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Miss Monna Lai
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Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
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Dear Miss Lai

Waste Disposal (Amendment) Bill 2005 (“the Bill”)

I refer to your above referenced letter dated 10 November in which you raised questions on the draft Waste Disposal (Clinical Waste) (General) Regulation and the Bill. Please find at Annex our response to your enquiry.

Yours sincerely,



(David K.K. HA)

for Director of Environmental Protection

c.c. DoJ (Attn: Ms. Fanny Ip, SALD)
DoJ (Attn: Ms. Frances Hui, SGC)
DoJ (Attn: Ms. Betty Cheung, SGC)

What are the elements of the offence to be proved by the prosecution under section 16A? Can consignment of the clinical waste amount to a lawful excuse under section 16 A?

Section 16A reads –

"(1) Any person who without lawful authority or excuse **deposits** or **causes or permits to be deposited** any waste –

- (a) in a public place;
- (b) on any Government land; or
- (c) on any land other than Government land without the consent of the owner or occupier,

commits an offence.

(2) In this section "Government land" (政府土地) means unleased land as defined in the Land (Miscellaneous Provisions) Ordinance (Cap 28)."

2. Therefore the offence under s.16A comprises the following elements –

- (1) the act of depositing waste in any of the prohibited places referred to in s.16A(1)(a) to (c);
- (2) the absence of lawful authority or excuse for that act - This element is a negative averment and the burden of proof of it lies with the defendant. (see s.94A of the Criminal Procedure Ordinance (Cap. 221));
- (3) the defendant is the person who deposited the waste in the prohibited place or who caused or permitted the waste to be so deposited.

3. There is a presumption of law that mens rea is required before a person can be held guilty of a criminal offence (*Gammon Ltd vs. AG of Hong Kong [1985] 1 AC 1*). Section 31 of the Ordinance directs that it is not necessary to prove (in relation to any of the specified offences, including an offence under s.16A) that the acts or omissions were accompanied by any intention, knowledge or negligence on the part of the defendant as to any element of the offence. So, for instance, a licensed waste collector who deposits waste on Government land commits an offence under s.16A even if he does not know that the land concerned is Government land.

4. In the context of proving an offence of "**causing** or **permitting** to be deposited any waste ..." under section 16 A, even though a person can be held

criminally liable under section 16A without criminal intent, the prosecution has to prove the identity of the person who actually caused or permitted the depositing of waste.

5. According to *O'Sullivan v Truth and Sportmans Ltd (1957)* 96 CLR 220, where the High Court of Australia was dealing with the offence of "causing" a newspaper to be offered for sale containing certain prohibited matters, it was held that : –

"[the expression to **cause**] should be interpreted as confined to cases where the prohibited act is done on the actual authority, express or implied, of the party said to have caused it or in consequence of his exerting some capacity which he possess in fact or law to control or influence the acts of the other. He must moreover contemplate or desire that the prohibited act will ensue".

The said passage was quoted and relied on by the court in *R v Wong Tak Choy*, HCMA 111 of 1994; also *AG v Tse Hung-lit* [1986] 3 WLR 320.

6. According to *para. 17-66a of Archbold*, the meaning given to "**permits**" depends on its context. It may be confined to "allows" or "authorises", or it may be wider and embrace "fails to take reasonable steps to prevent".

7. Applying the principles to the facts of the hypothetical scenario, if a waste producer has consigned the waste to a licensed collector, who eventually breaches section 16A, it is too remote to suggest that the waste producer has caused or permitted the waste to be deposited in contravention of the law. In the absence of evidence on the waste producer's involvement in the contravention of s. 16A (e.g., contemplation or desire that the waste will be disposed on Government land and his express or implied authority or control or influence over the disposal on Government land or at least some failure on his part), the element of "causing or permitting" is not proved. Therefore, the waste producer does not commit the offence and the question of lawful excuse does not arise.

8. On the other hand, should there be evidence that the waste producer instructed/conspired with the licensed collector to breach the law, then the mere fact that the person depositing the waste is a licensed collector is not a lawful excuse.