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Paper for the House Committee meeting on 15 June 2007

**Report of the Subcommittee on Subsidiary Legislation
Relating to the Shenzhen Bay Port Hong Kong Port Area**

Purpose

This paper reports on the deliberations of the Subcommittee on Subsidiary Legislation Relating to the Shenzhen Bay Port Hong Kong Port Area (HKPA).

Background

2. The Shenzhen Bay Port located at Shekou in Shenzhen will be the new vehicular boundary crossing between Hong Kong and the Mainland. It will be linked to the north-western part of the New Territories by the Shenzhen Bay Bridge. Persons entering or leaving Hong Kong will go through the new control point at HKPA. Cross-boundary vehicles will enter or leave the area consisting of HKPA, the Hong Kong section of the Shenzhen Bay Bridge and the Deep Bay Link portion of the local road in the vicinity (i.e. the relevant closed area).

3. HKPA has been declared a closed area under section 4 of the Shenzhen Bay Port Hong Kong Port Area Ordinance (HKPAO) for the purposes of the Public Order Ordinance (POO) (Cap. 245) and any other enactment that applies to a closed area. For the effective management of the new control point, the Hong Kong section of the Shenzhen Bay Bridge and the Deep Bay Link portion of the local road in the vicinity are also required to be designated as a closed area under section 36(1) of POO. Subsidiary legislation is required to effect the designation and to grant permission to persons to go through the relevant closed area for the purposes of cross-boundary travel and to provide for other matters under the Immigration Ordinance (IO) (Cap. 115), Immigration Service Ordinance (ISO) (Cap. 331) and the Road Traffic Ordinance (RTO) (Cap. 374).

The subsidiary legislation

Road Traffic (Amendment: Extension of Permitted Area for New Territories Taxis to Shenzhen Bay Port Hong Kong Port Area) Regulation 2007 (L.N. 68 of 2007)

4. The Regulation, made by the Secretary for the Environment, Transport and Works under section 6 of RTO, seeks to extend the permitted area for taxis licensed to be available for hire or to carry passengers within the New Territories to all roads in HKPA. It is to come into operation on the day on which sections 3 and 5 of HKPAO come into operation, i.e. the date on which HKPA commences operation.

Closed Area (Hong Kong Section of the Shenzhen Bay Bridge and Deep Bay Link Portion) Order (L.N. 69 of 2007)

5. The Order, made by the Chief Executive under section 36 of POO, seeks to designate the Hong Kong section of the Shenzhen Bay Bridge leading to HKPA and the related local road in the vicinity (i.e. the Deep Bay Link portion) as a closed area. The Order will come into operation on a date to be appointed by the Secretary for Security by notice published in the Gazette, which will be the date on which HKPA commences operation.

Immigration (Places of Detention) (Amendment: Shenzhen Bay Port Hong Kong Port Area) Order 2007 (L.N. 72 of 2007) and Immigration Service (Designated Places) (Amendment: Shenzhen Bay Port Hong Kong Port Area) Order 2007 (L.N. 73 of 2007)

6. The Orders, made by the Secretary for Security under section 35(1) of IO and section 13A(9) of ISO respectively, seek to designate detention quarters for use by the Immigration Department within the Clearance Area of HKPA. Both Orders are to come into operation on the day on which sections 3 and 5 of HKPAO come into operation.

Shenzhen Bay Port Hong Kong Port Area (Permission to Enter) Notice (L.N. 75 of 2007)

7. The Notice, made by the Commissioner of Police under section 38A of POO, seeks to grant permission to enter or leave the Closed Area (i.e. HKPA, and the Hong Kong section of the Shenzhen Bay Bridge and the Deep Bay Link portion referred to in Part 1 of the Schedule to L.N. 69 of 2007) to persons entering or leaving Hong Kong through the Clearance Area of HKPA and drivers of road vehicles, taxis, public light buses on a scheduled service and franchised buses on a specified route carrying those persons subject to the conditions and restrictions specified in the Notice. The Notice is to come into operation on the day on which sections 3 and 5 of HKPAO come into operation.

The Subcommittee

8. At the House Committee meeting on 11 May 2007, Members formed a subcommittee to study the five items of subsidiary legislation relating to HKPA tabled in Council on 9 May 2007. The membership list of the Subcommittee is in **Appendix I**.

9. Under the chairmanship of Hon LAU Kong-wah, the Subcommittee has held two meetings with the Administration.

10. To allow more time for the Subcommittee to study the subsidiary legislation, the scrutiny period of the five items of subsidiary legislation has been extended from 6 June 2007 to the Council meeting of 27 June 2007 by a resolution of the Council passed on 30 May 2007.

Deliberations of the Subcommittee

Operation hours of the Shenzhen Bay Port Hong Kong Port Area

11. Members have enquired whether vehicles with quota to cross the new control point at HKPA would be allowed to switch to the crossing at Lok Ma Chau at night time when the control point at HKPA is closed. The Administration has responded that at present, the new control point is planned to operate from 6:30 am to 12:00 midnight, while its design is for 24-hours operation. The Administration will review the operation hours of the new control point after it has commenced operation for about three months. The Administration will also consider the arrangement for such vehicles to use the crossing at Lok Ma Chau at night time if the new control point is not operating round-the-clock.

Closed Area (Hong Kong Section of the Shenzhen Bay Bridge and Deep Bay Link Portion) Order

12. Members have expressed concern that a driver may enter the closed area at the Deep Bay Link from the Hong Kong side by mistake and may consequently be prosecuted. At the suggestion of members, the Administration has agreed to provide advance and clear signage and proper marks on the road surface to indicate clearly to the motorists the entry point of the closed area at the Deep Bay Link.

Immigration (Places of Detention) (Amendment: Shenzhen Bay Port Hong Kong Port Area) Order 2007 and Immigration Service (Designated Places) (Amendment: Shenzhen Bay Port Hong Kong Port Area) Order 2007

13. On the meaning of "places of detention" and "designated places", the Administration has explained that a person who is required or authorised to be detained by or under IO will be detained in detention quarters, i.e. a place of detention, at a control point. For instance, a person who has been refused entry at the control point will

be detained in the detention quarters pending repatriation. A person who has been arrested by an officer of the ImmD under ISO will be detained in detention quarters, i.e. a designated place of detention, at a control point. For instance, a person who has committed an offence under the Crimes Ordinance (Cap. 200) which an immigration officer is authorised to handle may be detained under ISO in the detention quarters at the control point pending prosecution.

14. Members have enquired whether persons arrested in other parts of Hong Kong will be detained in the detention quarters in HKPA.

15. The Administration has responded that the detention quarters at the Clearance Area in HKPA set aside for use by ImmD will be used for detaining persons under IO or ISO. Under the two Ordinances, ImmD may detain persons in any of the designated detention places, regardless of the location of arrest. The choice of detention places will depend on factors such as operational needs and the utilisation of the relevant facilities. The Administration has advised that "the place of detention" and "designated place" under the respective Orders refer to the same detention quarters to be set up in the Clearance Area in HKPA.

Shenzhen Bay Port Hong Kong Port Area (Permission to Enter) Notice

Provisions in the Notice

16. Section 3 of the Notice provides that persons of categories specified in the Schedule to the Notice are permitted to enter or leave the Closed Area at any time subject to the conditions detailed therein. Item 1 of the Schedule covers drivers of and cross-boundary passengers on road vehicles entering or leaving Hong Kong via the control point at HKPA. Items 2 and 3 of the Schedule cover drivers of public light buses on a scheduled service, franchised buses on a specified route in uniform and taxis for the sole purpose of carrying persons to and from the Public Transport Interchange within HKPA. Persons on those vehicles for the sole purpose of leaving Hong Kong via the control point at HKPA are also covered. Items 4 and 5 of the Schedule cover persons who having entered Hong Kong via the Passenger Terminal Building either enter (or intend to enter) the Public Transport Interchange or are travelling on taxis, public buses on a scheduled service or franchised buses on specific routes for the purpose of leaving the Closed Area. One of the conditions imposed under items 1, 2, 3 and 5 is that the drivers, passengers or persons who have entered Hong Kong, as the case may be, shall not leave the immediate vicinity of the vehicle or bus on which they are travelling.

Meaning of the phrases "for the purpose of" and "for the sole purpose of" in the Schedule to the Notice

17. Members note that the phrase "for the purpose of" is used in column 2 of item 5 of the Schedule, while the phrase "for the sole purpose of" is used in column 2 of items 2, 3 and 4 of the Schedule. Members have enquired about the reasons for the difference.

18. The Administration has explained that item 5 of the Schedule describes persons who have entered Hong Kong and have already boarded specified public transport heading for Hong Kong. Drivers of such specified public transport are required to drive their vehicles from the Clearance Area to the Ha Tsuen Interchange directly under the conditions imposed under items 2 and 3 of the Schedule. Persons who have already boarded these public transports are, therefore, left with no room to maneuver inside the Closed Area. The Administration considers that it is not necessary to qualify that their travelling on such vehicles is for the sole purpose of leaving the Closed Area. On the other hand, items 2 to 4 describe, among others, persons who are physically within the Closed Area and are either leaving or entering Hong Kong via the control point. They may have already got off (in case of leaving Hong Kong) or have yet to get on (in case of having entered Hong Kong) the specified public transport. The Administration considers that there is a need to specify leaving or entering Hong Kong as their sole purpose to avoid their staying inside the Closed Area unnecessarily for other purposes.

Use of the words "without undue delay" and "directly" in the Schedule to the Notice

19. Members note that the words "without undue delay" are used in column 3 of item 4 of the Schedule to the Notice, while only the word "directly" is used in column 3 of items 1, 2 and 3 of the Schedule. Members have enquired about the reasons for the difference.

20. The Administration has explained that drivers who are covered by items 1 to 3 of the Schedule to the Notice are required to drive their vehicles directly from the Ha Tsuen Interchange to their destination within the Closed Area, i.e. the Clearance Area for item 1, and the Public Transport Interchange for items 2 and 3. These drivers are required to observe provisions concerning road safety. Item 4 of the Schedule concerns persons who have just entered Hong Kong and are either proceeding to or have reached the Public Transport Interchange on foot. Such persons are required to leave the Public Transport Interchange without undue delay. They are not allowed to wander in the Closed Area as this may affect the order of the Closed Area. As compared with vehicles within the Closed Area which are subject to provisions concerning road safety, such persons, if unrestricted, can wander freely in the Closed Area. The Administration, therefore, considers that there is a need to require them to leave the Public Transport Interchange without undue delay.

21. Hon James TO considers that amendments should be made by the Administration to the effect that the drivers covered by items 1 to 3 are required to drive

their vehicles without undue delay from the Ha Tsuen Interchange to their destination within the Closed Area.

Emergency situation where evacuation may be required

22. Hon James TO considers that the condition laid down in items 1, 2, 3 and 5 of the Schedule to the Notice (i.e. the driver, passenger or the person, as the case may be, shall not leave the immediate vicinity of the vehicle) is too rigid and does not cater for emergency situations where evacuation may be required.

23. The Administration has explained that the purpose of this condition is to prevent any persons from leaving the immediate vicinity of their vehicles whilst in the Closed Area and thereby avoiding any idling in the Closed Area that would adversely affect the order of the Closed Area. Immediate vicinity is a matter of fact and degree, rather than exact measurement. Literally speaking, immediate vicinity of a vehicle means somewhere quite close to it. However, the term allows room for reasonable judgment by the law enforcement agencies, including necessary evacuation in times of emergencies or accidents.

24. The Administration has advised that as with the enforcement of all other laws, the Police exercises suitable discretion and pay due regard to the circumstances of each case, in particular the need to act reasonably. Furthermore, the Police is under a duty to prevent injury to life in emergencies. Where special circumstances apply, e.g. in times of emergency, the Police will exercise its discretion not to charge a person for a technical breach of the law.

25. Hon James TO is of the view that flexibility should be provided in the Schedule to cater for emergency situations where leaving the immediate vicinity of the vehicle is required, rather than relying on the discretion of the Police. Mr TO has proposed to amend column 3 of items 1, 2, 3 and 5 of the Schedule to the effect that the person concerned shall not leave the immediate vicinity of the vehicle without reasonable excuse.

26. The Administration has responded that the proposed amendments, if passed, may give rise to different interpretations by individuals, and hence cause unnecessary disputes not only with law enforcement officers but with other passengers. It will increase enforcement difficulties unnecessarily and impact on the Police's manpower required for effective enforcement. The Administration has stressed that the same arrangements have worked well in other land boundary control points.

27. Hon LAU Kong-wah considers it important for the Police to maintain effective enforcement in closed areas.

28. The legal adviser to the Subcommittee has expressed the view that most emergency situations would be covered by the general defence of necessity at common law. The amendments proposed by Hon James TO may not be necessary.

29. Hon James TO has enquired whether the Police has in place internal guidelines for enforcement of the law in closed areas, e.g. the factors to be considered in determining reasonableness when handling special circumstances. The Administration has responded that in taking enforcement measures, whether in closed areas or not, the Police will have regard to its basic values. Depending on the circumstances of the case, the Police will make reasonable judgment having regard to lawfulness and reasonableness. At the suggestion of Hon James TO, the Police has agreed to consider the need for giving additional guidance to frontline officers on the handling of special circumstances.

Situation where a person needs to return to the Mainland immediately after entering Hong Kong

30. Members have pointed out that there may be situations where a person has a need to return to the Mainland immediately after entering Hong Kong via the Passenger Terminal Building, e.g., a Hong Kong resident residing in Shenzhen who has just entered Hong Kong receives a phone call that his child has an accident and his immediate attention is required. Hon James TO has asked the Administration to consider adding a provision to the Schedule to the Notice to cater for the need of returning to the Mainland.

31. The Administration has explained that the Notice seeks to cater for situations where a general permission for entering the Closed Area is needed. This general permission obviates the need for bona fide cross-boundary passengers and others such as bus drivers ferrying these passengers to apply for a closed area permit under section 37(2) of POO to enter and leave HKPA. By its nature, the general permission seeks to cover situations involving the normal intended use of HKPA. For others who have a genuine need to enter or leave HKPA, e.g. technical personnel for maintaining the computer systems therein, they may apply for a closed area permit under section 37(2) of POO. The same arrangements have worked well in other land border crossing points.

32. The Administration has stressed that as with the enforcement of all other laws, the Police exercises suitable discretion and pay due regard to the circumstances of each case, in particular the requirement of reasonableness. Where special circumstances show that a person who has entered a border control point has genuine need to turn back urgently, e.g., when he has just sustained an injury requiring his immediate return for emergency medical attention, the Police has the power and will exercise its discretion to grant the necessary permission. It would not be possible to list all the exceptional and unforeseen circumstances exhaustively in the law. The Administration is also wary that the proposed amendment may create a loophole that could be exploited by those who want to turn back for ulterior motives such as smuggling or itinerant merchandising.

The Administration has, therefore, concluded that it is not necessary to amend the Notice.

33. To cater for situations in need, Hon James TO has proposed to add a new item to the Schedule to the Notice to the effect that persons who have entered Hong Kong via the Passenger Terminal Building will be permitted to return to Shenzhen immediately.

34. The legal adviser to the Subcommittee is of the view that the categories of persons specified in column 2 of the Schedule are, subject to the conditions specified in column 3, only permitted to enter or leave, but not idle in, the Closed Area. They have the general permission to leave the Closed Area without any restriction on the direction of leaving. In his view, Hon James TO's amendment may not be necessary.

35. The Administration has pointed out that the Notice is to cater for normal situations where a permission for entering the Closed Area is needed. Those permitted to enter or leave the Closed Area have to comply with the conditions in relation to them as specified in column 3 of the Schedule. Persons specified in column 2 of the Schedule who enter Hong Kong via the control point must leave the control point for other parts of Hong Kong. The Administration has stressed that the amendments proposed by Hon James TO, if passed, may give rise to possible loopholes that could be exploited by those who want to turn back for ulterior motives such as smuggling or itinerant merchandising.

Conclusion

36. The Subcommittee raises no objection to the five items of subsidiary legislation relating to HKPA.

Proposed amendments

37. Hon James TO has proposed amendments to the Shenzhen Bay Port Hong Kong Port Area (Permission to Enter) Notice (paragraphs 25 and 33 above refer). A copy of the draft amendments proposed by Mr TO is in **Appendix II**.

Advice Sought

38. Members are invited to note the deliberations of the Subcommittee.

**Subcommittee on Subsidiary Legislation Relating to
the Shenzhen Bay Port Hong Kong Port Area**

Membership list

Chairman Hon LAU Kong-wah, JP

Members Hon Margaret NG
Hon James TO Kun-sun
Hon Bernard CHAN, GBS, JP
Hon WONG Yung-kan, JP
Howard YOUNG, SBS, JP
Hon Miriam LAU Kin-ye, GBS, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon WONG Ting-kwong, BBS
Hon KWONG Chi-kin

(Total: 10 Members)

Clerk Mrs Sharon TONG LEE Yin-ping

Legal Adviser Mr KAU Kin-wah

Date 22 May 2007

INTERPRETATION AND GENERAL CLAUSES ORDINANCE

RESOLUTION

(Under section 34(4) of the Interpretation and
General Clauses Ordinance (Cap. 1))

SHENZHEN BAY PORT HONG KONG PORT AREA
(PERMISSION TO ENTER) NOTICE

RESOLVED that the Shenzhen Bay Port Hong Kong Port Area (Permission to Enter) Notice, published in the Gazette as Legal Notice No. 75 of 2007 and laid on the table of the Legislative Council on 9 May 2007, be amended—

(a) In column 3 of item 1, 2, 3 and 5 of the Schedule, by adding “without reasonable excuse,” after “leave” whenever it appears;

(b) By adding a new item after item 3 of the Schedule—

“3A. Persons being in the Closed Area after entering Hong Kong via the Passenger Terminal Building, for the sole purpose of returning to Shenzhen. The person shall leave the Closed Area without undue delay.”.