

Comments on the Food Hygiene Rating Bill as introduced

1. I am Dr Richard Hyde and I am an Assistant Professor of Law at the University of Nottingham. My research focuses on food and consumer protection, and I have written a number of pieces regarding this. I am currently completing a book on the regulatory response to food-borne illness, and I believe that a hygiene rating scheme can make a positive contribution to such efforts.
2. I make the following comments on the detailed provisions of the bill to assist the committee in their scrutiny of the provisions.
3. Clause 2(3)(g) – it may be worth considering whether the information accompanying the notification should also set out the penalties for failure to comply with the obligations in clauses 7 and 8. The sub-clause would therefore read “an explanation of the effect of section 6 and of the duties under sections 7 and 8 and of the penalties for failure to comply with such duties, and.”
4. Clause 5(2) – a decision to edit replies or refuse to send a reply to the Food Standards Agency will be amenable to judicial review on normal grounds. However, it may be appropriate to include wording to make clear that the requirement that the decision be reasonable be placed within the statute to make clear to those making the decision that their power to edit or refuse is limited.
5. Clause 6(2)(a) – ‘change of ownership of the establishment’ might be a little unclear; it is not clear whether the approval would be terminated if the corporate owner of the premises remained the same but the ownership of the shares of the corporate owner changed hands. The approval would clearly be terminated if the business was sold by way of asset sale. The definition of establishment in Regulation 853/2004 has been considered by the High Court of England and Wales in *Allan Rich Seafoods v Lincoln Magistrates’ Court* [2009] EWHC 3391 (Admin). A firm conclusion was not expressed about whether a share sale rendered premises a different ‘establishment’ for the purposes of the approval provisions in Regulation 853/2004 (see paragraph [46]). Might it be better to include “(d) there is a change of ownership of the food business operator” as a further circumstance where the hygiene rating becomes invalid, particularly if a change in ownership and/or control can have the effect of altering the score allocated on account of the management of food hygiene issues.
6. Clause 7(2) – As a corollary to the choice given to a food business regarding the display of ratings should there be an offence of displaying multiple valid hygiene ratings, because the clause provides that they “may choose which of the two stickers to display” but there is seemingly no sanction if they choose to display both.
7. Clause 8(2)(b) – It may be better to make the second limb of the test of ‘relevant employee’ an objective test rather than being wholly subjective. Redrafting Clause 8(2)(b) as “in the reasonable opinion of a person in the position of the operator of the establishment...” would ensure that an operator could not argue that whilst a reasonable person would foresee that the employee would be subject to the request for oral information he or she had not, and therefore not be guilty of the offence under clause 10(3) because the employee who failed to provide information was not a relevant employee. A food business would remain protected by the due diligence defence in clause 10.
8. Clause 10 – it may be worth considering whether an employee who intentionally provides false information in response to a request should be guilty of an offence,

even if the food business can take advantage of the due diligence offence provided for by clause 10(4).

9. Clause 10(6) – In the Food Hygiene Rating Wales Act it is made explicit that it is not an offence to 'alter, deface or otherwise tamper with' a rating sticker in the process of removing it. Consideration should be given to the introduction of similar wording into the draft bill.
10. Clause 14(3) – the review should specifically include a review of enforcement, and particularly the operation of clauses 10 and 11, and particularly whether the fixed penalty provisions are working (and whether the offences to which they apply should be expanded to include, inter alia, those set out in section 10(3)).
11. Clause 16 – in the definition of 'food hygiene rating' replace 'that section' with 'section 1.' This would aid clarity particularly for businesses unfamiliar with the reading of statutes.
12. If the committee requires anything they should not hesitate to ask.

Richard Hyde, 10/12/2014