

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

**Delegation by the Legislature of the Power to Make
Subsidiary Legislation to an Executive Authority or Other Body**

This paper describes the principles and policies concerning the delegation of legislative powers to an executive authority or other body.

A. Delegation of legislative powers to the executive authority or other body

2. The practice of the legislature delegating the power to make subsidiary legislation to another body is a long-standing one. From early on it was accepted that there is nothing inherently improper in the cautious delegation of legislative power: as Lord Selborne said in *the Queen v Burah*:

“Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence, is no uncommon thing; and, in many circumstances, it may be highly convenient.”¹

3. In the United Kingdom (“UK”), the use of subsidiary legislation is a very common phenomenon and its use has increased enormously in the last few decades. There are more pieces of subsidiary legislation created each year than Acts of Parliament. For example, in 2007 there were only 31 Public General Acts of Parliament passed whereas there were 2 847 Statutory Instruments made². The use of subsidiary legislation in Hong Kong is also well-established and the system has been operating smoothly for years. To date, there are about 1 411 pieces of subsidiary legislation made under 687 principal Ordinances. The power to make subsidiary legislation is usually delegated to an executive authority (e.g. the Chief Executive in Council, the

¹ (1878) 3 App. Cas. 889, at 898, PC cited in *Craies on Legislation* at p 108.

² See the longitudinal study in *Acts & Statutory Instruments: Volume of UK legislation 1950 to 2007*, Standard Note: SN/SG/2911, 23 January 2008 issued by the House of Commons Library.

Chief Executive, a Director of Bureau or a Head of Department), but is not so limited. Legislation-making power can also be delegated to, for example, statutory bodies or committees³, professional bodies⁴ and public infrastructure operators⁵. The primary legislation may delegate powers to make subsidiary legislation to different persons for different purposes⁶.

4. The following are examples of provisions which may be found in subsidiary legislation in Hong Kong -

- (a) where the primary legislation has created a statutory scheme, such as a licensing or permit regime, detailed provisions relating to the operation of that scheme may be laid down in subsidiary legislation. For example, the Hazardous Chemicals Control (General) Regulation (Cap. 595 sub. leg. A) contains provisions concerning the application for permits under the Ordinance;
- (b) rules relating to the conduct of court or other proceedings. For example, rules made under the High Court Ordinance (Cap. 4), the District Court Ordinance (Cap.336) and the Criminal Procedure Ordinance (Cap.221); rules made under the Administrative Appeals Board Ordinance (Cap. 442);
- (c) bylaws made by professional bodies to regulate the professional practice. For example, the Professional Accountants By-laws (Cap. 50 sub. leg. A) made by the Hong Kong Institute of Certified Public Accountants pursuant to section 8 of the Professional Accountants Ordinance (Cap. 50); the Solicitors' Practice Rules (Cap. 159 sub. leg. H) made by the Council of the Law Society pursuant to section 73 of the Legal Practitioners Ordinance (Cap. 159);

³ For example, section 397 of the Securities and Futures Ordinance (Cap. 571) empowers the Securities and Futures Commission to make rules concerning licensing, registration, qualifications, experience and training of persons for purposes of the Ordinance; section 54 of the High Court Ordinance (Cap. 4) empowers the Rules Committee established by section 55 to make rules regulating and prescribing the procedure and practice of the High Court.

⁴ For example, sections 73 and 73A of the Legal Practitioners Ordinance (Cap. 159) empower the Council of the Law Society to make rules on various matters relating to the practice of solicitors.

⁵ For example, section 34 of the Mass Transit Railway Ordinance (Cap. 556) empowers the Corporation to make bylaws to prescribe the terms and conditions for use of its service, and to regulate the conduct of members of the public using the railway or the railway premises.

⁶ For example, pursuant to section 33 of the Medical Registration Ordinance (Cap. 161), the Chief Executive in Council, the Secretary for Food and Health and the Medical Council, are respectively empowered to make regulations on different subject matters.

- (d) bylaws made by public infrastructure or transport operators to regulate the use of the facilities by members of the public. For example, the Western Harbour Crossing Bylaw (Cap. 436 sub. leg. D) made by the Company pursuant to section 32 of the Western Harbour Crossing Ordinance (Cap. 436);
- (e) regulations prescribing the fees payable under an Ordinance and the forms for the purposes of an Ordinance. For example, the Estate Agents (Licensing) Regulation (Cap. 511 sub. leg. A) made by the Estate Agents Authority pursuant to section 56 of the Estate Agents Ordinance (Cap. 511); and
- (f) rules made by a statutory body established by an Ordinance to regulate formal investigations. For example, the Sex Discrimination (Formal Investigations) Rules (Cap. 480 sub. leg. A) made by the Equal Opportunities Commission pursuant to section 88 of the Sex Discrimination Ordinance (Cap. 480).

B. Reasons for delegating the power to make subsidiary legislation

5. The delegation of legislative powers by the legislature stems from practical considerations, serving the purpose of promotion of efficiency. It has been said that “it is impractical for all legally binding rules to be made by the [legislature] itself”⁷.

6. Based on the experience of Hong Kong, the following are the main reasons behind the use of subsidiary legislation -

- (a) *delegation saves the legislature’s time*: in view of the volume and range of businesses transacted by the legislature, the legislature cannot attend to all matters of detail. It may not be efficient or necessary to incorporate masses of complex detail in a primary legislation unless such provisions are designed to make important changes in the law. The delegation of power to make subsidiary legislation to an executive authority or other body enables the

⁷ Administrative Review Council’s Report to the Attorney-General on Rule Making by Commonwealth Agencies (1992), at para. 1.4

legislature to effectively **prioritise** its work and resources and focus its attention to discussion of major matters of public concern;

- (b) ***detailed and technical nature of the rules:*** where the legal rules in question are highly **detailed and technical or procedural/operational** in nature, it would be useful for the rules to be made by those persons who have expertise in the technical/professional field (see the examples in paragraph 4(b), (c) and (f) above; see also the numerous subsidiary legislation made under the Merchant Shipping (Safety) Ordinance (Cap. 369) prescribing detailed rules on various aspects of maritime safety) or who have direct knowledge and experience in the day to day administration and enforcement of the regulatory scheme in question (see the examples in paragraph 4(a) above);
- (c) ***rules which require flexibility as constant updating is necessary:*** subsidiary legislation provides greater flexibility for rules which need to be **changed more frequently** than others in order to respond to rapid developments or to keep pace with changing international standards and requirements. The legislature may delegate its power to the executive authority which can amend such rules within shorter legislative timeframe⁸. For example, the Merchant Shipping (Safety) Ordinance (Cap. 369) empowers the Secretary for Transport and Housing to make regulations relating to various aspects of marine safety e.g. radio safety and life saving applications. Section 112A(4) provides that such regulations may provide for the adoption of standards, specifications or codes of practice issued by the International Maritime Organisation. Another example is section 9 of the Prevention and Control of Disease Ordinance (Cap. 599) which empowers the Director of Health by order to prescribe measures to implement temporary recommendations made by the World Health Organisation under the International Health Regulations; and
- (d) ***need for emergency powers to meet changing circumstances:*** where there is emergency created by, for example, the occurrence or the imminent threat of a disease, an epidemic or a pandemic endangering public health and safety, it would be necessary for the

⁸ In some cases, subsidiary legislation has been made subject to positive vetting.

law to respond quickly to cope with the imminent danger. An example is section 8 of the Prevention and Control of Disease Ordinance (Cap. 599) which empowers the Chief Executive in Council to make regulations for the purposes of preventing, combating or alleviating the effects of the public health emergency and protecting public health.

C. Supervision of subsidiary legislation by the Legislature

7. By virtue of section 28(2) of the Interpretation and General Clauses Ordinance (Cap. 1) (“IGCO”), subsidiary legislation is required to be **published in the Government Gazette**. This requirement for publication ensures that there is transparency of legislation and access to the law by the public.

8. Moreover, delegation of the power to make subsidiary legislation to an executive authority or other body does not mean that the legislature relinquishes control over the subsidiary legislation. In fact, the Legislative Council continues to exercise scrutiny over the legislative process through a combination of means.

Control over the primary legislation

9. First, the Legislative Council retains ultimate control over the subsidiary legislation through **control over the primary legislation**. In this regard, the existence and scope of subsidiary legislation-making power is defined by the empowering provision(s) in the primary legislation. Such provision(s) would be subject to consideration and approval by the Legislative Council when the bill was first introduced. The Legislative Council can consider whether individual legislative proposals should be included in the primary legislation or should take the form of subsidiary legislation.

10. Moreover, pursuant to section 28(1)(b) of the IGCO, no subsidiary legislation shall be inconsistent with the provisions of any Ordinance. In making the subsidiary legislation, the maker must act within his powers. If not, the subsidiary legislation would be *ultra vires* and could be subject to legal challenge under the court’s judicial review power. A typical empowering provision would set the following parameters for the subsidiary

legislation -

- (a) the person who is empowered to make the subsidiary legislation and the boundaries of his discretion;
- (b) the form of the subsidiary legislation, e.g. rule, regulation, bylaw or order;
- (c) the matter(s) in respect of which subsidiary legislation may be made; and
- (d) the procedure, if any, to be followed in making and amending the subsidiary legislation. For example, the empowering provision may require the maker of the subsidiary legislation to consult or seek the approval of another person, or to go through a certain procedure before making or amending the subsidiary legislation e.g. under section 73(2) of the Legal Practitioners Ordinance (Cap. 159), the rules made by the Council of the Law Society under section 73 are subject to the prior approval of the Chief Justice. In some cases, the procedure to be followed can be quite elaborate and can include an independent and objective adjudication mechanism (e.g. arbitration). For example, section 55(3) of the Eastern Harbour Crossing Ordinance (Cap. 215) provides for tolls to be varied by agreement between the New Hong Kong Tunnel Company Ltd. (the Road Company) and the Chief Executive in Council, or in default of agreement, by submission to arbitration. The Commissioner for Transport is to amend the Schedule by notice in Gazette as soon as is practicable after such agreement or arbitral award has been made. Another example is sections 8 to 14 of the Country Parks Ordinance (Cap. 208) which set out an elaborate procedure and an independent mechanism to be followed leading to the making of a country park designation order by the Chief Executive.

Scrutiny over subsidiary legislation

11. Apart from control over the primary legislation, scrutiny over subsidiary legislation may also be exercised in the following manner -

- (a) in general, the relevant Panels of the Legislative Council will be consulted on major legislative proposals including subsidiary legislation prior to their introduction into the Legislative Council, making it possible for Members to debate on the issues in advance and for the Administration to, where appropriate, incorporate Members' views before introducing the relevant subsidiary legislation;
- (b) generally speaking, all subsidiary legislation will be brought to the attention of Members of the Legislative Council. This facilitates the Legislative Council in engaging in discussion or debate on matters of public interest, regardless of whether the subsidiary legislation would be subject to vetting (i.e. the power to amend, repeal and/or approve the subsidiary legislation) by the Legislative Council. In this regard, bureaux have been advised to issue briefs to the Legislative Council on all subsidiary legislation, including those which are not subject to vetting by the Legislative Council, except for commencement notices. For commencement notices, bureaux would consider issuing Legislative Council briefs on a needs basis. In other words, Members will have sufficient information to scrutinize the subsidiary legislation concerned;
- (c) most subsidiary legislation are subject to vetting by the Legislative Council. Section 34(2)-(5) of the IGCO sets out the "negative vetting" procedure in respect of subsidiary legislation. This is subject to modifications as may be specified by the Legislative Council in the primary legislation, for example -
 - (i) the primary legislation may prescribe a modified vetting procedure for the subsidiary legislation: see section 3(3)-(8) of the Fugitive Offenders Ordinance (Cap. 503) which set out a modified negative vetting procedure for orders made under that Ordinance;
 - (ii) the primary legislation may provide for the vetting procedure in section 34 of the IGCO not to apply: for example, section 13(5) of the Hong Kong Academy of Medicine Ordinance (Cap. 419) disapplies section 34 of the IGCO as regards any bylaw made by the Council of the Hong Kong Academy of Medicine under

section 13; and

- (iii) conversely, the primary legislation may also require the subsidiary legislation to be subject to positive vetting. For example, section 9(1A) of the Criminal Procedures Ordinance (Cap. 221) provides for rules and orders made by the Criminal Procedure Rules Committee not to have effect until approved by the Legislative Council and published in the Gazette. This is to be read with section 35 of the IGCO which sets out the “positive vetting” procedure for subsidiary legislation required to be approved by the Legislative Council;
- (d) for subsidiary legislation subject to positive vetting, once the Legislative Council decides to form a subcommittee to scrutinize a piece of such subsidiary legislation, the general practice is that the Administration will withdraw the notice of the relevant motion. The Administration will also attend meetings of the relevant subcommittee to assist Members in the scrutiny process. The Administration will give a fresh notice to move the motion after the relevant subcommittee has completed its scrutiny; and
- (e) for subsidiary legislation subject to negative vetting, notwithstanding section 28(3)(a) of the IGCO which allows subsidiary legislation to commence on the day of gazettal, the Administration has made it a general practice, as far as practicable, to set the commencement date of subsidiary legislation which is subject to the negative vetting procedure to a date after expiry of the negative vetting period (including possible extension if practicable) i.e. 28 days plus 21 days as far as practicable from laying before the Legislative Council, in order to enable Members to have sufficient time for scrutiny.

12. Finally, it is noted that whether or not the primary legislation requires the subsidiary legislation to be subject to vetting, the Legislative Council can initiate debate on it if issues concerning public interest are involved. Specifically, even if the primary legislation provides that the vetting procedure in the IGCO does not apply to the subsidiary legislation made under the ordinance, the Legislative Council may form a subcommittee to examine issues relating to such category of subsidiary legislation as it deems necessary

or appropriate. Besides, upon request from a Member, the House Committee Chairman will also move a motion at a Council sitting to enable Members to express his/her views on a piece of subsidiary legislation.

D. Other safeguards on the exercise of delegated legislative powers

13. In addition to the legislative scrutiny by the Legislative Council, other stakeholders can also provide effective checks on the subsidiary-legislation making power. Having regard to the needs of modern day good public administration, experts and other stakeholders are often consulted before the law-making process so that their views can be duly taken into account. For example, the Director of Health regularly reviews the list of infectious diseases which medical practitioners are required to report as set out in the relevant schedules in the Prevention and Control of Disease Ordinance (Cap. 599). In so doing, interested persons, including the relevant Scientific Committees of the Centre for Health Protection, the private medical sectors and District Councils, are informed of or consulted on any proposals to amend the list before they are tabled in the Legislative Council. In addition, the Court's power to review the limits of the powers exercised by the maker of the subsidiary legislation can also act as an effective safeguard to ensure that delegated legislative powers are exercised properly.

E. Statistics of subsidiary legislation scrutinized by the Legislative Council

14. **Annex A** to this paper sets out the statistics of subsidiary legislation which was subject to negative vetting (Table 1) and positive vetting (Table 2) by the Legislative Council during the third term and the first two sessions of the fourth term of the Legislative Council. Table 3 provides statistics on the number of subcommittees set up to scrutinize subsidiary legislation under either positive and negative vetting procedures as well as other instruments (e.g. technical memorandum). The statistics show that -

- (a) subcommittees were formed to scrutinize the subsidiary legislation only in a minority portion of the cases; and
- (b) very few subsidiary legislation subject to negative vetting were

repealed.

15. The statistics suggest that the practice of delegating legislative powers to an executive authority or other body has been working reasonably well. The high rates of subsidiary legislation subject to negative vetting being passed smoothly without amendment or without scrutiny by a subcommittee; the high rates of subsidiary legislation subject to positive vetting being passed smoothly within the same legislative session; and the low repeal rate after scrutiny, tend to suggest that in general, Members agreed that the relevant provisions were appropriately handled in the form of subsidiary legislation subject to negative or positive vetting, as the case may be.

16. In view of the practical considerations which underlie the need for subsidiary legislation as set out in paragraphs 5 to 6 above, it would not be practical for all legislative proposals to be put forward in the form of primary legislation, regardless of the nature of the proposals. As noted above, a range of means exist for the legislature to exercise supervision over subsidiary legislation. Naturally, the degree of supervision to be exercised by the Legislative Council can vary depending on the purpose and contents of the subject matter at issue.

17. The following observation of the leading commentator on the parliamentary practice in the UK is pertinent to the above discussion:

“The conditions of the making of statutory instruments and the degree of parliamentary control over them will depend in each case upon the particular statute which authorizes them. There is at present no consistent pattern or direct connection between the subject-matter of any particular instrument and the procedure to which it may be subjected.”⁹

F. Practice in other common law jurisdictions

18. A table summarizing the practice in the UK, Australia, New Zealand and Canada in respect of the delegation of the power to make subsidiary

⁹ *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (23rd ed., 2004), at p 669

legislation is set out at **Annex B**. A few salient points can be discerned from the table -

- (a) like Hong Kong, all the four common law jurisdictions share similar rationale in the use of subsidiary legislation, i.e. promotion of efficiency and relieving time pressure on the legislature, greater flexibility to deal with changing circumstances, emergency situations and technical matters;
- (b) all the four jurisdictions have made provisions for the publication of subsidiary legislation and the norm is to have the subsidiary legislation laid before the legislature, though exceptions are allowed in both the UK and Canada¹⁰;
- (c) similar to the situation in Hong Kong, repeal or annulment of a piece of subsidiary legislation is rare in the four jurisdictions though it can happen;
- (d) similar to the situation in Hong Kong, it appears that the most common arrangement for parliamentary scrutiny of subsidiary legislation is “negative vetting” though “affirmative resolution” (positive vetting) is also possible in the four jurisdictions. The choice of what level of scrutiny to apply is made by the legislature through the primary legislation; and
- (e) whilst it is possible for the Parliament of New Zealand to amend the subsidiary legislation, the general rule in Australia, Canada and the UK is that, whether the subsidiary legislation is subject to positive or negative vetting, the legislature can only approve or reject the subsidiary legislation but not amend it. In the UK, the Procedure Committee in its 1996 report on Delegated Legislation considered whether statutory instruments should be amendable and recommended against it, on the grounds that it would involve excessive complication, run directly counter to the past intentions of Parliament, and would frustrate the very purpose for which delegated powers were given¹¹.

¹⁰ In New Zealand, instruments not defined as “regulation” in the primary legislation would not be subject to the publication requirement even though such instruments are of legislative nature.

¹¹ Referred to in *Craies on Legislation*, p. 297. There is ongoing debate on whether the Parliament should have power to amend subsidiary legislation in the UK. See for example *Delegated Legislation: the*

19. The Legislative Council of the HKSAR, unlike its counterpart in the UK, has long enjoyed the power to amend (which includes repeal or vary) subsidiary legislation made by the delegate(s) under both the positive and negative vetting procedures¹². In addition, as discussed, subsidiary legislation must be published in the Government Gazette and Legislative Council briefs would also be prepared by the Administration for Members' easy reference. In summary, it is considered that the degree of supervision which the Legislative Council can exercise over the making of subsidiary legislation in Hong Kong is at least comparable to the four overseas jurisdictions, if not more rigorous.

Administration Wing, Chief Secretary for Administration's Office /
Department of Justice
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Table 1 - Statistics of subsidiary legislation subject to negative vetting

	Third Term				Fourth Term	
	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10
<u>Negative Vetting</u>						
Total no. of subsidiary legislation tabled in the session	168	220	203	210	176	141
(a) No. of subsidiary legislation not amended/repealed by resolutions	160 (95.2%)	213 (96.8%)	194 (95.6%)	196 (93.3%)	167 (94.9%)	135 (95.7%)
(b) No. of resolutions passed to amend subsidiary legislation	8 (4.8%)	7 (3.2%)	8 (3.9%)	14 (6.7%)	9 (5.1%)	5 (3.5%)
(c) No. of resolutions passed to repeal the subsidiary legislation	0	0	1 ¹ (0.5%) (by Government)	0	0	1 ² (0.7%) (by Member)

¹ This refers to the Air Pollution Control (Volatile Organic Compounds) Regulation. The Administration took the initiative to repeal the Air Pollution Control (Volatile Organic Compounds) Regulation in response to the request of Members of the relevant subcommittee to have more time for a thorough discussion on the Regulation. The Regulation was tabled before the Legislative Council again in the same session and was passed.

² This refers to the Country Parks (Designation) (Consolidation) (Amendment) Order 2010. Please also see the Chief Secretary for Administration's letter dated 4 January 2011 to the President of the Legislative Council.

Table 2 - Statistics on subsidiary legislation subject to positive vetting

	Third Term				Fourth Term	
	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10
<u>Positive Vetting</u>						
Total number of motions moved in the session to seek LegCo's approval to make/amend subsidiary legislation	10	22	21	16	21	15
(a) No. of motions passed within the session as originally scheduled	4 (40%)	19 (86.4%)	19 (90.5%)	11 (68.8%)	11 (52.4%)	12 (80%)
(b) No. of motions whose original notices were withdrawn but were passed eventually within the same session after scrutiny by the LegCo	6 (60%)	2 (9.1%)	1 (4.8%)	2 (12.5%)	10 (47.6%)	2 (13.3%)
(c) No. of motions whose original notices were withdrawn in the preceding session but were passed eventually in the session after scrutiny by the LegCo	0	1 (4.5%)	1 (4.7%)	3 (18.8%)	0	1 (6.7%)

Note: For subsidiary legislation under positive vetting procedure, if the Legislative Council requests more time to examine the subsidiary legislation or if a subcommittee is formed to scrutinize the subsidiary legislation, the Administration will normally withdraw the original notice of the relevant motion. A fresh notice to move the relevant motion will be submitted again upon completion of the scrutiny of the Legislative Council.

Table 3 - Subcommittees on subsidiary legislation/ other instruments

	Third Term				Fourth Term	
	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10
Total no. of subcommittees in operation	15	17	21	24	25	20
(a) No. of such subcommittees which completed their work within the session	12	13	18	24	24	17
(b) No. of such subcommittees which continued their work in the following session	3	4	3	0	1	3

Note : Subcommittees above include, among others, those formed to scrutinize subsidiary legislation subject to either positive or negative vetting. Some of the subcommittees were formed to scrutinise more than one piece of subsidiary legislation.

Comparative Research on Subsidiary Legislation - Delegation by the Legislature of the Power to Make Subsidiary Legislation

The following table summarizes the practice in the United Kingdom (“UK”), Australia, Canada, New Zealand and Canada concerning the delegation of the power to make subsidiary legislation.

	UK	Australia (federal)	New Zealand	Canada (federal)
1. Rationale of delegation of legislative power	<ul style="list-style-type: none"> - The House of Commons (“HC”) Information Office states the need of subsidiary legislation as providing details that would be too complex to include in the primary legislation.¹ - Bradley and Ewing discuss the justification of delegated legislation as (i) pressure on parliamentary time, (ii) technicality of subject matter, (iii) the need for flexibility and (iv) state of emergency.² - Wade and Forsyth comment that “Parliament is obliged to delegate very extensive law-making power over matters of detail, and to content itself with providing a framework of more or less 	<ul style="list-style-type: none"> - Odgers’ Australian Senate Practice: the Parliament deals with principles while the executive/other bodies attend to matters of administration and details. Uses of subsidiary legislation are for reducing pressure on parliamentary time, allowing legislation to be made to accommodate rapidly changing/uncertain situations, or in 	<ul style="list-style-type: none"> - The Legislation Advisory Committee states that the following grounds have traditionally been relied on as justifications for delegated legislation: (i) pressure on Parliamentary time, (ii) technicality of the subject matter, (iii) unforeseen contingencies, (iv) need for flexibility, (v) opportunity for experimentation, 	<ul style="list-style-type: none"> - Quoting a past Parliamentary committee, the House of Commons Procedure and Practice states that “if Parliament goes too far into the substance of day-to-day administration, it defeats many of the underlying reasons for delegating powers to make laws in the first place.”⁶ - Hogg states that “it is impossible for the [Parliament] to enact all of the laws that are needed in

	UK	Australia (federal)	New Zealand	Canada (federal)
	permanent status.” ³	cases of emergency. ⁴	and vi) emergency conditions requiring speedy or instant action. ⁵	its jurisdiction for the purpose of government in any given year. When a legislative scheme is established, the Parliament ... will usually enact the scheme in outline only, and will delegate to a subordinate body the power to make laws on matters of detail.” ⁷
2. Publication	- The Statutory Instruments Act 1946 (“ SIA 1946 ”) provides that all statutory instruments must be sent to the Queen’s printer as soon as made. ⁸ However, the statute also provides that the Secretary of State may pass regulations exempting statutory instruments from the printing requirements. ⁹ Wade and Forsyth state that “exemption has been given to local instruments.” ¹⁰	- The Legislative Instruments Act 2003 (“ LIA ”) establishes the Federal Register of Legislative Instruments. ¹¹ This database publishes legislative instruments in electronic form. ¹²	- The Acts and Regulations Publication Act 1989 stipulates that all “regulations” made after its passing shall be forwarded to the Chief Parliamentary Counsel, who shall arrange for the publication of the regulations. ¹³	- According to the Statutory Instruments Act (“ SIA ”), subject to any regulations made by the Governor in Council on the following aspects, every regulation shall be published in the Canada Gazette. These aspects concern, <i>inter alia</i> : (i) the regulation which affects only a limited number of persons and that

	UK	Australia (federal)	New Zealand	Canada (federal)
				reasonable steps will be taken for the purpose of bringing it to the attention of those persons or (ii) publication which could reasonably be expected to be injurious to A) the conduct by the Government of Canada of federal-provincial affairs, or B) the conduct of international affairs, the defence of Canada or any allied or associated States, or detection /suppression of subversive/ hostile activities. ¹⁴
3. Laying before the legislature	- Wade and Forsyth state that “an Act of Parliament will normally require that rules or regulations made under the Act shall be laid before Houses of Parliament ... Occasionally they do not have to be laid at all, because Parliament has omitted to make	- LIA stipulates that legislative instruments must be laid in the Parliament. ¹⁸	- Regulations (Disallowance) Act 1989 (“ RDA ”) states that all “regulations” shall be laid before the House of Representatives	- According to the SIA, subject to any regulations made by the Governor in Council on the following aspects, every regulation shall be referred to the

	UK	Australia (federal)	New Zealand	Canada (federal)
	<p>any provision.”¹⁵</p> <ul style="list-style-type: none"> - The HC Information Office states that instruments not laid before the Parliament “are, in general, not contentious.”¹⁶ - SIA 1946 states, “Where by [SIA 1946] or any Act passed after [its commencement], it is provided that any statutory instrument shall be subject to annulment in pursuance of resolution of either House of Parliament, the instrument shall be laid before Parliament after being made...”¹⁷ 		<p>after they are made.¹⁹</p>	<p>Parliament. These aspects concern, <i>inter alia</i>, (i) Canada’s federal-provincial or (ii) international affairs (same as above) or injustice/undue hardship to any person/body.²⁰</p>
4. Legislative vetting				
(i) <i>Guidelines on which vetting procedure to use (if at all</i>	<ul style="list-style-type: none"> - The HC Information Office states that the type of vetting mechanism “will usually be prescribed in the parent Act.”²¹ - Craies on Legislation: the 	<ul style="list-style-type: none"> - Subject to specified exceptions or where a certain parent Act specifies 	<ul style="list-style-type: none"> - All “regulations” will be subject to the negative vetting mechanism under the RDA.³⁰ RDA provides no 	<ul style="list-style-type: none"> - SIA states that, except for those regulations not referred to the Parliament (see above), every statutory instrument shall

	UK	Australia (federal)	New Zealand	Canada (federal)
<i>used)</i>	<p>authorities are likely to have regard to precedent and past expressions of opinion by Parliamentary Committees when choosing which level of legislative scrutiny to apply.²²</p> <ul style="list-style-type: none"> - A report of the House of Lords Select Committee on Delegated Powers and Regulatory Reform: there should be positive vetting for Henry VIII clauses (clauses in subsidiary legislation empowering the amendment or repeal of primary legislation) (see discussion below).²³ - A report of the Joint Committee on Delegated Legislation: positive vetting is the general rule for subsidiary legislation which: (i) substantially affect provisions of primary legislation, (ii) impose or increase taxation, and (iii) have special importance, e.g. creating serious criminal offences.²⁴ Wade and Forsyth concur that positive vetting is “normal for 	<p>otherwise, legislative instruments are subject to the negative vetting mechanism under the LIA (see mechanism below).²⁹</p> <ul style="list-style-type: none"> - No noticeable guidance is found on when the authorities will consider using positive instead of negative vetting. 	<p>exceptions to its application. See (ii) below however.</p> <ul style="list-style-type: none"> - RDA itself provides for no positive vetting mechanism. Nonetheless, it appears that the positive vetting system may be used in isolated schemes. A Parliamentary committee states that the affirmative resolution procedure should be used to approve regulations that specifically regulate the administration of Offices of Parliament.³¹ The 	<p>be subject to the negative vetting mechanism under the SIA.³³</p> <ul style="list-style-type: none"> - No noticeable guidance is found on when the authorities will consider using positive instead of negative vetting.

	UK	Australia (federal)	New Zealand	Canada (federal)
	<p>regulations which increase taxes or charges.”²⁵</p> <ul style="list-style-type: none"> - A report of the Joint Committee on Delegated Legislation states that “there is at present no consistent pattern or direct connection between the subject-matter of any particular instrument and the procedure to which it may be subjected.”²⁶ - Where the Legislative and Regulatory Reform Act 2006 (“LRRA”) applies, its non-binding Explanatory Notes suggest that the relevant Minister’s view of the complexity and impact of the proposed subsidiary legislation as well as representations made during the consultation process will influence the level of scrutiny.²⁷ - Craies on Legislation speaks of a “convention against annulment”, under which the House of Lords seldom rejects statutory 		<p>New Zealand Government generally agreed with the committee’s recommendations. ³²</p>	

	UK	Australia (federal)	New Zealand	Canada (federal)
	instruments. ²⁸			
<i>(ii) No vetting</i>	<ul style="list-style-type: none"> - Some statutory instruments are simply not laid before the Parliament (see above) and so will not be subject to Parliamentary vetting. - Moreover, some statutory instruments are only laid before the Parliament and there will not be any Parliamentary vetting (see relevant statistics below).³⁴ 	<ul style="list-style-type: none"> - LIA provides that specific legislative instruments are not “disallowable” (i.e. not subject to vetting) by the Parliament if they concern facilitation of establishment of an inter-governmental body involving the Commonwealth and one or more States, and some 44 items listed in s. 44(2) of the Act including certain definitions of residency or standards for commercial 	<ul style="list-style-type: none"> - As stated above, all “regulations” will be subject to the vetting mechanism under the RDA.³⁶ RDA provides no exceptions to its application. - A Cabinet paper issued by the Ministry of Justice takes the view that an instrument being legislative in nature should in general be declared to be a regulation for the purposes of disallowance under the RDA. It however recognizes that there are a very few cases with 	<ul style="list-style-type: none"> - According to the SIA, subject to any regulations made by the Governor in Council on the following aspects, every regulation shall be subject to Parliamentary vetting. These aspects concern, <i>inter alia</i>, i) Canada’s federal-provincial affairs or ii) international affairs or iii) injustice/undue hardship to any person/body (same as above).³⁸

	UK	Australia (federal)	New Zealand	Canada (federal)
		television programmes for children etc. ³⁵	good reasons which may allow departure from this general rule: (i) where instrument made by an independent body or an industry, is not subject to ministerial approval; (ii) there are strong reasons for Parliament not to intervene, e.g. an instrument which concerns academic/press freedoms, and (iii) an instrument which concerns interests of international uniformity. ³⁷	
<i>(iii) Negative vetting</i>	- Where s5 of SIA 1946 applies, a statutory instrument is subject to negative annulment by the Parliament. ³⁹	- In general, a legislative instrument takes effect unless the	- In general, a regulation takes effect on the day after the date of its	- In general, a regulation takes effect after registration unless the Parliament resolves to

	UK	Australia (federal)	New Zealand	Canada (federal)
		Parliament “disallows” it in accordance with the LIA. ⁴⁰	notification in the Gazette unless the House of Representatives “disallows” it in accordance with the RDA. ⁴¹	revoke it in accordance with the SIA. ⁴²
<i>(iv) Positive vetting</i>	- It does exist in some statutes (see relevant guidelines above and statistics below). ⁴³	- While LIA itself provides for no positive vetting mechanism, Odgers’ states that specific provisions of some instruments require positive vetting of both Houses to bring these into effect. ⁴⁴	- While RDA itself provides for no positive vetting mechanism, the Regulations Review Committee Digest states that some regulations are subject to positive vetting. ⁴⁵	- The Interpretation Act states that whenever the expression “subject to affirmative resolution of Parliament” (or “the House of Commons”) is used in relation to a regulation, that regulation has to be laid before the Parliament (or “the House of Commons”) and shall not come into force unless and until it is affirmed there. ⁴⁶
<i>(v) Power to amend subsidiary legislation</i>	- Craies on Legislation and Wade and Forsyth state that, regardless of the applicable vetting system, Parliament cannot itself amend the subsidiary legislation. ⁴⁷	- Odgers’ states that there is no opportunity for amendment. ⁴⁹	- Under RDA, the House of Representatives may amend any regulations. ⁵⁰	- From a reading of the SIA and the Interpretation Act, it appears that the Parliament may revoke but not amend a

	UK	Australia (federal)	New Zealand	Canada (federal)
	<ul style="list-style-type: none"> - The HC Information Office states that statutory instruments “cannot, except in extremely rare instances where the parent Act provides otherwise, be amended or adapted by either House.”⁴⁸ Each House simply expresses its wish for them to be annulled or passed into law, as the case may be. 			<p>regulation while scrutinising it.⁵¹</p>
5. Relevant statistics	<ul style="list-style-type: none"> - The Royal Commission on the Reform of the House of Lords states that more than half of all statutory instruments are subject to no Parliamentary procedure, i.e. are simply ‘laid’.⁵² - The HC Information Office states that “Affirmative Procedure ... is ... currently representing about 10% of instruments subject to Parliamentary procedure.”⁵³ This office also provides that, for instruments laid before the HC in Session 2006 – 2007, 16.2% are subject to the 	<ul style="list-style-type: none"> - According to the Delegated Legislation Monitor prepared by the Australia Parliament, in the week ending 4 February 2010, 320 disallowable instruments were tabled in the Parliament that week. But only 3 instruments were disallowed in 2010.⁵⁵ 	<ul style="list-style-type: none"> - The Regulations Review Committee Digest states that (from 1990) to June 2009, the disallowance procedure has only been used on four occasions – none of them was successful.⁵⁶ 	<ul style="list-style-type: none"> - Between 1986 and 2008, no regulations were revoked under the SIA mechanism.⁵⁷

	UK	Australia (federal)	New Zealand	Canada (federal)
	affirmative procedure, 83.6% to the negative procedure and 0.1% not subject o any procedure. ⁵⁴			

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Notes

¹ “Factsheet L7: Statutory Instruments”, UK House of Commons Information Office (2008), p.2

(<http://www.parliament.uk/documents/commons-information-office/107.pdf>).

² A. Bradley & K. Ewing, “Constitutional and Administrative Law” (14th ed.), Harlow, England ; New York : Pearson Longman (2007), pp.676-677.

³ W. Wade and C. Forsyth, “Administrative Law” (10th ed.), Oxford : Oxford University Press, 2009, p.731.

⁴ “Odgers’ Australian Senate Practice” (12th ed.), Australian Department of the Senate (2008), pp. 325-326

(<http://www.aph.gov.au/senate/pubs/odgers/pdf/odgers.pdf>).

⁵ “Guidelines on Process and Content of Legislation” (2007 ed.), Legislative Advisory Committee, pp.197 - 202

(<http://www.justice.govt.nz/lac/who/index.html>). The Committee is served by the Ministry of Justice and provides legal advice to the Minister of Justice.

⁶ “House of Commons Procedure and Practice” (2nd ed.), Canadian House of Commons (2009)

(<http://www2.parl.gc.ca/procedure-book-livre/Document.aspx?sbdid=7C730F1D-E10B-4DFC-863A-83E7E1A6940E&sbpid=1&Language=E&Mode=1>).

⁷ P. Hogg, “Constitutional Law of Canada” (5th ed. Supplemented), Ontario : Carswell, c2007, Volume 1, p. 14.1.

⁸ Section 2(1), Statutory Instruments Act 1946 (SIA 1946).

⁹ Section 8(1)(c), SIA 1946

¹⁰ W. Wade and C. Forsyth, “Administrative Law” (10th ed.), Oxford : Oxford University Press, 2009, p.760.

¹¹ Section 20, Legislative Instruments Act 2003 (LIA).

¹² “Legislative Instruments Handbook: A Practical Guide for Compliance with the Legislative Instruments Act 2003 and Related Matters”,

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- Office of Legislative Drafting and Publishing in the Australian Attorney-General's Department (2004), p. 30
([http://www.ag.gov.au/www/agd/rwpattach.nsf/vap/\(cfd7369fcae9b8f32f341dbe097801ff\)~11li+handbook_v3_1_1204.pdf/\\$file/11li+handbook_v3_1_1204.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/vap/(cfd7369fcae9b8f32f341dbe097801ff)~11li+handbook_v3_1_1204.pdf/$file/11li+handbook_v3_1_1204.pdf)).
- ¹³ Sections 4 and 5, Acts and Regulations Publication Act 1989.
- ¹⁴ Sections 11 and 20, Statutory Instruments Act (SIA)
- ¹⁵ W. Wade and C. Forsyth, "Administrative Law" (10th ed.), Oxford : Oxford University Press, 2009, p.765.
- ¹⁶ "Factsheet L7: Statutory Instruments", UK House of Commons Information Office (2008), p.3
(<http://www.parliament.uk/documents/commons-information-office/107.pdf>). The method for arriving at this figure is not illustrated. It is also noted no information is provided on the number of SI not being subject to Parliamentary procedure.
- ¹⁷ Section 5(1), SIA 1946.
- ¹⁸ Section 38, LIA.
- ¹⁹ Section 4, RDA.
- ²⁰ Sections 11, 19 and 20, SIA.
- ²¹ "Factsheet L7: Statutory Instruments", UK House of Commons Information Office (2008), p.3
(<http://www.parliament.uk/documents/commons-information-office/107.pdf>).
- ²² "Craies on Legislation: A Practitioners' Guide to the Nature, Process, Effect and Interpretation of Legislation" (9th ed.), London : Sweet & Maxwell (2008), p.307.
- ²³ As referred to in: "Craies on Legislation: A Practitioners' Guide to the Nature, Process, Effect and Interpretation of Legislation" (9th ed.), London : Sweet & Maxwell (2008), p. 298.
- ²⁴ As referred to in: "Craies on Legislation: A Practitioners' Guide to the Nature, Process, Effect and Interpretation of Legislation" (9th ed.), London : Sweet & Maxwell (2008), pp.298-299.
- ²⁵ W. Wade and C. Forsyth, "Administrative Law" (10th ed.), Oxford : Oxford University Press, 2009, p.765.
- ²⁶ "Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament" (23rd ed.), London : LexisNexis UK (c2004), p. 669.
- ²⁷ Explanatory Notes, p. 13 .
- ²⁸ "Craies on Legislation: A Practitioners' Guide to the Nature, Process, Effect and Interpretation of Legislation" (9th ed.), London : Sweet & Maxwell (2008), pp. 307-309.
- ²⁹ Sections 42 and 44, LIA.
- ³⁰ Section 6, RDA.
- ³¹ "Inquiry into the Affirmative Resolution Procedure" Regulations Review Committee (2007), p.11
(http://www.parliament.nz/NR/rdonlyres/19A01292-086C-49FE-B1C9-9C79752A0439/56794/DBSCH_SCR_3775_5014.pdf).

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- ³² R. Malone & T. Miller, “Regulations Review Committee Digest” (3rd ed.), Wellington: New Zealand Centre for Public Law (2009), p. 72 (<http://www.victoria.ac.nz/nzcpl/RegsRev/RRC%20Digest%202009.pdf>).
- ³³ Sections 11, 19, 19.1 and 20, SIA.
- ³⁴ W. Wade and C. Forsyth, “Administrative Law” (10th ed.), Oxford : Oxford University Press, 2009, p.766.
- ³⁵ Section 44, LIA.
- ³⁶ Section 6, RDA.
- ³⁷ “Cabinet Office Circular CO (O8) 4 – Delegated Legislation: Guidelines for Legislative Instruments that are not Regulations”, New Zealand Cabinet Office (2008) (<http://www.dpmc.govt.nz/cabinet/circulars/co08/4.html>).
- ³⁸ Sections 11, 19, 19.1 and 20, SIA.
- ³⁹ SIA 1946.
- ⁴⁰ Sections 12 and 42, LIA.
- ⁴¹ Section 6, RDA; section 9 of the Interpretation Act 1999.
- ⁴² Sections 6, 9 and 19.1, SIA.
- ⁴³ Note also LRRRA. This Act provides for three different levels of Parliamentary scrutiny for “Henry VIII provisions”: “negative resolution procedure”, “affirmative resolution procedure” and “super-affirmative resolution procedure.” If this later procedure applies, the drafter of the statutory instrument must consult the stakeholders and have regard to relevant resolutions of either House of the Parliament before the draft statutory instrument could be approved under a positive vetting process.
- ⁴⁴ “Odgers’ Australian Senate Practice” (12th ed.), Australian Department of the Senate (2008), p. 333 (<http://www.aph.gov.au/senate/pubs/odgers/pdf/odgers.pdf>).
- ⁴⁵ R. Malone & T. Miller, “Regulations Review Committee Digest” (3rd ed.), Wellington: New Zealand Centre for Public Law (2009), p. 70 (<http://www.victoria.ac.nz/nzcpl/RegsRev/RRC%20Digest%202009.pdf>).
- ⁴⁶ Section 39(1)(a), (b), Interpretation Act.
- ⁴⁷ “Craies on Legislation: A Practitioners' Guide to the Nature, Process, Effect and Interpretation of Legislation” (9th ed.), London : Sweet & Maxwell (2008), p.297. W. Wade and C. Forsyth, “Administrative Law” (10th ed.), Oxford : Oxford University Press, 2009, p.766.
- ⁴⁸ “Factsheet L7: Statutory Instruments”, UK House of Commons Information Office (2008), p.5 (<http://www.parliament.uk/documents/commons-information-office/107.pdf>).
- ⁴⁹ “Odgers’ Australian Senate Practice” (12th ed.), Australian Department of the Senate (2008), p. 329 (<http://www.aph.gov.au/senate/pubs/odgers/pdf/odgers.pdf>).
- ⁵⁰ Section 9(1)(a), RDA.
- ⁵¹ The SIA only states that the Parliament may “revoke” any regulations (section 19.1). The word is undefined in the SIA or the Interpretation Act. The term “amendment” is used elsewhere in the SIA but not used together with the term “revoke” (or the like), whereas the

words “revoke” and “amend” are used in the same provisions in the Interpretation Act, e.g. s42(1)). These may suggest the word “revoke” does not bear the meaning of “amend”. While this latter provision also stipulates that “every act shall be construed as to reserve to Parliament the power of repealing or amending it...”, the word “act”, defined twice in the Interpretation Act (ss. 2(1) and 35(1)), does not seem to include a “regulation” (if s42(1) is applicable otherwise). The preliminary conclusion is therefore that the Parliament may *not* amend a regulation while scrutinising it. See also the discussion in Chapter 17, Delegated Legislation, House of Commons Procedure and Practice, edited by Robert Marleau and Camille Montpetit, 2000 edition.

⁵² As referred to in: W. Wade and C. Forsyth, “Administrative Law” (10th ed.), Oxford : Oxford University Press, 2009, p.766.

⁵³ “Factsheet L7: Statutory Instruments”, UK House of Commons Information Office (2008), p.5

(<http://www.parliament.uk/documents/commons-information-office/107.pdf>). The method for arriving at this figure is not illustrated. It is also noted no information is provided on the number of SI not being subject to Parliamentary procedure.

⁵⁴ “Factsheet L7: Statutory Instruments”, UK House of Commons Information Office (2008), Appendix A, p.14

(<http://www.parliament.uk/documents/commons-information-office/107.pdf>). The figures do not add up to 100% because of the rounding-off effect. One may notice the figure of “about 10%” in p.5 and the figure in this Appendix do not match; this is not explained in the Factsheet. Another note is there is no data on the statutory instruments that were not laid before the House at all. It is not absolutely clear whether the terms “affirmative procedure” and “negative procedure” used in this Appendix include those procedures under the LRRRA (see above).

⁵⁵ Delegation Legislation Monitor 2 – 4 February 2010 (http://www.aph.gov.au/senate/committee/regord_ctte/mon2010/index.htm). See also Disallowance Alert 2010, http://www.aph.gov.au/senate/committee/regord_ctte/alert2010.htm.

⁵⁶ R. Malone & T. Miller, “Regulations Review Committee Digest” (3rd ed.), Wellington: New Zealand Centre for Public Law (2009), p. 11 (<http://www.victoria.ac.nz/nzcpl/RegsRev/RRC%20Digest%202009.pdf>).

⁵⁷ “House of Commons Procedure and Practice” (2nd ed.), Canadian House of Commons (2009)

(<http://www2.parl.gc.ca/procedure-book-livre/Document.aspx?sbdid=7C730F1D-E10B-4DFC-863A-83E7E1A6940E&sbpid=1&Language=E&Mode=1>).