

GOOD FOOD NATION (SCOTLAND) BILL

DELEGATED POWERS MEMORANDUM

INTRODUCTION

1. This Memorandum has been prepared by the Scottish Government in accordance with Rule 9.3.3B of the Parliament's Standing Orders, in relation to the Good Food Nation (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This Memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of this Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

OUTLINE OF BILL PROVISIONS

3. The purpose of the Good Food Nation (Scotland) Bill is to impose duties on the Scottish Ministers and certain other authorities to produce good food nation plans and to make provision as to the effect of those plans.

4. The content of the Bill is contained within 6 sub-headings.

- *National good food nation plan* - contains provisions on the preparation, effect, and the reporting, review and revision of the national good food nation plan;
- *Good food nation plans of public bodies* - contains provisions on the preparation, effect, and the reporting, review and revision of the good food nation plans of health boards, local authorities and specified public authorities;
- *Interpretation* - contains provisions on the interpretation of key terms;
- *Ancillary provision* – provides for the Scottish Ministers to be able to make by regulations certain changes they consider appropriate for the purposes of, in connection with or for giving full effect to the Bill (once it has become an Act) or any provision made under it;
- *Regulation-making powers* - provides for the regulation-making powers conferred on the Scottish Ministers by the Bill to include certain powers and to make different provision for different purposes; and
- *Commencement and short title* - sets out the provisions regarding commencement and the short title of the Bill.

5. Section 1 imposes a duty on the Scottish Ministers to publish, and lay before the Scottish Parliament, a national good food nation plan. Section 4 requires the Scottish Ministers to have regard to the national good food nation plan in the exercise of functions to be specified in subordinate legislation.

6. The national good food nation plans required by the Bill must set out:

- the main outcomes in respect of food-related issues which the Scottish Ministers want to be achieved in relation to Scotland;
- indicators or other measures by which progress in achieving the outcomes may be assessed; and
- the policies which the Scottish Ministers intend to pursue in order to secure the achievement of the outcomes.

7. The national good food nation plan may include such other material in relation to food-related issues as the Scottish Ministers consider appropriate. The Scottish Ministers are to have regard, among other things, to the scope for food-related issues to affect outcomes in relation to social and economic wellbeing, the environment, health, and economic development, when determining the content of the national good food nation plan.

8. Section 3 requires the Scottish Ministers to have regard to certain international instruments when preparing the plan. The Scottish Ministers are required to consult on a draft plan and have regard to the consultation responses (section 2); to publish a progress report every two years (section 5); and to review the plan every five years and revise the plan as appropriate (section 6).

9. The Bill imposes similar duties on health boards, local authorities, and other public authorities as may be specified in subordinate legislation (collectively referred to as “relevant authorities”). Section 7 requires the relevant authorities to publish a good food nation plan. They must have regard to that plan when exercising specified functions (section 10). The Bill requires the relevant authorities to have regard to the Scottish Ministers’ national good food plan when preparing their own plan (section 9). They are required to consult on a draft of the plan and have regard to the consultation responses (section 8); to publish a progress report every two years (section 11); and to review the plan every five years and revise the plan as appropriate (section 12).

RATIONALE FOR SUBORDINATE LEGISLATION

10. The Bill contains six delegated powers which are explained in more detail below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate.

11. The Scottish Government has had regard, when deciding whether provisions should be set out in subordinate legislation rather than on the face of the Bill, to the need to:

- strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances without the need for primary legislation;
- make proper use of valuable Parliamentary time;

- anticipate the unexpected, which might otherwise frustrate the purpose of provisions in primary legislation approved by the Scottish Parliament;
- allow detailed arrangements to be kept up to date within the basic structures set out in the Bill; and
- take account of the likely frequency of amendment of those arrangements.

12. The delegated powers provisions are listed below. For each provision, the memorandum sets out:

- the person upon whom, or the body upon which the power is conferred and the form in which the power is to be exercised;
- why it is considered appropriate to delegate the power; and
- the Parliamentary procedure (if any) to which the exercise of the power to make subordinate legislation is to be subject, and why it was considered appropriate to make it subject to that procedure (or not to make it subject to any such procedure).

DELEGATED POWERS

Section 3(3) – Power to require consideration of international material in the preparation of the national good food nation plan

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

13. Section 3 provides that the Scottish Ministers must have regard to the international instruments listed in section 3(2) when preparing the national good food nation plan. Section 3(3) provides that the Scottish Ministers may, by regulations, add to or otherwise modify the list in section 3(2). Section 3(4) provides that regulations made under section 3(3) may make such consequential modifications of section 14 as the Scottish Ministers consider appropriate.

Reason for taking power

14. Listing international instruments that Scottish Ministers must have regard to when preparing the national good food nation plan supports the commitment to a human rights based approach to the plan. The need to retain flexibility to update the list of international instruments in response to changing circumstances make it appropriate that these matters are provided for in subordinate legislation. The power to add to or otherwise amend the list in section 3(2) gives the flexibility to make prompt and efficient changes to the list of specified international instruments. For example, if new guidance was issued by an international organisation and the Scottish Ministers wished to consider that guidance when preparing the national good food nation plan, the Scottish Ministers may wish to make regulations to add to the list at section 3(2). This power allows Ministers to do so. Section 3(4) ensures that the Scottish Ministers can additionally make consequential amendments to insert related definitions of the international instrument, for example, the new guidance, when adding the new guidance to the list at section 3(2).

Choice of procedure

15. Section 16(3) provides that regulations made under section 3(3) are subject to the affirmative procedure. As regulations made under section 3(3) will be amending primary legislation, the affirmative procedure is considered appropriate in order to give a sufficient level of scrutiny to any proposed amendments to primary legislation.

Section 4 – Power to make regulations as regards the effect of the national good food nation plan

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

16. Section 4 provides that the Scottish Ministers must have regard to the national good food nation plan when they are exercising a function specified in regulations. This includes functions falling within a description specified in regulations. Section 14 provides that “specified” means specified in regulations made by the Scottish Ministers. The intention is that this power can be used to specify subject areas in relation to food-related issues within which functions are exercised by the Scottish Ministers but also to specify functions exercised by the Scottish Ministers which are included in other legislation. Section 10 (see below) sets out a similar provision for health boards, local authorities and specified public authorities.

Reason for taking power

17. The specification of functions or descriptions of functions by the Scottish Ministers will require detailed and lengthy lists. It is considered appropriate to make regulations to set out this detailed information. It may be appropriate or desirable to amend the lists of specified functions when the national good food nation plan is revised after five years, as Ministers may wish to add functions relevant to the revised plan. The need to retain flexibility to update the specified functions in response to a revised plan or indeed in response to changing circumstances makes it appropriate that these matters are provided for in subordinate legislation. The intention of this power is to allow a hybrid approach that allows the Scottish Ministers to specify descriptions of subject areas within which functions are exercised by the Scottish Ministers, but also to specify individual functions exercised by the Scottish Ministers which are included in other legislation. The functions will of course be functions already exercisable by the Scottish Ministers. It is intended that this will ensure that the Scottish Ministers consider the national good food nation plan when exercising specific functions and also when exercising functions within a broader subject area (if a description of a subject area is specified in regulations).

18. An example of how this approach would work is that a description for a broad subject area might be the “provision of food in schools” or a description such as “all functions relevant to provision of food in schools within the Education (Scotland) Act 1980”. Alternatively, specific functions could be specified e.g. functions in section 53 of the Education (Scotland) Act 1980. This would mean that Scottish Ministers would have regard to the national good food nation plan when carrying out functions that are related to the general subject of the provision of food in

schools or when exercising particular functions in the Education (Scotland) Act 1980 e.g. section 53.

Choice of procedure

19. The regulations will provide a list of specified functions and functions that fall within a specified description. Amendments may be required to ensure the list is kept up to date, reflects the content of the latest version of the national good food nation plan and is relevant for changing circumstances in respect of food-related issues. Therefore, it is considered that the negative procedure is appropriate given that the nature of the power is to list the functions or descriptions of functions that the Scottish Ministers wish to specify. The functions or descriptions of functions will concern functions already exercisable by the Scottish Ministers, so the regulations are intended to be relatively administrative in nature. Section 16(2)(a) provides that regulations made under section 4 are subject to the negative procedure. Given the administrative nature of the regulations, negative procedure is considered appropriate.

Section 7 – Power to specify additional public authorities, thus requiring the authorities to produce plans

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

20. Section 7(1) requires that health boards, local authorities and other public authorities as may be specified (collectively referred to as “relevant authorities”) must publish a good food nation plan. Section 7(2)(c) confers a power on the Scottish Ministers to specify, by regulations, the public authorities who are required to publish a good food nation plan. Section 14 provides that “specified” means specified in regulations made by the Scottish Ministers.

21. Section 7(3)(b) confers a power on the Scottish Ministers to specify in regulations a time period, by the end of which the good food nation plan must be published by the specified public authorities. As above, section 14 provides that “specified” means specified in regulations made by the Scottish Ministers.

Reason for taking power

22. It is the intention of the Scottish Ministers that health boards and local authorities be required to produce good food nation plans. In future, it may be desired to specify additional public authorities to be required to produce good food nation plans. The need to retain flexibility to add to and amend the specified authorities in response to changing circumstances make it appropriate that these matters are covered by subordinate legislation. The power to make regulations to specify additional public authorities and the time period within which the public authorities must publish their plan is intended to provide that flexibility and permit the expansion of the requirements to produce good food nation plans and allow other public authorities to be specified. Section 7(2)(c) provides the Scottish Ministers with a power to add to the authorities specified and gives the

flexibility to promptly specify further authorities. Section 7(3)(b) provides the Scottish Ministers with a power to set out the time period for the publication of the good food nation plans by the specified authorities to ensure that they are published timeously.

Choice of procedure

23. It is considered appropriate that regulations made using this power are subject to the negative procedure as the specification of a public authority would not be a significant change but would be an expansion of the authorities in the public sector required to produce good food nation plans. It would result in another public authority being required to produce a good food nation plan and to consider it when exercising certain specified functions (which would be specified for that particular public authority). Section 16(2)(b) provides that regulations under 7(2)(c) and (3)(b) are subject to negative procedure.

Section 10 – Power to make regulations as regards the effect of the good food nation plans

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

24. Section 10 provides that relevant authorities must have regard to their good food nation plan when they are exercising a function specified in regulations. This includes functions falling within a specified description. Section 14 provides that “specified” means specified in regulations made by the Scottish Ministers. The intention is that this power can be used to specify subject areas in relation to food-related issues within which functions are exercised by the relevant authorities but also to specify functions exercised by the Scottish Ministers which are included in other legislation. Section 4 (see above) sets out a similar provision for the Scottish Ministers.

Reason for taking power

25. The specification of functions or descriptions of functions by the Scottish Ministers will require detailed and lengthy lists. It is considered appropriate to make regulations to set out this detailed information. It may be appropriate or desirable to amend the lists of specified functions when the relevant authorities revise their plans every five years. Alternatively, it may be appropriate to update the lists of functions to ensure they are up to date. The need to retain flexibility to update the specified functions in response to changing circumstances makes it appropriate that these matters are provided for in subordinate legislation. The intention of this power is to allow a hybrid approach that allows the Scottish Ministers to specify descriptions of subject areas within which functions are exercised by the relevant authorities, but also to specify individual functions exercised by the Scottish Ministers which are included in other legislation. It is intended that this will ensure that the relevant authorities will consider the good food nation plans when exercising specific functions and also when exercising functions within a broader subject area (if a description of a subject area is specified in regulations).

26. An example of how this approach would work is that a description for a broad subject area might be the “provision of food in schools” or a description such as “all functions relevant to

provision of food in schools within the Education (Scotland) Act 1980”. Alternatively, specific functions could be specified e.g. functions in section 53A of the Education (Scotland) Act 1980. This would mean that the local authorities would have regard to their good food nation plan when carrying out functions that are related to the general subject of the provision of food in schools or when exercising particular functions in the Education (Scotland) Act 1980 e.g. section 53A.

Choice of procedure

27. The regulations will provide a list of specified functions and functions that fall within a specified description. Amendments may be required to ensure the list is kept up to date and is relevant for changing circumstances in respect of food-related issues. Therefore, it is considered that the negative procedure is appropriate. The functions or descriptions of functions will concern functions already exercisable by the relevant authorities, so the regulations are intended to be relatively administrative in nature. Section 16(2)(c) provides that regulations made under section 10 are subject to negative procedure. Given the administrative nature of the regulations, negative procedure is considered appropriate.

Section 15 – Ancillary Provision

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative if amending primary legislation, otherwise negative

Provision

28. Section 15(1) provides the Scottish Ministers with the power to make, by regulations, such incidental, supplementary, consequential, transitional, transitory or saving provision as they consider appropriate in connection with or for giving full effect to the Bill, any provision of the Bill or any provision made under it.

Reason for taking power

29. Such provision is common in Bills to provide flexibility to make any adjustments that may arise in light of experience in relation to the operation of the Act as timeously as possible. The Scottish Government recognises the potentially broad application of this power, which includes the power to modify primary legislation, and to alter the provisions of the Bill. Any incidental or supplementary use of the power would be strictly construed. While the Scottish Government has given careful consideration to the provisions of the Bill, this power is considered necessary to ensure that any unexpected issues which require further changes can be dealt with effectively and so that the purpose of the Bill is not inadvertently obstructed.

30. The good food nation plans are intended to be plans setting out the Scottish Ministers’ (or relevant authorities’) main outcomes, indicators and policies in relation to food-related issues for a 5 year period. Accordingly, they are intended to be relatively long-term plans, and will be reviewed and revised as necessary every 5 years. The ancillary provision is included to future-proof the Bill for the unexpected. There may be developments in food-related issues over the coming years as a result of changing circumstances. The power to make ancillary provision provides flexibility to ensure that unexpected issues can be dealt with effectively.

Choice of procedure

31. Section 16(4) provide that regulations made under section 15(1) which contain a provision which adds to, replaces or omits any part of the text of an Act are subject to the affirmative procedure. Otherwise, regulations made under this section are subject to the negative procedure. This approach is typical for ancillary powers of this type, and is considered to provide an appropriate level of scrutiny where there is a proposal to amend primary legislation.

Section 17(2) – Commencement

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: laid, no procedure

Provision

32. Section 17(2) provides for the Scottish Ministers, by regulations, to appoint a day when the provisions of the Bill come into force. Certain sections are excepted from this power, namely sections 13, 14, 16, 17 and 18, as they come into force on the day after Royal Assent. The regulations may include transitional, transitory or saving provision and may make different provision for different purposes.

Reason for taking power

33. The Scottish Ministers consider it appropriate for the provisions of the Bill not coming into effect on Royal Assent to be commenced at such a time as the Scottish Ministers consider to be suitable. It is standard practice for the commencement provisions to be dealt with by subordinate legislation.

Choice of procedure

34. As is usual for commencement regulations, the default laying requirement applies (as provided for by section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010). This is considered appropriate because the policy behind the provisions will already have been considered by Scottish Parliament during the passage of the Bill. Any regulations made under this section will be laid before the Scottish Parliament as soon as practicable after being made.

This document relates to the Good Food Nation (Scotland) Bill (SP Bill 4) as introduced in the Scottish Parliament on 7 October 2021

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