



The Scottish Parliament
Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

68th Report, 2014 (Session 4)

Food (Scotland) Bill as amended at stage 2

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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)
John Mason
Margaret McCulloch
Stuart McMillan (Deputy Convener)
John Scott
Stewart Stevenson

Committee Clerking Team:

Clerk to the Committee

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Food (Scotland) Bill as amended at stage 2

The Committee reports to the Parliament as follows—

INTRODUCTION

1. At its meeting on 2 December 2014, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Food (Scotland) Bill as amended at Stage 2 (“the Bill”)¹. The Committee submits this report to the Parliament under Rule 9.7.9 of Standing Orders.
2. The Bill was introduced by the then Cabinet Secretary for Health and Wellbeing on Thursday 13 March 2014. It makes provision for the establishment of Food Standards Scotland, a new food advisory body which will provide advice to the Scottish Ministers on food, taking over from the Food Standards Agency. The Bill also makes provision and creates offences in relation to food information law. Finally, the Bill establishes a new regime of administrative sanctions for food-related offences. Two types of sanction are created: compliance notices and fixed penalty notices.
3. The Scottish Government has provided the Parliament with a supplementary memorandum on the delegated powers provisions in the Bill, in advance of Stage 3 of the Bill (“the SDPM”²).
4. The Committee reported on certain matters in relation to the delegated powers provisions in the Bill at Stage 1 in its [34th report of 2014](#).

¹ Food (Scotland) Bill [as amended at Stage 2] available at:

[http://www.scottish.parliament.uk/S4_Bills/Food%20\(Scotland\)%20Bill/b48as4-stage2-amend.pdf](http://www.scottish.parliament.uk/S4_Bills/Food%20(Scotland)%20Bill/b48as4-stage2-amend.pdf)

² Food (Scotland) Bill Supplementary Delegated Powers Memorandum available at:

http://www.scottish.parliament.uk/S4_Bills/Food_Bill_-_SDPM.pdf

DELEGATED POWERS PROVISIONS

5. There are no new powers in the Bill after Stage 2 however several powers have been amended. The Committee considered each of the substantially amended delegated powers provisions.

6. After Stage 2, the Committee reports that it does not need to draw the attention of the Parliament to the substantially amended delegated powers provisions listed below, and that it is content with the Parliamentary procedure to which they are subject:

- Section 34 – Regulation of animal feeding stuffs
- Section 48(5) – Power to modify section 48(4)
- Section 50 – power to issue guidance to enforcement authorities

7. The Committee's comments and, where appropriate, recommendations on the remaining substantially altered delegated power in the Bill as amended are detailed below.

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

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

8. 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.

9. 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 imposed or issued. The converse provision may also be made i.e. provision facilitating, prohibiting or restricting the imposition of another sanction in circumstances 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. In its original Delegated Powers Memorandum, the Scottish Government explained that the power was being taken in order to allow for the relationship between the different types of administrative sanction to be managed effectively through the making of subordinate legislation.

10. Section 48(3) provides that regulations made under section 48(1) which contain the provision 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 refer to the effect of, respectively, a fixed penalty notice and a compliance notice on criminal proceedings and provide specifically that where a person has been issued with either type of notice with which they have complied, that person may not at any time be convicted of the relevant offence in respect of the relevant act or omission.

11. In its Stage 1 report, the Committee voiced concerns about the provision in section 48(3). The Committee considered that the provision could enable the Scottish Ministers to modify the two sections in the Bill which protect an individual from criminal conviction where that person has been issued with an administrative – i.e. non-criminal – sanction with which they have complied in full. The Committee considered that the power in section 48(3) could be exercised so as to remove the discharge of criminal liability which sections 37 and 44 provide, with effect that a person could remain liable to criminal proceedings *despite* compliance with an administrative sanction being rendered in full. The Committee was not persuaded by the Scottish Government’s argument that it did not intend to use the power in section 48(3) in this way, and recommended that the power be restricted at Stage 2 so as to prevent its exercise in the manner described.

12. The power in section 48(3) has been amended at Stage 2. As it now stands, the power may not be exercised so as to remove the discharge of criminal liability provided for in sections 37 and 44 but only in circumstances where a person who has been issued with both a fixed penalty notice and a compliance notice and has paid the penalty under the fixed penalty notice and has complied with the requirements of the compliance notice.

13. The Committee considers that the power as amended at Stage 2, while going some of the way towards meeting the Committee’s concern as expressed in the Stage 1 report, does not address that concern in full. It remains possible, having regard to the terms of the power as amended, for the power to be exercised so as to remove the discharge of criminal liability as provided for in sections 37 and 44 in circumstances where an individual has been issued with only *one* administrative sanction with which that person has complied. The Committee considers that the power ought to be restricted further, so as to provide that it may not be exercised so as to remove the discharge of criminal liability as provided for in sections 37 and 44 in circumstances where a person has been issued with not only both administrative sanctions, but where a person has been issued with one administrative sanction and has complied with it in full.

14. In that regard, the Committee notes that the SDPM states that the Scottish Government is considering a further amendment to section 48 to clarify its intended policy for Stage 3 and to address what it refers to as the “theoretical possibility” that the power may be exercised so as to remove a discharge of criminal liability where only one administrative sanction has been issued and complied with.

15. The Committee draws the provision in section 48(3) as amended at Stage 2 to the attention of the Parliament. The Committee notes that the power prevents the amendment of sections 37 and 44 in a way that removes the discharge of criminal liability provided for by those sections but only in circumstances where an individual has been served with *both* a compliance

notice and a fixed penalty notice and has complied with both. The Committee considers that the power as amended leaves open the possibility that the power in section 48(3) could still be used to remove the discharge of criminal liability in sections 37 and 44 in circumstances where a person has been issued with *only one* administrative sanction. The Committee calls on the Scottish Government to consider a further amendment to the Bill for Stage 3 so as to remove that possibility.

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