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

In the case of Malaysia and Singapore, both jurisdictions define "subsidiary legislation" in essentially the same way as Hong Kong. The definition of "subsidiary legislation" in Singapore's Interpretation Act is "any order in council, proclamation, rule, regulation, order, notification, bylaw or other instrument made under any Act, Ordinance or other lawful authority and having legislative effect". A similar definition is found in Malaysia's Interpretation Act. The courts in either jurisdiction appear to have only occasionally been required to determine whether an instrument is of a legislative character.

In the case of New Zealand, "subsidiary legislation" is defined in the form of a definition of "regulations" in the Regulations (Disallowance) Act 1989, as follows—

"Regulation" means—

(a) Regulations, rules, or bylaws made under the authority of any Act—
  (i) By the Governor-General in Council; or
  (ii) By any Minister of the Crown.

(b) Instruments, other than Acts of Parliament, which revoke regulations;

(c) Orders in Council, Proclamations, notices, Warrants, and instruments of authority made under any Act by the Governor- General in Council or by any Minister of the Crown which extend or vary the scope or provisions of any Act;

(d) Orders in Council bringing into force, or repealing, or suspending any Act or any provisions of any Act;

(e) Rules or regulations made under any Imperial Act or under the prerogative rights of the Crown and having force in New Zealand;

(f) Instruments deemed by any Act to be regulations for the purposes of the Regulations Act 1936 or this Act.

New Zealand therefore has a fairly mechanical test for “subsidiary legislation” under the current legislation.

In the case of Australia, “subsidiary legislation” is currently defined in accordance with the Acts Interpretation Act 1901 and Statutory Rules Publication Act 1903. A Legislative Instruments Bill was introduced in Australia in 1994 to provide for a test for “subsidiary legislation” according to the legislative character of the instrument. Under the Bill, the definition of “legislative instrument” covers all existing subordinate legislation which must be tabled in Parliament and instruments required to be printed under the 1903 Act. A schedule to the Bill lists instruments which are not legislative instruments for the purposes of the proposed Act. The Bill also provides that the Attorney General may issue a certificate for the purpose of determining whether an existing or proposed instrument is a legislative instrument for the purposes of the proposed Act.

The UK example has been set out in the paper submitted earlier to the Panel. Based on overseas examples above, our observation is that different jurisdictions have different ways of dealing with subsidiary legislation.