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Secretary for the Environment, Transport and Works  
(Attn: Ms Joyce HO, Assistant Secretary(E)2A)  
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**BY FAX**

Fax No. : 2136 3304  
Total No. of pages : (3)

Dear Ms Ho,

**Waste Disposal (Amendment) (No. 2) Bill 2003**

We are scrutinizing the legal and drafting aspects of the Bill and should be grateful for your clarification of the following points-

Clause 3 - New section 16A(1)

- (a) Would you give example(s) of "excuse" other than the circumstance envisaged in section 18(2)?
- (b) Should the word "reasonable" be added before "excuse"?

Clause 3 - New section 16A(2)

- (a) In the case of waste being deposited from a "public transport carrier", namely a public light bus or taxi, why should not the driver and employer be regarded as causing the waste to be deposited?
- (b) What is the standard of proof required for the defendant to rebut the presumption?

Clause 3 - New section 16A(5)

- (a) What is the policy intent of enacting the provision?
- (b) Would you illustrate with example(s) as to the operation of the allegation in paragraph (a) and its defence?
- (c) Would you illustrate with example(s) as to the operation of the allegation in paragraph (b) and its defence?
- (d) Is there any relation between new section 16A(4) and (5)?

Section 18(1)(a) and (b) - In relation to new section 16A

Supposedly, a person is convicted of three counts of offence under new section 16A during a trial. In applying section 18(1)(a) and (b), would the first offence be subject to subsection (1)(a) and the remaining offences subject to subsection (1)(b)? Would subsection (1)(b) apply to that person if he is convicted in another trial of an offence under new section 16A?

Section 18(1)(c) - In relation to new section 16A

Would you explain the circumstance in which a person be prosecuted for committing a continuing offence under new section 16A?

Clause 7

Does section 31 create an absolute offence in relation to new sections 16A and 18A?

Clause 5 - New section 23EA (general observation)

Under the provision, a magistrate's warrant will be issued to the Director of Environmental Protection. However, it is presumed that the Director will authorize a public officer under section 23A to execute the warrant. To protect members of the public in such case, would it be desirable to add provision to new section 23EA similar to section 23C(4)?

Clause 5 - New 23EA(1)(b)

Is there any objective standard assisting the Director of Environmental Protection to assess what is "an imminent risk of adverse environmental impact"?

Clause 5 - New 23EA(4)

Would it be appropriate to substitute "the Director" with "an authorized officer" (cf section 23C(3))? Does section 43(1) of Cap. 1 come into play?

Clause 5 - New section 23EA(5)

Does the term "domestic premises " include a vessel used for dwelling purpose? If not, why do you consider it unnecessary to extend the meaning of the term to include a dwelling vessel?

Clause 6(3) - New section 24(1B)

- (a) The Schedule to the Waste Disposal (Designated Waste Disposal Facility) Regulation (Cap. 354, sub. leg. L) specifies mainly three types of facilities, namely landfills, chemical waste treatment centre and transfer station. However, in light of paragraph 5 of the LegCo Brief, the Administration proposes to charge construction waste disposed of at landfills, sorting facilities and public fill reception facilities. Would you clarify whether the Administration is prepared to expand the definition of "designated waste disposal facility" under section 2 of the Regulation to include sorting facilities and public fill reception facilities as well?

- (b) In paragraph (b) of the provision, should the term "waste disposal facility" be modified to be "designated waste disposal facility"? The former term is not defined while the latter one is.

Clause 8(3) - New section 33(4)(ba)(ii)

Should the term "waste disposal facility" be modified to be "designated waste disposal facility"? The former term is not defined while the latter one is.

Clause 8(4) - New section 33(6)(b)

- (a) Why is it necessary to confine the charges to construction waste instead of waste in general (cf new section 33(4)(ba)(ii))?
- (b) Should the term "waste disposal facility" be modified to be "designated waste disposal facility"? The former term is not defined while the latter one is.

Clause 10 - New section 43(1)

- (a) The provision allows ring-fencing of charges collected from the operation of public service to go direct to a facility operator. Is there any precedent on similar arrangement in other legislation?
- (b) Would it be necessary to provide for the surplus amounts, after satisfying the purposes specified in paragraphs (a) and (b), be paid into general revenue?
- (c) What is the reason for not applying the accounting arrangements in paragraphs (a) and (b) to the landfills and public fill reception facility operators?

We should be grateful if you would reply in both languages at your earliest convenience.

Yours sincerely,

(Stephen LAM)  
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13 April 2004

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Dear Mr Lam,

**Waste Disposal (Amendment) (No.2) Bill 2003**

Our responses to your questions raised in respect of the Bill are as follows –

**Clause 3 – New section 16(A)1**

- (a) The law recognizes that certain “general defences” such as infancy, mental abnormality, mistake, duress and coercion may excuse a person from criminal liability.
- (b) The Administration prefers to adhere to the expression “lawful authority or excuse” such as is used in the current s.16A and does not intend to propose a deliberate change to its meaning by adding the word “reasonable” before “excuse” in the new s.16A of the Bill. For example, mistaken belief as a “lawful excuse” was discussed in *HKSAR v Leung Chun Wai Sunny* (HCMA 152/2002).

At paragraph 18 of the judgment, it is said that recent judicial views appear to be that the defence need not show reasonable grounds for the mistaken belief, but that would be a relevant factor for the trial judge to take into account, when such defence was raised, as to whether there was such a belief on the part of the defendant. The Administration would therefore like to defer to the court's interpretation as to what excuse will be acceptable in the circumstances of individual cases and in the light of recent common law developments.

**Clause 3 – New section 16A(2)**

- (a) Any person can freely access to public transport vehicles. The driver and the employer of the driver do not necessarily have control over passengers who may deposit waste from the vehicle. Hence, the Administration considers that the driver and employer of a vehicle that is being used as a public transport carrier should not be regarded as causing the waste to be deposited..
- (b) Where the burden of proof is placed upon the defendant, the standard of proof is generally the civil standard: that is, proof on the balance of probabilities.

**Clause 3 – New section 16A(5)**

- (a) While the effect of new s.16A(1) and (2) will be mitigated by the statutory defence provided in new s.16A(3), there is a procedural requirement in new s.16A(5) for the defendant to serve prior notice on the prosecutor if the defence involves an allegation that the commission of the offence was due to an act or omission of another person, or to reliance on information supplied by another person.

New s.16A(5) is modelled on the existing s.20G(3) of the Waste Disposal Ordinance (Cap. 354) and s.26(3) of the Dumping at Sea Ordinance (Cap. 466). It is similar to s.21(5) of the UK Food Safety Act 1990. It has been commented that statutory defences provided in earlier UK food legislation required that the defendant identify the person to whose act or default the contravention was due, and so those earlier statutory defences would not have helped a defendant if the contravention was due to some unknown person whom the defendant could not identify.

Under the proposed new s.16A(3) and (5) in this Bill, the only requirements for the defendant to establish the statutory defence are that he supply such information as is in his possession and prove that he took all reasonable precautions and exercised all due diligence.

- (b) For example, waste was found deposited from a truck at a place. The driver of the truck and his employer (i.e. the truck owner) are both prosecuted for committing an offence of causing waste to be deposited at the place under new s.16A(1) by virtue of the presumption in new s.16A(2). The fact was the employer had not instructed the driver to deposit the waste there. Neither did the driver himself

cause the waste to be deposited from the truck because the unloading device was then not within his control but was triggered by another person on board who rented the truck to remove the waste.

As far as the driver is concerned, he might not have any lawful authority or excuse or the permission of the owner or lawful occupier of the place concerned to justify the depositing of the waste. However, the driver may try to establish a defence under new s.16A(3) that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence. He may make an allegation that the commission of the offence was not due to his acting under the instructions of his employer but was due to an act of another person whom the driver could not control at the material time. According to new s.16A(5)(a), the driver will be required to serve prior notice on the prosecutor giving information to assist in the identification of the other person.

- (c) For example, a person pretended to be the lawful occupier of a piece of land in a remote area and purported to permit a contractor to use the land for waste depositing. The contractor was prosecuted for committing an offence of illegal waste depositing on that land under new s.16A(1). He may try to establish a defence under new s.16A(3) that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence. He may make an allegation that he relied on information supplied by the person who purported to be the lawful occupier of the land. According to new s.16A(5)(b), the contractor will need to serve prior notice on the prosecutor giving information to assist in the identification of that person.
- (d) New s.16A(3) sets out the statutory defence to the offence in new s.16A(1). New s.16A(4) provides for ways in which the defence under new s.16A(3) may be established. As new s.16A(4) is without prejudice to the generality of the defence under new s.16A(3), it is open to the defendant to satisfy the court in any other way that, as a matter of fact, he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence. New s.16A(5) imposes a further requirement that the defendant serve prior notice on the prosecution to give information in his possession if his defence involves an allegation that the commission of the offence was due to an act or omission of another person or to reliance on information supplied by another person. The requirement of new s.16A(5) is in addition to those contained in new s.16A(3). New s.16A(5) does not emanate directly from, and is not restricted by, the matters mentioned in new s.16A(4).

### **Section 18(1)(a) and (b) – In relation to new section 16A**

The existing section 18 of Cap. 354 provides for a higher penalty level when the offence committed is a second or subsequent offence. While the actual application of section 18(1)(a) and (b) is a matter for the sentencing court, it is possible that in a trial where the defendant is convicted of three counts of a similar offence, say, under new s.16A, the

magistrate may apply the penalty level in s.18(1)(a) to the first count and that in s.18(1)(b) to the second and third counts. However, according to the experience of the Environmental Protection Department, we cannot rule out the possibility that the relevant magistrate may treat each count as a first offence on conviction in the same trial and apply the penalty level in s.18(1)(a) to all of them.

Regarding whether subsection (1)(b) apply to that person if he is convicted in another trial of an offence under new section 16A, the Administration is of the view that it would apply.

#### **Section 18(1)(c) – In relation to new section 16A**

As an example, waste bentonite (i.e. a kind of construction waste) is deposited through discharge pipe, by which the waste can be continuously transported from a construction site to a neighbouring piece of land and then deposited there. As such, the deposit operation is a continuous act instead of a one-off action.

#### **Clause 7**

Section 31 should not be regarded as making new sections 16A and 18A an “absolute offence” because exceptions, defences and excuses are provided in new sections 16A(1) and (3) and 18A(4) and (5).

#### **Clause 5 – New section 23EA (general observation)**

The Administration agrees with your observation and has no objection to adding into new section 23EA a provision similar to s.23C(4).

#### **Clause 5 – New 23EA(1)(b)**

The assessment of whether a waste deposited in a place gives rise to imminent risk of adverse environmental impact is a matter of professional judgement, which needs to be made case by case. In determining whether an adverse environmental impact is considered imminent, while the Environmental Protection Department has developed a set of environmental standards in this regard, it needs to consider also other factors which may vary from case to case (e.g. the nature of pollutants, quantity and concentration of pollutants, ambient conditions of the receiving media etc).

Take for example, a waste which has been illegally deposited in a place may contain drums/bags of waste contaminated with pollutants (e.g. waste cement). The structural integrity of the drum/bags is compromised and spillage may take place at any time. If the spillage of the pollutants would contaminate the land and pollute the underground water and the nearby streams, the risk of adverse environmental impact would be considered imminent. However, if the drums/bags merely contains inert materials, or the integrity of the drums/bags has not been compromised, the concerned waste is less likely to cause imminent risk of adverse environmental impact. This example has

demonstrated that it is necessary to exercise professional judgment to determine if a deposited waste is likely to give rise to an imminent risk of adverse environmental impact case by case.

#### **Clause 5 – New 23EA(4)**

Similar to the existing s.15E(2) of Cap. 354, new section 23EA(4) provides that a magistrate may issue a warrant to “the Director” on the understanding that the Director may authorize a public officer to exercise his functions under Cap. 354 by virtue of s.23A. As regards section 23C of Cap. 354, which deals with the general powers of an “authorized officer” to enter premises and stop vehicles etc. as set out in s.23C(1), the reference to “authorized officer” in s.23C(3) is appropriate as it corresponds to the subject mentioned in s.23C(1).

The last specification of the Director under s.43 of Cap. 1 for the purpose of delegating some of his functions in Cap. 354 was made in 1986 (see L.N. 84 of 1986). It seems no longer necessary for the Director to rely on s.43 of Cap. 1 to delegate his functions under Cap. 354 since the enactment of s.23A of Cap. 354 in 1987.

#### **Clause 5 – New section 23EA(5)**

In the light of the existing s.23C(2) of Cap. 354, which expressly refers to both “domestic premises” and “vessel used wholly or principally for dwelling purposes”, it seems probable that a reference to “domestic premises” in new s.23EA will be construed as not including a vessel used for dwelling purposes. The Administration considers that it need not seek to further elaborate the meaning of “domestic premises” in new s.23EA(5) to either include or exclude a dwelling vessel in this context because in practice, it is highly unlikely that the enforcement agency will need to board a vessel in order to remove waste for the purpose of reducing or eliminating an imminent risk of adverse environmental impact.

#### **Clause 6(3) – New section 24(1B)**

- (a) It is the intention of the Administration to propose amendment to the existing Schedule to the Waste Disposal (Designated Waste Disposal Facility) Regulation (Cap. 354 sub. leg. L) to include sorting facilities and public fill reception facilities if this Bill is passed.
- (b) As the Administration does not intend to impose a charge for the disposal of construction waste at certain facilities (e.g. chemical waste treatment facilities) covered by the Schedule to the Waste Disposal (Designated Waste Disposal Facility) Regulation (Cap. 354 sub. leg. L), we consider that new s.24(1B)(b) in the Bill should refer only to a “waste disposal facility” as may be prescribed by the future regulations made under section 33 regarding the charging of construction waste disposal.



### **Clause 8(3) – New section 33(4)(ba)(ii)**

Again, as the Administration does not intend to impose a charge for the disposal of construction waste at certain facilities covered by the Schedule to the Waste Disposal (Designated Waste Disposal Facility) Regulation (Cap. 354 sub. leg. L), we consider that new s.33(4)(ba)(ii) in the Bill should refer only to a "waste disposal facility" as may be prescribed by the future regulations made under section 33 regarding the charging of construction waste disposal.

### **Clause 8(4) – New section 33(6)(b)**

- (a) At this stage, the Administration intends to seek only a restricted delegation of power for the Secretary for the Environment, Transport and Works to amend a schedule to regulations to revise charges in respect of construction waste disposal, instead of a general delegation of power to revise charges relating to waste disposal in general.
- (b) Again, as the Administration does not intend to impose a charge for the disposal of construction waste at certain facilities covered by the Schedule to the Waste Disposal (Designated Waste Disposal Facility) Regulation (Cap. 354 sub. leg. L), we consider that new s.33(6)(b) in the Bill should refer only to a "waste disposal facility" as may be prescribed by the future regulations made under section 33 regarding the charging of construction waste disposal.

### **Clause 10**

- (a) There are cases where operators of Government facilities are allowed under the relevant statutory provisions to retain parts or percentages of any tolls, fees or charges, which would not form part of the general revenue to cover remuneration or reimbursement for the management of the facilities. Similar arrangements and provisions can be found in s.22A of the Road Tunnels (Government) Ordinance (Cap. 368) for government toll-tunnels, s.115A of the Road Traffic Ordinance (Cap. 374) for government vehicle examination centres and parking meters, and s.31 of the Tsing Ma Control Area Ordinance (Cap. 498) for Tsing Ma Control Area.
- (b) In view of the general provision in s.3 of the Public Finance Ordinance (Cap. 2), we consider it unnecessary for new s.43 in the Bill to provide expressly for the relevant surplus amounts to be paid into the general revenue.
- (c) Unlike the sorting facilities which are new facilities to be developed, the landfills and public fill reception facilities already exist with the necessary funding for paying the facility operators available. Hence, it is not necessary to apply the accounting arrangements in paragraphs (a) and (b) to these facilities.

Yours sincerely,

(Joyce Ho)  
for Secretary for the Environment, Transport and Works

c.c. DoJ (Attn: Miss Shandy Liu)