

**Bills Committee on
the Public Health and Municipal Services (Amendment) Bill 2008**

**Follow-up on Matters Arising from
the Bills Committee Meeting on 10 January 2009**

Purpose

This paper sets out our response to the issues raised by Members at the Bills Committee meeting on 10 January 2009. These include the procedures for the Municipal Services Appeals Board (MSAB), the provisions relating to the Code of Practice, and the corresponding Committee Stage Amendments (CSAs) to the Public Health and Municipal Services (Amendment) Bill 2008.

2. The revised CSAs are at Annex A. The latest mark-up version of the Amendment Bill is at Annex B for Members' reference.

Procedures for Municipal Services Appeals Board

3. Section 78G of the Amendment Bill provides that a person bound by a section 78B order who is aggrieved by the order made by the Director of Food and Environmental Hygiene (DFEH) may, within the statutory period, appeal to the MSAB.

4. MSAB is an independent statutory body established under the Municipal Services Appeals Board Ordinance (Cap. 220). The function of the MSAB is to hear and determine an administrative decision from which an appeal lies to the Board under any Ordinance. The members of the MSAB are appointed by the Chief Executive.

5. A person who is aggrieved by a section 78B order (the appellant) may appeal to the MSAB. The respondent (i.e. DFEH) shall, within 28 days after receiving notice of an appeal to MSAB, serve on the appellant and any other person who is bound by the decision appealed against, and lodge with the MSAB a statement setting out the findings of fact, referring to evidence or other material on which those findings were based and giving the reasons for the decision, etc. The appellant may also make written representations on the statement to the Board within a specified period.

6. Notice of hearing will then be served on the appellant, respondent (i.e. DFEH) and other parties to an appeal not less than two weeks prior to the date set for the hearing. For the purposes of any appeal, the MSAB is to be constituted by the Chairman or a Vice-chairman of the MSAB, together with two members to hear and determine the appeal. The hearing shall be in public except in special circumstances after consulting the parties to the appeal. The appellant may be present at the hearing and make representations either in person or by counsel or solicitor or, with the consent of the MSAB, by some other person.

7. The MSAB may receive and consider any material, whether by way or oral evidence, written statements, documents or otherwise, even though such materials would not be admissible in evidence in civil or criminal proceedings. If necessary, the MSAB may examine on oath, affirmation or otherwise any person attending before it and require such person to answer all questions put by or with the consent of the MSAB.

8. The MSAB shall give reasons in writing for its decisions, and those reasons shall include its findings on material questions of fact and a reference to the evidence or other material on which those findings were based. The Secretary to the MSAB shall serve a copy of the MSAB's decision and of the reasons for the decision on the parties to the appeal.

Appeal and Compensation Mechanism

9. Having considered Members' view, we propose that there will be no need for a person bound by a section 78B order to first seek a decision from the MSAB if he wants to seek compensation under section 78H. Section 78H(1)(a) will be deleted accordingly. That said, Members may like to note that we have retained section 78G, i.e. the MSAB mechanism, added by the Amendment Bill to provide for an appeal channel for food traders who would like to seek to have a section 78B order varied or set aside by the MSAB.

Code of Practice

10. The new sections 78K and 78L of the Amendment Bill provides that DFEH may issue any code of practice that in the Authority's opinion is suitable

for the purpose of providing practical guidance in respect of Part VA of the Public Health and Municipal Services Ordinance (Cap. 132). There was suggestion at the Bills Committee meeting that DFEH shall be required to issue a code of practice, instead of allowing him the discretion to issue it or not.

11. It is the policy intention to issue a code of practice to provide practical guidance in respect of the provisions in the new Part VA of Cap. 132. We have therefore included the new sections 78K and 78L. The formulation of these two provisions (including the use of the word “may” in section 78K, giving DFEH the discretion to issue codes of practice) is very common among legislation which empower an authority or a public officer to issue codes of practice. These include, amongst others, section 42(1) of the Energy Efficiency (Labelling of Products) Ordinance (Cap. 598) and section 56(5) of Cap. 132. The new Part VA of Cap. 132 should be consistent with other similar provisions in the same Ordinance. We therefore intend to retain the word “may” in section 78K. That said, it is every intention of the Administration to issue a code of practice to provide practical guidance to members of the trade. In this regard, a draft code of practice has already been issued to the Bills Committee for comments (see paper CB(2)602/08-09(03)).

12. Section 78B of the Amendment Bill provides that DFEH may make an order (section 78B order) if he has reasonable grounds at the time of making the order to believe that the making of the order is necessary to prevent or reduce a possibility of danger to public health or to mitigate any adverse consequence of a danger to public health. DFEH will take into consideration a host of factors in deciding whether there are reasonable grounds for him to make a section 78B order. As explained to the Bills Committee on 10 January 2009, having considered Members’ views, we have decided to set out clearly in section 78B the factors that DFEH may take into account. The CSAs at Annex A have already reflected such amendments.

Advice Sought

13. Members are invited to comment on the above.

Food and Health Bureau
January 2009

PUBLIC HEALTH AND MUNICIPAL SERVICES (AMENDMENT) BILL 2008

COMMITTEE STAGE

Amendments to be moved by the Secretary for Food and Health

<u>Clause</u>	<u>Amendment Proposed</u>
2	<p>(a) In the proposed section 78A, in the definition of “food”, by deleting “by the definition of “food” in” and substituting “to it by”.</p> <p>(b) In the proposed section 78A, in the definition of “section 78B order”, by adding “and, as the context requires, includes such an order as varied from time to time under section 78B(4)” after “section 78B(1)”.</p> <p>(c) In the proposed section 78A, by adding – ““hazard” (危害) means a biological, chemical or physical agent in, or condition of, food with the potential to cause an adverse health effect;”.</p> <p>(d) In the proposed section 78B, by adding – “(2A) In determining whether there are reasonable grounds under subsection (2), the Authority may, in so far as is practicable and reasonable, take into account all factors relevant to the circumstances of the case that the Authority considers appropriate, including but not limited to the following –</p> <p>(a) information obtained from any importer or supplier of the food;</p>

- (b) information, reports or testing results obtained from a public analyst;
 - (c) information (including reports, alerts, warnings and advisories) obtained from any international food or health authority or the food or health authority of any place;
 - (d) the time required for obtaining reports or testing results from a public analyst;
 - (e) characteristics of any hazard in the food, the level of the hazard in the food, consumption pattern of the food and the exposure of the general public and vulnerable groups to the food;
 - (f) any statutory requirement relating to the food;
 - (g) information on the source and extent of the hazard, in particular on whether the hazard exists throughout or in any part of the manufacture or supply chain or is limited to a particular batch of food.”.
- (e) By deleting the proposed section 78C(3) and substituting –
- “(3) A section 78B order addressed as referred to in subsection (1)(b) or (c) must be published in the Gazette.”.
- (f) By deleting the proposed section 78C(6) and substituting –

“(6) A section 78B order addressed as referred to in subsection (1)(b) or (c) takes effect at the beginning of the day on which it is published under subsection (3).”.

(g) In the proposed section 78D(3)(a), by deleting “any act” and substituting “the act”.

(h) By deleting the proposed section 78D(3)(b) and substituting –

“(b) the employee was not, at the relevant time, in a position to make or influence a decision regarding that act or omission.”.

(i) In the proposed section 78G(1), by deleting everything after “within” and substituting “28 days from becoming bound by the order, appeal to the Municipal Services Appeals Board against the order as originally made.”.

(j) In the proposed section 78G, by adding –

“(1A) A person bound by a section 78B order who is aggrieved by a variation of the order under section 78B(4) may, within 28 days from becoming bound by the variation, appeal to the Municipal Services Appeals Board against the order as so varied.”.

(k) In the proposed section 78G(3), by deleting “subsection (1)” and substituting “this section”.

(l) By deleting the proposed section 78H(1) and substituting –

“(1) A person bound by a section 78B order may apply for an amount of compensation, recoverable as a civil debt due from the Government, that is just and equitable in all the circumstances of the case, for any loss of a kind set out in subsection (1B).

(1A) The person is entitled to compensation only if the person proves that –

- (a) the Authority did not have reasonable grounds to make the order at the time of making the order or to vary the order at the time of a variation of the order; and
- (b) the person has suffered the relevant loss.

(1B) The losses referred to in subsection (1) are the following losses arising as a direct result of compliance with the section 78B order or as a direct result of the exercise of a power under section 78I(1) in relation to the section 78B order –

- (a) total or partial loss of the food that is the subject of the order and that –
 - (i) has been destroyed or otherwise disposed of;
 - (ii) is no longer fit for human consumption; or
 - (iii) is depreciated in value;
- (b) costs or expenditure actually and directly incurred.

(1C) The amount of compensation recoverable –

- (a) in relation to a loss of a kind set out in subsection (1B)(a), must not exceed the market value of the food immediately before the time of

making the section 78B order or immediately before the time of the variation, as the case may be; and

(b) in relation to a loss of a kind set out in subsection (1B)(b), must not exceed the actual amount of the costs or expenditure incurred.”.

(m) In the heading of the proposed section 78J, by adding “**and principals**” after “**employers**”.

(n) By deleting the proposed section 78J(2) and (3) and substituting –

“(2) An act done or omission made by an agent of another person with the authority (whether express or implied and whether precedent or subsequent) of that other person is treated for the purposes of this Part as done or made by that other person, as well as by the agent.

(3) In any proceedings for an offence under this Part brought against a person in respect of an act or omission alleged to have been done or made by an employee or agent of the person, the person is liable to be convicted of and be punished for that offence unless the person establishes the defence described in subsection (4).

(4) If any proceedings are brought against a person by virtue of this section, it is a defence for the person to show that the person exercised all due diligence to prevent the employee or agent from –

(a) doing the act or making the omission; or

(b) doing an act or making an omission of that description in the course of the employee's employment or the agent's authority."

(o) By adding –

“78K. Codes of practice

(1) The Authority may issue any code of practice that in the Authority's opinion is suitable for the purpose of providing practical guidance in respect of this Part.

(2) If a code of practice is issued under subsection (1), the Authority must, by notice published in the Gazette –

- (a) identify the code;
- (b) specify the date on which the code is to take effect; and
- (c) specify for which of the provisions of this Part the code is so issued.

(3) The Authority may from time to time revise the whole or any part of a code of practice issued under subsection (1).

(4) Subsection (2) applies, with the necessary modifications, in relation to any revision made under subsection (3) as it applies in relation to the issue of a code of practice.

(5) The Authority may at any time revoke a code of practice issued under subsection (1).

(6) If a code of practice is revoked under subsection (5), the Authority must, by notice published in the

Gazette –

- (a) identify the code; and
- (b) specify the date on which the revocation is to take effect.

78L. Use of codes of practice in legal proceedings

(1) A failure on the part of any person to observe any provision of a code of practice does not of itself render the person liable to any civil or criminal proceedings.

(2) However, if in any legal proceedings the court is satisfied that a provision of a code of practice is relevant to determining a matter that is in issue in the proceedings –

- (a) the code of practice is admissible in evidence in the proceedings; and
- (b) proof that the person contravened, or did not contravene, the provision may be relied on by any party to the proceedings as tending to establish or negate that matter.

(3) In any legal proceedings, a code of practice which appears to the court to be the subject of a notice under section 78K is taken to be the subject of that notice in the absence of evidence to the contrary.

(4) In this section –
“code of practice” (實務守則) means a code of practice issued under section 78K(1) as revised from time to time under section 78K(3);

“court” (法院) has the meaning given to it by section 3 of the Interpretation and General Clauses Ordinance (Cap. 1) and includes a magistrate and the Municipal Services Appeals Board;

“legal proceedings” (法律程序) includes proceedings of the Municipal Services Appeals Board for an appeal under section 78G.”.

3

By adding –

“78K Director of Food and Environmental Hygiene”.

**PUBLIC HEALTH AND MUNICIPAL SERVICES
(AMENDMENT) BILL 2008****CONTENTS**

Clause		Page
1.	Short title	1
2.	Part VA added	1

“PART VA**ADDITIONAL POWERS IN RELATION TO FOOD**

78A.	Interpretation of Part VA	1
78B.	Additional powers in relation to food	2
78C.	Manner of making section 78B orders, service and publication	4
78D.	Contravention of section 78B orders	5
78E.	Actions taken in relation to section 78B orders and provision of samples	6
78F.	Power to obtain information or copies of documents	7
78G.	Appeals to Municipal Services Appeals Board	8
78H.	Compensation	8
78I.	Seizure, marking or destruction of food	10
78J.	Liability of employers and principals	11
78K.	Codes of practice	12
78L.	Use of codes of practice in legal proceedings	13
3.	Designated Authorities	14
4.	Names in which proceedings for offences may be brought under section 131(1)	14
5.	Penalties	15

A BILL

To

Amend the Public Health and Municipal Services Ordinance to –

- (a) empower the Director of Food and Environmental Hygiene to make orders in relation to food for the protection of public health; and
- (b) provide for incidental and connected matters.

Enacted by the Legislative Council.

1. Short title

This Ordinance may be cited as the Public Health and Municipal Services (Amendment) Ordinance 2008.

2. Part VA added

The Public Health and Municipal Services Ordinance (Cap. 132) is amended by adding –

“PART VA

ADDITIONAL POWERS IN RELATION TO FOOD

78A. Interpretation of Part VA

In this Part –

“food” (食物) has the meaning given ~~by the definition of “food” in~~ to it by section 2(1) but includes live poultry, live reptiles and live fish;
“hazard” (危害) means a biological, chemical or physical agent in, or condition of, food with the potential to cause an adverse health effect;

“section 78B order” (第 78B 條命令) means an order made under section 78B(1) and, as the context requires, includes such an order as varied from time to time under section 78B(4);

“supply” (供應), in relation to food, means –

- (a) to sell the food;
- (b) to offer, keep or exhibit the food for sale;
- (c) to exchange or dispose of the food for consideration;
- (d) to transmit, convey or deliver the food in pursuance of –
 - (i) a sale; or
 - (ii) an exchange or disposal for consideration;
 or
- (e) for commercial purposes, to give the food as a prize or to make a gift of the food.

78B. Additional powers in relation to food

(1) The Authority may make an order to do any one or more of the following –

- (a) prohibit the import of any food for the period specified in the order;
- (b) prohibit the supply of any food for the period specified in the order;
- (c) direct that any food supplied be recalled and specify the manner in which, and the period within which, the recall is to be conducted;
- (d) direct that any food be impounded, isolated, destroyed or otherwise disposed of and specify the manner in which, and the period within which, the

impounding, isolation, destruction or disposal is to be conducted;

- (e) prohibit the carrying on of an activity in relation to any food, or permit the carrying on of such activity in accordance with conditions specified in the order, for the period specified in the order.

(2) The Authority may only make a section 78B order if the Authority has reasonable grounds at the time of making the order to believe that the making of the order is necessary to prevent or reduce a possibility of danger to public health or to mitigate any adverse consequence of a danger to public health.

(2A) In determining whether there are reasonable grounds under subsection (2), the Authority may, in so far as is practicable and reasonable, take into account all factors relevant to the circumstances of the case that the Authority considers appropriate, including but not limited to the following –

- (a) information obtained from any importer or supplier of the food;
- (b) information, reports or testing results obtained from a public analyst;
- (c) information (including reports, alerts, warnings and advisories) obtained from any international food or health authority or the food or health authority of any place;
- (d) the time required for obtaining reports or testing results from a public analyst;
- (e) characteristics of any hazard in the food, the level of the hazard in the food, consumption pattern of the food and the exposure of the general public and vulnerable groups to the food;

- (f) any statutory requirement relating to the food;
- (g) information on the source and extent of the hazard, in particular on whether the hazard exists throughout or in any part of the manufacture or supply chain or is limited to a particular batch of food.

- (3) A section 78B order must specify –
- (a) the person, persons or class of persons intended to be bound by the order;
 - (b) particulars of the food that is the subject of the order;
 - (c) the reason for making the order;
 - (d) the prohibition or action required, as the case may be, and conditions (if any) under the order;
 - (e) the period referred to in subsection (1)(a), (b), (c), (d) or (e), as the case may be; and
 - (f) the provision under which the order is made and the consequences of a contravention of any term of the order.

(4) The Authority may, in the same manner as a section 78B order was made, vary or revoke the order, and section 78C applies, with the necessary modifications, in relation to the variation or revocation of a section 78B order under this subsection as it applies in relation to a section 78B order.

- (5) A section 78B order is not subsidiary legislation.

78C. Manner of making section 78B orders, service and publication

- (1) A section 78B order must be in writing and may be addressed to –
- (a) a particular person or particular persons;

(b) a class of persons; or

(c) all persons.

(2) A section 78B order addressed as referred to in subsection (1)(a) must be served on the person, or each of the persons, to whom it is addressed.

(3) A section 78B order addressed as referred to in subsection (1)(b) or (c) must be published in the Gazette. ~~Notice of a section 78B order addressed as referred to in subsection (1)(b) or (c) setting out the terms of the order and who is bound by the order must be published in the Gazette.~~

(4) A section 78B order, when it takes effect, is binding on the person or persons to whom it is addressed.

(5) A section 78B order that is served on a person takes effect in relation to the person when it is served on the person.

(6) A section 78B order addressed as referred to in subsection (1)(b) or (c) takes effect at the beginning of the day on which it is published under subsection (3). ~~A section 78B order, notice of which is published under subsection (3), takes effect at the beginning of the day on which the notice is published in the Gazette.~~

78D. Contravention of section 78B orders

(1) A person bound by a section 78B order who contravenes a term of the order commits an offence.

(2) It is not a defence for the person to show that the food concerned is the subject of a licence, permit or any other form of authorization issued or granted under this or any other Ordinance.

(3) It is a defence for an employee charged with an offence under subsection (1) to show that –

(a) ~~any act~~ the act done or omission made by the employee in contravention of a term of a section

78B order was done or made in the course of the employee's employment and under instructions given by the employer in the course of that employment; and

- (b) the employee was not, at the relevant time, in a position to make or influence a decision regarding that act or omission. ~~the employee did not exercise managerial functions at the relevant time.~~

78E. Actions taken in relation to section 78B orders and provision of samples

(1) The Authority may serve on a person bound by a section 78B order a notice requiring the person (at the time or times, or within the period, specified in the notice) to –

- (a) inform the Authority of the actions taken by the person in relation to the order; or
- (b) provide to the Authority samples of the food that is the subject of the order, in the quantity specified in the notice, for analysis, or for bacteriological or other examination.

(2) If any sample of food is provided to the Authority in compliance with a notice under subsection (1)(b), the Authority must pay to the person appearing to have the lawful custody of the food the market price of the sample, or if the market price is unknown or not readily ascertainable, a reasonable price.

(3) A person who, having been served with a notice under subsection (1) –

- (a) fails to comply with the notice; or
- (b) in purported compliance with the notice –
- (i) provides information that the person knows is false in a material particular; or

- (ii) recklessly provides information that is false in a material particular,

commits an offence.

78F. Power to obtain information or copies of documents

(1) If the Authority has reasonable grounds to believe that a person possesses any information or document that may assist the Authority in deciding whether to make, vary or revoke a section 78B order, the Authority may serve on the person a notice requiring the person to –

- (a) provide the information specified in the notice within the period so specified; or
- (b) produce the document specified in the notice at the time and place so specified and permit a public officer, authorized in writing in that behalf by the Authority, to take copies of the document at that time and place.

(2) A person who, having been served with a notice under subsection (1) –

- (a) fails to comply with the notice; or
- (b) in purported compliance with the notice –
 - (i) provides information or produces any document that the person knows is false in a material particular; or
 - (ii) recklessly provides information or produces any document that is false in a material particular,

commits an offence.

78G. Appeals to Municipal Services Appeals Board

(1) A person bound by a section 78B order who is aggrieved by the order may, within 28 days from becoming bound by the order, appeal to the Municipal Services Appeals Board against the order as originally made. ~~14 days from becoming bound by it, appeal to the Municipal Services Appeals Board.~~

(1A) A person bound by a section 78B order who is aggrieved by a variation of the order under section 78B(4) may, within 28 days from becoming bound by the variation, appeal to the Municipal Services Appeals Board against the order as so varied.

(2) In the case of an appeal against a section 78B order addressed as referred to in section 78C(1)(b) or (c), if the Municipal Services Appeals Board Ordinance (Cap. 220) authorizes or requires any document to be served or any notice to be given to the persons bound by the order, the document may be served or the notice may be given by –

- (a) publication in the Gazette; or
- (b) any other means specified by the Chairman of the Municipal Services Appeals Board by notice in writing signed by the Chairman.

(3) An appeal under ~~subsection (1)~~this section does not suspend the section 78B order unless the Authority decides otherwise.

78H. Compensation

(1) A person bound by a section 78B order may apply for an amount of compensation, recoverable as a civil debt due from the Government, that is just and equitable in all the circumstances of the case, for any loss of a kind set out in subsection (1B).

(1A) The person is entitled to compensation only if the person proves that –

(a) the Authority did not have reasonable grounds to make the order at the time of making the order or to vary the order at the time of a variation of the order; and

(b) the person has suffered the relevant loss.

~~(1) A person bound by a section 78B order may apply for an amount of compensation recoverable as a civil debt due from the Government (not exceeding the market value of the food at the time of making the order) that is just and equitable in all the circumstances of the case, taking into account all factors relevant to the circumstances, if—~~

~~(a) an appeal has been made under section 78G(1) and the Municipal Services Appeals Board has varied or set aside the order; and~~

~~(b) the person proves that—~~

~~(i) the Authority did not have reasonable grounds to make the order at the time of making the order; and~~

~~(ii) the person has suffered loss as a result of the order or as a result of the exercise of a power under section 78I(1) in relation to the order.~~

(1B) The losses referred to in subsection (1) are the following losses arising as a direct result of compliance with the section 78B order or as a direct result of the exercise of a power under section 78I(1) in relation to the section 78B order –

(a) total or partial loss of the food that is the subject of the order and that –

(i) has been destroyed or otherwise disposed of;

(ii) is no longer fit for human consumption;

or

(iii) is depreciated in value;

(b) costs or expenditure actually and directly incurred.

(1C) The amount of compensation recoverable –

(a) in relation to a loss of a kind set out in subsection (1B)(a), must not exceed the market value of the food immediately before the time of making the section 78B order or immediately before the time of the variation, as the case may be; and

(b) in relation to a loss of a kind set out in subsection (1B)(b), must not exceed the actual amount of the costs or expenditure incurred.

(2) An application under subsection (1) may be made –

(a) to the Small Claims Tribunal, for claims up to the maximum jurisdiction of the Tribunal; or

(b) to the District Court, irrespective of the amount claimed.

78I. Seizure, marking or destruction of food

(1) If it appears to a public officer, authorized in writing in that behalf by the Authority, that a term of a section 78B order has been contravened by a person bound by the order in respect of any food, the public officer may –

(a) seize and remove from the person any such food or any package in which it is contained;

(b) affix to any such food that is in the person's possession a mark, seal or other designation; or

(c) destroy or otherwise dispose of any such food that is in the person's possession or cause it to be destroyed or otherwise disposed of.

(2) The Authority may, in a court of competent jurisdiction, recover from the person referred to in subsection (1) any reasonable costs incurred under subsection (1)(a), (b) or (c) as if those costs were a debt due to the Authority from that person.

(3) If a person removes, alters or obliterates any mark, seal or other designation affixed under subsection (1)(b), with intent to deceive any other person, the person commits an offence.

(4) Before a public officer destroys or otherwise disposes of any food or causes any food to be destroyed or otherwise disposed of under subsection (1)(c), the public officer must record a description and other details that are sufficient to identify the food, and the Authority must keep the record in the Authority's custody for a period of not less than 12 months.

(5) In the case of any conviction for an offence under this Part, the court may order that any food to which the conviction relates, and any similar food found on the defendant's premises or in the defendant's possession at the time of the commission of the offence or of the seizure of the food in question, is to be forfeited, together with all packages in which the food is contained.

(6) Any food, and any package in which it is contained, forfeited under subsection (5) may be disposed of in the manner specified by the Authority.

78J. Liability of employers and principals

(1) An act done or omission made by an employee in the course of the employee's employment is treated for the purposes of this Part as done or made by the employer, as well as by the employee.

~~(2) In any proceedings for an offence under this Part brought against an employer in respect of an act or omission of an employee of the employer, the employer is liable to be convicted of and be punished for that offence unless the employer establishes the defence described in subsection (3). An act done or omission made by an agent of another person with the authority (whether express or implied and whether precedent or subsequent) of that other person is treated for the purposes of this Part as done or made by that other person, as well as by the agent.~~

~~(3) If any proceedings are brought against an employer by virtue of this section, it is a defence for the employer to show that the employer exercised all due diligence to prevent the employee from doing the act or making the omission, or doing an act or making an omission of that description, in the course of the employee's employment." In any proceedings for an offence under this Part brought against a person in respect of an act or omission alleged to have been done or made by an employee or agent of the person, the person is liable to be convicted of and be punished for that offence unless the person establishes the defence described in subsection (4).~~

~~(4) If any proceedings are brought against a person by virtue of this section, it is a defence for the person to show that the person exercised all due diligence to prevent the employee or agent from –~~

~~(a) doing the act or making the omission; or~~

~~(b) doing an act or making an omission of that description in the course of the employee's employment or the agent's authority.~~

78K. Codes of practice

~~(1) The Authority may issue any code of practice that in the Authority's opinion is suitable for the purpose of providing practical guidance in respect of this Part.~~

(2) If a code of practice is issued under subsection (1), the Authority must, by notice published in the Gazette –

(a) identify the code;

(b) specify the date on which the code is to take effect;
and

(c) specify for which of the provisions of this Part the code is so issued.

(3) The Authority may from time to time revise the whole or any part of a code of practice issued under subsection (1).

(4) Subsection (2) applies, with the necessary modifications, in relation to any revision made under subsection (3) as it applies in relation to the issue of a code of practice.

(5) The Authority may at any time revoke a code of practice issued under subsection (1).

(6) If a code of practice is revoked under subsection (5), the Authority must, by notice published in the Gazette –

(a) identify the code; and

(b) specify the date on which the revocation is to take effect.

78L. Use of codes of practice in legal proceedings

(1) A failure on the part of any person to observe any provision of a code of practice does not of itself render the person liable to any civil or criminal proceedings.

(2) However, if in any legal proceedings the court is satisfied that a provision of a code of practice is relevant to determining a matter that is in issue in the proceedings –

(a) the code of practice is admissible in evidence in the proceedings; and

(b) proof that the person contravened, or did not contravene, the provision may be relied on by any party to the proceedings as tending to establish or negate that matter.

(3) In any legal proceedings, a code of practice which appears to the court to be the subject of a notice under section 78K is taken to be the subject of that notice in the absence of evidence to the contrary.

(4) In this section –
“code of practice” (實務守則) means a code of practice issued under section 78K(1) as revised from time to time under section 78K(3);
“court” (法院) has the meaning given to it by section 3 of the Interpretation and General Clauses Ordinance (Cap. 1) and includes a magistrate and the Municipal Services Appeals Board;
“legal proceedings” (法律程序) includes proceedings of the Municipal Services Appeals Board for an appeal under section 78G.”.

3. Designated Authorities

The Third Schedule is amended by adding –

“78B	Director of Food and Environmental Hygiene
78E	Director of Food and Environmental Hygiene
78F	Director of Food and Environmental Hygiene
78G	Director of Food and Environmental Hygiene
78H	Director of Food and Environmental Hygiene
78I	Director of Food and Environmental Hygiene”.
<u>78K</u>	<u>Director of Food and Environmental Hygiene”.</u>

4. Names in which proceedings for offences may be brought under section 131(1)

The Sixth Schedule is amended by adding –

“78D	Director of Food and Environmental Hygiene
------	--

78E	Director of Food and Environmental Hygiene
78F	Director of Food and Environmental Hygiene
78I	Director of Food and Environmental Hygiene”.

5. Penalties

The Ninth Schedule is amended by adding –

“78D(1)	level 6 and 12 months imprisonment	—
78E(3)	level 3 and 3 months imprisonment	—
78F(2)	level 3 and 3 months imprisonment	—
78I(3)	level 5 and 6 months imprisonment	—”.

Explanatory Memorandum

The object of this Bill is to amend the Public Health and Municipal Services Ordinance (Cap. 132) (“the Ordinance”) to provide for the additional powers of the Director of Food and Environmental Hygiene (“the Director”) in relation to food for the protection of public health.

2. Clause 2 adds a new Part VA to the Ordinance. In particular –

- (a) new section 78B empowers the Director to make orders (“section 78B orders”) if it is necessary to prevent or reduce a possibility of danger to public health or to mitigate any adverse consequence of a danger to public health, and the orders may –
- (i) prohibit the import of any food;
 - (ii) prohibit the supply of any food;
 - (iii) direct that any food be recalled;
 - (iv) direct that any food be impounded, isolated, destroyed or otherwise disposed of; or
 - (v) prohibit the carrying on of an activity in relation to any food or permit the carrying on of such activity in accordance with conditions;

- (b) new section 78C provides for the service of section 78B orders addressed to particular persons and publication of notices of section 78B orders addressed to a class of persons or to all persons;
- (c) new section 78D creates an offence for the contravention of section 78B orders;
- (d) new section 78E empowers the Director to require a person bound by a section 78B order to inform the Director of the actions taken in relation to the order or provide samples;
- (e) new section 78F empowers the Director to obtain information or copies of documents before making, varying or revoking section 78B orders;
- (f) new section 78G provides that appeals against section 78B orders lie with the Municipal Services Appeals Board;
- (g) new section 78H provides for compensation;
- (h) new section 78I provides for the seizure, marking or destruction of food that is the subject of a section 78B order if a term of the order has been contravened; and
- (i) new section 78J provides for liability of employers for acts and omissions of their employees.

3. Clause 4 adds the offences under new Part VA to the Sixth Schedule to the Ordinance so that prosecutions for those offences may be brought in the name of the Director.