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 (ALA) dated 25 March 2019, which asked for information and clarifications relating to the Bill.

Meaning of "dispose" and "disposal", etc.

Q1. It is stated in paragraph 7 of your reply that, 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 Waste Disposal Ordinance (Cap. 354) should be construed in their ordinary meanings and in the light of the context and purpose of Cap. 354 (as amended by the Bill). It is noted that the word "disposal" means "the action of disposing of or getting rid of" (among other meanings) in Angus Stevenson (ed.). (2007). The Shorter Oxford English Dictionary on historical principles. 6th ed., vol. 1, Oxford University Press, p. 712. Please clarify whether this definition or any other definition would be the ordinary meaning of "disposal" as stated in your previous reply.

2. Notwithstanding that there are various means to ascertain the ordinary meaning of a word, we agree that the definition of "disposal", i.e. "the action of disposing of or getting rid of", quoted in paragraph 2 of your letter and extracted above, accords with the ordinary meaning of this word.

Clause 4

Proposed section 20K of the Waste Disposal Ordinance (Cap. 354)

Q2. Concerning the proposed section 20K(1) of Cap. 354, it is stated in paragraph 10 of your reply that, "[a]s 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". Please clarify:

(a) with reference to relevant case authorities, whether and how "doing nothing to prevent the prohibited act from occurring"

would amount to "permits to be deposited" under proposed section 20K(1); and

(b) with reference to Justice Bokhary et al. (eds.). (2018). Archbold Hong Kong 2019. China, Sweet & Maxwell, p. 1145 and other relevant case authorities, whether the permitting party would need to have the relevant "actual knowledge … or willful blindness like in the sense of actual suspicion on his part" as an element of the offence under proposed section 20K(1).

3. The relevant passage in *Archbold Hong Kong 2019* quoted in the ALA's letter is quoted in full as follows:

"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". The narrow meaning will usually import knowledge, in the sense of knowledge of what is being allowed or authorised. In the normal way, a person cannot be said to allow a particular activity, still less authorise it, unless he is aware of the activity being carried on or expected to be carried on. Where the word is to be given its broader meaning, however, what has to be proved is a failure to match up to an objective standard, plus a causal link between that failure and the prohibited result; provided that the failure was deliberate in the sense that the omissions were deliberate and not due to honest mistake or accident, there is no need to prove subjective foresight of the prospect, or risk, of a contravention occurring. The knowledge required for "permitting" is actual knowledge by the defendant or willful blindness like in the sense of actual suspicion on his part: R v Cheng Ching Kwong [1986] HKC 109." (emphasis underlined)

4. In this Bill, given that the offence under the proposed section 20K(1) is a strict liability offence and having regard to the availability of statutory defences under the proposed section 20Q, the broader meaning (and not the narrow meaning) of "permits" is to be adopted for the purpose of the offence under the proposed section 20K(1). It therefore includes doing nothing to prevent the prohibited act from occurring. It is not necessary for the prosecution to prove any actual knowledge or willful blindness.

Q3. For a person who unties the opening of a designated bag ("DB") inside a specified bin in order to take away the soft drink cans etc. inside the DB and then leaves without re-tying the DB, it is stated in paragraph 14 of your reply that such an act is likely to constitute "depositing" for

the purpose of the proposed section 20K. It is also noted that in paragraph 9 of your reply, you have stated that the term "deposits" should be construed to mean "put[s] or set[s] down in specific place …". Please clarify, with reference to relevant case authorities, whether the person would be considered as "depositing" the relevant waste, which is at all material times at the place where the waste had first been disposed of by another person.

5. The meaning of "deposit", in the context of the legislation in other common law jurisdictions in respect of waste disposal offences, has been considered by the relevant courts in a number of cases. See in particular *Thames Waste Management Ltd v Surrey County Council* [1997] Env LR 148 QBD. The relevant principles, which may shed light on how the same term is to be interpreted in Hong Kong, may be summarised as follows:

(1) "Deposit" is an ordinary and uncomplicated word, meaning "put, place or set down";
(2) The word "deposit" takes its flavour from its context;
(3) It has also to be construed in a broad sense, unless the context otherwise requires;
(4) "Deposit" is not restricted to deposit of waste at its "final resting place"; and
(5) In some circumstances, "deposit" could embrace a "continuing state of affairs". In the *Thames Waste Management* case where it was found that the actual "deposit" in question was the failure to cover up the waste in accordance with a condition of the waste management licence, which took place after the initial deposit.

6. Depending on the facts and circumstances of a given case, untying a designated bag (DB) and leaving it untied is therefore likely to constitute "depositing" for the purpose of the proposed section 20K. Besides, "with the bag's opening tied so that no solid contents can escape from the bag during handling and transportation" is a key component of the definition of "wrapped in a designated bag" in the Bill. The definition of "wrapped in a designated bag" is also a key component when interpreting the definition of "non-compliant waste". The word "deposit" should be construed in such way as not to allow this definition to be easily circumvented. Therefore, causing the continuous status that municipal solid waste (MSW) is "not wrapped in a designated bag" could also be considered as "depositing" non-complaint waste (NCW). As stated in paragraph 14 of our reply dated 13 February 2019, in order to facilitate effective implementation of the charging requirement, it is considered that 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.

Q4. It is noted that different acts of "depositing", "causing" and/or "permitting" are proposed to be criminal offences under the following proposed provisions of Cap. 354:

(a) "depositing, causing or permitting" to be deposited non-compliant waste ("NCW") into a specified bin etc. under proposed sections 20K, 20L, 20M, 20N and 20O;

(b) "depositing or causing" to be deposited NCW in a common area of any premises under proposed section 20P (i.e. "permitting" per se would not be an offence under proposed section 20P); and

(c) selling, offering to sell or exhibiting for the purpose of sale any DB or designated label under proposed section 20U (i.e. "causing or permitting to be sold" per se would not be an offence under proposed section 20U).

From the perspectives of policy intent and law drafting, please explain to members the rationale for the different use of "causing" and/or "permitting" in the above provisions.

7. The drafting of the proposed sections 20K, 20L, 20M, 20N and 20O with the acts of "depositing, causing or permitting to be deposited" or "delivering, causing or permitting to be delivering" serves to reflect the intended regulatory approach to catch not only a person who deposits or delivers NCW. The policy intent is to deter waste producers and those involved in the provision of waste collection services at various MSW reception points (e.g. private waste collectors providing waste collection service) from depositing or accepting NCW.

8. As for the proposed section 20P, with reference to the existing waste disposal and collection arrangements generally adopted in premises, we do not envisage the act of "permitting" the deposition of NCW would occur in a common area of any premises that is used for depositing waste pending removal from the premises for disposal (common area for waste). It is unlikely that a person will be in a position of authority as such to permit or not to permit another person to make the deposit at common area for waste.

9. The proposed section 20U serves to reflect the intended regulatory approach to prohibit the sale of DBs or designated labels (DLs) by an unauthorized person. We do not see the operational need to introduce offences to catch an unauthorized person who causes or permits the sale of DBs or DLs (if any) under the Bill. As stated in paragraph 44 of our reply dated 13 February 2019, if the conduct of a person is such as to constitute aiding, abetting, counselling or procuring the commission of any offence under the proposed section 20U, 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.

Proposed section 20L(1) of the Waste Disposal Ordinance (Cap. 354)

Q.5 Regarding the proposed section 20L(1) of Cap. 354 which seeks to provide for an offence in respect of waste collection officers who are not employed by the Government, while not seeking to provide for a similar offence for those employed by the Government, it is stated in paragraph 24 of your reply that default in performance on the part of the waste collection officers employed by the Government (i.e. staff of the Food and Environmental Hygiene Department ("FEHD")) will be subject to disciplinary action which might have more serious implications. The Administration therefore does not consider it necessary to apply the proposed offence to FEHD's staff. Please provide, for members' reference, any other existing statutory provision(s) which provide(s) for similar differential treatment for Government employees and non-Government employees due to possible disciplinary action with more serious implications for Government employees.

10. Currently, removal services at a RCP or by a waste vehicle are provided by several parties including "waste collection officers" (i.e. waste collection officers employed by the Government such as the Food and Environmental Hygiene Department (FEHD) staff), persons on behalf of FEHD (i.e. outsourced staff), and private waste collectors. The proposed section 20L serves to prohibit the latter two parties from depositing NCW at these MSW reception points. As stated in paragraph 24 of our reply dated 13 February 2019, if a "waste collection officer" is reported to have committed the same act, he or she will already be subject to disciplinary actions which might have more serious implications. As such, we do not consider it necessary to subject them to this offence. Given the unique circumstances surrounding the requirements imposed on the parties involved in the provision of waste collection services, we do not have any available information on other situations that provides similar arrangements.

Clause 6 – mental ingredients of certain offences

Q6. It is stated in paragraph 50 of your reply that the effect of clause 6 is to make the offences under the proposed sections 20K, 20L, 20M, 20N, 20O and 20P strict liability offences. Please clarify, with reference to relevant case authorities, whether the common law defence of "honest and reasonable mistaken belief" would be applicable in respect of the six proposed sections and the underlying rationale.

11. As the Court of Final Appeal held in *Hin Lin Yee & Anor v HKSAR* (2010) 13 HKCFAR 142, if the statutory defence, properly construed, is inconsistent with the availability of the common law defence, then only the statutory defence can be relied on (see paragraphs 16 and 164). The Court further held that although the concepts of the "due diligence" defence and the common law defence of "honest and reasonable but mistaken belief" are distinct, their application involves an overlap sufficient to indicate an exclusionary legislative intent (see paragraph 179).

12. For all of the offences under consideration in this question, the statutory defences under the proposed section 20Q(1) are available. In particular, the proposed section 20Q(1)(a) provides that it is a defence if the person charged took all reasonable precautions and exercised all due diligence to avoid committing the offence. In other words, merely having an honest and reasonable belief of some exculpatory circumstances (e.g. that a DB is tied) is insufficient for a defendant to be acquitted of the relevant offence, if the defendant fails to take all reasonable precautions and exercise all due diligence to avoid the commission of the offence.

Clause 34 – charges for disposal of municipal solid waste at scheduled facilities under Part 3

Q7. It is noted that the proposed section 4(a)(ii) of Part 1 of the Schedule to the Waste Disposal (Refuse Transfer Station) Regulation (Cap. 354M) (under clause 34(3) of the Bill) seeks to provide for a proposed charge of $150 for each unweighed load disposed of at a "Group 3 facility". Please clarify whether there is any corresponding item of charge under the existing Cap. 354M, and how that proposed amount of $150 is arrived at.

13. "Group 3 facility" under the proposed Waste Disposal (Charge for Disposal of Municipal Solid Waste at Scheduled Facilities) Regulation (the

proposed Regulation) means Outlying Islands Transfer Facilities (OITF) located at Cheung Chau, Mui Wo, Peng Chau, Hei Ling Chau, Yung Shue Wan and Sok Kwu Wan. These OITF are not listed in the existing Waste Disposal (Refuse Transfer Station) Regulation (Cap. 354M) and so the waste delivered to these OITF are now not subject to charging under Cap. 354M.

14. According to our statistics, given the remote locations of these OITF and the relatively small population on these outlying islands, the average actual weight load received by these OITF in the past few years was around 0.4 tonne. The proposed charge of $150 for each unweighed load disposed of at a "Group 3 facility" is calculated based on this average loading, and the proposed charge for one tonne after the implementation of MSW charging (i.e. $365 per tonne at "Group 3 facility").

Environment Bureau
Environmental Protection Department
May 2019