

Food Safety Bylaw 2013 Review

Options report 2019

Introduction

This report provides advice on options available to Auckland Council in response to the review of Tāmaki Makaurau Whakapai Kai 2013, Auckland Council Food Safety Bylaw 2013. It draws on findings in the “Food Safety Bylaw 2013: Findings Report 2019”.

Executive summary

To enable Auckland Council to decide how to respond to the findings report on the review of the Tāmaki Makaurau Whakapai Kai 2013, Auckland Council Food Safety Bylaw 2013, staff assessed the following options using Local Government Act 2002 criteria:

- **option one** (improve Bylaw): new bylaw requiring most food businesses that serve the public and are registered and verified by council to display a food grade
- **option two** (extend Bylaw): new bylaw requiring more food businesses that serve the public regardless of registration or verification agency to display a food grade
- **option three** (no bylaw): allow the Bylaw to expire but continue food grading
- **option four** (no bylaw or grading): allow the Bylaw to expire and cease food grading

Staff recommend **option one** (improve Bylaw) to require most food businesses to display a food safety grade certificate (food grade) is the most favourable option because:

- the current Bylaw and food grading scheme have support from the public, operators, health experts and environmental health officers as they can incentivise better food safety practices
- most food businesses that serve the public are currently required to display a food grade (6,711 or 70 per cent), even if they have a lower grade
- it raises public awareness of food safety standards and enables them to make an informed decision
- it has less compliance costs for business and council than option two and avoids the risk of inconsistency with the Food Act
- it can provide greater incentives for food businesses to improve food safety standards than options three and four which have no requirement to display a food grade
- it fills a regulatory gap in the absence of a national food grading scheme.

Option two (extend Bylaw) would be more effective than the other options as it would require 81 per cent of food businesses that serve food to the public to display a food grade. The key trade-off is it would increase compliance costs for food businesses not registered and verified by council and may be inconsistent with the Food Act 2014. Further engagement with food businesses and the Ministry for Primary Industries would be required before adopting this option.

Option three (no Bylaw) is less effective than options one and two. **Option four** (no bylaw or grading) is the least effective of all options.

Problem definition and status quo (current Bylaw)

Original problem statement and status quo

When the Bylaw was made, staff defined the original problem as follows:

Unhygienic or unsafe premises being operated; high levels of food poisoning arising from food sold by food premises; public usually unable to determine the standards of hygiene in food premises; crockery, cutlery and utensils potentially hired to the public in an unhygienic state; sale of food to private premises (bun running) occurring in unsafe manner; and food stalls and mobile food shops operated in unsafe manner.¹

The current Bylaw was introduced to respond to this problem by amalgamating all legacy bylaws to provide a single bylaw for the whole region.

Current and future problem

The current and future problem is that some food businesses continue to have poor food safety practices that may lead to an increased risk of the public contracting foodborne illness or “food poisoning”.

Common foodborne illnesses include:

- Campylobacteriosis
- Hepatitis A
- Shigellosis
- Giardiasis
- Yersiniosis
- Norovirus
- Cryptosporidiosis
- Listeriosis
- Acute gastroenteritis
- Salmonellosis
- Trichinellosis

Scale and magnitude of the problem

Foodborne illness can cause gastroenteritis and can lead to acute and long-lasting health problems such as kidney failure.

New Zealand has high rates of foodborne illness (particularly campylobacteriosis) compared to other western countries. There was an estimated 3,634 incidences of notifiable illness in Auckland in 2017, a high proportion of which was likely to be caused by contaminated food (see findings report).

Data shows Aucklanders are eating out more often and this, combined with food trends such as the consumption of raw foods, may increase risks of foodborne illness in the future.

Stakeholder views of the problem

Stakeholders, including the Auckland Council Environmental Health Unit and health experts, consider there are ongoing food safety problems at some food businesses that can lead to foodborne illness. These include cleanliness concerns, pest control, and poor food storage, handling, preparation and display.

¹ Statement of Proposal, Introduction of a new Food Safety Bylaw, 2012, pp. 5, 10, 11.

Objectives

In line with the problem definition, Food Act 2014 (Food Act), Local Government Act 2002 and the Auckland Plan², the objectives of a regulatory response to this problem are to:

1. reduce the risk of foodborne illness while ensuring:
 - (i) compliance costs are reasonable
 - (ii) consistency with the Food Act
2. meet legislative requirements under the Local Government Act 2002 including:
 - (i) giving effect to its identified priorities and desired outcomes in an efficient and effective manner (section 14)
 - (ii) ensuring any bylaw does not give rise to any implications or is inconsistent with the New Zealand Bill of Rights Act 1990 (sections 155).

These objectives are used to assess the options below.

Outcomes

The key desired outcome is to protect public health from foodborne illness resulting from poor food safety practices by food businesses.

Status quo (current Bylaw)

The Bylaw requires 6,711 current template food safety control plan businesses to display a food grade if they serve the public, are registered and verified by council, and were graded before the introduction of the Food Act. This equates to 70 percent of all food businesses that serve the public in Auckland.

Food Control Plan businesses registered and verified by council that were not previously graded can opt-in to food grading (e.g. early childhood centres, marae).

Other Food Control Plan and all National Programme 1, 2 and 3 businesses that serve the public are not required to display under the Bylaw.

Eatsafe Auckland does however provide food grades as an additional service outside of the Bylaw to National Programme food businesses registered and verified by council to display if they choose.

Eatsafe Auckland do not provide food grades to the remaining food businesses that serve the public, as they are not registered and verified by council.

Food Act Terms

Custom food control plan

include food chains and supermarkets.

Template food control plan

business include restaurants, bars, cafes and takeaways

National Programme 3 include dairies, services stations that reheat food

National Programme 2 include early childhood centres, retailers that sell chilled and frozen foods, except ice cream

National Programme 1 include coffee carts, stores that sell pre-packaged ice cream and shelf stable products.

² Auckland Plan 2050 direction to “improve health and wellbeing for all Aucklanders by reducing harm and disparities in opportunities” (Belonging and Participation, direction 2) and “ensure regulatory planning and other mechanisms support business, innovation and productivity growth” (Opportunity and Prosperity, focus area 2).

Options

Staff identified the following options to achieve the outcome sought:

- **Option one:** (improve Bylaw) new bylaw requiring most food businesses that serve the public and are registered and verified by council to display a food grade
- **Option two:** (extend Bylaw) new bylaw requiring more food businesses that serve the public regardless of registration or verification agency to display a food grade
- **Option three:** (no bylaw) allow the Bylaw to expire but continue food grading
- **Option four:** (no bylaw or grading) allow the Bylaw to expire and cease food grading.

Retaining the status quo is not possible as the current Bylaw will expire on 23 May 2020.

An option to require National Programme food businesses to display a food grade was considered but not assessed further because they are lower risk.

A summary of which food businesses are required to display a food grade under each option is contained in Table 2 and a more detailed description of each option is provided below.

Note, the food business and grading data used in this report is based on an analysis of MPI³ and Eatsafe Auckland data as at 24 June 2019.

Table 2: food businesses required to display a food grade under each option

Examples of types of food business	Status Quo	Option one (improve bylaw)	Option two (extend bylaw)	Option three (no bylaw)	Option four (no bylaw or grading)
Auckland only cafes, restaurants and takeaways registered and verified by council (6,712 food businesses)	✓	✓	✓	x	x
food chains, supermarkets registered by MPI and/or verified by third-parties (1,081 food businesses)	x	x	✓	x	x
dairies and service stations that heat food, coffee carts (1,824 food businesses)	x	x	x	x	x

³ Ministry of Primary Industries (MPI)/Territorial Authority Multiple Approvals Processing System (MAPS) data

Option one: improve Bylaw

Description

This option would involve making a new bylaw that would:

- continue to apply to the 6,711 Template Food Control Plan businesses that serve the public and are registered and verified by council
- continue to exclude 1,082 Food Control Plan businesses that serve the public because they are not registered and verified by council
- continue to exclude the 1,824 National Programme businesses that serve the public because they are lower risk and less frequently verified
- issue a food grade following verification or inspection
- require a food grade to be displayed in an appropriate location to council's satisfaction
- meet best practice drafting standards.

Eatsafe Auckland would continue to provide food grades as an additional service outside of the Bylaw that can be changed at any time.

Implementation

The current process to issue food grades at no additional charge and the use of a graduated enforcement approach to Bylaw compliance would continue (refer to Findings Report 3.4.2).

Council would continue to verify food businesses and respond to complaints as required under the Food Act.

Pros and cons

Pros

- the display of food grades and food grading has strong public and operator support
- health experts and environmental health officers consider food grades can incentivise better food safety practices
- requires most food businesses that serve the public to display a food grade (6,711 or 70 per cent)
- requires most food businesses to display a food grade even if it is a lower grade
- raises public awareness of food safety standards and enables them to make an informed decision
- can provide greater incentives for food businesses to improve food safety standards
- does not increase compliance costs for businesses or council
- fills a regulatory gap in the absence of a national food grading scheme.

Cons

- retains an 'uneven playing field' and public confusion as 2,906 food businesses (24 per cent of all food businesses) that serve the public would not be required to display a food grade.

Risks

- MPI allows third-party verification of Auckland-based Template Food Control Plans, resulting in some of the current 6,711 food businesses changing to a third-party verifier if they do not want to display a food grade
- MPI introduces a national food grading scheme that is different to Eatsafe Auckland, which makes the transition for businesses more complicated
- MPI does not support this option because it retains an 'uneven playing field' and could cause public confusion.

Mitigation

- rely on strong operator support for the display of food grades and food grading
- council engages with MPI about the proposed new bylaw and any future grading developments to avoid or address any inconsistency with the Food Act.

Option two: extend Bylaw

Description

This option would involve making a new bylaw that would:

- apply to the 7,793 Custom and Template Food Control Plan businesses that serve the public regardless of registration or verification authority
- exclude the 1,824 National Programme businesses that serve the public because they are lower risk and less frequently verified
- require third-party verifiers or businesses to provide council with verification report
- issue a food grade following verification or inspection
- require a food grade to be displayed in an appropriate location to council's satisfaction
- meet best practice drafting standards.

Eatsafe Auckland would continue to provide food grades as an additional service outside of the Bylaw that can be changed at any time.

Implementation

The current process to issue food grades and the use of a graduated enforcement approach to Bylaw compliance will continue (refer to Findings Report 3.4.2).

Council would charge an additional fee to process a food grade for each of the 1,081 food businesses not currently registered and verified by council.

Additional administration and enforcement resources may be needed to process verification reports and ensure third-party verifiers and/or food businesses provide them to council.

However, there would be no additional charge for food businesses registered and verified by council.

Council would continue to verify food businesses and respond to complaints as required under the Food Act.

Council would not be able to issue 'D' or 'E' food grades for the 1,081 Custom and Template Food Control businesses registered with MPI. MPI food safety officers take all enforcement action for these businesses and council is not informed of the outcome.

Pros and cons

Pros

- the display of food grades and food grading has strong public and operator support
- health experts and environmental health officers consider food grades can incentivise better food safety practices
- extends the number of food businesses that serve the public and required to display a food grade from 6,711 to 7,793 or from 70 per cent to 81 per cent
- requires more food businesses to display a food grade even if it is a lower grade
- creates a level playing field in Auckland as all Custom and Template Food Control Plan businesses that serve the public would be required to display a food grade
- raises public awareness of food safety standards and enables them to make an informed decision
- reduces public confusion about which food businesses must display a food grade
- provides incentives to improve food safety standards
- fills a regulatory gap in the absence of a national food grading scheme.

Cons

- the additional administration fee for the 1,081 food businesses currently not registered and verified by council may be contrary to the principles of the Food Act
- increased council resourcing is required to process third-party verification reports and to ensure verification information is provided to enable council to issue a food grade
- creates an uneven playing field if only food businesses registered and verified with council are actually required to display a 'D' or 'E' grade
- food business registered with MPI that would otherwise be issued a 'D' or 'E' food grade could continue to display an 'A' grade.

Risks

- food businesses not currently required to display a food grade may challenge the extension of the bylaw, for example food chains, supermarkets or service stations
- third-party verifiers or food businesses may refuse to provide verification information
- MPI introduces a national food grading scheme that is different to Eatsafe Auckland, which makes the transition for businesses more complicated
- MPI is likely to be opposed to this option
- Council has not specifically engaged with food businesses or MPI on this option.

Mitigation

- council engages with MPI, third-party verifiers and MPI registered food businesses prior to further consideration of this option.

Option three: no bylaw

Description

This option would:

- allow the current Bylaw to expire
- make the display of a food grade voluntary for the current 6,711 Template Food Control Plan businesses that serve the public and required to display a food grade.

Eatsafe Auckland would continue to provide food grades as an additional service that can be changed at any time.

Implementation

The current process to issue food grades at no additional charge for food businesses registered and verified by council would continue.

There would be no enforcement, as the display of a food grade would be voluntary.

Council may use non-regulatory tools such as public and food business education campaigns to promote display.

Council would continue to verify food businesses and respond to complaints as required under the Food Act.

Pros and cons

Pros

- food businesses can still choose to display a food grade which is supported by stakeholders
- creates a level playing field in Auckland as no food business would be required to display a food grade
- it raises public awareness of food business safety standards and enables them to make an informed decision
- council would still hold publicly accessible records of food grades for businesses that choose to be graded
- could provide incentives for food businesses to improve food safety standards.

Cons

- stakeholders consider the requirement to display a food grade is important for food safety
- unable to take enforcement action
- the incentive to improve food safety would be reduced because businesses are not required to display a low grade
- decreased public awareness of food safety standards and ability to make informed decisions on where to purchase food, which would increase public confusion

Risks

- reputational risk that the public view council as failing to ensure food safety
- the majority of food businesses do not display a food grade making Eatsafe Auckland redundant

- MPI introduces a national food grading scheme that is different to Eatsafe Auckland, which makes the transition for businesses more complicated.

Mitigation

- media campaign to reassure the public that food businesses are verified and inspected for food safety
- promote the benefits of displaying a food grade for attracting customers, although this will be less effective for food businesses with lower grades
- council engages with MPI about any future grading developments to avoid or address any inconsistency with the Food Act.

Option four: no bylaw or grading

Description

This option would:

- allow the current Bylaw to expire.
- remove the mandatory display of food grades from the current 6,711 food businesses in Auckland that serve the public and are registered and verified by council.

Eatsafe Auckland would cease to exist and a food grade would no longer be issued.

Implementation

No implementation as food grading and the requirement to display would not exist.

Council would continue to verify food businesses and respond to complaints as required under the Food Act.

Pros and cons

Pros

- creates a level playing field in Auckland as no food businesses would be required to display a food grade
- avoids public confusion about why only some food businesses are displaying a food grade
- removes disincentive for some food businesses to be verified by council where they are concerned about having to display a food grade.

Cons

- reduced public awareness of food business safety standards and ability to make informed decisions
- removes incentive for food businesses to improve food safety practices to obtain a higher food grade
- majority of stakeholders consider the food grading scheme and requirement to display a food grade is important for food safety.

Risks

- significant reputational risk as the public will consider that council is removing a useful information source and is reducing food safety standards.

Mitigation

- public awareness campaign about what change will mean and council's role in ensuring food safety under the Food Act.

Options assessment

Preliminary legal assessment

Bylaws must comply with certain legal requirements to be valid, including that they be authorised by statute, and not be repugnant or unreasonable.

Staff consider option one meets these preliminary legal requirements. Option two may arguably be inconsistent with the Food Act.

Options three and four do not require a legal assessment as they do not require the preparation of a bylaw. However, they would not be repugnant or unreasonable.

Consistency with the Food Act

The Food Act provides that local authorities must not make a bylaw that is inconsistent with the Act. If a bylaw is inconsistent, the Food Act will prevail over the bylaw to the extent it is inconsistent.⁴

Options one and two are consistent with the Food Act's purpose (section 4) to achieve the safety and suitability of food and maintain confidence in New Zealand's food safety regime. Option one is also aligned with all other principles of the Act (section 16).

Option two however, is arguably inconsistent with "the need to minimise compliance costs for food businesses" if it imposes additional costs on food businesses that use third-party verifiers. Option two may also be contrary to the development and maintenance of productive working relationships and enhanced co-operation with MPI and the need for a coordinated and aligned approach. Further engagement with MPI is required to complete this assessment.

While option three does not involve the preparation of a bylaw it would align with the purpose and principles of the Food Act as a food safety guidance measure.

New Zealand Bill of Rights Act 1990 assessment

Options one and two raise potential limitations to freedom of expression by requiring food business operators to display a food grade. Any limitation however is minor and justified in meeting the broader purpose to protect the public from foodborne illness. The requirement to display a food grade supports this purpose by increasing public awareness of food safety and incentivising better food safety practices by businesses. Therefore, there are no implications and the options are not inconsistent with the New Zealand Bill of Rights Act 1990.

Option three and four do not require the preparation of a bylaw and therefore a New Zealand Bill of Rights Act assessment is not required.

⁴ Food Act 2014, section 446.

Assessment against criteria

Staff have completed a comparative assessment against criteria. These criteria reflect the objectives of a regulatory response to this problem identified above to:

1. improve and maintain business food safety standards to decrease the risk of foodborne illness while ensuring:
 - (i) compliance costs are reasonable
 - (ii) consistency with the Food Act.
2. meet legislative requirements under the Local Government Act 2002 including:
 - (i) giving effect to its identified priorities and desired outcomes in an efficient and effective manner (section 14)
 - (ii) ensuring any bylaw does not give rise to any implications or is inconsistent with the New Zealand Bill of Rights Act 1990 (sections 155).

The criteria and a summary of the assessment is shown in Table 3. The “✓” and “✗” reflect the impact of the option against each criterion relative to other options. For instance, the more “✓”, the better the option.

Table 3: Summary of assessment of options against stated objectives

	Effectiveness at improving and maintaining business food safety standards to decrease the risk of foodborne illness	Reasonableness of compliance costs and consistency with Food Act
Option one: improve Bylaw	<p style="text-align: center;">✓✓</p> <p>Option one is effective as it requires most public serving food businesses to display, incentivises them to improve food safety to gain a higher grade and allows the public to make informed decisions.</p>	<p style="text-align: center;">✓✓</p> <p>Option one has reasonable compliance costs as it requires little extra council resourcing to issue food grades and there is no additional charge to food businesses. Option one is consistent with the Food Act.</p>
Option two: extend Bylaw	<p style="text-align: center;">✓✓✓</p> <p>Option two would be very effective as it requires all food business that serve the public to display, incentivises them to improve food safety to gain a higher grade and allows the public to make more informed decisions.</p>	<p style="text-align: center;">xx</p> <p>Option two would increase compliance costs for food businesses who use third-party verifiers (likely administrative fee) and council resourcing to ensure verification information is provided for grading. Option two is arguably inconsistent with the Food Act. Further engagement is required to make a final determination.</p>
Option three: no bylaw	<p style="text-align: center;">✓</p> <p>Option three may be an incentive for some food businesses to improve food safety but would reduce public information and provide less incentive for some businesses as they could choose not to display a food grade.</p>	<p style="text-align: center;">✓✓</p> <p>Option three has reasonable compliance costs as it requires little extra council resourcing and there is no additional charge to food businesses. Option three is consistent with the Food Act.</p>
Option four: no bylaw, no grading	<p style="text-align: center;">xx</p> <p>Option four would not provide any additional food safety incentives above the Food Act requirements and would remove a public information source.</p>	<p style="text-align: center;">✓✓✓</p> <p>The compliance costs for option four would be more reasonable as it would not require extra council resourcing to issue food grades and there would be no additional charge to food businesses. Option four is consistent with the Food Act.</p>

Analysis and recommendations

Option one (improve Bylaw) scores most favourably against the assessment criteria.

Based on analysis against assessment criteria and the pros and cons of each option, staff recommend **option one** (improve Bylaw) as the most favourable option because:

- the current Bylaw and food grading scheme have support from the public, operators, health experts and environmental health officers as they can incentivise better food safety practices
- most food businesses that serve the public are required to display a food grade (6,711 or 70 per cent) even if they have a lower grade
- it raises public awareness of food safety standards and enables them to make an informed decision
- it has less compliance costs for businesses and council than option two and avoids the risk of inconsistency with the Food Act
- it can provide greater incentives for food businesses to improve food safety standards than options three and four which have no requirement to display
- it fills a regulatory gap in the absence of a national food grading scheme.

Option two (extend Bylaw) would be more effective than the other options as it would require 81 per cent of all food businesses that serve food to the public to display a food grade. The key trade-off is it would increase compliance costs for food businesses not registered and verified by council and may be inconsistent with the Food Act. Further engagement with food businesses and MPI would be required before adopting this option.

Option three (no bylaw) would continue to raise public awareness and incentivise some food businesses. However, there would be no ability to enforce the display of food grades, particularly for businesses with lower grades. If most food businesses choose not to display a food grade, the scheme would become redundant.

Option four (no bylaw or grading) is the least effective option because it would not provide any additional food safety incentives above the Food Act verification requirements and would remove a public information source.