

Food Safety Act 1990

Code of Practice No. 5:

The Use of Improvement Notices (Second Revision
Autumn 1999)

CODE OF PRACTICE ON THE USE OF IMPROVEMENT NOTICES

(Code of Practice No. 5 Second Revision)

The sections in **bold type** are a Code of Practice issued under Section 40 of the Food Safety Act 1990 to which food authorities must have regard to. The remaining text is for information only.

Introduction

- 1 This Code of Practice ~~discusses~~ **gives guidance on** the use of Improvement Notices under Section 10 of the Food Safety Act 1990. **It assumes that guidance given in Code of Practice No. 9 on the conduct of inspections, including the provision of an opportunity for informal discussion, has been followed.**
- 2 If an authorised officer of an enforcement authority has reasonable grounds for believing that a proprietor of a food business is failing to comply with food hygiene or food processing regulations, the officer should require the proprietor to remedy the defects within a given period. Depending on the circumstances the officer may **take** ~~adopt~~ an informal enforcement approach **to securing compliance**, ~~by setting out the requirements of the regulations in a letter~~ or adopt a more formal approach by the service of an improvement notice under Section 10 of the Food Safety Act 1990. ~~This Code of Practice discusses~~ The factors which should be considered when deciding the enforcement approach and the procedures which should be adopted **are set out below.**

Factors which should determine the enforcement approach

- 3 The **informal approach** ~~existing procedure~~ of giving advice and sending informal letters is well established and is accepted and understood by the food trade. **Authorised officers should continue to use informal procedures as long as they believe that such procedures will secure compliance with the requirements of food hygiene or food processing regulations within a timescale that is reasonable in the circumstances. The use of an improvement notice should not generally be considered as the first option where breaches are found on inspection, unless the circumstances outlined in paragraph 11 are satisfied.** ~~Authorised officers should only use improvement notices in the circumstances described~~
4. **An authorised officer should ~~not~~ take enforcement action which is disproportionate to the risk to public health arising from any contravention identified.**
- 5 **In deciding the type of enforcement action to take an authorised officer should have regard to the nature of the breach and the history of compliance of the proprietor with food safety legislation, ~~or~~, In the case of new businesses or new requirements, an assessment of the proprietor's willingness to comply and the likelihood that the proprietor will do so should be made.** ~~undertake the work identified by the officer.~~

- 6 It is important that the full range of enforcement options remain open to an authorised officer and a food authority should not adopt policies where the number of improvement notices served is used as an indicator of the performance of its officers.
- 7 Food authorities should recognise that some organisations, **including voluntary and charitable ones and small businesses**, ~~are operated by volunteers and they~~ will need help and guidance in understanding the detailed requirements of ~~the~~ hygiene legislation. An informal approach, in the first instance, to such organisations is likely to be ~~more~~ helpful and effective.

Procedures to be adopted in using an informal approach

8. ~~When an authorised officer decides to adopt an informal approach to secure compliance with food hygiene or processing regulations the officer should ensure that the letter contains information which will enable a proprietor to understand what work is necessary and why it is necessary.~~
- 8a. Any programme of work required to secure compliance should be discussed and agreed with the proprietor or his representative. The authorised officer should offer advice or clarification if requested, and should normally allow sufficient time, following the issue of a letter, for the business to consider the matter and seek advice before taking any further action. The letter should explain:
- (a) what remedial action needs to be taken to achieve compliance and within what timescale;
 - (b) why the action is necessary;
 - (c) what defect or omission currently constitutes a breach of the law, with a reference to the legislation contravened, indicating the regulation, section or schedule, chapter, paragraph as appropriate;
 - (d) what enforcement action could be taken in the absence of remedial action.
- 9 The letter should **be written in plain language and should offer the opportunity for discussion or for the proprietor to make representations. The names and contact points of the relevant authorised officer and their manager should be included** ~~indicate which regulation has been contravened and the measures which in the opinion of the officer are required to be taken in order to secure compliance.~~ It would also be helpful to the proprietor if the letter contained an indication of the time scale suggested for completion of works to satisfy food hygiene or processing regulations. ~~The programme of work should be discussed and agreed with the proprietor.~~
- 10 If the authorised officer includes measures in the letter which are recommendations of good hygiene practice the officer should ensure that such measures are clearly indicated as being recommendations and not legal requirements.

When to use Improvement Notices

- 11 The use of improvement notices may be appropriate in any of the following

circumstances, or combination thereof:

- (a) where formal action is proportionate to the risk to public health;
- (b) where there is a **documented history** ~~record of non-compliance with~~ **food safety legislation** ~~breaches of food hygiene or food processing regulations;~~
- (c) where **an informal approach has been tried but has not been successful, or the authorised officer has reason to believe that such an informal approach will** ~~would not succeed; be successful.~~
- (d) **in the case of new businesses or new requirements, where the authorised officer assesses that the proprietor is unwilling to comply or is unlikely to do so, for whatever reason;**
- (e) **where there is a breakdown in procedural controls, including hygiene practices falling within that category, which are critical for food safety or, where no such controls exist.**

12 The improvement notice procedure would not be appropriate in the following circumstances:

- (a) where the contravention might be a continuing one, for example relating to personal cleanliness of staff, when a notice would only secure an improvement at one point in time;
- (b) in transient situations, where breaches exist which pose **an** ~~a potential and~~ imminent risk of injury to health and it is considered that swift enforcement action is needed, for example at a one day festival or sporting event. An emergency prohibition notice would be the only formal remedy which would have immediate effect;
- (c) where ~~there is a breach of a recommendations~~ **s of good hygiene practice are not followed.**

An improvement notice cannot be issued if there is no failure to comply with **legislation** ~~an appropriate regulation.~~

15 An appeal may be lodged against an improvement notice and the officer may have to defend the notice before a court. **Consequently the officer should be satisfied before deciding to issue an improvement notice that all the required information and evidence has been obtained, including such additional evidence as would be needed to form a substantiated case.**

16 An improvement notice therefore should not be issued, unless:

- (a) there is sufficient evidence available to justify the issue of the improvement notice at the hearing of a subsequent appeal before a court; and
- (b) it can be proved to be a properly issued notice, in the court, if proceedings follow. It is important that there should be no failure due to procedural errors. The success of the system depends to a great extent on the regard in which it is held.

51—Whilst the proprietor has a right of appeal as detailed above against the service of an

~~improvement notice~~ The authorised officer should be prepared to discuss the need for the improvement notice and its requirements informally with the proprietor, particularly where the proprietor indicates that the requirements of the improvement notice are inconsistent with the interpretation of the legislation given by other food authorities. The food authority should have particular regard to any view expressed by the "Home Authority" as defined in the LACOTS "Home Authority" principle.

~~52 Similarly the authority should also be prepared to discuss the requirements of any letter (see paras 8 to 10) as described in paragraph 51 above.~~

53 Food authorities should consider what internal arrangements they should adopt to consider such requests for further discussion and how they make these procedures known to proprietors. Any disputes which arise should be referred to an appropriate senior manager. ~~or to the CEHO or the deputy CEHO.~~

~~18 Circumstances may arise where prosecution is indicated and in addition it is deemed necessary to issue an improvement notice (see paragraph 13 above). In such cases proceedings may be prepared for prosecution or in Scotland referral to the Procurator Fiscal but the information should not be laid until after the appeal period for the improvement notice has passed or any appeal has been heard.~~

13 The issue of an improvement notice does not preclude the food authority from pursuing prosecution action, at the same time, for the breaches of the regulations which are the subject of the notice, where conditions are serious or deteriorating. Indeed, if such conditions are found on inspection, the food authority may be criticised if it failed to ensure that the conditions were remedied in the most effective way possible and as quickly as possible. **Where it is intended to recommend prosecution (or in Scotland referral to the Procurator Fiscal), in addition to the service of an improvement notice, this should be made clear to the proprietor at the time the improvement notice is served. In such cases proceedings may be prepared but the food authority should consider deferring the laying of the information until after the appeal period for the improvement notice has passed or any appeal has been heard.**

19 In Scotland, every essential element of an offence, that is those elements which make up the legal definition of the crime, must be "corroborated". In effect this means that there must be independent evidence to the same effect from a second source. The two sources of evidence may be direct, circumstantial or a mixture of the two.

Who Should Sign an Improvement Notice

20 Improvement notices may be signed only by officers authorised to do so by an enforcement authority. To maintain a consistent approach by all authorities, food authorities should arrange that these notices should be signed only by qualified officers with experience in food law enforcement, **who are properly trained and competent.** These **should will be in one of the following groups:** ~~include~~

- environmental health officers enforcing food hygiene or food processing regulations and where appropriate, official veterinary surgeons carrying out official veterinary surgeon duties;

- holders of the Higher Certificate in Food Premises Inspection who are authorised to carry out food hygiene inspections;

- or holders of the Ordinary Certificate in Food Premises Inspection who are authorised to carry out food hygiene inspections of food premises in risk categories C - F, who may be authorised to sign improvement notices in respect of those premises only.

- 21 ~~Officers other than environmental health officers and official veterinary surgeons may also sign improvement notices where their training and qualifications are suitable. Officers who have obtained a degree in an appropriate food science or technology may be considered to have undertaken appropriate initial training. Officers will also need to receive structured training in relation to food law and enforcement powers, for example collecting evidence, court procedures, etc. unless received as part of their qualification, and demonstrate an understanding in the use of those powers.~~
- 22 The authority, before authorising an officer to sign improvement notices, should be satisfied that the officer is competent to do so, is qualified as set out in paragraph 20 and 21 and possesses **sufficient** experience in a variety of food enforcement situations. ~~which would allow the officer to undertake the duties for which the officer has been authorised. Officers other than environmental health officers and official veterinary surgeons will require a period of structured practical training with a food enforcement authority or not less than 6 months in a variety of food enforcement situations.~~
- 23 Before authorising an officer to issue improvement notices the food authority should have full regard to the fact that the issue of such notices is a significant step in a legal process. Consequently, inappropriate or wrongful service of a notice could result in a court making an order for costs against the authority. **The improvement notice procedure should be properly used by all authorised officers.**
- 24 Where officers who are not authorised to sign improvement notices carry out an inspection an improvement notice should not be signed on their behalf. ~~unless~~ The officer signing the notice **must have** ~~has~~ witnessed the contravention and **be** satisfied that it constitutes a breach of food hygiene or food processing regulations.

Drafting the Improvement Notice

- 30 It is important that the recipient of an improvement notice knows what ~~they are~~ **he is** being asked to do and why. Therefore the wording of the notice should be clear and easily understood.
- 14 The improvement notice may need to be accompanied by a covering letter written in the recipient's own language suggesting that help should be sought if the meaning of the improvement notice is not understood. The issue of an improvement notice should be treated seriously. The person receiving it should be made aware of the obligation to comply with the improvement notice and that failure to do so may result in prosecution.
- 32 ~~The improvement notice must include details of the regulation contravened and the~~

~~reason for the opinion of the authorised officer that there has been a contravention.~~ The authorised officer must include in the improvement notice a precise reference to the legislation contravened, indicating the regulation, section and subsection, or schedule, chapter, paragraph, and subparagraph, as appropriate, and the reason for the opinion of the authorised officer that there has been a contravention. It is not sufficient simply to quote the regulations.

50 It is essential that the recipient of a notice clearly understands ~~that he has~~ the right of appeal against the service of an improvement notice. All the relevant information should be contained within notes attached to the notice. Details should include how, where, within what period, and on what grounds, an appeal may be brought, and whether enforcement action would be stayed or, in Scotland, suspended, while an appeal is pending. The address of the relevant magistrates' court should also be given. ~~for example, the name and address of the relevant local court.~~ The proprietor should also be asked to notify the officer if an appeal is lodged.

28 The success or failure of any appeal before a court may well depend on the skill exercised by the authorised officer in drafting ~~the~~ his notice. ~~The proper procedure for drawing up the notice and for serving it as laid down in the Act must be carefully followed otherwise the notice may be declared invalid by the court.~~ If it is necessary to prosecute for failure to comply with the terms of an improvement notice it will be a valid defence that a proper notice was not served. The appropriate forms should always be used.

29 ~~If it is necessary to prosecute for failure to comply with the terms of an improvement notice it will be a valid defence that a proper notice was not served. The appropriate forms, with notes explaining rights of appeal etc., should always be used.~~

31 ~~It is not sufficient simply to quote the regulations.~~

~~For example:~~

~~(a) Regulation 21(1) of the Food Hygiene (General) Regulations 1970 states "There shall be provided ... sinks or other washing facilities suitable and sufficient for ..." if a contravention of this regulation occurs it would *not* suffice to say that the sink was not suitable or not sufficient. The officer should *describe* the fault, for example, there are not enough sinks for the size of the operation or the sink is too small or the sink is old and chipped.~~

~~(b) Regulation 25 of the Food Hygiene (General) Regulations 1970 "The walls, floors, doors, windows, ceiling, woodwork ... shall be kept clean and shall be kept in such good order, repair and condition as to ..."~~

~~Again the officer should *describe* why the floor, wall or ceiling is not acceptable, for example, floor tiles are open jointed or badly worn, flaking paint on the ceiling, broken window to storage area therefore increased risk of infestation.~~

33 An authorised officer ~~food authority~~ will need to consider whether ~~to~~ to issue a separate improvement notice for each breach of the regulation or a schedule attached to a single notice listing the various items.

- 34 Non-compliance with any improvement notice within the period specified in the notice is an offence. **The period allowed to effect an improvement expires at midnight on the last day stated on the notice.** The service of separate notices with separate time limits may be easier to handle if there is an appeal. If the notice is served in the form of a schedule of contraventions an appeal against any one item on the schedule would result in suspension of the effect of the whole notice until the appeal had been dealt with. Failure to comply with one or more items would mean failure to comply with the whole notice and would constitute one offence. ~~In England and Wales further advice on the use and preparation of notices may be found in guidance issued by the Local Authorities Co-ordinating Body on Food and Trading Standards (LACOTS).~~

Time **Limit to be Specified on the Improvement Notice**

- 35 **The improvement notice should clearly specify both the measures to be taken and the period of time within which the proprietor must complete those measures. The minimum period which may be specified is 14 days.**
- 36 **It is essential that the period given for **compliance** ~~completion of the work~~ should be a realistic one. It should be discussed with the proprietor or their representatives wherever possible before it is determined although the officer may set a limit without the proprietor's agreement.** Although improvement notices should be complied with in the shortest practicable time, due regard should be given to any genuine difficulties which may occur.
- 37 The time required for obtaining new equipment should be considered in assessing the time limit. There are often delays of several weeks before some equipment can be delivered. Significant delays may also arise where structural repair work is considered necessary. Estimates will be required and regard must also be had to the delay before specialist contractors or builders may be able to commence work.
- 38 **Therefore, the following factors should be taken into consideration before a time limit is set:**
- (a) **the risk to public health;**
 - (b) **the nature of the problem;**
 - (c) **the availability of solutions.**
- 39 An appeal may be lodged against the time **limit** ~~period~~ specified **in** ~~under~~ the improvement notice. An officer will therefore wish to ensure that the requirement is reasonable and, if necessary, ~~to~~ be able to justify the reasonableness of the period in court. It is ~~highly~~ undesirable that an officer should appear in court only because **an** unrealistically short time for **compliance** ~~completion of the work~~ was given. Even more so if it is shown that the officer had no regard to the practicalities of the requirements.
- ~~40 It is suggested that the minimum period of 14 days should be given in respect of most cleaning contraventions unless conditions are so insanitary that emergency prohibition action is necessary. A prosecution could also be taken.~~

Service of the Improvement Notice

- 25 Section 50 of the Act covers the service of all legal documents.
- 26 **The Act requires the improvement notice to be served on the proprietor.** If it is not possible to identify the name and address of the proprietor, Section 59(2) of the Act allows the notice to be addressed to ~~him as~~ the "owner" of the premises and left at the premises. **The officer serving a notice should ensure wherever possible that the person who is responsible for taking action receives a copy of the notice, especially in cases where the local manager is not the proprietor.**
- 27 The authorised officer should normally serve the document by post, obtaining proof of posting and/or advice of delivery. The officer may alternatively serve an improvement notice by delivering it to the proprietor of the food business by hand. The improvement notice need not necessarily be served by the authorised officer who signed and issued it.
- 42 **The proprietor should be given written advice at the time of the service of the notice that any request for an extension of the time limit should be made in writing before the expiry date of the notice.**

Requests for Extension of Time **Limit**

- 41 Although there is no specific provision in the ~~Food Safety~~ Act to extend the time limit on an improvement notice, it would be considered unreasonable not to **allow more time** ~~do so~~ if the proprietor had a genuine reason for requesting **a longer period within** ~~more time in~~ which to comply with the notice. **When deciding on a request for an extension of the time limit the officer should take into account the following:**
- (a) the risk to public health **which would arise** ~~associated with the fault~~ if an extension **were** ~~was~~ granted;
 - (b) the reason for the request;
 - (c) the remedy involved;
 - (d) the past record of co-operation of the proprietor;
 - (e) any temporary action which the proprietor proposes to take **in the meantime** ~~to remedy the defect~~.
- 43 **If the officer considers that the request for an extension of **the time limit** is reasonable, the officer may decide not to enforce the notice until a further period of time has elapsed. The proprietor should be advised, in writing, of the decision and any new time limits **should be** reconfirmed.**

Works of at Least Equivalent Effect

- 44 **It is the responsibility of the **authorised officer** ~~food authority~~ to make it clear that there is provision within Section 10 to allow the proprietor to carry out measures **to secure compliance** of at least equivalent effect ~~to secure compliance within the Regulation to those specified by the officer~~. The authorised officer should ask the proprietor to discuss any alternative proposals with him before carrying out the works. **The proprietor could then****

comply with the requirements of the notice and avoid further legal action. Information about the proprietor's right to take equivalent measures to comply with the improvement notice is included on the form. **If the officer and proprietor agree on alternative works the officer should confirm in writing that these have the alternative work has been approved.**

- 45 **In situations where the manager is not the proprietor, and cannot make decisions with regard to structural repairs or replacements, the officer should, if possible, discuss the detail of the works to be carried out with a person in a position to authorise repairs before issuing a notice. Such discussions are desirable but the issue of the notice should not be delayed.**
- 46 The onus is on the authority to follow up, in writing, any requests received from the proprietor to vary the work. **Any disputes which arise should be referred to an appropriate senior manager or to the CEHO or the deputy CEHO. Food authorities should adopt internal procedures to consider such requests so that it is clear to the proprietor that there is a proper review.**

~~Appeals and further discussions with the Authority~~

- 47 The proprietor has the right of appeal against the decision of an authorised officer to serve an improvement notice (Section 37) by way of a complaint to the court.
- 48 A proprietor may not necessarily wish to appeal against the notice as a whole but against one or more of its requirements or against the period within which he is required to comply. Under Section 39(1) of the Act the court may cancel, affirm or modify the terms of the notice, for example to delete or reduce what it considers to be an ~~over-vigorous~~ **overly rigorous** requirement or to extend the timescale in which the proprietor is required to comply with the notice.
- 49 Section 39(2) provides that the recipient of the notice is not prejudiced by lodging an appeal as ~~the appeal suspends~~ the period of compliance **is suspended** until the appeal has been determined. An appeal is regarded as no longer pending if it is finally determined by the court, the proprietor withdraws **it the appeal**, or the appeal is struck out because the proprietor did not pursue it **in time. quickly.**

Compliance and Records

- 54 In order to maintain good working relationships the authorised officer, or another authorised officer from the same department, should if possible liaise with the proprietor while work is being undertaken, and encourage the proprietor to notify the authority when the work has been completed.
- 55 **The work should be checked as soon as practicable after notification has been received, from the proprietor, that the alterations or improvements have been completed. The officer should confirm in writing that the works have been completed to the satisfaction of the officer.**
- 56 ~~The food authority should review the frequency of inspection at the premises after the works have been carried out, bearing in mind the nature of the risk which led to the issuing of the notice.~~

17 Prosecution or in Scotland referral to the Procurator Fiscal should be the rule if the requirements of an improvement notice are not met. Before proceeding with prosecution action the enforcement authority should check whether the proprietor has appealed against the notice.

55a **A copy of each informal letter issued under paragraph 8 above and of each improvement notice should be retained on the relevant premises file for at least 2 years unless required for longer retention because of litigation or local ombudsman review.**