
Report To:	Education and Communities Committee	Date:	10 March 2015
Report By:	Corporate Director Education, Communities and Organisational Development	Report No:	EDUCOM/25/15/MM
Contact Officer:	Martin McNab	Contact No:	2426
Subject:	Food Safety and Health & Safety Enforcement Policies		

1.0 PURPOSE

- 1.1 To seek Committee approval for a new Food Safety & Standards Enforcement Policy
- 1.2 To seek Committee approval for a new Workplace Health & Safety Enforcement Policy

2.0 SUMMARY

- 2.1 In June 2012 the Committee approved an updated Food Safety Enforcement Policy covering the enforcement arrangements for the implementation of the Food Standard Agency's Cross Contamination Guidance. As reported at the time this involved a significant change in the Council's inspection programme over a period of up to three years and changes to the way officers would enforce the law related to Food Safety & Standards.
- 2.2 The Food & Health Team of Safer & Inclusive Communities completed the programme to implement the guidance ahead of time in July 2014 as a result of which it is now necessary to revise the Enforcement Policy.
- 2.3 At the same time significant changes were made to the national policy relating to the enforcement of Health and Safety at Work with the Launch of the National Local Authority Enforcement Code. The implementation of the code has brought about a need to revise our Workplace Safety Enforcement Policy to bring it into line with the national requirements.

3.0 RECOMMENDATIONS

- 3.1 That the Committee approves the new Food Safety & Standards Enforcement Policy.
- 3.2 That the Committee approves the new Workplace Safety Enforcement Policy.

4.0 BACKGROUND

- 4.1 Safer & Inclusive Communities enforces a plethora of legislation. In general the enforcement of the vast majority of that legislation does not require separate policies provided we adhere to the five principles of better regulation:

Proportionality

Regulators should intervene only when necessary. Remedies should be appropriate to the risk posed, and costs identified and minimised.

Accountability

Regulators should be able to justify decisions and be subject to public scrutiny.

Consistency

Government rules and standards must be joined up and implemented fairly.

Transparency

Regulators should be open, and keep regulations simple and user-friendly.

Targeting

Regulation should be focused on the problem and minimise side effects.

- 4.2 There are however exceptions to this. The enforcement of Food Safety & Standards legislation is subject to specific audit by the Food Standards Agency (shortly to be replaced by Food Standards Scotland). The framework upon which this audit is based requires a number of specific policies including an enforcement policy. The resumption of a risk based inspection programme following the conclusion of a specific enforcement drive to implement the FSA's Cross Contamination Guidance also requires a restatement of the Authority's general policy replacing the specific policy required to implement that programme.
- 4.3 The revised Food Safety & Standards Enforcement Policy is attached as Appendix 1. As well as restating the general approach to the enforcement of this legislation, the policy also takes account of recent experience in the use of new enforcement tools including Remedial Action Notices.
- 4.4 The launch of the National Local Authority Enforcement Code for Health and Safety at Work in 2014 has required Safer & Inclusive Communities to revise its strategy for the enforcement of the law in this area. This has been done by the development of a specific Service Plan and by the new Workplace Safety Enforcement Policy attached at Appendix 2. The new code included a number of measures which we now need to consider, including revisions to the sectors considered to be priorities for enforcement and the introduction of the Independent Regulatory Review Panel.

5.0 PROPOSALS

- 5.1 That the Committee approves the Food Safety & Standards Enforcement Policy and the Workplace Safety Enforcement Policy.

6.0 IMPLICATIONS

6.1 Financial Implications

There are no financial implications.

6.2 Legal Implications

There are no legal implications.

6.3 Human Resources Implications

There are no implications for Human Resources.

6.4 Equalities Implications

Enforcement of all legislation is intended to be fair, proportionate and transparent and as such should be fully in line with our obligations to consider and promote equalities.

6.5 Repopulation Implications

There are no implications for repopulation.

7.0 CONSULTATIONS

7.1 There have been no formal consultations for these policies but feedback from businesses in the sectors affected is always considered when developing approaches to enforcement.

8.0 LIST OF BACKGROUND PAPERS

8.1 Safer & Inclusive Communities Food safety Enforcement Policy – Education & Communities Committee 12 June 2012.

Consultation on Proposals for a National Local Authority Enforcement Code – Health and Safety at Work, England, Scotland and Wales – Education & Communities Committee 12 March 2013

Inverclyde Council

Safer & Inclusive Communities

Food Safety & Standards Enforcement Policy

General Enforcement

Inverclyde Council is committed to informal means of ensuring compliance with Food Safety & Standards Legislation where such means are effective. This is in keeping with the Food Law Code of Practice which suggests that unless circumstances indicate a significant risk, officers should initially operate a graduated and educative approach.

Whilst there is a presumption against formal enforcement as an initial outcome in most situations, there will be occasion where the seriousness of the situation or the track record of compliance means it should be considered. Formal enforcement will, therefore, be appropriate in circumstances where businesses consistently fail to respond to informal attempts to secure compliance and/or where there are risks to food safety. Officers will always ensure that enforcement action is reasonable, proportionate, risk-based and consistent with good practice.

Where the contravention appears to relate to a deliberate act to mislead and or defraud consumers and/or other business operators and is considered to be a criminal offence, the graduated approach will not be applied and the default position will be to consider submitting a report to the Procurator Fiscal.

The Principles of Enforcement

The Council's approach to the enforcement of Food Safety & Standards Law is informed by the following principles:

Proportionality - Enforcement action relates to the risks to the public, to the seriousness of any breach and to any actual or potential harm arising from a breach of the law.

Targeting - The regulatory activities of the Council are directed primarily on those whose activities give rise to the most serious risks or where the hazards are least well controlled. As such the Council maintains a risk based inspection programme in line with the requirements of the Food Law Code of Practice.

Consistency - Taking a similar approach in similar circumstances to achieve similar ends. This is not the same as uniformity and requires the exercise of professional judgement and discretion by inspectors.

Transparency - Helping Food Business Operators to understand what is expected of them and what they should expect from the Council as an enforcing authority. It also means making clear to FBOs not only what they have to do, but, where this is relevant, what they don't. This means distinguishing between statutory requirements and advice or guidance about what is good practice but not compulsory. Public transparency also requires that the Council shall publicise successful enforcement actions such as prosecutions.

Formal Approaches

A decision to initiate a formal approach will be taken having regard to all relevant matters including:

- Any reasons offered by the proprietor for the failure to comply;
- Confidence in the Food Business Operator (FBO) to respond to an informal approach;
- Whether requiring training may be a positive way forward;
- Risk(s) to public health associated with non-compliance; and
- Whether there has been a history of general non-compliance with food hygiene legislation.

Further information on the use of formal action is contained in Appendix 1 - **Formal Action Procedure**.

Article 5 Enforcement

Article 5 of Regulation (EC) 852/2004 requires food business operators to put in place, implement and maintain a permanent procedure or procedures based on the HACCP (Hazard Analysis Critical Control Point) principles.

In enforcement of Article 5 the principle will again be towards an informal, educative approach where possible. Enforcement officers will assess the potential food safety hazards within the establishment and confirm that the FBO has suitable controls and monitoring systems in place. If documented procedures are in place, officers will ensure that these are being adhered to by inspection and questioning of key personnel.

In the absence of documented procedures the same principles apply in that officers will satisfy themselves that the FBO has suitable controls and monitoring systems in place. This will be through the use of inspection and investigation techniques and will include observation and questioning of key personnel.

If it becomes apparent that controls and/or monitoring is inadequate at critical points (e.g. no effective means of monitoring cooking temperatures, inadequate separation of raw and ready to eat foods, etc.), the officer will consider if it represents an imminent risk of injury to health requiring immediate action with a HEPN. Service of a RAN may be appropriate for serious matters which don't constitute an imminent risk (further information is contained in Appendix 1- **Formal Action Procedure**.)

As a minimum the inspection will trigger a 3 month re-visit and the inspection report will set out the action required by the FBO to address the missing controls. They will be given access to useful compliance tools to assist them in this e.g. Cooksafe, SFBB, in-house documentation, etc.

Compliance will be re-assessed at the re-visit and if there are still inadequate controls at critical points, formal proceedings may be instigated.

Training Enforcement

Training assessment forms an integral part of the inspection both on general hygiene and, where appropriate, on the maintenance of food safety procedures. Again, a graduated, educative approach will be used initially. Any areas of non-compliance with training requirements will be brought to the FBO's attention in the inspection report. If considering formal action, use may be made of the Training Assessment Form to record evidence.

Improvement notices may be used to require food business operator training where deficiencies with the Article 5 food safety management system is as a result of the FBO's lack of knowledge and awareness.

Documentation

Although important, documentation only represents one aspect of Article 5 compliance. Therefore, although the FBO will be informed of the requirement to document procedures from first contact, officer time initially will be spent in ensuring suitable controls are in place, again using a graduated approach. Once officers are satisfied that suitable controls are in place, they will adopt an informal approach to documentation of procedures and give the FBO sufficient time to put them on paper. This could potentially be as long as the next programmed inspection.

Structural issues including cleanliness

The graduated approach will again be the norm for any structural matters unless these are serious enough to warrant an HEPN or a RAN. An example of the former would be a serious lack of cleaning of food critical areas which could constitute an imminent risk. The latter could include a defective refrigerator which requires to be taken out of use until repaired.

Appendix 1

Safer & Inclusive Communities

Food Safety & Standards

Formal Action – Documented Procedure

Purpose

This procedure deals with the circumstances surrounding the use of formal action to secure compliance with Food Safety & Standards Legislation.

Improvement Notices & Hygiene Improvement Notices

A Hygiene Improvement Notice is a formal enforcement notice requiring action to be taken to remedy contraventions of food hygiene regulations. The notice specifies the contravention, details the remedial action required and specifies a time scale for action to be taken. Businesses may appeal to a Sheriff should they disagree with any or all parts of a notice or believe a notice to be wrongly served. Failure to comply with a Hygiene Improvement Notice is an offence. The notice may be served in any of the following circumstances:

- Where formal action is proportionate to the risk to health;
- Where there is a record of breaches of food hygiene or food processing regulations;
- Where there is reason to believe that an informal approach will be unsuccessful.

In considering whether the service of a Hygiene Improvement Notice is proportionate to the nature of the contraventions found, reference will be made to the relevant sections of the Food Law Code of Practice (Scotland) in addition to the officer's own professional judgement as to the gravity of the offence and the food business operator's previous history of compliance.

Procedures for the service of Improvement Notices are essentially the same as the above these can however be used for certain contraventions of food standards legislation where a Hygiene Improvement Notice cannot.

All cases will be discussed with the Health Protection Manager or Food & Health Team Leader before a final decision is made.

Hygiene Emergency Prohibition Notices & Emergency Prohibition Notices

Where there is considered to be an imminent risk to health arising from the operations or processes of a food business a Hygiene Emergency Prohibition Notice (or an Emergency Prohibition Notice where the risk is chemical rather than microbiological) may be served. The notice prohibits the use or operation of a part or all of the premises of a food business, a process or processes carried out or the use of a particular piece of equipment.

The service of an HEPN/EPN is a serious matter, it obviously will have an immediate and, in some cases, lasting effect on the business. The notice requires to be confirmed by a Sheriff within three working days and there are provisions for compensation should the notice be found to be improperly served. Notwithstanding these issues Inverclyde Council will not hesitate to serve such a notice should the circumstances justify it. In accordance with the

principle of proportionality however, the notice will prohibit the minimum process or activity required to remove the risk.

In considering whether the service of an Emergency Prohibition Notice or Hygiene Emergency Prohibition Notice (HEPN) on premises, or on a piece of equipment or process would be proportionate to the nature of the contraventions found, reference will be made to the relevant sections of the Food Law Code of Practice (Scotland) in addition to the officer's own professional judgement as to whether the health risk condition is fulfilled.

All cases will be discussed with the Service Manager or Head of Service before a final decision is made.

Voluntary closure of a food business as an alternative to emergency prohibition will only be accepted where enforcement officers have a high degree of confidence that the closure will be adhered to until such times as the risk has been removed to the satisfaction of the Service. A written undertaking to this effect will be required from the food business operator and the premises will be checked at regular intervals to ensure that the undertaking is being followed. Voluntary closure will only be accepted in appropriate circumstances and will not be used simply as an easy alternative to emergency prohibition. Enforcement officers may only suggest this option when the health risk conditions allowing the service of an HEPN/EPN are fulfilled and where such a course of action is in accordance with the general principles of this policy, the service of an HEPN/EPN should always be considered as the first option.

Seizure/Detention/Surrender of Food

In considering whether the detention or seizure of food or the use of voluntary surrender procedures would be proportionate to the conditions found, the officer would use their own professional judgement as to whether the situation merits such actions and with due regard to the relevant sections of the Food Law Code of Practice (Scotland).

All cases will be discussed with the Service Manager or Head of Service before a final decision is made.

Remedial Action Notices

Remedial action notices (RANs) allow urgent action to be taken to address an issue where there is need for prompt corrective action but not necessarily evidence of an imminent risk to health. They will be used where the minimum notice period required for a Hygiene Improvement Notice is inappropriate, for example to tackle cleaning or cross contamination issues. This could have a significant short-term impact on the business, particularly if the Food Business Operator has to close the premises or stop a particular operation to rectify the hygiene issue. In the majority of circumstances where there is an imminent risk to health however a Hygiene Emergency Prohibition Notice is the more appropriate enforcement option.

In considering whether the service of a Remedial Action Notice would be proportionate to the nature of the conditions or practices found, referral would be made to the relevant sections of the Food Law Code of Practice (Scotland) in addition to the officer's own professional judgement.

Use of these notices will be discussed with a Service Manager or Head of Service before service.

Reports to the Procurator Fiscal

The decision to report a food business to the procurator fiscal will generally be made either where other appropriate enforcement options have not been successful in ensuring compliance or where there is a need for an additional sanction. In all cases reporting will be carried out in accordance with the most up to date guidance from the Crown Office. It will be made clear in the report why prosecution is considered to be in the public interest.

As a general guide prosecution will be considered to be in the public interest where:

- The alleged offence involved a flagrant breach of the law such that the public was put at risk;
- There was a failure to comply with a statutory notice;
- There was a history of non-compliance involving repeated serious breaches of food law;
- The alleged offence involved a failure to correct a potential risk to food safety having been given a reasonable opportunity to comply.

Additional considerations will be the likely effect of prosecution on other businesses and on public confidence in the safety of food.

All cases will be discussed with the Service Manager or Head of Service before a final decision is made.

Withdrawal/Suspension of Approval

The decision to withdraw or suspend approval or conditional approval from premises approved under the relevant legislation would only be taken after exploring other enforcement options to control any food hazards presented by the establishment. Any such decision would be taken with due regard to the relevant sections of the Food Law Code of Practice (Scotland).

All cases will be discussed with the Service Manager or Head of Service before a final decision is made.

Service of Notices & Follow Up

Where any notices have been served they will be accompanied by the relevant covering letter. Should the notice recipient require additional time to comply, a request must be received in writing before the notice expires. Extensions will not be given automatically but consideration will be given as to whether the request is reasonable and having regard to the Food Law Practice Guide (Scotland). If the request is granted, the existing notice will be withdrawn and a new notice issued reflecting the revised time scale.

A completion letter or notice of withdrawal will be sent to the food business operator when the notices have been completed to the officer's satisfaction. If there is any doubt as to whether satisfactory compliance has been achieved the case will be discussed with the Team Leader or, where necessary, the Service Manager before a final decision is made.

Inverclyde Council

Safer & Inclusive Communities

Workplace Health & Safety Enforcement Policy

General Enforcement

Inverclyde Council is an enforcing authority for the purposes of the Health and Safety at Work etc. Act 1974 ("the Act"). As an enforcing authority under the Act, the Council's objective is to protect the health, safety and welfare of people at work, and to safeguard others, mainly members of the public, who may be exposed to risks from the way work is carried out.

The Council is required to have regard to the Health and Safety Executive's (HSE's) Enforcement Policy Statement in determining its own policy and to HSE's Enforcement Management Model in making enforcement decisions in individual cases.

The Principles of Enforcement

Inverclyde Council is committed to firm but fair enforcement of health and safety law. The Council's approach is informed by the following principles:

Proportionality - Enforcement action relates to the risks to health and safety, to the seriousness of any breach and to any actual or potential harm arising from a breach of the law.

Targeting - The regulatory activities of the Council are directed primarily on those whose activities give rise to the most serious risks or where the hazards are least well controlled. Targeting also requires that action is focussed on the dutyholders who are responsible for the risk and who are best placed to control it.

Consistency - Taking a similar approach in similar circumstances to achieve similar ends. This is not the same as uniformity and requires the exercise of professional judgement and discretion by inspectors.

Transparency - Helping dutyholders to understand what is expected of them and what they should expect from the Council as an enforcing authority. It also means making clear to dutyholders not only what they have to do, but, where this is relevant, what they don't. This means distinguishing between statutory requirements and advice or guidance about what is good practice but not compulsory.

Public transparency also requires that the Council shall publicise successful enforcement actions such as prosecutions.

Accountability - The Council, as an enforcing authority, is accountable to the public for its actions. This means having a clear and accessible complaints procedure which is brought to the attention of those with whom inspectors come into contact.

The Purpose and Methods of Enforcement

The purpose of enforcement is to:

- Ensure that dutyholders take action to deal immediately with serious risks;
- Promote and achieve sustained compliance with minimum legal standards;
- Ensure that dutyholders who breach minimum legal requirements, and directors or managers who fail in their responsibilities, may be held to account, which may include recommending prosecution.

The principal methods of enforcement are:

- Giving information and advice, either verbally or in writing
- Serving improvement or prohibition notices
- Making a recommendation of prosecution to the Procurator Fiscal.

In addition to the methods of enforcement above, inspectors have powers under section 20 of the Act to deal with causes of immediate danger in the workplace.

Enforcement Decisions

Enforcement decisions are taken having regard to HSE's Enforcement Policy Statement and the Enforcement Management Model. Enforcement decisions shall be made in accordance with the principles of enforcement set out above.

The Precautionary Principle

In circumstances where there may be a significant risk to public health but evidence is not immediately available of the quality normally required for an enforcement decision, inspectors are required to exercise a precautionary approach. The precautionary approach requires the inspecting Officer to act as if the hazard and risk have been confirmed, based upon the available objective evidence. This recognises that to await absolute evidence may endanger public health in certain circumstances. In these circumstances the Health Board Health Protection Team and, in some circumstances, Health Protection Scotland, should be consulted if possible and the action should be approved by a Service Manager or the Head of Service.

Prosecution

The decision to prosecute in any case is a matter for the Procurator Fiscal, having regard to the available evidence and the public interest.

The decision to report an offence to the Procurator Fiscal shall be considered when:

- Prosecution is identified as the most appropriate intervention from the Enforcement Management Model
- The relevant dutyholder has failed to comply with an improvement notice without reasonable excuse
- The requirements of a prohibition notice have been breached
- Irrespective of whether or not prior enforcement action has been taken, the circumstances warrant consideration of prosecution.

The circumstances when it is appropriate that a report shall be made to the Procurator Fiscal in the latter case are likely to involve a combination of high risk and extreme failure to

meet an explicit or defined standard, which is well-known and obvious. This is not moderated by factors such as the dutyholder's previous record, or any other moderating factors specific to the circumstances of a case.

Where inspectors are obstructed in the execution of their duty, consideration shall be made to reporting the matter to the Procurator Fiscal.

The decision to refer a case to the Procurator Fiscal shall be made by a Service Manager or the Head of Service.

The Right to Challenge Incorrect Health and Safety Advice

Businesses are entitled to receive sensible health and safety advice based on risk and Inverclyde Council are committed to giving advice on that basis. Inverclyde Council shall put the following procedures in place to provide a route to challenge incorrect health and safety advice or advice which goes beyond what is required to control the risk(s) adequately:

- A business can raise the matter with the Inspector directly
- If not satisfied by the above, the business can raise the matter with the inspector's line manager.
- If still not satisfied, the business can raise the matter through the Council's Complaints Procedure, and/or raise the matter with the Independent Regulatory Challenge Panel.

All informal letters will include a paragraph setting out the Council's commitment to giving sensible health and safety advice and indicating how a business may raise concerns about the requirements or advice given, including how to contact the Independent Regulatory Challenge Panel.

Enforcement in premises in which Inverclyde Council may have an interest

Inverclyde Council is aware of the need to address both real and perceived conflicts of interest. As such where any such conflict is identified arrangements will be made to address the conflict. Ultimately this could include the agreed transfer of enforcement responsibilities to the HSE. This would be a last resort where the conflict of interest was such that it was impossible to carry out the Council's enforcement responsibilities in line with this policy.

Appointment of Inspectors

The Head of Safer & Inclusive Communities has delegated authority under the Council's Scheme of Delegation to appoint inspectors under the Act. The appointment of inspectors and the variation of the level and scope of their appointments is at the discretion of the Head of Safer & Inclusive Communities.