

FOOD STANDARDS AGENCY CONSULTATION

Title: Consultation on New Proposed Enabling Primary Food & Feed Legislation Provisions

CONSULTATION SUMMARY PAGE

Date consultation launched:	Closing date for responses:
Thursday, 28 th February 2013	Wednesday, 22 nd May 2013

Who will this consultation be of most interest to?
Consumers, local authorities and their representatives and professional bodies, and food businesses and their representative bodies.

What is the subject of this consultation?
Proposed enabling provisions for new measures and functions that will give Scottish Ministers, local authorities and the proposed New Food Body powers and tools to support the development of a robust regulatory enforcement strategy.

What is the purpose of this consultation?
To provide the opportunity to comment on proposed new enabling primary legislation provisions which might be included in the Scottish Government's New Food Body Bill ("NFBB"). This consultation, which focuses on potential new powers which have already been identified, is being issued in parallel with the wider NFBB consultation on the scope and functions of the new food body that is being issued by Scottish Government. The NFBB consultation asks a more general question about any additional new statutory powers which the new food body might need in the future.

Responses to this consultation should be sent to:

Name Fiona Bruce Division/Branch Standards & Hygiene Associated Regulatory Policy FOOD STANDARDS AGENCY in SCOTLAND Tel: 01224 285170 Fax: 01221 285128	Postal address: 6 th Floor, St Magnus House, 25 Guild Street Aberdeen AB11 6NJ Email: Fiona.bruce@foodstandards.gsi.gov.uk
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Is a Business & Regulatory Impact Assessment (BRIA) included with this consultation?	Yes <input type="checkbox"/>	No <input checked="" type="checkbox"/> See Annex A for reason.
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Consultation on New Proposed Enabling Primary Food & Feed Legislation Provision

DETAIL OF CONSULTATION

1. It is our intention to take the opportunity to ensure that Scottish Ministers, local authorities and the proposed new food body in Scotland (“NFB”) have adequate powers to support development of a robust, effective and proportionate regulatory enforcement strategy designed to drive up levels of compliance with food and feed law thereby improving consumer protection, while at the same time providing targeted flexible, effective, proportionate measures to reduce unnecessary burdens on business and adhere to the principles of better regulation.
2. This consultation gives stakeholders the opportunity to comment on 3 new proposals which have already been identified for possible inclusion in the NFBB.
3. This consultation is being issued in parallel with the Scottish Government’s consultation on the wider scope and function of the NFB. This consultation also asks for information as to any additional powers which might be required.

Introduction

Background

4. At the request of Scottish Ministers, Professor Jim Scudamore led an independent review to assess the feasibility of establishing a stand-alone Scottish Food Standards Agency including a Scottish meat inspection delivery body.
5. The review recommended that the current FSA in Scotland (FSAS) be transformed into a separate independent body at arm’s length from Scottish Government. Following Cabinet discussions on the 19th June 2012, Scottish Ministers decided to accept all of the Scudamore report recommendations.
6. It is envisaged that to meet this new challenge the new body will develop a robust, effective and proportionate regulatory enforcement strategy to drive up levels of compliance thereby improving consumer protection, whilst also protecting the reputation and viability of compliant businesses.

Proposals

7. It is appropriate to take this opportunity to look at the adequacy of the existing domestic food and feed legislation and in particular to identify any potential gaps which might currently exist which may require changes to primary legislation, and which could be accommodated within the NFBB. The main drivers for this are:-
 - To ensure that Scottish Ministers, local authorities and the NFB have adequate powers and tools to enable the development of a robust regulatory enforcement strategy.
 - The need to align the domestic legislation with the wider better regulation policy objectives contained in the Scottish Government Better Regulation Bill.

- The need to meet EU obligations contained in the Official Food and Feed Control Regulation¹, in particular, the need for effective, proportionate and dissuasive sanctions and the proposed new obligation to ensure that financial penalties applicable to intentional infringements of community law offset the potential economic advantage being sought through the infringement.
- To address representations that the existing FSA in Scotland have already received from stakeholders about perceived gaps in current enforcement provisions.

Key proposal(s):

- a) New primary legislative powers to provide a statutory basis for a scheme to enable Scottish Ministers to make, if agreed in the future, any food business operator display the outcome of an official food inspection.**
- b) New primary legislative powers to enable Scottish Ministers to create, if required, new enforcement sanctions such as administrative penalties or forms of restorative justice in relation to food/feed law.**
- c) New primary legislative powers to enable the detention of any food, where there are reasonable ground to suspect that it does not meet the requirements of food law in relation to food standards or labelling, similar to those which already exist for foods not complying with food safety legislation.**

- a) New primary legislative powers to provide a statutory basis for a scheme to enable Scottish Ministers to make, if agreed in the future, any food business operator display the outcome of an official food inspection.**

Background

8. Food Hygiene Information Schemes are key public health measures and an important commercial driver for businesses to achieve and maintain compliance with existing food hygiene law. They work by providing transparency to consumers about the hygiene standards in food outlets at the time of inspection by authorised enforcement officers. This allows consumers to make informed choices about where they choose to eat or shop for food. This is a powerful tool to influence consumer choice to recognise businesses that meet the existing legal requirements, and provides an additional incentive for those that do not to improve. Any improvements that businesses need to make to get a 'Pass' rating are already required by food law so the scheme does not impose additional financial burdens on businesses.

9. Currently there is a voluntary scheme in place, in Scotland, the Food Hygiene Information Scheme (FHIS), which applies to food outlets that supply food directly to consumers in Scottish Local Authority areas which have agreed to participate in the scheme. Currently 23 out of 32 Local Authorities participate in the FHIS (the remaining 9 authorities have signed up to participate in the future) with results for over 30,000 food outlets currently available throughout Scotland. Each food outlet is

¹ Article 55 of The Official Feed and Food Controls (Scotland) Regulations 2007 (SSI 2007 No. 522)

asked to prominently display a certificate indicating whether it has passed its hygiene inspection or whether improvement is required.

10. Results are designated 'Pass' for businesses that satisfactorily comply with applicable food hygiene legislation or 'Improvement Required' for businesses which fall short of the standard. Businesses that have not been inspected are designated as 'Awaiting Inspection'. Certificates are not issued to a small proportion of establishments that are designated as 'Exempt' because, due to the nature of their operations, they have been assessed as a negligible food safety risk and unlikely to be considered by customers as food premises.

11. All FHIS results, whether displayed by the business or not, are also uploaded by local authorities for publication on the FSA's website. This provides Scottish consumers with useful information on how well food outlets have fared in their last food hygiene inspection enabling them to make informed choices about where they choose to eat or buy their food. Placing this information in the public domain should also help drive up hygiene standards and ensure that a very high proportion of businesses comply with the law.

12. FHIS was developed by the Food Standards Agency in Scotland, consumer organisations, industry and local authorities in response to consumer concern. There is a similar scheme in other parts of the UK – the Food Hygiene Rating Scheme.

13. The current position is that the FHIS in Scotland is voluntary both for Local Authorities to participate in the scheme, and for businesses to display their certificate.

14. There has been a growing support for the need for a mechanism to provide a legal basis to ensure greater transparency and full involvement of all businesses and local authorities in these types of schemes.

15. At this stage, this consultation deals with a proposal to provide suitable enabling powers and to provide a statutory basis for the scheme; the introduction of any new legislative policy would be the subject of further detailed consultation.

Questions asked in this consultation:

Q1: Do you agree that it would be useful to provide enabling powers, so that, following a further consultation, Scottish Ministers might provide regulations requiring the outcomes of official food inspections to be displayed by food business operators and requiring local authorities to participate in such schemes?

Q2: Are you aware of any similar schemes in existence in other countries where improvements in compliance with hygiene rules have been verified after their introduction? If so please provide details of the scheme.

b) New primary legislative powers to enable Scottish Ministers to create, if required, new enforcement sanctions such as administrative penalties or forms of restorative justice in relation to food and feed law?

Background

16. The sanctions currently available in existing food and feed legislation relate exclusively to criminal law provisions and require engagement with the Court system through either summary or solemn procedures.

17. It is Scottish Government justice policy to consider the use of non criminal proceedings where appropriate to release pressure on the criminal justice system.

18. Research² suggests that a flexible, proportionate, risk-based approach which utilises a range of direct measures and other tools in addition to criminal prosecution is needed to improve compliance. Therefore it may be appropriate to extend the range of tools available to enforcers and to provide a non-criminal route to achieve compliance.

19. The Westminster Regulatory Enforcement and Sanctions Act 2008 provides broad brush enabling powers for civil sanctions including fixed monetary penalties; discretionary requirements such as a variable monetary penalty or compliance or remediation notices; stop notices; and enforcement undertakings for reserved measures in Scotland. However, the subject of this Act does not extend to food and feed law in Scotland.

20. At this stage this consultation deals with a proposal to provide suitable enabling powers; the introduction of any new legislative policy would be the subject of further detailed consultation.

Questions asked in this consultation:

Q3: Do you agree that it would be useful to provide enabling provisions in this area?

Q4: If these were to be introduced which areas of food and feed regulatory policy do you think they would be best suited to?

Q5: Do you have any experience of the application of similar provisions in other areas of public policy and if so have you considered them a useful tool?

² Richard Macrory "Regulatory Justice: Making Sanctions Effective". November 2005 and Philip Hampton "Reducing Administrative Burdens: Effective Inspection and Enforcement" 2 March 2005

c) New primary legislative powers to enable the detention of any food, where there are reasonable ground to suspect that it does not meet the requirements of food law in relation to food standards or labelling, similar to those which already exist for foods not complying with food safety legislation.

Background

21. The recent incidents of meat species substitution have provided a heightened focus on food standards enforcement and raised the profile of the importance of this work with consumers.

22. Early stakeholder feedback has identified a strong preference for robust enforcement tools to be available to help ensure there are sufficient deterrents in place to prevent these situations from arising and ensure swift interventions can be applied to prevent accidental or deliberate marketing of such products should non-compliance be detected. The NFBB consultation seeks stakeholders' views on a general question with respect to the possible need for further statutory powers in this area. However, one potential area where primary legislative powers might be required has already been identified during the ongoing investigations and this is described below.

23. Statutory powers already exist to allow enforcement officers to seize and detain foods, pending further investigation where there is a suspicion that the foods do not comply with food safety requirements. However these powers are not available where foods do not pose a public health risk, but may be described or labelled in a misleading way, or where the foods might not comply with the compositional standards. There may be circumstances where breaches of the statutory provisions related to this are suspected, but cannot be confirmed until the results of analytical testing or other investigations have been completed. In these circumstances a power of detention would provide control over any such food while it is under investigation.

Questions asked in this consultation:

Q6: Do you consider that it would be useful to extend the existing powers of authorised officers to detain food, which already exists for foods not complying with food safety requirements, to areas where the food is considered safe but there are doubts over either its composition or its description or labelling?

Q7: In addition to extending the scope of the powers to detain food to areas of food standards and labelling do you consider that there are any situations where powers should also be provided to allow for foods to be seized and destroyed for non-compliance with food standards and labelling rules, similar to those that already exists for foods not meeting food safety requirements?

Consultation Process

24. A 12-week public consultation is being undertaken on the proposals outlined above. All responses received as part of this consultation will be given careful consideration. These will be summarised and published on the FSA website in due course.

25. In advance of this consultation Scottish Government and the FSA arranged an initial scoping meeting with Stakeholders to seek views on the above proposals.

Responses

26. **Responses are required by close 22nd May 2013.** Please state, in your response, whether you are responding as a private individual or on behalf of an organisation/company (including details of any stakeholders your organisation represents).

Publication of consultation responses

27. A summary of responses to this consultation will be published and placed on the Food Standards Agency Scotland website within three months from the close of the consultation process

Thank you on behalf of the Food Standards Agency in Scotland for participating in this public consultation.

Yours faithfully

Fiona Bruce

Standards & Hygiene Associated Regulatory Policy
Food Standards Agency in Scotland

Enclosed

Annex A: Standard Consultation Information

Annex B: List of interested parties

Queries

1. If you have any queries relating to this consultation please contact the person named on page 1, who will be able to respond to your questions.

Publication of personal data and confidentiality of responses

2. In accordance with the FSA principle of openness, our office in St Magnus House in Aberdeen will hold a copy of the completed consultation. The FSA will also publish a summary of responses, which may include full name. Disclosure of any other personal data would be made only upon request for the full consultation response. If you do not want this information to be released, please complete and return the Publication of Personal Data form, which is on the website at <http://www.food.gov.uk/multimedia/worddocs/dataprotection.doc>. Return of this form does not mean that we will treat your response to the consultation as confidential, just your personal data.
3. In accordance with the provisions of Freedom of Information Act 2000/Environmental Information Regulations 2004, all information contained in your response may be subject to publication or disclosure. If you consider that some of the information provided in your response should not be disclosed, you should indicate the information concerned, request that it is not disclosed and explain what harm you consider would result from disclosure. The final decision on whether the information should be withheld rests with the FSA. However, we will take into account your views when making this decision.
4. Any automatic confidentiality disclaimer generated by your IT system will not be considered as such a request unless you specifically include a request, with an explanation, in the main text of your response.

Further information

5. A list of interested parties to whom this letter is being sent appears in Annex B. Please feel free to pass this document to any other interested parties, or send us their full contact details and we will arrange for a copy to be sent to them direct.
6. Please let us know if you paper copies of the consultation documents or of anything specified under '**Other relevant documents**'.
7. This consultation has been prepared in accordance with HM Government Code of Practice on Consultation, available at: <http://www.berr.gov.uk/files/file47158.pdf>
The Consultation Criteria from that Code should be included in each consultation and they are listed below:

The Seven Consultation Criteria

Criterion 1 — When to consult

Formal consultation should take place at a stage when there is scope to influence the policy outcome.

Criterion 2 — Duration of consultation exercises

Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

Criterion 3 — Clarity of scope and impact

Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

Criterion 4 — Accessibility of consultation exercises

Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

Criterion 5 — The burden of consultation

Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

Criterion 6 — Responsiveness of consultation exercises

Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

Criterion 7 — Capacity to consult

Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

8. The Code of Practice states that an Impact Assessment should normally be published alongside a formal consultation. We have not produced a Business & Regulatory Impact Assessment for this proposal because the subject of this consultation does not have any impact at this stage. The purpose of this consultation is simply to obtain views of stakeholders about the merits of providing Scottish Ministers with new primary enabling provisions which may confer new powers on the new food body and local authorities in the future. An impact assessment will be produced, as required, should any of the new enabling powers be proposed to be adopted in the future.
9. For details about the consultation process (not about the content of this consultation) please contact: [Food Standards Agency Consultation Co-ordinator](#), 2nd floor, Aviation House, 125 Kingsway, London, WC2B 6NH. Tel: 020 7276 8140.

Comments on the consultation process itself

10. We are interested in what you thought of this consultation and would therefore welcome your general feedback on both the consultation package and overall consultation process. If you would like to help us improve the quality of future consultations, please feel free to share your thoughts with us by using the Consultation Feedback Questionnaire at <http://www.food.gov.uk/multimedia/worddocs/consultfeedback.doc>
11. If you would like to be included on future Food Standards Agency consultations on other topics, please advise us of those subject areas that you might be specifically interested in by using the Consultation Feedback Questionnaire at <http://www.food.gov.uk/multimedia/worddocs/consultfeedback.doc>. The questionnaire can also be used to update us about your existing contact details.

List of organisations consulted

Aberdeen City Council
Aberdeenshire Council
Academy of Medical Royal Colleges and Faculties in Scotland
Agricultural Industries Confederation (AIC)
Angus Council
Arbroath Fish Processors Association
Argyll & Bute Council
Association for the Study of Obesity
Association of Independent Meat Suppliers
Association of Meat Inspectors
Association of Scottish Shellfish Growers
Aynsley - Green Consulting (Former Children's Commissioner for England)
Barkers Highland Beef and Stirling Farmers Market (Also Chair of SAFM)
BASC
British Association for the Study of Community Dentistry
British Dietetic Association
British Heart Foundation
British Hospitality Association
British Meat Processors Association
British Retail Consortium
British Society of Animal Science
British Soft Drinks Association
British Trout
British Veterinary Association
British Veterinary Association Scottish Branch
Caroline Walker Trust
Cefas
Centre for Epidemiology and Biostatistics
Centre for Public Health - Nutrition Research
Citizens Advice Scotland
City of Edinburgh Council
Clackmannanshire Council
Comhairle nan Eilean Siar
Community Composting Network
Community Food and Health
Consumer Focus Scotland
Convention of Scottish Local Authorities
CPAG (Child Poverty Action Group) in Scotland
Crofting Commission
Crown Office & Procurator Fiscals Service
Dairy UK (Scotland)
Diabetes UK
Dumfries & Galloway Council
Dundee City Council
East Ayrshire Council
East Dunbartonshire Council
East Lothian Council
East Renfrewshire Council

Edinburgh Scientific Services
Education Scotland
Equality and Human Rights Commission
Europa
Faculty of Public Health
Falkirk Council
Federation of Chefs Scotland
Federation of City Farms and Community Gardens
Federation of Scottish Aquaculture Producers
Federation of Small Businesses
Fife Council
Fish Salesman's Association
Food & Health Alliance
Food Ethics Council
Friends of the Earth Scotland
Glasgow Caledonian University
Glasgow City Council
Glencoe Shellfish
Health Protection Scotland
Highland Council
Hugh Pennington
Improve Ltd
Institute of Food Science and Technology
Inverclyde Council
James Hutton Institute
Meat Inspectors
Midlothian Council
Moredun Foundation
National Beef Association Scotland
National Fallen Stock
National Heart Forum
National Sheep Association Scotland
NDR-UK
Neogen
NFUS Scotland
NHS Ayrshire & Arran
NHS Borders
NHS Dumfries and Galloway
NHS Fife
NHS Forth Valley
NHS Grampian
NHS Greater Glasgow and Clyde Board
NHS Health Scotland
NHS Health Scotland
NHS Health Scotland
NHS Highland Health Board
NHS Lanarkshire
NHS Lothian
NHS Orkney Board
NHS Shetland Board

NHS Tayside
NHS Western Isles
North Ayrshire Council
North Lanarkshire Council
Northern Ireland Meat Exporters Association
Orkney Meat Ltd
Orkney Cheese Company Limited
Orkney Meat Ltd
Orkney Islands Council
Perth & Kinross Council
Peter Bowbrick
Peterhead & Fraserburgh Fish Processors Association
Quality Meat Scotland
Queen Margaret University
Renfrewshire Council
Robert Gordon University
Roslin Institute
Rowett Institute of Nutrition and Health
Royal Dick School of Veterinary Studies
Royal Highland Education Trust (RHET)
Royal Environmental Health Institute for Scotland
Royal Society of Public Health
Scotch Whisky Association
Scotland Food and Drink
Scottish Agricultural College
Scottish Agricultural Organisation Society
Scottish Association for Marine Sciences
Scottish Association of Farmers' Markets
Scottish Association of Fish producers Organisation
Scottish Association of Meat Wholesalers
Scottish Bakers
Scottish Beef Association
Scottish Beekeepers Association
Scottish Beer & Pubs Association
Scottish Borders Council
Scottish Cancer Prevention Network
Scottish Countryside Alliance
Scottish Council for Voluntary Organisations
Scottish Crofting Federation
Scottish Egg Producers and Retailers Association
Scottish Egg Producers Retailers Association
Scottish Enterprise
Scottish Environment Protection Agency
Scottish Salmon Producers Organisation
Scottish Farmers Market Partnership
Scottish Federation of Meat Traders' Association
Scottish Fishermen's Federation
Scottish Fishermen's Organisation
Scottish Food and Drink Federation
Scottish Food Enforcement Liaison Committee

Scottish Food Quality Certification Ltd
Scottish Game Dealers and Processors Association
Scottish Grocers' Federation
Scottish Land & Estates
Scottish Licensed Trade Association
Scottish Parliament's Cross Party Group (CPG) on Food
Scottish Pig Producers
Scottish Retail Consortium
Scottish Salmon Producers' Organisation
Scottish Scallop Association
Scottish Shellfish Marketing Group
Scottish United Rural Colleges - SRUC
Scottish White Fish Producers Association
Scottish Wholesale Association
Salmon Net Fishing Association of Scotland
Scottish Women's Rural Institute
Seafish Industry Authority
Seafish/Seafood Scotland
SEPA Corporate Office
SG Regulatory Review Group
Shetland Islands Council
Shetland Agricultural Association
Scottish Natural Heritage
Society of Chief Environmental Health Officers in Scotland
Society of Chief Executive Officers of Environmental Health in Scotland
Society of Chief Officers of Trading Standards in Scotland
Soil Association Scotland
South Ayrshire Council
South Lanarkshire Council
SRUC (was SAC)
SSPCA
Stirling Council
Stornoway Black Pudding Association
Sustain
The Moray Council
The Rowett Institute of Nutrition and Health
The Royal Society of Edinburgh
The Scottish Beekeepers Association
Traditional Ayrshire Dunlop Cheese
Unison
University of Aberdeen
University of Abertay Dundee
University of Dundee
University of Edinburgh
University of Glasgow
University of Stirling
Veterinary Public Health Association
Weight Concern
West Dunbartonshire Council
West Lothian Council

Which? Scotland