Subcommittee to Study Issues Relating to the Power of
the Legislative Council to Amend Subsidiary Legislation

Meeting on 20 April 2011

Views of the Hong Kong Bar Association

1. The Subcommittee to Study Issues Relating to the Power of the Legislative Council to Amend Subsidiary Legislation ("Subcommittee") has invited the Hong Kong Bar Association ("HKBA") to a meeting of the Subcommittee in the Legislative Council ("LegCo") on 20 April 2011.

2. The HKBA proposes to offer its views on the areas to be examined by the Subcommittee in the order as they appear on the Areas of Study.

Statutory provisions indicating the nature of an instrument as subsidiary legislation

3. The most fundamental question in examining LegCo's power to amend subsidiary legislation falls on whether an instrument constitutes subsidiary legislation or not. As provided in the Interpretation and General Clauses Ordinance (Cap 1) ("IGCO"), LegCo's negative vetting procedure under s.34 and positive vetting procedure

under s.35 are only triggered where a particular instrument is an item of subsidiary legislation.

4. Section 3 of the IGCO contains the following definition of "subsidiary legislation": *"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.* The question clearly turns on whether an instrument in question has "legislative effect", a concept that is not statutorily defined.

5. As the learned authors in *Wade and Forsyth, Administrative Law* observed, "[there] is an infinite series of graduations, with a large area of overlap, between what is plainly legislation and what is plainly administration".[1] The "legislative effect" test in s.3 offers no criteria against which one could distinguish an instrument with legislative effect from one that is only administrative in nature.[2]

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[1] H.W.R. Wade and C.F. Forsyth, *Administrative Law*, (Oxford University Press, 10th edn, 2009), p.732.

[2] The HKBA had previously submitted its views on the definition of subsidiary legislation under s.3 of IGCO in a meeting on 24 January 2005 of the Panel on Administration of Justice and Legal Services. See: LC Paper No. CB(2)745/04-05(01).

6. The HKBA recognizes that there is not a wealth of judicial authority in this jurisdiction on the matter. The most relevant decision is probably that of Stock JA for the Court of Appeal in *Julita F. Raza and Others v Chief Executive in Council and Others* CACV 218/2005, unreported, 19 July 2006. His Lordship applied the "general principles or indicia" from the Australian decision of *RG Capital Radio v Australia Broadcasting Authority* (2001) 113 FCR 185 for differentiating between a legislative and an administrative instrument. The list of non-exhaustive principles has been set out in the Paper for the House Committee on the appointment of this Subcommittee[3], and they are not repeated here.

7. The HKBA notes that the Administration's approach since October 1999 has been to include in the parent ordinance an express provision declaring or clarifying the character of an instrument in cases of doubt.[4] The HKBA considers that this approach could facilitate LegCo Members' deliberations at the lawmaking stage on the crucial question of what power (legislative or administrative) they intend to confer on the Administration through the parent ordinance, and the possible consequences thereof. This could also reduce the potential for dispute after the

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[3] LC Paper No. CB(2)852/10-11, §2.7.

[4] *Ibid.*, §2.8. Earlier efforts to this end include s.22(3) of the Hong Kong Institute of Education Ordinance (Cap.444) (which was enacted in 1994).

parent ordinance is passed, for the intent of the legislature as expressed in the legislative provisions would be one important pointer in the legislative/administrative distinction.

8. The LegCo Panel on Administration of Justice and Legal Services reported in March 2005 to the House Committee on factors relevant to determining whether an instrument is subsidiary legislation.[5] The Appendix to the report lists approaches taken in several common law jurisdictions. It appears that Australia and New Zealand have taken approaches that are different from Hong Kong.

9. The practical problem now faced by the Subcommittee would be how to ascertain the nature of an instrument where the intent of the legislature is not clear, especially with respect to legislation passed before October 1999, such as the Country Parks Ordnance (Cap 208).

10. In the controversy surrounding the Country Parks (Designation) (Consolidation) (Amendment) Order 2010,[6] both the Administration and LegCo Members

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

[6] For studies of the controversy, see P. Y. Lo, *Hong Kong Basic Law* (LexisNexis, 2011) pp 368-370; and Bonnie Cheng and Jolene Lin, "The Tseung Kwan O Landfill Controversy" (2010) 40 HKLJ 537.

proceeded on the assumption that the Amendment Order was subsidiary legislation which had to be tabled before LegCo under s.34 of the IGCO. However, taking into account the general principles adopted in *Julita F. Raza*, as well as the overall statutory scheme and purpose of the Country Parks Ordinance, plausible arguments could be advanced to the effect that the Amendment Order constituted an administrative rather a legislative instrument.[7] This could well be an additional (and arguably more fundamental) dimension to the controversy surrounding the Amendment Order arising from the legislative/administrative distinction.

11. It appears that a few options may be open to address the difficulty of making such a distinction:

(1) resolving the issue through the judicial process, as in *Julita F. Raza* and *English Schools Foundation & Anor v. Bird* [1997] 3 HKC 434 – this option requires a party with *locus standi* to bring the matter to Court;

(2) amending the definition of subsidiary legislation under s.3 of the IGCO, as

[7] See, for example, Professor Johannes Chan S.C., "Controversy over country park Order" (郊野公園指令的風波), *Ming Pao*, D05, 13 Oct 2010.

suggested in a previous submission of the HKBA dated 24 January 2005[8];

(3) involving the Administration and LegCo Members in deliberation to resolve the issue under a specific parent ordinance with reference to an agreed set of principles (such as those adopted in *Julita F. Raza*).

12. These options are not mutually exclusive. For example, if further judicial pronouncements are made on the principles for determining the nature of an instrument, they may form the basis for LegCo and the Administration to deliberate on the nature of a particular instrument.

Statutory provisions empowering the making of subsidiary legislation under which LegCo's power to amend varies

13. The HKBA notes that s.28(1)(b) of the IGCO provides that "*no subsidiary legislation shall be inconsistent with the provisions of any Ordinance*". Also, there is a proviso under s.34(2) of the IGCO that subsidiary legislation shall be

[8] LC Paper No. CB(2)745/04-05(01).

amended in "*any manner whatsoever consistent with the power to make such subsidiary legislation*".

14. During the controversy surrounding the Country Parks (Designation) (Consolidation) (Amendment) Order 2010, the Administration relies on the above provisions to support the proposition that LegCo, in the context of vetting an item of subsidiary legislation, exercises only the legislative power as delegated and not the plenary lawmaking power.

15. The HKBA is aware that such a construction means that LegCo's power to amend subsidiary legislation would vary according to the provisions in the parent ordinance which empowers the making of the subsidiary legislation.

16. The HKBA fully recognizes that LegCo is the institution of the HKSAR vested with the power to enact, amend or repeal laws in accordance with the provisions of the Basic Law and legal procedures[9], and that it has a constitutional duty to control the exercise of delegated legislative powers.

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[9] Basic Law, Articles 66 and 73(1).

17. The HKBA does not however consider the aforesaid construction to be objectionable in principle. It has to be recognized that legislative power was supposed to be delegated through a parent ordinance in the first place for a legitimate reason – as, for example, where the subject-matter of the parent ordinance lies within the expertise of a particular executive authority, or demands urgent intervention by the Administration. Another example is where a parent ordinance requires an elaborate set of mechanisms (such as public consultation procedures) to be complied with before the subsidiary legislation is to be enacted, it may not necessarily be desirable for LegCo to be able to repeal the subsidiary legislation altogether even though all the statutory mechanisms had indeed been duly complied with. In situations where the application of s.34(2) of the IGCO leads to an undesirable outcome, the remedy should probably lie in the amendment of the empowering provisions in the parent ordinance so as to expand the scope of LegCo's vetting power. If it is thought that the subject-matter of an item of subsidiary legislation is of significant public interest or concern, there is the option of positive vetting.

Enabling provisions in various ordinances in relation to the scrutiny of subsidiary legislation by LegCo

18. The HKBA notes that some parent ordinances subject subsidiary legislation to the approval of LegCo under s.35, whereas some prescribe only the application of s.34. The HKBA recognizes that there could be legitimate reasons for limiting LegCo's role to the negative vetting procedure. For example, the subsidiary legislation may be of a kind that calls for urgent enforcement. Under those situations, it may be appropriate to allow the subsidiary legislation to take effect before subjecting it to LegCo's *ex post facto* scrutiny.

19. What the HKBA finds to be problematic is when the parent ordinance excludes the application of ss.34 *and* 35 altogether. The effect of this is that LegCo has no means of scrutiny over the exercise of delegated legislative power, be it *ex ante* or *ex post facto*. At present, the HKBA is able to identify such "dis-application provisions" in two ordinances in Hong Kong, namely, s.3(5) of the United Nations Sanctions Ordinance (Cap 537) ("UNSO") and s.3(15) of the Fugitives Offenders Ordinance (Cap 503) ("FOO").

20. The UNSO is of special concern given that the subsidiary legislation promulgated under the ordinance (in the form of regulations) can create and (did create) criminal offences with serious penal effects.[10]

21. In its previous submission on 20 October 2007 with regard to the regulations made under the UNSO, the HKBA considers that s.3(5) of the ordinance is unusual and that the rationale put forward by the Administration for the provision, namely the timely implementation of Security Council sanctions, is not supported in overseas parliamentary practice, particularly the practice adopted by common law jurisdictions with a written constitution.

22. The HKBA also notes the views expressed previously by the Subcommittee dealing with the issue of Implementation in Hong Kong of Resolutions of the

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[10] Notices promulgated under the FOO, on the other hand, only reflect what bilateral or multilateral arrangements have ceased to relate or become related to a place outside the HKSAR. In respect of the UNSO regulations, there would have been a large scope for LegCo to make amendments, such as to the enforcement powers, level of penalties, and so on. As regards the FOO notices, however, LegCo's role would be limited because it cannot alter the agreements that have been reached between the HKSAR and another place. Although this might somehow suggest that there was not specifically a need to disapply s.34 of the IGCO to the notices in the first place, such dis-application is apparently less problematic than that in relation to the UNSO regulations. For a study of the UNSO matter, see P. Y. Lo, *Hong Kong Basic Law* (LexisNexis, 2011) pp 364-368.

United Nations Security Council in relation to Sanctions, especially its concerns about the constitutionality of s.3(5) under the doctrine of separation of powers.

23. Another potential problem the HKBA identifies within the UNSO is the absence from the ordinance of any substantive limits on how delegated legislative powers are to be exercised. The delegatee of the power is guided only to the extent that (1) the power is to be exercised by making regulations and (2) the penalties in the regulations cannot exceed a prescribed maximum level.[11]

The provisions in Cap 1 in relation to the scrutiny of subsidiary legislation

24. Provisions in the IGCO in relation to the scrutiny of subsidiary legislation have been discussed in the foregoing paragraphs.

Proposals for alternative provisions, if any, for LegCo's power to amend (including repeal) subsidiary legislation

[11] Section 3(1) and (3) of the UNSO.

25. The HKBA is of the view that the current provisions for LegCo's power to amend (including repeal) subsidiary legislation, namely ss.34 and 35 of the IGCO, do not have to be changed. The HKBA repeats its views in paragraphs 13 to 17 above.

26. The HKBA does wish to highlight the need for LegCo and the Administration to review existing statutory provisions that purport to disapply ss.34 and 35, and to avoid such "dis-application provisions" in the enactment of future ordinances.

Proposals on procedure and practice to be followed where LegCo and the Administration take different views on the interpretation of provisions impinging on LegCo's jurisdiction to amend an item of subsidiary legislation

27. Where LegCo and the Administration differ on the interpretation of provisions impinging on LegCo's jurisdiction to amend an item of subsidiary legislation, such as during the controversy surrounding the Country Parks (Designation) (Consolidation) (Amendment) Order 2010, the HKBA regards it as good practice

for both sides to substantiate their positions with full legal reasons and engage in deliberations that are open and transparent to the public.

28. If the difference between LegCo and the Administration cannot be resolved, however, the HKBA is of the view that judicial determination of the matter should be seriously considered. Taking the controversy surrounding the Country Parks (Designation) (Consolidation) (Amendment) Order 2010 as an example, the HKBA notes that the Administration considered LegCo's resolution to repeal the Amendment Order ("the Resolution") to be lacking any legal basis, but nevertheless decided not to seek judicial review.[12]

29. The HKBA expresses strong reservations about the Administration's approach. It means effectively that the Administration is leaving on the books in Hong Kong a resolution by LegCo the legal validity of which it expressly disputes.[13] This state of affairs is unsatisfactory under the principle of legal certainty.

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[12] LC Paper No. CB(2)852/10-11, §1.19.

[13] The Bilingual Legal Information System currently lists in the Country Parks (Designation) (Consolidation) Order (Cap 208 sub leg B) against the entry for the Clear Water Bay Country Park both LN 72 of 2010 and LN 135 of 2010 but gives as version date 7 November 2008 (the date of LN 190 of 2008, an order designating the Lantau North (Extension) Country Park).

Principles and policies for delegating legislative powers by way of empowering an Executive Authority to make subsidiary legislation

30. The HKBA emphasizes the fundamental importance for a principled determination of the question whether an instrument constitutes an item of subsidiary legislation. The HKBA considers it to be desirable for LegCo Members to focus their attention on the nature of the power they intend to confer at the stage of formulating the parent ordinance, and to make such intention as clear as possible in the statutory provisions.

31. Regarding the delegation of legislative powers by way of empowering an Executive Authority to make subsidiary legislation, the HKBA would like to refer to its previous submission with regard to the regulations made under the UNSO. In particular, the HKBA wishes to highlight a judgment it had previously cited, namely that of Sachs J of the South Africa Constitutional Court in *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* (1995) (10) BCLR 1289 (CC).

32. The learned judge identified at p.1371 certain relevant factors which the HKBA considers to be worthy of consideration in LegCo's delegation exercise:

(1) the extent to which the discretion of the delegated authority (delegatee) is structured and guided by the enabling Act;

(2) the public importance and constitutional significance of the measure – the more it touches on questions of broad public importance and controversy, the greater will be the need for scrutiny;

(3) the shortness of the time period involved;

(4) the degree to which Parliament continues to exercise its control as a public forum in which issues can be properly debated and decisions democratically made;

(5) the extent to which the subject-matter necessitates the use of forms of rapid intervention which the slow procedures of Parliament would inhibit;

(6) any indications in the Constitution itself as to which such delegation was expressly or impliedly contemplated.

33. Taking into account these factors, the HKBA stresses the importance for LegCo to consider thoroughly when formulating the parent ordinance what level of scrutiny it wishes to preserve over the subsidiary legislation that would be eventually made, bearing in mind the proviso under s.34(2) of the IGCO and the overall statutory scheme and purpose of the parent ordinance.

34. For reasons aforesaid, the HKBA also considers that LegCo should be very slow in acceding to the Administration's proposal for "dis-application provisions" such as those under the UNSO, as well as purported delegation that prescribes no limits to guide the delegatee's exercise of legislative powers.

Dated 8th April 2011

Hong Kong Bar Association