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Secretary for Environment and Food
(Attention: Ms Eva To
Principal Assistant Secretary)
Environment and Food Bureau
10/F Citibank Tower
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Hong Kong

2 March 2001

BY FAX
Fax No. : 2136 3281
Total no. of page(s) : 9

Dear Ms To,

Fixed Penalty (Public Cleanliness Offences) Bill

I am scrutinizing the above Bill with a view to advising Members and should be grateful if you would clarify the following matters:

Clause 3

- (a) Is a person under a duty to receive a fixed penalty notice given to him by a public officer? What happens if he refuses to receive the notice? Clause 15 may apply if his refusal amounts to wilfully obstructing or resisting a public officer exercising his powers. However, what if his refusal is not wilful but is based on his honest belief that that he has not committed the scheduled offence? Is he liable to any penalty under such circumstances?
- (b) Does the Administration intend that a person who refuses to receive a fixed penalty notice, even for a legitimate reason, will lose the opportunity to discharge his liability to conviction for a scheduled offence by payment of fixed penalty? If not, will the Administration consider adding a proviso to the effect that failure to comply with subclause (2) will not affect the operation of the fixed penalty system, in line with section 15(2) of the Fixed Penalty (Traffic Contraventions) Ordinance (Cap. 237) and section 3(2) of the fixed Penalty (Criminal Proceedings) Ordinance (Cap. 240)?

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Clause 4

- (a) In subclause (1), why is it necessary to require the person concerned to "state" his name given that the person's name should be evident from his proof of identity?
- (b) Does a person commit an offence under subclause (2) if he does not state his name but merely produces his proof of identity and tells the public officer that his name is as printed on the proof of identity?
- (c) It seems that the requirement to carry proof of identity under section 17C of the Immigration Ordinance (Cap. 115) does not apply to tourists. What, therefore, would happen if a tourist cannot produce proof of identity as required by a public officer? Will he be prosecuted for failing to comply with the requirement?
- (d) Do all public officers specified in Schedule 2 wear uniform when performing their duties under the Bill? Are they required to carry proof of identity in executing their powers under the Bill? If they do not wear uniform, are they under a duty to produce their means of identity on request? Should provisions be made for these matters?

Clause 7

If a person against whom an order under subclause (1) is made pays the full amount of the fixed penalty and additional penalty shown in the order, will he be liable to be prosecuted or convicted for the scheduled offence to which the order relates? Should a provision similar to section 3A(5) of the Fixed Penalty (Criminal Proceedings) Ordinance (Cap. 240) be included in this Bill?

Clause 10

- (a) Service of summons issued by a magistrate is governed by section 8 of the Magistrates Ordinance (Cap. 227). If it is intended that a different mode of service should apply to summons issued in proceedings in respect of a scheduled offence under this Bill, should "notwithstanding section 8 of the Magistrates Ordinance (Cap. 227)" be added in this clause in line with a similar provision in the Fixed Penalty (Criminal Proceedings) Ordinance (Cap. 240)?
- (b) How is service of the summons to be proved?

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- (c) What can a magistrate do if a person served with a summons under clause 10 does not appear before the court at the time and place required by the summons and service of the summons is proved? Can the magistrate hear and

determine the case in the absence of the defendant? If so, should a provision to this effect be included in the Bill?

- (d) In proceedings in respect of a scheduled offence conducted in the absence of a defendant and if the defendant is convicted in those proceedings, how will the defendant be informed of the conviction?

Clause 14

It is noted that this provision is similar to section 138 of the Public Health and Municipal Services Ordinance (Cap. 132). The provision may be justified in the context of Cap. 132 since public officers are given extensive enforcement powers such as the power to seize hawkers' equipment and commodities which may make them liable to damages. Under this Bill, however, the public officers are performing duties similar to those of police officers in traffic offences. There is no equivalent provision in Cap. 237 and Cap. 240 protecting police officers acting in good faith. Nor is such provision found in the Police Force Ordinance (Cap. 232). What is the reason for giving such protection to public officers exercising powers under this Bill?

Clause 15

Does the word "wilfully" qualify "resists" as well?

Clause 17

Why is the power of the Legislative Council restricted to increasing the fixed penalty in relation to a scheduled offence?

Schedule 1

According to the LegCo Brief, the Administration's intention is to introduce a fixed penalty system for minor public cleanliness offences. Is an offence under section 16A(1) of the Waste Disposal Ordinance (Cap. 354) minor in nature in light of the maximum penalty for that offence? As you may be aware, the maximum penalty for an offence under section 16A(1) of Cap. 354 is a fine of \$200,000 and imprisonment for 6 months for the first offence and for a second or subsequent offence, the maximum penalty is a fine of \$500,000 and 6 months' imprisonment.

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Schedule 2

Some of the ranks of public officers in the Food and Environmental Hygiene Department and the Marine Department set out in Schedule 2 cannot be found in the Fourth Schedule of the Magistrates Ordinance (Cap. 227). Does the Administration intend that additional ranks of public officers in those departments should be public

officers for the purpose of the Bill? Is it necessary to amend the Fourth Schedule of Cap. 227 accordingly?

Proof in Proceedings in the absence of defendants

While there is a provision providing for proof in proceedings under clause 7, there is no provision on proof in proceedings when a defendant is absent after he has notified the Authority that he wishes to dispute liability and proceedings have been taken against him in respect of a scheduled offence. Should such a provision be included in the Bill?

Consequence for non-payment of fixed penalty, additional penalty and costs

Is it intended that sections 68 and 101 of the Magistrates Ordinance (Cap. 227) should apply in cases of non-payment of fixed penalty, additional penalty and costs under this Bill? As you may be aware, section 101 of Cap. 227 will apply in the absence of express provision to the contrary in any other enactment.

Chinese text

My comments on the Chinese text are marked up on the relevant pages for your consideration.

I would appreciate it if you would let me have your reply in both English and Chinese as soon as possible.

Yours faithfully,

(Connie Fung)
Assistant Legal Adviser

c.c. DoJ (Attn: Ms Fanny IP, SALD)
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LA

Letterhead of Environment and Food Bureau Government Secretariat

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29 March 2001

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Dear Miss Fung,

Fixed Penalty (Public Cleanliness Offences) Bill

Thank you for your letter of 2 March on the above Bill. Please find below our responses to the questions that you raised.

Clauses 3(a) and (b)

A person who refuses to receive a fixed penalty notice may not necessarily be held liable for an offence under clause 15. What does or does not amount to obstruction depends upon the particular facts and circumstances of the case. Under the bill, a person to whom a fixed penalty notice is served will have the right to dispute liability. If a person believes that he has not committed a scheduled offence for which he has received a fixed penalty notice, he should notify the Authority that he wishes to dispute liability instead.

That said, we agree to take on board your suggestion to add a proviso to the effect that non-compliance of subclause (2) will not affect the operation of the fixed penalty system.

Clause 4

- (a) and (b) We agree that it will be sufficient if the person "gives" his name and address and produces proof of identity. We do not think it is absolutely necessary for the person to "state" his name. We will consider moving CSAs.
- (c) We will consider moving CSA to add ", without reasonable excuse," after "who".
- (d) A number of ranks of public officers proposed to take enforcement actions under the bill are uniformed. There are however several ranks of public officers, particularly those of the Environmental Protection Department and Housing Department as well as the more senior officers of the grades are not uniformed. Details are provided in the **Annex**.

Most of the ranks in the Annex are already empowered to take enforcement action against littering offences through issuance of Form 1A under the Magistrates Ordinance (Cap. 227). All enforcement officers, whether they are uniformed or not, will carry warrant cards. Each warrant card shows the name of the department and the officer, his office held, photo of the officer, and a list of powers the officer is authorized to exercise. Since this is already the established practice, we do not consider it necessary to include in the bill the duty of enforcement officer to carry warrant card. However, we will remind the staff in the training programme and the operation guidelines will include such reminder as well.

Clause 7

Such person will be considered as having paid the full amount under clause 5(4), and therefore will be not liable to prosecution or conviction for the scheduled offence. For clarity sake, we will consider moving a committee stage amendment similar to section 3A(5) of Cap 240.

Clause 10

- (a) The service of summons under the bill basically follows section 8 of Cap. 227, which provides that the summons may be served either by

post or by hand. We will consider moving CSA to put this beyond doubt.

- (b) On proof of service of the summons, section 8(3) of Cap. 227 will apply.
- (c) If the person does not appear before the court at the time and place specified on the summons, the magistrate may issue a warrant of arrest under section 18A of Cap 227 to bring the person before the court.
- (d) In the premises, no hearing will be conducted in the absence of the defendant.

Clause 14

This clause reflects the common law defence of statutory authority or lawful justification. In the context of the bill, this clause is particularly relevant to clause 4, which empowers a public officer to arrest a person who, without reasonable excuse, fails to comply with a requirement made under clause 4(1). Please note that Cap. 237 and Cap. 240 do not have provisions similar to clause 4.

Clause 15

The word "wilfully" only qualifies "obstructs".

Clause 17

We have made reference to section 13 of Cap. 237 which also provides that the Legislative Council may amend the fixed penalty level to a larger amount by a resolution.

Schedule 1

The definition of "waste" in the Waste Disposal Ordinance (Cap. 354) makes no reference to the size of the waste. The maximum penalty under 16A of Cap. 354 is to reflect the gravity of the offence in the extreme. However, the Environmental Protection Department, being the enforcement department for the Ordinance, has also prosecuted people who deposit in public places waste of smaller size and of relatively minor environmental impact, such as carton boxes, several bags of construction waste, etc. After the fixed penalty system is implemented, enforcement

officers will have the discretion to decide whether a person should be given the fixed penalty notice, or be issued with a summons, taking into consideration the gravity of the offences.

Schedule 2

"Health Inspector" of the Food and Environmental Hygiene Department in Fourth Schedule of Cap. 227 is the name of the grade. In fact, it comprises the following ranks: Senior Superintendent of Environmental Health, Superintendent of Environmental Health, Chief Health Inspector, Senior Health Inspector, Health Inspector I and Health Inspector II. These ranks are all listed out in Schedule 2 of the bill. As regards the three grades of Marine Department not included in Schedule 4 of Cap. 227, the Assistant Marine Officer grade has been abolished and its duties are now taken up by the Marine Controller and Assistant Marine Controller grades. Senior Assistant Shipping Master is a new grade established in the Marine Department for port control and service duties.

Strictly speaking, it is not necessary to add these three grades into the Fourth Schedule of Cap. 227 for the operation of the fixed penalty system. Nevertheless, we agree that they should be included in Cap. 227 eventually for the sake of consistency. It is also desirable to have the officers empowered to issue both the fixed penalty notices and the "Notices to appear before a magistrate". Since the amendment of Cap. 227 to this effect is not a consequential amendment arising from this bill, we will follow up the matter separately.

Proof in proceedings in the absence of defendants

Please refer to response (d) under Clause 10 above.

Consequence for non-payment of fixed penalty, additional penalty and costs

It is not our policy intention to exclude the application of any of sections 68 and 101 of the Magistrates Ordinance.

Chinese text

The Law Draftsman will discuss with you directly on the CSAs

(if required) to be moved to ensure, in so far as practicable, consistency in drafting style amongst the Chinese text and the English text.

Yours sincerely,

(Ms Eva TO)
for Secretary for the Environment and Food

Uniformed and non-uniformed officers in Schedule 2

Department	Uniformed	Non-uniformed
Food and Environmental Hygiene Department	Senior Health Inspector Health Inspector I Health Inspector II Senior Overseer Overseer Senior Foreman Foreman 5 ranks of Hawker Control Officers	Senior Superintendent of Environmental Health Superintendent of Environment Health Chief Health Inspector
Agriculture, Fisheries and Conservation Department	Field Officer Field Assistant Forest Guard Fisheries Supervisor	Forestry Officer Fisheries Officer
Leisure and Cultural Services Department	Senior Foreman Foreman	Amenities Officer Amenities Assistant Librarian Manager, Cultural Services Recreation and Sports Officer
Housing Department	-	Housing Manager Assistant Housing Manager Housing Officer
Marine Department	Assistant Marine Controller Marine Inspector I Marine Inspector II	Marine Officer Marine Controller Senior Assistant Shipping Master

Department	Uniformed	Non-uniformed
Environmental Protection Department	-	Environmental Protection Officer Assistant Environmental Protection Officer Assistant Pollution Control Officer Chief Environmental Protection Inspector Senior Environmental Protection Inspector Environmental Protection Inspector Pollution Control Inspector