

**立法會**  
***Legislative Council***

LC Paper No. CB(2)696/04-05(01)

Ref : CB2/PL/AJLS

**Panel on Administration of Justice and Legal Services**

**Background brief prepared by Legislative Council Secretariat**

**Government's policy on subsidiary legislation**

**Purpose**

The issue of the Government's policy for determining what kind of instrument made under an ordinance should be subsidiary legislation was referred to the Panel on Administration of Justice and Legal Services (AJLS Panel) by the Bills Committee on Boilers and Pressure Vessels (Amendment) Bill 2001 (Bills Committee). This paper provides background information on –

- (a) the concern raised by the Bills Committee; and
- (b) the past discussion held by the Panel on Constitutional Affairs (CA Panel) on the relevant issues.

**Concern raised by the Bills Committee**

2. Members of the Bills Committee expressed concern about proposed sections 6(7) and 6(8) in the Boilers and Pressure Vessels (Amendment) Bill 2001 which stipulated that the Authority might make rules in relation to the examinations conducted for the issue or endorsement of certificate, and that such rules were not subsidiary legislation. Members were concerned whether the rules to be made would have legislative effect and fall within the realm of subsidiary legislation.

3. The Administration had explained that the test for determining whether certain rules made by the Authority under powers conferred by ordinances were subsidiary legislation was whether the rules carried any legislative effect. Following discussion by the CA Panel in 1999, the Administration had undertaken to include, wherever necessary, an express provision in new legislation to make it abundantly clear whether a statutory instrument was subsidiary legislation. The

Administration had confirmed that the rules to be made under the proposed sections were intended to be rules on the administrative arrangements for examinations. As the rules were administrative in nature and were not intended to carry any legislative effect, it was specifically declared that such rules were not subsidiary legislation for the avoidance of doubt.

4. In view of the concern of the Bills Committee, the Administration reviewed the need for including the proposed sections in the Bill. The Administration had come to a view that since the power to conduct examination would be deemed to be conferred on the Authority by virtue of section 40(1) of the Interpretation and General Clauses Ordinance (Cap.1), the Administration considered that the proposed sections could be deleted from the Bill. The Administration had subsequently introduced Committee Stage amendments to replace the proposed sections by a new provision.

5. The Bills Committee agreed that the issue of the Government's policy for determining what kind of instrument made under an ordinance should be subsidiary legislation should be referred to the AJLS Panel for consideration. A relevant extract from the report of the Bills Committee is in **Appendix I**.

## **Discussion of the CA Panel in 1999**

### Background

6. The relevant issues were discussed by the CA Panel in 1999. Arising from the deliberation of the Panel on Transport on whether notices on the maximum fares for licensed ferry services issued by the Commissioner for Transport under section 33(1) of the Ferry Services Ordinance (Cap. 104) were subsidiary legislation, the issue of the existing mechanism for the Legislative Council (LegCo) to monitor the exercise of delegated authority for making of subsidiary legislation was referred to the CA Panel for consideration.

7. The CA Panel considered the issue at its meetings on 15 May and 19 July 1999. To facilitate discussion of the Panel, the Legal Service Division (LSD) of the LegCo Secretariat provided a paper which set out the nature of "notice in the Gazette" issued under different ordinances and a general analysis of the problems involved. LSD considered that the inconsistency in the treatment of "notice in the Gazette" had raised a fundamental issue of whether the existing mechanism for LegCo to monitor the making of subsidiary legislation under delegated authority should be examined in order to provide a better means of identifying which of the instruments with legislative effect should be subject to the scrutiny of LegCo.

### Definition of subsidiary legislation

8. According to the Administration, "subsidiary legislation" is a general term for a legislative instrument made by an authority to whom the power to legislate has been delegated by LegCo through primary legislation. It is defined in section 3 of the Interpretation and General Clauses Ordinance (Cap. 1) as "... any proclamation, rule, regulation, order, resolution, notice, rule of court, bylaw or other instrument made under or by virtue of any Ordinance and having legislative effect". There are more than 1,000 pieces of subsidiary legislation made under 650 odd principal ordinances.

9. Under section 34 of Cap. 1, all subsidiary legislation should be laid on the table of LegCo at the next sitting after the publication in the Gazette of that subsidiary legislation, and subject to the "negative vetting procedure" of LegCo.

10. The Administration advised the CA Panel that the nomenclature of an instrument was not of importance. What matters was whether the authority to make the instrument was derived from an ordinance, and whether the instrument had "legislative effect". It was not always easy to distinguish whether an instrument was "legislative" in nature. The Administration had relied on the following factors, adduced principally by reference to court decisions in other common law jurisdictions, in determining whether an instrument had legislative effect and was therefore subsidiary legislation, as opposed to an administrative act –

- (a) whether there was an express statutory provision identifying the instrument as being subsidiary legislation;
- (b) whether the instrument extended or amended existing law;
- (c) whether the instrument had general application to the public or a class as opposed to individuals;
- (d) whether the instrument formulated a general rule of conduct without reference to particular cases; and
- (e) the legislative intent.

### Practice of overseas jurisdictions

11. The Administration had provided information on whether "subsidiary legislation" was defined in the United Kingdom, Malaysia, Singapore, New Zealand and Australia and whether they had encountered problems in determining whether an instrument was of a legislative character (**Appendix II**). The CA

Panel noted that different jurisdictions had different ways of defining "subsidiary legislation" and determining whether an instrument was "subsidiary legislation" having "legislative effect".

The Administration's proposal and members' views

12. In view of members' concern whether a distinction should be made in relevant legislation between instruments of a legislative character and instruments of an administrative character, the Administration proposed that wherever necessary, express provision would be included in new legislation to make it abundantly clear whether a instrument was subsidiary legislation. Members of the CA Panel agreed that it was not easy to determine whether an instrument was subsidiary legislation. They had no objection to the Administration's proposal and agreed to deal with disputes only when they arose.

13. The relevant extracts from the minutes of the CA Panel meetings on 17 May and 19 July 1999 are in **Appendices III and IV** respectively.

14. The Panel made a report to the House Committee on its deliberation on 8 October 1999 (LC Paper No. CB(2)15/99-00), a copy of which is in **Appendix V**. The House Committee accepted the Panel's support for the Administration's proposal.

Council Business Division 2  
Legislative Council Secretariat  
18 January 2005

**Extract from the report of the Bills Committee on  
Boilers and Pressure Vessels (Amendment) Bill 2001  
to the House Committee meeting on 17 May 2002**

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Reasons for specifying that the rules to be made in relation to the conduct of examinations are not subsidiary legislation (clause 2(d))

31. Members have expressed much concern about the proposed sections 6(7) and 6(8) which stipulate that the Authority may make rules in relation to the examinations conducted for the issue or endorsement of certificate, and that such rules are not subsidiary legislation. Members are concerned about whether the rules to be made under section 6(7) will stray beyond what is intended into matters with a legislative effect, i.e. within the realm of subsidiary legislation. In this connection, the Bills Committee has asked the Administration to clarify -

- (a) the policy and principles for declaring what kind of rules made by the Authority under powers conferred by Ordinances should or should not be subsidiary legislation; and
- (b) the reasons for specifying in the proposed section 6(8) that the rules to be made in relation to examinations conducted for the issue or endorsement of certificates of competency are not subsidiary legislation.

32. The Administration has explained that the test for determining whether certain rules made by the Authority under powers conferred by ordinances are subsidiary legislation is whether the rules carry any legislative effect. Following discussion by the Panel on Constitutional Affairs in 1999, the Administration has undertaken to include, wherever necessary, an express provision in new legislation to make it abundantly clear whether a statutory instrument is subsidiary legislation. The purpose is to avoid unnecessary dispute over the legal nature of the relevant instrument. The Administration has confirmed that the rules to be made under the proposed section 6(7) are intended to be rules on the administrative arrangements for examinations, for example, syllabus for examinations and standards of competency to be attained by the candidates. As these rules are administrative in nature and are not intended to carry any legislative effect, it is specifically declared in the proposed section 6(8) that such rules are not subsidiary legislation for the avoidance of doubt.

33. The Chairman has pointed out that as the Bill involves a relatively simple labour policy, it should not be complicated by the insertion of the proposed section 6(8) which has implications on Government's policy on legislation and administrative measures. She has suggested that the Administration should consider deleting the

proposed section 6(8) if it does not affect the Authority's powers to make rules in relation to examinations under the principal ordinance.

34. In view of concerns raised by the Bills Committee, the Administration has reviewed the need for including the proposed sections 6(7) and 6(8). The Administration has subsequently come to a view that since the proposed section 6(6) provides the Authority with the power to conduct examination, related powers to decide on the administrative arrangements for the examination will be deemed to be conferred on the Authority by virtue of section 40(1) of the Interpretation and General Clauses Ordinance (Cap. 1). The Administration therefore considers that the proposed section 6(7) and (8) can be deleted. However, there is doubt as to whether the power to conduct examinations also includes the power to review examination results. The Administration, therefore, considers it necessary to include an express provision empowering the Authority to review examination results. To effect these amendments, the Administration will introduce CSAs to replace the proposed sections 6(7) and 6(8) by the new provision.

**Follow-up actions required**

35. The Bills Committee has suggested that the legislative issue regarding Government's policy for determining what kind of statutory instrument should be subsidiary legislation should be referred to the Panel on Administration of Justice and Legal Services for further consideration.

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(c) **To advise whether “subsidiary legislation” is defined in other jurisdictions and whether these jurisdictions have encountered similar problems**

In the case of Malaysia and Singapore, both jurisdictions define “subsidiary legislation” in essentially the same way as Hong Kong. The definition of “subsidiary legislation” in Singapore’s Interpretation Act is “any order in council, proclamation, rule, regulation, order, notification, bylaw or other instrument made under any Act, Ordinance or other lawful authority and having legislative effect”. A similar definition is found in Malaysia’s Interpretation Act. The courts in either jurisdiction appear to have only occasionally been required to determine whether an instrument is of a legislative character.

In the case of New Zealand, “subsidiary legislation” is defined in the form of a definition of “regulations” in the Regulations (Disallowance) Act 1989, as follows –

“Regulation” means –

- (a) Regulations, rules, or bylaws made under the authority of any Act –
  - (i) By the Governor-General in Council; or
  - (ii) By any Minister of the Crown.
- (b) Instruments, other than Acts of Parliament, which revoke regulations;
- (c) Orders in Council, Proclamations, notices, Warrants, and instruments of authority made under any Act by the Governor-General in Council or by any Minister of the Crown which extend or vary the scope or provisions of any Act;
- (d) Orders in Council bringing into force, or repealing, or suspending any Act or any provisions of any Act;
- (e) Rules or regulations made under any Imperial Act or under the prerogative rights of the Crown and having force in New Zealand;
- (f) Instruments deemed by any Act to be regulations for the purposes of the Regulations Act 1936 or this Act.

New Zealand therefore has a fairly mechanical test for "subsidiary legislation" under the current legislation.

In the case of Australia, "subsidiary legislation" is currently defined in accordance with the Acts Interpretation Act 1901 and Statutory Rules Publication Act 1903. A Legislative Instruments Bill was introduced in Australia in 1994 to provide for a test for "subsidiary legislation" according to the legislative character of the instrument. Under the Bill, the definition of "legislative instrument" covers all existing subordinate legislation which must be tabled in Parliament and instruments required to be printed under the 1903 Act. A schedule to the Bill lists instruments which are not legislative instruments for the purposes of the proposed Act. The Bill also provides that the Attorney General may issue a certificate for the purpose of determining whether an existing or proposed instrument is a legislative instrument for the purposes of the proposed Act.

The UK example has been set out in the paper submitted earlier to the Panel. Based on overseas examples above, our observation is that different jurisdictions have different ways of dealing with subsidiary legislation.

The UK is an example of a jurisdiction which has attempted to define "subsidiary legislation" and has encountered similar problems.

Under the Statutory Instruments Act 1946, subsidiary legislation made under pre-1948 UK statutes would include only instruments of a "legislative" character. In determining whether an instrument is "legislative" in substance would involve asking essentially the same questions in our determination of whether an instrument is "subsidiary legislation" having "legislative effect" pursuant to the Interpretation and General Clause Ordinance. Subsidiary legislation made under post-1947 statutes is termed "Statutory Instruments" of which there are two types, namely Orders in Council and instruments made by Ministers under delegated statutory power and expressly provided for in the statutes as "Statutory Instruments".

Extract from the minutes of the Constitutional Affairs Panel meeting  
on 17 May 1999

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Review of existing mechanism for LegCo to monitor the exercise of delegated  
authority for the making of subsidiary legislation

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(LC Paper No. CB(2) LS 186/98-99)

3. The Chairman said that the issue was referred to the Panel by the House Committee, as a result of the deliberations of the Panel on Transport on whether notices on the maximum fares for licensed ferry services issued by the Commissioner for Transport under section 33(1) of the Ferry Services Ordinance (Cap. 104) were subsidiary legislation.

4. At the invitation of the Chairman, Legal Adviser (LA) briefed members on the background of the existing mechanism for LegCo to monitor the exercise of delegated authority for the making of subsidiary legislation as follows -

- (a) Under section 34 of the Interpretation and General Clauses Ordinance (Cap. 1), all subsidiary legislation should be laid on the table of the LegCo at the next sitting after the publication in the Gazette of that subsidiary legislation;
- (b) Section 3 of Cap. 1 defined “subsidiary legislation” as “... any proclamation, rule, regulation, order, resolution, notice, rule of court, bylaw or other instrument made under or by virtue of any Ordinance and having legislative effect”. In this regard, to determine whether a notice in the Gazette was subsidiary legislation, it was necessary to decide whether such notice had “legislative effect”. If a notice was subsidiary legislation, it would be subject to the “negative vetting procedure” of the LegCo under section 34(1) and (2) of Cap. 1;
- (c) There was no direct authority on the precise meaning of “having legislative effect”. However, there were cases in the Commonwealth jurisdictions in which judges had expressed opinions on the meaning of those words. These opinions were not binding on the courts in Hong Kong; and
- (d) There were at least some 330 provisions in the Laws of Hong Kong which contained the reference to “by notice in the Gazette”. However, there had not been consistency in treatment in that some were published as legal notices while some as general notices. The latter would not be

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tabled in the Council and were not subject to the scrutiny of the Council. In some ordinances, there were express provisions on whether or not a notice was subsidiary legislation.

5. LA said that the crux of the matter was the definition of “subsidiary legislation” in Cap. 1. In the absence of a clear definition of “having legislative effect”, the legislative intent was relevant in determining whether an instrument had legislative effect. He pointed out that the inconsistency in the treatment of “notice in the Gazette” had raised a fundamental issue of whether the existing legislative mechanism for the LegCo to monitor the exercise of power to make subsidiary legislation should be examined in order to provide a clear means of identifying which of the instruments with legal effect made by persons under delegated authority provided by statute should be subject to the scrutiny of the Council.

Adm 6. The Chairman said that the Administration had advised that the matter was under examination by the Department of Justice. One possible option was to include an express provision in new legislation to specify whether a statutory instrument was subsidiary legislation. The Chairman opined that such an arrangement would not resolve the basic problem. He suggested and members agreed that the Administration and the Research and Library Division of the LegCo Secretariat should be asked to provide information on the definition of subsidiary legislation in other jurisdictions and whether these jurisdictions had encountered similar problems.

Adm 7. Referring to item IV of Annex A to the paper, Mr LEE Wing-tat pointed out that the notice under section 40 of the Road Traffic Ordinance (Cap. 374) was treated and published as subsidiary legislation in 1984, but recent notices had been published in the form of general notices in the Gazette instead. He said that the Administration should explain why a legal notice was changed to a general notice, as such a decision would have the effect of depriving the legislature the power to scrutinise notices having legislative effect which were not published as subsidiary legislation. He urged that a clear distinction should be made in the relevant legislation between instruments of a legislative character, and those of an administrative character; and that there should be consistency in drafting. Members agreed that the Administration should be asked to comment on the paper prepared by the Legal Service Division and recommend proposals to address members’ concern. Members also agreed that the subject should be discussed at the next meeting to be held on 21 June 1999.

Adm 8. In response to members, Deputy Secretary for Constitutional Affairs (2) (DS for CA(2)) undertook to reflect members’ views to the Director of Administration.

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**Extract from the minutes of the Constitutional Affairs Panel meeting  
on 19 July 1999**

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**III. Review of existing mechanism for LegCo to monitor the exercise of delegated authority for making of subsidiary legislation**

(LC Paper Nos. LS 186/98-99, CB(2) 2306/998-99(07) and 2558/98-99(02))

3. Referring to the two papers provided by the Administration, Director of Administration (D of Adm) summarized that different jurisdictions had different ways of dealing with subsidiary legislation. The United Kingdom, on which the Hong Kong law system was based, had encountered similar problems in trying to define subsidiary legislation. At present, Hong Kong had more than 1 000 pieces of subsidiary legislation made under 650 odd principal Ordinances. In view of Members' concern over the matter, the Administration would, wherever necessary, include an express provision in new legislation to make it abundantly clear whether a statutory instrument was subsidiary legislation.

4. At the request of Ms Emily LAU and referring to LC Paper No. LS186/98-99, Legal Adviser (LA) briefed members on the background of the subject -

- (a) The issue was referred to this Panel by the House Committee, as a result of the deliberations of the Panel on Transport on whether notices on the maximum fares for licensed ferry services issued by the Commissioner for Transport under section 33(1) of the Ferry Services Ordinance (Cap. 104) were subsidiary legislation. It was noted that if such a notice was not published in form of a legal notice, it would not be laid on the table of the LegCo. Accordingly, section 34 of the Interpretation and General Clauses Ordinance (Cap. 1) could not be brought into operation and the notice would not be subject to scrutiny by LegCo under the "negative vetting procedure";
- (b) Arising from concerns that the replacement of franchised ferry services by licensed ferry services would deprive the right of LegCo in scrutinizing proposals for fare adjustment, a member of the Panel on Transport had moved a motion to urge the Administration to follow the procedure of subsidiary legislation and table all future notices on the determination and adjustment of fares of licensed ferry services for scrutiny of the LegCo in the form of subsidiary legislation. Although the motion was negated, the Panel considered that a clear distinction should be made in the relevant legislation between instruments of a legislative character and those of an administrative character;

- (c) Subsidiary legislation was defined under section 3 of Cap. 1 as "any proclamation, rule, regulation, order, resolution, notice, rule of court, bylaw or other instrument made under or by virtue of any Ordinance and having legislative effect". However, there was no direct legal authority on the precise meaning of "having legislative effect". As advised by the Administration, based on case references in other common law jurisdictions, a number of criteria had been adopted in determining whether an instrument had legislative effect, the most important of which was the legislative intent of the enabling legislation.

5. LA said that in case of disputes involving legal interests of concerned parties over whether an instrument was subsidiary legislation, the matter had to be adjudicated in court. On the way forward, LA said that members might wish to consider the following options -

- (a) To provide a clear legal definition of "subsidiary legislation". From a legal point of view, this could avoid disputes between the Administration and LegCo. In this connection, LA pointed out that a Legislative Instruments Bill was introduced in Australia in 1994 to deal with subsidiary legislation. Although the Bill had yet to be passed, this was a possible way for LegCo to consider; or
- (b) To support the Administration's proposal to include an express provision in new legislation to make it clear that a statutory instrument was subsidiary legislation and to deal with any disputes over interpretation of existing subsidiary legislation as it arose.

6. On the responsibility and mechanism for tabling of subsidiary legislation, LA advised members that section 34(1) of Cap. 1 did not specify the person responsible for tabling the subsidiary legislation. After discussion, the Subcommittee to study issues relating to the tabling of subsidiary legislation in Legislative Council held the view that the public officer or another authorized person who made the relevant subsidiary legislation should be responsible for its tabling. For the purpose of ensuring all the subsidiary legislation that needed to be tabled were tabled, the Subcommittee and the Administration agreed to put in place a new mechanism under which the Legal Supplement No. 2 of the Gazette would be divided into two parts; Part A would include items which were required to be tabled pursuant to section 34(1) of Cap. 1, while part B would include those which were not so required.

7. Ms Emily LAU opined that a clear definition of "subsidiary legislation" was necessary to facilitate LegCo in monitoring the making of subsidiary legislation. Mr Howard YOUNG said that new legislation should specify clearly whether a statutory instrument was subsidiary legislation.

8. Mr Martin LEE said that having regard to the difficulties encountered by the UK and Australia, it was indeed not easy to define "subsidiary legislation". Since the

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existing system had worked well, he suggested to deal with disputes only when they arose and put the problem aside for the time being. Having regard to the Administration's proposal to specify clearly in new legislation whether a statutory instrument was subsidiary legislation and the new arrangement to divide the Legal Supplement No. 2 into two parts, Dr YEUNG Sum agreed with Mr LEE's view. He suggested that the Director of Administration should be the gate keeper to ensure that statutory instruments which were subsidiary legislation would be expressly specified in new legislation and subject to negative vetting by LegCo.

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9. LA said that the Legal Service Division would pay special attention to instruments published as general notices and in case of doubt, would follow up with the Administration. He also pointed out that there were at present over 1,000 pieces of subsidiary legislation made under various Ordinances. Some of these were by practice not regarded as subsidiary legislation. He suggested the Administration to consider putting in place a mechanism to review whether these instruments had legislative effect and should therefore be classified as subsidiary legislation on the basis of the tests elaborated in item (a) of the Administration's paper. D of Adm undertook to follow up with relevant bureaux on doubtful cases.

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10. The Chairman said that LegCo and the Administration might have different views on whether an instrument was of administrative character or legislative character. He asked whether notices which were considered to be of administrative character by the Administration but made under the authority of an ordinance could also be published in a separate part of Legal Supplement No. 2, instead of the General part of the Gazette, to facilitate checking by LA. Deputy Law Officer (Civil Law) explained that the format of the Gazette was designed as a matter of convenience. The practice was that a notice which was subsidiary legislation would be placed at the end of the relevant principal ordinance, while general notices would not. D of Adm undertook to consider the Chairman's suggestion and give a written reply.

*(Post-meeting note : The Administration's reply was issued to members vide LC Paper No. CB(2)2897/98-99)*

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*Legislative Council*

LC Paper No. CB(2)15/99-00

Ref. : CB2/PL/CA

**Paper for the House Committee meeting on 8 October 1999**

**Panel on Constitutional Affairs**

**Mechanism for Legislative Council to monitor  
the making of subsidiary legislation**

**Purpose**

This paper reports on the deliberations of the Panel on Constitutional Affairs on the mechanism for the Legislative Council (LegCo) to monitor the making of subsidiary legislation.

**Background**

2. On 23 April 1999, the Panel on Transport made a report to the House Committee on the legal procedures in respect of the determination of maximum fares for licensed ferry services (LC Paper No. CB(1)1152/98-99). The Panel also drew Members' attention to the fact that there were many provisions in current legislation which contained the reference to "by notice in the Gazette", and that there had not been consistency in treatment in that some were published as legal notices while some as general notices. The Panel considered that a clear distinction should be made in the relevant legislation between instruments of a legislative character, and those of an administrative character.

3. Members noted that the Panel on Transport had raised a much broader and fundamental issue of whether the existing legislative mechanism for the LegCo to monitor the making of subsidiary legislation should be examined in order to provide a clear means of identifying which of the instruments with legal effect made by persons under delegated authority should be subject to the Council's scrutiny. Members agreed at the House Committee meeting on 30 April 1999 that the issue should be followed up by the Panel on Constitutional Affairs.

## **Deliberations of the Panel on Constitutional Affairs**

### Tests in determining "subsidiary legislation"

4. The Panel has considered whether the issue of a clear legal definition of "subsidiary legislation" should be pursued. The Panel notes that there are at least 330 provisions in the Laws of Hong Kong which contain the reference to "by notice in the Gazette". In some ordinances, there are express provisions on whether or not a notice is subsidiary legislation. In the absence of such express provision, the way in which notices in the Gazette have been treated varies from ordinance to ordinance, even though those notices may be issued for similar purposes.

5. According to the Administration, "subsidiary legislation" is a general term for a legislative instrument made by an authority to whom the power to legislate has been delegated by the LegCo through primary legislation. It is defined in section 3 of the Interpretation and General Clauses Ordinance as "any proclamation, rule, regulation, order, resolution, notice, rule of court, bylaw or other instrument made under or by virtue of any Ordinance and having legislative effect." To date, there are more than 1 000 pieces of subsidiary legislation made under 650 odd principal ordinances.

6. The Administration advises that it is not always easy to distinguish whether an instrument is "legislative" in nature. Some instruments which have legal effect but are not legislative in nature may be described as administrative acts. The Administration relies on the following tests, adduced principally by reference to court decisions in other common law jurisdictions, in determining whether an instrument (e.g. notice in the Gazette) has legislative effect and is therefore subsidiary legislation -

- (a) whether there is an express statutory provision identifying the instrument as being subsidiary legislation;
- (b) whether the instrument extends or amends existing law;
- (c) whether the instrument has general application to the public or a class as opposed to individuals;
- (d) whether the instrument formulates a general rule of conduct without reference to particular cases; and
- (e) the legislative intent.

7. The Administration advises that the application of the above tests has worked well in deciding whether to classify an instrument as subsidiary legislation, which is subject to vetting by the legislature under section 34(1) of the Interpretation and General Clauses Ordinance (Cap. 1), or as an administrative instrument.

### Practices in overseas jurisdictions

8. To facilitate its consideration, the Panel has requested the Administration to provide information on whether overseas jurisdictions have encountered similar problems in defining "subsidiary legislation".

9. The Panel notes that different jurisdictions have different ways of dealing with subsidiary legislation as follows -

- (a) United Kingdom (UK) has encountered similar problems in attempting to define "subsidiary legislation". Under pre-1948 UK statutes, in determining whether an instrument is "legislative" in substance, essentially the same tests as those used in Hong Kong would be adopted. Subsidiary legislation made under post-1947 statutes is expressly provided for in the statutes as "Statutory Instruments".
- (b) In Malaysia and Singapore, "subsidiary legislation" is defined in essentially the same way as in Hong Kong. The courts in either jurisdiction appear to have only occasionally been required to determine whether an instrument is of a legislative character.
- (c) In New Zealand, "subsidiary legislation" is defined in the form of a definition of "regulations" in the Regulations (Disallowance) Act 1989. It has a fairly mechanical test for "subsidiary legislation" under the current legislation.
- (d) In Australia, "subsidiary legislation" is defined in accordance with the Acts Interpretation Act 1901 and Statutory Rules Publication Act 1903. A Legislative Instruments Bill was introduced in 1994 to provide for a test for "subsidiary legislation" according to the legislative character of the instrument. However, the Bill has yet to be passed.

### The Administration's proposal

10. To address Members' concern over the issue, the Administration has undertaken to include, wherever necessary, an express provision in new legislation to make it abundantly clear whether a statutory instrument is subsidiary legislation.

### Mechanism for tabling of subsidiary legislation

11. On a related issue, the Panel notes that the Administration has already put in place a new mechanism to ensure that all subsidiary legislation that need to be tabled in the LegCo are tabled. Under the arrangement, the Legal Supplement No. 2 of the Gazette is divided into two parts; Part A for legal notices required to be tabled in Council pursuant to section 34(1) of Cap. 1, and Part B for legal notices not required to be tabled in Council.

The Panel's view

12. While a few Panel members consider that a clear legal definition of "subsidiary legislation" would facilitate the LegCo in monitoring the making of subsidiary legislation, the Panel acknowledges that it is not easy to come up with such a definition. Having regard to the new arrangement adopted for publication of legal notices in the Gazette (paragraph 11 above refers), the Panel agrees to support the Administration's proposal to include an express provision in new legislation to specify whether a statutory instrument is subsidiary legislation, and to deal with any doubtful cases as and when they arise. Members also reckon that in the case of any disputes involving legal interests of concerned parties over whether an instrument is subsidiary legislation, it would be a matter for the court to adjudicate ultimately.

**Advice sought**

13. Members are invited to take note of the deliberations of the Panel as set out in this paper.

Legislative Council Secretariat

5 October 1999