FOOD (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

Purpose

1. This Memorandum has been prepared by the Scottish Government to assist the Delegated Powers and Law Reform Committee in its consideration of the Food (Scotland) Bill. This Memorandum describes provisions in the Bill conferring power to make subordinate legislation which were amended at Stage 2. In this case, no new provisions conferring power to make subordinate legislation were introduced to the Bill at Stage 2. The Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION AMENDED AT STAGE 2

2. The amended delegated powers provisions in the Bill are listed 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.

Section 34 – Regulation of animal feeding stuffs

Power conferred on:  The Scottish Ministers  
Power exercisable by: Order made by Scottish statutory instrument  
Parliamentary procedure: Affirmative procedure of the Scottish Parliament

Provision

3. Section 34 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 the power is described in section 34(2)(a) and (b).

4. Section 34(2)(b) was amended at Stage 2. Section 34(2)(b), as introduced, enabled the Scottish Ministers to make provision equivalent to any of the provisions of the Food Safety Act 1990 (“the 1990 Act”). Section 34(2)(b), as amended, enables the Scottish Ministers to make provision equivalent to, or reasonably similar to, any of the provisions of the 1990 Act.

5. A new subsection was added to section 34 at Stage 2 (section 34(2A)). This narrows the power in section 34 so that it may not be used to make provision creating an
This document relates to the Food (Scotland) Bill as amended at Stage 2 (SP Bill 48A)

offence which is punishable with imprisonment for a period of more than 2 years or punishable on summary conviction with imprisonment for a period of more than 12 months or a fine of more than £20,000.

Reason for taking power

6. The reason for taking the power, as introduced, was to ensure that the Scottish Ministers still have a power to regulate animal feeding stuffs which is equivalent to the power they currently have under section 30 of the Food Standards Act 1999 (“the 1999 Act”). The Bill repeals section 30, together with other provisions of that Act which are within the legislative competence of the Scottish Parliament. Section 34 is intended to restate the Scottish Ministers’ powers under section 30.

7. The amendment of section 34(2)(b) is to ensure that the specific provision which may be made using the power is the same as the specific provision which may currently be made under section 30 of the 1999 Act. Section 30(2) enables the making of provision “corresponding to, any provisions of the 1990 Act….with or without modifications”. Section 34(2), as introduced, enabled the making of provision which applies (with or without modifications) any provisions of the 1990 Act, or provision which is equivalent to any provisions of the 1990 Act. Consequently, if the Scottish Ministers chose to apply provisions of the 1990 Act, they could apply modified versions of the provisions but if they chose to restate provisions of the 1990 Act, they would have to be exactly the same. The amendment is to ensure that the Scottish Ministers’ power to restate provisions of the 1990 Act is sufficiently wide to enable the making of provisions which are slightly different from, but still reasonably similar to, the provisions of the 1990 Act.

8. The insertion of a new subsection in section 34 is in response to the Committee’s comment 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. The Scottish Government considers that it is appropriate to place a restriction on the maximum penalties which may be imposed for offences created by an order under section 34 and the new subsection achieves that.

Choice of procedure

9. The choice of procedure is unchanged. An order made under section 34 remains subject to the affirmative procedure, for the reasons given in the original Delegated Powers Memorandum.

Section 48(1) – Power to make supplementary etc. provision

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish statutory instrument
Parliamentary procedure: Affirmative procedure of the Scottish Parliament

Provision

10. Section 48(1) enables the Scottish Ministers to make, by regulations, 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.
Regulations under section 48(1) may make provision facilitating, prohibiting or restricting
the issuing of more than one sanction in respect of the same relevant offence arising out of
the same act or omission. Regulations which make such provision may also make
modifications of sections 37 (effect of a fixed penalty notice on criminal proceedings) and
44 (effect of a compliance notice on criminal proceedings) as the Scottish Ministers
consider necessary or expedient in connection with the provision.

11. At Stage 2, a new subsection was added to section 48 (section 48(3A)). This
narrows the power so that regulations cannot modify section 37 or 44 in such a way that a
person may be convicted of a relevant offence arising out of an act or omission if the
person has been issued with both a fixed penalty notice and a compliance notice and has
paid the fixed penalty and complied with the compliance notice (or has not complied with
the compliance notice but, by virtue of section 43(2), does not commit an offence in
relation to it).

Reason for taking power

12. The reason for taking the power, as introduced, to make regulations under section
48 was to enable supplementary, incidental or consequential provision to be made to
ensure that the administrative sanctions scheme works effectively in practice. The power
enables provision to be made to facilitate, prohibit or restrict the issuing of more than one
sanction so that the technical detail of the relationship between different sanctions can be
set out in regulations after consultation with Food Standards Scotland. It enables provision
to be made modifying section 37 or 44 (on the effect of an administrative sanction on
criminal proceedings) so that there is flexibility to modify those sections if this is
necessary to enable more than one sanction to be issued in respect of the same offence.

13. The insertion of the new subsection in section 48 is in response to one of the
Committee’s recommendation (found at paragraph 33 of the Committee’s 34th Report of
2014). The recommendation was that, if the power is exercised to modify section 37 or 44
(in connection with a provision which facilitates, prohibits or restricts the issuing of more
than one sanction), the power should not enable a “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”. The new subsection restricts
the power so that it cannot be used to remove the discharge of criminal liability of a person
who has been issued with more than one sanction and has complied with both. There may
be circumstances in which it would be appropriate to issue more than one sanction in
respect of the same offence and it may therefore be appropriate to defer the discharge of
criminal liability until the point of compliance with both sanctions. For that reason, the
power has been restricted to prevent a wholesale removal of the discharge of criminal
liability in circumstances in which a person complies with the sanctions issued to the
person but the power has been left wide enough to enable a deferral of the discharge of
criminal liability until the point of compliance with both sanctions (if two sanctions are
issued).

14. The Scottish Government has given further thought to whether this goes far enough to
meet the policy aim. As the provision currently stands, if a person is issued only with one
administrative sanction (e.g. a fixed penalty notice) and that is complied with, there remains a theoretical possibility that the power in section 48 could still be exercised to make provision which provides for the removal of the discharge of criminal liability under sections 37 and 44, resulting in the position that criminal proceedings could still be brought.

15. In order to address this theoretical position and to better reflect the intended policy, the Scottish Government is currently considering a further amendment at Stage 3 of the Bill to make it clear that the power in section 48(3) may only be exercised in relation to a case in which a person has been issued with both a fixed penalty notice and a compliance notice in relation to the same relevant offence arising out of the same act or omission. This will result in the position that alterations to the discharge of criminal liability are enabled only in circumstances where the regulations provide for situations where a person receives both a fixed penalty notice and a compliance notice in relation to the same relevant offence arising out of the same act or omission.

**Choice of procedure**

16. At Stage 2, the procedure for regulations under section 48(1) which modify section 37 or 44 was changed from negative procedure to affirmative procedure. This responds to the Committee’s recommendation that regulations which modify primary legislation be made subject to a higher level of scrutiny.

**Section 48(5) – Power to modify section 48(4)**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Regulations made by Scottish statutory instrument  
**Parliamentary procedure:** Affirmative procedure of the Scottish Parliament

**Provision**

17. Section 48(5) enables the Scottish Ministers to make regulations modifying subsection (4). Subsection (4) provides a definition of the term “another sanction” for the purposes of subsection (2)(a) (which is about making provision facilitating, prohibiting or restricting the issuing of an administrative sanction in cases where “another sanction” has been issued or imposed).

18. The only change at Stage 2 was to change the parliamentary procedure from negative to affirmative procedure.

**Reason for taking power**

19. The power was taken so that the meaning of “another sanction” could be modified to take account of developments in the law and lessons learned once the administrative sanctions scheme is in place.
Choice of procedure

20. At Stage 2, the procedure was changed from negative to affirmative procedure in response to the Committee’s recommendation that regulations which modify primary legislation be made subject to a higher level of scrutiny.

Other relevant amendments

21. The amendments described above are amendments which substantially alter provisions conferring powers to make subordinate legislation. In addition, the Committee will wish to note that there was also an amendment to remove the order making power in section 52, in consequence of the insertion of definitions of “food” and “animal feeding stuffs”, and an amendment of section 50 to require the Lord Advocate to publish any guidance issued to enforcement authorities (subject to certain exemptions).
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