Food (Scotland) Bill

Scottish Retail Consortium

1. The Scottish Retail Consortium (SRC) is the lead trade association for retailers operating in Scotland including retailers large and small selling food and non-food and operating on high streets, in rural communities, out of town and online. The SRC represents all of the major food retailers and many of the quick service restaurant chains operating in Scotland. We estimate that our food retail members account for more than 90 per cent of all grocery sales in Scotland.

2. The SRC has responded to a number of requests for views on establishing a new and separate food body in Scotland including the Scottish Government’s consultation A Healthier Scotland, the Consultation on New proposed Enabling Food and Feed legislation Provisions from the Food Standards Agency Scotland (FSAS), and we also gave evidence to the Scudamore Review. We have, however, been disappointed that the points and concerns that we raised in each of these calls for evidence have not been reflected in their conclusions. In the case of the Scudamore Review, we believe the group would have benefitted from a representative with food retail expertise who could have given a different perspective to its work and possibly led to a different conclusion.

3. In addressing those issues on which the Committee has requested information our response will focus on the following:

   A. General principles of the Bill: the merits of creating a separate Scottish food body
   B. Food Information (Part 2, Section 32)
   C. Food Hygiene Information Scheme (Section 33)
   D. Administrative Sanctions (Part 3)

A. General Principles of the Bill

4. The SRC has been consistent in its opposition to the principle of creating a separate Scottish food body, preferring instead to maintain the existing structure and relationship between Food Standards Agency (FSA) UK and FSA Scotland. Our concerns can be summarised by the three following points.

   A.I Consistency in approach, communications and advice across the UK
5. The vast majority of the food sold in Scotland by grocery retailers is by businesses that operate across the UK. Similarly, for many Scottish food manufacturers their biggest market is outside Scotland. Consistent application of food safety is absolutely fundamental to their business, but also for ensuring public safety and consumer confidence. It is our concern that by fragmenting the existing regime, essentially creating two sources of advice and control within the one market where hitherto there has only been the one opinion, there is a danger that decisions taken by one body could conflict with that of the other body. This would be confusing for consumers, who will be exposed to competing messages, and also for Scottish food businesses that could suffer as a consequence.

6. An example could be the direction given to the food sector on action to take in response to a food incident. It is conceivable that the new Scottish food body and FSA UK could reach different conclusions on what action food businesses should take in terms of removing products from the market. Given that consumers are exposed, in large part, to a UK-wide media, they will be exposed to all opinions and react accordingly. It is, therefore, possible that a product deemed acceptable for sale by the new food body will still be affected if the advice from FSA UK is different. This is further complicated by the fact that FSA UK will remain the competent authority for the UK as a Member State of the EU and thus responsible for demonstrating that the necessary food safety measures have been followed. Food companies are, therefore, required to adopt those measures proposed by the FSA UK.

7. Another example is the power provided to FSS under Section 30 of the Bill, which allows FSS to develop and publish guidance on food borne illnesses. This raises the possibility of divergence in messaging between Scotland and the rest of the UK, or indeed potentially a different focus on what the priorities are. We know this from the difficulty of embedding relatively simple messages such as not washing poultry to reduce the risk of campylobacter.

8. We also have concerns, which we raise in detail below, about the divergent approach to the enforcement of food labelling. With two separate food bodies, we could have the situation where products are removed from sale in Scotland but not in the rest of the UK because the Bill, as currently drafted, doesn’t provide any provision to suspend action to withdraw in Scotland pending an appeal. Such a situation would send contradictory signals to consumers and would be logistically very burdensome for retailers.

A.II Ensuring the interests of food businesses in Scotland are recognised in future regulation
9. The overwhelming majority of legislation and controls on food operate at a European Union (EU) level where discussions on the development and implementation of that legislation are undertaken by the Member States. Whilst FSA Scotland has historically played an important role within Scotland, it is clear to Scottish food businesses that the main decisions that will continue to affect them will be taken at an EU level where it is the UK, and not Scotland, which is recognised as the Member State. Therefore, it is unclear how Scottish food interests will be recognised given that FSA UK will continue to represent the EU in negotiations on new regulations in Brussels whilst Scotland will have no representation on the FSA UK Board.

A.III Denuding existing resources by replication and undermining economies of scale

10. Finally, we are concerned that operating a separate food body in Scotland which is, essentially, designed to replicate the same functions of the FSA UK, will denude current resources through duplicated and increased operational costs whilst diluting the expertise and experience currently concentrated in FSA UK.

11. Whilst we accept there may be some issues of specific health or commercial importance to Scotland, more general food safety issues such as contaminants, microbiological issues and improvements in hygiene are common to the UK. Indeed, the recent horsemeat issue is an excellent example of how interconnected supply chains means that there will rarely be a Scottish, but rather UK and EU wide response to food incidents. It is our view that it makes little sense, particularly given current pressures on public finance, to duplicate work and lose economies of scale.

12. If the new body is established we believe that it is incredibly important that a robust protocol on ways of working is agreed to mitigate the problems outlined above, which have the potential to damage both consumer trust and Scottish food businesses. The development of that protocol needs to fully involve Scottish food retailers who will be able to bring invaluable experience and expertise to discussions. The protocol should also be transparent, so all parties from consumers to food businesses know what to expect from both FSS and FSA UK and that food safety issues are correctly prioritised, based on clear evidence and with resources maximised.

B. Food Information (Part 2, Section 32)

13. Section 15B creates a new power for authorised officers to issue a notice to detain food which contravenes food information law.
14. We do not support this provision as currently drafted. We consider it a disproportionate and an unnecessary extension of power, particularly given that there is no right to suspend detention pending an appeal, and believe that it is not justified where the issue is not one of food safety.

15. It is incorrect to justify the measures, as has been outlined in the Policy Memorandum, on the basis of the horsemeat incident. That was a problem of food fraud and controls that occurred earlier in the supply chain. All the retailers affected had labelled those products in good faith based on the clear specification they had given to their suppliers. Retailers know how important consumer trust is and would never jeopardise this by intentionally mislabelling a product. Indeed, in those cases where they were affected they took swift action, on their own volition, to remove these products. It is naïve in the extreme to suggest the incident would not have happened if these proposed measures were in place. This was fraud arising in the supply chain and by its nature the final labeller of the product was also defrauded and unaware that they were being supplied with deficient goods.

16. Retailers have treated the horsemeat incident with utmost seriousness and taken a number of proactive steps in the aftermath such as reviewing auditing of suppliers, targeted testing and shortening supply chains. These are measures that will tackle fraud, they do not affect the clear specification the retailer gives to their suppliers which is then reflected in the label on the final product.

17. Our concern is that a misguided justification has led to the development of a heavy-handed approach to tackling mislabelling, and one that does not fit with the Scottish Government’s commitment to better regulation. The major problem is the apparent inability of a food business to challenge the enforcing officer when they order products to be removed from sale. Elsewhere in the UK, the regulatory framework allows for a suspension of a similar notice whilst a review of the evidence is undertaken. This is a more proportionate and sensible approach for issues not concerning food safety. Our experience over the years of challenges by local enforcement officers is one where, in the vast majority of cases, it is actually the retailer’s interpretation of labelling legislation that turns out, ultimately, to be correct. We also note that the implementation of the new Food Information to Consumers Regulation will add to the complexity of this issue. An automatic withdrawal of products based on the judgement of a single enforcing officer which could be incorrect, or inconsistent with the approach of other enforcing authorities, could lead to unnecessary gaps on shelves, undermining consumer confidence and unfairly penalising businesses.
18. Therefore, if the Scottish Parliament is minded to support the provisions under Section 32 of the Bill, we suggest that suitable safeguards are considered to ensure that businesses are not disproportionately overburdened or that consumer confidence is unnecessarily undermined. This should include appropriate challenge from a food business to the original notice with the right to suspend action until the issue is resolved. Another very important safeguard would be to ensure that these provisions be considered in scope of the Primary Authority arrangements which are provided for through the Regulatory Reform (Scotland) Act 2014. We would suggest that the role of Primary Authority in this regard should be acknowledged in both legislation and guidance. Government policy has clearly acknowledged that Primary Authority has a key role to play, especially in times of challenging economic circumstances and public finance restraint, in ensuring that those businesses that have a PA relationship are not subjected to unnecessary enforcement or inspection decisions where there has been clear and assured advice from their PA on the issue in question. This is particularly important given Section 15C of the Bill: Duty to report non-compliance with food information law.

19. Finally, one last point we make about the practical ramifications of this section of the Bill is that any food that cannot be sold should be disposed of responsibly. For example, during the recent horsemeat incident our members ensured that any withdrawn products were used for energy production to limit the environmental impact of the waste. At other times it might be possible to re-package the product or use it in an alternative waste stream such as animal feed. Retailers have the appropriate infrastructure to deal with these situations and as they have a proven record in removing non-compliant products it is unnecessary for the new body to be given these powers.

**C. Food Hygiene Scheme (Section 33)**

20. We note the Bill will introduce the primary powers to introduce a mandatory food hygiene scheme. We would commend the approach of the Welsh Government who introduced a mandatory scheme in 2013. The Welsh Government, working with FSA Wales worked closely with enforcers and businesses to develop appropriate regulations and pragmatic guidance to them to ensure an effective introduction of the scheme. A similar approach which focuses on the key priority of ensuring compliance rather than enforcement is recommended.

**D. Administrative Sanctions (Part 3)**

23. As a point of principle the SRC does not support the imposition of fixed penalties and sanctioning in general terms. We believe that better regulation means securing compliance through a risk, evidence and advice based
approach. Fixed penalties can lead to a tick box approach to enforcement whereby businesses are reluctant to seek advice, a greater number of penalties are imposed for minor infringements and rogue retailers accept an administrative penalty as one of the costs of doing business their way.

24. Justice is about fairness, equity, evidence and proof, not just administrative expedience and cost. We are concerned that the introduction of fixed penalties could shift the burden of proof away from the enforcer having to prove that the retailer has infringed the regulations towards the retailer proving that it has not. A business accused of a breach of regulation should always be allowed to have its day in court to defend itself. Indeed the standard of proof required for a fixed penalty to be served could inevitably be lower than that required if a court hears an alleged offence. We note that the Explanatory Notes make clear that the standard of proof – i.e. beyond reasonable doubt or on the balance of probability – is to be set by regulations.

25. Like the provisions on labelling enforcement, again we see an important role for Primary Authority with regards to any enforcement action, be that fixed penalty or compliance notices. Primary Authority would act as an important check and safeguard on any enforcement action but would also ensure that there was consistency in enforcement across all 32 local authorities.

26. Furthermore, it should also be made clear that the notice should be served not just on ‘the person’ (e.g. store manager) but it should also be sent to a nominated person within the company’s headquarters. Although the Primary Authority should have been consulted on and authorised any fixed penalty or compliance notice prior to its being issued, the PA should also be notified that a notice has been served.

Scottish Retail Consortium
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