



The Scottish Parliament  
Pàrlamaid na h-Alba

Published 21 June 2024  
SP Paper 628  
46th Report, 2024 (Session 6)

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

## **Delegated powers in the Circular Economy (Scotland) Bill (as amended at Stage 2)**



**Published in Scotland by the Scottish Parliamentary Corporate Body.**

---

All documents are available on the Scottish Parliament website at:  
<http://www.parliament.scot/abouttheparliament/91279.aspx>

For information on the Scottish Parliament contact Public Information on:  
Telephone: 0131 348 5000  
Textphone: 0800 092 7100  
Email: [sp.info@parliament.scot](mailto:sp.info@parliament.scot)

# Contents

<b>Introduction</b>	<b>1</b>
<b>Delegated Powers</b>	<b>2</b>
<b>Review of powers</b>	<b>3</b>

# 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](mailto:dplr.committee@parliament.scot)



0131 348 5212

# Committee Membership



**Stuart McMillan**  
Scottish National Party



**Bill Kidd**  
Scottish National Party



**Foyso Choudhury**  
Scottish Labour



**Tim Eagle**  
Scottish Conservative  
and Unionist Party



**Jeremy Balfour**  
Scottish Conservative  
and Unionist Party

# Introduction

1. At its meeting on 18 June 2024<sup>i</sup>, the Delegated Powers and Law Reform Committee ("the Committee") considered the delegated powers contained in the Circular Economy (Scotland) Bill following amendments made at Stage 2.
2. This is a Scottish Government Bill which was introduced on 13 June 2023. The lead committee was the Net Zero, Energy and Transport Committee.
3. The Scottish Government has stated that the Bill seeks to set a framework that will allow the 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.

---

<sup>i</sup> Foyso Choudhury MSP submitted apologies for this meeting.

# Delegated Powers

4. On introduction, the Bill conferred sixteen delegated powers on the Scottish Ministers. The Committee previously considered the delegated powers in this Bill at Stage 1 on 3 and 31 October 2023, and published a [report](#) on 2 November 2023.
5. The Bill completed Stage 2 on 28 May 2024. The Scottish Government produced a [Supplementary Delegated Powers Memorandum](#) (“sDPM”) covering the delegated powers as amended at Stage 2.
6. The Committee is required by Rule 9.7.9(b) of the Standing Orders to consider and report to the Parliament on new or substantially altered delegated powers after Stage 2.

# Review of powers

## Section 6(1) – Circular economy targets

### Power conferred on: The Scottish Ministers

### Power exercisable by: regulations made by Scottish statutory instrument

### Parliamentary procedure: Subject to pre-laying procedure on the first exercise of the power and thereafter affirmative

### Revised or new power: revised

### Provision

7. On introduction, section 6 provided that the Scottish Ministers “may” by regulations make provision imposing targets on the Scottish Ministers relating to developing a circular economy. Section 6 has been amended in order that the setting of circular economy targets becomes a statutory duty and therefore the Scottish Ministers “must” make regulations which impose targets on themselves relating to developing a circular economy.
8. Section 6(3) sets out an illustrative list of the matters that targets may be set in relation to. That list has been amended to include “increasing refurbishment” and “increasing repair”.
9. Section 7A has also been inserted by amendment and states that the first exercise of the power will be subject to an additional pre-laying requirement, sometimes referred to as the super-affirmative procedure. It provides that the Scottish Ministers must lay before the Parliament a copy of the proposed regulations and a statement setting out their reasons for proposing to make those regulations. The Scottish Ministers must also specify a period during which representations on the proposed regulations may be made to them, and that period must be at least 90 days. When laying the proposed regulations after such a representation period, the Scottish Ministers must lay a statement setting out the details of any representations, resolutions or reports and the changes, if any, they have made to the proposed regulations in response.
10. All regulations made under this power following the first exercise of the power will be subject to the affirmative procedure.

### Committee consideration

11. In its Stage 1 report, the Committee noted that other climate related primary legislation created duties on the Scottish Ministers with regards to climate targets and asked the Scottish Government whether the power in section 6 should likewise be framed as a statutory duty to make regulations. The Scottish Government responded that its intention is to set such targets, however the Committee noted that future governments would not be bound to do so and therefore highlighted the provision to the lead committee.
12. The Scottish Government states in the sDPM that the amendment makes it clear



that its intentions is to ensure that “Scotland can monitor its journey towards developing a circular economy at a national level and ensure that progress is being made”.

13. In relation to the amendment to the procedure in respect of the first regulations made under this power, the Scottish Government notes in the sDPM that this was a recommendation made by the lead committee. It states that the first use of the power will likely set the trajectory of Scotland’s progress towards increased recycling and reduced waste carbon and that the intended significance of the impact of the targets means that an enhanced level of scrutiny by the Parliament is merited.

**14. The Committee welcomes that the Scottish Government has amended the power in section 6 to place a duty on the Scottish Ministers to set circular economy targets.**

**15. The Committee also welcomes the inclusion of an enhanced laying procedure on the first exercise of the power which responds to a recommendation of the lead committee.**

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

**Power conferred on: The Scottish Ministers**

**Power exercisable by: order made by Scottish statutory instrument**

**Parliamentary procedure: negative**

**Revised or new power: revised**

### **Provision**

16. New section 9A modifies section 33A(10) 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 an order from £500 to £1000. It also enables the Scottish Ministers to substitute different amounts (not exceeding level 3 on the standard scale) in relation to different cases or descriptions of case.
17. The order making power has existed in the 1990 Act since 2004 and is subject to the negative procedure. However, that Act provides that any power that is subject to the negative procedure may also be made subject to the affirmative procedure. There is no amendment made by this Bill to the procedure attached to the power and as such any order made under this revised power will be subject to the negative procedure, with the option of using affirmative procedure.

### **Committee consideration**

18. The Scottish Government explains in its sDPM that there has been an increase to the prescribed fixed penalty notice amount in section 33A(9) of the 1990 Act to

£500, which is the current level 2 amount on the standard scale. Therefore, the order making power in 33A(10) would not allow the Scottish Ministers to substitute a higher amount than is already specified. The amendment to the power now allows the Scottish Ministers to set a higher penalty amount up to a maximum of £1000. It also enables the Scottish Ministers to set the fixed penalty amount at different levels in different circumstances, and the sDPM offers the example that this may be used to capture instances where a previous fixed penalty notice has been issued to the same person.

19. With regards to the procedure, the Scottish Government notes in its sDPM that it seems unlikely that the Scottish Ministers would consider that it would be appropriate for any order under this provision to be subject to the affirmative procedure, and that it is expected that any order under the amended provisions would be subject to the negative procedure.
20. The Committee agrees that the negative procedure is appropriate given that the scope for increase is relatively limited and, if passed, the Parliament will have approved that scope.

**21. The Committee accepts the revised power in principle 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**

**Revised or new power: revised**

#### **Provision**

22. Section 11(2) of the Bill inserts section 46ZE into the 1990 Act which confers power on Scottish Ministers to issue guidance on the operation of sections 46ZA to 46ZD (which set out how the household waste requirements are to be enforced) which a waste collection authority and an officer of a waste collection authority must have regard to. Guidance issued under section 46ZE is not subject to any Parliamentary procedure.
23. The power to issue guidance has been revised by amendment to replace the discretionary power with a statutory duty to issue guidance. An amendment has also been made which requires the Scottish Ministers to consult with waste collection authorities in preparing such guidance.
24. Guidance issued under new section 46ZE will not be subject to any parliamentary procedure.

#### **Committee consideration**

25. The Committee considered the power to issue guidance in its Stage 1 report. It recommended that a consultation duty should apply.

26. The Committee had also asked the Scottish Government about whether it would be appropriate to subject the power to any parliamentary procedure. The Committee was content with the Scottish Government's response that parliamentary procedure in this instance is not considered appropriate given that guidance would be focussed on technical detail and also would likely be subject to revisions which will need to be updated frequently. As such, making such guidance subject to parliamentary procedure may be considered a disproportionate use of parliamentary time.
27. The Committee considers that the amendment which places a duty on the Scottish Ministers to issue such guidance rather than a discretionary power is appropriate, as it will give waste collection authorities certainty as to the expected operation of their enforcement powers.

**28. The Committee accepts the revised power in principle, and is content that it is not subject to any parliamentary procedure.**

**29. The Committee also welcomes the inclusion of a requirement to consult in line with the Committee's Stage 1 recommendations.**

### **Section 13(2) – Targets for local authorities relating to household waste recycling**

**Power conferred on: The Scottish Ministers**

**Power exercisable by: regulations made by Scottish statutory instrument**

**Parliamentary procedure: affirmative**

**Revised or new power: revised**

#### **Provision**

30. Section 13(2) of the Bill also amends the 1990 Act 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.
31. 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. The illustrative list in section 47B has been amended to remove the entry which stated that such regulations may impose liability on a local authority to pay a penalty to the Scottish Ministers if a target imposed under the regulations is not achieved, and consequentially to remove the entry relating to provision for appeals against the imposition of such penalties.
32. Before making regulations under this section the Scottish Ministers must consult

publicly and obtain the views of local authorities and the Scottish Environment Protection Agency.

33. Regulations made under section 47B(1) are subject to the affirmative procedure.

### **Committee consideration**

34. The Scottish Government states in its sDPM that there was opposition at Stage 1 to the inclusion of the express power to impose financial penalties. The lead committee expressed mixed views on the matter and suggested that an alternative approach that also incentivised local authorities be found.
35. The Committee considers that the removal of these entries relate more to policy considerations than the scope of the power and as such, the Committee defers to the lead committee's report on this matter.

36. **The Committee notes that this power has been revised in light of recommendations from the lead committee.**

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

**Power conferred on: The Scottish Ministers**

**Power exercisable by: regulations made by Scottish statutory instrument**

**Parliamentary procedure: choice of negative or affirmative**

**Revised or new power: new**

### **Provision**

37. New 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 the offences created in regulations prohibiting or restricting the use, storage or supply of environmentally harmful items.
38. Regulations made under this power would be subject to the negative procedure. However, the 1990 Act enables any regulations which require to be made by negative procedure to be made by affirmative procedure.

### **Committee consideration**

39. The Scottish Government states in its sDPM that the revision of this power is in response to requests from local authorities for powers to use fixed penalty notices in relation to such offences in respect of the supply of environmentally harmful items. It states that at present the only enforcement option for local authorities is to report any offence under such regulations for prosecution.
40. The Committee considers that this power is limited in scope as it may only do what is provided for on the face of this Bill. It appears appropriate that the use of fixed penalty notices may be enabled through regulations given that the creation of the offences to which they will relate is also legislated for through regulations.

41. **The Committee finds the power acceptable in principle and is content that it is subject to the negative procedure.**

