



The Scottish Parliament  
Pàrlamaid na h-Alba

# **Delegated Powers and Law Reform Committee**

## **72nd Report, 2014 (Session 4)**

### **Subordinate Legislation**

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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:**

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**Delegated Powers and Law Reform Committee**

**72nd Report, 2014 (Session 4)**

**Subordinate Legislation**

The Committee reports to the Parliament as follows—

1. At its meeting on 2 December 2014, the Committee agreed to draw the attention of the Parliament to the following—

Marriage Between Persons of Different Sexes (Prescribed Bodies)  
(Scotland) Regulations 2014 (SSI 2014/304);

Food Information (Scotland) Regulations 2014 (SSI 2014/312).

2. The Committee's recommendations in relation to the above instruments are set out below.

3. The Committee determined that it did not need to draw the Parliament's attention to the instruments which are set out at the end of this report.

**POINTS RAISED: INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE**

**[Marriage Between Persons of Different Sexes \(Prescribed Bodies\) \(Scotland\) Regulations 2014 \(SSI 2014/304\)](#) (*Equal Opportunities Committee*)**

4. These Regulations prescribe the religious or belief bodies whose ministers, clergymen, pastors, priests or other celebrants are entitled to solemnise marriage between persons of different sexes, without the need to be registered as approved celebrants. The bodies are prescribed in the Schedule. The Church of Scotland are not prescribed in these regulations as their ministers or deacons are entitled to solemnise marriage between persons of different sexes (under section 8(1)(a)(i) of the Marriage (S.) Act 1977).

5. The regulations come into force on 16 December 2014.

6. In considering the document, the Committee asked the Scottish Government for an explanation of certain matters. The correspondence is reproduced at Annex A.

7. The Committee identified a minor drafting error in the instrument, as follows.

**8. The Committee draws the Regulations to the attention of the Parliament on the general reporting ground, as they contain a minor drafting error. Regulation 2 states that the bodies prescribed for the purposes of 8(1)(a)(ii) of the Marriage (Scotland) Act 1977 are listed in the Schedule, which omits “section”.**

**9. The Committee notes that the minor error will be corrected when the Regulations are next amended for another reason.**

**Food Information (Scotland) Regulations 2014 (SSI 2014/312)** *(Health and Sport Committee)*

10. The principal purpose of the instrument is to provide for the enforcement in Scotland of certain provisions of EU Regulation 1169/2011 on the provision of food information to consumers (“the EU Regulation”). The instrument also provides for certain derogations from the EU Regulation, and implements a number of national measures permitted by the Regulation. Finally it implements certain provisions of Directive 1999/2/EC concerning foods and food ingredients treated with ionising radiation.

11. The instrument revokes and replaces the Food Labelling Regulations 1996 insofar as they apply to Scotland, with effect from 13 December 2014 (with certain exceptions). Consequential amendments and revocations are also made to other instruments relating to food law.

12. The instrument is subject to the negative procedure and, for the most part, comes into force on 13 December 2014. Certain of its provisions come into force on 13 December 2016 and on 13 December 2018, in line with provision made in the EU Regulation.

13. In considering the document, the Committee asked the Scottish Government for an explanation of certain matters. The correspondence is reproduced at Annex B.

14. The Committee considers that the instrument could be clearer in giving effect to the Scottish Government’s stated policy intention, in the following two respects.

**15. The Committee draws the instrument to the Parliament’s attention under reporting ground (h) as:**

- (i) the form or meaning of regulation 5(5) could be clearer. Regulation 5(5) does not clearly give effect to the policy intention that the provisions of the regulation should apply where the relevant ingredient or processing aid is itself a substance or product listed in Annex II of EU Regulation 1169/2011 on the provision of food information to consumers; and**
- (ii) the form or meaning of paragraph 2(a)(iii) of Schedule 5 to the instrument could be clearer. Paragraph 2(a)(iii) substitutes the text “(b) an indication of its maximum alcoholic strength in required form 1, 2 or 3.” in column 2 of the entry relating to the description “low alcohol” in Part I of Schedule 8 to the Food Labelling Regulations 1996. The text which should be substituted is “(b) the drink is marked or labelled with an indication of its maximum alcoholic strength in required form 1, 2 or 3.”. Accordingly paragraph 2(a)(iii) of Schedule 5 does not clearly give effect to the policy intention.**

16. The Committee also identified four minor drafting errors in the instrument, as follows.

**17. The Committee draws the instrument to the Parliament's attention under the general reporting ground as it contains the following minor drafting errors:**

- (i) regulation 2(3) provides that a reference to certain EU provisions in a "regulation" listed in paragraph (4) is a reference to that EU provision as amended from time to time. It should instead provide that a reference to certain EU provisions in a "provision of the Regulations" listed in paragraph (4) is a reference to that EU provision as amended from time to time;**
- (ii) In Part 1 of Schedule 3 to the instrument, in the entry relating to "Article 18(1) (list of ingredient requirements)", the reference in column 2 to "regulation (8)" should be to "regulation 8";**
- (iii) Part 1 of Schedule 4 to the instrument purports to revoke certain provisions of the Miscellaneous Food Additives (Amendment) Regulations 1999. Those Regulations were however revoked in full in 2013 (insofar as they extend to Scotland) and accordingly the purported revocation is of no effect; and**
- (iv) Paragraph 15(b) of Schedule 5 to the instrument inserts a definition of "Regulation 1169/2011" in the Natural Mineral Water, Spring Water and Bottled Drinking Water (Scotland) (No. 2) Regulations 2007. The definition is however unnecessary as Regulation 1169/2011 is not referred to in those Regulations.**

**18. The Committee notes that the errors described in paragraphs 14 and 16(ii), (iii) and (iv) above will be amended at the first appropriate opportunity. Given that the Scottish Government accepts that including references to the Schedules of the instrument as well as to the regulations would have made the intention in regulation 2(3) of the instrument clearer, the Committee suggests that the Scottish Government may wish to take the same opportunity to amend the error described in paragraph 16(i) above.**

## **NO POINTS RAISED**

19. At its meeting on 2 December 2014, the Committee considered the following instruments and determined that it did not need to draw the attention of the Parliament to any of the instruments on any grounds within its remit:

### ***Education and Culture***

Children and Young People (Scotland) Act 2014 (Commencement No. 4) Order 2014 (SSI 2014/314);

Children and Young People (Scotland) Act 2014 (Ancillary Provision) (No. 2) Order 2014 (SSI 2014/315);

Education (Disapplication of section 53B) (Scotland) Regulations 2014 (SSI 2014/318).

### ***Health and Sport***

Public Bodies (Joint Working) (Content of Performance Reports) (Scotland) Regulations 2014 (SSI 2014/326).

### ***Justice***

Public Services Reform (Inspection and Monitoring of Prisons) (Scotland) Order 2014 [draft].

### ***Rural Affairs, Climate Change and Environment***

Smoke Control Areas (Exempted Fireplaces) (Scotland) Order 2014 (SSI 2014/316);

Smoke Control Areas (Authorised Fuels) (Scotland) Regulations 2014 (SSI 2014/317);

Environmental Regulation (Relevant Offences) (Scotland) Order 2014 (SSI 2014/319);

Controlled Waste (Fixed Penalty Notices) (Scotland) Order 2014 (SSI 2014/320);

Litter (Fixed Penalty Notices) (Scotland) Order 2014 (SSI 2014/321);

Environmental Regulation (Liability where Activity Carried Out by Arrangement with Another) (Scotland) Order 2014 (SSI 2014/323);

Environmental Regulation (Significant Environmental Harm) (Scotland) Order 2014 (SSI 2014/324);

Common Agricultural Policy (Cross-Compliance) (Scotland) Regulations 2014 (SSI 2014/325).

**ANNEX A**

**Marriage Between Persons of Different Sexes (Prescribed Bodies) (Scotland) Regulations 2014 (SSI 2014/304)**

**On 17 November 2014 the Scottish Government was asked:**

Regulation 2 states that the bodies prescribed for the purposes of 8(1)(a)(ii) of the Marriage (Scotland) Act 1977 are listed in the Schedule, omitting “section”. Would the Scottish Government propose to amend this error?

**The Scottish Government responded as follows:**

The Scottish Government accept that there is a minor drafting error with the omission of “section” in regulation 2. Despite this error, the meaning of the regulation is clear when read with the preamble which states that “The Scottish Ministers make the following Regulations in exercise of the powers conferred on them by section 8(1)(a)(ii) of the Marriage (Scotland) Act 1977 and all other powers enabling them to do so. In accordance with section 8(1A)(a) of the Marriage (Scotland) Act 1977 the bodies prescribed in regulation 2 have requested the Scottish Ministers to prescribe them.” Given this, we are not of the view that there is doubt caused by this error and therefore will amend regulation 2 when the Regulations are next amended. We anticipate that this will be next year when further bodies may be prescribed.

**ANNEX B**

**Food Information (Scotland) Regulations 2014 (SSI 2014/312)**

**On 20 November 2014 the Scottish Government was asked:**

1. Regulation 2(3) provides for certain references to FIC, or a provision of FIC, to be ambulatory. The references which are ambulatory are those contained “in a *regulation* listed in paragraph (4)”. The list in paragraph (4) however includes provisions of Schedule 1 and Schedule 3, in addition to regulations. We assume that the intention is for the references in the provisions of those Schedules to be ambulatory. Standing the wording of regulation 2(3), does the Scottish Government consider that the regulation is sufficiently clear in achieving that effect? If so, please explain why.

2. (a) Regulation 5(1) provides that a food business operator who offers a relevant non-prepacked food for sale may provide the Article 9(1)(c) particulars (mandatory indication relating to allergens or intolerances) in relation to that food “in any manner that they choose”. Regulation 5(5) however provides that the Article 9(1)(c) particulars “must be provided with a clear reference to” the name of the substance or product in certain circumstances. Is the intention that regulation 5(1) should be subject to or qualified by regulation 5(5)? If so, how is this intention given effect in the regulation?

(b) Under regulation 5(5), the Article 9(1)(c) particulars are to be provided with a clear reference to the name of the substance or product listed in Annex II where “the relevant ingredient or processing aid is *derived from* a substance or product listed in Annex II”, and where the particulars are made available otherwise than by means provided in FIC. Can the Scottish Government explain how the Article 9(1)(c) particulars are to be provided where the relevant ingredient or processing aid is itself listed in Annex II (i.e. not where it is derived from such a substance or product), and where the particulars are made available otherwise than by means provided in FIC?

3. Regulation 8(2) and (4) refers to a product intended for “the ultimate consumer”. Can the Scottish Government explain the intended meaning of “the ultimate consumer” in those provisions, and how the definition is given effect?

4. Regulation 10(d) provides that a person is guilty of an offence if the person fails to comply with regulation 7(1) as read with regulation 7(5). Regulation 7(1) requires a food business operator in certain circumstances to provide the particulars required by Article 9(1)(d) (quantity of certain ingredients) in respect of the ingredients in a product which are meat. Regulation 7(5) makes provision about where those particulars must appear. Regulation 7(4) provides for the method by which the quantity of meat to be specified in the particulars under regulation 7(1) “must be determined”.

Is the intention to provide that an offence is committed where, in providing particulars under regulation 7(1), the quantity of meat is not determined in accordance with regulation 7(4)? If so, and in the absence of the words “regulation 7(1) as read with regulation 7(4)”, can the Scottish Government explain how this intention is given effect in the regulations?

5. In Part 1 of Schedule 3, in the entry relating to “Article 18(1) (list of ingredient requirements)”, does the Scottish Government agree that the reference in column 2 to “regulation (8)” should be to “regulation 8”? If so, is any corrective action proposed? We note in this regard that the text in column 2 aids construction of the specified FIC provision in column 1, and that failure to comply with the specified FIC provision is an offence under regulation 10.

6. Schedule 4, Part 1 purports to revoke certain provisions in the Miscellaneous Food Additives (Amendment) Regulations 1999. These regulations appear already to have been revoked in full (insofar as they extend to Scotland) by the Food Additives, Flavourings, Enzymes and Extraction Solvents (Scotland) Regulations 2013 (SSI 2013/266), regulation 19 and Schedule 5. Does the Scottish Government agree that the 1999 Regulations have been revoked, and if so, what is the effect of the purported revocation in Schedule 4 of this instrument?

7. Schedule 5, paragraph 2(a)(iii) amends column 2 of the entry relating to the description “low alcohol” in Part I of Schedule 8 of the Food Labelling Regulations 1996. It appears that the text to be substituted as new sub-paragraph (b) should be “(b) *The drink is marked or labelled with* an indication of its maximum alcoholic strength in required form 1, 2 or 3.” Does the Scottish Government agree that the text shown in italics here has been omitted in error, and is any corrective action proposed?

8. In Schedule 5, paragraph 8(c), the regulation which is to be omitted from the Specified Sugar Products (Scotland) Regulations 2003 is not specified. Does the Scottish Government agree that there has been a failure to specify the regulation to be omitted, and is any corrective action proposed?

9. Schedule 5, paragraph 15(b) inserts a definition of “Regulation 1169/2011” in the Natural Mineral Water, Spring Water and Bottled Drinking Water (Scotland) (No. 2) Regulations 2007. “Regulation 1169/2011” does not however appear to be referred to in those regulations. Does the Scottish Government agree that the definition has been inserted in error, and is any corrective action proposed?

**The Scottish Government responded as follows:**

We thank the Committee for drawing these matters to our attention.

1. We believe that Regulation 2(3) adequately achieves its effect but note that the inclusion of reference to the schedules after the word “regulation” in line 2 of 2(3) would have made this intention clearer.

2. (a) We believe that the sense and operation of the regulation is clear as the references are cumulative in nature. The reference to the “manner” in 5(1) as (qualified) by the example of “orally” indicates the possible “means” for communicating the allergenic substance in a non-prepacked (and therefore unlabelled) foodstuff in (say) a market stall scenario. It is correct to assume that that 5(1) is qualified by 5(5) which specifies the “details” of the relevant ingredients which require to be communicated.

(b) We agree that a reference to ingredients themselves as well as those derived from a substance or product listed in Annex II would be helpful and an amendment to this effect will be made at the first appropriate opportunity.

3. Regulation 2.-(1) refers to Final consumer and the definition in Regulation (EC) 178/2002, Article 3 (18). This defines ‘Final consumer as the ultimate consumer of a foodstuff who will not use the food as part of any food business operation or activity. Noted that various regulations for which consequential amendments are made use a mix of ‘ultimate’ and ‘final’. Both terms of art are well known in the industry and we do not envisage this causing any difficulty.

4. Article 18 (2) on the name of ingredients as read with Annex VII is a specified FIC provision. I.e. the method of specifying the quantity of meat is the same for a non-prepacked food containing meat as it is for a prepacked food containing meat. In this case, we believe therefore Regulation 10(a) cover the Committee’s point. We believe that the regulation works as while the inclusion of the quantity of meat under 7(4) is linked to 7(1) by narrative but the overt reference in the offence provision i.e. to the failure to properly label that information requires to be adequately linked to 7(1) to ensure that the issue of labelling is clearly identified as the potential offence.

5. We agree that the brackets around the reference to regulation 8 are incorrect and this matter will be amended at the first appropriate opportunity.

6. We agree that this reference is now redundant having been overtaken by an earlier legislative exercise. An appropriate amendment will be made at the first appropriate opportunity.

7. The intention is to apply the same marking or labelling requirements to ‘low alcohol’ as has been used for the other alcohol descriptions. It is accepted that the suggested text would make the matter clearer and an amendment will be made at the first appropriate opportunity.

8. We are not proposing to make an amendment to deal with this issue. It is understood that this matter arose as a technical fault in the instrument laid before the Parliament whereas the instrument made by the Minister contains a reference to regulation “6”. It is understood that the National Archive has agreed to accept a corrective print of the instrument as the version signed by the Minister clearly includes the relevant number.

9. We agree that the inclusion of the definition is redundant and an amendment will be made to rectify this at the first appropriate opportunity.

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