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Paper for the House Committee meeting on 8 October 1999

Panel on Constitutional Affairs

**Mechanism for Legislative Council to monitor
the making of subsidiary legislation**

Purpose

This paper reports on the deliberations of the Panel on Constitutional Affairs on the mechanism for the Legislative Council (LegCo) to monitor the making of subsidiary legislation.

Background

2. On 23 April 1999, the Panel on Transport made a report to the House Committee on the legal procedures in respect of the determination of maximum fares for licensed ferry services (LC Paper No. CB(1)1152/98-99). The Panel also drew Members' attention to the fact that there were many provisions in current legislation which contained the reference to "by notice in the Gazette", and that there had not been consistency in treatment in that some were published as legal notices while some as general notices. The Panel considered that a clear distinction should be made in the relevant legislation between instruments of a legislative character, and those of an administrative character.

3. Members noted that the Panel on Transport had raised a much broader and fundamental issue of whether the existing legislative mechanism for the LegCo to monitor the making of subsidiary legislation should be examined in order to provide a clear means of identifying which of the instruments with legal effect made by persons under delegated authority should be subject to the Council's scrutiny. Members agreed at the House Committee meeting on 30 April 1999 that the issue should be followed up by the Panel on Constitutional Affairs.

Deliberations of the Panel on Constitutional Affairs

Tests in determining "subsidiary legislation"

4. The Panel has considered whether the issue of a clear legal definition of "subsidiary legislation" should be pursued. The Panel notes that there are at least 330 provisions in the Laws of Hong Kong which contain the reference to "by notice in the Gazette". In some ordinances, there are express provisions on whether or not a notice is subsidiary legislation. In the absence of such express provision, the way in which notices in the Gazette have been treated varies from ordinance to ordinance, even though those notices may be issued for similar purposes.

5. According to the Administration, "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 LegCo 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.

6. The Administration advises that it is not always easy to distinguish whether an instrument is "legislative" in nature. Some instruments which have legal effect but are not legislative in nature may be described as administrative acts. The Administration relies on the following tests, adduced principally by reference to court decisions in other common law jurisdictions, in determining whether an instrument (e.g. notice in the Gazette) has legislative effect and is therefore subsidiary legislation -

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

7. The Administration advises that the application of the above tests has worked well in deciding whether to classify an instrument as subsidiary legislation, which is subject to vetting by the legislature under section 34(1) of the Interpretation and General Clauses Ordinance (Cap. 1), or as an administrative instrument.

Practices in overseas jurisdictions

8. To facilitate its consideration, the Panel has requested the Administration to provide information on whether overseas jurisdictions have encountered similar problems in defining "subsidiary legislation".

9. The Panel notes that different jurisdictions have different ways of dealing with subsidiary legislation as follows -

- (a) United Kingdom (UK) has encountered similar problems in attempting to define "subsidiary legislation". Under pre-1948 UK statutes, in determining whether an instrument is "legislative" in substance, essentially the same tests as those used in Hong Kong would be adopted. Subsidiary legislation made under post-1947 statutes is expressly provided for in the statutes as "Statutory Instruments".
- (b) In Malaysia and Singapore, "subsidiary legislation" is defined in essentially the same way as in Hong Kong. The courts in either jurisdiction appear to have only occasionally been required to determine whether an instrument is of a legislative character.
- (c) In New Zealand, "subsidiary legislation" is defined in the form of a definition of "regulations" in the Regulations (Disallowance) Act 1989. It has a fairly mechanical test for "subsidiary legislation" under the current legislation.
- (d) In Australia, "subsidiary legislation" is defined in accordance with the Acts Interpretation Act 1901 and Statutory Rules Publication Act 1903. A Legislative Instruments Bill was introduced in 1994 to provide for a test for "subsidiary legislation" according to the legislative character of the instrument. However, the Bill has yet to be passed.

The Administration's proposal

10. To address Members' concern over the issue, the Administration has undertaken to include, wherever necessary, an express provision in new legislation to make it abundantly clear whether a statutory instrument is subsidiary legislation.

Mechanism for tabling of subsidiary legislation

11. On a related issue, the Panel notes that the Administration has already put in place a new mechanism to ensure that all subsidiary legislation that need to be tabled in the LegCo are tabled. Under the arrangement, the Legal Supplement No. 2 of the Gazette is divided into two parts; Part A for legal notices required to be tabled in Council pursuant to section 34(1) of Cap. 1, and Part B for legal notices not required to be tabled in Council.

The Panel's view

12. While a few Panel members consider that a clear legal definition of "subsidiary legislation" would facilitate the LegCo in monitoring the making of subsidiary legislation, the Panel acknowledges that it is not easy to come up with such a definition. Having regard to the new arrangement adopted for publication of legal notices in the Gazette (paragraph 11 above refers), the Panel agrees to support the Administration's proposal to include an express provision in new legislation to specify whether a statutory instrument is subsidiary legislation, and to deal with any doubtful cases as and when they arise. Members also reckon that in the case of any disputes involving legal interests of concerned parties over whether an instrument is subsidiary legislation, it would be a matter for the court to adjudicate ultimately.

Advice sought

13. Members are invited to take note of the deliberations of the Panel as set out in this paper.

Legislative Council Secretariat

5 October 1999