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**Paper for the House Committee Meeting
on 26 February 2010**

**Legal Service Division Report on
Subsidiary Legislation Gazetted on 5 February 2010**

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Amendment to be made by : 17 March 2010 (or 14 April 2010 if extended by resolution)

**SUBSIDIARY LEGISLATION RELATING TO TRANSFER OF
MANAGEMENT OF THE CASTLE PEAK BAY IMMIGRATION CENTRE**

Prisons Ordinance (Cap. 234)
Prisons (Amendment) Order 2010 (L.N. 13)

Immigration Ordinance (Cap. 115)
Immigration (Places of Detention) (Amendment) Order 2010 (L.N. 14)
Immigration (Treatment of Detainees) (Amendment) Order 2010 (L.N. 15)

Smoking (Public Health) Ordinance (Cap. 371)
Smoking (Public Health) Ordinance (Amendment of Schedule 2) Order 2010 (L.N. 16)

Background

The Castle Peak Bay Immigration Centre (CIC) commenced operation in 2005 and is used for the detention of adults provided for under the Immigration Ordinance (Cap. 115). Owing to the then manpower situation of the Immigration Department (ImmD) and the Correctional Services Department (CSD), the Government decided that CSD would take up the management of CIC until the second quarter of 2010.

2. CIC is currently set apart for the purposes of a prison under the Prisons Ordinance (Cap. 234) and is specified in the Schedule to the Prisons Order (Cap. 234 sub. leg. B). The effect of this is that the treatment of detainees in CIC is subject to the Prison Rules (Cap. 234 sub. leg. A) (the Prison Rules). The existing arrangement cannot continue after ImmD assumes the management of CIC, as members of Immigration Service cannot exercise the powers provided under the Prison Rules. Arrangements have to be made for the continuous detention and management of persons detained in CIC, albeit under the powers and provisions of the Immigration (Treatment of Detainees) Order (Cap. 115 sub. leg. E) rather than the Prison Rules.

L.N. 13

3. L.N. 13, made by the Secretary for Security under section 4 of the Prisons Ordinance (Cap. 234), discontinues the use of CIC as a prison. The Schedule to the Prisons Order (Cap. 234 sub. leg. B) is amended accordingly.

L.N. 14

4. L.N. 14, made by the Secretary for Security under section 35(1) of the Immigration Ordinance (Cap. 115), amends Schedule 3 to the Immigration (Places of Detention) Order (Cap. 115 sub. leg. B) by specifying CIC as a place for detaining persons required or authorized to be detained by or under the Immigration Ordinance (Cap. 115). It also removes from that Schedule certain places that have been closed down or are no longer used for the detention of immigration detainees.

L.N. 15

5. Schedule 1 to the Immigration (Treatment of Detainees) Order (Cap. 115 sub. leg. E) (the principal Order) contains the rules on the treatment accorded to detainees in the centres specified in Schedule 2 to the principal Order. L.N. 15, made by the Chief Executive under section 35(1) of the Immigration Ordinance (Cap. 115) after consultation with the Executive Council, amends Schedule 1 by adding to it certain rules relating to smoking by the detainees at an area set aside by the Director of Immigration and visits of the detainees by justices of the peace at all reasonable times and for reasonable periods.

6. L.N. 15 also amends Schedule 2 to the principal Order by specifying CIC as a place for detaining persons required or authorized to be detained by or under the Immigration Ordinance (Cap. 115) so that the rules relating to the treatment of detainees as set out in Schedule 1 will apply to persons detained in CIC. It also removes from that Schedule certain places that have been closed down or are no longer used for the detention of immigration detainees.

7. The treatment of detainees in CIC is currently subject to the Prison Rules. It is noted that rules 222 to 235 of the Prison Rules contain detailed provisions relating to visits of prisons by visiting justices (i.e. justices of the peace). For instance, rule 222(1) provides that two visiting justices shall visit each prison at least once a fortnight. Rule 228(1) further provides that visiting justices shall hear and investigate any complaint which any prisoner may desire to make to them. However, it is noted that the new rule 16 of Schedule 1 to the principal Order (as added by section 2(4) of L.N. 15), which relates to visits of persons detained under the Immigration Ordinance (Cap. 115) by justices of the peace, seems to be drafted in relatively general terms when compared with similar provisions under the Prison Rules. For instance, the new rule 16 does not provide for the number of visiting justices on each visit and the frequency of visits. Moreover, it provides for visits of "detainees" (as opposed to "prison" under rule 222(1) of the Prison Rules) by visiting justices. There are also no provisions on hearing and investigating detainees' complaints by visiting justices under the new rule 16.

8. The Legal Service Division (LSD) has asked the Administration the reasons for adopting a different approach in the new rule 16 of Schedule 1 to the principal Order. The Administration has replied that the new rule 16 provides for the key arrangements for visits by visiting justices, and other arrangements will by and large follow the current practice (e.g. two visiting justices will be invited to visit CIC at least once a fortnight). These other arrangements will be set out in ImmD's CIC Operation Manual. Furthermore, providing for visits of "detainees", instead of visits of the "Centre [prison]", will help ensure that the visiting justices are able to communicate with the detainees. Although there are no provisions on hearing and investigating detainees' complaints by visiting justices under the new rule 16, the Administration stated that there is no restriction against a detainee lodging a complaint to a visiting justice. On the other hand, if a visiting justice finds anything improper, he could make such further enquiries as he considers necessary.

L.N. 16

9. Part 2 of Schedule 2 to the Smoking (Public Health) Ordinance (Cap. 371) describes the areas that are exempted from the prohibition on smoking imposed by section 3 of the Ordinance. L.N. 16, made by the Secretary for Food and Health under section 16A of the Smoking (Public Health) Ordinance (Cap. 371), amends that Part to exempt from the smoking prohibition an area set aside by the Director of Immigration in a place specified in Schedule 2 to the Immigration (Treatment of Detainees) Order (Cap. 115 sub. leg. E) for smoking by persons detained there.

10. L.N. 13 to L.N. 16 will come into operation on 15 April 2010.

11. Members may refer to the LegCo Brief (File Ref. SBCR 10/2091/94) issued by the Security Bureau on 3 February 2010 for background information.

12. At its meeting on 5 January 2010, the Panel on Security was consulted on the Administration's plans to make the above four Orders, which sought to enable ImmD to take over the management of CIC from CSD. At the request of some members, the Administration has provided a comparison of detainees' rights as well as the treatment of detainees between the management of CIC by ImmD and CSD. Members may refer to the Administration's paper (LC Paper No. CB(2)892/09-10(01)) for further information.

13. Other than the issues mentioned in paragraphs 7 and 8 above, no difficulties have been observed in the legal and drafting aspects of the above items of subsidiary legislation.

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