

Administration response to LegCo's letter of 19 May 1999
in respect of making of subsidiary legislation

(a) Comment on the paper on provisions containing the reference to “by notice in the Gazette” in the Laws of Hong Kong (LC Paper No. LS 186/98-99)

“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 Legislative Council 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. There are four main reasons why subsidiary legislation has become a normal feature of law-making, namely, pressure on Legislature’s time, technical character of modern legislation, need for flexibility and need for emergency powers to meet changing circumstances.

The nomenclature of an instrument is not of importance. A notice in the Gazette, for example, may or may not be subsidiary legislation. What matters are whether -

- (i) the authority to make the instrument is derived from an Ordinance; and
- (ii) the instrument has “legislative effect”.

Some Ordinances provide for instruments to be made under them that have legal effect, but are not legislative in nature. These instruments may be described as administrative acts. It has been acknowledged that to distinguish whether an instrument is “legislative” in nature is not always easy. The following factors, adduced principally by reference to court decisions in other common law jurisdictions, have been considered relevant in determining whether an instrument has legislative effect -

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

To date, the Administration has continued to rely on the above tests in determining whether an instrument such as “notice in the Gazette” has legislative effect and is therefore subsidiary legislation, as opposed to an administrative act. For the most part, the application of these tests has worked well in deciding whether to classify an instrument as subsidiary legislation which is subject to vetting by the legislature or as an administrative instrument, although doubts can nevertheless arise in the case of individual instruments.

(b) To recommend proposals to address members’ concern e.g. to consider the need for a distinction to be made in relevant legislation between instruments of a legislative character and instruments of an administrative character

Over 300 pieces of subsidiary legislation have, since the beginning of the LegCo term in July 1998, been presented to the LegCo for scrutiny or approval. This shows that, under the existing arrangement, LegCo is already heavily engaged in vetting numerous pieces of subsidiary legislation. In view of Members’ concern, the Administration has taken further steps whereby, wherever necessary, express provision is included in new legislation to make it abundantly clear whether a statutory instrument is subsidiary legislation. This approach was adopted, for example, in section 2(15)(d) of the Banking Ordinance.

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

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”.

Department of Justice/
Administration Wing
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