

LegCo Panel on Administration of Justice and Legal Services
Supplementary information paper following meeting on 24 January 2005

Subsidiary legislation

Introduction

This paper provides certain further information requested by the Panel as a follow-up to the meeting on 24 January 2005.

- (a) Whether there is any case law or other information to illustrate how Malaysia and Singapore have dealt with the problem of determining whether statutory instruments are of a legislative character.**

2. In Malaysia and Singapore, “subsidiary legislation” is defined in essentially the same way as in Hong Kong. Similarly to Hong Kong, the courts in either jurisdiction have only occasionally been required to determine whether an instrument made under the authority of primary legislation is of a legislative character or of “legislative effect”. However, on such occasions, the same tests as those used in Hong Kong have been applied.

Malaysia

3. In *Liew Jee Chin v Public Prosecutor* [1993] 1 MLJ 82, 88-89, Richard Malanjum JC considered the difference between an executive or administrative order and an order having “legislative effect”. The judgment cited Latham CJ in *The Commonwealth v Grunseit* (1943) 67 CLR 58, 82, who said: “The general distinction between legislation and the execution of legislation is that legislation determines the content of a law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases.”

4. *Liew Jee Chin* also cited Lord Pearson in *McEldowney v Forde* [1969] 2

All ER 1039, 1065, who said: “It is clear that the regulations ... are legislative in character, because they may vary or revoke any provisions of the regulations and they are to have effect and be enforced in like manner as regulations contained in the Schedule [to the Act]. They are thus on the same plane as the initial legislation contained in the Act.”

5. As further illustration, *Liew Jee Chin* cited another Malaysian case, *Johnson Tan Han Seng v Public Prosecutor* [1977] 2 MLJ 66, 76, in which Raja Azlan Shah FJ said: “The true distinction therefore, is, between the power to make the law ... which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion upon the Attorney General as to its execution, to be exercised under and in pursuance of the law.”

Singapore

6. In *Cheong Seok Leng v Public Prosecutor* [1988] 2 MLJ 481, 486-487, Chan Sek Keong JC held that the statutory instrument in question was “subsidiary legislation” using the test for “legislative effect” set out in *The Commonwealth v Grunseit* (see paragraph 3 above). The judgment also referred to *JW Hampton Jr & Co. v United States* (1928) 276 US 394, 407, where it was said: “The true distinction, therefore, is between the power to make law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law”.

(b) Previous cases decided by the courts of Hong Kong on whether a statutory instrument was subsidiary legislation having legislative effect, apart from the two recent examples quoted by the Administration at the meeting.

7. For purposes of context, the Administration cited two cases at the Panel’s 24 January 2005 meeting –

English Schools Foundation v Bird [1997] 3 HKC 434 in which it was held that regulations made under section 10 of the English Schools Foundation Ordinance (Cap. 1117) were of “legislative effect” and, therefore, “subsidiary legislation” notwithstanding a provision to the effect that it was not necessary to publish the regulations or lay them on the table of the Legislative Council.

Julita F Raza & Others HCAL No. 30 of 2003, 4 January 2005, in which it was held that an approval by the Chief Executive in Council of a scheme for importation of foreign domestic helpers as a “labour importation scheme” under section 14(3) of the Employees Retraining Ordinance (Cap. 423), making the employers of foreign domestic helpers liable to pay a levy in respect of each helper employed, had no “legislative effect”. The approval did not make law or alter law, it gave rise to no more than an administrative arrangement. The legislature, in vesting the discretion in the Chief Executive in Council “from time to time” to approve a scheme as a labour importation scheme, had done no more than say it is within his discretion in the general application of Hong Kong’s immigration policies, which are themselves administrative in nature, to determine as a matter of policy the eligibility criteria for each scheme.

8. The issue of “legislative effect” has arisen indirectly in some town planning cases. For example, *Singway Co. Ltd v AG* [1974] HKLR 275 held that the making of plans under the Town Planning Ordinance (Cap. 131) was a legislative process since the Building Authority was required to refuse approval of proposed building plans which contravened town plans further to section 16(1)(d) of the Building Ordinance (Cap. 123). In *Building Authority v Head Step Ltd* [1996] 6 HKPLR 87, the Court of Appeal held that the Building Authority has a discretion to approve a building plan even when the plan contravenes a town plan.

9. The courts have since held that town plans are not legislative in nature, nor subsidiary legislation, in *Kwan Kong Co. Ltd v Town Planning Board* [1995] 3 HKC 245, and *Wah Yick Enterprises v Building Authority* [1997] HKLRD 177 (affirmed [1998] 2 HKC 125, CA). The reasons were –

- (1) while the Town Planning Ordinance has an express provision empowering the Chief Executive in Council to make regulations, there is no provision to authorise the making of town plans as subsidiary legislation;
- (2) all subsidiary legislation is required to be laid before the Legislative Council, but there is no provision in the Town Planning Ordinance requiring approved plans to be laid before the Legislative Council, and there is no evidence that approved plans are ever laid before the Legislative Council.

Legal Policy Division
Department of Justice
February 2005