

ETWB(E) 55/03/113B pt.3
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16 June 2004

Mr Stephen Lam
Assistant Legal Adviser
Legal Service Division
Legislative Council Secretariat
(By Fax 2877-5029)

Dear Mr Lam,

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

Thank you for your letter dated 10 June 2004.

We note your opinion expressed in the letter. We consider that the number of cases under your inquiry would be few and far between. This is particularly so because according to section 26 of the Magistrate Ordinance (Cap. 227), any complaint or information in respect of an offence under the existing or the proposed new section 16A of the Waste Disposal Ordinance must be made or laid within 6 months from the time when the matter of such complaint or information respectively arose. Even under such unlikely scenarios, we do not intend that an order under new section 18A(1)(a) or (b) should be made in the case of a conviction under the existing section 16A (to be re-enacted) if the offence is committed before the commencement of new sections 16A and 18A because in our view, new section 18A should not be construed as applicable to impose punitive consequences unknown to a convicted person at the time when he committed the offence under the general presumption against retroactivity. Similarly, we do not intend that an order under new section 23EA(2) should be made in the case of a conviction under the existing section 16A (to be re-enacted) if the offence is committed before the commencement of new section 23EA.

As for the empowering provision in new section 23EA, the Director of Environmental Protection may enter any place to remove the waste deposited in the place so long as all the criteria set out in section 23EA (1)(a), (b) and (c) are satisfied. In the interest of public health and environmental protection, we intend that the Director may invoke that power on or after the commencement of the Amendment Ordinance, if made, even if the waste might have been deposited before the

commencement of the Amendment Ordinance. Since section 23EA contemplates a situation with on-going facts, we consider that the section will have immediate application after the commencement of the Amendment Ordinance to a subsisting state of affairs, even though that state of affairs might have come into existence before the commencement of the Amendment Ordinance. With regard to government land, the relevant government authorities can always take action to remove waste deposited on government land.

Our views on the enforcement of new sections 16A, 18A and 23EA in the Bill as explained above are based on the interpretative rules concerning the temporal operation and application of legislation¹. There is no doubt that legislation is generally presumed not to have a retrospective or retroactive application, and the same applies to the Amendment Ordinance (if enacted). Article 12 of the Hong Kong Bill of Rights also requires that new criminal offences and heavier penalties shall not have retrospective operation. But as you would also agree, this presumption is distinguished from the immediate and general application of legislation to on-going facts or a subsisting state of affairs, which is a prospective and not a retroactive application of law. Our opinion and policy intent on how the new provisions should be applied follow these well-established rules of construction and are consistent with the purposive approach to statutory interpretation enshrined in section 19 of Cap. 1. We consider that further amendments to the Bill are unnecessary.

In relation to the defences under new section 16A, it is also our view that if a defendant is charged under the former section 16A for an offence committed under that section and the trial straddles the commencement of new section 16A, the statutory defences under new section 16A will be available to the defendant once the Bill (if passed) comes into force. Again, as a matter of ordinary rules of statutory interpretation, the court will apply beneficial legislation immediately and generally to on-going situations because there is no reason to restrict its application. The immediate application of the new defences to ongoing proceedings is not retroactive and does not interfere unfairly with existing rights. In practice, we do not consider that the availability of defences under new section 16A to the defendant will enable him to drag on the proceedings because any abuse of the process of the court is not acceptable.

Yours sincerely,

(Ms Doris Cheung)
for Secretary for the Environment, Transport and Works

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

¹ Ref. Chapter 19 of *Driedger on the Construction of Statutes* (3rd ed. by Ruth Sullivan).