

# CLIMATE CHANGE (SCOTLAND) ACT 2009

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## EXPLANATORY NOTES

### THE ACT

#### Part 5 – Other Climate Change Provisions

##### Chapter 1 – Adaptation

##### *Adaptation programmes*

96. [Section 53](#) applies where the Secretary of State lays a report under section 56 of the UK Climate Change Act 2008 before the UK Parliament on the impact of climate change on the United Kingdom. Where such a report is laid, under subsection (2) the Scottish Ministers must lay a programme before the Scottish Parliament. This programme must set out the Scottish Ministers' objectives in relation to adaptation to climate change, their proposals and policies for meeting those objectives, including the timescales within which the proposals and policies will be introduced and otherwise address the risks identified for Scotland in the Secretary of State's report. It must also outline arrangements to ensure engagement with stakeholders in delivering the programme, specifically with employers and trade unions and what mechanisms will be used to ensure the public is engaged in meeting the objectives. Subsection (3) requires the Scottish Ministers' programme, where it is a programme being laid following upon a subsequent report by the Secretary of State within the terms of section 56(3) of the 2008 Act, to also contain an assessment of progress made under the previous programme.
97. [Section 54](#) requires the Scottish Ministers to lay before the Scottish Parliament reports setting out their assessment of progress made towards implementing the objectives, proposals and policies set out in the section 53 programme. It also specifies timescales for when such reports have to be laid.
98. [Section 55](#) applies where the Scottish Ministers lay a programme under section 53(2). It requires the Scottish Ministers to request the relevant body to prepare a report setting out its assessment of the progress made towards implementing the objectives, proposals and policies set out in that programme. Subsection (2) provides that the request has to be made within 2 years of the day on which a programme is laid by the Scottish Ministers before the Scottish Parliament. The assessments will be conducted by the relevant body, currently the UKCCC, until such time as a Scottish advisory body is established.
99. [Section 55](#) also applies where the Secretary of State lays a second or subsequent report under section 56 of the UK Climate Change Act 2008. When this occurs, then the Scottish Ministers must request the relevant body to prepare a further report setting out an assessment of the progress made towards implementing the Scottish Ministers' objectives, proposals and policies set out in the most recent programme under section 53. Under the UK Act, subsequent reports of the Secretary of State are due to be laid every five years after the first.
100. [Section 56](#) only applies when an order is made by the Scottish Ministers designating an advisory body. It requires the Scottish Ministers to request the advisory body to prepare a report setting out an assessment of progress made towards the programmes

to adapt to climate change in the same circumstances and within the same timescales as for section 55.

## Chapter 2 – Land Use

### ***Duty to produce a land use strategy***

101. **Section 57** requires the Scottish Ministers to produce a land use strategy.
102. Subsection (1) requires that the Scottish Ministers must lay the strategy before the Scottish Parliament no later than 31 March 2011. Subsection (2) provides that the strategy must set out objectives in relation to sustainable land use, proposals and policies for meeting those objectives, and timescales over which the policies and proposals are expected to take effect. Subsection (3) states that these objectives, policies and proposals must contribute to achieving the emissions reduction targets set by the Act, the objectives set in an adaptation programme and sustainable development. Subsections (4) and (5) make provisions regarding publishing a draft strategy, the need for consultation and reporting on consultation. Subsection (6) requires the Scottish Ministers to revise the land use strategy at least every five years.

### **Variation of permitted times for making muirburn**

103. **Section 58** of the Act inserts a new section 23A into the Hill Farming Act 1946 (the “1946 Act”).
104. Subsection (1) of new section 23A enables the Scottish Ministers to make successive orders specifying the dates before or after which it is lawful to make muirburn in any year. Subsection (1) also clarifies the effect of any order made under subsection (1), that is, to substitute for any of the dates specified in section 23(1), (2) or (3) of the 1946 Act, the dates specified in any such order.
105. Subsection (2) of new section 23A provides that the Scottish Ministers may make an order under new section 23A(1) of the 1946 Act only where they consider it necessary or expedient to do so in relation to climate change. Subsection (3) of new section 23A prevents the order-making power being exercised so as to reduce the length of the muirburn season below that currently provided for under section 23 of the 1946 Act.
106. Subsection (5) of new section 23A of the 1946 Act provides that any statutory instrument containing an order made under subsection (1) of that section is subject to affirmative parliamentary procedure.
107. **Schedule 2** to the Act provides for a minor amendment of section 23(1) of the 1946 Act, to clarify that section 23 of the 1946 Act is subject to any provision made by order under new section 23A(1) of that Act.

### **Power to modify functions of Forestry Commissioners**

108. Subsection (1) of section 59 allows the Scottish Ministers, by order, to modify the functions of the Forestry Commissioners in or as regards Scotland. Subsection (2) provides that such modifications may be made only where the Scottish Ministers consider it necessary or expedient to allow them to comply with their duties under sections 1, 2(1) or 3(1)(b) of the Act to reduce greenhouse gas emissions or more generally in relation to climate change.
109. Subsection (3) provides that the order may modify the Forestry Commissioners’ functions to allow them to form or participate in corporate bodies or trusts.
110. Subsection (4) imposes the duty in section 1 of the Nature Conservation (Scotland) Act 2004 on any body corporate or trust established by the Forestry Commissioners by virtue of an order under subsection (1).

111. **Section 96** makes more general provision in relation to the power to make an order under section 59, and makes provision as to the parliamentary procedure for such an order. Subsections (2) and (3) of section 96 provide that an order made by the Scottish Ministers under section 59 may make different provision for different cases or purposes, or make any appropriate consequential, incidental, supplementary, transitory, transitional or saving provision, including modification of any enactment. Section 96(4) provides that an order made under section 59 is subject to affirmative resolution procedure.

### **Chapter 3 – Energy efficiency**

#### ***Duty of Scottish Ministers to promote energy efficiency***

112. **Section 60** requires the Scottish Ministers, within 12 months of the section coming into force, to publish a plan for promoting energy efficiency and improving the energy efficiency of living accommodation in Scotland. Under subsections (5) and (6), Ministers are required to review the plan at least every 3 years. The plan must set annual energy efficiency targets and describe how those targets are to be reported on. The plan must also include details of how the Scottish Ministers intend to update planning and building regulations to ensure that all new buildings avoid a specified and rising proportion of the projected greenhouse gas emissions from their use, calculated on the basis of the approved design and plans for the specific building, through the installation and operation of low and zero-carbon generating technologies.
113. Following a review, the Scottish Ministers must in accordance with subsection (7) publish the plan if the review results in changes to the plan.
114. When preparing a plan and when varying it after a review, subsection (8) requires the Scottish Ministers to have regard to the contribution that improvements to buildings and changes in building standards can make to improving overall energy efficiency and lowering carbon emissions in Scotland.
115. “Energy efficiency” is defined in subsection (9) and includes the use of (a) technologies (other than those used for the production of heat) reliant on renewable sources of energy, (b) materials and equipment the manufacture or use of which produces or involves lower emissions of greenhouse gases than other materials and equipment, and (c) surplus heat from electricity generation or other industrial processes for district heating or other purposes. “Fossil fuel” and “renewable sources” are also defined in subsection (9).

#### **Duty of Scottish Ministers to promote renewable heat**

116. **Section 61** requires the Scottish Ministers to prepare and publish a plan for the promotion of the use of heat produced from renewable sources. Subsection (2) provides that the plan must set targets, the dates by which the targets are to be met and describe how those targets are to be reported on. This subsection also requires that the Scottish Ministers describe how the targets will be reported on.
117. Subsection (3) requires the Scottish Ministers to publish, within 12 months of the section coming into force, the plan prepared under subsection (1). Under subsections (4) and (5), Ministers are required to review the plan at least every 2 years. If, following a review, the plan is varied, Ministers must publish the revised plan.

#### **Laying of plans and reports**

118. **Section 62(1)** requires the Scottish Ministers to lay the initial energy efficiency and renewable heat plans and any subsequent revised versions of those plans before the Scottish Parliament as soon as reasonably practicable after they are published. Subsections (2) and (3) require Ministers to lay reports before the Scottish Parliament on what steps have been taken to implement the plans. These reports must be laid within 12 months of the plans first being published and at least annually thereafter. Under

subsection (4), the Scottish Ministers are required to make a statement to Parliament as soon as reasonably practicable after the plans are laid.

### **Non-domestic buildings: assessment of energy performance and emissions**

119. [Section 63](#) requires the Scottish Ministers to make regulations providing for the assessment of (a) the energy performance of non-domestic buildings, and (b) emissions of greenhouse gases produced by or associated with such buildings or with activities carried out in such buildings, and to make regulations requiring owners of such buildings to take steps to improve the energy performance of buildings and to reduce emissions.
120. Subsection (2) sets out (without prejudice to the generality of the power in subsection (1)) some of the detail which may be included in the regulations, including: the kinds of non-domestic buildings covered; persons who are required to obtain assessments; time periods for carrying out assessments; procedures and methodologies for assessing energy performance and emissions; persons who can carry out such assessments; the issuing of certificates following assessment; the form of any recommendations as to the improvement of the energy performance and reduction of emissions; the manner and periods within which steps must be taken with regard to such recommendations; the registration of certificates; the disclosure of information entered in the register; enforcement authorities; the keeping of records; enforcement of the regulations; and offences.
121. Subsection (3) makes provision about the enforcement authority provided for in the regulations and subsection (4) allows the regulations to provide for the functions of the enforcement authority to be exercised by two or more such authorities and also allows provision to be made about the functions of each of those authorities.
122. Subsection (5) allows the enforcement authority to levy charges to recover reasonable costs incurred by exercising the functions under the regulations and subsection (6) requires the Scottish Ministers to publish a report, within 12 months of section 63 coming into force. This will set out the measures they intend to take to reduce emissions from non-domestic buildings, and when they intend to make regulations to set out the form of recommendations and the manner and periods within which steps are to be taken to comply with the recommendations.
123. Subsection (7) defines “non-domestic building” as all buildings, other than buildings which are dwellings. Yards, gardens, outbuildings and other land or buildings associated with dwellings, and any common areas so associated, are also excluded from the meaning of “non-domestic building”.

### **Living accommodation: assessment of energy performance and emissions**

124. [Section 64](#) requires the Scottish Ministers to make regulations providing for the assessment of (a) the energy performance of living accommodation, and (b) emissions of greenhouse gases produced by living accommodation. Ministers must also, by regulations, require owners of such accommodation to take steps, identified by the assessments, to (a) improve the energy performance of such accommodation, and (b) reduce such emissions.
125. Subsection (2) sets out (without prejudice to the generality of the power in subsection (1)) some of the detail which may be included in the regulations, including: the kinds of living accommodation covered; persons who are required to obtain assessments; time periods for carrying out assessments; procedures and methodologies for assessing energy performance and emissions; persons who can carry out such assessments; the issuing of certificates following assessment; the form of any recommendations as to the improvement of the energy performance and reduction of emissions; the manner and periods within which steps must be taken with regard to such recommendations; the registration of certificates; the disclosure of information

entered in the register; enforcement authorities; the keeping of records; enforcement of the regulations; and offences.

126. Subsection (3) makes provision about the enforcement authority provided for in the regulations and subsection (4) allows the regulations to provide for the functions of the enforcement authority to be exercised by two or more such authorities and also allows provision to be made about the functions of each of those authorities.
127. Subsection (5) allows the enforcement authority to levy charges to recover reasonable costs incurred in exercising the functions under the regulations. Subsection (6) requires the Scottish Ministers to publish a report, within 12 months of section 64 coming into force. This will set out the measures they intend to take to reduce emissions from living accommodation, and when they intend to make regulations to set out the form of recommendations and the manner and periods within which steps are to be taken to comply with the recommendations.
128. Subsection (7) defines “living accommodation” as a dwelling, and includes any building having a total useful floor area of 50m<sup>2</sup> or more and any common areas associated with such a dwelling.

### **Duty of local authorities to establish energy efficiency discount schemes**

129. [Section 65](#) amends the Local Government Finance Act 1992 by inserting new section 80A – Local authority’s power to reduce amount of tax payable. Subsection (1) of section 80A requires local authorities to establish schemes for reducing the amounts which persons are liable to pay in respect of council tax where improvements are made to the energy efficiency of chargeable dwellings. Subsection (2) defines such a scheme as an “energy efficiency discount scheme”.
130. Subsection (3) gives local authorities the discretion to design schemes as they see fit and lists provision which it may in particular include. Subsection (4) states that certain conditions must be met before the amount which a person is liable to pay in respect of council tax may be reduced. Subsections (5) and (6) set out these conditions.
131. Subsection (7) details the minimum reduction which may be provided under an energy efficiency discount scheme. Where that person’s council tax liability is £50 or more, the discount must be no less than £50. Where that person’s council tax liability is less than £50, the discount must be equal to that liability. Subsection (8) allows a local authority, under an energy efficiency discount scheme, to reduce a person’s liability to zero.
132. Subsection (9) contains definitions of expressions, such as “energy efficiency”, used in section 80A.
133. Subsection (3) of section 65 inserts a new paragraph 22 into schedule 2 to the Local Government Finance Act 1992, which provides that a council tax reduction under an energy efficiency discount scheme is to be treated, for the purposes of that schedule, as a discount equal to the amount of the reduction.

### **Review of energy efficiency discount schemes**

134. [Section 66](#) requires the Scottish Ministers to produce a report as soon as practicable after 31 March 2012, and annually thereafter, on the operation of energy efficiency discount schemes established under section 80A of the Local Government Finance Act 1992. The report must include an assessment of the effectiveness of council tax reductions in promoting energy efficiency.
135. Subsection (2) allows the Scottish Ministers to amend section 80A of the 1992 Act to improve the contribution of energy efficiency discount schemes to promoting energy efficiency.



### **Non-domestic rates: discounts for energy efficiency etc.**

136. [Section 67](#) amends section 153 of the Local Government etc. (Scotland) Act 1994 by amending the power of the Scottish Ministers to make regulations prescribing the amount of non-domestic rates so that the amount payable for properties which fall into specific categories determined by energy efficiency and greenhouse gas emissions may be lower than the amount payable for other properties.

### **Climate change burdens**

137. [Section 68](#) inserts a new section 46A into the Title Conditions (Scotland) Act 2003 to create a new kind of real burden – a “climate change burden”- that can be added to a property’s title deeds to specify the mitigation or adaptation standards that must be met when the burdened property is developed. Subsection (3) identifies those public bodies in whose favour a climate change burden can be created, as those bodies listed in Part I or Part II of the schedule to the [Title Conditions \(Scotland\) Act 2003 \(Conservation Bodies\) Order 2003 \(SSI 2003/453\)](#).

### **Tenement Management Scheme: definition of “maintenance”**

138. [Section 69](#) amends the definition of “maintenance” in schedule 1 to the Tenements (Scotland) Act 2004 to include the installation of insulation. The 2004 Act deals with the management and maintenance of tenements, providing a default management scheme which applies when the title deeds do not set out how a tenement should be managed. Amending the definition of maintenance brings the installation of insulation within those matters governed by the scheme, including the scheme rules on how decisions should be made and how the costs should be shared between the individual owners.

### **Permitted development rights**

139. [Sections 70](#) and [71](#) place duties on the Scottish Ministers to bring forward subordinate legislation under the Town and Country Planning (Scotland) Act 1997 to provide for permitted development rights in specified circumstances for the installation of air source heat pump and wind turbine microgeneration equipment in domestic buildings and for the installation of microgeneration equipment in non-domestic buildings.
140. The provisions in these sections of the Act indicate the scope of the consultation that will require to be undertaken with representative persons concerning the extension of permitted development rights. When implemented, the provisions should simplify the planning process and provide a cost saving to applicants.

### **Development plans: inclusion of greenhouse gas emissions policies**

141. [Section 72](#) inserts a new section 3F into the Town and Country Planning (Scotland) Act 1997, placing a requirement upon planning authorities that local development plans must contain greenhouse gas emissions policies. These policies are to ensure that all new buildings are designed to contribute to energy efficiency by the installation and operation of low and zero-carbon generating technologies.

### **Annual report on operation of [section 72](#)**

142. Subsection (1) of section 73 requires the Scottish Ministers to report to the Scottish Parliament annually on the operation of section 72. The report must include an assessment of whether the requirements placed upon planning authorities have contributed effectively to the reduction of greenhouse gas emissions from developments.
143. Subsection (2) requires that the fourth and subsequent reports to the Parliament must include an assessment of the continuing need or otherwise for the requirement placed upon planning authorities to include greenhouse gas emissions policies in local

development plans. It makes provision for repeal by the Scottish Ministers of section 3F of the Town and Country Planning (Scotland) Act 1997 and section 73 if, after the fourth and subsequent reports, the Scottish Ministers consider that the requirement is no longer necessary.

### **Duty of Scottish Water to promote water conservation and water-use efficiency**

144. Section 56(1) of the Water Industry (Scotland) Act 2002 puts a duty on the Scottish Ministers to give Scottish Water directions on certain matters. These directions are binding on Scottish Water and can be enforced by Ministers. Section 74 amends section 56(1) of the 2002 Act so that the Scottish Ministers must in future also give specific directions to Scottish Water to promote water conservation and water-use efficiency.

### **Chapter 4 – The Scottish civil estate**

#### ***Energy performance of buildings procured for the Scottish civil estate.***

145. Section 75(1) places a duty on the Scottish Ministers to ensure, in so far as reasonably practicable, that the energy performance of any building that becomes part of the civil estate in Scotland falls within the top quartile of energy performance.
146. Subsection (2) sets out the criteria that determine the circumstances in which a building becomes part of the civil estate in Scotland.
147. Subsection (3) enables the Scottish Ministers to disapply the duty that a building or category of buildings must fall in the top quartile of energy performance by making regulations to that effect. This may be necessary, for example where there is an operational need to locate in a specific area or in rural areas where it is unlikely that there may be any buildings that fall into the top quartile of energy performance.

#### **Report on the Scottish civil estate**

148. Section 76(1) requires the Scottish Ministers, for each financial year beginning with 2010 to 2011, to lay before the Scottish Parliament a report containing an assessment of the progress made in the year towards improving (a) the efficiency of buildings that are part of the civil estate in Scotland; and (b) the contribution to sustainability of those buildings.
149. If a building, the energy performance of which does not fall within the top quartile, becomes part of the civil estate during the year, subsection (2) requires the report for that year to explain why.
150. Subsection (4) contains the deadline by which reports under subsection (1) are to be laid before the Scottish Parliament. For example, for the financial year which ends on 31 March 2011, the report must be laid no later than 31 October 2011.

#### **Scottish civil estate: supplementary**

151. Section 77(1) defines the term “building” for the purposes of this section and sections 75 and 76 and sets out what buildings are to be considered as being part of the civil estate in Scotland for these sections.
152. Subsection (2) contains an order-making power to allow specific descriptions of buildings to be included in or excluded from the scope of sections 75 to 77.

### **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.