

立法會 *Legislative Council*

LC Paper No. CB(2)990/04-05

Ref : CB2/PL/AJLS

Paper for the House Committee meeting on 4 March 2005

Report of the Panel on Administration of Justice and Legal Services concerning the factors relevant to determining whether an instrument is subsidiary legislation

Purpose

This paper reports on the deliberations and views of the Panel on the Administration of Justice and Legal Services on the factors relevant to determining whether or not an instrument is subsidiary legislation.

Background

2. The issue was referred to the Panel by the Bills Committee on the Boilers and Pressure Vessels (Amendment) Bill 2001 as a result of the Committee's deliberations on proposed section 6(7) and (8) of the Bill. The section specified that the rules to be made by the Boilers and Pressure Vessels Authority under powers conferred on it by the primary legislation, in relation to examinations conducted for the issue or endorsement of certificates of competency, would not be subsidiary legislation. The Bills Committee expressed concern whether the rules to be made would have legislative effect and fall within the realm of subsidiary legislation. After consideration, the Administration decided that the proposed section could be deleted from the Bill, as the relevant powers would be deemed to be conferred on the Authority by virtue of section 40(1) of Cap. 1.

3. The Bills Committee suggested that the criteria for determining whether an instrument made under an ordinance should be subsidiary legislation should be referred to the Panel for consideration.

Deliberations of the Panel

Legislative instruments vs administrative instruments

4. The Administration has advised the Panel that "subsidiary legislation" is defined in section 3 of the Interpretation and General Clauses Ordinance (Cap. 1)

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”. There are more than 1 000 pieces of subsidiary legislation made under 650 odd principal ordinances. Under section 34 of Cap. 1, all subsidiary legislation should be laid on the table of the Legislative Council (LegCo) at the next meeting after the publication in the Gazette of that subsidiary legislation, and subject to the “negative vetting procedure” of LegCo.

5. There is, however, no statutory definition of the term “legislative effect” in the definition of subsidiary legislation in section 3 of Cap. 1.

6. The Administration has pointed out that some instruments which have legal effect but are not legislative in nature may be described as administrative acts. Although administrative instruments are not subject to the control of LegCo, they are subject to judicial control. The courts may declare that a particular administrative instrument is outside the ambit of the relevant enabling legislation and hence unlawful.

Practices in overseas jurisdictions

7. In the course of its deliberation, the Panel has made reference to practices in a few overseas jurisdictions provided by the Administration (the **Appendix** refers).

8. In response to members’ request, the Administration has also provided information on relevant court cases to illustrate how Malaysia and Singapore have dealt with the problem of determining whether certain instruments are of a legislative character.

The current practice in “doubtful cases”

9. The Panel has expressed concern that given the existing definition under section 3 of Cap. 1, disputes over whether or not an instrument is subsidiary legislation having legislative effect would arise from time to time.

10. The Administration agrees that it is not easy in some cases to draw a distinction whether an instrument is legislative or administrative in character. In view of this difficulty, since October 1999, in cases of doubt as to whether or not an instrument is subsidiary legislation, the Administration has adopted the approach of including in new legislation an express provision declaring or clarifying the character of the instrument. When such a provision is proposed, it will come under the scrutiny of LegCo and is subject to amendment and debate by LegCo. Once enacted, the provision can be regarded as expressing the legislative intent as to the nature of the instrument.

11. The Administration has also explained that in case of a dispute as to whether or not an instrument is subsidiary legislation, it would be a matter for the

court to adjudicate ultimately. The court, in making its decision, would take all relevant factors into account, including the relevant provisions of Cap. 1, any express provision in the principal legislation declaring the character of the instrument, as well as an objective assessment of the legislative intent.

12. In response to members' request for examples of cases in which the court's decision on the nature of the particular instrument was sought, the Administration has advised that there were only a limited number of such cases and cited the following two recent court cases in which the issue of "legislative effect" had arisen –

- (a) in *English Schools Foundation v Bird* [1997] 3 HKC 434, the court held that regulations made under section 10 of the English Schools Foundation Ordinance (Cap. 1117) were of "legislative effect" and, therefore "subsidiary legislation" notwithstanding a provision to the effect that it was not necessary to publish the regulations or lay them on the table of LegCo; and
- (b) in *Julita F Raza & Others HCAL No. 30 of 2003*, the court held that the approval by the Chief Executive in Council of a scheme for importation of foreign domestic helpers as a "labour importation scheme" under section 14(3) of the Employees Retraining Ordinance (Cap. 423) in making the employers of foreign domestic helpers liable to pay a levy in respect of each helper employed, had no "legislative effect". The approval did not make law or alter law, and gave rise to no more than an administrative arrangement.

Factors relevant to determining whether an instrument is subsidiary legislation

13. Members have requested the Administration to inform the Panel of the factors which are relevant to considering and determining whether or not an instrument is subsidiary legislation.

14. The Administration has explained that in determining whether an instrument has "legislative effect" and is therefore subsidiary legislation, reliance is placed on factors that have been considered in judicial decisions to be relevant. The following factors have been considered by the courts to be relevant in determining whether an instrument has legislative effect –

- (a) whether the instrument extends or amends existing legislation (or alters the common law);
- (b) whether the instrument has general application to the public or a class as opposed to individuals. Although not conclusive, if the instrument has general application to the public or to a class, the instrument is more likely to be held to be subsidiary legislation; and

- (c) whether the instrument formulates a general rule of conduct without reference to particular cases. A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases.

15. When a court determines the question of whether an instrument has “legislative effect”, the legislative intent is also relevant. An express provision declaring or clarifying the status of the instrument would be a clear indicator of the legislative intent as to the nature of the instrument. Sometimes, the legislative intent may be ascertained from provisions other than a provision expressly stating the nature of the instrument.

View of The Hong Kong Bar Association

16. The Panel has invited the legal professional bodies to give views on the issue. The Hong Kong Bar Association considers that the law should be both certain and accessible, and the definition in section 3 of Cap. 1 would not help in clearly determining whether or not a particular instrument is subsidiary legislation. While the Bar Association considers that there is no perfect solution to resolve the problem, a clearer definition should be provided to reduce the scope of possible dispute. The Bar Association suggests that consideration may be given to the approach adopted by Australia or the United Kingdom, by referring specifically to the express terms of the instruments in question. For example, if a particular instrument is expressly stated as a rule or regulation, then it should be regarded as subsidiary legislation having legislative effect.

17. The Administration has advised that it is difficult to provide a definition for instruments with or without legislative effect. The approach adopted by the Administration to include in the legislation an express provision declaring or clarifying the character of an instrument is considered a good practice and it will continue. The Administration’s position is that the existing definition of subsidiary legislation in section 3 of Cap. 1 has stood the test of time. The definition is familiar to LegCo Members, legal practitioners as well as other users of legislation in Hong Kong. It allows each instrument, when drafted, to be classified according to its substance, whereas a mechanical test or definition might result in misclassification of an instrument as either legislative or administrative. The Administration also considers that where justified by the circumstances, express provisions could be included in individual ordinances for the purpose of reducing ambiguities. Nonetheless, there is a practical difficulty in trying to define a precise threshold for differentiating legislative instruments and administrative instruments.

Views of the Panel

18. The Panel agrees that there are inherent difficulties to provide a definition for instruments with or without legislative effect. It is also impracticable to review all existing instruments to determine whether they should be subsidiary legislation or not.

19. The Panel is of the view that the Administration should seriously consider and respect the views expressed by Members in deciding its position on the nature of an instrument and whether or not it should be subsidiary legislation. The existing practice of the Administration to include in new legislation an express provision declaring or clarifying the character of an instrument should continue (paragraph 10 above refers). Any disputes over whether or not an instrument is subsidiary legislation having legislative effect could be dealt with by the relevant Bills Committee on a case-by-case basis, if necessary. In cases where Members are not in agreement with the Administration on whether certain instrument is subsidiary legislation, particularly in cases where the Administration considers that the instrument has no legislative effect, Members could consider moving amendments to the relevant bill. It would be for the Council to decide whether to pass the amendments. The Panel also notes that any disputes over whether or not an instrument is subsidiary legislation would ultimately have to be decided by the court.

Advice sought

20. The House Committee is invited to take note of the views of the Panel as set out in paragraphs 18 and 19 above.

Overseas practices

- (1) 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".

- (2) 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.
- (3) 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 notice 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.

- (4) 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.