

# **CLEAN NEIGHBOURHOODS AND ENVIRONMENT ACT 2005**

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## **EXPLANATORY NOTES**

### **THE ACT**

#### *Commentary on Sections*

#### **Part 5: Waste**

#### *Chapter 2: Deposit and Disposal of Waste*

#### **Offence of unlawful deposit of waste etc**

#### *Section 40 Defence of acting under employer's instructions*

138. **Section 40** amends section 33 of the Environmental Protection Act 1990 (under which it is an offence to make an unauthorised or harmful deposit etc. of waste) so as to remove the defence (at section 33(7)(b)) of acting under one's employer's instructions.

#### *Section 41 Penalties on conviction*

139. **Section 41(1)** amends the penalties available for offences under section 33 of the 1990 Act. It increases the maximum available fine on summary conviction for the illegal disposal of waste from £20,000 to £50,000 and raises the maximum term of imprisonment on conviction on indictment for non-hazardous waste offences to five years (the same as is already applied for offences involving hazardous waste).

#### *Section 42 Investigation and enforcement costs*

140. **Section 42** inserts a new section 33A into the 1990 Act. Section 33A applies where a person is convicted of an offence under section 33 and enables the court to make an order requiring the offender to pay the enforcing authorities' investigation and enforcement costs, and any costs associated with seizure of vehicles involved in the offence. In this section, the enforcement authorities are defined as the Environment Agency and waste collection authorities.

#### *Section 43 Clean-up costs*

141. **Section 43** inserts a new section 33B into the 1990 Act. Section 33B applies where a person has been convicted of an offence under section 33(1) of the 1990 Act consisting of the deposit or disposal of controlled waste. It enables the court to make an order requiring the offender to pay to either the Environment Agency or a waste collection authority or the occupier of land or the owner of land, any costs incurred by them in removing waste that has been illegally deposited or disposed of in or on land, or in taking steps to eliminate or reduce the consequences of the deposit or both.

### **Section 44 Forfeiture of vehicles**

142. **Section 44** inserts a new section 33C into the 1990 Act. Section 33C applies where a person has been convicted of an offence involving contravention of section 33(1) of the 1990 Act consisting of the deposit or disposal of controlled waste. Section 44 enables the court to make an order to deprive the offender of his rights to a vehicle (and its contents) if the court is satisfied that the vehicle was used in or for the purpose of the commission of the offence.
143. The order by the court may give possession of the vehicle and its contents to the relevant enforcement authority. The new section 33C requires a court to take into account the value of the vehicle, the impact of forfeiture on the offender, the offender's need to use the vehicle lawfully, and, if it appears that the offender is engaged in a business that illegally disposes of waste, whether the order is likely to be dissuasive of further such activity.

### **Offences relating to documentation**

#### **Section 45 Failure to furnish documentation: fixed penalty notices**

144. Section 34 of the 1990 Act places a duty on any person who imports, produces, carries, keeps, treats or disposes of controlled waste or, as a broker, has control of such waste, to secure a written description of the waste whenever it is transferred. Section 34(5) provides for regulations to be made to require such documents to be retained and furnished.
145. **Section 45** inserts a new section 34A into the 1990 Act. Section 34A empowers an enforcement authority to issue a fixed penalty notice to a person who has failed to comply with a requirement to furnish documents under regulations made under section 34(5), offering him the opportunity to discharge any liability to conviction for an offence by payment of a fixed penalty.
146. The amount of the fixed penalty is set at £300, which may be substituted by a different amount by an order made by the appropriate person. By section 34A(11), the enforcement authority may make provision for treating the fixed penalty as being paid if a lesser amount is paid during such shorter period as it may specify. By section 34A(12) the appropriate person may make regulations restricting the extent to which and circumstances in which an authority may provide for such reduced early payments. The new section 73A (section 52) below makes provision about the use of such receipts.

### **Offences: powers of seizure**

#### **Section 46 Power to search and seize vehicles**

147. *Subsection (1)* of section 46 inserts new sections 34B and 34C into the 1990 Act. These sections confer powers to stop, search and seize a vehicle (and its contents) where it is reasonably believed that the vehicle has been, is being, or is about to be, used in the commission of an offence under section 33 or 34.
148. Section 34B allows an authorised officer of an enforcement authority or a constable to seize a vehicle and its contents but only a constable in uniform may stop a vehicle on the road. A vehicle or its contents seized by a constable in the presence of an authorised officer of an enforcement authority are seized on behalf of that authority; where a vehicle or its contents are seized by a constable acting alone they are seized on behalf of the waste collection authority in whose area the seizure took place.
149. Section 34B(7) creates offences of failing to assist or otherwise intentionally obstructing an authorised officer or constable.

150. Section 34B(8) empowers an authorised officer or a constable to demand the name and address of any occupant of a vehicle he has stopped under this section, the name and address of the registered owner of the vehicle, or any other information he may reasonably request.
151. By section 34B(9) it is an offence to fail without reasonable excuse to give this information, or to give information which is knowingly or recklessly false or misleading. Any offence under section 34B is punishable on summary conviction by a fine not exceeding level 5 on the standard scale (currently £5,000).
152. New section 34C empowers the appropriate person (described in section 34C(6)) to make regulations specifying how an enforcement authority must deal with any seized property and to issue guidance to enforcement authorities in relation to their performance of their functions under such regulations.
153. *Subsection (2)* also extends to waste collection authorities the use of notices under section 71(2) of the 1990 Act to include functions conferred by the new sections 34C and 34D.

## **Local authority waste collection and disposal**

### ***Section 47 Abolition of requirement to contract out waste disposal functions***

154. Prior to this section coming into force, waste disposal authorities (county councils and unitary authorities) were required by the Environmental Protection Act 1990 to make arrangements for the disposal of all municipal waste collected in their area. Section 32 of the 1990 Act required them to divest themselves of their waste disposal undertakings and transfer them to either ‘arm’s length’ companies or wholly to the private sector. Waste disposal authorities had to carry out their waste disposal functions by means of letting contracts. The contract-letting procedures for waste disposal authorities required by the 1990 Act were no longer considered necessary given the requirements of the Public Contracts Services Regulations 1993. They also limited the range of procurement options open to waste disposal authorities to carry out their functions which may have lead to conflict with their Best Value duty to secure continuous improvement in the way in which their functions are exercised, having regard to a combination of economy, efficiency and effectiveness.
155. **Section 47** repeals section 32 of and Schedule 2 to the 1990 Act, thereby repealing the requirement for waste disposal authorities to have to form waste disposal companies; limiting companies thus formed to waste functions only; and requiring waste disposal authorities to dispose of controlled waste only through waste disposal contractors. This allows waste disposal authorities greater opportunity to affect improvement in the way that best fits their local circumstances.

### ***Section 48 Offences relating to waste receptacles: fixed penalty notices***

156. **Section 48** inserts new sections 47ZA and 47ZB into the 1990 Act. Section 47ZA applies where an authorised officer of a waste collection authority has reason to believe that a person has committed an offence under section 46 or 47, and enables the officer to issue a notice to that person, offering him an opportunity to discharge any liability to conviction for the offence by payment of a fixed penalty.
157. Section 47ZB enables a waste collection authority to specify the amount of the fixed penalty in its area; the fixed penalty is set at £100 where no amount is set by an authority. In either case, a lesser amount may be permitted to be paid if early payment is made within a specified period.
158. Section 47ZB(4) gives powers to the appropriate person to make regulation governing the power of waste collection authorities to set local fixed penalty rates (e.g. by

specifying a range within which the amount must fall or limiting the extent to which and circumstances in which a local authority may provide for reduced early payment).

#### **Section 49 Payments for waste recycling and disposal**

159. Prior to section 49 coming into force, section 52 of the Environmental Protection Act 1990 imposed a duty on waste disposal authorities to make payments to waste collection authorities in their area. It provided for payments to be made by both tiers to third parties where waste is retained for recycling. The purpose of these payments was to offset any disincentive to recycle by making available to recyclers the savings in disposal and collection costs in respect of waste retained.
160. That system was introduced before many of the other policy levers designed to encourage recycling were put in place, and needed reform to bring it in to line. Particular issues were: increasing payment costs to waste disposal authorities; the inflexible system of payments between waste collection and waste disposal authorities; re-use not incentivised in same way as recycling; payments to third parties being inconsistently administered; and, planned reform of the Joint Waste Disposal Authority levy will negate the need for payments to waste collection authorities in these areas.
161. **Section 49** amends section 52 of the 1990 Act to give the Secretary of State the power to make regulations in England to set the method of calculation of the payments. This will allow calculations to take into account increasing disposal costs due to diversion from landfill and the rising rate of landfill tax.
162. Section 52(1A) gives the Secretary of State the power to disapply by order the duty on a Joint Waste Disposal Authority to make payments to a waste collection authority in respect of waste collected and retained for recycling. This will allow removal of the duty once the levy system in these areas is reformed to directly incentivise recycling by the waste collection authorities.
163. Section 52(1B) exempts a waste disposal authority in England from the duty to make payments to a waste collection authority in respect of waste retained by the waste collection authority where the two authorities agree to alternative arrangements. Where no such mutually agreed arrangements are in place the duty to make payments applies.
164. Section 52(8A) gives the Secretary of State the power to produce guidance to assist English waste collection and disposal authorities in determining whether to make payments to third parties in respect of waste collected for the purpose of recycling.
165. **Section 52(12)** clarifies that payments should be made in respect of all waste recycled including waste which is re-used with or without undergoing any treatment.

#### **Section 50 Power to require owner of land to remove waste**

166. **Section 50(2)** inserts section 59ZA into the 1990 Act. Where controlled waste was deposited in or on any land in contravention of section 33(1) of the 1990 Act, section 59 previously enabled a notice to be served on only the *occupier* of land, requiring him to remove the waste or to take such specified steps with a view to eliminating or reducing its consequences.
167. Section 59ZA enables a notice to be served on the *owner* of the land requiring him to clear waste from it in circumstances where there is no occupier of the land or the occupier cannot be found without the enforcing authority incurring unreasonable expense or the occupier has successfully appealed against a notice served in him. An occupier or owner can appeal the notice if he neither deposited nor knowingly caused nor knowingly permitted the deposit of the waste. If an occupier or owner fails to comply with the requirements in a notice, section 59 enables the Environment Agency or a waste collection authority to enter the land, remove the waste or take such specified steps and recover the costs of doing so from the occupier or owner.

## **Supplementary**

### ***Section 51 “Appropriate person”***

168. **Section 51** amends the definition of an authorised person in section 29 of the Environmental Protection Act 1990 as the Secretary of State in relation to England, and the National Assembly for Wales in relation to Wales.

### ***Section 52 Use of fixed penalty receipts***

169. **Section 52** inserts section 73A into the 1990 Act, which allows a waste collection authority to retain the receipts arising from fixed penalty notices issued under section 34A or 47ZA, and specifies the functions under which the receipts may be used. It makes similar provision to that made by section 8 (*subsection (8)*) as described in paragraph 44 above.

### ***Section 53 Supplementary enforcement powers***

170. **Section 53** amends section 108 of the Environment Act 1995. The effect is to enable waste collection authorities to use the powers of investigation under that section in investigating incidents or offences in relation to discharging any of their functions under Part 2 of the 1990 Act.