

立法會

Legislative Council

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Panel on Constitutional Affairs

A Note on background to amendment to section 34(4) of the Interpretation and General Clauses Ordinance (Cap. 1) in 1993 and proposals for its further amendment

Purposes of the paper

This paper sets out the background to changes brought about by the Interpretation and General Clauses (Amendment) (No. 2) Ordinance (Ordinance No. 89 of 1993) ("the Amendment Ordinance") to section 34 of the Interpretation and General Clauses Ordinance (Cap. 1) and proposes possible amendments to section 34 in order to better facilitate the Legislative Council in the scrutiny of subsidiary legislation for which the current scrutiny period of 28 days plus one sitting may not be adequate.

Amendments to section 34 of Cap. 1 in 1993

2. Section 17 of the Amendment Ordinance amends section 34 of Cap. which, before the Amendment Ordinance, provided as follows—

"34. Placing of subsidiary legislation before Legislative Council

(1) All subsidiary legislation shall be laid on the table of the Legislative Council at the next sitting thereof after the publication in the Gazette of that subsidiary legislation.

(2) Where subsidiary legislation has been laid on the table of the Legislative Council under subsection (1), the Legislative Council may, by resolution passed at a sitting of the Legislative Council held not later than 28

days after the sitting at which it was so laid, provide that such subsidiary legislation shall be amended in any manner whatsoever consistent with the power to make such subsidiary legislation, and if any such resolution is so passed the subsidiary legislation shall, without prejudice to anything done thereunder, be deemed to be amended as from the date of publication in the Gazette of such resolution.

(3) If the period referred to in subsection (2) would but for this subsection expire—

(a) after the end of a session of the Legislative Council or a dissolution thereof; but

(b) on or before the day of the second sitting of the Legislative Council in the next following session thereof,

that period shall be deemed to extend to and expire on the day after that second sitting.

(4) Before the expiry of the period referred to in subsection (2) or that period as extended by virtue of subsection (3), the Legislative Council may by resolution in relation to any subsidiary legislation specified therein extend that period or that period as so extended by a further period not exceeding 21 days.

(5) Any resolution passed by the Legislative Council in accordance with this section shall be published in the Gazette not later than 14 days after the passing thereof or within such further period as the Governor may allow in any particular case.

(6) In this section "subsidiary legislation" does not include a resolution of the Legislative Council."

3. The Amendment Ordinance appeared as the Interpretation and General Clauses (Amendment) Bill 1992 which mainly proposed various technical amendments to Cap. 1 without amendment to section 34. It was in the course of scrutiny of the Bill, the Legal Unit (as it then was) raised the possibility of amending section 34 with the Administration in three areas, namely amending "end of a session" to read "last sitting of a session" in order to cover situations where the last sitting preceded the actual date of the end of the session, amending the definition of "sitting" to exclude Governor's Question Time sittings and reviewing the 21 day extension period. The first two areas are not presently of concern. We therefore focus on the last area. The problem, as the Legal Unit then saw, with section 34(4) was as follows. Because of the timing of some of the mid-session recesses (particularly Christmas and New Year) the 21 day extension period provided for in section 34(4) could be

rendered meaningless. The Legal Unit put forth a practical example to illustrate the problem as follows—

- (a) Item laid on table of Legislative Council on 17th November.
- (b) Expiry date under section 34(2) (28 days) was 15th December.
- (c) On 15th December Legislative Council should be able to extend scrutiny period by 21 days (under section 34(4)).
- (d) But next sitting after 15th December was 12th January which was more than 21 days.
- (e) Therefore section 34(4) failed in its purpose of providing a 21 day extension.

4. The Legal Unit therefore recommended that section 34(4) be amended to provide that if there was no sitting on the date of expiry of the extended period then that period should be deemed to be further extended until the day after the next sitting.

5. In the light of the Legal Unit's recommendation, among other things, in particular about section 34(4), the Administration proposed the following Committee Stage amendment as marked-up—

"(4) Before the expiry of the period referred to in subsection (2) or that period as extended by virtue of subsection (3), the Legislative Council may by resolution in relation to any subsidiary legislation specified therein extend that period or that period as so extended ~~by a further period not exceeding 21 days~~ (to the next sitting)."

When applying new subsection (4) to the practical example mentioned in paragraph 3 above, Legislative Council may by resolution on 15th December extend the scrutiny period to 12th January.

6. The following comparison table shows the similarities and differences of section 34 before and immediately after the Amendment Ordinance (with changes underlined for easy reference)—

34. Placing of subsidiary legislation before Legislative Council	34. Placing of subsidiary legislation before Legislative Council
<p>(1) All subsidiary legislation shall be laid on the table of the Legislative Council at the next sitting thereof after the publication in the Gazette of that subsidiary legislation.</p>	<p>(1) All subsidiary legislation shall be laid on the table of the Legislative Council at the next sitting thereof after the publication in the Gazette of that subsidiary legislation.</p>
<p>(2) Where subsidiary legislation has been laid on the table of the Legislative Council under subsection (1), the Legislative Council may, by resolution passed at a sitting of the Legislative Council held not later than 28 days after the sitting at which it was so laid, provide that such subsidiary legislation shall be amended in any manner whatsoever consistent with the power to make such subsidiary legislation, and if any such resolution is so passed the subsidiary legislation shall, without prejudice to anything done thereunder, be deemed to be amended as from the date of publication in the Gazette of such resolution.</p>	<p>(2) Where subsidiary legislation has been laid on the table of the Legislative Council under subsection (1), the Legislative Council may, by resolution passed at a sitting of the Legislative Council held not later than 28 days after the sitting at which it was so laid, provide that such subsidiary legislation shall be amended in any manner whatsoever consistent with the power to make such subsidiary legislation, and if any such resolution is so passed the subsidiary legislation shall, without prejudice to anything done thereunder, be deemed to be amended as from the date of publication in the Gazette of such resolution.</p>
<p>(3) If the period referred to in subsection (2) would but for this subsection expire—</p> <p>(a) <u>after the end of a session of the Legislative Council or a dissolution thereof;</u> but</p> <p>(b) on or before the day of the second sitting of the Legislative Council in <u>the next following session thereof,</u></p> <p>that period shall be deemed to extend to and expire on the day after that second sitting.</p>	<p>(3) If the period referred to in subsection (2) would but for this subsection expire—</p> <p>(a) <u>after the last sitting before the end of a session or dissolution of the Legislative Council;</u> but</p> <p>(b) on or before the day of the second sitting of the Legislative Council in <u>the next session,</u></p> <p>that period shall be deemed to extend to and expire on the day after that second sitting.</p>

<p>(4) Before the expiry of the period referred to in subsection (2) or that period as extended by virtue of subsection (3), the Legislative Council may by resolution in relation to any subsidiary legislation specified therein extend that period or <u>that period as so extended by a further period not exceeding 21 days.</u></p>	<p>(4) Before the expiry of the period referred to in subsection (2) or that period as extended by virtue of subsection (3), the Legislative Council may by resolution in relation to any subsidiary legislation specified therein extend that period or <u>that period as so extended to the next sitting.</u></p>
<p>(5) Any resolution passed by the Legislative Council in accordance with this section shall be published in the Gazette not later than 14 days after the passing thereof or within such further period as the Governor may allow in any particular case.</p>	<p>(5) Any resolution passed by the Legislative Council in accordance with this section shall be published in the Gazette not later than 14 days after the passing thereof or within such further period as the Governor may allow in any particular case.</p>
<p>(6) In this section "subsidiary legislation" does not include a resolution of the Legislative Council.</p>	<p>(6) In this section— <u>"sitting" (會議), when used to calculate time, means the day on which the sitting commences and only includes a sitting at which subsidiary legislation is included on the order paper;</u> "subsidiary legislation" (附屬法例) does not include a resolution of the Legislative Council.</p>

The version of section 34 remains unchanged since the Amendment Ordinance, except for technical amendments introduced by the Adaptation of Laws (Interpretative Provisions) Ordinance (Ordinance No. 26 of 1998).

Possible amendments to section 34(4) of Cap. 1

First Proposal

7. One possible way to amend section 34(4) is to adopt the Legal Unit's proposal in 1993 set out in paragraph 4 above that is 28 days plus 21 day extension but if there is no sitting on the day of expiry of the scrutiny period, then Legislative Council may extend that period to the sitting next following the 21 day period.

Second Proposal

8. Another possible amendment to section 34(4) is along the line of the proposal made by Hon Andrew WONG, Chairman of the Panel at the last meeting. The Chairman suggested a formulation of extending the 28 days by 21 days or one sitting whichever is the longer. In our view, the qualifier of "whichever is the longer" may not be necessary because the Legislative Council could make the decision of whether it should be extended by 21 days or one sitting when considering a motion to extend.

9. In relation to both proposals, considerations have to be given to implications on procedural requirements such as notice period under the Rules of Procedure and consistency with the Legislative Council scrutiny mechanism on legislative instruments made under various ordinances, for example the power to amend a code of practice issued under section 69 of the Sex Discrimination Ordinance (Cap. 480) (Appendix). That mechanism is substantially the same as that provided by section 34 of Cap. 1 but the code of practice is not a piece of subsidiary legislation.

Encl

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(2) The protection conferred under subsection (1) on any person to whom that subsection applies in respect of any act or default shall not in any way affect the liability of the Commission for that act or default.

- (3) The persons to whom subsection (1) applies are—
- (a) any member of the Commission or a committee;
 - (b) any employee of the Commission;
 - (c) any conciliator.

Codes of practice

69. Codes of practice

(1) The Commission may issue codes of practice containing such practical guidance as it thinks fit for the purposes of—

- (a) the elimination of discrimination;
- (b) the promotion of equality of opportunity between men and women generally;
- (c) the elimination of sexual harassment.

(2) When the Commission proposes to issue a code of practice, it shall prepare and publish (otherwise than in the Gazette) the code, shall consider any representations made to it about the code and may modify the code accordingly.

(3) In the course of preparing any code of practice for eventual publication under subsection (2), the Commission shall, where the code relates (whether in whole or in part) to the elimination of discrimination in the field of employment, consult with—

- (a) such organizations or associations of organizations representative of employers or of workers; and
- (b) such other organizations, or bodies,

as appear to the Commission to be appropriate.

(4) If the Commission determines to proceed with a code of practice published under subsection (2), it shall cause the code to be—

- (a) published in the Gazette; and
- (b) laid on the table of the Legislative Council at the next sitting after its publication in the Gazette.

(5) Where a code of practice has been laid on the table of the Legislative Council under subsection (4), the Legislative Council may, by resolution passed at a sitting of the Legislative Council held before the expiration of a period of 28 days after the sitting at which it was so laid, provide that the code of practice shall be amended in any manner consistent with this section.

(6) If the period referred to in subsection (5) would but for this subsection expire—

(2) 根據第(1)款就任何作為或錯失而給予該款所適用的人的保障，在各方面均不影響委員會為該項作為或錯失所負的法律責任。

- (3) 第(1)款適用於以下人士——
- (a) 委員會或小組委員會的任何成員；
 - (b) 委員會任何僱員；
 - (c) 任何調解人。

實務守則

69. 實務守則

(1) 委員會可為——

- (a) 消除歧視；
- (b) 一般地促進男性與女性之間的平等機會；
- (c) 消除性騷擾，

的目的，發出載有它認為合適的實務性指引的實務守則。

(2) 委員會如擬發出實務守則，它須擬備守則並以在憲報刊登以外的方式將之發表。委員會亦須考慮與守則有關並向委員會作出的陳述，並可據此修改守則。

(3) 在擬備最終會根據第(2)款發表的任何實務守則的過程中，如守則(不論全部或部分)關乎在僱傭範疇消除歧視，委員會須諮詢它覺得合適的——

- (a) 代表僱主或僱員的組織或該等組織所組成的聯會；及
- (b) 其他組織或團體。

(4) 如委員會決定繼續推行根據第(2)款發表的實務守則，它須安排將守則——

- (a) 在憲報刊登；及
- (b) 在刊登於憲報之後的首次立法會會議上，提交立法會省覽。(由1999年第66號第3條修訂)

(5) 凡有實務守則根據第(4)款在某次立法會會議上提交立法會省覽，立法會可藉於該次會議後的28天內舉行的立法會會議上通過的決議，規定該守則須以不抵觸本條的方式修訂。(由1999年第66號第3條修訂)

(6) 如第(5)款所指的期間若無本款規定便會——

- (a) make reference to any of the provisions of any enactment (howsoever described) of any place outside Hong Kong where such enactment relates (whether in whole or in part) to the elimination of such discrimination;
- (b) incorporate any of those provisions;
- (c) both make reference to and incorporate any of those provisions, as the Commission thinks fit and subject to such modifications, if any, to those provisions as the Commission thinks fit and specified in the code.

(14) A failure on the part of any person to observe any provision of a code of practice shall not of itself render him liable to any proceedings; but in any proceedings under this Ordinance before any court any code of practice issued under this section shall be admissible in evidence, and if any provision of such a code appears to the court to be relevant to any question arising in the proceedings it shall be taken into account in determining that question.

(15) In this section, "sitting" (會議), when used to calculate time, means the day on which the sitting commences and only includes a sitting at which subsidiary legislation is included on the order paper.

Investigations

70. Power to conduct formal investigations

Without prejudice to the generality of section 64(1), the Commission may if it thinks fit, and shall if required by the Chief Secretary for Administration, conduct a formal investigation for any purpose connected with the carrying out of any of its functions under that section.

(Amended L.N. 362 of 1997)

71. Terms of reference

(1) The Commission shall not embark on a formal investigation unless the requirements of this section have been complied with.

(2) Terms of reference for the formal investigation shall be drawn up by the Commission or, if the Commission was required by the Chief Secretary for Administration to conduct the investigation, by the Chief Secretary for Administration after consulting the Commission. (Amended L.N. 362 of 1997)

(3) It shall be the duty of the Commission to give general notice of the holding of the formal investigation unless the terms of reference confine it to activities of persons named in them, but in such a case the Commission shall in the prescribed manner give those persons notice of the holding of the investigation.

- (a) 援引香港以外任何地方的、關乎(不論是全部或部分)消除該種歧視的任何成文法則(不論稱謂如何)的條文;
- (b) 將該等條文納入守則內;
- (c) 既援引該等條文又將其納入守則內,

而該等條文須作委員會認為合適並在守則中指明的變通(如有的話)。

(14) 任何人不依循實務守則的條文,此事本身不使該人可被起訴,但在根據本條例而於任何法院進行的法律程序中,根據本條發出的實務守則可獲接納為證據,而如該法院覺得該守則的條文與法律程序中產生的問題有關,在裁定該問題時,該條文須予考慮。

(15) 在本條中,“會議”(sitting)用於計算時間時,指會議開始之日,但有關的議事程序表如不包括附屬法例,則該次會議不算在內。

調查

70. 進行正式調查的權力

在不影響第 64(1) 條的概括性的原則下,委員會如認為合適,可為任何與執行它在該條下的職能有關連的目的,進行正式調查;如政務司司長有此要求,則必須為該等目的進行正式調查。

(由 1997 年第 362 號法律公告修訂)

71. 調查範圍

(1) 除非本條規定已獲遵守,否則委員會不得展開正式調查。

(2) 正式調查的範圍須由委員會劃定,如調查是應政務司司長的要求而進行的,則其範圍須由政務司司長在諮詢委員會後劃定。(由 1997 年第 362 號法律公告修訂)

(3) 委員會有責任就正式調查的進行發出一般通告,但如調查範圍局限於被點名的人的活動,則以上責任不適用,而在後述情況下,委員會須就調查的進行以訂明方式向該等被點名的人給予通知。

- (a) after the end of a session of the Legislative Council or a dissolution thereof; but
- (b) on or before the day of the second sitting of the Legislative Council in the next following session thereof,

that period shall be deemed to extend to and expire on the day after that second sitting.

(7) Before the expiration of the period referred to in subsection (5) or that period as extended by virtue of subsection (6), the Legislative Council may by resolution in relation to a code of practice specified therein extend that period or that period as so extended to the next sitting.

(8) A resolution passed by the Legislative Council in accordance with this section shall be published in the Gazette not later than 14 days after the passing thereof or within such further period as the Chief Executive may allow in any particular case. (Amended 66 of 1999 s. 3)

(9) A code of practice issued under this section shall come into operation—

- (a) in the case where before the expiration of the period referred to in subsection (5), or before the expiration of that period as extended under subsection (6) or (7), the Legislative Council does not pass a resolution amending the code of practice, upon the expiration of that period, or upon the expiration of that period as so extended, as the case may be; and
- (b) in the case where the Legislative Council passes a resolution amending the code of practice, upon the expiration of the day next preceding the day of the publication in the Gazette of such resolution under subsection (8).

(10) A code of practice issued under this section may contain such transitional provisions or savings as appear to the Commission to be necessary or expedient in connection with the matters the subject of the code.

(11) The Commission may from time to time revise the whole or any part of a code of practice issued under this section and issue that revised code, and subsections (2) to (10) shall apply (with appropriate modifications) to such a revised code as they apply to the first issue of a code.

(12) Without prejudice to the generality of subsection (1), a code of practice issued under this section may include such practical guidance as the Commission thinks fit as to what steps it is reasonably practicable for employers to take for the purpose of preventing their employees from doing in the course of their employment acts made unlawful by this Ordinance.

(13) Without prejudice to the generality of subsection (1), a code of practice issued under this section, in so far as it relates to the elimination of discrimination between men and women as regards terms of employment, may—

(a) 在立法會會期終結後屆滿，或在立法會解散後屆滿；但

(b) 在緊接的下一會期第二次立法會會議當日或之前屆滿，

該期間須當作為延展至該次會議翌日並於該日屆滿。(由 1999 年第 66 號第 3 條修訂)

(7) 在第 (5) 款所指的期間(或憑藉第 (6) 款延展的該期間)屆滿前，立法會可通過決議，就決議中指明的實務守則將該期間或經延展的期間，延展至下次會議。(由 1999 年第 66 號第 3 條修訂)

(8) 立法會按照本條通過的決議，須在決議通過後的 14 天或行政長官在個別情況下准許的較長限期內於憲報刊登。(由 1999 年第 66 號第 3 條修訂)

(9) 如——

(a) 在第 (5) 款所指的期間(或根據第 (6) 或 (7) 款延展的該期間)屆滿前，立法會沒有通過決議修訂根據本條發出的實務守則，該守則在該期間或該經延展的期間(視屬何情況而定)屆滿時開始實施；及

(b) 立法會通過決議修訂根據本條發出的實務守則，而該項決議於某日根據第 (8) 款在憲報刊登，該守則在該日的前一日終結時開始實施。(由 1999 年第 66 號第 3 條修訂)

(10) 根據本條發出的實務守則，可載有委員會覺得必要或有利，並與屬守則標的事宜有關連的過渡性條文或保留條文。

(11) 委員會可不時修改根據本條發出的整份實務守則或守則的一部分，並可發出該份經修改的守則，而第 (2) 至 (10) 款經作出適當的變通後，適用於經修改的守則，一如它們適用於守則的首度發出。

(12) 在不影響第 (1) 款的概括性原則下，根據本條發出的實務守則可載有委員會認為合適的，關於有何步驟屬僱主可在合理的切實可行範圍內採取，以防止他們的僱員在其受僱工作中作出被本條例定為違法的作為的實務性指引。

(13) 在不影響第 (1) 款的概括性原則下，在根據本條發出的實務守則是關乎消除男性與女性之間在僱用條款方面的歧視的範圍內，守則可視乎委員會認為合適而——