

**Bills Committee on
Waste Disposal (Amendment)(No.2) Bill 2003**

**List of follow-up actions arising from the discussion
at the meeting on 3 June 2004**

	Follow up actions	The Administration's responses
(1)	To review the threshold for depth of filling under the option to regulate land filling activities under the Environmental Impact Assessment (EIA) Ordinance (Cap.499).	In the light of Members' comments, the Administration will further examine the details of the possible option to address the issue of land filling activities on private land, including the appropriate threshold for the depth of filling.
(2)	To step up publicity on the care which employers and employees should take to ensure proper disposal of construction waste in order to avoid contravention of proposed section 16A.	Upon passage of the Bill and the relevant regulations, we will carry out publicity and education programmes to widely publicize the implementation of the construction waste disposal charging scheme. We will also provide advice to the relevant parties, including the waste haulers and their employers, to assist them in complying with the legal requirements.
(3)	To provide the past court case regarding the interpretation of the phrase "lawful excuse".	The court case discussing the meaning of "lawful excuse" was <u>HKSAR v Leung Chun Wai Sunny</u> (HCMA 152/2002). The relevant paragraphs of the judgment are provided at Annex.
(4)	To review the requirement of the part of proposed section 16A(4) on "and in either case that he took all steps reasonably open to him to ensure that an offence would not be committed", which in members' view is hard to comply with. Consideration should be given to revising it as "and in either case that he had no reason to believe that an offence would be committed".	In the light of Members' discussion at the last meeting, we have reviewed the requirement of the proposed new section 16A(4). Considering the fact that the existing section 16A was originally created as a strict liability offence by virtue of the existing section 31, we maintain the view that the act of depositing waste anywhere without permission should be seen as

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		<p>irresponsible and should amount to an offence unless the doer has other lawful authority or excuse or statutory defences of acceptable standards.</p> <p>New section 16A(4) in the Bill, which is modelled on the existing section 20G of the principal Ordinance, proposes to add a statutory defence in certain specific scenarios when the defendant can also prove that “he took all steps reasonably open to him to ensure that an offence would not be committed”.</p> <p>Noting Members’ concern that a defendant who acted under his employer’s instruction might not know what additional steps the court would expect him to take to satisfy the second requirement under new section 16A(4), we consider that in those specific scenarios, if the defendant can satisfy the court that he had no reason to believe that an offence would be committed, it should be acceptable to regard the defendant as innocent. We therefore agree to propose an amendment to that effect as proposed by Members.</p>
(5)	<p>To review the requirement of proposed section 23EA(1)(a) given that failure to establish an offence under proposed section 16A will render the entire section futile. The problem cannot be resolved by deleting proposed section 23EA(1)(a) as entrance of the place by the Director of Environmental Protection in the absence of such a provision may constitute an intrusion to</p>	<p>In the light of Members’ comments, we have reviewed the requirement of the proposed section 23EA(1).</p> <p>We agree with Members that the proposed section 23EA(1)(a) should not be deleted as it would give the Director very wide power to remove waste on private land, which may have human right</p>

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	privacy.	<p>implications.</p> <p>We understand that Members are concerned that failure to establish an offence under the proposed section 16A will render the entire section futile. We would like to clarify that the proposed section 23EA(1) does not require the establishment of an offence under section 16A. It would be sufficient if the Director “has reasonable grounds to believe that an offence under section 16A has been committed in a place”.</p> <p>In respect of Government land, it is unlikely that the Director will have difficulties in ascertaining whether there are reasonable grounds to believe that an offence under section 16A has been committed.</p> <p>In respect of private land, the likely scenarios include –</p> <p>(a) the owner/occupier of the land concerned reports to the Director the disposal of waste in his place without his consent;</p> <p>(b) upon receipt of complaint or after inspection, the Director confirms with the owner/occupier of the land concerned that consent for the waste disposal is not available;</p> <p>(c) a person is caught at the scene by the enforcement officers when depositing waste on the land. The person either admits that no consent from the</p>

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		<p>owner/occupier is available or fails to provide information showing that such consent is available.</p> <p>Under the above scenarios, the Director will have reasonable grounds to believe that an offence under section 16A has been committed in the concerned place, and may enter the place to remove the waste if the conditions as set out in s.23EA(1)(b) and (c) are also satisfied.</p> <p>We recognize that there could be situations where it would be more difficult for the Director to ascertain whether there are “reasonable grounds to believe” an offence under section 16A has been committed. For example, if the waste is found disposed of on private land where no one has been caught at the scene, and the owner/occupier of the concerned land cannot be contacted by any convenient means to ascertain whether consent is available. According to the experience of the Environmental Protection Department, such situation is rare. The Director could also consider circumstantial evidence to exercise judgement if an offence under section 16A has been committed e.g. in most cases of illegal waste disposal, the concerned waste was deposited in an unmanaged manner, or did not match the surrounding environment. While such circumstantial situations may merely raise suspicion of the lack of consent of the owner/occupier, but if there is other reason to believe</p>

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		<p>that the consent is not available, then such situations may support that reason and altogether be regarded as reasonable grounds. It is unusual that waste deposited with consent would cause imminent risk of adverse environmental impact as the owner/occupier is unlikely to allow his place to suffer from such risk.</p> <p>We realize that under the scenario where consent of the owner/occupier for the waste disposal on private land is available, the Director cannot enter the place to remove waste under the proposed section 23EA if he does not have reasonable grounds to believe that an offence under section 16A has been committed. Nonetheless, such cases are extremely rare and the Director may rely on other ordinances to take enforcement action e.g. if the concerned waste is chemical waste, the Director may take enforcement action under the Waste Disposal (Chemical Waste)(General) Regulation.</p> <p>Having taken into account the above, we consider that no amendment to new section 23EA(1) proposed in the Bill is necessary.</p>

Environment, Transport and Works Bureau
June 2004

**Extract of the relevant paragraphs of the judgment re the court case
HKSAR v Leung Chun Wai Sunny (HCMA 152/2002)**

17. I do not think there can be any dispute about these basic principles and also that a mistaken belief could amount to a **lawful excuse**. In the case of *Cambridgeshire and Isle of Ely County Council v. Rust*, Lord Widgery CJ, having analysed a number of authorities on the application of '**lawful excuse**', gave the following interpretation of the term in his judgment :

' I think that in order for the defendant to have **lawful excuse** for what he did, he must honestly believe on reasonable grounds that the facts are of a certain order when, if they were of that order, he would have an answer to the charge, and indeed his conduct would be lawful and not contrary to the law. I do not believe at any time one can have **lawful excuse** for conduct because one is mistaken as to the law; everyone is supposed to know the law, but a mistaken of fact of the kind which I have described seems to me to amount to **lawful excuse**.'

This formulation of the principle was expressly approved by Yang CJ (as he then was) in the case of *The Queen v. Li Wing Tat and Others* [1991] 1 HKLR 731. This was also a magistracy appeal case involving the use of a loudhailer, but the focus was different. On the meaning of '**lawful excuse**', the Chief Justice stated that :

'The contention here is that because the police over a long period of time, some 18 years or more, have not prosecuted any person under either of the two sub-sections, save for one single occasion when a boutique was summonsed for using a loudspeaker without permit to attract passers-by, the defendants had an excuse in using loudhailers, honestly and reasonably believing that it was permissible so to do. Similar arguments were advanced in respect of the sub-s. (17) offences.

In this connection I need only refer to *Cambridgeshire v. Rust* [1972]2 QB 426. There Lord Widgery, C.J. sitting with Saw and Wien, JJ, described the word 'excuse' as a reasonable belief that you have the right to do what you seek to do. A defendant therefore has a **lawful excuse** if, on reasonable grounds, he is honestly mistaken as to a fact (at p. 433 E, p. 434B). He went on to say, 'I do not believe at any time one can have **lawful excuse** for conduct because one is mistaken as to the law; everyone is supposed to know the law, but a mistake of fact of the kind which I have described seems to me to amount to **lawful excuse**.'

18. However, 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.