

6. PUBLIC DISCLOSURE OF FOOD PREMISES CLOSURES

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The purpose of this report is to consider the development of a Council policy on publicly advertising the names and addresses of food premises that close for hygiene purposes.

INTRODUCTION

At the Council meeting held on the 26 February 2004 Councillor Alister James asked the following question of Councillor Sue Wells:

“Given that the Christchurch City Council has an officer practice rather than a Council policy on the issue of public disclosure or lack thereof, of food premises which are subject to closure action and given recent public debate on the issue and the Manukau City Council policy for disclosure, will she request officers to report to the Regulatory and Consents Committee at the earliest opportunity, so the Council can develop a policy on the issue?”

In reply, Councillor Wells advised that she would request officers to report to the Regulatory and Consents Committee on this issue, at the earliest opportunity.

BACKGROUND

The specific power for local authorities to deal with food premises rests with the provisions of the Food Hygiene Regulations 1974. These require the local authority to enforce the provisions of the regulations within its district including the regular inspection of all registered premises in the area. It requires the registration of food premises in the district except for those which are exempt from the provisions where they are operating an approved food safety programme under the provisions of the Food Act 1981. Approval of such food safety programmes rests with the Director-General of Health. Such premises are not under the control of the local authority for the purpose of food hygiene matters.

To date there are 1,864 food premises registered with the Council under the Food Hygiene Regulations 1974 and 107 premises operating approved Food Safety Programmes which are not required to be registered by the Council.

The Council does not have the power to close food premises, whether registered or not, under the legislation relating to food premises.

The power to require closure of registered food premises is contained in regulation 82 of the Food Hygiene Regulations 1974 and this power rests with designated officers¹ under the regulations. Such designated officers are appointed by the Director-General of Health and consist of officers employed by the Ministry of Health or through Public Health Units such as Community and Public Health in this area. In this area it includes the Medical Officer of Health and some other officers employed by that body. No City Council officers are appointed as ‘designated officers’.

The provisions of regulation 82 allow for three options in cases where it is considered premises are by reason of their situation, construction, disrepair in such a condition that food may be exposed to contamination or taint, or deteriorate or become dirty. The designated officer may serve a notice on the occupier requiring either;

- (a) To clean, reconstruct, or repair the premises in a manner to be specified in the notice, within a period (not being less than 7 days) to be specified in the notice; or
- (b) To clean, reconstruct, or repair the premises in a manner to be specified in the notice, and to cease to use the premises as food premises until the cleaning, reconstruction or repair has been completed to the satisfaction of a [designated officer]; or

¹ Designated officer

(a) means a person who is-

(i) an officer within the meaning of the Food Act 1981; and

(ii) for the time being designated by the Director-General for the purposes of that provision, any provision or provisions of which it forms part, or these regulations; and

(b) includes the Director within the meaning of the Food Act 1981] Food Hygiene Regulations 1974.

- (c) To cease to use the premises as food premises, and not to subsequently resume the use of the premises as food premises.

While appeal provisions exist against such notices the regulations state that a notice shall have effect despite the time for filing an appeal (14 days) has not expired or the appeal has not been determined. Appeals against such closures, as contained in subclauses (b) and (c) above may be made to the Director-General of Health, and if an occupier does not accept that decision on the appeal to the District Court the notice remains in effect. It is understood that not more than three premises were closed under the above provisions in the last year.

Food Premises may close temporarily for a variety of reasons. In a limited number of cases they may be requested to voluntarily close by a Council Environmental Health Officer. In general this would be for largely matters that are somewhat less significant than an immediate risk to health. These may include the need to thoroughly cleanse the premises without risk of contamination of food under preparation, to avoid the risk of contamination or taint of food by chemicals being used in other parts of the building (eg a food court in a shopping mall), the loss of refrigeration capacity or means of heating water, the need to fumigate the premises for insect or rodent control. Indeed in some cases voluntary closures may occur without any reference to, or input from, a Council officer. Such voluntary closures are undertaken by the occupiers acting responsibly, and accepting the need to undertake maintenance or cleaning, or in a few cases, to avoid more formal action either under regulation 82 or prosecution under other provisions of the regulations. As reported less than six cases occurred in the last year of requested voluntary closure.

In more serious cases, where it is considered significant risks to health could exist from continued operation of the premises the Council officers would request the Medical Officer of Health, or his staff who are designated officers, to use their powers under regulation 82 of the Food Hygiene Regulations 1974.

DISCUSSION

The purpose of licensing food premises and setting standards for the premises and food handlers behaviour is to protect, to the extent that is appropriate or possible, members of the public who consume food from such premises. In either case of the two types of closure that may occur, whether formally under regulation 82 by a designated officer or voluntarily by the occupier on request, the fact that the premises are closed precludes the possibility that members of the public are exposed to any risk of food poisoning from such operations. That does not mean that they may not be so exposed from other food sources, including poor food handling practices at homes. Voluntary closure means that the premises are quickly brought up to standard without the need to take legal action for breaches of the regulations, which has proved to be a lengthy and expensive process in the past.

It should be noted that there are no restrictions on who may own or operate any food premises, nor requirements for the holding of qualifications or having training to operate such premises. To this extent there may be, in some cases, no better knowledge of food hygiene amongst staff than exists in the general public where poor food handling practices in homes are a significant source of food borne illness.

This is one of the reasons the Ministry of Health have introduced, under the Food Act 1981, the concept of "food safety programmes" based on HACCP² principles for commercial food producers. This is considered one of the better ways of ensuring that food premises produce safe food. This is defined by the Food Act 1981 (as amended in 1996) as "*a programme designed to identify and control food safety risk factors in order to establish and maintain food safety.*" In essence, the food safety programme (FSP) identifies the hazards involved in the preparation of food at the premises concerned and sets out how those hazards will be eliminated, reduced or controlled. In addition there must be appropriate record-keeping provisions and a regular audit by an approved auditor to verify the provisions of the FSP are being adhered to. Premises with an approved FSP are exempt from any requirements to be registered with a local authority.

The New Zealand Food Safety Authority is promoting the implementation of FSPs and has indicated their belief that local authorities have a considerable role to play in this area. It explicitly requires that each of the persons operating in the food area are knowledgeable about the critical points at which contamination may occur and how to avoid such problems.

² HACCP means Hazard Analysis Critical Control Point.

It is unclear to what degree the publishing of the names of closed food premises, either by the Medical Officer of Health under regulation 82 or voluntarily by the occupier on request by the Council would assist in reducing the risk to the public of food poisoning if that is the purpose of such publication. In the case of those closed under the provisions of regulation 82 it would be up to the designated officer, in this area normally an officer of Community and Public Health to determine whether such premises should be named. Dr Mel Brieseman, Medical Officer of Health for Community and Public Health does not consider such "naming and shaming" would serve any useful purpose and agrees with the approach adopted by Council staff. He has stated to one of the officers at the time this matter was raised in The Press;

"The important issue is for the public not to be at risk. And if the issue is resolved then that is the end of the matter. To name one premise that has a temporary problem also allows the assumption that all the others are 100% OK. Which you and I know is not the case. If a problem is not resolved or becomes prolonged, that is a different issue. I expressed my views to the Press and was sorry to see they did not include it - presumably because it wasn't the view they wanted!"

In the case of voluntary closures for maintenance or cleaning purposes, there is considered to be no value in naming the premises as, in most cases, by the time the premises had been identified the problem would have been resolved and the premises would have re-opened and be operating in a safe and hygienic manner. It is extremely rare for a premises that has been closed to re-offend and if it did then legal action would be considered which would result in them being identified in the court in normal circumstances. At that stage the occupier would have the ability to argue his or her case in regard to guilt and the appropriate penalty. If convicted it is possible that the Council could publish the name of the premises through its website as has occurred in the case of Manukau City. It should be noted that Manukau City, and Wellington City, have bylaw requirements in relation to powers to require closure so there are legal powers available to them for this purpose but only Manukau publishes such closures. It should be noted that this usually occurs after the premises have re-opened and are presumably then compliant with the standards.

The Council has delegated to the Environmental Services Manager the powers to issue certificates of registration for food premises under the Food Hygiene Regulations 1974 and the Health (Registration of Premises) Regulations 1966, all the powers of the Council under regulations 4 and 5 of the Health (Registration of Premises) Regulations 1966, and the power of the Council to institute prosecutions under the provisions of the Health Act 1956 or any regulations made under that Act administered by the Environmental Services Unit. Prosecution taken for failing to comply with the conduct provisions of the Food Hygiene Regulations 1974 has not been the preferred option for dealing with failures as it takes a long time to get cases prepared and into the Courts and the co-operation of premises occupiers in undertaking the required works can normally be gained for early fixing of the problems.

CONCLUSIONS

The Council has, for a number of years, delegated the operational decisions regarding the control of food premises, including registration and the power to take prosecutions for breaches of the regulations to professional officers on the grounds that they have the expertise and training for that purpose. Decisions regarding the release of individual details of premises operations are made in the context of the amount of proof that may be available to support legal action for breaches of the regulations. Where premises are voluntarily closed for deferred maintenance or cleaning purposes, as noted above, they do not at that time create any risk to the public and notification of such closure would seem to serve no purpose whatever. If the purpose of publicly notifying such closures is to reduce the opportunity for the premises to trade, by suggesting they are not suitable food handlers, it is considered the opportunity should exist for the matter to be tested in a legal manner. The power exists in the Health (Registration of Premises) Regulations 1966 where the occupier can be required to show cause why registration of the premises should not be revoked.

From the information officers have been able to obtain the publication of names of food premises that have been required or requested to close for a period for maintenance or cleaning purposes appears to be limited to the few Councils that have bylaw provisions allowing for required closures. Only one of these, Manukau, publishes such closures without formal Court action. It has not been considered in the past that the Council should cover matters through bylaws that were adequately covered by statute or regulations. The adding of an additional layer of bureaucracy would seem to be unnecessary, and in the context of this matter (publicising the names of food premises that have closed for maintenance) adds nothing to the argument.

Councillors are able to be involved in the operational aspects of food premises control provisions through the provisions contained in the Health (Registration of Premises) Regulations 1966 which permit the revocation of a certificate of registration if the holder has been convicted of an offence against any regulations and fined an amount exceeding \$20 exclusive of costs, or there is a failure to comply with a notice requiring remedial work. In such cases the Council may call upon the person to show cause why the certificate of registration should not be revoked and if the explanation is not satisfactory to the Council may revoke the certificate and decline to issue a new certificate to that person for a period of two years from the date of his conviction. Such a decision is subject to appeal to the Court. In such cases the evidence of failure to comply with the regulation standards has been tested in an appropriate forum and the principles of natural justice largely satisfied. These powers are currently delegated to the Council Hearings Panel. There has been only one such case since 1993.

It is not considered any useful purpose would be served by media attention to premises that may be subject to requested voluntary closure for the purposes of undertaking deferred maintenance or cleaning. If the Council decided to publicise the names of premises that do not comply with the regulation standards it is considered criteria should be clearly stated for such punishment to apply and all cases should be publicised to avoid the possibility of bias. A number of premises fail to comply with food hygiene requirements at some time during a year and are issued with notices requiring action to bring these up to standard. The question could be asked whether these should be named in addition to those closing to undertake remedial work. That would also require the Council to advertise such cases rather than relying on the whims of the media picking up such matters at their will. It is likely that the extent of voluntary closures would decline if such advertising occurred and occupiers of premises may possibly wait for legal action to occur before undertaking required deferred maintenance and cleaning. It is not considered this would necessarily serve any useful purpose in improving food hygiene in either the short or long term.

Staff

- Recommendations:**
1. That the Council note that it does not have the power to close food premises under the provisions of the legislation relating to their control.
 2. That the Council note that designated officers, such as the Medical Officer of Health employed by Community and Public Health, do have such a power in certain circumstances but have declined to name those they close under those provisions.
 3. That the Council confirms the current practice of Council officers not naming food premises that have been requested by the Council to voluntarily close for cleaning or maintenance purposes.

Chairman's

- Recommendation:** That the above recommendation be adopted.