

MIDLOTHIAN COUNCIL
PROTECTIVE SERVICES – BUSINESS REGULATION
FOOD & SAFETY
FOOD LAW ENFORCEMENT POLICY

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MIDLOTHIAN COUNCIL

FOOD LAW ENFORCEMENT POLICY

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Introduction

Midlothian Council is designated as a Food Authority by the Food Safety Act 1990 (as amended) and as an Enforcement Authority under the Food Hygiene (Scotland) Regulations 2006 to carry out official food controls within Midlothian. The Food Service responsible for the statutory duties under the above legislation sits within Protective Services.

The Council's Food Service is responsible for enforcing a wide variety of laws relating to food produced and consumed within Midlothian; the safety, hygiene and composition of food, food contact materials and information about food that must be provided to the consumer. This document describes how the relevant food law will be enforced.

Authorised Officers of the Food Service also take recognition of the overarching Protective Services Enforcement Policy.

1. General Statement of Intention

It is the policy of Midlothian Council to;

- 1.1. act to ensure that food and drink stored, handled, produced, distributed or consumed in food businesses within Midlothian is properly described to the consumer and is safe to eat.
- 1.2. carry out risk-based interventions at food businesses to check compliance with food law and take appropriate enforcement action using the full range of enforcement options available. Where non-compliance is identified actions will be taken to control the risk to public health or those that prejudice the consumer.
- 1.3. be reasonable, proportionate, consistent and appropriate when enforcing the law having regard to relevant Codes of Practice and Operational Procedures.
- 1.4. appoint enough suitably qualified and experienced officers to carry out the food law enforcement duties of the Council. Competent officers are duly appointed as Authorised Officers.
- 1.5. reduce the risk of non-compliance by providing assistance, guidance and advice to any business that approaches us to help them meet their legal obligations.
- 1.6. be aware, when exercising our regulatory functions, of the duty on regulators under the Regulatory Reform (Scotland) Act 2014 and the [Scottish regulators' strategic code of practice - gov.scot \(www.gov.scot\)](http://www.gov.scot/publications/scottish-regulators-strategic-code-of-practice/pages/introduction.aspx) to contribute to achieving sustainable economic growth.

2. Business Regulation

- 2.1. Business regulation and any associated enforcement of food law is carried out by Authorised Officers appointed by the Council.
- 2.2. Food law means any law, enacted in the UK and Scotland or assimilated European Union regulations covering food hygiene, safety or compositional standards, food information or the import or export of food.
- 2.3. Authorised Officers are suitably qualified and deemed competent to assess compliance with food law and have up-to-date information available to enable them to carry out their duties. This includes; relevant legislation, Food Law Codes of Practice and Practice Guidance, UK guides to Good Practice, guidance issued by Food Standards Scotland (FSS) other government departments and Scottish Food Enforcement Liaison Committee (SFELC), guidance issued by Food Standards Agency (FSA) and Local Government Association (LGA), where they are relevant to Scotland, and relevant Industry Codes of Practice and technical guidance, where appropriate.
- 2.4. Regulation comprises of interventions to assess food business compliance with food law. Intervention activities include; inspection of food and food business premises, audit of food business documentation, visits to investigate complaints, sampling for the examination and analysis of foods.
- 2.5. The majority of Official Control Interventions i.e. inspections, audits and sampling shall be carried out un-announced. Prior warning can be given in such cases as audits where the Food Business Operator's presence is necessary. Where a business is operating from a private residence, a minimum of 24 hours notice will be given.
- 2.6. Authorised Officers have a legal right to enter any premises where food and/or drink is stored, manufactured, handled, sold or provided within the Council's area, to check compliance with food law.
- 2.7. If we find during an intervention that food law is not being complied with, we will act to protect the safety and interest of consumers and to bring the business into a state of compliance with the law.
- 2.8. Where an intervention involves attendance at a premises we will leave a record of the inspection or visit, noting any actions to be taken by the Food Business Operator. This record will also detail any enforcement action taken or likely to be taken by the Authorised Officer.
- 2.9. Where officers are considering action, which may be inconsistent or not covered by relevant guidance, they can take reference from members of the Lothian and Borders Food Liaison Group. If a consensus of approach cannot be achieved the matter will be referred to Food Standards Scotland.

- 2.10. During interventions including inspection or audit officers are permitted by law to take with them any suitably qualified and skilled person(s) they consider necessary who may provide expertise in a particular field.
- 2.11. Revisit inspections of food businesses should be undertaken by officers where there is significant or sustained non-compliance with statutory requirements and/or no confidence in compliance going forward. This includes failure to comply with;
- i. a single requirement that compromises food safety, public health or prejudices consumers;
 - ii. a number of requirements that, taken together, indicate ineffective management
 - iii. businesses where formal enforcement action has been taken as a result of a recent intervention.

In this regard officers would seek to revisit businesses that have been risk rated as Band D or E, in any grouping, after an initial inspection.

3. Communication with Food Businesses

- 3.1. Authorised Officers will exercise their powers courteously and with respect to persons and property.
- 3.2. All communications regarding actions taken at food businesses including enforcement will be, where possible, in accordance with the relevant sections of the Food Law Codes of Practice (Scotland).
- 3.3. After all interventions at food businesses the Authorised Officer will issue a Record of Intervention as a written record of the visit for the Food Business Operator.
- 3.4. Where an informal approach is taken any written documentation issued will;
- Detail each contravention and the work which could be taken in order to comply with the law
 - Make clear the distinction between action that is needed to meet legal requirements and recommendations of good practice.
 - Give an indication of the time scale suggested for achieving compliance. For those of a significant or serious nature, definitive timescales will be given to allow steps to remedy non-compliance to be planned and prioritised.
- 3.5. Where a food business establishment is multi-site the officer will send communications directly to the head office and or registered office, unless the business has agreed other arrangements.

- 3.6. When requested by the Food Business Operator, officers will discuss the intervention, any inspection records or warning letters issued and/or the rating applied to the business.
- 3.7. Where appropriate, in the case of a decision to adopt an informal approach in accordance with this policy, Authorised Officers should take recognition of any Home, Primary (England and Wales only), Originating or Enforcing Authority arrangements.
- 3.8. A copy of this policy can be made available upon request.

4. Enforcement

- 4.1. Following a food law intervention at a food business where officer(s) identify that there is non-compliance with food law there are a range of enforcement actions that can be taken.
- 4.2. Authorised Officers will decide on the appropriate action using a graduated approach where possible, taking recognition of the National Food and Feed Compliance Spectrum, Appendix 1, that supports effective targeting of food law enforcement.
- 4.3. Officers will consider the following options;
- i. No enforcement action necessary e.g. education or verbal advice only
 - ii. Informal action e.g. issue a Record of Intervention or written warning
 - iii. Service of Hygiene Improvement Notice
 - iv. Service of Compliance Notice
 - v. Service of Remedial Action Notice
 - vi. Service of (Hygiene) Emergency Prohibitions Notices or voluntary closure agreement if appropriate
 - vii. Formal notices to detain and/or seize food or voluntary surrender if appropriate
 - viii. Report to the Crown Office Procurator Fiscal Service (COPFS)
- 4.4. Officers will seek the cooperation of the Food Business Operator in the first instance, using education, advice and informal action where possible. Where an informal approach is failing to secure compliance, the officer may progress to more formal action. If circumstances indicate a significant risk officers may initiate formal enforcement action immediately.
- 4.5. Where the contravention(s) identified appear to relate to a deliberate act to mislead or defraud consumers or other Food Business Operators and there is evidence of a criminal offence, the graduated approach should not be applied.

Consideration will be given to submitting a report to the COPFS in discussion with the Lead Food Officer.

- 4.6. Any departures from this policy should be exceptional and discussed with the Lead Food Officer, where possible in advance of the departure, and the reasons for departure recorded by the officer.

5. Enforcement options

Informal Action: Record of Intervention / Written Warnings

- 5.1. Informal action is used to enable, educate and encourage food businesses into compliance. This will be considered appropriate where the nature of the breach is minor and the risk to public health is low, there is good history of compliance of the Food Business Operator and/or their willingness to undertake the work identified has been established.
- 5.2. A Record of Intervention is issued, on-site, by the officer at the end of every food law inspection, providing a written record of the visit for the Food Business Operator. This includes when the visit is for advisory purposes only and/or the conditions at the time of the visit are satisfactory.
- 5.3. Written Warnings are a formal letter sent to the Food Business Operator to advise them that they are not complying with the law.
- 5.4. We are most likely to issue a written warning following an inspection in any of the following circumstances: -
- i. Our assessment of the food business operator indicates that compliance can be achieved by a written warning.
 - ii. Contraventions of the law were considered not to pose an immediate or significant risk to public health or of misleading the consumer. However, we consider that hazards to food safety in the business need to be more effectively controlled or improvements made to food information.
 - iii. There were structural or operational contraventions of the law that need to be improved to prevent risk to public health or detriment to the consumer.
 - iv. A surveillance sample of food from the business indicates that there are improvements to practices which need to be made.

Formal Action: Statutory Enforcement Notices

- 5.5. Authorised Officers can serve a range of statutory enforcement notices to bring a food business into compliance.
- 5.6. Officers will follow all relevant legal procedures and guidance within Codes of Practice and any operational procedures developed by Midlothian Council relating to the use and service of statutory enforcement notices.
- 5.7. Officers shall have sufficient evidence to justify the service of a statutory notice and prove non-compliance. Evidence must be sufficient to satisfy proceedings where a Food Business Operator can appeal the service of a notice or fails to comply with a statutory notice that may result in a report to the COPFS.
- 5.8. At the earliest opportunity, Authorised Officers should discuss any formal enforcement action (including voluntary undertakings) being considered with a manager.
- 5.9. Statutory Enforcement Notices will only be signed by officers properly authorised by the council and who have witnessed the contravention.
- 5.10. An enforcement notice would be considered appropriate where;
- i. It is found that significant hazard(s) to food safety has not been identified by the food business and are not being controlled.
 - ii. Any non-compliance is likely to cause a risk to the health of consumers should the contravention persist.
 - iii. There is a history of non-compliance following previous regulatory activity including failure to respond to written warnings.
 - iv. There is a lack of confidence that the Food Business Operator will respond to an informal approach e.g. written warning.
- 5.11. Formal enforcement action (including voluntary undertakings) taken by an Authorised Officer shall be witnessed by a second officer appointed by the Council. Where this is not possible the Authorised Officer will discuss with the Lead Food Officer or a manager, prior to service of any enforcement notice.
- 5.12. Any Notice served will state, where required:
- What law is not being complied with
 - Why the officer believes the law is not being complied with
 - What the food business needs to do to comply with the law
 - A time limit for doing what is required, and
 - Any rights to make representation to a court or to appeal against the requirements of a notice and any time limit for doing so.

- 5.13. Failure to comply with a statutory notice is likely to result in a report to the COPFS. The Authorised Officer will discuss this with the Lead Food Officer prior to any decision.

Hygiene Improvement Notice

- 5.14. A Hygiene Improvement Notice can be issued by an Authorised Officer where there is evidence of a significant or sustained contravention of food law. The notice requires the business to remedy the contravention by a specified timescale.
- 5.15. Service of a Hygiene improvement Notices is considered appropriate in the following circumstances;
- i. Formal action is proportionate to the risk to public health
 - ii. There is history of non-compliance with food law
 - iii. An informal approach will, in the opinion of the Authorised Officer, not be successful.
- 5.16. It will not be considered appropriate where;
- i. The contravention is/might be continuing and would only secure compliance at one point in time e.g. personal cleanliness of staff, cleanliness issues.
 - ii. Transient situations e.g. a one day event requires timeous enforcement action
 - iii. There is serious or imminent risk and the use of Hygiene Emergency Prohibition Notice(s) or Remedial Action Notice(s) would be more appropriate.
 - iv. Where the issue is a failure of good hygiene practice and no contravention of food law has occurred.
- 5.17. Before service of the notice the officer should discuss with the Food Business Operator, and preferably agree, an appropriate and realistic timescale.
- 5.18. The officer should be prepared to discuss the measures that are specified in the notice to be carried out and any alternative actions suggested by the Food Business Operator that would have an equivalent effect to those specified.
- 5.19. Where agreement cannot be reached, regarding timescales or measures to be taken, between the Authorised Officer and the Food Business Operator this shall be brought to the attention of the Lead Food Officer for review.

Compliance Notice

- 5.20. A Compliance Notice may be issued by an Authorised Officer to any food business that manufactures or retails a food product where there is evidence of a breach with regard to food information, food standards, composition or labelling.

- 5.21. A Compliance Notice allows the Authorised Officer to instruct a food business to rectify any food standards non-compliances within a defined timescale.
- 5.22. Use of this statutory enforcement notice allows for a graduated and proportionate approach to encourage business compliance before consideration of detention and seizure of any product or a report to the COPFS.
- 5.23. An Authorised Officer may issue a Compliance Notice where;
- i. An informal approach would, in the opinion of the Authorised Officer, not be successful
 - ii. Formal action is proportionate to the breach, or
 - iii. There is evidence that there has been a breach of one of the relevant offences
- 5.24. Service of a Compliance Notices will not be considered appropriate where;
- i. transient situations, e.g. a one day event requires timeous enforcement action
 - ii. the breach falls under any hygiene regulations
 - iii. it is not possible to provide a suitable corrective action(s) for compliance, or where corrective action(s) will only achieve partial compliance
 - iv. there is a significant risk to public health as a result of the breach. An alternative enforcement decision would be more appropriate.
 - v. the breach is deliberate, the result of fraudulent activity or the business has sustained poor compliance history where more serious enforcement action may be required

Remedial Action Notice

- 5.25. A Remedial Action Notice may be issued by an Authorised Officer in relation to any food establishment where there is evidence of a breach of the hygiene regulations or an inspection under these regulations is being hampered and action is required promptly. This action is appropriate where there is serious non-compliance and a risk to food safety.
- 5.26. The notice can direct the Food Business Operator to stop the use of any piece of equipment, process or part of a the food establishment, or modify a process or rate of operation. Any conditions imposed must remove any risk to health or prevent obstruction of an officer.
- 5.27. Once the Authorised Officer, (preferably the person who issued the notice) is satisfied the required action(s) has been taken, the notice will be withdrawn in writing by issuing a Notice of Withdrawal of a Remedial Action Notice.

5.28. Where a Remedial Action Notice has been issued by an Authorised Officer they may also consider whether food at the establishment should be detained or seized.

Prohibition Procedures

5.29. A Hygiene Emergency Prohibition Notice (HEPN) immediately closes a food business, prohibits a process or use of equipment where there is evidence that the health risk condition is fulfilled. This action is appropriate where there is an imminent risk of injury to health.

5.30. The health risk condition is defined under The Food Hygiene (Scotland) Regulations 2006, Regulation 7(2) / Regulation 8(4). Emergency procedures will be undertaken in accordance with the Food Law Code of Practice (Scotland) and Midlothian Council Operational Procedures.

5.31. Any notices and associated documentation will only be signed by a competent Authorised Officer who has witnessed the contravention(s).

5.32. An Emergency Prohibition Notice (EPN) may be issued to the proprietor by an Authorised Officer where there is evidence of an imminent risk of injury to health defined under The Food Safety Act 1990, Section 12.

5.33. Examples of when this may be appropriate include; a process or treatment introducing into food a teratogenic chemical which may cause injury to a developing fetus or a genotoxic chemical that damages genes or chromosomes.

5.34. Voluntary procedures to close a premises, may be suggested by the Authorised Officer, only where there is sufficient evidence of an imminent risk of injury to health. Any accepted voluntary closure must be in writing and agreed between the Authorised Officer and Food Business Operator (FBO) that the premises will remain closed until the officer is satisfied there is no longer a risk to public health.

5.35. Before accepting voluntary procedures the Authorised Officer shall:

- Consider if there is a risk the establishment may re-open without agreement, in which case formal prohibition procedures should be followed,
- Explain to the FBO that by making the offer to close any right to compensation is lost and formal procedures could still be used if necessary for any breaches of legislation.

Detention and Seizure of Food

5.36. Authorised Officers have powers to inspect, detain or seize food suspected of not complying with food safety requirements.

5.37. Enforcement action to detain or seize food is appropriate where the Authorised Officer is of the opinion that;

- food has not been produced, processed or distributed in accordance with food law and has been certified (in accordance with Regulation 27 of the Food Hygiene (Scotland) Regulation 2006) by the officer.
- There is a serious breach of Food Information Law, relating to substitution, authenticity, adulteration and misleading descriptions.
- There is use of an unauthorised Novel Food.

5.38. A Detention Notice may be issued by an Authorised Officer to stop food entering the food chain while checks are made on its compliance with safety and / or labelling requirements.

5.39. Where evidence or information indicates that detained food is safe and can be released, the Authorised Officer will withdraw the Detention Notice in writing issuing a Notice of Withdrawal of a Detention Notice.

5.40. Where there is sufficient evidence that;

- food is unfit or unsafe and cannot be treated or processed before consumption to make it safe,
- there are serious breaches of food information law, or
- there is use of an unauthorised Novel Food,

5.41. an Authorised Officer may issue a Food Condemnation Notification, warning of the intention to take to the food before a Sheriff and apply for its destruction.

5.42. Voluntary procedures to remove unfit or unsafe food from the food chain may be used. The Authorised Officer may initiate this when the owner of the food agrees that the food is not suitable for human consumption.

5.43. Where voluntary procedures are used by the Authorised Officer they will issue a receipt to the owner of the food. Authorised Officers will agree arrangements with the owner of the food for the destruction or disposal of the food. The officer will seek, and confirm in writing, agreement from the owner of the food that the owner will pay reasonable expenses for the destruction or disposal of the food.

5.44. Midlothian Council will ensure appropriate destruction of food that has been seized or voluntarily surrendered. Evidence of appropriate disposal will be obtained by the Authorised Officer.

Formal Action Prosecution

5.45. A report may be submitted to the COPFS recommending prosecution for offences committed under food law.

5.46. In deciding whether there are sufficient grounds to recommend that prosecution be sought by the COPFS, due consideration will be given to relevant guidelines. A decision to initiate a report will be discussed and agreed with the Lead Food Officer at the earliest opportunity.

5.47. In addition to any of the enforcement action described above a report may be submitted to the COPFS in any of the following circumstances;

- i. Where a statutory notice has not been complied with
- ii. Where the alleged offences involve a blatant breach of the law and public health is, or has been, put at risk
- iii. Where it appears there is deliberate intent to adulterate food, defraud, or mislead the consumer as to the nature or composition of food
- iv. Where there are significant contraventions of the law relating to the composition of food or it's labelling
- v. Where the alleged offender has been given reasonable opportunity to correct a potentially serious risk to food safety identified to them by an Authorised Officer but has failed to do so
- vi. Where there is a history of similar offences related to risk to public health
- vii. Where there has been deliberate obstruction of an Authorised Officer.

5.48. We will only make a report to the COPFS where there is sufficient evidence to support a reasonable likelihood of conviction and it is in the public interest to proceed. Factors we consider include;

- i. the degree of harm caused, or potentially caused, by the offence
- ii. the compliance history of the offender
- iii. the likelihood of a due diligence defence being established
- iv. the ability and willingness of important witnesses to cooperate
- v. the willingness of the offender to prevent a recurrence of the problem
- vi. the public benefit of a prosecution
- vii. any explanation offered by the offender.

5.49. Where prosecution could result in the imposition of a Prohibition Order by the Court (banning a person from being a Food Business Operator) appropriate information to support the prohibition will be provided to the COPFS as detailed in the Food Law Code of Practice (Scotland) and Practice Guidance.

5.50. The Authority will notify details of any Prohibition Order made against a person to Royal Environmental Health Institute of Scotland (REHIS).

5.51. Where it is considered in the public interest the Authority will publicise details of a successful prosecution.

6. Formal Action in Approved Premises

- 6.1. Authorised Officers have additional powers in food business that are approved under Regulation (EC) No 853/2004.
- 6.2. Officers will have regard to the guidance given in the Food Law Code of Practice (Scotland), Practice Guidance and Approved Establishments Scottish National Protocol when determining the level of enforcement action that is appropriate.
- 6.3. Action to suspend or withdraw the approval for an establishment will be taken when all other enforcement options are considered insufficient to control the food hazards presented by the establishment.
- 6.4. Suspension or withdrawal of approval will be considered by the Authority where an Authorised Officer has;
 - i. identified serious deficiencies, or, has to stop production at an approved establishment repeatedly and
 - ii. the food business operator is not able to provide adequate guarantees regarding future production, or
 - iii. where a Hygiene Prohibition Order has been made against the Food Business Operator.
- 6.5. The Authority may suspend an establishment's approval temporarily if the Food Business Operator cannot guarantee that it will resolve deficiencies within a reasonable time.
- 6.6. Where an officer takes the above action they shall also consider if action is required to deal with any food that is a risk to public health.

7. Regulation in Low Risk Businesses

- 7.1. Some food businesses present a very low risk to the consumer. Where there is sufficient information an Authorised Officer can risk rate a food business as a Group 3 Band A.
- 7.2. Where the Lead Food Officer agrees that there is minimal inherent risk there will be no proactive inspection of the premises.
- 7.3. Where no proactive inspection of a food business will take place the Food Business Operator will be notified.
- 7.4. Complaints received will still be investigated and requests for advice and guidance will still be actioned, where appropriate.

8. Enforcement within Premises Operated by Midlothian Council

- 8.1. Food establishments operated by Midlothian Council will be subject to the same food law intervention procedures and enforcement actions as any other food business.
- 8.2. Written communications concerning contraventions noted during inspections will be sent to the appropriate Head of Service.
- 8.3. Any serious breaches of food law shall be brought to the attention of the Executive Director or Chief Executive.

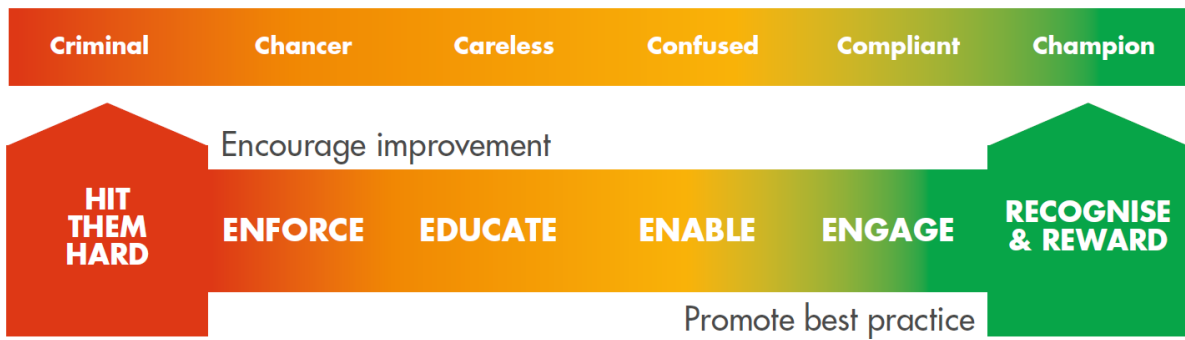
9. Enforcement Following Food Sampling

- 9.1. Food samples from businesses in Midlothian are taken according to the requirements of the annual food safety plan and the food sampling policy.
- 9.2. Where a sample taken for surveillance purposes produces an adverse result – being unhygienic or not of the described nature, an informal approach will be used to bring this to the attention of the Food Business Operator.
- 9.3. Where an informal approach has not been effective or a formal sample produces an adverse result, formal enforcement action will be considered.

10. Monitoring and Review

- 10.1. It is the policy of the Authority to monitor the consistency of its enforcement activity to ensure that this policy is properly followed.
- 10.2. This policy will be reviewed every 24 months

Appendix 1 – National Food and Feed Compliance Spectrum



[Food Law Code of Practice \(Scotland\)](#) | [Food Standards Scotland](#) | [Food Standards Scotland](#)