

# CLIMATE CHANGE (SCOTLAND) ACT 2009

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## EXPLANATORY NOTES

### THE ACT

#### **Part 5 – Other Climate Change Provisions**

#### **Chapter 5 – Waste reduction and recycling**

#### *Waste prevention and management plans*

153. **Section 78** enables the Scottish Ministers to make detailed provision, by regulations, requiring persons specified in such regulations to make waste prevention and management plans, and to comply with them. Some of the detail which may be included in the regulations is specified in subsection (2), but this is without prejudice to the generality of the power in subsection (1). Some essential terms are defined in subsection (4).
154. The effect of regulations made under this section could be, for example, to provide that a builder should draw up plans for how he proposed to reduce waste generated by a building operation by, for example, the re-use of rubble on-site. On a different scale, they might require an office to prepare a plan showing how it will minimise waste – for example by adopting double-sided printing. A person might be required by virtue of subsection (2)(a) to prepare more than one plan, for instance to deal with different types of waste.
155. Subsection (3) ensures that any enforcement authority appointed in relation to this section must have regard to any guidance the Scottish Ministers may give in relation to its functions, which may include the approval of waste prevention and management plans (subsection (2)(e)(ii)). Further provision about enforcement authorities is made by section 89.
156. It is very likely that a system of enforcement, including offences and penalties, would be required to ensure that plans were actually drawn up and complied with, but this will be a matter for regulations. Maximum penalties which may be imposed in any regulations made under this Chapter are specified in section 90.

#### **Information on waste**

157. **Section 79** enables the Scottish Ministers to make detailed provision, by regulations, requiring the provision of information by persons specified in those regulations about waste associated with their activities to the Scottish Environment Protection Agency (SEPA). Some of the detail which may be included in the regulations is specified in subsection (2), but without prejudice to the generality of the power in subsection (1). “Waste” is a term which has already been defined in section 78(4): this definition matches that of Directive [2006/12/EC](#) on waste.
158. Subsection (3) refers to section 34(5) of the Environmental Protection Act 1990 (the “1990 Act”). This enables the Scottish Ministers to make regulations requiring those who import, produce, carry, keep, treat or dispose of controlled waste to make, retain and furnish documents. The powers have been used to make the Environmental

Protection (Duty of Care) Regulations 1991 (the “1991 Regulations”) and the Special Waste Regulations 1996 (the “1996 Regulations”). These regulations require notes to be prepared when waste covered by them is transferred. Subsection (3) ensures that regulations made under section 79 are not construed as replacing the separate requirements contained in existing regulations.

159. Subsection (5) provides that the Scottish Ministers must bring forward regulations establishing a scheme to require the provision of data about waste within 12 months of section 79 coming into force.
160. It is very likely that a system of enforcement, including offences and penalties, would be required to ensure that information is provided correctly and timeously, but this will be a matter for regulations. Powers to make such provision are contained in subsections (2)(g) and (h).

### **Recyclable waste: facilities for deposit etc.**

161. [Section 80](#) enables the Scottish Ministers to make detailed provision, by regulations, requiring persons specified in those regulations to provide facilities for the deposit of waste, and requiring that waste deposited in such facilities be collected by an authorised person and, as far as practicable, recycled. Some of the detail which may be included in the regulations is specified in subsection (2), but without prejudice to the generality of the power in subsection (1). “Waste” and “recycling” are terms which have already been defined in section 78(4). “Authorised person” is defined in subsection (5) in terms of section 34(3) of the 1990 Act, and includes local authorities and holders of waste management licences.
162. The power this section grants could be used to require offices to have facilities to collect paper for recycling, for example. Such facilities might be no more than a box, but more complex facilities, such as can-crushers, could also be required, as appropriate. This section could not be used to require facilities to be provided at temporary public events, which are covered by section 81 (see section 80(4)). Subsection (2)(b) may be used to restrict the categories of person who must be allowed to use the facilities, such as staff only in an office environment.
163. Subsection (2)(d) may be used to require an authorised person to remove the waste deposited, for example where the person providing the facilities could otherwise encounter difficulties in getting the waste uplifted. If this power were exercised, subsection (2)(e) could be used to set charges to finance this collection, and the recycling of the relevant material.
164. It is very likely that a system of enforcement, including offences and penalties, would be required to ensure that facilities were provided and used properly, but this will be a matter for regulations. Relevant powers are contained in subsection (2)(h) and (i).

### **Recyclable waste: facilities for deposit at events etc.**

165. [Section 81](#) enables the Scottish Ministers to make detailed provision, by regulations, empowering local authorities to issue notices requiring organisers of temporary public events to provide facilities for the deposit of waste, and requiring that the waste be collected by an authorised person and, as far as practicable, recycled. Subsection (4) of section 80 ensures that events are not subject to requirements, possibly competing, made under both sections.
166. An example of how the power might be used could be a local authority requiring the holder of a music festival to ensure that facilities to collect the kinds of waste to which such a festival might give rise (such as bottles, cans, or plastic cups) are provided for the duration of that festival.
167. Subsection (2)(g) could be used to ensure that notices were issued sufficiently far in advance of the relevant events. Provision for appeals against notices may be made

under subsection (2)(h). Subsection (2)(k) to (n) deal with enforcement and provide for the appointment of an enforcement authority, which need not necessarily be the local authority. Further provision on enforcement authorities is made by section 89.

### **Procurement of recyclate**

168. [Section 82](#) enables the Scottish Ministers to make detailed provision, by regulations, requiring persons specified in those regulations to ensure that specified things procured or constructed by them include or contain a certain amount or proportion of recyclate. Some of the detail which may be included in the regulations is specified in subsection (3), but without prejudice to the generality of the power in subsection (1). “Recyclate” is defined by subsection (6) in relation to the definition of “recycling” in section 78(4).
169. Subsection (3)(d) could be used to deal with measurement of the proportion of recyclate present in complex items. Subsection (3)(e) could be used to allow the requirement to procure recyclate to be disapplied on application to the Scottish Ministers, for example where this could conflict with Community internal market rules.
170. It is very likely that a system of enforcement, including offences and penalties, would be required to ensure that recyclate was procured in at least the proper proportion, but this will be a matter for regulations.

### **Targets for reduction of packaging etc.**

171. [Section 83](#) enables the Scottish Ministers to make detailed provision, by regulations, setting targets for reducing the amount of packaging in use (subsection (1)(a)(i)), or the amount of greenhouse gas emissions associated with packaging (subsection (1)(a)(ii)). Some of the detail which may be included in the regulations is specified in subsection (2), but without prejudice to the generality of the power in subsection (1). “Packaging” is defined by subsection (4) in terms of Directive [94/62/EC](#) on packaging and packaging waste.
172. Subsection (2)(c) would allow targets to be set by a variety of means, for instance by reference to turnover or market share. Subsection (2)(f) could be used to require the production of baseline information about the amount of packaging in circulation, which might then be used to set targets. It is very likely that a system of enforcement, including offences and penalties, would be required to ensure that accurate information was provided and the targets actually met, but this would be a matter for the regulations.

### **Deposit and return schemes**

173. [Section 84](#) enables the Scottish Ministers to make detailed provision, by regulations, setting up deposit and return schemes for packaging associated with specified products, the products themselves, or both, where Ministers are satisfied that it is necessary or expedient to do so in order to promote recycling. Some of the detail which may be included in the regulations is specified in subsections (3) to (5) and (7), but without prejudice to the generality of the power. Subsections (4)(d) and (5)(g) would confer power to require that materials returned under such a scheme were “recycled”, using the definition at the beginning of this Chapter, which includes re-use and recovery. Any scheme would have to take account of the waste hierarchy set out in the Waste Framework Directive ([2008/98/EC](#)), which prioritises re-use over recycling (narrowly defined), and both over recovery.
174. Subsection (5) would permit regulations to establish an administrative body (called a “scheme administrator”) to act on behalf of relevant producers and retailers in certain respects. This is dealt with in more detail in section 85. Subsection (7) deals with matters such as mechanisms for identifying articles and/or packaging as falling within a scheme, customer information and specification of the places to which packaging could be returned and the deposit reclaimed. The latter could for example be used to deal

with return of packaging to a different retailer selling similar types of product. It also provides for a scheme of “split deposits”, whereby there could be an element added to the price which was *not* refundable. This could be used to fund the scheme.

175. It is very likely that a system of enforcement, including offences and penalties, would be required to ensure that deposits were actually taken and repaid, and subsection (7) (n) to (q) contain appropriate powers.

### **Deposit and return schemes: designation of scheme administrator**

176. [Section 85](#) sets out the detail of the Scottish Ministers’ powers to designate, by order, a scheme administrator. The administrator may be a new or an existing body. If an existing body is chosen, it is highly unlikely that its existing powers and functions will match those required for the administrator. Subsection (2), therefore, allows the Scottish Ministers to alter the functions of an existing body accordingly. In subsection (3) particular mention is made of powers to borrow or charge, which will be necessary to fund the operation of the scheme.
177. Similarly, while it is common for the Scottish Ministers to have powers to direct bodies which have a relationship with Government (SEPA being an obvious example), Ministers do not have such powers over all bodies to whom the functions of scheme administrator might be given. Subsection (4) ensures that such directions may be given, but only in respect of a deposit and return scheme. Thus, should a body which is not currently subject to a power of direction by the Scottish Ministers be given the functions of scheme administrator, the Ministers could direct it only in respect of those functions. Its pre-existing functions which were not subject to a power of direction would remain unaffected.

### **Power to establish scheme administrator**

178. Should the Scottish Ministers determine that a new body be established to act as scheme administrator, it is necessary for them to have appropriate powers to give that new body the full range of functions needed to run a deposit and return scheme. [Section 86](#) gives the Scottish Ministers those powers, which they may exercise by order. Again, specific mention is made of powers to borrow and to charge. Under subsection (2), any body which may be established to be a scheme administrator will be a body corporate.
179. Subsection (5) gives Ministers explicit powers to make specific arrangements in relation to issues such as status, constitution, accounts and records. Similarly, the Scottish Ministers may make specific rules for the status, remuneration, allowances and pensions of the members and employees who work for the scheme administrator.

### **Finance of scheme administrator**

180. Whether a new or existing body undertakes the functions of scheme administrator, it is likely that financial support will be required, at least temporarily, from the Scottish Ministers. Examples of circumstances in which this need for financial support might arise are during the start-up phase, and during the operational phase where there is a mismatch between the timing of receipts (from charges and sale of recyclate, for example) and outgoings. [Section 87](#) gives the Scottish Ministers power to give financial support to the scheme administrator, whether by grant, loan or financial guarantee. The section gives powers to the Ministers to determine the conditions upon which such support shall be given.

### **Charges for supply of carrier bags**

181. [Section 88](#) enables the Scottish Ministers to make detailed provision, by regulations, requiring persons supplying carrier bags to take goods away to charge for those bags, and requiring that the net proceeds of such charges be applied to environmental good

causes. Some of the detail which may be included in the regulations is specified in subsection (2), but without prejudice to the generality of the power in subsection (1).

182. Subsection (2)(c) provides a power to specify the carrier bags in respect of which a charge would have to be made. This could be used to exempt certain bags, for example where Ministers were satisfied that they were likely to be re-used rather than quickly becoming waste.
183. The amount of the charge is to be fixed, and may be varied, by regulations. The charge is to be levied, not by central or local government, but by the supplier of the bag to which the regulations may apply. Subsection (2)(a) to (c) provide that the regulations may apply the charge to particular kinds of goods, or bags, or suppliers of goods. Subsection (2)(e) enables regulations to provide a mechanism for the calculation of the net proceeds of the charge.
184. Subsections (1)(b) and (2)(f) would allow Ministers to ensure that the net proceeds were spent on broadly environmental purposes, and to define those purposes in more detail if that was thought necessary (such as specifying that funds raised were to be spent in Scotland). It is very likely that a system of enforcement, including offences and penalties, would be required to ensure that charges were levied, appropriately accounted for, and devoted to appropriate causes, but this would be a matter for the regulations.

### **Enforcement authorities**

185. [Section 79](#) names SEPA as the enforcement authority in respect of waste information. Other provisions in this Chapter enable the Scottish Ministers to specify, by regulations, enforcement authorities in respect of them. [Section 89](#) allows the Scottish Ministers to specify SEPA, a local authority or such other person or body as may be selected. Subsection (3) allows the functions of an enforcement authority to be divided between different specified bodies. Subsection (4) provides that enforcement authorities may charge to recover costs reasonably incurred in connection with their functions. SEPA, however, already has a charging power under [section 41\(1\)](#) of the Environment Act 1995, so charging in respect of its functions under [section 79](#) has been dealt with as a consequential amendment of [section 41\(1\)](#) (see [schedule 2, paragraph 2](#)).

### **Penalties**

186. [Section 90](#) sets out the maximum penalties for offences created by regulations under any section in Part 5 of the Act (namely, [section 63](#) in Chapter 3 and [sections 78 to 88](#) in Chapter 5). The statutory maximum for summary cases (those heard without a jury) is currently £10,000, and was set by the Criminal Proceedings etc. (Reform) (Scotland) Act 2007. It may, however, be varied by order by the Scottish Ministers under powers given by the Criminal Procedure (Scotland) Act 1995. Where a prosecution is on indictment rather than under summary procedure, the court may impose an unlimited fine.