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Delegated Powers and Law Reform Committee
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21 June

CIRCULAR ECONOMY (SCOTLAND) BILL – (1) AMENDMENT TO THE ENVIRONMENTAL PROTECTION ACT 1990 SECTION 59 AND (2) AMENDMENT TO THE SECTION 85 OF THE CLIMATE CHANGE (SCOTLAND) ACT 2009

I want to make the Committee aware that we have lodged two amendments at Stage 3 of the Circular Economy Bill (amendments 85 and 92) which seek to (1) amend the existing provision in section 59 of the Environmental Protection Act 1990 in relation to the removal of waste unlawfully deposited on private land; and (2) amend section 85 of the Climate Change (Scotland) Act 2009 (the 2009 Act) in relation to deposit and return schemes.

Section 59 of the Environmental Protection Act 1990

The Scottish Government has set out its plans to tackle flytipping in the National Litter and Fly-tipping Strategy (published in June 2023) and, with partners, we have been delivering the Strategy's Year One Action Plan, which includes a number of legislative and non-legislative actions aimed at deterring and tackling flytipping. The Strategy recognises the particular challenges faced by private landowners and occupiers and this has been reiterated in the Stage 1 and 2 debates on the Circular Economy Bill. The National Litter and Flytipping Strategy Year One Action Plan sets out specific action to provide support for land-owners/occupiers by developing guidance and carrying out trials to better support private landowners to deter and deal with flytipping affecting their land. However, we recognise that further action is needed to help address the challenges being faced by occupiers of private land and this would include the amendment as set out below.

Following discussion with Murdo Fraser MSP, who has secured the right to introduce his Flytipping (Scotland) Member's Bill to the Parliament, and engagement with SEPA and local Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

authority leads, I have, therefore, lodged an amendment (Annex A) that will make changes to the existing powers to require removal of unlawfully deposited waste on private land and to the related appeals process contained in section 59 of the Environmental Protection Act 1990, as detailed below:

- insertion of subsection (1A) providing that a notice under section 59(1) may only be served where the waste regulation authority (SEPA) or the waste collection authority (a local authority) is satisfied that the occupier either deposited the waste or knowingly caused or permitted the waste to be deposited.
- amendment to sub-section 2 providing that an appeal of a notice under section 59(1) is to the Scottish Ministers rather than the sheriff and consequential amendments related to that change in appeal process to subsections (3) and (4).
- insertion of subsection (10) conferring a new power on the Scottish Ministers to make further provision about appeals under sub-section (2); this power is exercisable by regulations made by Scottish statutory instrument subject to the negative procedure.
- insertion of subsection (11) conferring a new power on the Scottish Ministers to issue guidance to waste regulation authorities and waste collection authorities on the operation of section 59, and a related provision in subsection (12) requiring the authorities to have regard to any such guidance; this guidance-making power is not subject to any parliamentary procedure.
- insertion of subsection (13) to provide that section 59 is subject to the power in section 114(2) of the Environment Act 1995 (the 1995 Act) enabling the Scottish Ministers to delegate their functions of determining, or to refer matters involved in, appeals and to consequentially amend section 114(2) of the 1995 Act to add an appeal under section 59(2) to the existing list of appeals in that section; this revises an existing power and will enable the delegation of the function of determining an appeal under section 59(2).

These amendments require that an enforcement authority must be satisfied that the occupier bears responsibility for the unlawful deposit of waste on private land, or for having knowingly caused or permitted the deposit of the waste on the land: ensuring clarity will be beneficial to both the enforcement agencies and to land occupiers. They also make a change to the current appeal provision, with the aim of providing for a more accessible appeal route and provide a related power to Scottish Ministers to make provision in relation to appeals. Finally, they provide a guidance-making power to Ministers which will be developed with stakeholders and ensure that there is consistency across Scotland.

Section 85 of the Climate Change (Scotland) Act 2009

I have lodged an amendment (Annex B) to the direction-making powers given to the Scottish Ministers in section 85 of the 2009 Act. The amendment seeks to remove the direction-making powers given to the Scottish Ministers in section 85(4) of the 2009 Act and replace them with a new provision which provides a power for Scottish Ministers to include direction-making powers in an order which designates a *new body or an existing body* as the scheme administrator for any deposit and return scheme.

The purpose of this amendment is to enable Scottish Ministers to use the power in section 85 to designate a scheme administrator of any deposit and return scheme established under section 84 of the 2009 Act without such body being subject to the ministerial direction-making powers in the existing section 85(4) of the 2009 Act. The issue with section 85(4) is

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that it leads to a substantial risk that a body (whether a new body or an existing body) designated under section 85 would be classified by the Office of National Statistics as a public body. The public sector classification would arise because a direction-making power on the face of the 2009 Act represents potential ministerial control over such a scheme administrator.

Under the Deposit and Return Scheme for Scotland Regulations 2020, Circularity Scotland Limited was approved by the Scottish Ministers as a scheme administrator in Scotland. This would have allowed the DRS to be fully operational in Scotland. However, following the discussions with other UK nations since the scheme was delayed and, recognising that Circularity Scotland no longer exists as a scheme administrator in Scotland, Scottish Ministers may, as part of our working with other nations to develop DRS across the UK, use section 85 of the 2009 Act to designate a body as a scheme administrator for Scotland.

This amendment ensures that a direction-making power could still be given to Ministers under an order made to designate a body under section 85 and is therefore still aligned with the original intention of the provisions. This amendment means that, in future, Ministers can decide whether it is appropriate, in relation to any body being designated under section 85, whether it should be subject to ministerial direction-making powers; that decision would be informed by whether the policy intention was for the body to be classified as public or private sector.



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After section 9A

Gillian Martin**85** After section 9A, insert—**<Removal of unlawfully deposited waste**

- (1) In section 59 of the Environmental Protection Act 1990—
 - (a) after subsection (1) insert—
 - “(1A) A waste regulation authority or waste collection authority may only impose a requirement under subsection (1) on an occupier of land if the authority is satisfied that the occupier—
 - (a) deposited the waste, or
 - (b) knowingly caused or knowingly permitted the deposit of the waste.”,
 - (b) in subsection (2), for “the sheriff by way of summary application” substitute “the Scottish Ministers”,
 - (c) in subsection (3)—
 - (i) after “court” insert “or the Scottish Ministers (as the case may be)”,
 - (ii) after “is” insert “or they are”,
 - (d) in subsection (4)—
 - (i) after “court” insert “or the Scottish Ministers (as the case may be)”,
 - (ii) after “it” insert “or they”,
 - (e) after subsection (9) insert—
 - “(10) The Scottish Ministers may by regulations make further provision about appeals to them under subsection (2), including—
 - (a) provision about the manner in which appeals are to be brought,
 - (b) provision about the manner in which appeals are to be considered,
 - (c) transitional, transitory or saving provision.
 - (11) The Scottish Ministers may issue guidance for waste regulation authorities and waste collection authorities on the operation of this section.
 - (12) Waste regulation authorities and waste collection authorities must have regard to any guidance issued under subsection (11).
 - (13) This section is subject to section 114 of the Environment Act 1995 (delegating or referring of appeals etc).”.
- (2) In section 114(2) of the Environment Act 1995, in paragraph (a)(iii), after “22(5),” insert “59(2),”.>

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After section 17A

Gillian Martin

92 After section 17A, insert—

<Deposit and return schemes

Deposit and return schemes: power to direct scheme administrator

- (1) The Climate Change (Scotland) Act 2009 is modified as follows.
- (3) For section 85(4) substitute—
“(4) An order under subsection (1)(a) or (b) may include provision about the giving of directions by the Scottish Ministers to the scheme administrator about the exercise of the administrator’s functions in relation to the scheme.”.>

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