Delegated Powers and Law Reform Committee

34th Report, 2014 (Session 4)

Food (Scotland) Bill

Published by the Scottish Parliament on 13 May 2014
Delegated Powers and Law Reform Committee

Remit and membership

Remit:

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
   (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; and
   (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.

Membership:

Richard Baker
Nigel Don (Convener)
Mike MacKenzie
Margaret McCulloch
Stuart McMillan (Deputy Convener)
John Scott
Stewart Stevenson
Committee Clerking Team:

Clerk to the Committee
Euan Donald

Assistant Clerk
Elizabeth White

Support Manager
Daren Pratt
Delegated Powers and Law Reform Committee

34th Report, 2014 (Session 4)

Food (Scotland) Bill

The Committee reports to the Parliament as follows—

1. At its meetings on 1 and 22 April and 6 and 13 May, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Food (Scotland) Bill at stage 1 ("the Bill"). The Committee submits this report to the lead committee for the Bill under Rule 9.6.2 of Standing Orders.

2. The Scottish Government provided the Parliament with a memorandum on the delegated powers provisions in the Bill ("the DPM").

3. In this report the following expressions bear the following meanings:

   “FSA” means the Food Standards Agency;
   “FSS” means Food Standards Scotland;
   “the Bill” means the Food (Scotland) Bill;
   “the 1990 Act” means the Food Safety Act 1990; and
   “the 1999 Act” means the Food Standards Act 1999.

OVERVIEW OF BILL

4. The Bill was introduced by the Scottish Government on 13 March 2014. The Health and Sport Committee is the lead Committee.

5. The Bill makes provision for the establishment of FSS, an advisory body which will replace the current operations of the FSA insofar as they relate to Scotland. The Bill confers specific objectives on FSS, which are to protect the

---

1 Food (Scotland) Bill [as introduced] available here: http://www.scottish.parliament.uk/S4_Bills/Food%20(Scotland)%20Bill/b48s4-introd.pdf

2 Food (Scotland) Bill Delegated Powers Memorandum available here: http://www.scottish.parliament.uk/S4_Bills/Food_DPM.pdf
public from risks to health which may arise in connection with the consumption of food; to improve the extent to which members of the public have diets which are conducive to good health; and to protect the other interests of consumers in relation to food. The Bill also makes provision in relation to the membership of FSS, its governance and accountability.

6. Part 2 of the Bill makes provision in relation to food information law. The Scottish Ministers are given power to define the term “food information law” in regulations. New provision is inserted into the 1990 Act to deal with contraventions of, and non-compliance with, food information law, including the creation of offences and provision for the seizure and disposal of food.

7. Part 3 of the Bill establishes a new regime of administrative sanctions in relation to “relevant offences”, a term which is defined in the Bill to mean offences under food legislation which are specified by the Scottish Ministers in regulations. The administrative sanctions the Bill creates are fixed penalty notices and compliance notices. The administrative sanctions scheme is largely supplemented by subordinate legislation making powers which will be used by Ministers to provide much of its operational detail.


DELEGATED POWERS PROVISIONS

9. The Committee considered each of the delegated powers in the Bill. At its first consideration of the Bill, the Committee determined that it did not need to draw the attention of the Parliament to the following delegated powers:

- Section 32, inserting a new section 15A into the 1990 Act – power to specify enactments as “food information law”
- Section 33, inserting a new section 16(1)(da) into the 1990 Act – power to make provision for a food hygiene information scheme
- Section 35(2) – power to specify the sum of money to be paid under a fixed penalty notice
- Section 35(4) – power to specify the standard to which an authorised officer must be satisfied before issuing a fixed penalty notice
- Section 36(2) – power to specify the period of time within which payment of a fixed penalty notice is to be made
- Section 41(3) – power to specify the standard to which an authorised officer must be satisfied before issuing a compliance notice
- Section 42(3) – power to specify a minimum period of time within which steps are to be taken to comply with a compliance notice
• Section 51 – power to specify “relevant offences” under food legislation for the purposes of Part 3

• Section 52(1) – power to specify the meaning of “food” and “animal feeding stuffs”

• Section 57 – power to specify aircraft, ships, boats or other water-going vessel which are not to be considered “premises”

• Section 60 – ancillary provision

• Section 62 – commencement

10. At its meeting of 22 April, the Committee took oral evidence from Scottish Government officials on a number of the delegated powers in the Bill. In light of the responses received, the Committee agreed that it was content with the following delegated powers (which the Committee considered together) and did not need to comment on them further:

• Sections 36(3) and 42(4) – power to make provision about the form and content of fixed penalty notices and compliance notices

Recommendations

11. The Committee’s comments and, where appropriate, recommendations on the remaining delegated powers provisions in the Bill are detailed below.

Section 34 – power to make provision for the purpose of regulating animal feeding stuffs

Power conferred on: The Scottish Ministers
Power exercisable by: Order
Parliamentary procedure: Affirmative

Provision

12. Section 34 of the Bill confers a power on the Scottish Ministers to, by order, make specific provision for the purpose of regulating any animal feeding stuff, or anything done, or which might be done to, or in relation to, or with a view to the production of, any animal feeding stuff. The specific provision which may be made using this power is provision which applies, or which is equivalent to, any of the provisions of the 1990 Act, including any power in that Act to make orders or regulations or to give directions.

13. This power, which is subject to the affirmative procedure, also permits Ministers to apply the provisions of the 1990 Act either with or without modifications, and to modify any enactment.

Comment
14. The Committee asked the Scottish Government why the power in section 34 of the Bill is drafted in such wide terms. The Committee also asked whether it agreed that the power as drafted would enable the Scottish Ministers to make subordinate legislation which applies offence provisions under the 1990 Act for the purpose of regulating animal feed, and to use the power to modify any such provisions which are applied so as to remove the restrictions which the 1990 Act places on the maximum penalties that may be imposed in relation to those offences.

15. In response to the Committee’s questions, the Scottish Government explained that the power in section 34 of the Bill is largely a restatement of an existing power in section 30 of the 1999 Act which is currently available to Ministers to use. The Scottish Government considers it to be more convenient to have that power set within the context of the new Bill, as opposed to remaining separately within the 1999 Act.

16. The Committee is not persuaded that the Scottish Government has provided sufficient explanation for taking the power in section 34 of the Bill. The Committee does not consider that the fact that a very similar power already exists in section 30 of the 1999 Act is by itself sufficient justification for the taking of the present power in equally wide terms. The Committee also notes that the power in section 30 of the 1999 Act, the existence of which the Scottish Government appears to rely on as a justification for taking the present power, does not appear to have been used by the Scottish Ministers for the purpose of regulating animal feed. In the Committee’s view, this places further emphasis on the need for the taking of a very similar power to be properly justified by the Scottish Government.

17. The Committee also notes that the drafting of the power in section 34 of the Bill would permit the application of offence provisions under the 1990 Act, and the modification of those offence provisions in a manner which removed or altered the maximum penalties that could be imposed for those offences. The Committee considers that, as a general matter of principle, the prescription of maximum penalties is a matter for primary, as opposed to subordinate, legislation and that where a delegated power seeks to permit the modification or removal of maximum penalties in subordinate legislation, the need for such a power ought to be fully explained by the Scottish Government. In the context of this Bill, the Committee does not consider that section 34 has been adequately justified by the Scottish Government.

18. The Committee accordingly draws the lead committee’s attention to the width of the power in section 34 of the Bill, on the basis that the Committee considers that the Scottish Government has not provided sufficient justification for the taking of a power in such wide terms, having particular regard to the fact that the power could be exercised so as to make subordinate legislation which applied offence provisions under the 1990 Act, but which removed the restrictions which the 1990 Act places on the maximum penalties which may be imposed for offences under that Act.

Section 48 – power to make supplementary etc. provision

Power conferred on: The Scottish Ministers
Provision

19. Section 48(1) of the Bill confers power on the Scottish Ministers to make such supplementary, incidental or consequential provision as they consider appropriate in connection with fixed penalty notices and compliance notices and the carrying out by enforcement authorities and their authorised officers of functions under Part 3 of the Bill (Part 3 establishes a regime of fixed penalty and compliance notices for “relevant offences” in food law, which are to be specified by the Scottish Ministers in regulations made under section 51 of the Bill). The power in section 48 is restricted to supplementary, incidental or consequential provision necessary for the purposes of Part 3 only. A more general power to make ancillary provision for the purposes of the Bill exists at section 60.

20. Section 48(2)(a)-(c) lists particular types of provision that may be contained in regulations made under section 48(1). Section 48(2)(a) provides that Ministers may make regulations under section 48(1) for the purpose of “facilitating, prohibiting or restricting” the issuing of a fixed penalty notice or a compliance notice in respect of a relevant offence arising out of an act or omission in cases where another sanction has been issued or imposed in respect of the same act or omission. Section 48(2)(a) also provides for converse provision to be made, namely provision “facilitating, prohibiting or restricting” the issuing or imposing of another sanction in respect of an act or omission in cases where a fixed penalty notice or compliance notice has been issued in respect of a relevant offence arising out of the same act or omission. Section 48(4) defines the term “another sanction” for the purposes of section 48(2)(a) and section 48(5) provides that the Scottish Ministers may modify that definition by regulations.

21. Section 48(2)(b) provides that regulations made under section 48(1) may include provision for early payment discounts in relation to fixed penalty notices. Section 48(2)(c) provides that regulations may apply with modifications, or make provision equivalent to the sections of the 1990 Act relating to offences which are listed in section 48(2)(c)(i)-(xii).

22. Section 48(3) of the Bill provides that regulations made under section 48(1) which contain the provision mentioned in section 48(2)(a) may also make such modifications of sections 37 and 44 of the Bill as the Scottish Ministers consider necessary or expedient in connection with the provision. Sections 37 and 44 of the Bill refer to the effect of, respectively, a fixed penalty notice and a compliance notice on criminal proceedings. Regulations made under section 48(1), including those which are made for the purposes listed in section 48(2), and which contain the provision mentioned in section 48(3), are subject to the negative procedure.

Comment

Section 48(1)

23. The Committee asked the Scottish Government why section 48(1) of the Bill was drafted in such wide terms, and also why that provision was considered to be
necessary, given that section 60 of the Bill provides a free-standing power to make ancillary provision for the purposes of, or in connection with, the Bill.

24. In response to the Committee’s questions, the Scottish Government explained that it was considered to be of assistance to readers and users of the legislation to include an ancillary power in relation to the scheme of administrative sanctions established by Part 3 of the Bill in the same place as the provisions which establish that regime. The Scottish Government also explained that the additional detail in sections 48(2)-(5) as to the manner in which the power in section 48(1) could be exercised was intended to be helpful, and to avoid debate over the scope of the power in section 60 at a future date.

25. The Committee considers, having regard to the answers provided by the Scottish Government, and subject to the Committee’s further comments below, that the power in section 48(1) of the Bill is acceptable in principle. While the Committee observes that there is a clear degree of overlap between the power in section 48(1) and the power in section 60 of the Bill, it considers that the inclusion of the additional detail regarding the exercise of the power in section 48(1) in sections 48(2)-(5) is helpful to readers and users of the legislation as a matter of principle.

Section 48(2)(a)

26. The Committee asked the Scottish Government how the power in section 48(1), when used so as to make the provision mentioned in section 48(2)(a), would be exercised. In particular, the Committee asked why section 48(2)(a) contemplates regulations being made for the purpose of “facilitating” the issuing of further administrative sanctions where other types of such sanction have already been issued. In response to the Committee’s questions, the Scottish Government explained that the power to make the provision referred to in section 48(2)(a) will enable the Scottish Ministers to regulate the relationship between the administrative sanctions created by the Bill and other types of sanction which already exist in food legislation, and to streamline the sanctions process in circumstances where there has been more than one breach of food law by the same individual or food business. Section 48(2)(a) is intended to enable Ministers to control the manner in which the various sanctions fit together, and to manage any overlaps. The Scottish Government officials explained in their evidence to the Committee that while the use of the word “facilitating” in section 48(2)(a) is perhaps not common in legislation, its meaning in the context of this power is clear.

27. The Committee considers that the exercise of the power in section 48(1) of the Bill for the purpose mentioned in section 48(2)(a) is acceptable in principle, having regard to the further explanation provided by the Scottish Government. The Committee accepts that it is necessary for the Bill to contain provision which will allow the Scottish Ministers to regulate the administrative sanctions scheme set up by Part 3 of the Bill once that scheme comes into force and its practical operation can be assessed. The Committee further accepts that the power to do so requires to be drafted flexibly in order to accommodate the different types of provision that may require to be made in its exercise.
Section 48(3)

28. The Committee also asked the Scottish Government for further explanation as to how the power in section 48(1) of the Bill, when exercised so as to make the provision referred to in section 48(2)(a) and which also includes the provision contemplated by section 48(3), is intended to be exercised, and in what circumstances it might be considered necessary or expedient to make provision modifying the effect of sections 37 and 44 of the Bill. The Committee also asked the Scottish Government why it was considered appropriate in principle to permit the modification of sections 37 and 44 of the Bill through subordinate legislation. The Scottish Government explained to the Committee that the purpose in section 48(3) for which regulations may be made under section 48(1) would again enable Ministers to regulate the relationship between the different administrative sanctions created by the Bill and the manner in which criminal liability is discharged where those sanctions are complied with. The provisions are intended to address the possibility that a fixed penalty notice and a compliance notice may be issued simultaneously and to simplify the procedure in that type of case in order that those who receive a fixed penalty notice or a compliance notice are able to understand their position and the steps they are required to take next.

29. In response to the Committee’s questions, the Scottish Government agreed that the power in section 48(1), when exercised for the purpose in section 48(3), would permit the modification of sections 37 and 44 in a manner which completely removes the discharge of criminal liability which those sections make provision for, although it was explained to the Committee that the Scottish Government does not intend to use the power for that purpose. The Scottish Government also noted that the power may only be exercised where the Scottish Ministers consider it necessary or expedient to do so, and that any exercise of the power in section 48(3) of the Bill would have to be lawful and within vires.

30. The Committee remains concerned about the power in section 48(1) of the Bill, when exercised for the purpose mentioned in section 48(3). The Committee considers that sections 37 and 44 of the Bill are key provisions in the scheme of administrative sanctions established by Part 3 of the Bill. At present, section 48(3) is drafted in a manner which would permit regulations made under section 48(1) to modify sections 37 and 44 in a manner which entirely removed the discharge of criminal liability which those sections seek to provide where an administrative sanction has been issued and complied with.

31. The Committee notes that the Scottish Government has indicated that it does not intend to use the power for the purpose of removing the discharge of criminal liability which sections 37 and 44 provide. The Committee accordingly considers that it would be appropriate for the purpose in section 48(3) for which the power in section 48(1) may be exercised to be drawn more narrowly so as to restrict the exercise of the power in a way which removed the discharge of criminal liability where an administrative sanction has been issued and complied with, given that the Scottish Government has explained to the Committee in evidence that the power is not intended to be exercised for that purpose.

32. The Committee draws the power in section 48(1) of the Bill, when exercised to make regulations which include the provision in section 48(2)(a)
and which also make the provision contemplated by section 48(3), to the attention of the Parliament. When exercised so as to include the provision in section 48(3), the power in section 48(1) of the Bill permits the modification of sections 37 and 44 of the Bill without apparent restriction.

33. Bearing in mind the explanation provided to the Committee by the Scottish Government as to its intended use of the power for the purpose mentioned in section 48(3), the Committee recommends that the Scottish Government gives consideration to amending the Bill so as to restrict the exercise of the power in these circumstances so that it does not permit the wholesale removal of the discharge of criminal liability which sections 37 and 44 provide in circumstances where an administrative sanction has been issued and complied with.

Sections 48(3) and 48(5)

34. The Committee asked the Scottish Government why, when sections 48(3) and 48(5) of the Bill expressly contemplate the textual modification of primary legislation, the negative procedure affords the appropriate level of scrutiny over the exercise of those powers. In response to the Committee’s questions, the Scottish Government explained that the focus of these powers is narrow, and related to the operational detail of the administrative sanctions regime set up by Part 3 of the Bill. As such, the negative procedure had been considered to afford the appropriate level of scrutiny over the exercise of these powers.

35. While the Committee accepts that sections 48(3) and 48(5) of the Bill have a narrow focus, it considers that the modifications to the text of the Bill which could be made in exercise of those powers are significant. In particular, the power in section 48(1), when exercised for the purpose mentioned in section 48(3), permits the modification of sections 37 and 44 of the Bill without apparent restriction. The Committee considers that any modification to those sections would be of significant interest to the Parliament. As such, the Committee considers that the power in section 48(1), when exercised for the purpose mentioned in section 48(3), and the power in section 48(5), should be subject to the higher level of scrutiny afforded by the affirmative procedure. This is also consistent with the Committee’s general approach, which is that powers to modify primary legislation should be subject to the affirmative procedure unless there is a good reason why negative procedure is appropriate.

36. The Committee recommends that the Scottish Government gives consideration to amending the Bill at Stage 2 to make subordinate legislation made under section 48(1) of the Bill which contains the provision mentioned in section 48(3), or which is made under section 48(5) of the Bill so as to modify the definition of the term “another sanction” in section 48(4), subject to the affirmative procedure.

Section 50 – power to issue guidance to enforcement authorities

- Power conferred on: The Lord Advocate
- Power exercisable by: Guidance
- Parliamentary procedure: None
Provision

37. Section 50(1) of the Bill confers power on the Lord Advocate to issue, and from time to time revise, guidance to enforcement authorities as to the exercise by them and their enforcement officers of their functions under Part 3 of the Bill in relation to fixed penalty notices and compliance notices. Section 50(2) of the Bill imposes a duty on enforcement authorities to comply with such guidance as may be issued under section 50(1) and to ensure that their enforcement officers also comply with such guidance or revised guidance in exercise of those functions.

Comment

38. The Committee asked the Scottish Government whether it was intended that the guidance issued by the Lord Advocate under section 50 of the Bill would be published, given that the power in section 50 of the Bill was not addressed in the Scottish Government's DPM. In response to the Committee’s questions, the Scottish Government explained that the decision as to whether the Lord Advocate’s guidance would be published was a matter for the Lord Advocate’s discretion, on the basis that the matter relates to the enforcement and operation of the new regime of administrative sanctions created by Part 3 of the Bill.

39. The Committee considers that, as a general matter of principle, guidance prepared by public authorities should be made available in the public domain. The Committee recognises, however, that there may be circumstances in which the publication of certain aspects of guidance to enforcement authorities may not be suitable for publication. The Committee accordingly considers that it may be possible to amend section 50 of the Bill so as to include a general requirement for the guidance issued by the Lord Advocate under section 50(1) of the Bill to be published, subject to an exception in circumstances where the Lord Advocate considers that publication of the guidance would be prejudicial to the effective exercise by enforcement authorities and their officers of their functions. The Committee observes that an approach of this nature is taken to the publication of delegations and directions made by Revenue Scotland under section 4 of the Revenue Scotland and Tax Powers Bill, currently undergoing Stage 1 scrutiny in the Parliament.

40. The Committee recommends that the Scottish Government gives consideration to amending section 50 of the Bill so as to require the publication of guidance issued by the Lord Advocate under section 50(1) of the Bill subject to an exception in circumstances where the Lord Advocate considers that publication would be prejudicial to the effective exercise by enforcement authorities and their authorised officers of their functions under Part 3 of the Bill.
Members who would like a printed copy of this *Numbered Report* to be forwarded to them should give notice at the Document Supply Centre.