

**Motion debate on “The Report of the Subcommittee to Study Issues
Relating to the Power of the Legislative Council
to Amend Subsidiary Legislation” – Progress report**

PURPOSE

At the Council meeting held on 29 February 2012, the Legislative Council (“LegCo”) passed the motion moved by the Hon Dr Margaret Ng on “The Report of the Subcommittee to Study Issues Relating to the Power of the Legislative Council to Amend Subsidiary Legislation” (the Subcommittee Report). This progress report updates Members on follow-up action by the Administration in response to the recommendations contained in the Subcommittee Report.

DETAILS

Inclusion of an express provision in the primary legislation declaring the character of the instrument in cases of doubt
(paragraph 5.3(a) of the Report)

2. Since October 1999, in case of doubt as to the nature of an instrument to be made pursuant to an Ordinance, the Administration has adopted the practice of including an express provision to declare or clarify the character of the instrument (i.e. whether or not it is subsidiary legislation). The Administration would continue with this practice.

Proposed statement in LegCo Briefs on subsidiary legislation
(paragraph 5.3(c) of the Report)

3. The Subcommittee considers, at paragraph 5.3(c) of the Subcommittee Report, that to avoid the controversy over the Country Parks (Designation)(Consolidation)(Amendment) Order 2010 from happening again, the Administration should enhance its communication with LegCo and should state clearly in each LegCo Brief on subsidiary legislation to be tabled in the Council its position as to whether LegCo

has the power to amend or repeal the subsidiary legislation concerned.

4. The Administration recalls that, as observed in the paper entitled “Principles Underlying the Cases Quoted in the LegCo Secretariat’s Information Paper LC Paper No. CB(2) 852/10-11” (CB(2) 558/10-11(02)), a distinction should be drawn between those cases where the negative vetting procedure in section 34 of the Interpretation and General Clauses Ordinance (Cap. 1) has not been disapplied, and those cases where it has. In case of the former, the vetting procedure in section 34 of Cap. 1 continues to apply. Any perceived “restriction” on LegCo’s power to amend the subsidiary legislation may be the result of the interpretation and application of section 34(2) of Cap. 1 in the particular context of the primary legislation. This is because section 34(2) provides that “the Legislative Council may, by resolution... provide that such subsidiary legislation shall be amended in any manner whatsoever consistent with the power to make such subsidiary legislation”. Section 28(1)(c) provides that “subsidiary legislation may at any time be amended by the same person and in the same manner by and in which it was made...”. In other words, the scope of LegCo’s amendment powers is primarily a matter of statutory interpretation of the effect of section 34(2) as read with section 28(1) of Cap. 1 and the empowering provisions in the primary legislation.

5. As stated in Secretary for Justice’s response to the motion debate, the Administration agrees in principle that whenever LegCo and the Administration differ on the interpretation of a statutory provision, the Administration should strive to inform LegCo as soon as practicable the Administration’s interpretation of the relevant provision with full legal reasons, in order that both sides could engage in deliberations in a timely, open and transparent manner. However, it should be noted that statutory interpretation is not always a straightforward matter. Depending on the details of the statutory scheme and provisions, different interpretation principles may apply requiring research and careful consideration before a legal view may be formed. Moreover, whether LegCo has power to make a particular amendment necessarily depends on the nature and content of the proposed amendment in question. The Administration cannot meaningfully comment on the power of amendment in a vacuum without knowing the nature and content of the proposed amendment(s).

At the time of introducing the subsidiary legislation to LegCo, the Administration is not in a position to anticipate the range of possible amendments which a Member may propose. That being so, at the stage of preparing the relevant LegCo Brief, the Administration has practical difficulty in stating the precise limits of LegCo's power to amend the subsidiary legislation. The question can be more meaningfully and efficiently considered when the nature and content of amendment(s) proposed by a Member are known.

6. Moreover, since statutory interpretation is not always a straightforward matter, we would like to point out that the Administration needs reasonable time to consider the legal position and to form a view. The Administration will endeavour to comment on LegCo's power to make the amendment under contemplation as soon as practicable after receiving an indication of the proposed amendment. As always, the Administration will work closely with LegCo and its Legal Advisor with a view to reaching consensus on issues before LegCo.

Resolving differences by judicial review proceedings
(paragraph 5.3(d) of the Subcommittee Report)

7. At paragraph 5.3(d) of the Subcommittee Report, the Subcommittee expresses the view that if the dispute between LegCo and the Administration is about a resolution with legislative effect passed by LegCo, and if an application for judicial review is warranted, the question of who should be the proper respondent would need to be resolved. In this regard, the Administration should thoroughly study the legal and procedural issues involved and take appropriate legislative measures, if required.

8. The Administration notes from the judgments of judicial review proceedings involving Members and/or President of LegCo as respondents that the question of who should be made the respondent to a judicial review application is to be decided on a case-by-case basis in light of the nature and subject matter of the dispute. The Administration will bear in mind the views of the Subcommittee in this respect and will keep in view any related further development when considering the way

forward.

Administration Wing, Chief Secretary for Administration's Office
Department of Justice

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