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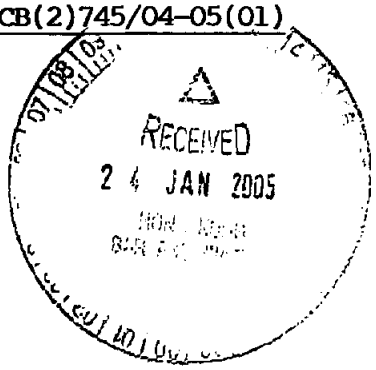

Panel on Administration of Justice and Legal Services
Meeting on 24 January 2005
Government Policy on Subsidiary Legislation
A short note on behalf of the Hong Kong Bar Association

Introduction

1 By section 3 of the Interpretation and General Clauses Ordinance, Cap 1, subsidiary legislation is defined as follows:

> "subsidiary legislation" and "subordinate legislation" mean 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.

Arising from this definition, the Panel on the Administration of Justice and Legal Services has decided to consider the government's policy on subsidiary legislation. The Panel has asked the government to set out its policy. The Hong Kong Bar Association has been invited to send a representative.[1]

2 This note is an attempt to contribute to this important discussion.

BASIC PRINCIPLES

3 At the heart of the discussion should be a concern which underlies the rule of law: that the law should be both certain and accessible. Accordingly, whether a particular instrument may be characterised as subsidiary or subordinate legislation is a critical issue. If the instrument can be characterised as subsidiary or subordinate legislation then certain provisions concerning scrutiny of that instrument come into operation. In the event that the instrument cannot be so characterised then there is no legal obligation to submit the instrument for scrutiny by the Legislative Council. If an instrument can be characterised as subsidiary legislation then not only is there

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[1] The undersigned would like to thank Philip Dykes, SC for his commentary on an earlier draft of this note.

scrutiny by the Legislative Council but also there are *almost* always requirements for publication.[2] It is critical to the accessibility of law by the public in relation to the instrument. There may, but not must, be an absence of publication if the particular instrument cannot be characterised as subsidiary legislation. If the instrument is not to be characterised as subsidiary legislation and is not publicised then members of the community affected by it may not be able to regulate the conduct by reference to it.

THE DEFINITION IN SECTION 3

4 Section 3 of the Ordinance provides that in order to be subordinate or subsidiary legislation, an instrument must have two features:

- it must be characterised as a proclamation, rule, regulation, etc; and
- it must have "legislative effect".

The first feature is relatively easy to identify. It is the second which may be the elusive concept. For most instruments the second concept will not be difficult. This is because certain forms of instruments are clearly intended to have legislative effect. However, there will be instruments whether by reference to subject matter or format where this is not clear.

5 The only case of which the undersigned is aware where this issue arose in a direct way is *English Schools Foundation v Bird* [1997] 3 HKC 434. This decision provides limited guidance in the sense that Justice Le Pichon said that the mere fact that a provision does not have to be submitted to the legislative Council for negative vetting under section 34 of the Interpretation and General Clauses Ordinance do not determine whether the relevant instrument is or is not one "having legislative effect". The case by no means provides any real guidance other than this somewhat negative point *i.e.* that we know that the requirement or otherwise for negative vetting would

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[2] Some legislative provisions empowering the making of delegated legislation provide that it shall not be necessary for any regulation made under that provision to be published or laid on the table of the legislative Council. An example of this is to be found in section 10 of the English Schools Foundation Ordinance.

not appear to have any impact on which is an instrument "having legislative effect" and one which is not. It might also follow from the judgement of Justice Le Pichon that the mere fact that there is an express power to make regulations does not affect the issue one way or another.

6 In short, the decision as to whether an instrument is determined by reference to the phrase "having legislative effect" to be one which is subordinate legislation or one which is not would appear to be essentially an instinctive reaction to an instrument. It might be argued that in some cases this criterion might have a deleterious effect on principles concerning certainty of and access to provisions that regulate conduct.

7 A helpful analysis may be seen in a textbook entitled *Delegated Legislation in Australia*,[3] by Professor Dennis Pearce and Stephen Argument. They make the point that the concept of legislation (including delegated legislation) is generally defined by distinguishing legislative and executive activity. The authors take the view that legislative activity involves the process of formulating general rules of conduct without reference to particular cases (and usually operating prospectively) while executive action involves a process of performing particular acts issue in particular orders or making decisions that apply general rules to particular cases.[4]

8 Clearly in testing the definition in section 3 of the Interpretation and General Clauses Ordinance it must meet two fundamental criteria:

- Does the legislation provide a predictable and reliable and accessible means of determining whether subsidiary legislation is, in truth, a form of legislation or is something else - such as an executive direction?
- Assuming predictability, does the legislation strike the right balance between which is to be characterised as subsidiary legislation and that which is not?

There are respectable arguments for saying that the current formulation of section 3 fails to meet the criteria. There are equally respectable arguments that while it would be interesting to know what government policy is in relation to whether a

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3 2nd edition, 1999 Butterworths.

4 The authors cite *Commonwealth v Grunseit* (1943) 67 CLR 58 and *Minister for Industry and Commerce v Tooheys Ltd* (1982) 42 ALR 260. The authors also cite *Latitude Fisheries Pty Ltd v Minister for Primary Industries and Energy* (1992) 110 ALR 228.

particular instrument is to be characterised by reference to section 3 as subsidiary legislation or otherwise, that government policy is really not the point. The real point is that the section which governs the dividing line is itself inadequate and there is an argument that no amount of pronouncement of government policy can fix this. It may be true that any replacement definition will still have problems. However, even if a replacement simply reduced the scope of problems, that might be a step forward. In short a new definition in section 3 may be a good option.

9 The only other option is to require the principal legislation declare what is intended under section 3. Alternatively, this might be declared in the instrument itself. This is probably wholly incapable of any meaningful supervision. It may even make the problem worse in terms of access to law and legal certainty.

DATED the 24th day of January 2005

(Andrew Bruce, SC)