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

Good Food Nation (Scotland) Bill: Stage 1



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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.



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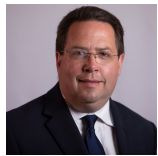
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Introduction

1. At its meetings on 16 November 2021 and 18 January 2022, the Delegated Powers and Law Reform Committee considered the delegated powers contained in the Good Food Nation (Scotland) Bill (“the Bill”) at Stage 1.ⁱ
2. The Committee submits this report to the lead Committee for the Bill under Rule 9.6.2 of Standing Orders.

ⁱ The Bill as introduced is available [here](#)

Overview of the Bill

3. This Scottish Government Bill was introduced by the Cabinet Secretary for Rural Affairs and Islands, Mairi Gougeon MSP, on 7 October 2021. The lead committee is the Rural Affairs, Islands and Natural Environment Committee.
4. The Bill was created to support the ambition of the Scottish Government that Scotland becomes a 'Good Food Nation'. The Scottish Government has a vision that by 2025 Scotland will be "a Good Food Nation, where people from every walk of life take pride and pleasure in, and benefit from, the food they produce, buy, cook, serve, and eat each day."
5. The purpose of the Bill is to provide for the Scottish Ministers and certain other public authorities (referred to in the Bill as "relevant authorities") to produce good food nation plans and to make provision as to the effect of those plans, namely that the Scottish Ministers and specified public bodies must have regard to the plans when exercising certain functions. These plans will set out main outcomes, indicators and policies in relation to food-related issues. Food-related issues is defined in section 13 of the Bill which is referred to in further detail below.
6. The Bill has 18 sections and is contained within six sub-headings. It makes provision as follows:
 - National good food nation plan (sections 1 to 6) - contains provisions on the requirement for Scottish Ministers to produce a national good food nation plan and for the preparation, effect, and the reporting, review and revision of the plan. Section 1 of the Bill provides that the plan must set out:
 - the main outcomes in relation to food-related issues which the Scottish Ministers want to be achieved in relation to Scotland;
 - indicators or other measures by which progress in achieving the outcomes may be assessed; and
 - the policies which the Scottish Ministers intend to pursue in order to secure the achievement of the outcomes.
 - Good food nation plans of public bodies (sections 7 to 12) - contains provisions on the requirement for relevant authorities to produce a good food nation plan and for the preparation, effect, and the reporting, review and revision of the plans of health boards, local authorities and specified public authorities.
 - Interpretation (sections 13 and 14) - contains provisions on the interpretation of key terms. This includes "food-related issues" which is defined with reference to the definitions of "food" and "food matter" contained in the Food (Scotland) Act 2015. The definition of food is consistent with European legislation and with the interpretation of "food" set out in various sections of schedule 5 of the Scotland Act 1998. Food matter is any matter connected with health which may arise in relation to the consumption of food, or other interests of consumers in relation to food.
 - Ancillary provision (section 15) – provides for the Scottish Ministers to be able to make by regulations certain changes they consider appropriate for the purposes of, in connection with or for giving full effect to the Bill (once it has become an Act) or any provision made under it.

- Regulation-making powers (section 16) - provides for the regulation-making powers conferred on the Scottish Ministers by the Bill to include certain powers and to make different provision for different purposes.
- Commencement and short title (sections 17 and 18) - sets out the provisions regarding commencement and the short title of the Bill.

Delegated Powers

7. The Bill confers seven powers to make subordinate legislation on the Scottish Ministers. The Scottish Government has prepared a Delegated Powers Memorandum which sets out the reasoning for taking the delegated powers in the Bill and the parliamentary scrutiny procedure that has been chosen.ⁱⁱ
8. At its meeting on 16 November 2021, the Committee was content with the following delegated powers:
 - Section 3(3) – Power for Scottish Ministers to modify the list of international instruments in section 3(2) which require to be considered in the preparation of the national good food nation plan
 - Section 7(3)(b) – Power to specify the period in which an additional public authority specified under section 7(2)(c) is required to publish a good food nation plan
 - Section 15 – Power to make ancillary provision in relation to the Bill
 - Section 17(2) – Power to commence provisions.
9. It did, however agree to write to the Scottish Government to raise questions in relation to the following regulation-making powers:
 - Section 4 – Power to specify functions or descriptions of functions (as regards the effects of national good food nation plans)
 - Section 10 – Power to specify functions and descriptions of functions (as regards the effect of the good food nation plans)
 - Section 7(2)(c) – Power to specify additional public authorities, thus requiring the authorities to produce plans.
10. On receipt of the response from the Scottish Government, the Committee reconsidered these regulation-making powers at its meeting on 18 January 2022.
11. A copy of all correspondence can be found in the **Annex**.
12. The issues considered by the Committee in relation to these powers, together with its recommendations, are set out below.

Section 4 – Power to specify functions or descriptions of functions (as regards the effects of national good food nation plans)

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Section 10 - Power to specify functions and descriptions of functions (as regards

ii The Delegated Powers Memorandum is available [here](#)

the effect of the good food nation plans)

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provisions

13. Section 4 of the Bill provides that the Scottish Ministers must, when exercising a specified function or a function falling within a specified description, have regard to the national good food nation plan.
14. Section 10 of the Bill provides that relevant authorities must have regard to their good food nation plan when they are exercising a function specified in regulations. This includes functions falling within a specified description.
15. Section 14 of the Bill provides that “specified” means specified in regulations made by the Scottish Ministers. This means that functions referred to in sections 4 and 10, or the description within which they fall, will be specified in regulations.

Committee consideration

16. In relation to these powers, the Committee asked the Scottish Government why all functions or descriptions of functions are to be specified by way of subordinate legislation.
17. In its response, the Scottish government stated that they consider the proposed approach to be advantageous in that it will allow for consultation with stakeholders and the public on any draft secondary legislation specifying the functions. It highlighted that this would provide an additional opportunity consideration of how the duty would work in practice, allow for testing of the relevance and appropriateness of the duty and to help improve understanding of the purpose of the duty and how functions might work in practice. The Scottish Government also stated that this provides flexibility in adding to or amending any measures under sections 4 and 10 of the Bill noting the requirement for less parliamentary time and without requiring further primary legislation, particularly when any such future changes are likely to be relatively minor in terms of scope and effect.
18. The Scottish Government also noted that arguably, using secondary legislation to provide for the duty and functions allows for future proofing of the primary legislation more readily and enables future governments to adapt and augment the approach to being a Good Food Nation. It is further noted that the approach being taken is consistent with the proposals for the Bill that were set out in the consultation and attracted no substantive comment or concern from respondents.
19. The Committee acknowledged, that in its response, the Scottish Government provided an expanded explanation and justification, beyond that contained within the supporting documents to the Bill, as to why all functions or descriptions of functions are to be specified by way of subordinate legislation. The Committee noted that whilst it may have been an option for the Scottish Government to have listed some functions or descriptions of functions on the face of the Bill and specified others by way of subordinate legislation it was acknowledged that the use of subordinate legislation will allow for consultation.

20. **The Committee welcomes the Scottish Government's response and is therefore content with the regulation-making powers as set out in sections 4 and 10 of the Bill.**

Section 7(2)(c) – Power to specify additional public authorities, thus requiring the authorities to produce plans

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provisions

21. Section 7 of the Bill makes provision for the requirement to produce good food nation plans. Subsection 1 imposes a duty on each relevant authority to publish a good food nation plan and subsection 2 provides that a “relevant authority” is a health board, a local authority or a specified public authority.
22. Section 14 provides that “specified” means specified in regulations made by the Scottish Ministers. Section 7(2)(c) therefore confers a power on the Scottish Ministers to specify, by regulations, the public authorities (in addition to health boards and local authorities) who are required to publish a good food nation plan.
23. Section 14 also defines “public authority” and restricts this to a person who is (a) a part of the Scottish Administration, or (b) a Scottish public authority with mixed functions or no reserved functions (within the meaning of the Scotland Act 1998).
24. Section 7(4) and 7(6) set out what the plans must and may contain, and require the relevant authority, in determining the content of its plan, to have regard to the scope for food-related issues to affect outcomes in relation to social and economic wellbeing, the environment, health and economic development.

Committee consideration

25. In its consideration of this power, the Committee asked the Scottish Government why there is no formal requirement to consult with a public authority that is to be specified by regulations considering the resource implications this may have, the circumstances where a public authority may need to be specified promptly, and related to this, whether the affirmative procedure may be more appropriate.
26. The Committee also asked the Scottish Government for further information regarding the potential for duplication to occur particularly where additional public authorities are required to produce these plans. In particular, further clarity was sought as to the formal definition of a good food plan in terms of the intent and scope of such plans and what subordinate legislation may in future specify in this regard.
27. In its response, the Scottish Government noted that the power is intended to provide flexibility so that further authorities can be added in the future. Examples were provided where new relevant bodies may be created through future legislation which might be expected to produce food plans, or where an existing body

increases its role or functions in relation to food. The Scottish Government also highlighted in its response, that a public authority may require to be specified promptly where an authority is giving cause for concern with regard to their policies on food.

28. With regards to the lack of a requirement to consult, the Scottish Government explained that it is intended that the Scottish Ministers and specified public authorities would be expected to collaborate to ensure a joined-up approach to the delivery of Good Food Nation policy in Scotland and that there should be ongoing communication and informal consultation. Notwithstanding this, the Scottish Government noted the Committee's concern about the lack of a formal process of consultation and advised that further advice will be provided in this regard to the Cabinet Secretary for Rural Affairs and Islands for her consideration during the bill process.
29. In relation to the proposed negative procedure, the Scottish Government noted that this procedure is considered appropriate. Further, that there is an expectation that there would be ongoing collaboration, communication and informal consultation between Scottish Ministers and specified public authorities to achieve a joined-up approach to the delivery of a Good Food Nation policy.
30. The Scottish Government also noted that the potential for duplication of work and resources has been raised in ongoing stakeholder engagement. Further, that any additional public authority that was specified would have the benefit of the experience of other public authorities in producing good food nation plans and would be able to use these as the basis for their own plans.
31. In response to the Committee's question on the meaning of "good food", the Scottish Government acknowledged its meaning is "somewhat subjective" meaning different things to different people in a wide range of circumstances. It was further explained that good food can refer to broad range of different positive aspects of food for different people and different areas of policy; for example being healthy and nutritious, environmentally sound and sustainably produced food or locally produced food. It was also noted in recognition of this subjective nature that a broad description has been chosen that seeks to include rather than exclude, so as to allow a broad interpretation and wide reach of policy action. Additionally, it was highlighted that the wording reflects the Scottish Government's Good Food Nation policy which is a broad cross-cutting policy and does not specifically define "good food". No formal definition of "good food" is therefore provided in the Bill.
32. To aid interpretation of the purpose of the good food nation plans and the intended content, the Scottish Government also referred the Committee to provisions in Sections 1 and 7 of the Bill. These sections of the Bill provide that a good food nation plan is a document which must set out the main outcomes which the Scottish Ministers or public authority wish to be achieved in relation to food related issues, as well as the measures by which progress in achieving those outcomes may be assessed, and the policies which will be pursued to achieve those measures. These provisions also set out that a good food nation plan may include other material on food-related issues, and the content of a good food nation plan is to be determined with regard to the scope for food-related issues to affect outcomes relating to social and economic well-being, the environment, health and economic development.
33. The Committee acknowledged the Scottish Government's expectation that there

would be ongoing collaboration, communication and informal consultation between Scottish Ministers and specified public authorities to achieve a joined-up approach to the delivery of a Good Food Nation policy. Notwithstanding these expectations the Committee noted concerns that there are still likely to be resource implications for public authorities in producing such plans and there is no formal provision on the face of the Bill requiring consultation with such authorities prior to these authorities being specified. The Committee considered that while a commitment to engage with stakeholders is an element of good governance, a formal requirement to consult as a pre-requisite to subordinate legislation being made would ensure the appropriate consultation takes place.

34. The Committee also noted that whilst the Scottish Government provides an example of when a public authority may require to be specified promptly, it is not considered that this precludes the use of the affirmative procedure as opposed to the proposed negative procedure. Accordingly, it suggested that the affirmative procedure, providing the highest level of scrutiny, would be appropriate to be used when specifying further public authorities required to produce good food nation plans.

- 35. The Committee welcomes the Scottish Government's acknowledgement that the Committee has concerns regarding the lack of a requirement for formal consultation and that further advice is to be given to the Cabinet Secretary for Rural Affairs and Islands in this regard. Nevertheless, it recommends that the Bill should include a formal provision for consultation with the proposed specified public authorities before any regulations are made particularly considering the subjective nature of "good food" which is not defined in the Bill.**

- 36. In addition, the Committee calls on the Scottish Government to seek to amend the Bill at Stage 2 to make regulations under section 7(2)(c) subject to the affirmative procedure such that there can be enhanced scrutiny of any proposals to specify additional public authorities, thus requiring those authorities to produce good food nation plans.**

Annex

29 November 2021, correspondence from the Committee to the Scottish Government

The Delegated Powers and Law Reform Committee considered the above Bill at its meeting on 16 November 2021 and seeks an explanation of the following matters:

Section 4 – Power to specify functions or descriptions of functions (as regards the effects of national good food nation plans)

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Paragraph 17 of the DPM provides justification for the power on the basis that the specification of functions or descriptions of functions by the Scottish Ministers will require detailed and lengthy lists which it is considered would be more appropriate to be set out in regulations rather than on the face of the Bill. This, states the DPM, also provides flexibility to update the specified functions when the national good food plan is revised or in response to other changes in circumstance.

While the Committee acknowledges the rationale for taking the power given the ‘detailed and lengthy lists’ required, it would be grateful for an explanation of:

1. **why there are no functions or descriptions of functions listed on the face of the Bill; and**
2. **why these are all to be specified by way of subordinate legislation.**

Section 7(2)(c)– Power to specify additional public authorities, thus requiring the authorities to produce plans

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

The DPM, at paragraph 22, explains that good food nation plans will require to be produced by health boards and local authorities. The reason for taking the power is that in future it may be desired to specify additional public authorities to be required to produce these plans. Further, the need to retain flexibility to add specified authorities promptly and amend the specified authorities in response to changing circumstances makes it appropriate that these matters are covered by subordinate legislation.

It is not however clear from the supporting documents to the Bill in what circumstances a public authority may require to be specified promptly.

In relation to the choice of the negative procedure, paragraph 23 of the DPM highlights that the specification of a public authority would not be a significant change but would be

an expansion of the authorities in the public sector required to produce good food nation plans. This, states the DPM, would result in another public authority being required to produce a good food nation plan and to consider it when exercising certain specified functions.

A public authority that is specified under section 7(2)(c) will need to take steps to prepare and publish a good food nation plan. This could be a significant matter for a public authority which may have budgetary, staffing and or other administrative implications. The accompanying [Financial Memorandum](#) refers to these matters in respect of local authorities and health boards.

It is acknowledged that the power is restricted to public authorities, as defined by section 14(1) of the Bill, however there are nevertheless implications as identified above which may arise for a specified authority. Furthermore, there is no formal requirement for the Scottish Ministers to consult with the authority being specified.

It is also noted that the definition of a good food nation plan is relatively limited in the Bill. Furthermore, there appears to be little guidance as to how public authorities might work together in creating such plans to avoid duplication of effort.

The Committee would therefore be grateful for an explanation of:

- 3. why there is no formal requirement to consult a public authority being specified;**
- 4. given the implications outlined above for specified public bodies should they be required to produce good food nation plans and in the absence of an explanation of the circumstances in which a public authority may require to be specified promptly, whether the affirmative procedure would be more appropriate;**
- 5. for clarity as to the intent and scope of such plans in relation to what subordinate legislation may in future specify, what is the formal definition of a good food plan; and**
- 6. given the potential impact on relevant public authorities in relation to the requirement to produce good food nation plans, how might these regulations look to reduce any possible duplication of work and resources?**

Section 10 – Power to specify functions and descriptions of functions (as regards the effect of the good food nation plans)

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Paragraph 24 of the DPM explains that the intention is that this power can be used to specify subject areas in relation to food-related issues within which functions are exercised by the relevant authorities but also to specify functions exercised by the Scottish Ministers which are included in other legislation. Section 4 of the Bill (referred to above) sets out a similar provision for the Scottish Ministers.

Paragraph 25 of the DPM provides justification for the power on the basis that the specification of functions or descriptions of functions by the Scottish Ministers will require

detailed and lengthy lists which it is considered would be more appropriate to be set out in regulations rather than on the face of the Bill. This power also provides flexibility to amend the lists of specified functions when the relevant authorities revise their plans every five years. It is further noted that the need to retain flexibility to update the specified functions in response to changing circumstances makes it appropriate that these matters are provided for in subordinate legislation.

It is acknowledged that it is for the Scottish Government to determine the functions exercised by relevant authorities that will require these authorities to have regard to their good food nation plan. Nevertheless, as with section 4 above, the Committee would be grateful for an explanation of:

7. why there are no functions or descriptions of functions listed on the face of the Bill; and

8. why these are all to be specified by way of subordinate legislation.

I would be grateful if you could please email your response to the Delegated Powers and Law Reform Committee e-mail address above by 5pm on Monday 20 December 2021.

17 December 2021, response from the Scottish Government

Thank you for your letter to James Hynd of 29 November 2021 requesting an explanation on the rationale behind the proposed use of delegated powers in the Good Food Nation Bill. As the Bill manager, I am responding to your request and I trust that the undernoted answers your questions.

Section 4 – Power to specify functions or descriptions of functions (as regards the effects of national good food nation plans)

Section 10 – Power to specify functions and descriptions of functions (as regards the effect of the good food nation plans)

The same response is provided for the questions on these two provisions.

You note in your letter the rationale for taking the power given the detailed and lengthy lists required but ask for further explanation of why there are no functions or descriptions of functions listed on the face of the Bill and why these are all to be specified by way of subordinate legislation.

This approach is advantageous in that it will allow for consultation with stakeholders and the public on any draft secondary legislation specifying the functions. This would provide an additional opportunity consideration of how the duty would work in practice, allow for testing of the relevance and appropriateness of the duty and to help improve understanding of the purpose of the duty and how functions might work in practice. Setting out the specified functions and description of functions in secondary legislation also provides for flexibility in adding to or amending any measures under sections 4 and 10 without having to seek a further opportunity for primary legislation, taking up valuable parliamentary time, particularly when any such future changes are likely to be relatively minor in terms of scope and effect. Arguably, using secondary legislation to provide for the duty and functions allows for future proofing of the primary legislation more readily and enables future governments to adapt and augment the approach to being a Good Food Nation.

The approach being taken is consistent with the proposals for the Bill that were set out in the consultation and attracted no substantive comment or concern from respondents.

Section 7(2)(c)– Power to specify additional public authorities, thus requiring the authorities to produce plans

You asked why there is no formal requirement to consult a public authority which is being specified. The intention is that the Scottish Ministers and specified public authorities would be expected to collaborate to ensure a joined up approach to the delivery of Good Food Nation policy in Scotland. This power is to provide flexibility so that further authorities can be added in the future. The reasons for wishing to add further authorities could be e.g. that this Parliament creates new relevant bodies through legislation in the future which might be expected to produce food plans or an existing body increases its role or functions in relation to food. The intention would be that there would be ongoing communication and informal consultation in both these scenarios. In response to your comment that it is not clear in what circumstances a public authority would need to be specified promptly this may be the case in the scenario where an authority is giving cause for concern with regard to their policies on food. But we note the committee’s concern about the lack of a formal process of consultation in such circumstances and will provide further advice to Cabinet Secretary for Rural Affairs and Islands for her consideration during the bill process.

You asked whether the affirmative procedure might be more appropriate given the implications of producing a good food nation plan. Given that the intention is for a joined up approach to the delivery of Good Food Nation policy there is an expectation that there would be ongoing collaboration, communication and informal consultation between Scottish Ministers and specified public authorities to achieve this aim and the negative procedure is considered to be appropriate. Any additional public authority that was specified would have the benefit of the experience of other public authorities in producing good food nation plans and would be able to use these as the basis for their own plans. This also links to your comment on possible duplication of work and resources, which has also been raised in ongoing stakeholder engagement.

You also asked for a formal definition of a good food nation plan. The Bill provides that a good food nation plan is a document which must set out the main outcomes which the Scottish Ministers or public authority wish to be achieved in relation to food related issues, as well as the measures by which progress in achieving those outcomes may be assessed, and the policies which will be pursued to achieve those measures (sections 1(3) and 7(4)). A good food nation plan may include other material on food-related issues (sections 1(4) and 7(5)), and the content of a good food nation plan is to be determined with regard to the scope for food-related issues to affect outcomes relating to social and economic well-being, the environment, health and economic development (sections 1(5) and 7(6)).

The Bill defines “food-related issue” in Section 13 as:

13 Meaning of “food-related issue”

(1) In this Act, “food-related issue” means—

(a) a food matter, or

(b) any other matter connected with—

(i) the availability of food,

(ii) the production, processing or distribution of food,

(iii) the preparation or service of food for consumers.

(2) In subsection (1), “food” and “food matter” have the same meanings as in the Food (Scotland) Act 2015 (see, respectively, sections 53(1) and 54 of that Act).

We are aware that what “good food” means is also somewhat subjective - it will mean different things to different people in a wide range of circumstances. That is why we have chosen a broad description that seeks to include rather than exclude, so as to allow a broad interpretation and wide reach of policy action. The wording reflects the Scottish Government’s Good Food Nation policy which is a broad cross-cutting policy and does not specifically define “good food”.

Good food can refer to broad range of different positive aspects of food for different people and different areas of policy; for example being healthy and nutritious, environmentally sound and sustainably produced food or locally produced food. For this reason no formal definition of good food is given.

I hope that you find the answers I have provided to your questions helpful.

