

FOOD (SCOTLAND) ACT 2015

EXPLANATORY NOTES

THE ACT

Part 1: Food Standards Scotland

Section 1: Establishment

5. This section establishes Food Standards Scotland (FSS) as a public body. Outwith the scope of this Act, a section 104 order made under the Scotland Act 1998 will designate FSS as a non-ministerial office of the Scottish Administration. That will be the basis of its operational autonomy from the Scottish Ministers. FSS employees will be civil servants.

Section 2: Objectives

6. *Section 2* gives FSS' three objectives: to protect the public from risks arising from consuming food, to improve the diet of the public and to protect consumers' other interests with regards to food. These objectives are deliberately wide in scope. This gives FSS flexibility to be involved in a very broad range of policies, too numerous to try to define. For example FSS, under these objectives could contribute to policies on animal health or to policies which would be marginal to food itself such as food sustainability or food poverty. The general nature of the objectives gives FSS the flexibility and authority to act in relation to a wide range of food matters.

Section 3: General functions

7. The general functions of FSS are designed to focus effort and expertise on delivering the objectives, above. The functions are set out in detail, but in summary they are to develop (and assist public bodies or office-holders to develop) policies, provide advice and assistance to public bodies or office-holders, to keep the public and users of animal feeding stuffs informed about significant matters which concern them about food and feeding stuffs and to monitor the performance of, and to promote best practice by, the authorities who enforce food law. The reference to public bodies and office-holders covers any such body or office-holder; it is not limited to public bodies and office-holders in Scotland e.g. it could include, and therefore enable FSS to work with, UK or European public bodies and office-holders. As with the objectives, these functions are deliberately wide so as not to be overly restrictive. It is intended that FSS as the independent body with policy responsibility in Scotland for food matters is seen to be able to operate without overly prescriptive boundaries.
8. FSS must comply with requests from the Scottish Ministers in respect of its general functions (other than the function of monitoring enforcement authorities) where reasonably practicable. This is designed to provide public assurance both on the operational independence of FSS and that the Scottish Ministers can still influence FSS transparently, in the public interest. In short, this provision allows flexibility in the relationship between the Scottish Government and FSS – allowing them to work

together across food policy areas in a way that does not put the independence of FSS at risk.

Section 4: Governance and accountability

9. This provision requires FSS to work in a proportionate, transparent and accountable manner. This is consistent with its other general duties of sustainable growth, efficiency, effectiveness and economy from the Public Services Reform (Scotland) Act 2010¹.

Section 5: Statement on performance of functions

10. FSS must develop a statement setting out how it will carry out its functions in order to meet its objectives and operate in accordance with section 4. This needs to be approved by the Scottish Ministers (with or without modifications) and laid before the Scottish Parliament. Having a published statement such as this will ensure transparency and public accountability, as it will be clear how FSS is aiming to perform its functions and how it intends to demonstrate that transparently. FSS must review the statement from time to time and consequently may submit a revised statement to the Scottish Ministers for approval and laying before the Scottish Parliament.

Section 6: Number and appointment of members

11. This section sets out the number of members FSS can have – between 4 and 8 - (which includes a chair) and lists certain office-holders who are automatically excluded from being a member. Members are appointed by the Scottish Ministers for such a period and under such terms and conditions as the Scottish Ministers may determine. Members will normally be referred to collectively as “the board”. The Scottish Ministers may assign one of the members to deputise for the chair which includes giving that member the function of chairing the board during any period where a chair has not been appointed. Subsection (3) specifies that during a recruitment process to appoint members, equal opportunity requirements must be followed.

Section 7: Early ending of membership

12. This section sets out situations when a person’s membership of FSS will end. This is to prevent a conflict of interest and to maintain FSS’ independence. For example, membership will end if the person becomes a member of the Scottish Parliament. It is also to enable the Scottish Ministers to end a person’s membership in the circumstances set out in subsection (2).

Section 12: Committees

13. **Section 12** allows FSS to create committees as and when required and to regulate their procedures. These committees could be set up to address specific issues on a case-by-case basis. This approach is more flexible than having a set of statutory committees in place permanently when there was no need for them for most of the time.

Section 13: Validity of things done

14. This section makes clear that where certain circumstances arise, such as a vacancy for a member or the ending of membership for a member, would not affect the validity of things done by FSS.

Section 15: Annual and other reports

15. FSS must publish an annual report on its functions and performance and lay it before the Scottish Parliament who it will be accountable to. As an independent body not

¹ Section 32 of the PSR Act 2010, Public functions: duty to provide information on exercise of functions

accountable to the Scottish Ministers, this section provides for transparency and public accountability on its work and performance.

Section 16: General powers

16. **Section 16** gives FSS a general power to do anything it deems necessary in order to carry out its functions. This provision gives FSS operational independence and wide-ranging autonomy to take action on things like training and direct stakeholder engagement for example. This freedom is subject to two exceptions: moving office premises without approval of the Scottish Ministers and charging for services at a profit. These restrictions will ensure FSS acts in accordance with wider Scottish Administration principles.

Section 17: Application of legislation relating to public bodies

17. **Section 17** inserts reference to FSS into various pieces of primary legislation that confer duties and responsibilities on listed public bodies in Scotland. For example, FSS will have to adhere to the Freedom of Information (Scotland) Act 2002. These individual enactments confer particular duties on FSS, and these are commonly applied to public bodies in Scotland.

Section 18: Serious failure

18. This section provides the Scottish Ministers authority to step-in where there has been a serious failure by FSS to meet its functions. Subsection (2) allows the Scottish Ministers to give FSS directions in order to remedy the failure. If FSS fails to comply with a direction, the Scottish Ministers can end the membership of all of FSS' members and carry out their functions until replacements are appointed.

Section 19: Duty to acquire, compile and keep under review relevant information

19. In order for FSS to carry out its functions – developing policy and giving advice – and come to sound decisions, it has a duty to keep up-to-date with, and review, developments in food matters and animal feeding stuffs matters. It can also carry out or commission research on food matters and on animal feeding stuffs. The meaning of a “food matter” and an “animal feeding stuff matter” is set out in Part 4 of the Act.

Section 20: Observations with a view to obtaining information

20. To assist FSS in carrying out its duty to compile and review information, section 20 allows it to carry out observations, for example, through visits and inspections either routine or unannounced, of businesses in any part of the supply chain in order gain information about food or animal feeding stuffs. This provision extends to all aspects of food production (e.g. farms and production plants), food supply (e.g. wholesale or retail) or food consumption (e.g. food outlets and restaurants).

Section 21: Powers for persons carrying out observations

21. **Section 21** confers powers on a person authorised by FSS to carry out observations. An authorised person can be a FSS employee or any other individual, for example, a local authority employee. The powers are to enter premises, take samples, inspect and copy documents and require the person under observation to provide documents and information. These powers can only be used if it is necessary to carry out an observation. Documents can include the health records of individuals held by the business to assess an individual's suitability for working in the production or supply of food. For example, in order to prevent a public health risk, employers may need to obtain medical certificates about their employees' suitability to carry out certain duties with food. This section does not allow FSS access to the personal health records of an individual.

Section 22: Offences in relation to section 21

22. **Section 22** makes it an offence for an authorised person carrying out an observation to disclose or use information gathered which relates to a trade secret, outwith the course of their duties. This section does not prohibit FSS from using its own powers under section 31 to publish or disclose information. Instead, it is intended to apply to a situation where an authorised person gives a trade secret they have gathered during an observation to a rival business. Subsection (3) makes it an offence for a person to obstruct an authorised person from carrying out their duty to gather information as part of an observation.

Section 23: Setting performance standards

23. FSS may set standards of performance for enforcement authorities (as defined in section 58), which would include FSS itself and local authorities' trading standards and environmental health departments, to enforce "food legislation" (as defined in section 57). Who the enforcement authorities are for particular pieces of food legislation is designated in food legislation (mostly in regulations made by the Scottish Ministers). This provision gives FSS the role of setting the performance standards for the enforcement authorities in respect of all food legislation in Scotland.

Section 24: Reporting own enforcement activities

24. FSS must include information about enforcement action it has taken in its annual report. As an autonomous office in the Scottish Administration, the intention of this provision is for FSS to be open about its own activities.

Section 25: Reporting on enforcement action by others

25. **Section 25** allows FSS to make a report on any enforcement authority's performance and provide it with guidance on how to make improvements and meet any standards set out by FSS. This open and transparent system is designed to provide public assurance on the performance of authorities.

Section 26: Power to request information in relation to enforcement action

26. This section gives FSS the power to require information from enforcement authorities and others to help it make an assessment of the performance of enforcement authorities.

Section 27: Offences in relation to section 26

27. This provision makes it an offence to fail to comply with the requirement to provide information to FSS under section 26. It also makes it an offence to provide or knowingly or recklessly provide false or misleading information. Having an offence of failing to provide information will help ensure FSS has access to all information it needs to be able to assess the performance of enforcement authorities.

Section 28: Powers for persons monitoring enforcement action

28. **Section 28** provides FSS the power to allow an authorised person to enter premises (other than a dwelling house), take samples and copy documents in order to monitor enforcement action. It includes a power to require any person present on the premises to provide assistance to an authorised officer which is reasonably requested. The detail of these powers is set out in the section, and the intention is to help ensure FSS has access to all the information it needs to be able to assess the performance of enforcement authorities. An authorisation issued by FSS must be made in writing and it may contain such limitations or conditions as FSS determine (e.g. hygienic precautions to be taken by an authorised officer in exercising powers under the authorisation).

Section 29: Offences in relation to section 28

29. **Section 29** makes it an offence for an authorised person monitoring enforcement action to disclose information or use information gathered outwith the course of that person's duties. This section does not prohibit FSS from using its own powers under section 31 to publish or disclose information. Instead, it is intended to apply to a situation where an authorised person gives a trade secret they have gathered during monitoring to a rival business. Subsection (3) makes it an offence for a person to obstruct an authorised person from carrying out that person's powers under section 28 to monitor enforcement action. This subsection will help ensure FSS has access to all information it needs to be able to assess the performance of enforcement authorities.

Section 30: Power to issue guidance on control of food-borne diseases

30. FSS may issue guidance to the Scottish Ministers and Scottish public bodies about their general responsibilities for the control and management of food-borne diseases. Any such guidance must be published. This will ensure transparency and public accountability for measures that should be taken to combat food-borne disease. The Scottish Ministers and Scottish public bodies have to have regard to this guidance as required. The section provides that the power to issue guidance includes power to issue revised guidance.

Section 31: Publication and disclosure of advice and information

31. **Section 31** gives FSS freedom to publish information as it sees fit. This power applies to information gathered from observations and monitoring (or obtained from any other source). The intention is for this to safeguard the autonomy of FSS. This power could be used to publish advice and information unrestrained by the Scottish Ministers or other stakeholders, a right to publish or disclose information. This power is subject to that publication or disclosure not being prohibited by another law, not being in contempt of court and not being outweighed by considerations of confidentiality attaching to it.

Section 32: Certain functions of Food Standards Agency ceasing to be exercisable

32. This section provides that all the functions that the Food Standards Agency exercises in or as regards Scotland which are conferred by the 1999 Act cease to be exercisable in Scotland to the extent made possible by the legislative competence of the Scottish Parliament. Equivalent functions will now be conferred on FSS through this Act.