

Legislative Council
Subcommittee on Proposed Resolution under Section 37 of
the West Kowloon Cultural District Authority Ordinance (Cap. 601)

Follow-up to the meeting on 18 April 2016

1. **The West Kowloon Cultural District Authority (WKCD) was requested to respond to the following suggestions raised by members of the Subcommittee/the Legal Adviser to the Subcommittee in relation to the proposed West Kowloon Cultural District (Public Open Spaces) Bylaw (the proposed Bylaw):**
 - (a) **to consider the need of stating explicitly in the proposed Bylaw, through including a footnote or other appropriate means, that the vision and mission statement in the proposed preamble (as provided in paragraph 2 of WKCD's response to the issues raised at the meeting on 14 March 2016 (LC Paper No. CB(2)1263/15-16(03)) was formulated on the basis of section 4(2) of the principal Ordinance (i.e. the West Kowloon Cultural District Authority Ordinance (Cap. 601) (WKCDAO)), which set out the objectives that WKCD aimed to achieve in performing its functions under section 4(1) of WKCDAO;**

WKCD's proposed amendment to the preamble is as follows:

“WHEREAS -

- (1) The vision and mission of the West Kowloon Cultural District Authority for the Public Open Spaces in the West Kowloon Cultural District is formulated in the light of section 4(2)(m) of the West Kowloon Cultural District Authority Ordinance (Cap. 601);

- (2) The West Kowloon Cultural District Authority aims to provide or facilitate the provision of free and accessible open space within the leased area to the general public;
- (3) The West Kowloon Cultural District Authority aims to manage the open space in ways which aim to achieve the mission for the open space to inspire, promote and encourage cultural pursuits for all.”

(b) to specify clearly in section 3 of the proposed Bylaw the types of persons who would be given authorization by WKCDA, the functions that each of these types of authorized persons were to perform and the powers (in particular, the enforcement powers conferred under Part 10 such as those relating to detention of a person who had committed an offence under the proposed Bylaw until the person was delivered into the custody of a police officer) to be given to each of these types of authorized persons under the proposed Bylaw; and

Personnel employed by WKCDA to work in the public open spaces (POS) will be given authorization for the implementation of the proposed Bylaw appropriate to their levels of engagement with members of the public in their day to day work, which will be reflected in their job descriptions and training.

There will be different levels of authorization and personnel will be briefed and trained as to the appropriate level at which they will be authorized to operate. For instance, there will be a level of personnel employed for relatively basic level tasks such as gardening and cleaning; such personnel will be authorized to interact with the public to assist and advise and to give permissions for day to day matters, for example, allowing members of the public to retrieve a ball from an area which is marked off for repair and closed to members of the public.

There will be further levels of authorization to personnel such as Park Ambassadors, who will be briefed and trained to engage and guide members of the public as to what behaviours are not allowed under the proposed Bylaw or to give permissions where necessary as allowed by the proposed Bylaw, so as to better enable members of the public to fully enjoy the freedom intended by the WKCDA for members of the public under the proposed Bylaw.

Supervisory personnel such as Senior Park Ambassadors or Park Managers and security personnel will be further authorized, briefed and trained to undertake more intensive enforcement action where discussion and persuasion from Park Ambassadors has not succeeded in preventing members of the public from breaching the proposed Bylaw, or to detain members of the public who are clearly in breach of the proposed Bylaw and refusing to co-operate with Senior Park Ambassadors/Park Managers/security personnel until the arrival of the police.

WKCDA considers that there is no need to specify in section 3 of the proposed Bylaw the types of persons who would be given authorization by WKCDA and their functions, as those authorizations will be part of the job descriptions and training given to POS personnel. If any POS personnel is asked to give a permission beyond his/her delegated authority, he/she will consult his/her supervisor further up the authority chain or ask the visitor concerned to approach the Park Administration Office, particularly if a written authorization is needed. In the eyes of the public interacting with POS personnel the authorization will be seamless between different levels of personnel.

- (c) to provide a defence of reasonable excuse for the offences set out in sections 7(2), 8(4) and 9(9), as well as other offences punishable with a fine under the proposed Bylaw, so as to enhance the protection for members of the public who might inadvertently contravene the relevant requirements under the proposed Bylaw.**

WKCDA considers that it is not necessary to provide a defence of reasonable excuse for those offences. For example, section 13(1) of the proposed Bylaw requires the public not to conduct certain behaviours in the POS, such as not to smoke or carry a lighted cigarette, cigar or pipe except in any smoking area (section 13(1)(f)) or cause a nuisance or annoyance to any other person after being requested to desist from such conduct by an authorized person (section 13(1)(g)). WKCDA does not contemplate any reasonable excuses which could justify a breach of these provisions.

In circumstances where there may be lawful excuses for contravention of the provisions of the proposed Bylaw, express provisions have been made in the proposed Bylaw to provide for such a defence. For example, under section 16(1), it is provided that, except with a lawful excuse, a male person must not enter any part of a public convenience that is allocated for the exclusive use of female persons.

In case there are good reasons which justify a departure from the requirements in the proposed Bylaw but are not expressly provided for in the proposed Bylaw, an authorized person may give written or oral permission to relax these requirements pursuant to section 4 under Part 2 of the proposed Bylaw.

WKCDA has also considered the Ocean Park Bylaw (Cap. 388B), the Kadoorie Farm and Botanic Garden Bylaw (Cap. 1156A) and the Pleasure Grounds Regulation (Cap. 132BC) which legislation contains similar provisions relating to offences but which do not provide a defence of reasonable excuse (e.g. section 3(3), 5(2), 5(6), 5(8), 6(2), 7(5), 8(4), 9(5) and 12(6) of the Ocean Park Bylaw, section 21 of the Kadoorie Farm and Botanic Garden Bylaw and section 30 of the Pleasure Grounds Regulation).

Further, in the event an offence under the proposed Bylaw has been committed, WKCDA would still have to consider whether it is in the public interest to prosecute the offender, see Chapter 5 of the Prosecution Code published by the Department of Justice. If the offender has a reasonable excuse such that the public interest would not be served by prosecuting the offender, WKCDA would not do so.

For the reasons stated above WKCDA does not consider the inclusion of a “reasonable excuse” is appropriate in the proposed Bylaw.

However, if members consider that there is a need to insert a “reasonable excuse” defence, WKCDA is prepared to add in, for instance in section 7 below, the appropriate wording “without reasonable excuse” as appropriate in sections 7(2), 8(4), 9(9), 10(9), 17(4), 22(2), 23(3) and (6):

“7. Restricted areas

- (1) A person must not enter or remain in, or attempt to enter or remain in, a restricted area, without permission.
- (2) A person who, *without reasonable excuse*, contravenes subsection (1) commits an offence and is liable on conviction to a fine at level 1.”

2. **WKCDA was also requested to clarify the definition of “events” the conduct of which would require the written permission of WKCDA under section 10(1) of the proposed Bylaw, and advise whether persons who intended to conduct events in the public open spaces in the West Kowloon Cultural District (WKCD) would be subject to the relevant requirements under the Places of Public Entertainment Ordinance (PPEO) (Cap. 172) in addition to those under section 10 of the proposed Bylaw.**

As to the definition of “events”, the essence of an event is that it is a performance, entertainment, activity or gathering organized for

the purposes of the organizer to present and engage the audience for a purpose, say for entertainment, education or any other purpose, attendance by the public might be paid for or not, or ticketed or not.

For the purposes of the proposed Bylaw, an event is an activity of that kind which will occupy such amount of the POS as may present members of the public who are not members of the audience some inconvenience or restrict their free access to the area concerned.

It is events of that nature which will require the written permission of WKCDA under section 10(1) of the proposed Bylaw in order to enable WKCDA to ensure public safety or order.

Where such an event requires WKCDA or the organizers to restrict admission by closing part of the POS, by ticketing or other means, such as invitation only events, PPEO will apply. Where members of the public are free to attend without restriction or control of admission the PPEO does not apply.

As the proposed Bylaw is subsidiary legislation, it would not override the operation of primary legislation such as the PPEO in circumstances where that Ordinance would apply.

West Kowloon Cultural District Authority
May 2016