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# **Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh**

## **Agriculture (Retained EU Law and Data) (Scotland) Bill: Stage 1**



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# Contents

<b>Introduction</b>	<b>1</b>
<b>Overview of the Bill</b>	<b>2</b>
<b>Delegated Powers with which the Committee Are Content</b>	<b>3</b>
<b>Matters for Further Consideration</b>	<b>6</b>
<b>Annex: Correspondence with the Scottish Government</b>	<b>18</b>

# Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(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;

(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.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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# Committee Membership



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# Introduction

1. At its meetings on 10 December 2019, 7, 21 and 28 January 2020 and 4 February 2020, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Agriculture (Retained EU Law and Data) (Scotland) Bill ("the Bill") at Stage 1.<sup>i</sup>
2. The Committee first considered the delegated powers in the Bill at its meeting on 10 December 2019 and agreed to write to the Scottish Government with some questions (full correspondence in the Annex).
3. The Committee considered the Scottish Government's response at its meeting on 7 January 2020 and agreed to invite Fergus Ewing MSP, Cabinet Secretary for the Rural Economy to give evidence on the Bill.
4. The Committee took evidence from the Cabinet Secretary on 21 January 2020 and discussed the evidence heard at its meeting on 28 January 2020. A draft report was then considered on 4 February 2020.
5. The Committee submits this report to the lead Committee for the Bill (the Rural Economy and Connectivity Committee) under Rule 9.6.2 of the Standing Orders.
6. The Scottish Government has provided the Parliament with a memorandum on the delegated powers provisions in the Bill.<sup>ii</sup>

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<sup>i</sup> Agriculture (Retained EU Law and Data) (Scotland) Bill, as introduced.

<sup>ii</sup> Agriculture (Retained EU Law and Data) (Scotland) Bill, Delegated Powers Memorandum

# Overview of the Bill

7. This Bill has two broad purposes. The first purpose, as stated in the Policy Memorandum, is to give the Scottish Ministers powers to make regulations which amend or replace parts of the EU Common Agricultural Policy (“CAP”) which will form part of retained EU law when the UK leaves the EU.<sup>iii</sup> The Explanatory Notes to the Bill provide a detailed background to the CAP at paragraphs 5 to 85.<sup>iv</sup> The other purpose of the Bill is to provide for new powers to collect agricultural data. Those powers will replace existing powers in the Agriculture Act 1947.
8. The Scottish Government consulted on the proposals that form this Bill in 2018. The Policy Memorandum sets out the main policy objectives of the Bill as follows:
  - From 1 January 2021, to enable the continued operation of current CAP schemes and policies, but also to allow them to be progressively improved and simplified.
  - From 1 January 2021, to enable pilot projects to be run in order to test out new policy approaches, so as to inform the development of longer term future rural policy.
  - To update the legal mechanism by which agricultural data is collected, reinforcing the principles of the General Data Protection Regulation (GDPR).

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<sup>iii</sup> [Agriculture \(Retained EU Law and Data\) \(Scotland\) Bill, Policy Memorandum](#)

<sup>iv</sup> [Agriculture \(Retained EU Law and Data\) \(Scotland\) Bill, Explanatory Notes](#)

# Delegated Powers with which the Committee Are Content

9. At its meeting on 10 December 2019, the Committee agreed that it was content with the following delegated powers:
- Section 5(1) – Power to modify CAP legislation on public market intervention and private storage aid
  - Section 7(1) – Power to revoke the EU Food Promotion Scheme
  - Section 9(2) – Marketing standards: agricultural sectors
  - Section 12(10) – Defined terms
  - Section 13(2) – Agri-food supply chains: requirement to provide information
  - Section 14(2) – Agricultural activity: requirement to provide information
  - Section 18(1) – Enforcement of information requirements
  - Section 21(1) – Ancillary provision
  - Section 23(2) – Commencement
10. In relation to the powers below, the Committee agreed to seek further information from the Scottish Government. The Committee wrote to the Scottish Government on 10 December 2019 and received a response on 19 December 2019 (the full correspondence can be found in the Annex). The Committee considered this response at its meeting on 7 January 2020 and agreed that, having explored its initial concerns, it was now content with these powers.

## **Section 4(1) – Power to modify financial provision in CAP legislation**

### **Power conferred on: Scottish Ministers**

### **Power exercisable by: Regulations made by Scottish Statutory Instrument**

### **Parliamentary procedure: Affirmative**

#### Provision

11. Section 4(1) provides that the Scottish Ministers may make regulations to modify any provision of the main CAP legislation relating to the setting or determining of ceilings on the amounts of any payments or expenditure for any purpose under the legislation, and relating to the reallocation or transfer of amounts or proportions of such ceilings between or among different purposes under the legislation.

#### Committee Consideration

12. The Delegated Powers Memorandum explains that this power may be required to respond to funding cuts at UK level. How any such cuts would be distributed across



the different aspects of CAP expenditure in Scotland could involve significant policy choices with significant impacts on the individual farmers and crofters depending on their circumstances and the type of payments they receive.

13. The Committee therefore asked the Scottish Government if a statutory consultation requirement would be appropriate.
  14. The Scottish Government responded that it did not consider a statutory consultation appropriate (in relation to this power or those in sections 2(1), 3(1) or 6(1) which are discussed below). The response explained that a full "Stability and Simplicity" consultation had already been conducted and set out the ways in which the Scottish Government would expect to consult in future. It stated that a statutory consultation requirement could be considered a "one size fits all" approach which may not work in all contexts. It stated the need for a flexible approach to consultation.
  15. The Scottish Government's response also explained that certain changes may be required in order for the CAP to continue to operate but that in these cases there may not be any policy options to consult on. An example was provided of "modifying financial provision as part of our response to UK Government budget decisions, and consequent funding allocations". The response also stated that even in such cases the Scottish Government would "seek to engage fully with stakeholders on the purpose and effect of the changes being made".
  16. The Committee is content with the Scottish Government's reasons for not having a statutory consultation requirement. It considers that as this power is subject to affirmative procedure this will allow appropriate scrutiny of the exercise of this power.
17. The Committee therefore reports that it is content with this power in principle, and that it is subject to the affirmative procedure.

## **Section 10(1) – Carcass classification**

**Power conferred on: Scottish Ministers**

**Power exercisable by: Regulations made by Scottish Statutory Instrument**

**Parliamentary procedure: Negative**

Provision

18. Section 10(1) provides that the Scottish Ministers may make regulations about the classification, identification and presentation of bovine, pig and sheep carcasses by slaughterhouses in Scotland ("carcass classification"). These regulations may also include provision about enforcement of the carcass classification requirements.
19. Before making regulations under this section, the Scottish Ministers must consult such persons as they consider are representative of the interests of persons likely to be affected by the regulations (section 10(4)).

Committee Consideration

20. This power enables Scottish Ministers to establish a new regime for the regulation of carcass classification in Scotland after EU withdrawal. The detail of what a new regime might entail is not given in the Bill. Furthermore, the power will enable the creation of offences subject to a maximum penalty of 5 years imprisonment on indictment (1 year on summary conviction) (section 20(4)).
  21. The Committee therefore asked the Scottish Government if the affirmative procedure would be more appropriate.
  22. The Scottish Government responded that there was no intention to use this power at present. If used, it would only be to keep pace with the EU or the rest of the UK. It also stated that the maximum penalty is unlikely to be used, with a level 5 fine being more likely.
  23. The Committee considers that as this power applies to a narrow set of circumstances (contrasting for example with the power in section 2(1) of the Bill which can modify any element of the CAP legislation and with the power in section 8(1) of the Bill which could establish an entirely new regime for marketing standards), it is content that the negative procedure applies.
24. The Committee therefore reports that it is content with this power in principle, and that it is subject to the negative procedure.

# Matters for Further Consideration

25. On the sections considered below, the Committee's concerns were not alleviated by the correspondence with the Scottish Government (see the Annex). The Committee explored these matters further in an evidence session with Fergus Ewing MSP, Cabinet Secretary for Rural Economy on 21 January 2020.
26. In relation to these powers, the Committee would like to draw certain issues to the attention of the lead committee, the Rural Economy and Connectivity Committee, for its consideration.

## **Section 2(1) – Power to simplify or improve CAP legislation**

### **Power conferred on: Scottish Ministers**

### **Power exercisable by: Regulations made by Scottish Statutory Instrument**

### **Parliamentary procedure: Negative**

#### Provision

27. Section 2(1) provides that the Scottish Ministers may make regulations to modify the main CAP legislation (as defined in section 1(2)). It specifies that they may do so only where they consider that such modifications would simplify or improve the operation of the provisions of that legislation.
28. Section 1(2) defines the main CAP legislation as:
  - (a) the Direct Payments Regulation,
  - (b) the Rural Development Regulation,
  - (c) the Horizontal Regulation,
  - (d) the Common Provisions Regulation so far as relating to the operation of the Rural Development Regulation (b),
  - (e) any delegated or implementing EU Commission or EU Council Regulations made under any of Regulations (a) to (d) above,
  - (f) any subordinate legislation implementing or otherwise relating to any of (a) to (e) above.

#### Committee Consideration

29. The Committee considered that there was potential for disagreement over whether a particular proposed modification would “simplify or improve the operation of the provisions of the legislation” and that this could potentially enable significant changes to be made to the main CAP legislation.
30. The power covers the whole of the main CAP legislation, which ranges over many subject areas, and the power can be used to make changes to any aspect of this legislation. The Committee was therefore concerned that the power could be

exercised in ways that have a very significant effect on the individuals who receive CAP funding and on the policies delivered through the CAP.

31. In response to written questions from the Committee, the Scottish Government said that this power would only be used to make modest changes that are “predominantly minor in nature”. The Committee considered that this contrasts with the statement on page 1 of the Policy Memorandum that “This Bill is intended to provide the Scottish Ministers with regulation-making powers to amend or replace the ... CAP ... elements of retained EU law in Scotland”, which appeared much wider. The Committee therefore asked in its evidence session with the Cabinet Secretary for further clarity on the intended use of this power.
32. The Cabinet Secretary accepted that there is “a value judgement as to whether one characterises such changes as modest or immodest, or wide or narrow” but he considered that the Bill “defines to a reasonably clear extent the nature of the powers and why they are sought”.
33. Mr Ewing added that the power was deliberately constrained by the wording of section 2(2): “The Scottish Ministers may only make modifications under subsection (1) that they consider would simplify or improve the operation of the provisions of the legislation.” He argued that if the power had been to “simply or improve the legislation” it would have been broad, but in fact it is restricted to improving the “operation” to allow the *process* to be improved, not the policy.
34. The Cabinet Secretary stated that he did not think that the Bill permitted major policy changes while listing some examples of the sort of measures that might be implemented in order to simplify the process:

“...improved mapping; mapping stability during the single application form window; proportionate approaches to penalties; an inspections charter; the standardisation of capital grant rates; improving appeals processing performance; and improving communications to customers about scheme applications so that there is less risk that they are non-compliant”.

Mr Ewing said that each of these measures would cover a large area of technicalities.

35. The Cabinet Secretary re-emphasised that there is a need for Ministers to be able to act quickly and added: “If we cannot, we risk a situation in which farmers and crofters do not get the money to which they are entitled and that Parliament wishes them to get.”
36. John Kerr (Head of the Agricultural Policy Division) added:

“...the types of changes that we envisage making are within the context of something that everybody will still recognise as a support payment to farmers and crofters and to the one or two other land managers in Scotland that receive support that we give, such as forestry planting grants. We need to be able to make the necessary changes in order to continue to have current schemes that operate well. Increasing the number of trees that are planted is an example of something that we might do that is within the current framework of the existing support structure.”

37. The Committee also questioned the Cabinet Secretary about the potential risk that a future Government could use the powers to make substantial changes, though this is not what the current Government envisage.
38. The Cabinet Secretary responded that flexibility is needed given the remaining unknowns around Brexit and any successor of his would also need such flexibility. He also made reference to the scrutiny process that exists for subordinate legislation at the Scottish Parliament and that this is greater than the scrutiny attaching to subordinate legislation at Westminster.
39. Mr Ewing stated that “it is important that we should not bind the hands of a future Government” by limiting this power. He said that the power was already drafted in such a way as to avoid giving Ministers “carte blanche” as it can only be used in relation to the “operation” of the legislation.

40. The Committee considers the additional discussion on this power to be helpful in clarifying its scope. It is reassured about the intentions of the current Scottish Government in relation to this power but remains concerned that a future Scottish Government may use this power in more significant ways.
41. The Committee considers that the intended scope of this power could be clearer on the face of the Bill.

42. Given the Committee's concerns about the breadth of this power, it asked the Scottish Government if the affirmative procedure would be more appropriate.

43. The Government's response stated, as discussed above, that:

“it is not intended that it would or could be used to make radical changes to the structure of the CAP or to individual CAP schemes.

Rather, it is expected that the power would be used to make moderate changes to the CAP during the transition period.”

44. The response referred to the simplifications and improvements that were identified in the responses to the “Stability and Simplicity” consultation as examples of what may be brought forward in secondary legislation made under this power and described these as “predominantly minor in nature”.

45. The Committee explored this matter further in its evidence session with the Cabinet Secretary and his officials.

46. David Maclennan (Scottish Government Legal Directorate) responded that “a lot of the exercise of the power is likely to be highly technical in nature”. He stated: “a lot of the simplification improvements are likely to simplify and improve how the legislation works as legislation as opposed to doing anything that will have a massive effect on the ground” and that therefore a higher level of procedure would not be merited.

47. John Kerr (Head of the Agricultural Policy Division) added:

“...there are quite a lot of technical things that we could improve with regard to the way in which the schemes are run from a housekeeping perspective, and it would not necessarily be of significant value to stakeholders to engage with that. We might not want to tie up time with the additional requirements that would be afforded to the use of the affirmative procedure if there is no merit in doing so.”

48. The Committee asked if the affirmative procedure may produce negative effects. Mr Kerr said that it could because it might “add significant time to the process, which could constrain how the process works.”

49. Mr Kerr also confirmed that the Scottish Government “[does] not intend to bring about significant policy changes in the Bill. That would be a matter for future legislation.”

50. The Committee accepts that much of what is done under this power may be of a “housekeeping” nature and that in these circumstances the negative procedure may be appropriate. However, the Committee considers that this power could also be used to make more significant changes, though this may not be the current Scottish Government’s present intention. In relation to changes with a significant policy impact, the Committee considers the affirmative procedure to be more appropriate.

51. The Committee recommends that consideration is given to having a choice of procedure available in relation to this power so that the negative procedure can be used for “housekeeping” matters and the affirmative procedure can be used when there are policy implications.

52. The Committee notes that this would be similar to the approach taken in relation to the current powers to implement EU law in this area in the European Communities Act 1972.

53. The Committee also asked in relation to the power in section 2(1) whether a statutory consultation would be appropriate.

54. The Scottish Government responded, as outlined in relation to the power in section 4(1) above, that flexibility was required to consult as appropriate in the circumstances and that a statutory requirement could create a restrictive “one size fits all” approach. The response also outlined the ways in which the Scottish Government had already consulted and how it intends to consult in the future.

55. The Committee is content with the Scottish Government’s response in relation to statutory consultation requirements.

56. The stated policy intention is for the power in section 2(1) to be exercised during a transition period of approximately five years (DPM paragraph 36). However, the power in the Bill is unlimited in time. The Committee therefore asked the Scottish Government in its initial letter whether a sunset provision would be appropriate, in line with the policy intention to only use the power until 2024.

57. In its response, the Scottish Government reiterated that its intention is "to have a new long term policy for agriculture in place from 2024". However, the response also stated that:
- "...much remains uncertain, including the length of any transitional period for the purposes of the Withdrawal Agreement (during which EU law will continue to apply for some purposes), and the nature of any long-term UK/EU deal that will apply after that period.
- Given there are still so many unknowns, an end date for these provisions has not been included in the Bill, as there needs to be some flexibility."
58. The Scottish Government was therefore of the view that a sunset provision would not be appropriate, although it did "not intend to rely on the powers in section 2 of the Bill any longer than is absolutely necessary".
59. The Committee pressed this issue in its evidence session with the Cabinet Secretary, asking whether there was any time limit that would be appropriate for the use of this power, or the power in section 6(1) (discussed below).
60. In response the Cabinet Secretary said that he did not believe that a time limit was appropriate, sensible or prudent. He believed it was essential "that we do not put ourselves in the position that ministers have to seek to make primary legislation". Mr Ewing made reference to a "congested" schedule for primary legislation and considered that a requirement to use primary legislation might prevent Ministers from acting with the required speed if various issues arose. He provided examples of circumstances in which Ministers may be required to act quickly such as trade tariffs being imposed which may require subsidies to be changed to compensate or a flood of cheap imports of beef which may require coupling payments to be increased urgently.
61. The Cabinet Secretary also said that the timetable the Government initially set in its *Stability and Simplicity* document in 2018, "envisaged that Brexit would be at a much more advanced stage by this time". He made reference to remaining uncertainties regarding trade and tariffs in particular, which made the timetable uncertain.
62. The Cabinet Secretary stated that there was no current intention to use the powers after 2024 but that he could not "eliminate the possibility that such an eventuality will arise".
63. Mr Ewing added that a sunset clause might be damaging as the future timetable for the implementation of Brexit was still unknown and that some expect it will take beyond 2024. He referred to work by the National Audit Office which "set out very clearly that some matters may take 10 years fully to adjust".
64. The Cabinet Secretary also referred to "vital matters relating to climate change that we need to get on with now". He added that a future administration may take a different view about climate change and be opposed to dealing with it and that such an administration, "could use the fact that we did not have the powers to act quickly to drag its feet and then postpone the implementation of primary legislation".

65. Given the Scottish Government's repeated assertion that it intends not to use the power in section 2(1) any longer than is strictly necessary, the Committee considers that a sunset provision would be in keeping with the policy intention.
  66. The Committee acknowledges that there are remaining uncertainties and that proposed timetables may not be achieved. The Committee would not therefore recommend a sunset provision ending in 2024 as this may not provide the Government with the flexibility it requires.
  67. However, the Committee recommends that a sunset provision extending to a date beyond 2024, but no later than 2030, would be appropriate.
  68. The Committee considers that it would not be proportionate for the Scottish Government to have such a potentially broad power indefinitely and that if the Scottish Government wishes to continue to have such a power, it would be appropriate to seek the renewed approval of the Parliament. This would strike a more appropriate balance between the role of the Parliament as the legislature and the need for the Scottish Government to be able to act quickly through the use of delegated powers during a period of uncertainty.
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69. The Committee also asked the Scottish Government whether, in light of the uncertainty over how the power will be used, and given that the power is not limited in time, if it would be appropriate to insert a requirement on the Scottish Government to report periodically to the Parliament on how the power has been used.
  70. The written response from the Scottish Government stated that "The Scottish Parliament can of course ask Ministers to account for their use of any power in this Bill at any time". While it recognised that "considerable changes are now in motion and that the powers in the Bill are to a degree (and necessarily) general in nature", the Scottish Government did not consider that there should be a statutory duty to report to the Parliament. The response did state that the Scottish Government would "reflect on how we could keep the Parliament informed about developments".
  71. The Committee followed this up in its evidence session with the Cabinet Secretary, asking if he had reflected on how best to keep the Parliament informed.
  72. In response, Mr Ewing outlined the usual methods by which he keeps the Parliament informed and stated his concern that:

"If Acts of Parliament contain numerous ad hoc and, some might say, random measures about reporting to Parliament, future ministers might say that, in the absence of a statutory duty, they should not report to committees. The absence of a duty on a Government to report to Parliament on a particular matter could be abused by that Government."
  73. When the Committee pointed out that others may not be as open or transparent as the Cabinet Secretary and may not be as accommodating of committees, Mr Ewing made reference to his interaction with the Rural Economy and Connectivity (REC) Committee:



“The REC Committee routinely asks us to provide information that it wants. There has to be a reasonable facility for free engagement in practice. That is how it works”.

74. The Cabinet Secretary also pointed out that there would be an opportunity for the Parliament to scrutinise the secondary legislation itself, whether this is subject to negative or affirmative procedure. He again justified the use of negative procedure, stating the need for Committees to prioritise workloads and that they do not want to “overburden themselves with the affirmative procedure”.
75. The Cabinet Secretary added that stage 2 may provide a fuller opportunity to explore this.

76. The Committee is content with the Scottish Government's response and its intention to keep the Parliament informed as it requests through the usual processes.

### **Section 3(1) – Power to provide for the operation of CAP legislation beyond 2020**

#### **Power conferred on: Scottish Ministers**

#### **Power exercisable by: Regulations made by Scottish Statutory Instrument**

#### **Parliamentary procedure: Affirmative**

#### Provision

77. Section 3(1) provides that the Scottish Ministers may make regulations to modify the main CAP legislation for the purpose of securing that its provisions continue to operate in Scotland for one or more years after 2020.
78. This includes the express power to determine, for any year, the level of the “national ceiling” in relation to Scotland (section 3(2)).

#### Committee Consideration

79. As with the power in section 2(1), given that the policy on how to continue the CAP beyond 2020 has not yet been developed, the Committee considered that there was uncertainty about how this power would in fact be used. The Committee also considered that decisions on how to continue the CAP beyond 2020 will involve a significant policy process.
80. These considerations led to a number of written questions to the Scottish Government in relation to this power. Firstly, the Committee asked whether a statutory consultation requirement would be appropriate.
81. The Scottish Government responded, as similarly discussed in relation to the powers in sections 2(1) and 4(1) above, that flexibility was required in relation to the way consultation is undertaken.

82. The Committee is content with the Scottish Government's response in relation to statutory consultation requirements.

83. As in relation to the power in section 2(1), discussed above, the Committee also asked whether it would be appropriate to insert a requirement on the Scottish Government to report periodically to the Parliament on how the power has been used.

84. As above, the Committee explored this issue further in its evidence session with the Cabinet Secretary and is content with the Scottish Government's position on how it would report to the Parliament.

85. Section 3(3)(b) allows the Scottish Ministers, by regulations under section 3(1), to confer functions on any person in connection with, or in connection with the making of, a determination of the annual national ceiling.

86. The Committee asked the Scottish Government on whom functions might be conferred in connection with, or with the making of, a determination and what those functions might be.

87. The Scottish Government responded that new bodies may be created to carry out some of the functions currently exercised by EU bodies and that it may be appropriate to confer some ancillary functions on such a body, such as a duty to provide advice to the Scottish Ministers in respect of a proposed determination. However, the Scottish Government emphasised that "no new decisions have been made on any of those matters".

88. The Committee welcomes this further information and is reassured that the power in section 3(1) is subject to the affirmative procedure. The Committee is therefore content with the Scottish Government's response on this issue.

89. After considering the issues above, the Committee is now content with the power in section 3(1) and that it is subject to the affirmative procedure.

## **Section 6(1) – Power to simplify or improve CAP legislation on aid for fruit and vegetable producer organisations**

### **Power conferred on: Scottish Ministers**

### **Power exercisable by: Regulations made by Scottish Statutory Instrument**

### **Parliamentary procedure: Negative**

### **Provision**

90. Section 6(1) provides that the Scottish Ministers may make regulations that they consider would simplify or improve the operation of legislation governing aid for fruit and vegetable producer organisations (as defined in subsection (3)).
91. Subsection (3) defines “legislation governing aid for fruit and vegetable producer organisations” as:
- (a) Articles 32 to 38 of the CMO Regulation, and
  - (b) the following so far as relating to aid for fruit and vegetable producer organisations—
    - (i) Commission Delegated Regulation (EU) 2017/891 of 13 March 2017 supplementing the CMO Regulation with regard to the fruit and vegetables and processed fruit and vegetables sectors and supplementing the Horizontal Regulation with regard to penalties to be applied in those sectors, and
    - (ii) Commission Implementing Regulation (EU) 2017/892 of 13 March 2017 laying down rules for the application of the CMO Regulation with regard to the fruit and vegetables and processed fruit and vegetables sectors.

#### Committee Consideration

92. The Committee considered that the exercise of this power would principally affect officially recognised Producer Organisations and the growers who are members of these organisations which can apply to receive financial assistance to help increase their competitiveness in the supply chain. The exercise of this power might have a significant impact on them.
93. The Committee therefore asked whether a statutory consultation with this limited and easily identifiable group of stakeholders would be appropriate.
94. For the same reasons as set out in relation to sections 2(1), 3(1) and 4(1), the Scottish Government did not support a statutory consultation requirement. In addition, the Scottish Government referred again to its “Stability and Simplicity” consultation and stated that any simplifications and improvements to the CAP legislation on aid for fruit and vegetable producer organisations “are likely to be of a minor nature and would not therefore justify a further formal consultation”.
95. The Committee is content with the Scottish Government's response in relation to statutory consultation requirements.
96. As discussed in relation to the power in section 2(1), this power is not limited in time, despite the Policy Memorandum stating that the aim is to enable simplification and improvement of this aid scheme by making amendments to retained EU law “during the period up to around 2024”.
97. The Committee therefore asked whether a sunset clause would be appropriate in relation to this power.
98. The Scottish Government's response again referred to the “ongoing uncertainty around the UK’s exit from the EU, what any future relationship with the EU may look

like, and what rules we may have to follow". It considered that this could impact on the Government's intended timetable so flexibility is required to use this power beyond 2024. The Scottish Government added that it did not "intend to rely on the powers in Section 6 of the Bill any longer than is absolutely necessary".

99. As discussed above, the Committee explored the idea of sunset clauses in relation to the powers in section 2(1) and 6(1) in its evidence session with the Cabinet Secretary.

100. The Committee notes that the power in section 6(1) is narrower in scope than the power in section 2(1) as it affects only fruit and vegetable producer organisations. The Committee is particularly concerned about the section 2(1) power but also considers that a sunset provision would be appropriate in relation to section 6(1).

101. The Committee remains of the view that a sunset clause, though one which extends beyond 2024, would be appropriate in relation to the power in section 6(1).

102. As discussed in relation to the power in section 2(1), the Committee considers that a sunset clause extending beyond 2024 could allow the Scottish Government the flexibility it requires, while not leaving this power available indefinitely.

## **Section 8(1) – Marketing standards**

### **Power conferred on: Scottish Ministers**

### **Power exercisable by: Regulations made by Scottish Statutory Instrument**

### **Parliamentary procedure: Negative**

#### Provision

103. Section 8(1) provides that the Scottish Ministers may make regulations in relation to products marketed in Scotland that fall within certain agricultural sectors (as listed in section 9), concerning the standards with which those products must conform. These are known as "marketing standards".

104. The regulations can include, in particular, provision relating to the range of issues set out in section 8(2), such as production methods, grading by weight, size or age, presentation, labelling, packaging, and disposal or use of nonconforming products. The list in section 8(2) is not exclusive.

105. Regulations may also include provision about the enforcement of these standards, including provision about record keeping and provision of information, investigative powers, offences and penalties.

106. Before making regulations under this section, the Scottish Ministers must consult such persons as they consider are representative of the interests of persons likely to be affected by the regulations (section 8(5)).

#### Committee Consideration

107. This power enables the establishment of a new regime for the regulation of marketing standards in Scotland after EU withdrawal. The Committee considered that this might involve significant and politically sensitive policy considerations. The Committee was also concerned that this power could enable radical changes to be made to marketing standards in Scotland, though it acknowledged that this was not the present Government's intention. It was also concerned about this power being able to create offences with a penalty of up to 5 years imprisonment.
108. The Committee asked the Scottish Government whether, with all of this in mind, the affirmative procedure might be more appropriate.
109. The Scottish Government responded that this power would simply enable Scotland to keep pace with other parts of the UK or with the EU. The response also referred to the consultation requirement that exists in relation to this power which, in the Scottish Government's view, "will ensure that there is an opportunity for any significant issues to be aired and addressed".
110. The Scottish Government also indicated that a much lower maximum penalty (a level 5 fine) was expected to be used in practice rather than the high penalties set out in the Bill. This led the Committee, in its evidence session with the Cabinet Secretary, to question whether the Bill should be reframed to reduce the maximum penalties available, thus better reflecting the Scottish Government's stated policy intention.
111. George Burgess (Deputy Director of Food and Drink) said that it would be possible to amend section 20 to constrain it and that this would be considered, but that there was no need to do so. He continued:
- "...the existing marketing standards regulations, which have set the maximum penalty for offences at a level 5 fine, were made under the European Communities Act 1972, which itself allows for maxima of up to two years' imprisonment, an unlimited fine on conviction on indictment and a level 5 fine on summary conviction. Within the freedom that is provided by the 1972 Act, the practice has been to set a much lower level of penalty for breaches of marketing standards, of the sort that we outlined in our letter."
112. Mr Burgess added that there was no record of any prosecution under the marketing standards provisions in at least the last 5 years. When asked why such a high maximum penalty was required if there have been no prosecutions, Mr Burgess responded that this acts as a deterrent.

113. The Committee wishes to draw its consideration of this matter to the attention of the lead committee but it does not wish to make a specific recommendation on this point as it considers this to be an issue of policy.

114. In the evidence session with the Cabinet Secretary, the Committee also explored further whether the affirmative procedure might be considered more appropriate for this power. In response, George Burgess stated:

"...although the powers may appear broad, if we are looking to maintain consistency within the UK and internationally, the room for manoeuvre is much more limited than it might at first seem. In practice, many of the

standards are developed at an international level. Although, in theory, the power could be used to make radical changes, common sense dictates that, in practice, the changes will be rather more limited.”

115. Mr Burgess also pointed to the requirement to consult those who are likely to be affected by any changes and again compared these powers with the existing powers in the European Communities Act 1972. He said that under the 1972 Act there is a choice of affirmative or negative procedure, but that in practice the negative procedure has always been chosen for marketing standards regulations, including for regulations which create offences.
116. The evidence heard by the Committee did not suggest that this power would be used to make a great number of minor changes, nor that it might be needed in circumstances of urgency (unlike, for example, the evidence in relation to section 2(1)).
117. It may be the case that the power will only be used to align the Scottish standards with new standards which are brought in elsewhere, for example in other parts of the UK. However, this could involve significant changes to the current Scottish standards. Whether to align with a particular new standard which is brought in elsewhere in the UK could in itself be a significant policy choice. Similarly, ensuring alignment with standards that have been agreed at an international level could result in significant changes to the current Scottish standards. The Committee also notes that marketing standards is an area of significant public interest.
118. The Committee welcomes the consultation requirement in relation to the delegated power in section 8(1).
119. However, the Committee considers that the negative procedure is not appropriate for a power which could be used to implement an entirely new regime of marketing standards and which could be used to make very significant changes to current marketing standards. Given that the regulations can also be used to create offences with such high maximum penalties, the Committee considers that the higher level of scrutiny afforded by the affirmative procedure would be appropriate.

# Annex: Correspondence with the Scottish Government

## Letter to the Scottish Government

### **Agriculture (Retained EU Law and Data) (Scotland) Bill at Stage 1**

The Delegated Powers and Law Reform Committee considered the above Bill on 10 December 2019 and seeks an explanation of the following matters:

#### **Section 2(1) – Power to simplify or improve CAP legislation**

**Power conferred on: Scottish Ministers**

**Power exercisable by: Regulations made by Scottish Statutory Instrument**

**Parliamentary procedure: Negative**

The Scottish Government has stated clearly that it does not intend to use this power to make major changes (DPM paragraph 26), but this power will be available without limit of time to future governments, whose intentions cannot be known. It could be used to make changes to any aspect of the CAP, with significant effects on individuals who received CAP funding and on the policies delivered through the CAP. How the power will be used is not yet known and therefore cannot be scrutinised at present. The affirmative procedure would enable the Parliament to scrutinise the policies which the power will be used to effect, as and when they have been developed.

- 1. In light of all these factors, would the affirmative procedure be more appropriate?**

The DPM notes that it is essential that stakeholders are fully engaged in the process of making these simplifications and improvements (DPM paragraph 23). The intention of the present Scottish Government to consult is noted (Policy Memorandum paragraphs 31-36). However, this power could be exercised by future Governments to make potentially significant changes without any consultation.

- 1. Would a statutory consultation requirement be appropriate?**

The policy is for this power to be exercised during a transition period of approximately five years (Policy Memorandum paragraph 36), but the power in the Bill is unlimited in time.

- 1. Would a sunset provision be appropriate?**

- 1. In light of the uncertainty over how the power will be used, and given that the power is not limited in time, would it be appropriate to insert a requirement on the Scottish Government to report periodically to the Parliament on how the power has been used?**

#### **Section 3(1) – Power to provide for the operation of CAP legislation beyond 2020**

**Power conferred on: Scottish Ministers**

## **Power exercisable by: Regulations made by Scottish Statutory Instrument**

### **Parliamentary procedure: Affirmative**

The current Scottish Government has stated its intention to consult on the use of this power, and states in the DPM that decisions on how to continue the CAP beyond 2020 will be a significant policy process. This power can be used without limit of time by future governments.

1. **Would a statutory consultation requirement be appropriate?**
1. **In light of the uncertainty over how the power will be used, and given that the power is not limited in time, would it be appropriate to insert a requirement on the Scottish Government to report periodically to the Parliament on how the power has been used?**
1. **On whom might functions be conferred in connection with, or with the making of, a determination? What might those functions be?**

## **Section 4(1) – Power to modify financial provision in CAP legislation**

### **Power conferred on: Scottish Ministers**

## **Power exercisable by: Regulations made by Scottish Statutory Instrument**

### **Parliamentary procedure: Affirmative**

The DPM (paragraphs 36-38) explains that this power may be required to respond to funding cuts at UK level. How any such cuts would be distributed across the different aspects of CAP expenditure in Scotland could involve significant policy choices with significant impacts on the individual farmers and crofters depending on their circumstances and the type of payments they receive.

1. **Would a statutory consultation requirement be appropriate?**

## **Section 6(1) – Power to simplify or improve CAP legislation on aid for fruit and vegetable producer organisations**

### **Power conferred on: Scottish Ministers**

## **Power exercisable by: Regulations made by Scottish Statutory Instrument**

### **Parliamentary procedure: Negative**

The exercise of this power would principally affect an easily identifiable, limited group of stakeholders, and could have significant financial impact on individual growers.

1. **Would a statutory consultation requirement be appropriate?**

This power is not limited in time, despite the Policy Memorandum stating that the aim is to enable simplification and improvement of this aid scheme by making amendments to retained EU law “during the period up to around 2024”.

1. **Would a sunset provision be appropriate?**



## **Section 8(1) – Marketing standards**

**Power conferred on: Scottish Ministers**

**Power exercisable by: Regulations made by Scottish Statutory Instrument**

**Parliamentary procedure: Negative**

This power establishes a new regime for the regulation of marketing standards in Scotland after EU withdrawal. Although this is not the Scottish Government's intention, the power could enable radical changes to be made to marketing standards in Scotland. It also enables the creation of offences with a penalty of up to 5 years imprisonment. Deciding whether or not to replicate changes made at UK level could involve significant and politically sensitive policy considerations to which the Parliament may wish to apply a higher level of scrutiny.

1. **In light of these factors, would the affirmative procedure be more appropriate?**

## **Section 10(1) – Carcass classification**

**Power conferred on: Scottish Ministers**

**Power exercisable by: Regulations made by Scottish Statutory Instrument**

**Parliamentary procedure: Negative**

This power enables Scottish Ministers to establish a new regime for the regulation of carcass classification in Scotland after EU withdrawal. The detail of what a new regime might entail is not given in the Bill. The power can be used to create offences with a penalty of up to 5 years imprisonment.

1. **In light of these factors, would the affirmative procedure be more appropriate?**

I'd be grateful if you could please email your response to the Delegated Powers and Law Reform Committee e-mail address above by 12 noon on Monday 6 January 2020.

Thank you.

Response from the Scottish Government

## **AGRICULTURE (RETAINED EU LAW AND DATA) (SCOTLAND) BILL**

Thank you for your letter on behalf of the Delegated Powers and Law Reform Committee to James Hynd, dated 10 December 2019, which sought further explanation regarding the delegated powers of the above Bill as introduced. An answer to each of the Committee's questions is set out below, with the Committee's questions in bold.

### **Section 2(1) – Power to simplify or improve CAP legislation**

**Power conferred on: Scottish Ministers**

**Power exercisable by: Regulations made by Scottish Statutory Instrument**

**Parliamentary procedure: Negative**

**Question 1: In light of all [the] factors, would the affirmative procedure be more appropriate?**

It is the stated intention of the current Scottish Government that this power would be used to make changes during a transition period for the Scottish CAP in the immediate aftermath of the UK exit from the EU, and that such changes would be restricted to those that could be considered a simplification or improvement of the current CAP rules and regulations. The Stability and Simplification consultation sought to identify, for example, how to reduce the administrative burden through proposals to streamline and synergise some of the Pillar 2 schemes during a transition period. This transition period relates only to our policy on CAP, and is not the same as the transition period agreed by the EU and the UK under the Withdrawal Agreement (which currently ends on 31 December 2020).

The Committee noted this power will be available without limit of time to future governments, and said that it could be used to make changes to any aspect of the CAP, with potentially significant effects on individuals who receive CAP funding and on the policies delivered through the CAP.

It is true of course that a change may be significant to those directly affected, but the power is expressly limited to simplifying or improving the main CAP legislation (so not including common market organisation), and it is not intended that it would or could be used to make radical changes to the structure of the CAP or to individual CAP schemes.

Rather, it is expected that the power would be used to make moderate changes to the CAP during the transition period. This is reflected in the questions asked as part of the “Stability and Simplicity” consultation between 20 June 2018 and 15 August 2018, and in the responses. The simplifications and improvements that were identified in the responses, and which may be brought forward in secondary legislation made under this power, are predominantly minor in nature

Parliamentary time is of course valuable, and it remains our view that negative procedure is both appropriate and proportionate in respect of changes of that kind.

Even so, we thank the Committee for their comments, and will reflect further on them as we consider our approach for this section of the Bill as it progresses through the Scottish Parliament.

**Question 2: Would a statutory consultation required be appropriate?**

The Committee notes that it is the Scottish Government’s intention to fully engage stakeholders in the process of making simplifications and improvements, however it would be possible for a future Government to exercise this power to make changes without consultation.

The Scottish Government aims to make it as easy as possible for those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work. It will consult on proposals unless that is clearly impracticable because for example the matter is urgent, or unnecessary because for example the policy has already been subject to consultation.

The Scottish Government carried out a full “Stability and Simplicity” consultation between 20 June 2018 and 15 August 2018. This consultation included a wide range of questions on a number of areas that could be seen as a simplification or improvement of the CAP legislation. It may not therefore be necessary to consult again on some of those proposals,

as affected stakeholders have had a recent opportunity to contribute to policy development.

The Scottish Government would expect to consult on further 'simplification' changes, and may depending on the circumstances consult again on changes covered by the previous consultation. It would aim to consult in a proportionate manner, having regard for example to the best use of our limited resources, and to the risks of consultation 'fatigue'.

It may be appropriate for example to have only a short focused consultation with a small number of stakeholders on a particular technical change.

It may be appropriate to consider any new proposals through the regular stakeholder engagement through various groups, most notably the Agriculture and Rural

Development Stakeholder Group which includes over 30 stakeholder organisations from across the rural spectrum. A further public consultation might not then add anything to the policy development process.

A statutory requirement to consult may therefore be a 'one size fits all' solution to an issue that is best dealt with in a flexible manner as set out above, that does not deliver any particular new benefit.

Taking account of all these factors, the Scottish Government does not consider at this time that a statutory consultation requirement is needed for this section of the Bill. However we will reflect further on this issue.

### **Question 3: Would a sunset provision be appropriate?**

It is the Scottish Government's intention to have a new long term policy for agriculture in place from 2024. On the 10 January 2019 the Scottish Parliament agreed to establish a stakeholder group, the Farming and Food Production Future Policy Group, to explore and make recommendations on such long term policy.

The Committee notes that the policy intention is for this power to be exercised during a transition period of approximately 5 years, but that the power within the Bill is unlimited in time. It asks if a sunset provision is appropriate.

The Scottish Government considers that much remains uncertain, including the length of any transitional period for the purposes of the Withdrawal Agreement (during which EU law will continue to apply for some purposes), and the nature of any long-term UK/EU deal that will apply after that period.

Given there are still so many unknowns, an end date for these provisions has not been included in the Bill, as there needs to be some flexibility. The Scottish Government do not intend to rely on the powers in section 2 of the Bill any longer than is absolutely necessary.

In light of these factors, we do not feel that a sunset provision would be appropriate for this section.

**Question 4: In light of the uncertainty over how the power will be used, and given that the power is not limited in time, would it be appropriate to insert a requirement on the Scottish Government to report periodically to the Parliament on how the power has been used?**

The Scottish Parliament can of course ask Ministers to account for their use of any power in this Bill at any time.

Even so, the Scottish Government recognises that considerable changes are now in motion, and that the powers in the Bill are to a degree (and necessarily) general in nature.

It does not follow that we consider there should be a legal duty to report periodically, but we will reflect on how we could keep the Parliament informed about developments.

### **Section 3(1) – Power to provide for the operation of CAP legislation beyond 2020**

**Power conferred on: Scottish Ministers**

**Power exercisable by: Regulations made by Scottish Statutory Instrument**

**Parliamentary procedure: Affirmative**

#### **Question 5: Would a statutory consultation requirement be appropriate?**

This section of the Bill is about modifying the main CAP legislation to ensure it continues to operate in Scotland beyond 2020, including the ability to determine a national ceiling for each year.

The Committee notes the intention to consult on the use of this power, and asks if a statutory consultation requirement is appropriate.

The Scottish Government does not consider that it would be, for the reasons set out above in relation to the exercise of the powers in section 2 of the Bill. The continuing uncertainty in relation to process of leaving the EU is again relevant here, and in addition the views of the new UK administration on the arrangements that will (for example) replace the role of the EU Commission are not yet known.

#### **Question 6: In light of the uncertainty over how the power will be used, and given that the power is not limited in time, would it be appropriate to insert a requirement on the Scottish Government to report periodically to the Parliament on how the power has been used?**

The Scottish Government will reflect on this, for the same reasons as set out in respect of the power in section 2 of the Bill.

#### **Question 7: On whom might functions be conferred in connection with, or with the making of, a determination? What might those functions be?**

The Scottish Government expects that significant powers, such as the power to determine a national ceiling, would best be conferred on the Scottish Ministers.

It may be that new bodies are created to carry out, at a national or UK level, some of the functions currently exercised by EU bodies. It may also be appropriate to confer some ancillary functions on such a body, such as a duty to provide advice to the Scottish Ministers in respect of a proposed determination.

The Scottish Government emphasises, however, that no new decisions have been made on any of those matters.

### **Section 4(1) – Power to modify financial provision in CAP legislation**

**Power conferred on: Scottish Ministers**

**Power exercisable by: Regulations made by Scottish Statutory Instrument**

**Parliamentary procedure: Affirmative**

**Question 8: Would a statutory consultation be more appropriate?**

This section of the Bill relates to the power to modify the CAP legislation in relation to financial provisions, including the distribution of funds between pillars and schemes and the ability to cap individual payments.

The Committee notes this power may be required to respond to funding cuts at a UK level, and that any such cuts would be distributed across different aspects of CAP and could involve significant policy choices with significant impacts on individual farmers and crofters depending on circumstances and types of payments they receive. It asks if a statutory consultation requirement would be appropriate

The Scottish Government does not consider that it would be, for the reasons set out above in relation to the exercise of the powers in section 2 of the Bill.

The Scottish Government notes for example that it may be necessary to modify financial provision as part of our response to UK Government budget decisions, and consequent funding allocations. It might be that changes must be made in order for the CAP to continue to operate, so that there are no policy options to consult on. But we would even in that event seek to engage fully with stakeholders on the purpose and effect of the changes being made.

**Section 6(1) – Power to simplify or improve CAP legislation on aid for fruit and vegetable producer organisations**

**Power conferred on: Scottish Ministers**

**Power exercisable by: Regulations made by Scottish Statutory Instrument**

**Parliamentary procedure: Negative**

**Question 9: Would statutory consultation requirement be more appropriate?**

The Committee notes exercise of this power would principally affect an easily identifiable, limited group of stakeholders, and could have a significant impact on individual growers. The Scottish Government agrees that this power principally affects an easily identifiable group of growers; there are three existing Producer Organisations with headquarters in Scotland that receive funding through the Fruit and Vegetables Aid Scheme. The Scottish Government is in regular contact with them about their current operational programmes.

The Scottish Government's "Stability and Simplicity" consultation included a wide range of questions on a number of areas that could be seen as a simplification or improvement of the CAP legislation. Any simplifications and improvements to the CAP legislation on aid for fruit and vegetable producer organisations that may be brought forward are likely to be of a minor nature and would not therefore justify a further formal consultation.

As mentioned in question 2 three groups are taking forward a programme of work to effectively assess the proposals for change identified in the consultation. These groups include stakeholder membership and/or further stakeholder engagement and are in

addition to other regular stakeholder engagement through various groups, such as the Agriculture and Rural Development Stakeholder Group which includes over 30 stakeholder organisations from across the rural spectrum.

Please also see our comments for question 2 on section 2 of the Bill.

Taking account of all these factors, the Scottish Government does not believe a further statutory consultation requirement is appropriate for this section of the Bill.

### **Question 10: Would a sunset clause be appropriate?**

Similar to question 3 the Committee notes this power is not time limited, despite the Policy Memorandum stating that the aim is to enable simplifications and improvements to this aid scheme by making amendments to retained EU law during the period up to around 2024.

It is the Scottish Government's intention to have a new long term policy for agriculture in place from 2024. On 10 January 2019 the Parliament agreed to establish a stakeholder group, the Farming and Food Production Future Policy Group, to explore and make recommendations on such long term policy.

However, the ongoing uncertainty around the UK's exit from the EU, what any future relationship with the EU may look like, and what rules we may have to follow, has the potential to impact on that timetable.

Given there are still so many unknowns, an end date for these provisions has not been included in the Bill, as there needs to be some flexibility. The Scottish Government do not intend to rely on the powers in Section 6 of the Bill any longer than is absolutely necessary.

In light of these factors, we do not feel that a sunset provision would be appropriate for this section.

### **Section 8(1) – Marketing standards**

#### **Power conferred on: Scottish Ministers**

#### **Power exercisable by: Regulations made by Scottish Statutory Instrument**

#### **Parliamentary procedure: Negative**

### **Question 11: In light of these factors, would the affirmative procedure be more appropriate?**

The provisions related to marketing standards are in response to the provisions that were in the UK Agriculture Bill. As set out in the policy memorandum the risk is that Scotland would be adrift compared with England, Wales and Northern Ireland if the provisions in the UK Agriculture Bill, when reintroduced, proceeded. This power will simply enable Scotland to keep pace with other parts of the UK or with the EU.

The Committee notes that radical changes involving significant and sensitive policy considerations could be made under this power, and that the Parliament may therefore wish a higher level of scrutiny. We would note that, unlike the equivalent provisions in the former UK Agriculture Bill, section 8(5) specifically requires consultation with persons likely to be affected by the regulations before they are made. This will ensure that there is an opportunity for any significant issues to be aired and addressed.

The Committee notes that offences can be created with a maximum penalty of 5 years imprisonment on conviction on indictment. While that is true (and is a consequence of the provisions in section 20 applying generally to all offence-creating provisions in the Bill), in practice the maximum penalties for offences are likely to be at a considerably lower level. Under the existing marketing standards regulations, for example the Marketing of Horticultural Produce (Scotland) Regulations 2009, the Eggs and Chicks (Scotland) (No. 2) Regulations 2008, the Beef and Veal Labelling (Scotland) Regulations 2010, the Marketing of Bananas (Scotland) Regulations 2012, the maximum penalty is a level 5 fine on summary conviction. Each of those regulations has been made under negative procedure.

We thank the Committee for their comments on this issue and will reflect further on them as we consider our approach for this section of the Bill as it progresses through the Scottish Parliament.

### **Section 10(1) – Carcass classification**

**Power conferred on: Scottish Ministers**

**Power exercisable by: Regulations made by Scottish Statutory Instrument**

**Parliamentary procedure: Negative**

**Question 12: In light of these factors, would the affirmative procedure be more appropriate?**

Similar to question 11 this will simply enable Scotland to keep pace with other parts of the UK or the EU. At this stage there is no proposal anywhere in the UK to changes to carcass classification legislation.

The Committee notes that offences can be created with a maximum penalty of 5 years imprisonment on conviction on indictment. While that is true (and is a consequence of the provisions in section 20 applying generally to all offence-creating provisions in the Bill), in practice the maximum penalties for offences are likely to be at a considerably lower level. Under the existing carcass classification regulations, the Beef and Pig Carcase Classification (Scotland) Regulations 2010, the maximum penalty for most offences is a level 5 fine on summary conviction – the only exceptions being offences related to misleading marks on beef and pig carcasses, for which an unlimited fine may be imposed on conviction on indictment. Those regulations were made under negative procedure.

We thank the Committee for their comments on this issue and will reflect further on them as we consider our approach for this section of the Bill as it progresses through the Scottish Parliament.

