the enforcement of regulations under this provision.
29. This power is also subject to the affirmative procedure, allowing for a high level of scrutiny to be applied. What the power could be used to do therefore appears clear from the Bill’s provisions.

30. **The Committee accepts the power in principal and is content that it is subject to the affirmative 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

31. Section 9(4) of the Bill amends the Climate Change (Scotland) Act 2009 by inserting a new section 87A which confers power on Scottish Ministers, by regulations to require suppliers to charge for specified single-use items and may also require those proceeds to go towards environmental protection or improvement. Regulations made under section 87A may specify circumstances

where, for example, the charge is to apply, suppliers who it will apply to and the minimum amount to be charged. The regulations can only specify items which meet the criteria outlined in section 87A(3). Guidance may be issued by Scottish Ministers to any enforcement authority on whom the regulations confer functions, and the enforcement authority must have regard to that guidance.

32. Regulations made under section 9(4) are subject to the affirmative procedure.

Committee consideration

33. The DPM states that the aim of this power is to reduce the consumption of single use items by imposing a minimum charge to encourage a change in consumer behaviour. It further states that it is intended that the first use of this power will be to apply the minimum charge to single-use beverage cups, but that there may require to be other disposable items that the minimum charge should be applied to in the future that are having a harmful effect on the environment.
34. There are limitations on the exercise of the power in that regulations can only specify items that meet the criteria already outlined in the Bill. Further, the newly inserted section 87A(2) also lists the various matters which regulations may make provision for which includes the circumstances in which the requirement applies, how net proceeds are to be applied, the keeping of records and suppliers whom it would apply to, amongst other things. This gives clarity on how the power is likely to be exercised in the future.
35. Regulations made under this section are subject to the affirmative procedure offering a high level of scrutiny, however, there are additional requirements when regulations made under this section specify or modify the description of items that suppliers are required to charge for. When regulations are doing this, they require to be laid before the Parliament along with a statement of reasons for proposing to make the regulations. There is also a requirement to publicise the proposals and there is a 90 day “representation period” during which representations on the proposed regulations may be made to them which Scottish Ministers must have regard to when considering the regulations. This offers a high level of scrutiny, but also allows for engagement from the public and stakeholders and ensures that any representations are taken into account in the regulations and their consideration.

- 36. The Committee accepts the power in principal and is content that it is subject to the affirmative procedure.**

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

37. Section 10 of the Bill amends the Environmental Protection Act 1990 making a

breach of the householder’s duty of care a criminal offence and permits the issue of a fixed penalty notice to those who fail to comply with this duty.

38. Section 10(3) of the Bill, the power this Committee is considering, also inserts a new section 34ZC(9) which confers power on Scottish Ministers, by regulations to substitute a different amount for the amount specified as the amount of the fixed penalty in section 34ZC(8).
39. Regulations made under section 34ZC(9) are subject to the negative procedure.

Committee consideration

40. The DPM at paragraph 24 states that the Bill gives local authorities additional enforcement powers relating to a householder’s duty of care to prevent fly-tipping of household waste and ensure that householders are clear on their duties. The Scottish Government considers this power is necessary in order to allow Scottish Ministers the flexibility to increase the amount of the fixed penalty charge issued for a breach of the householder’s duty of care, should that be considered necessary. An increase in the amount of the fixed penalty cannot exceed level 2 on the [standard scale](#), so there are limitations to what level of increase can be permitted through subordinate legislation.
41. Regulations made under this provision can do no more than increase the amount of a fixed penalty notice which cannot exceed level 2 on the standard scale with there being other provisions within the 1990 Act with analogous powers subject to the negative procedure. The Scottish Government does not consider that it would be a good use of Parliamentary time to increase the amount of the fixed penalty notice via primary legislation. This would appear to be appropriate given the limited nature of the power and how it can be exercised.

42. **The Committee accepts the power in principal and is content that it is subject to the negative procedure.**

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

43. Section 10(3) of the Bill also inserts section 34ZC(16) which confers power on Scottish Ministers, by regulations to add another category of person defined as an “authorised officer” to be able to issue the fixed penalty in section 34ZC(8) and to make any modifications to section 34ZC as is appropriate in connection with a change to that definition.
44. Regulations made under section 34ZC(16) are subject to the negative procedure.

Committee consideration

45. The Committee asked for further information on why the negative procedure has been chosen and whether this provision should be subject to the affirmative procedure instead.
46. The Scottish Government explains that it considers the negative procedure to be appropriate as they consider this to be a power analogous to others in the Environmental Protection Act 1990 that are also subject to the negative procedure to allow the flexibility to make changes to definitions relatively quickly in order to ensure proper enforcement. It is further explained that whilst the power does permit the modification of primary legislation the Scottish Government considers this to be a relatively minor modification relating to technical detail.
47. There are two very similar powers already in the 1990 Act which permit other persons to be defined as an “authorised person” which are subject to the negative procedure. The power in section 10(3) inserts further provisions into the 1990 Act of a similar nature.
48. Normally it is expected that delegated powers that make amendments to primary legislation should be subject to the affirmative procedure, however, in this instance the power is similar to the other powers already in the 1990 Act and the power is limited in how it can be exercised. The modifications that can be made to primary legislation are limited to that section only, and only insofar as is appropriate in connection with making provision adding another category of “authorised officer” and so it appears to be appropriate that this level of scrutiny be applied in this case.

49. The Committee accepts the power in principal and is content that it is subject to the negative procedure.

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

50. Section 11 of the Bill creates new enforcement provisions relating to the collection of household waste, which includes the issue of a civil penalty notice for failure to comply with the duties. Section 11(2) of the Bill amends the Environmental Protection Act 1990 by inserting a new section 46ZC which confers a power on Scottish Ministers, by regulations, to make provision about the procedure to be followed and the amount of civil penalty charges as well as the form and content of notices, period of representations, consideration of representations and appeal procedure.
51. Regulations made under section 46ZC are subject to the affirmative procedure.

Committee consideration

52. The DPM at paragraphs 32 and 33 states that large quantities of recyclable materials are still being sent for disposal and the civil penalty charge scheme will strengthen local authorities' enforcement powers regarding household recycling. The Scottish Government considers that it is more appropriate for the detailed provision of the scheme to be outlined in secondary legislation to provide flexibility. It states this would allow changes to be made to the scheme and to make the best use of Parliamentary time.
53. The DPM further states that such regulations would be subject to the affirmative procedure which is appropriate given the detail of the scheme will include procedure to require payment of a notice, making representations, period for payment amongst other things.
54. The detail and specifics of such a scheme would not normally appear on the face of a Bill and it is usual practice for this to be detailed in subordinate legislation. The regulations allow detailed provision to be made on a range of issues relating to enforcement and issue of notices and it would appear appropriate that a higher level of scrutiny be applied to such regulations.

55. The Committee accepts the power in principal and is content that it is subject to the affirmative procedure.

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

56. Section 11 also inserts section 46ZD into the Environmental Protection Act 1990 which outlines the process for civil penalty notices issued by an authorised officer of a waste collection authority under section 46(6). Section 46ZD(6) confers power on Scottish Ministers, by regulations to specify the amount of the fixed penalty and to specify the form of notice for the fixed penalty.
57. Regulations made under section 46ZD(6) are subject to the negative procedure.

Committee consideration

58. This power has similarities to that in section 10 of the Bill. The DPM at paragraphs 37 and 38 states that the Bill gives local authorities enforcement powers to issue written warnings and civil penalty charges to individuals for failure to comply with their duties and to be able to issue fixed penalty notices for committing an offence. The power is considered appropriate by the Scottish Government in order to allow Scottish Ministers to specify the amount of the fixed penalty charge and to specify the form of a notice via subordinate legislation, rather than on the face of the Bill. The amount of the fixed penalty cannot exceed level 2 on the standard scale, so there are limitations to what level of charge can be permitted through subordinate

legislation.

59. Regulations made under this provision can do no more than specify the amount of a fixed penalty notice which cannot exceed level 2 on the standard scale and to specify the form of a notice. The Scottish Government does not consider that it would be a good use of Parliamentary time to specify the amount of the fixed penalty notice via primary legislation. This would appear to be appropriate given the limited nature of the power and how it can be exercised.

60. The Committee accepts the power in principal and is content that it is subject to the negative procedure.

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

61. Section 11(2) of the Bill also inserts section 46ZE into the Environmental Protection Act 1990 which confers power on Scottish Ministers to issue guidance on the operation of sections 46ZA to 46ZD which a waste collection authority and an officer of a waste collection authority must have regard to.
62. Guidance issued under section 46ZE is not subject to any Parliamentary procedure.

Committee consideration

63. The Committee asked for further information from the Scottish Government on whether this power to issue guidance about the enforcement of offences in relation to recycling of household waste and use of receptacles should be subject to a consultation requirement and some form of Parliamentary scrutiny, similar to the power in section 12(2).
64. The Scottish Government's response explains that this guidance will have significance for waste authorities from an operational perspective and that it would be developed through co-design with local authorities and stakeholders. It is further explained that whilst this guidance will be of significance to local authorities, it will be focussed on technical detail and also likely be subject to revisions which will need to be updated frequently.
65. The Scottish Government describes the guidance under section 11 as not as significant as the power to issue a code of practice in section 12. It is explained that the code of practice will apply at a local and national level, it is not considered that parliamentary scrutiny would be appropriate to be applied to the guidance, and it is appropriate a higher level of scrutiny be applied to the code of practice.
66. The response does not address the question of whether the guidance should be subject to a consultation requirement. Given that the guidance will be significant to

local authorities and is described by the Scottish Government as something that will be developed through a co-design process with local authorities being the principal stakeholders, the Committee considers that it is appropriate that there should be a consultation requirement with local authorities before issuing any guidance under this provision.

67. The Committee accepts the explanation provided by the Scottish Government as to why parliamentary scrutiny of any guidance issued under this section would not be considered proportionate.

68. The Committee recommends that the exercise of this power should be subject to a requirement to consult with local authorities before being exercised. It is otherwise content with the power in principle and that it is not subject to any parliamentary procedure.

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

69. Section 12 of the Bill also amends the Environmental Protection Act by inserting section 44ZZA which confers power on Scottish Ministers to prepare and publish a code of practice which sets out the standards expected and steps to be taken by local authorities in carrying out their waste management functions as it relates to the collection and recycling of household waste. The Code of Practice can make provision about a number of matters which are outlined in section 44ZZA(2) including receptacles to be used for household waste collection and frequency of collection.

70. When preparing the Code of Practice Scottish Ministers must consult publicly and obtain the views of local authorities and the Scottish Environmental Protection Agency. The draft Code of Practice cannot be finalised until it has been laid in Parliament for 40 days. Scottish Ministers can also revise the code.

Committee consideration

71. The DPM states that the code of practice will set out the standards expected of, and steps to be taken by local authorities in carrying out their household waste collection and recycling functions. The code of practice will be a detailed and technical document and will need to be kept up to date, requiring changes to be made to it over time and so it is not appropriate for this to be set out on the face of the Bill.

72. There is a wide consultation requirement before being able to publish a code of practice. Scottish Ministers must consult publicly and solicit the views of local authorities and the Scottish Environment Protection Agency, and the code of

practice must be laid before the Parliament to allow scrutiny of the code.

73. It would not be appropriate for the information to be contained in the code of practice to appear on the face of the Bill. Additionally, the code of practice is subject to a wide consultation requirement and a requirement to be laid before the Parliament, giving the Parliament a level of oversight before the code of practice is finalised and published.

74. The Committee accepts the power in principal and is content that the Code of Practice requires to be laid before Parliament.

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

75. Section 13(2) of the Bill also amends the Environmental Protection Act 1990 by inserting section 47B which confers power on Scottish Ministers, by regulations to impose targets on local authorities in their waste management functions of recycling household waste. Regulations made under section 47B cannot set targets to be met by any time before 1 April 2030.
76. Section 47B(3) provides further specification on what such regulations may do, which includes specifying indicators, conferring functions on the Scottish Environment Protection Agency and providing for appeals amongst other things. These regulations can also make different provision for different purposes, areas of authorities and can make incidental, supplementary, consequential, transitional, transitory or saving provision and may also modify any enactment.
77. Before making regulations under this section Scottish Ministers must consult publicly and obtain the views of local authorities and the Scottish Environment Protection Agency.
78. Regulations made under section 47B(1) are subject to the affirmative procedure.

Committee consideration

79. The Committee asked for further information on how this power would be exercised and for information in relation to how much notice local authorities would be given to prepare for the imposition of such targets.
80. The response from the Scottish Government explains that a significant period of time is to be allowed before implementing targets to allow the different starting points, varied geographies and demographics of local authorities to be considered. The response also explains that infrastructure and service changes would be required to support these targets and the significant lead in time of April 2030 is needed to be achievable and fair.

81. The Scottish Government also states that the Welsh Government implemented a similar policy with a 2-year lead in time and that this is considered to be the minimum reasonable period of notice for implementation of targets.
82. The Scottish Government has provided an explanation on how it anticipates the power would be developed and exercised and that a significant period of time will be provided to allow all necessary work to be carried out to implement these targets. The Committee is content with the explanation provided regarding what work requires to be done and the timescales that would be involved in that.

83. The Committee accepts the power in principal and is content that it is subject to the affirmative procedure.

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

84. Section 14(2) of the Bill also amends the Environmental Protection Act 1990 by inserting section 88C which allows the imposition of a civil penalty notice to the keeper of a vehicle for the offence of littering from a vehicle. Section 88C(5) confers power on Scottish Ministers, by regulations to make provision in relation to the civil penalty charge that is imposed including the amount that can be imposed, providing for discounts, the procedure to be followed where a civil penalty notice is cancelled and representations and appeals amongst other things.
85. Regulations made under section 88C(5) are subject to the affirmative procedure.

Committee consideration

86. Littering from a vehicle is currently an existing criminal offence, however, it requires identification of the person littering and a criminal standard of proof requires to be met. The DPM states that the Bill introduces a civil penalty regime to bridge the gap that has been identified to act as a deterrent and to increase the enforcement options available in tackling roadside littering.
87. The DPM also states that such regimes are typical, and the detail of the regime being set out in secondary, rather than primary legislation, allows for changes to be made to ensure it works properly and can be refined. The Scottish Government does not consider that it would be appropriate, nor a good use of Parliamentary time, for primary legislation to be required when such changes are needed.
88. The Bill itself introduces the regime and it is standard in modern primary legislation for the specific detail of such a regime to be outlined in secondary legislation. The power itself lists at inserted section 88C(5) what may be included in such regulations and also provides for a number of definitions, and this being done by

secondary legislation allows a level of flexibility in implementing and managing such a regime. Any regulations made under this power are also subject to the affirmative procedure, so the highest level of scrutiny is applied.

89. The Committee accepts the proposed power in principal and is content that it is subject to the affirmative procedure.

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

90. The Bill amends the Environmental Protection Act 1990 to permit constables and officers of SEPA to search and seize vehicles and their contents where it is believed it is being used in relation to a relevant offence. Section 15(2) inserts section 110C into the 1990 Act and section 110C(2)(a) confers power on Scottish Ministers, by regulations to specify how any seized property is to be dealt with.
91. Regulations made under section 110C(2)(a) must set out the matters outlined in section 110C(3) which includes amongst other things the duties of a responsible authority, circumstances that seized property must be returned, circumstances which the responsible authority can dispose of the property and what the uses of proceeds of the sale of any seized property. When making regulations under this section Scottish Ministers must have regards to any guidance issued.
92. Regulations made under section 110C(2)(a) are subject to the affirmative procedure.

Committee consideration

93. The Bill itself allows for vehicles and their contents to be seized in certain circumstances outlined in the Bill. This power allows for secondary legislation to specify how any such vehicles and contents are to be dealt with. The DPM states that making detailed provision for this within the Bill would be difficult and would not be appropriate to make minor refinements and changes once it is in place. It further states that handling of seized property may need to differ depending on the type of property seized and the circumstances of its seizure.
94. Such detail would not usually be expected to appear on the face of a Bill. The inserted section 110C(3) sets out what regulations made under this section must include which consists of the duties of a responsible authority, circumstances in which the responsible authority may sell, destroy or dispose of seized property, the circumstances when seized property must be returned and how the proceeds of any sale should be used.
95. This being done by way of secondary legislation also allows for changes requiring

to be made to be able to take place easily without unnecessary use of Parliamentary time. Regulations made under this section are also subject to the affirmative procedure, so the highest level of scrutiny is applied.

96. The Committee accept the proposed power in principal and is content that it is subject to the affirmative procedure.

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

97. Section 15(2) of the Bill also inserts section 110D into the Environmental Protection Act 1990. Section 110D confers power on Scottish Ministers, by regulations to provide for an offence to be, or cease to be, relevant for the purposes of the power to search and seize property and also to modify any enactment.

98. Regulations made under this section are subject to the affirmative procedure.

Committee consideration

99. The DPM states that the nature and types of crime relating to the environment is subject to change and therefore it is necessary to have this power that would allow regulations to be made which would apply the enforcement provisions added by sections 110A-110C to other offences. This is considered appropriate as the offences added would already be for conduct that is considered a criminal offence within legislation. Any regulations made under this power would apply the enforcement provisions to those offences.

100. The power cannot create new offences, simply provide for an offence specified in legislation to be considered relevant for the enforcement provisions of search and seizure. Any regulations made under this power are subject to the affirmative procedure, which is appropriate as it permits modification of primary legislation and will apply the enforcement of search and seizure to new offences, offering a high level of Parliamentary scrutiny.

101. The Committee accepts the proposed power in principal and is content that it is subject to the affirmative procedure.

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

102. Section 18 of the Regulatory Reform (Scotland) Act 2014 allows Scottish Ministers to make a wide range of provision by regulations for environmental purposes, as set out in schedule 2. Section 17(2) of the Bill amends schedule 2 of the 2014 Act making amendments to the purposes for which provision can be made so that regulations can impose duties on persons to make specified information publicly available, excluding domestic activities.
103. Regulations made under this section are subject to the affirmative procedure where primary legislation is being modified, and otherwise subject to the negative procedure.

Committee consideration

104. The Scottish Government states that this power is considered necessary to make provision for a power to require persons to report on their waste and surplus with a view to this promoting better use of resources. The Scottish Government notes that in exercising this power there will have to be consultation with various sectors so that workable definitions can be found that may need adjusting over time.
105. This power is a limited one to specify persons to make information publicly available in the manner specified. The information that can be made publicly available is about anything that is stored or disposed of in a non-domestic setting. It appears clear how this power will be used and what it will be used to do. Such regulations are subject to the negative procedure, which is in line with other regulation making powers that are made under section 18 of the Regulatory Reform (Scotland) Act 2014 and would appear appropriate in this instance.

106. The Committee accepts the proposed power in principal and is content that it is subject to the negative 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

107. Section 18(1) confers power on Scottish Ministers, by regulations to make any incidental, supplementary, consequential, transitional, transitory or savings provision as they consider appropriate for the purposes of, or in connection with, or for giving full effect to the Bill or any provision made under it. Subsection (2) provides that any such regulations may also make different provision for different purposes and may modify any enactment (including the Bill).

108. Regulations made under this provision are subject to the affirmative procedure if modifying primary legislation, otherwise they will be subject to the negative procedure.

Committee consideration

109. The power to make stand-alone ancillary provision by regulations is common in modern primary legislation. The power is limited to the extent that it can only be used if the Scottish Ministers consider it appropriate for the purposes of, in connection with, or for giving full effect to the Bill.
110. The reason given in the DPM for taking this power is that it is necessary to provide flexibility and to be able to deal with and address any unforeseen circumstances which could arise from the Bill's provisions. The DPM also states that without such a power minor unforeseen modifications would require to be made through primary legislation which is not considered an effective use of resources.
111. The power can be exercised to make ancillary provision to allow (for example) unexpected issues to be dealt with by secondary rather than further primary legislation. The power is significantly limited to giving full effect to the Act so the power can only be used to make provision that was within the scope and intention of the Act as passed, however, it may still permit the amendment of primary legislation depending on how the power is exercised. Where primary legislation is modified in the exercise of this power then the affirmative procedure will apply to ensure the highest level of scrutiny, otherwise the negative procedure will apply, as is standard for ancillary powers.

- 112. The Committee accepts the proposed power in principal and is content that the affirmative procedure applies to any provision which modifies primary legislation and that otherwise the negative procedure applies.**

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

113. Section 19(2) confers power on Scottish Ministers, by regulations, to appoint a day when the provisions of the Bill will come into force, excluding sections 18, 19 and 20 which will come into force the day after Royal Assent. Regulations made under this provision may include transitional, transitory or saving provision and may make different provision for different purposes.
114. Regulations made under this provision will be laid before the Parliament but will not be subject to any further Parliamentary procedure.

Committee consideration

115. The power to commence provisions by regulations is standard practice in modern

primary legislation. The DPM provides that the power is appropriate to commence the provisions of the Bill at such time as Scottish Ministers consider appropriate to ensure that preparations are made for the law changing. The DPM further notes that to be able to address any matter which arises in the application of the new legislation the power contains allows transitional, transitory and saving provision to be made.

116. This is a narrow power that is limited in how it may be exercised. It is subject to the laid only procedure, which is standard in commencement regulations.

117. The Committee accepts the proposed power in principal and is content that it is subject to being laid only and not subject to any Parliamentary procedure.

Annex - correspondence with the Scottish Government

Letter to the Minister for Green Skills, Circular Economy and Biodiversity, 5 October 2023

At its meeting on 3 October 2023, the Delegated Powers and Law Reform Committee considered the 16 delegated powers contained in the above Bill. It agreed to query four of these powers with you.

Section 6(1) - Circular economy targets

The [Delegated Powers Memorandum](#) (“the DPM”) states that section 6(1) – which enables the Scottish Ministers, by regulations, to impose targets on themselves – is necessary in order to monitor Scotland's progress towards developing a circular economy. It notes there are many methods of being able to track and monitor progress, with the Circularity Gap Report and the Zero Waste Scotland Material Flow Accounts using differing methodologies, although presently there isn't an agreed position on the robustness and comparability of the differing methods and further work is required to be done.

The Scottish Government also states in the DPM that to have this as a power to make subordinate legislation to set targets rather than appear on the face of the Bill provides flexibility with regards to the methodologies, and should changes be required then this is best done by way of secondary legislation.

Given this power is likely to be significant for both businesses and households across the country, the Committee queried why there is no information in the Bill, or the supporting documentation on what further work requires to be done and what timescales would be involved for that being completed in order to finalise the target setting methodology, despite this being the second iteration of the Bill.

The Committee also noted that the power is discretionary; Scottish Ministers “may by regulations” set targets. However, the supporting documentation to the Bill suggests targets will be set.

The Committee therefore asks:

- 1. for further information in relation to how it is anticipated that this power will be exercised;**
- 2. whether the intention of section 6(1) is that, by reference to the wording “may by regulations”, the Scottish Ministers will not be under a duty to set targets; and**
- 3. why section 6(1) does not create a duty on the Scottish Ministers to set targets?**

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

In relation to the section 10(3) stated above, the DPM states that local authorities are given additional enforcement powers where there has been a breach of a householder's duty of care to reduce fly tipping. Furthermore, it states the power is necessary to allow

flexibility to modify the definition of an “authorised officer” and add another category of persons who can carry out enforcement of the Bill’s provisions on a householder’s duty of care.

In the DPM, the Scottish Government states that it considers the negative procedure is the appropriate level of scrutiny for what it describes as a minor modification of a definition of “authorised officer” and describes similar analogous powers.

The Committee considers that the power is in effect giving Scottish Ministers the power to permit other descriptions of persons the ability to carry out enforcement for a breach of householder’s duty (a criminal offence), which includes issuing fixed penalty notices. Such regulations would modify primary legislation by modifying the definition and can also modify other parts of inserted section 34ZC in connection with modification of the definition of “authorised officer”.

Given this power is a modification to who can carry out enforcement action and permits the modification of primary legislation, the Committee agreed to ask why the Scottish Government does not consider the affirmative procedure and higher level of Parliamentary scrutiny to be more appropriate in this instance.

The Committee therefore asks:

1. **what further detail can be given on why the negative procedure has been chosen; and**
2. **why the Scottish Government does not consider the affirmative procedure to be more appropriate for the exercise of this power, given it appears to permit the modification of primary legislation?**

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

The DPM states the power in section 11(2) above is necessary to assist waste collection authorities with the exercise of the comprehensive enforcement powers of local authorities that are inserted by section 11 of the Bill. These enforcement powers and any guidance issued under this section are aimed at improving rates of recycling and reducing contamination of recyclables driving behaviour change. The guidance is not subject to any parliamentary procedure.

Any guidance issued under this section will have significant standing as waste collection authorities must have regard to it when exercising their enforcement powers under 46ZA to 46ZD. While to provide assistance in enforcing these new provisions appears appropriate in itself, there will be no opportunity for Parliamentary scrutiny, despite waste collection authorities having to have regard to it when enforcing the Bill’s provisions.

Whilst there is a consultation requirement with the Scottish Ministers in preparing and issuing a code of practice under section 12(2), and a requirement for that to be laid before the Parliament, the Committee noted there is no such consultation requirement in respect of guidance issued under this section. Instead, it noted that the delegated power to issue guidance on enforcement is exercised administratively without further legislative scrutiny.

The Committee therefore queried whether there should be some form of consultation prior to any guidance being finalised and whether any guidance issued to be subject to some form of scrutiny, such as being laid before the Parliament.

The Committee therefore asks:

1. **if it considers any guidance issued under section 11(2) should be subject to a consultation requirement like the power to issue a code of practice in section 12(2) of the Bill, and if not, why not?**
2. **if it considers that any guidance issued under section 11(2) should subject to some form of Parliamentary scrutiny again like the power to issue a code of practice in section 12(2) of the Bill, and if not, why not?**

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

Section 13(2) of the Bill amends the Environmental Protection Act 1990 by inserting section 47B which confers power on Scottish Ministers, by regulations, to impose targets on local authorities in their waste management functions of recycling household waste.

The DPM states that this power is intended to be used to address the slower than expected pace of progress towards recycling targets. This will provide a legislative, rather than voluntary, framework to address this along with the power to issue a code of practice in section 12(2) which local authorities must have regard to.

The Committee noted that although the power outlines a number of matters that may be covered in regulations, there is little information in the supporting documentation on how it is anticipated it is to be exercised. The Committee therefore asks how such a delegated power is to be exercised, to assist in assessing whether the power should be delegated, as it is one which is likely to be significant for local authorities in carrying out their functions.

The Committee therefore asks:

1. **how much notice it is anticipated will be given to local authorities to prepare for the imposition of the targets, which may include enforcement of penalties for failure to meet them; and**
2. **for further information on how this power is anticipated to be exercised?**

Letter from the Minister for Green Skills, Circular Economy and Biodiversity to the Convener, 13 October 2023

Thank you for your letter of 5 October 2023 about the Circular Economy Bill.

The Bill provides a combination of detail on the face of the Bill with a framework for future action in certain areas supported by a number of delegated powers, the use of which will be underpinned by a co-design process with stakeholders including local authorities, businesses and householders. The delegated powers will allow for flexibility in the implementation of the Bill provisions and complement the principal policies and structures set out on the face of the Bill. In the attached Annex I have set out replies to the specific queries you raise in relation to four of those powers.

I hope this is helpful.

Section 6(1) - Circular economy targets

- i. **for further information in relation to how it is anticipated that this power will be**

exercised;

This section provides enabling powers for Scottish Ministers to set targets on themselves that relate to the Circular Economy through secondary regulations. The Bill sets out a non-exhaustive list of potential areas that targets could cover. These are:

- **Reducing the consumption of materials**
- **Increasing reuse**
- **Increasing recycling**
- **Reducing waste**

Before any regulations are brought forward we intend to develop, and consult upon, an appropriate monitoring and indicator framework. This will ensure there is an agreed understanding of the relevant methodologies and datasets that would be a basis for setting targets and/or measures. Stakeholders, including businesses and households, will be able to meaningfully participate in the process of determining this framework. Relevant Committees would be invited to scrutinise any such proposed monitoring and indicator framework should they choose to do so during the consultation.

The provisions also require that in considering targets, Scottish Ministers must have regard to the desirability of the economy being one in which there is sustainable consumption and increased reuse and recycling (on the same basis as that used for the Circular Economy strategy).

ii. whether the intention of section 6(1) is that, by reference to the wording “may by regulations”, the Scottish Ministers will not be under a duty to set targets; and

iii. why section 6(1) does not create a duty on the Scottish Ministers to set targets?

As set out above, any targets would require further work to be undertaken to develop the appropriate monitoring and indicator framework on which they would be based. As the committee notes, this power is likely to be significant for both businesses and households across the country and, given the setting of targets could require significant behaviour and systems change, there is a need to evaluate the impact of any such targets on different areas of society. Framing this as a power rather than a duty allows for a sufficient degree of flexibility to take account the range of factors that would need to be considered in advance of setting a particular target.

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

i. what further detail can be given on why the negative procedure has been chosen; and

ii. why the Scottish Government does not consider the affirmative procedure to be more appropriate for the exercise of this power, given it appears to permit the modification of primary legislation?

New section 34ZC(16) defines authorised officers as authorised local authority officers and those of the Loch Lomond and The Trossachs National Park authority. In future this could

be extended to include, for example, enforcement officers from another national park. This is analogous to similar powers in the Environmental Protection Act 1990 in relation to fixed penalty notices for flytipping offences (section 33A(13A)) and littering (section 88(10)(c)) to allow the flexibility to make changes to definitions relatively quickly in order to ensure proper enforcement. The existing powers in the 1990 Act are also subject to the negative procedure. Applying the negative procedure to these powers is consistent with that approach and would mean that a change to all three fixed penalty notice procedures could be accomplished by the same instrument in the same time scales. While it does permit the modification of primary legislation this is a relatively minor modification relating to a technical detail.

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

i. if it considers any guidance issued under section 11(2) should be subject to a consultation requirement like the power to issue a code of practice in section 12(2) of the Bill, and if not, why not?

ii. if it considers that any guidance issued under section 11(2) should subject to some form of Parliamentary scrutiny again like the power to issue a code of practice in section 12(2) of the Bill, and if not, why not?

Guidance under section 46ZE refers to guidance about the enforcement of offences in relation to recycling of household waste and use of receptacles. As the Committee notes, the guidance will have significance to waste authorities from an operational perspective and accordingly such guidance would be developed through co-design with local authorities and stakeholders. As largely operational guidance focussed on technical detail, there may also be a need to make revisions and update the guidance with some frequency. It would potentially be disproportionate to lay this type of guidance before parliament and it is unclear what this process would contribute in terms of the content of the guidance. The code of practice outlined at section 12(2), while technical in nature, is of much greater significance in terms of how waste management activities will be undertaken at a national and local level with implications for local authorities and householders and so a higher level of parliamentary scrutiny is entirely appropriate.

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

i. how much notice it is anticipated will be given to local authorities to prepare for the imposition of the targets, which may include enforcement of penalties for failure to meet them; and

ii. for further information on how this power is anticipated to be exercised?

Any targets set under this power would need to be both achievable and fair and take into account the different starting points, varied geographies and demographics of local authorities. It is also important to recognise that improvements to recycling rates will require infrastructure and service changes. As such, any targets will be the product of co-design with local authorities and stakeholders and would not apply before 2030 to ensure the principles of achievability and fairness are delivered.

The intention is to use this lead in time to 2030 to provide local authorities with a significant period of notice of the targets against which their performance will be measured. Local authorities already receive data on a yearly basis, collected by SEPA, on the waste and

recycling rates in their authority. The primary benefit of setting targets is to encourage improvement in recycling and reuse rates, and local authorities will be best equipped to achieve this with as much notice of targets as is practical.

The Welsh Government, which has implemented a similar policy, provided local authorities with two years' notice of targets when these were first introduced in 2012/13. The Scottish Government considers this to be the minimum reasonable notice period for targets and recognises that more notice is both desirable and likely to help with achieving targets. Through the development of targets with local authorities, officials will explore how the implementation timeline can best provide local authorities with the opportunity to experience the process and the knowledge they need to plan for any changes to their services required to meet targets in 2030.

