Promotion of Recycling and Proper Disposal (Electrical Equipment and Electronic Equipment) (Amendment) Bill 2015

This note serves to provide supplementary information about the Promotion of Recycling and Proper Disposal (Electrical Equipment and Electronic Equipment) (Amendment) Bill 2015 ("Amendment Bill") in response to the letter from the Assistant Legal Adviser dated 8 April 2015, which requests information or clarifications on the following matters about the proposed amendments to the Waste Disposal Ordinance (Cap. 354) ("WDO") –

Definitions and their Respective Interpretations

(a) the legal considerations of requiring the person to discharge an evidential burden in respective of new sections 18(5) and 20G(6) instead of requiring the person to establish that, on the balance of probabilities, a fact that needs to be established for the defence exists;

2. The proposed amendments to the WDO target at e-waste generated from regulated electrical equipment ("REE") as defined under the proposed Schedule 6 to the Product Eco-responsibility Ordinance (Cap. 603) ("PERO") and the enhanced control will not apply to disposal (including storage, treatment, re-processing and recycling) as well as import and export of non-regulated electrical equipment. We however envisage that at the waste stream, there will be practical difficulties in establishing that an item of e-waste satisfies the technical definitions of REE as contained in column 3 in the proposed Schedule 6 to the PERO because that item of e-waste may be in defective forms or the verification process will require complicated testing methods. It will facilitate effective control if the definition of e-waste makes reference to the class of electrical equipment or electronic equipment contained in column 2 rather than the corresponding technical definition in column 3.

3. Under the current proposal, if an item of e-waste is an item set out in column 2 of the proposed Schedule 6 to the PERO but does not satisfy the technical definition in column 3, a person who is accused of having contravened section 16 or section 20E of the WDO ("the defendant") may have a defence by establishing that that item of e-waste does not satisfy the technical definition in column 3 of the proposed

Schedule 6 to the PERO ("the relevant fact"). Under the proposed section 18(5) or 20G(6) of the WDO, the defendant is taken to have established the relevant fact if (a) there is sufficient evidence to raise an issue with respect to the fact; and (b) the contrary is not proved by the prosecution beyond reasonable doubt.

4. Since the item of e-waste in question would have been in the possession or control of the accused, he would be in a better position to identify and produce evidence for the purpose of determining the relevant fact (e.g. by producing relevant information such as the model number and functions of the item in question). Hence, we consider it appropriate to impose an evidential burden on the accused to adduce or point to sufficient evidence to raise a reasonable doubt that the item of e-waste in question does not fit the technical definition in column 3. This is consistent with the right to be presumed innocent until proved guilty according to law protected under Article 11 of the Hong Kong Bill of Rights. In the context of the current legislative proposals, we envisage it is feasible for the prosecution to prove the relevant facts to the contrary, so it is not justifiable or necessary to impose a legal burden on the accused to prove the relevant fact on a balance of probabilities.

(b) given that, besides the new section 20G(5), section 20G(1) also provides for a defence, clarification on whether the new section 20G(6) would be applicable to the defence provided in section 20G(1); and

(c) if the answer to (b) is in the negative, whether and how clause 16 of the Bill will be amended to reflect the legislative intent.

5. The Amendment Bill has amended section 20A and 20B of the WDO to require a permit for the import and export of e-waste. Under section 20E, a person who imports or exports e-waste without a permit commits an offence. Such an offence is "an offence under Part IVA" and hence an offence to which section 20G(1) applies. With section 20G(1), the person may establish a defence by taking all reasonable precautions and exercising all due diligence.

6. The newly added section 20G(5) further provides that a person charged with an offence for the import or export of any regulated e-waste will have a defence if the person establishes that the equipment concerned does not fall within the definition in column 3 of the proposed Schedule 6, which is a question of fact. To avail of the defence under section

20G(5), it is likely that the person has to establish a fact. This is how section 20G(6) comes in – if there is sufficient evidence to raise an issue with respect to a fact and the contrary is not proved by the prosecution beyond the reasonable doubt, the person is taken to have established a fact.

7. Thus, the defences provided under section 20G(1) and (5) are distinct. "[T]*he* defence" in section 20G(6) clearly refers to the defence under section 20G(5); "the person" in s.20G(6) also follows "a person" and "the person" in s.20G(4) and (5) respectively. It is inconceivable how a person can prove that he/she has taken all reasonable precautions and exercised all due diligence by discharging the evidential burden under section 20G(6) to raise an issue.

8. The above is consistent with our intention that the proposed section 20G(6) is only applicable to the defence under the proposed section 20G(5) but not applicable to the defence under section 20G(1).

Environmental Protection Department
April 2015