# Waste Disposal (Charging for Municipal Solid Waste) (Amendment) Bill 2018

This note serves to provide supplementary information about the Waste Disposal (Charging for Municipal Solid Waste) (Amendment) Bill 2018 (the Bill) in response to the letter from the Assistant Legal Adviser dated 4 December 2018, which asked for information and clarifications relating to the Bill.

General matters – Dual modes of charging under Part 2 and Part 3 of the Bill

***Q.1 It is stated in paragraph 4 of the Legislative Council ("LegCo") Brief (File Ref: EP CR 9/65/3) issued by the Environment Bureau ("ENB") and the Environmental Protection Department ("EPD") on 31 October 2018 that charges on municipal solid waste ("MSW') are proposed to be levied through the dual modes of charging by (a) designated bags ("DB')/designated labels ("DL") and (b) weight-based "gate-fee". It is also stated that the charging mode applicable to a waste producer would depend on the waste collection service used by him/her. Part 2 (clauses 3 to 10) of the Bill seeks to establish a quantity-based charging scheme for MSW disposal by the mandatory use of DB or DL, whereas Part 3 (clauses 11 to 34) of the Bill seeks to amend the Waste Disposal (Refuse Transfer Station) Regulation (Cap. 354M) to provide for a charging scheme and related registration and billing systems for MSW disposal at landfills, transfer stations and transfer facilities. In order to facilitate members' understanding of the Bill, please clarify in detail how the policy objectives as stated in the LegCo Brief could actually be reflected in the provisions of the Bill. Please clarify in particular whether Part 2 and Part 3 of the Bill are meant to deal with entirely different matters in the sense that there would not be an overlap in charging for MSW disposal.***

2. As stated in the LegCo Brief (File Ref: EP CR/9/65/3), the proposed MSW charging framework is premised on the "polluter-pays" principle. The Bill will provide the legal underpinning to the proposed charging modes, i.e. (a) charging by DB/DL and (b) charging by weight-based gate-fee. The applicable charging mode to a particular waste producer will depend on the waste collection service used by him/her. For MSW collected by the Food and Environmental Hygiene Department (FEHD) through waste collection vehicles, refuse collection points (RCPs) and specified bins, as well as MSW collected by private waste collectors (PWCs) using waste collection vehicles with rear compactors (RCVs),

charging will be imposed through requiring the use of pre-paid DB. The MSW will have to be properly wrapped in the DB before disposal at the waste reception points of RCVs, RCPs and specified bins as well as at the waste reception chambers or areas on individual floors of multi-storey buildings which are serviced by FEHD or PWCs using RCVs. Charging for oversized waste collected by FEHD that cannot be wrapped into a DB will be imposed through requiring the oversized waste to be affixed with a DL before disposal. For other MSW collected by PWCs' using waste collection vehicles without compactors (i.e. non-RCVs), a gate-fee will be charged based on the weight of MSW disposed of at scheduled facilities. We have maintained close communication with property management associations and will develop guidelines for and educate the relevant building management ahead of the effective date of the MSW charging scheme so that the latter could advise the building occupants of the applicable charging modes.

3. Part 2 of the Bill pertains to charging by DB/DL and provides for the requirements to use DB/DL for delivery and disposal of MSW, offences for non-compliance and defences to such offences, and the power for the Director of Environmental Protection (DEP) to authorize persons to produce, sell or supply DB/DL, etc. Part 3 of the Bill pertains to charging by the weight-based gate-fee at scheduled facilities. The two charging modes provided in these two parts apply to the respective MSW collected through different collection and disposal arrangements as noted above, and there would not be any overlap in charging.

Application to the Government

***Q.2 It is stated in the existing section 36(7) of the Waste Disposal Ordinance (Cap. 354) ("WDO") that no fee or charge prescribed for the purposes of Cap. 354 shall be payable by the Crown. Please clarify whether the proposed MSW charging regime under the Bill would apply to Government premises, departments and/or employees etc.***

4. Pursuant to Section 36 of the existing WDO, no fee or charge prescribed for the purpose of the Ordinance shall be payable by the Government. However, given the strategic importance of the introduction of the MSW charging in driving behaviour change to reduce waste generation, Government bureau and departments will take the lead and voluntarily pay the MSW charges on an administrative basis for the MSW generated, except in cases where certain MSW are generated as a direct and inevitable result of the delivery of public services (e.g. the concerned bureaux/departments have to handle such waste as agents of last

resort such as collection of street waste by FEHD).

Commencement

***Q.3 Clause 3(3) seeks to amend section 2(1) of Cap. 354 by adding, among others, the definition of "scheduled facility" which refers to section 2 of Cap. 354M, while clause 3(4) seeks to replace the term "Refuse Transfer Station" in the proposed definition of "scheduled facility" with the term "Charge for Disposal of Municipal Solid Waste at Scheduled Facilities". Please clarify when and how clauses 3(3) and 3(4) are expected to take effect if the Bill is passed.***

***Q.4 It is stated in paragraph 13 of the LegCo Brief that a preparatory period of 12 to 18 months is proposed to be put in place after the passage of the Bill before the actual implementation of MSW charging. Please explain to members the intended commencement of the Bill, in particular whether and when different clauses of the Bill are expected to take effect in phases, if the Bill is passed.***

5. We intend to adopt a two-phase approach for commencing different provisions of the Bill if it is passed. Generally speaking, empowering or enabling provisions necessary for making preparation before the implementation of MSW charging would take effect around 6 months in advance, whereas the remaining provisions would take effect on the actual implementation date of MSW charging. Commencement notices would be gazetted to this end, subject to negative vetting by the LegCo.

6. More specifically, empowering or enabling provisions necessary for making preparation before the implementation of MSW charging include those relating to (i) specifying the requirements for DB and DL, (ii) production, sale and supply of DB and DL (including prices of DB/DL), (iii) prescribing signs for refuse collection points, specified bins and waste vehicles; (iv) relevant registration and billing systems in relation to the weight-based gate-fee, and (v) stipulating empowering provisions to revise charges to be imposed in respect of waste disposed at a waste disposal facility (i.e. scheduled facility) prescribed by regulations. The remaining provisions which would take effect on the actual implementation date of MSW charging include those relating to (i) gate-fee charges, offences, defences and penalties under MSW charging, and (ii) operation of the billing arrangements at the scheduled facilities such as recording of weight and time at weight-bridges thereat, etc.

Meaning of "dispose" and "disposal" etc.

***Q.5 It is noted that the terms "dispose" and "disposal" etc. are used in the Bill, see e.g. the proposed sections 20J(1), 20J(2) and 20Q(3)(a) of Cap. 354 and the proposed section 4(1)(a) of Cap. 354M. Please clarify the meaning of the terms "dispose" and "disposal" etc. in the above proposed provisions. Reference may be made to the definitions of "disposal" in the existing sections 2(1) and 20I(1) of Cap. 354.***

7. In line with the general principle of statutory interpretation, the terms "dispose" and "disposal", etc. in the proposed sections 20J(1), 20J(2) and 20Q(3)(a) of the WDO should be construed in their ordinary meanings and in the light of the context and purpose of the WDO (as amended by the Bill). The definition of "disposal" in the existing section 2(1) of the WDO is well-delineated to apply to chemical waste, clinical waste and e-waste specifically and explicitly in the law while the definition of "disposal" in the existing 20I(1) of the WDO applies to waste including animal waste, chemical waste, clinical waste, construction waste, e-waste, household waste, livestock waste, street waste and trade waste. Both sections are not in the context of MSW.

**Clause 3(3) – definition of "municipal solid waste"**

***Q.6 Please clarify whether it is the policy intent that the term MSW (which means any waste except chemical waste, clinical waste and construction waste under clause 3(3)) may include municipal waste in semi-solid or purely liquid form. If so, please clarify why MSW is not (a) referred to as "municipal waste" (i.e. omitting the word "solid") in the Bill or (b) expressly defined to include semi-solid and liquid forms for the avoidance of doubt.***

8. It is the policy intention that MSW in different forms, including semi-solid and liquid forms, be subject to MSW charging. This policy intention is reflected in the definition of MSW in the Bill, i.e. any waste except chemical waste, clinical waste and construction waste. Waste is also defined under section 2 of the existing WDO as "any substance or article which is abandoned and includes animal waste, chemical waste, clinical waste, construction waste, household waste, livestock waste, street waste and trade waste". It should also be noted that as a common nomenclature, the term MSW is not confined to MSW in solid form but MSW in different forms. We therefore do not consider it necessary to omit the word "solid" in the Bill or expressly define it to include semi-solid and liquid forms.

**Clause 4**

Proposed section 20K(1) of the WDO

***Q.7 Please clarify the meaning of the terms "deposits" and "deposited" in the proposed section 20K(1) of Cap. 354, which seeks to provide that a person commits an offence if the person deposits, or causes or permits to be deposited, any non-compliant waste ("NCW") at a refuse collection point, onto a waste vehicle or into a specified bin. Reference may be made to the definition of "depositing" in section 2(1) of the Summary Offences Ordinance (Cap. 228).***

9. The terms "deposits" and "deposited" are not new to the WDO as the same *actus reus* appears in various existing offences under the WDO. In line with the general principle of statutory interpretation, the terms should be construed in their ordinary meanings, i.e. "put or set down in specific place", and in the light of the context and purpose of the WDO. "Deposit" and "depositing" are given a non-exhaustive definition in section 2(1) of the Summary Offences Ordinance (Cap. 228) to include "casting, throwing, sweeping, placing or dropping litter". These definitions do not go beyond the ordinary meaning of "deposit".

***Q.8 Please clarify the meaning of the term "causes or permits to be deposited" in the proposed section 20K(1).***

10. The drafting of the proposed section 20K(1) is modelled on the existing fly-tipping control[1] and serves to reflect the intended regulatory approach to catch not only a person who deposits non-compliant waste (NCW), but also those who may be regarded as responsible for that person's conduct, namely those who causes or permits it. The term "cause" should be construed in its ordinary meaning. The relevant offence under proposed section 20K(1) is a strict liability offence (see section 31 as amended by clause 6). For example, if a person ("Person A") gives an express or implied instruction to somebody else ("Person B")

[1] Under section 16A of the WDO, a person commits an offence if he deposits or causes or permits to be deposited waste in any place except with lawful authority or excuse, or except with the permission of any owner or lawful occupier of the place. Similarly, under section 4(1)(d) of the Public Cleansing and Prevention of Nuisances Regulation (Cap. 132BK), no person shall deposit or cause or permit to be deposited any litter or waste on or in any Government property except with the consent of a public officer.

to deposit NCW, Person A "causes" Person B to deposit NCW. In this example, Person A could be (but is not limited to) Person B's employer or a client who engages Person B's services. As regards the term "permit", given the offence under proposed section 20K(1) is a strict liability offence (see section 31 as amended by clause 6) and having regard to the availability of statutory defences under the proposed section 20Q, the relevant permission may be express, or implied, and may include doing nothing to prevent the prohibited act from occurring. If Person A fails to exercise his or her authority to stop or prevent Person B from depositing NCW, Person A "permits" Person B to deposit NCW. In essence, Person A is in a position of authority to permit or not to permit Person B to make the deposit. For example, Person A could be the person-in-charge at a RCP.

***Q.9 In the case of citizens voluntarily picking up waste which does not pose danger to the public on the street and depositing it without using DB or DL at a refuse collection point (e.g. after a strong typhoon), please clarify whether they would commit an offence under the proposed section 20K(1)(a).***

11. The MSW charging is proposed to be implemented at the MSW reception points including FEHD's RCPs and specified bins, waste vehicles (public and private one) and EPD's landfills and refuse transfer stations (RTSs). The proposed MSW charging framework is premised on the "polluter-pays" principle. While it will be a legal requirement that MSW has to be properly wrapped before being disposed of at a RCP, it will not be a common occurrence for a person on the street to voluntarily move MSW deposited by someone else on the street to the RCP. In the unlikely event of such happening, whether this person will commit the relevant offence will have to be considered based on the actual facts and circumstances.

12. On the other hand, for cleansing activities organised or participated by government departments or held at venues managed by government departments, the relevant departments generally provide the required equipment, including garbage bags, for volunteers taking part in such activities. Under the Bill, the DEP may supply DB or DL for free. Having regard to the nature of the events, the need to upkeep the "polluters-pay" principle, and other relevant factors, the DEP may supply DB or DL for free to any person or organisation as necessary.

***Q.10 Please clarify what a "specified bin" under the proposed section***

***20K(1)(c) is intended to be and whether it would include the ordinary rubbish bins currently put in public places by the Government.***

13. The specified bins (指明桶箱) are intended to be refuse containers managed by FEHD for collecting MSW that are normally placed at the RCPs managed by FEHD. The MSW collected therein are to be further collected by FEHD's RCVs. It should be pointed out that a "specified bin" does not cover "litter container" (廢屑箱) put in public places as managed by FEHD. Prescribed signs will be exhibited on specified bins, regardless of whether they are placed in RCPs, as required under the Bill to facilitate easy identification by the public. These litter containers are designed for the collection of small quantity of small-size litter generated by pedestrians.

***Q.11 Please clarify whether a person who unties the opening of a DB inside a specified bin in order to take away the cartons and soft drink cans inside the DB and then leaves without re-tying the DB would be considered as "depositing" that DB and the remaining waste therein, thereby contravening the proposed section 20K(1)(c).***

14. If a DB is opened and not re-tied up, the MSW contained in such a DB would fall outside the definition of "wrapped in a DB" and hence become NCW. MSW may escape from an untied DB during handling and transportation, causing pollution or other environmental hygiene problems. In order to facilitate effective implementation of the charging requirement, the underpinning legal requirements should not seek to provide for exemptions unless they are strictly necessary lest this should undermine the integrity of the charging regime. Under the Bill, the act of untying a DB inside a specified bin in a RCP and leaving it untied is likely to constitute "depositing" for the purpose of the proposed section 20K. However, whether enforcement actions will be taken in such cases, and if so, the priority it will be accorded with, depends on the actual facts and circumstances of individual cases.

***Q.12 It is stated in paragraph 8 of the LegCo Brief that charging for oversized waste collected by the FEHD that cannot be wrapped into a DB would be imposed through requiring the oversized waste to be affixed with a DL before disposal. Please clarify how this policy is reflected in the provisions of the Bill.***

15. In clause 3(3) of the Bill, the defined terms "non-compliant waste", "wrapped in a designated bag", "designated bags" and "designated

label" are proposed to be added to section 2(1) of the WDO. "Non-compliant waste" means "municipal solid waste that neither is wrapped in a designated bag nor has a designated label attached to it". "Wrapped in a designated bag" means "completely contained in a DB with the bag's opening tied so that no solid contents can escape from the bag during handling and transportation". Although oversized waste is not defined in the Bill, the combined effect of the said defined terms is that oversized waste (i.e. any MSW that is incapable of being wrapped in a DB because of its size) would fall within the definition of "non-compliant waste" unless it has a DL attached to it.

16. Sections 20K, 20L, 20M and 20P proposed to be added by clause 4 of the Bill create offences that prohibit: (1) depositing NCW at FEHD's RCPs, onto FEHD's public waste vehicles or specified bins; (2) delivery of NSW to FEHD's officers or contractors; and (3) depositing NCW in certain common areas of a premises. If the producer of a piece of oversized waste that is to be collected by FEHD fails to attach a DL to the waste before disposing of the waste, the producer would commit an offence under the proposed section 20K, 20L, 20M or 20P because the oversized waste would be a piece of NCW. Charging through DL for oversized waste that is collected by FEHD is thereby achieved.

17. On the other hand, oversized waste that is not collected by FEHD (i.e. collected by PWCs) does not require a DL to be attached to it and should be collected from the premises and delivered to scheduled facilities (e.g. RTSs and landfills) by waste collection vehicles without compactors (i.e. non-RCVs) and subject to a weight-based gate-fee (i.e. the charge specified in the Schedule to the Waste Disposal (Charge for Disposal of Municipal Solid Waste at Scheduled Facilities) Regulation (Cap. 354M)).

***Q13. Please clarify whether a person would commit an offence under the proposed section 20K(1) for depositing at a refuse collection point MSW which is:***

***(a) different dismantled parts of the same abandoned furniture firmly tied together by a rope which is attached with one Designated Label (DL); and***

***(b) a table and some chairs firmly tied together with one DL attached.***

18. MSW collected by the FEHD should be wrapped in a DB before disposal and the maximum size of a DB to be sold at retail level would be

100-litre[2] ($11 each). For those MSW to be collected by the FEHD but could not be wrapped in a 100-litre DB, it is required to be attached with a DL before disposal under the Bill.

19. While it will be impracticable to prescribe the individual circumstances and criteria for defining what constitutes a piece of MSW for the purpose of determining the number of DLs required, references would be made to such factors as the structure, functions, design, overall size and quantity of the waste in question in determining whether the MSW should be considered as one or several articles. On this basis, with regard to scenario (a), subject to the actual facts and circumstances, the dismantled parts of the same abandoned furniture firmly tied together by a rope is likely to be regarded as one article of waste requiring one DL for disposal. As regards scenario (b), subject to the facts and circumstances of the case, a table and some chairs are likely to be regarded as separate articles, each requiring a DL for disposal.

20. Frontline enforcement staff would take into account facts and circumstances of a given case in considering the need for taking enforcement actions, and guidelines and training would be provided for them beforehand.

Proposed section 20L(1) of the WDO

***Q14. Please clarify whether a person (other than a waste collection officer) who is acting in the course of providing removal services would commit an offence for depositing NCW under the proposed section 20L(1) of Cap. 354 if the person deposits onto a waste vehicle DBs which have been damaged (e.g. by dogs or rats) so that solid waste inside the DB would escape during the handling process.***

21. In order to facilitate effective implementation of the charging requirement, the Bill will mandate the use of DB/DL generally in the waste disposal and collection process to promote waste reduction at source. Regardless of whether the damage of a DB has been caused by dogs or rats or whether the case involves a deliberate use of damaged bag by the waste disposer, a damaged DB to the extent that the MSW would escape from the

[2] 240-litre and 660-litre DBs are also available but will only be sold for use by buildings with chutes so that frontline cleansing workers would not have to unnecessarily put NCW collected at the bottom of the chutes into DB for further disposal. Administrative arrangements will be made to ensure that these DBs will not be sold to individuals.

DB would fall outside the definition of "wrapped in a designated bag" and it would be considered as a NCW, if the MSW is not "completely contained in a DB with the bags' opening tied so that no solid contents can escape during handling and transportation". A person (other than a waste collection officer) who is acting in the course of providing removal services would commit an offence for depositing NCW under the proposed section 20L(1) if the person deposits such DB onto a waste vehicle, subject to the statutory defences under the proposed section 20Q (such as taking all reasonable precautions and exercising all due diligence). However, whether enforcement actions will be taken in such cases, and if so, the priority it will be accorded with, depend on the actual facts and circumstances of individual cases.

22. Guidelines and training would be provided to frontline enforcement staff and frontline cleansing staff accordingly.

***Q15. Please clarify whether employees of an outsourced contractor of the Government who are acting in the course of providing removal services by a waste vehicle on behalf of the Government would commit an offence under the proposed section 20L(1) for depositing NCW onto a waste vehicle. If so, please explain to members the rationale for this offence and why this is not applicable to waste collection officers who are employed by the Government.***

23. Employees of an outsourced contractor of the Government who are acting in the course of providing removal services by a waste vehicle on behalf of the Government would commit an offence under the proposed section 20L(1) for depositing NCW onto a waste vehicle. A person who commits an offence under this section is liable to a fine at level 2 (i.e. $5,000) or fixed penalty of $1,500 of a Fixed Penalty Notice pursuant to Fixed Penalty (Public Cleanliness and Obstruction) Ordinance (Cap. 570).

24. As for a waste collection officer who is employed by the Government (i.e. FEHD's staff) and carries out the duty of loading MSW onto a public waste vehicle or moving MSW at a RCP, default in performance will be subject to disciplinary action which might have more serious implications. We therefore do not consider it necessary to apply the offence to FEHD's staff.

***Q16. and Q17. Please also clarify whether employees of a removal services provider who are acting in the course of providing removal services by a waste vehicle (other than a waste collection officer) would***

***generally have a positive duty to check whether the waste is NCW before depositing the waste onto the waste vehicle under the proposed section 20L(1).***

***Please clarify whether cleaning staff employed by the management company of a building would have a positive duty to check whether the waste is NCW before delivering it to a waste collection officer in order to avoid committing an offence under the proposed section 20M(1).***

25. In order to effectively implement MSW charging, it is important to ensure that the MSW disposed of has been charged through the use of DB or DL as appropriate (save those subject to gate-fee). As such, removal services providers and their employees; and the cleansing staff employed by the management company of a building should not collect or deliver NCW. The legislative intent has been reflected in the proposed section 20L(1) and section 20M(1). They are expected to check whether if the MSW they collect or deliver is NCW, and this intent has been reflected in the defences under proposed section 20Q(1)(a) and section 20Q(1)(b) which require the relevant person to take all reasonable precautions and exercise all due diligence, or take all reasonable steps, to avoid committing the relevant offences.

<u>Proposed sections 20N(1) and 20O(1) of the WDO</u>

***Q18. and Q19. Under the proposed section 20N(1) of Cap. 354, a person would commit an offence if the person deposits onto a private waste vehicle any MSW that has a DL attached to it but that is not wrapped in a DB. Please explain to members the rationale for this proposed offence. Please also clarify why it would not be an offence if the waste vehicle involved is a public one.***

***Under the proposed section 20O(1) of Cap. 354, a person would commit an offence if the person delivers to another person acting in the course of providing removal services by a private waste vehicle any MSW that has a DL attached to it but that is not wrapped in a DB. Please explain to members the rationale for this proposed offence. Please also clarify why it would not be an offence if the waste vehicle involved is a public one.***

26. Bulky waste that cannot be wrapped into a DB could be produced by domestic premises or commercial and industrial (C&I) premises alike. However, the bulky waste produced from the latter come in a much greater variety in terms of sizes and volumes, e.g. large size metal ware and wood panels, etc. While a uniform charge of $11 will be charged for disposing of a single piece of bulky waste regardless of its size, it will not accord with the polluter-pays principle should the same arrangement be applied to the bulky waste generated from C&I premises. Unlike public waste vehicles, which collect MSW only from domestic premises, private waste vehicles collect MSW from both domestic and C&I premises, and as such it would not be practicable to distinguish if a particular private waste vehicle is collecting MSW from domestic or C&I premises. Therefore, PWCs would not be allowed to collect MSW that has a DL attached to it under the proposed MSW charging framework. Bulky waste generated from premises engaging the service of PWCs should be collected by PWCs' waste collection vehicles without compactors (e.g. grab lorries, demountable trucks, and tippers, etc.) and a gate-fee will be charged based on the weight of MSW disposed of at the waste disposal facilities, i.e. landfills or RTSs. The proposed section 20N(1) and section 20O(1) serve to reflect this requirement.

Proposed section 20P of the WDO

***Q20. Please clarify whether:***

***(a) residents of a building would commit an offence under the proposed section 20P(1) of Cap. 354 for depositing MSW into large DBs which are put at the common area of each floor of that building by the management company, which would eventually be tied up before disposal;***

***(b) the residents would commit an offence under the proposed section if they cause their domestic helpers or underaged children to deposit the waste in the same manner; and***

***(c) the management company would commit an offence under the proposed section for causing the residents to deposit the waste***

***into the DBs, if the company instructs or asks the residents to deposit the waste in that manner (e.g. by posting relevant written notices in the common area).***

27. The proposed MSW charging framework is premised on quantity-based and the "polluter-pays" principles. The policy intent of the proposed MSW charging framework is that it is primarily the responsibility of individual households to bear the charges for DB and DL, so as to achieve the legislative purpose of driving behavior changes in order to achieve waste reduction and contribute to carbon emission reduction. To this end, under the proposed MSW charging framework, even if a property management company (PMC) of a multi-storey building places a DB at the common areas that is used for depositing waste pending removal from the premises for disposal, individual households will still be required to deposit MSW wrapped in a DB or affixed with a DL before disposal. Otherwise, such an arrangement, i.e. placing one big DB at the common area to obviate the need for individual households to use DB for MSW disposal, may significantly reduce the incentive for individual households to reduce MSW. Hence, a person is likely to commit an offence (under proposed section 20P(1) of Cap. 354) in the scenarios described in (a) to (c), although much would depend on the facts and circumstances of a given case.

***Q21. And Q22. Please also clarify whether a big DB (e.g. a 100-litre DB) placed at the common area at each floor of a residential building by its management company may be considered as a "litter container" under the proposed section 20P(3)(a) of Cap. 354, so that depositing NCW into this DB would not be an offence.***

***Please also clarify what would amount to "a small quantity" of "small-sized" MSW under the proposed section 20P(3)(a).***

28. Having regard to the existing practice adopted in multi-storey buildings, we note that PMCs usually place small litter containers at the lobbies or lift waiting areas so as to facilitate individuals to dispose of small quantity of small-sized MSW such as used tissue paper. These small litter containers are however not designed for individuals to dispose of daily MSW from individual households or offices, etc.. Hence, only litter

containers designed for depositing a small quantity of small-sized MSW only are exempted from the prohibition in the proposed section 20P(1).

29. In line with the general principle of statutory interpretation, the terms "a small quantity" of "small-sized" MSW under the proposed section 20P(3)(a) should be construed in their ordinary dictionary meaning and in the light of the context and purpose of the Bill, and applied having regard to the facts and circumstances of a given case, such as the size of the lobbies or lift waiting areas, nature of the buildings, etc. In this connection, a large DB (e.g. a 100-litre DB) is most unlikely to be regarded as a "litter container" for the purpose of the proposed section 20P(3)(a).

Proposed sections 20U, 20V and 20W of the WDO

***Anti-counterfeit measures***

***Q23. It is stated in paragraph 7 of the LegCo Brief that each DB would bear an anti-counterfeit label to deter forgery. Please clarify whether it would be an offence if a person sells, offers to sell, or exhibits for sale any counterfeit bags or uses counterfeit DBs for disposal of waste. Reference may be made to Articles 9 to 11 of a similar legislation in Taipei on MSW charging ("臺北市一般廢棄物清除處理費徵收自治條例" in Chinese). Please also clarify whether DLs would bear any anti-counterfeit features, and whether there would be any corresponding offences.***

30. We note that Articles 9 to 11 of Taipei's legislation on MSW charging ("臺北市一般廢棄物清除處理費徵收自治條例") have provisions to set out the penalty for any offence involving manufacture, sale and use of counterfeit DB for disposal of waste. The Bill does not provide for any offence relating to counterfeit DB as such. Depending on the actual circumstances of each case, the sale, offer to sell, exhibition for sale, or use of counterfeit DB for disposal of MSW could amount to various offences contrary to other existing Ordinances.

31. First of all, the DEP will publish notice in the Gazette to specify the specifications for DB and DL, including their sizes, shapes, designs and materials (i.e. proposed section 20T). Each DB and DL will bear an anti-counterfeit label of hologram. An application will be filed for registration under section 47 of the Trade Marks Ordinance (Cap. 559) (TMO) to register the DB and DL as registered trade marks under the

TMO. Under section 7(1) and section 9(2) of the Trade Descriptions Ordinance (Cap. 362) (TDO), it will be an offence for a person to sell, offer to sell, or exhibit for sale or uses counterfeit DB and or DL will be tackled under the TDO. Any person who commits an offence under sections 7 and/or 9 of the TDO shall be liable on conviction on indictment, to a fine of $500,000 and to imprisonment for 5 years or on summary conviction, to a fine of $100,000 and to imprisonment for 2 years.

32. On the other hand, if a person uses counterfeit DBs or DLs for disposal of MSW, he/she can be prosecuted for offences under the Bill because MSW contained in a counterfeit DB or with a counterfeit DL attached is NCW. In addition, depending on the actual circumstances of the case, the person may be prosecuted with other offences[3].

**Charging for MSW disposal at scheduled facilities under Part 3**

***Q24. To facilitate members' understanding, please illustrate in tabular form the proposed changes in the charges for disposal of waste at each and every RTS and proposed scheduled facility by comparing the respective charges under the existing Cap. 354M and the proposed provisions under Part 3 of the Bill.***

***Please also explain to members how the proposed charges under clause 34 (including the proposed charges at $365 and $395) are arrived at.***

33. The relevant information on scheduled facility charges is set out in the table in **Annex**.

34. Currently, PWCs have to pay $30 - $110 per tonne for waste disposed of at RTSs[4] but no charge at landfills. The charging rate for

[3] For example, under section 73 of the Crimes Ordinance (Cap. 200), a person who uses an instrument which is, and which he/she knows or believes to be, false, with the intention of inducing somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his/her own or any other person's prejudice, commits an offence and is liable on conviction on indictment to imprisonment for 14 years.

[4] Currently, PWCs have to pay $30 per tonne for waste disposed of at the four urban RTSs (i.e. Island West Transfer Station, Island East Transfer Station, West Kowloon Transfer Station and Shatin Transfer Station). The charging levels of Northwest New Territories Transfer Station, Ma Wan Transfer Facility and North Lantau Transfer Station are $38 per tonne, $68 per tonne and $110 per tonne respectively.

RTSs is set at a level intended to be commercially viable to the trade and to enable the Government to recover at least the additional cost for handling of the waste delivered by PWCs to RTSs . The proposed charges under clause 34 (i.e. $365 and $395 per tonne) are proposed having regard to the estimated costs of transfer and disposal of waste at landfills and public acceptance level as recommended by the Council for Sustainable Development following a public engagement exercise on the implementation framework for MSW charging.

35. To avoid any over-capacity problem, the charging differential of $30 per tonne between disposal at urban RTSs and landfills is proposed to be maintained after the implementation of MSW charging, and be applied to the Northwest New Territories Transfer Station (currently charging at $38 per tonne) as well to simplify the structure of the proposed charging scheme. As regards the RTSs in Ma Wan, North Lantau Island and other outlying islands, the charging level for disposal of MSW at these RTSs would be set at the same level as that at landfills considering that there is no other alternative waste disposal outlet to these RTSs.

Proposed section 20P of the WDO

***Q25. It is stated in the proposed section 20P(3)(c) of Cap. 354 that the proposed section 20P(1) would not apply if the NCW is deposited by any person in providing services connected with the removal of MSW from the premises. Please clarify the meaning of "connected with the removal of [MSW] from the premises" and what situations the proposed section 20P(3)(c) is intended to cover.***

36. "Services connected with the removal of municipal solid waste from the premises" (the services) under the proposed section 20P(3)(c) refer to the various services rendered in preparation for the removal of MSW from the premises concerned by FEHD or by a private waste removal service provider. Taking a multi-storey residential building as an example, the services would include the collection of MSW from various parts of the premises (e.g. from the waste bins or refuse chambers of each floor), the transportation of the waste through service lifts or otherwise to the central refuse chamber for storage before collection by FEHD or a private waste removal service provider, etc.. While the intention of the proposed section 20(P)(1) is to catch the person who deposits, or causes to

be deposited, NCW in a common area, the frontline cleansing staff responsible for handling the waste collection would be exempted by virtue of the proposed section 20(P)(3).

***Q26. It is stated in the proposed section 20P(3)(d) that the proposed section 20P(1) would not apply if the NCW waste is (i) reasonably suitable for recycling; and (ii) deposited into a container, or in an area, that is reasonably used for depositing materials for recycling. Please clarify the meaning of the terms "reasonably suitable for recycling" and "materials for recycling".***

37. MSW which is "reasonable suitable for recycling" refers to waste of a material that is reasonably expected to be capable of being recycled at the time of the disposal. It should be noted that what is reasonably expected to be capable of being recycled may change with regard to various factors such as advancement in technology and development of the local recycling industry. The EPD promulgates guidelines on practising recycling to the public from time to time, which would provide reference as to what is suitably for recycling and how to practice recycling.

38. A container or an area that is "reasonably used for depositing materials for recycling" refers to one that is actually used for depositing materials for recycling and is considered by a reasonable person to be so used, such as recycling bins, bags, boxes as provided by EPD, PMCs, and/or resident organisations. For example, a person who deposits glass bottles at an otherwise clean and tidy lift lobby will not be able to claim the protection under the proposed section 20P(3)(d)(ii).

<u>Proposed section 20Q(1)(B) of the WDO</u>

***Q27. Under the proposed section 20Q(1)(b) of Cap. 354, it would be a defence for a person charged with an offence under section 20K, 20L, 20M, 20N, 20O or 20P to prove that the person (i) did not act constituting the offence at the instruction of the person's employer etc., and (ii) took all steps reasonably open to the person to avoid committing the offence. Please clarify the meaning of the phrase "took all steps reasonably open to the person to avoid committing the offence".***

39. The notion of "taking all steps reasonably open" is similar to concepts of "taking all reasonable steps" and "exercising all reasonable diligence", which are commonly found in other statutes and have been considered by the courts in various cases authorities. With reference to relevant case authorities and subject to the facts and circumstances of a given case, the use of the word "reasonable" connotes an objective test and requires the court to examine what the defendant could have been reasonably expected to have done in the circumstances. The court has to look at the particular circumstances of the defendant.

40. The defence under the proposed section 20Q(1)(b) specifically caters for the employment context (as indicated by the proposed section 20Q(1)(b)(i)). Thus, it would be reasonable to take into account the realities of the employment context in which a particular defendant is found, including the nature of his/her work, the seniority of his/her position, the reporting/supervisory relationship between the defendants and his/her employer(s), the resources (financial and otherwise) available to him/her in the performance of his/her duties, etc.

41. For illustrative purposes, if a frontline cleansing worker collecting MSW from a residential building has identified a NCW, it would generally be reasonable for the worker to inform his/her employer/supervisor, or the management office of building to rectify the problem or wrap it with a DB. If he/she is then instructed by the employer/supervisor that he/she should proceed nonethelesss, one would have to recognise that few or no options remain reasonably open to him/her. It is likely that he/she will be able to resort to the defence clause in the proposed section 20Q(1)(b).

<u>Proposed section 20S of the WDO</u>

***Q28. Regarding the proposed section 20S of Cap. 354, please clarify whether (a) there would be a system in place for a company to apply to be authorized to produce DB or DL, and (b) any authorization granted may be suspended instead of revoked. Reference may be made to the existing section 20C(1) of Cap. 354 on the suspension or revocation of the relevant permit.***

42. Under the Bill, the DEP may sell or authorize any person to

produce DB or DL. We will invite interested person to apply to be authorized to produce DB and DL through an open tender exercise in accordance with relevant procurement regulations and guidelines.

43. Under the proposed section 20S(3), the DEP may revoke an authorization granted under subsection (2) if any term or condition specified for the authorization is contravened. We intend to include appropriate administrative measures (such as issuance of warning or reminder letters) in the contracts as terms and conditions of authorization for the production, sale and supply of DB or DL. These administrative measures would serve to deal with unsatisfactory performance such as failure to provide adequate supply of DB of DL for sale. As such, we consider that, a suspension of authorization, which is interim measure by nature, is not necessary under the proposed arrangements.

Proposed sections 20U, 20V and 20W of the WDO

***Q29. Under the proposed section 20U(1) of Cap. 354, a person who sells, offers to sell or exhibits for the purpose of sale any DB or DL without authorization would commit an offence. Please clarify whether it would be an offence if the person, instead of selling, "causes or permits" DB or DL to be sold without authorization. Please also clarify a similar scenario under the proposed sections 20V(1) and 20W(1) of Cap. 354.***

44. The proposed sections 20U, 20V and 20W do not make it an offence for "causing or permitting" DB or DL to be sold without authorisation, at a price other than that prescribed, or supplied for free, as such. If the conduct of a person is such as to constitute aiding, abetting, counselling or procuring the commission of any offence under sections 20U, 20V or 20W, the person shall be guilty of the like offence by virtue of section 89 of the Criminal Procedure Ordinance (Cap. 221), which requires proof of intention.

***Q30. In the case of a person periodically running errands for people with mobility difficulties for a monthly charge, please clarify whether the person would commit an offence under the proposed section 20U(1) or 20W(1) for respectively selling DB or supplying DB at no extra charge to the those people without authorization.***

45. Generally speaking, if a person (the "helper") merely helps another person buy a DB and is reimbursed by the other person for the price of the DB, this helper is only acting on behalf of/as an agent of that other person to buy a DB only. The action is unlikely to qualify as a "sale" as the word is ordinarily understood, as long as the monthly charge is attributable to the provision of the agency service and not as any additional price for the DB. If the helper receives a monthly charge for provision of such agency service, the helper may be supplying the DB in the course of a profit-seeking business. However, the helper would not be supplying the DB for free as long as he/she gets reimbursed for the price of the DB.

Proposed sections 20Y and 20Z of the WDO

***Q31. and Q32. The proposed sections 20Y(1) and 20Y(2) of Cap. 354 respectively seek to provide that the driver of a public waste vehicle and of a private waste vehicle must ensure the relevant sign (prescribed under the proposed section 20X of Cap. 354) is exhibited on the vehicle in the prescribed way. The proposed section 20Y(3)(a) of Cap. 354 seeks to provide that, if in contravention of the proposed section 20Y(1) or 20Y(2), the driver would commit an offence. Please clarify:***

***(a) whether the prosecution would need to prove the relevant knowledge on the part of the driver; and***

***(b) while noting the defence under the proposed section 20Y(4) of Cap. 354, whether the common law defence of "honest and reasonable mistaken belief" would be applicable to the offences under the proposed section 20Y.***

***Please also clarify the similar scenario in relation to the proposed section 20Z of Cap. 354.***

46. The proposed MSW charging framework will be implemented at MSW reception points, i.e. a refuse collection point (proposed sections 20K and 20L), a public waste vehicle or a private waste vehicle (proposed sections 20K and 20L), a specified bin (proposed section 20K) and a common area of any premises that is used to for depositing waste pending

removal from the premises for disposal (proposed section 20P). To facilitate easy identification by the public and effective enforcement actions of the MSW charging, it would be necessary to ensure the proper exhibition of prescribed signs at relevant MSW reception points.

47. In the context of the proposed section 20Y, the term "ensure" implies a positive duty. Having regard to relevant case law, the context and purpose of this provision, it is considered not necessary for the prosecution to prove any relevant knowledge on the part of the driver under the proposed section 20Y(4). Failure to comply with this exhibition requirement under the proposed section 20Y would impact upon other persons' ability in complying with other sections of the Bill such as the proposed section 20K (i.e. without the properly exhibited prescribed signage, the public may have difficulty in identifying this as a waste vehicle as defined under the Bill and may commit the offence inadvertently). As such, it would be important to ensure this duty be properly discharged and the common law defence of "honest and reasonable mistaken belief" is not intended to be applicable to the offences under the proposed section 20Y.

48. In the context of the proposed section 20Z, the prohibited conduct is the "allowing" of the exhibition of the prescribed sign in certain circumstances. Having regard to relevant case law and the context and purpose of this provision, the term "allow" has an implied connotation of knowledge and therefore requires the proof of knowledge on the part of the driver that the prescribed sign is exhibited on a vehicle which is not a public or private waste vehicle. In comparison, failure to comply with this requirement under the proposed section 20Z is unlikely to impact upon other persons' ability in complying with other proposed sections such as the proposed section 20K. Since the prosecution is required to prove knowledge on the part of the driver, the common law of "honest and reasonable mistaken belief" is irrelevant.

**Clause 6**

***Q33. Please explain to members the rationale of clause 6 which seeks to amend section 31 of Cap. 354 to the effect that the prosecution needs not prove that the defendant's acts or omissions in question were accompanied by any intention, knowledge or negligence as to any***

***element of the proposed offences under the proposed sections 20K, 20L, 20M, 20N, 20O and 20P.***

49. It is our policy intent to amend the WDO and the RTS Regulation to establish a charging scheme for the disposal of MSW. The proposed offences under the proposed sections 20K, 20L, 20M, 20N, 20O and 20P are introduced to provide the framework of the MSW charging and the mandatory use of DB or DL when disposing of MSW.

50. The effect of clause 6 of the Bill to include offences under the proposed sections 20K, 20L, 20M, 20N, 20O and 20P in section 31 of the WDO is to make them strict liability offences. Noting that the nature of these offences is similar to that prohibiting fly-tipping under the existing WDO (such as sections 16, 16A and 16B of the WDO), we consider it appropriate to adopt the same established prosecution approach for consistency's sake.

**Clause 7, 8, 33 and 35 - charges set at above cost recovery level**

***Q.34, Q35 and Q36 Please explain to members the rationale for the proposed power to set charges at above cost recovery level under clauses 7, 8, 33 and 35.***

***Please provide existing statutory examples (if any) which empower the setting of charges at above cost recovery level.***

***Please also clarify why the notices to amend the relevant Schedules to revise the charges would only be subject to the negative vetting procedure instead of the positive vetting procedure.***

51. Clauses 7 and 8 respectively amend sections 33 and 37 of the WDO to empower the Chief Executive in Council to make regulations that impose charges for the disposal of waste, with the power to set the charges at above cost recovery level and the Secretary for the Environment (SEN) to revise the charges specified by the regulations, with the power to set the charges at above cost recovery level, as well as to empower SEN to revise the prices of DB and DL prescribed in the proposed Schedule 14, with the power to set the prices at above cost recovery level. Clauses 33 and 35

serve to empower SEN to revise the charges specified in the Schedule to the RTS Regulation for the disposal of MSW at scheduled facilities and the charges for the disposal of construction waste in the Waste Disposal (Charges for Disposal of Construction Waste) Regulation (Cap. 354N) (Construction Waste Regulation), with the power to set the charges at above cost recovery level.

52. It is an established policy that government fees should in general be set at levels adequate to recover the full costs of providing the goods or services. However, the policy intent of the proposed MSW charging is to create financial incentives to drive behavior changes in waste generation and hence reduce overall waste disposal based on the "polluter-pays" principle. While raising Government's revenue or recovering the costs incurred by the Government in providing waste collection and disposal service is not the primary consideration, the charging level should be set at a level effective to achieving waste reduction.

53. The proposed power to set charges at above cost recovery level in the aforementioned clauses is to allow flexibility for the Government to set charges to provide financial incentives to effectively achieve the legislative purpose to drive behavioural change in reducing waste disposal having regard to other factors such as affordability and public acceptability. In this regard, it should be pointed out that the Government has made a public commitment that the proposed charges for DB, DL and gate-fee would remain unchanged in the first three years of implementation.

54. As regards the disposal charges for construction waste, as the proposed MSW gate-fee to be charged at scheduled facility under the Bill is higher than the current landfill charge for construction waste, it is necessary to align the charges so as to avoid any deliberate mixing of MSW and construction waste with a view to disposing MSW as construction waste at landfills.

55. Some existing statutory examples which empower the setting of charges at above cost recovery level are set out below –

(a) section 18(2) of the Amusement Game Centres Ordinance (Cap. 435);
(b) section 23(5) of the Residential Care Homes (Elderly Persons)

Ordinance (Cap. 459); and

(c) section 44(2) of the Human Reproductive Technology Ordinance (Cap. 561).

56. As regards the notices to amend the relevant Schedules to revise the charges, it should be noted that the amendment of the Schedule by SEN in relation to construction waste disposal charges (section 33(6) of the WDO refers) and the notice published by SEN to amend Schedules of the Construction Waste Regulation (section 23 of the Construction Waste Regulation refers) are subject to negative vetting. Given the similar nature and the interface between construction waste disposal charges and MSW gate-fee as explained above, it is considered appropriate to adopt the same approach for handling adjustments to the charging levels for DL, DB and gate-fee.

**Environmental Protection Department**
**Environment Bureau**
**February 2019**

**Annex**

## Summary of Charging Rates of Scheduled Facilities before and after Implementation of Municipal Solid Waste (MSW) charging

| | Before implementation of MSW charging (per tonne) | After implementation of MSW charging (per tonne) |
|---|---|---|
| (a) West New Territories Landfill | $0 | $365 |
| (b) North East New Territories Landfill | $0 | $365 |
| (c) North Lantau Transfer Station | $110 | $365 |
| (d) Ma Wan Station | $68 | $365 |
| (e) Island East Transfer Station | $30 | $395 |
| (f) West Kowloon Transfer Station | $30 | $395 |
| (g) Island West Transfer Station | $30 | $395 |
| (h) Northwest New Territories Transfer Station | $38 | $395 |
| (i) Shatin Transfer Station | $30 | $395 |
| (j) Other Outlying Islands Transfer Facilities[Note] (OITF) | $0 | $365 |

Note: Including OITFs at (a) Cheung Chau, (b) Mui Wo, (c) Peng Chau, (d) Hei Ling Chau, (e) Yung Shue Wan and (f) Sok Kwu Wan.