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Legislative Council

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Paper for the House Committee meeting on 10 February 2012

Report of the Subcommittee to Study Issues Relating to the Power of the Legislative Council to Amend Subsidiary Legislation and priority allocation of a debate slot to the Chairman of the Subcommittee

Purpose

This paper invites Members to -

(a) note the Report of the Subcommittee to Study Issues Relating to the Power of the Legislative Council to Amend Subsidiary Legislation;

(b) endorse the recommendations of the Subcommittee in paragraph 5.3 of Chapter 5 of the Report; and

(c) consider the Subcommittee's request for priority allocation of a debate slot under Rule 14A(h) of the House Rules ("HR") to Dr Hon Margaret NG, Chairman of the Subcommittee, for moving a motion for debate on the Report at the Council meeting of 29 February 2012.

Appointment of the Subcommittee and its Report

2. Tabled in the Legislative Council ("LegCo") on 9 June 2010, the Country Parks (Designation) (Consolidation) (Amendment) Order 2010 ("Amendment Order") sought to replace the original approved map in respect of the Clear Water Bay Country Park ("CWBCP") with a new approved map, for the purpose of excising an area of five hectares from the original approved map of CWBCP to form part of the proposed South East New Territories Landfill Extension. A subcommittee was formed under the House Committee on 11 June 2010 to study the Amendment Order ("the Country Parks Subcommittee"). The Country

Parks Subcommittee reported on its deliberations to the House Committee on 8 October 2010. The House Committee noted its decision to move a motion to repeal the Amendment Order as well as the differences between the Country Parks Subcommittee and the Administration on the legal effect of repealing the Amendment Order and the lawfulness of the proposed repeal of the Amendment Order.

3. The proposed resolution to repeal the Amendment Order was passed by the Council at its meeting of 13 October 2010. At the House Committee meeting on 15 October 2010, Members discussed ways to follow up the issues arising from the Amendment Order. Members stressed that as the Legislature was the only institution empowered under the Basic Law ("BL") to enact, amend or repeal laws, unless it, in enacting certain legislation, had delegated its law-making power to third parties, the law-making power rested with the Legislature. Members were gravely concerned about the Administration's legal views, which seemed to suggest that the Chief Executive but not LegCo had the ultimate power to make laws, and that LegCo might not have the power to vet or amend certain subsidiary legislation subject to the negative vetting procedure. Members considered it important to make clear the power of LegCo in respect of subsidiary legislation. The Secretariat was requested to collate information relating to LegCo's power to amend subsidiary legislation to facilitate Members' consideration of the matter.

4. After consideration of the information compiled by the Secretariat at the House Committee meeting on 21 January 2011, Members decided to form a subcommittee to study in depth issues relating to the power of LegCo to amend subsidiary legislation which is subject to section 34 of the Interpretation and General Clauses Ordinance (Cap. 1). Members agreed that the Subcommittee should study the respective roles of the Legislature and the Executive Authorities under the BL in the legislative process and make recommendations to the House Committee where necessary.

5. Under the chairmanship of Dr Hon Margaret NG, the Subcommittee has held four meetings. The Subcommittee has focused its examination on, among others, statutory provisions indicating the nature of an instrument as subsidiary legislation; enabling provisions in various ordinances in relation to the scrutiny of subsidiary legislation by LegCo; the procedures and practices 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; and principles and policies for delegating legislative powers by way of empowering an Executive Authority to make subsidiary legislation. The membership, terms of reference, deliberations, observations and recommendations of the Subcommittee are set out in the Report in **Appendix I**.

The Subcommittee's recommendations in the Report

6. After examining the relevant issues, the Subcommittee has made a number of recommendations, the details of which are set out in paragraph 5.3 of the Report. Among others, the Subcommittee is of the view that -

(a) the Administration should state clearly in each LegCo Brief on subsidiary legislation to be tabled in the Council its position as to whether LegCo has the power to amend or repeal the subsidiary legislation concerned. Whenever LegCo and the Administration differ on the interpretation of an empowering provision which limits LegCo's power to amend the subsidiary legislation, the Administration should inform LegCo in the first instance its position with full legal reasons in order that both sides could engage in deliberations in a timely, open and transparent manner (paragraph 5.3(c) of the Report); and

(b) if warranted, judicial review may be considered as a means to resolve the differences between LegCo and the Administration on the power of LegCo to amend or repeal subsidiary legislation or settle their disputes. However, if the dispute is about a resolution with legislative effect passed by LegCo and the Administration wishes to institute judicial review proceedings against the resolution, the question of who should be the proper respondent would need to be resolved. In this regard, the Administration should thoroughly study the legal and procedural issues involved and take appropriate legislative measures, if required. LegCo should follow up on the matter (paragraph 5.3(d) of the Report). Subject to Members' view, the matter may be referred to the relevant Panel(s) for follow-up.

Request for priority allocation of a debate slot

7. As issues relating to the power of LegCo to amend subsidiary legislation are of significant importance, the Subcommittee considers it necessary to provide an opportunity for all Members to express views on the observations and recommendations made in its Report and for the Administration to respond. At its meeting on 30 January 2012, the Subcommittee agreed that the House Committee's agreement should be sought for the priority allocation of a debate

slot to its Chairman for moving a motion for debate on the Report at the Council meeting of 29 February 2012.

8. Under HR 14A(h), committees and subcommittees of the Council may make a request for priority allocation of debate slots and such request shall be put forward to the House Committee for consideration on a case-by-case basis. Should the House Committee accede to such a request, the debate slot shall not be counted as the mover's own slot.

9. Pursuant to HR 14A(h), the Subcommittee seeks the agreement of the House Committee for the priority allocation of a debate slot to its Chairman for moving a motion for debate on the Report at the Council meeting of 29 February 2012. The wording of the motion as agreed by the Subcommittee is in **Appendix II**.

Advice sought

10. Members are invited to -

(a) note the Report in Appendix I;

(b) endorse the recommendations of the Subcommittee in paragraph 5.3 of Chapter 5 of the Report; and

(c) consider the Subcommittee's request for priority allocation of a debate slot to its Chairman for moving a motion for debate on the Report at the Council meeting of 29 February 2012.

Council Business Division 2
Legislative Council Secretariat
9 February 2012

Legislative Council
of the
Hong Kong Special Administrative Region

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

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TABLE OF CONTENTS

Chapter 1 - Introduction

1.1 At its meeting on 21 January 2011, the House Committee appointed a subcommittee to study issues relating to the power of the Legislative Council ("LegCo") to amend subsidiary legislation. This Chapter provides the background to the appointment of the Subcommittee and matters relating to its work.

Background

The Country Parks (Designation) (Consolidation)(Amendment) Order 2010

1.2 Gazetted on 4 June 2010 and tabled in LegCo on 9 June 2010, the Country Parks (Designation) (Consolidation) (Amendment) Order 2010 ("Amendment Order") sought to amend the Country Parks (Designation)(Consolidation) Order (Cap. 208 sub. leg. B) to replace the original approved map in respect of the Clear Water Bay Country Park ("CWBCP") with a new approved map, for the purpose of excising an area of five hectares from the original approved map of CWBCP to form part of the proposed South East New Territories ("SENT") Landfill Extension.

1.3 A subcommittee was formed under the House Committee on 11 June 2010 to study the Amendment Order ("the Country Parks Subcommittee"). At its meeting on 4 October 2010, the Country Parks Subcommittee resolved that a motion be moved by its Chairman to repeal the Amendment Order.

1.4 The Administration then provided to the Subcommittee its written view on the legal implications concerning repeal of the Amendment Order. The Country Parks Subcommittee was concerned about the Administration's legal views, which seemed to suggest that the Chief Executive ("CE") but not LegCo had the ultimate power to make laws, and that LegCo might not have the power to vet or amend certain subsidiary legislation subject to the negative vetting procedure.

1.5 The Country Parks Subcommittee reported on its deliberations to the House Committee on 8 October 2010. Members of the Country Parks Subcommittee expressed grave dissatisfaction with the Administration's late presentation of its legal views which was not made until the Subcommittee had decided to move a motion to repeal the Amendment Order. The House Committee noted the decision of the Subcommittee as well as the differences between the Subcommittee and the Administration on the legal effect of repealing

the Amendment Order and the lawfulness of the proposed repeal of the Amendment Order. Members considered that such an approach had adversely affected the relationship between the Executive and the Legislature.

1.6 The proposed resolution to repeal the Amendment Order ("the Resolution") was passed by the Council at its meeting of 13 October 2010. A summary of the controversy over the repeal of the Amendment Order is in **Appendix I**.

Follow-up to the repeal of the Amendment Order

1.7 At the House Committee meeting on 15 October 2010, Members discussed ways to follow up the issues arising from the Amendment Order, in particular the power of LegCo to amend subsidiary legislation. To take the matter forward, Members requested the Secretariat to collate information relating to LegCo's power to amend subsidiary legislation, and agreed that Members would further consider the issues surrounding the power of LegCo to amend subsidiary legislation after the information was available.

Appointment of the Subcommittee and its terms of reference

1.8 The information in the form of a paper entitled "Appointment of a subcommittee to study issues relating to the power of the Legislative Council to amend subsidiary legislation" (LC Paper No. CB(2)852/10-11) prepared by the LegCo Secretariat was submitted to the House Committee on 21 January 2011. The House Committee appointed a subcommittee to study issues relating to the power of LegCo to amend subsidiary legislation ("the Subcommittee"). The Subcommittee comprises nine members and its membership list is in **Appendix II**.

1.9 Under the chairmanship of Dr Hon Margaret NG, the Subcommittee discussed its terms of reference and work plan at its first meeting on 22 February 2011. The Subcommittee proposed its terms of reference as follows -

> "To study issues relating to the power of LegCo to amend subsidiary legislation which is subject to section 34 of the Interpretation and General Clauses Ordinance (Cap. 1) and the respective roles of the Legislature and the Executive Authorities under the Basic Law in the legislative process, and to make recommendations to the House Committee where necessary."

1.10 The terms of reference proposed by the Subcommittee was endorsed by the House Committee on 11 March 2011.

Areas of study

1.11 Based on its terms of reference, the Subcommittee has decided to focus its examination on the following areas in relation to subsidiary legislation subject to negative vetting -

(a) statutory provisions indicating the nature of an instrument as subsidiary legislation;

(b) statutory provisions empowering the making of subsidiary legislation under which LegCo's power to amend varies;

(c) enabling provisions in various ordinances in relation to the scrutiny of subsidiary legislation by LegCo;

(d) the provisions in Cap. 1 in relation to the scrutiny of subsidiary legislation by LegCo;

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

(f) proposals on the procedures and practices 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; and

(g) principles and policies for delegating legislative powers by way of empowering an Executive Authority to make subsidiary legislation.

Invitation for views and meetings held

1.12 In the course of its study, the Subcommittee has invited views from the two legal professional bodies and legal academics from three universities on issues relating to LegCo's power to amend subsidiary legislation; a list of which is in **Appendix III**. The Subcommittee has received a submission from the Hong Kong Bar Association ("Bar").

1.13 Between February 2011 and January 2012, the Subcommittee has held four meetings, including two meetings with the Administration. The Subcommittee has met with representatives from the Bar at its meeting on

20 April 2011. A list of the documents considered by the Subcommittee is in **Appendix IV**.

Chapter 2 - Legislative power of the Legislative Council and its delegation under the Basic Law

2.1 The Subcommittee has considered the respective role of LegCo and the Executive Authorities in the legislative process and taken note of the relevant provisions in the Basic Law ("BL") regarding LegCo's legislative power and delegation under BL. This Chapter sets out the relevant provisions in BL and highlights the role of LegCo and the Executive Authorities in the legislative process.

The Legislative Council

2.2 The Subcommittee notes that BL 16, 17 and 19 provide for the executive, legislative and judicial powers of the Hong Kong Special Administrative Region ("HKSAR") respectively. By virtue of BL 66, LegCo is the legislature of the HKSAR. Under BL 73(1), the powers and functions of LegCo include "to enact, amend or repeal laws in accordance with the provisions of this Law and legal procedures". Therefore, LegCo is vested with the power and constitutional duty to scrutinize and, where necessary, to amend or repeal laws.

2.3 Under BL 8, the laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene BL, and subject to any amendment by the legislature of the HKSAR. BL 18 provides that the laws in force in the HKSAR shall be BL, laws previously in force in Hong Kong as provided for in BL 8, and the laws enacted by the legislature of the HKSAR. By virtue of BL 8 and 18, BL recognizes the delegation of power to make subsidiary legislation given the empowering provisions in the principal ordinances.

The Executive Authorities

2.4 The Subcommittee also notes that by virtue of BL 62(5), the Government of the HKSAR has the powers and functions of drafting and introducing bills and subordinate legislation. CE has the constitutional responsibility to sign bills passed by LegCo and to promulgate laws as provided for in BL 48(3).

Chapter 3 - Control over the delegated legislative powers

3.1 The Subcommittee notes that under BL, LegCo, as the legislature of the HKSAR, has the power and duty to control the exercise of delegated legislative powers. LegCo's control over the delegated powers to make subsidiary legislation can be effected through the empowering provision under the principal ordinance and the scrutiny procedures provided in Cap. 1. The Administration and the Bar have been invited to present their views on the matter. This Chapter sets out the Subcommittee's consideration over the matter and the negative and positive vetting provisions in Cap. 1.

The empowering provision under the principal ordinance

The Administration's views

3.2 The Administration is of the view that LegCo retains ultimate control over the subsidiary legislation through the provisions in the principal ordinance. In this regard, the existence and scope of subsidiary legislation-making power are defined by the empowering provision(s) in the principal ordinance. Such provision(s) would be subject to scrutiny and approval by LegCo when a bill was first introduced. LegCo can determine whether individual legislative proposals should be part of the principal ordinance or should have effect in the form of subsidiary legislation.

3.3 According to the Administration, pursuant to section 28(1)(b) of Cap. 1, no subsidiary legislation shall be inconsistent with the provisions of any Ordinance. In making the subsidiary legislation, the maker must act within his powers. Otherwise, the subsidiary legislation would be *ultra vires* and could be subject to judicial review. 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 scope of his discretion;

(b) the form of the subsidiary legislation, e.g. rule, regulation, bylaw or order;

(c) the subject 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.

Examples of the parameter in (d) above provided by the Administration are in **Appendix V**.

The Bar's views

3.4 The Bar fully recognizes that LegCo is the institution in the HKSAR vested with the power to enact, amend or repeal laws in accordance with the provisions of BL and legal procedures, and that it has a constitutional duty to control the exercise of delegated legislative powers.

The Subcommittee's views

3.5 The Subcommittee agrees with the Administration that it is for LegCo to decide whether power should be delegated to an Executive authority or other body to make subsidiary legislation. LegCo has ultimate control over the exercise of delegated legislative powers.

The scrutiny procedures under Cap. 1

3.6 The Subcommittee notes that the procedures for LegCo's scrutiny of subsidiary legislation are provided in sections 34 and 35 of Cap. 1.

Negative vetting

3.7 Section 34 of Cap. 1 requires all subsidiary legislation to be laid on the table of LegCo at the next meeting after the publication in the Gazette[1]. Section 34(2) of Cap.1 provides that where an item of subsidiary legislation has been laid on the table of LegCo[2], the Council may, by resolution passed at a meeting held not later than 28 days after the meeting at which it was so laid, amend (by way of repeal, addition, or variation as defined in section 3 of Cap. 1) the subsidiary legislation "in any manner whatsoever consistent with the power to make such subsidiary legislation". The Council may also, by passing a resolution, extend the scrutiny period by 21 days, or to the Council meeting immediately following the 21 days if there is no Council meeting on the 21st day.

Positive vetting

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1 By virtue of section 28(2) of Cap. 1, subsidiary legislation is required to be published in the Gazette. The requirement for publication provides for transparency of legislation and access to the law by the public.

2 The subsidiary legislation is already made before it is tabled.

3.8 Under section 35 of Cap. 1, where any Ordinance provides that subsidiary legislation shall be subject to the approval of LegCo, or contains words to the like effect, then the proposed subsidiary legislation shall be submitted for the approval of LegCo. The subsidiary legislation is only made when LegCo approves it by a resolution, which must be published in the Gazette. LegCo may simultaneously by resolution amend the whole or any part of the proposed subsidiary legislation.

3.9 The Subcommittee has taken note of the practices adopted by the Administration to allow LegCo to fully exercise its right to scrutinize subsidiary legislation. A summary of the Administration's practices is in **Appendix VI**.

Exceptions to the scrutiny procedures under Cap. 1

3.10 The Subcommittee notes that there are cases where the scrutiny procedures provided for in sections 34 and 35 of Cap. 1 do not apply. Some main types of such cases are as follows -

(a) the principal ordinance expressly provides that an instrument made is not subject to the vetting procedures in sections 34 and 35 of Cap. 1 and is therefore not required to be laid before LegCo and not subject to its scrutiny or amendment : e.g. regulations made by CE under section 3(1) of the United Nations Sanctions Ordinance (Cap. 537) ("UNSO") to give effect to relevant instructions of the Ministry of Foreign Affairs of the People's Republic of China in relation to the implementation of sanctions imposed by a resolution of the Security Council of the United Nations;

(b) the principal ordinance expressly provides that an instrument made is not subject to the vetting procedure in section 34 of Cap. 1 and is therefore not required to be laid before LegCo and not subject to its scrutiny or amendment : e.g. a notice by the Commissioner for Transport made under section 52(1) of the Western Harbour Crossing Ordinance (Cap. 436) to vary a toll under its section 52; and

(c) the principal ordinance expressly provides that an instrument made is not subject to the vetting procedures in sections 34 and 35 of Cap. 1, but prescribe a modified vetting procedure for the instrument : e.g. orders on arrangements for the surrender of fugitive offenders made under the Fugitive Offenders Ordinance (Cap. 503)

("FOO"). The procedure similar to that provided for in section 34 of Cap. 1 is in **Appendix VII**.

Ambiguous cases

3.11 The Subcommittee also notes the cases where the vetting procedure provided in section 34 of Cap. 1 applies but LegCo's power to amend the subsidiary legislation appears to be restricted; or controversy has arisen as to whether the subsidiary legislation is subject to amendment by LegCo. The following are some examples of these cases compiled by the LegCo Secretariat -

Subsidiary legislation in respect of which LegCo's power to amend may be restricted

(a) a notice made under section 55 of the Eastern Harbour Crossing Ordinance (Cap. 215) to implement the determination of new tolls (e.g. L.N. 37 of 2005);

(b) a notice made under section 36 of the Tate's Cairn Tunnel Ordinance (Cap. 393) to implement the determination of new tolls (e.g. L.N. 67 of 2010);

Controversy as to whether the subsidiary legislation is subject to amendment by LegCo

(c) an order published in the Gazette by CE under section 14 of the Country Parks Ordinance (Cap. 208) ("CPO") to designate the area in the approved map by CE in Council to be a country park; and

(d) an order published in the Gazette by CE under section 15 of the Marine Parks Ordinance (Cap. 476) to designate the area in the approved map by CE in Council to be a marine park or marine reserve; and an order published by CE under section 16(8) of the Ordinance in respect of an approved replacement map.

Further details of the above cases are in **Appendix VIII**.

Chapter 4 - Issues studied by the Subcommittee

4.1 The Subcommittee has examined in detail the following issues in relation to an instrument -

(a) the principles and policies for delegating legislative powers to an Executive Authority or other body to make subsidiary legislation;

(b) the definition of subsidiary legislation;

(c) LegCo's power to amend subsidiary legislation; and

(d) the 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.

In the course of its scrutiny, the Subcommittee has sought the views of the Administration and the Bar. This Chapter summarizes the views of the Subcommittee, the Administration and the Bar on these issues.

Principles and policies for delegating legislative powers to an Executive Authority or other body to make subsidiary legislation

Delegation of legislative powers

The Administration's views

4.2 According to the Administration, 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.

4.3 In 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 made. 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. CE in Council, CE, 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 committees[3], professional bodies[4] and public infrastructure operators[5]. The primary legislation may delegate powers to make subsidiary legislation to different persons for different purposes[6]. Examples of such subsidiary legislation in Hong Kong cited by the Administration are in **Appendix IX**.

4.4 In the Administration's view, the delegation of legislative powers by the legislature stems from practical considerations, serving the purpose of promotion of efficiency. Based on the experience of Hong Kong, the following are given as 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 legislature to effectively prioritize 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;

(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

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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.

standards and requirements. The legislature may delegate its power to the executive authority which can amend such rules within shorter legislative timeframe; 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 law to respond quickly to cope with the imminent danger.

The Bar's views

4.5 In referring to a judgment 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), the Bar has pointed out the following factors identified by the learned judge that are relevant to LegCo's consideration in delegating its legislative powers -

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

(b) the public importance and constitutional significance of the measures, i.e., the more it touches on questions of broad public importance and controversy, the greater will be the need for scrutiny;

(c) the shortness of the time period involved;

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

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

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

4.6 Taking into account these factors, the Bar stresses the importance for LegCo to consider thoroughly, when formulating the provisions delegating power under the principal ordinance, the level of scrutiny it wishes to preserve over the subsidiary legislation that would be made, bearing in mind the proviso

under section 34(2) of Cap. 1 and the overall statutory scheme and the purpose of the principal ordinance. The Bar also considers that LegCo should be very slow in acceding to the Administration's proposal for "disapplication provisions" such as those under UNSO, and purported delegation that prescribes no limits to guide the delegated authority's exercise of legislative powers.

4.7 The Bar has pointed out the problem of inclusion in the principal ordinance a provision for the disapplication of sections 34 and 35 of Cap. 1 altogether. The effect of this is that LegCo has no means to scrutinize the exercise of the delegated legislative power. Such disapplication provision in section 3(5) of UNSO is of special concern given that the regulation made under the Ordinance can create criminal offences with serious penal effect. Another potential problem identified by the Bar in 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". The Bar considers it a need for LegCo and the Administration to review existing statutory provisions that purport to disapply sections 34 and 35 of Cap. 1, and to avoid such disapplication provisions in the enactment of ordinances in the future.

The Subcommittee's views

4.8 In addition to the views of the Administration and the Bar, the Subcommittee has considered the practices in UK, Australia, Canada and New Zealand regarding the delegation of the power to make subsidiary legislation. A table summarizing the practices in these four jurisdictions provided by the Administration is in **Appendix X**. The Subcommittee notes the following points in respect of their practices -

(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 UK and Canada;

(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" (i.e. 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 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 cannot amend it. In 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 given.

4.9 Noting the legal and constitutional issues arising from regulations made under UNSO in implementing UN sanctions in Hong Kong identified by a subcommittee formed under the House Committee in October 2004 ("the UN Sanctions Subcommittee"), the Subcommittee is particularly concerned about the disapplication of sections 34 and 35 of Cap. 1 to such regulations. A summary of the issues of concern examined by the UN Sanctions Subcommittee is in **Appendix XI**. The Subcommittee agrees with the Bar's view that in dealing with any proposal for disapplying sections 34 and 35 of Cap. 1, LegCo has to exercise extreme care when acceding to such proposal.

Factors for deciding a matter to be included in primary or subsidiary legislation

4.10 The Subcommittee has sought information on the principles or factors for deciding a matter to be included in the primary or subsidiary legislation. The Subcommittee has been advised by the Administration that the crux of the issue is when law-making power should be exercised by the legislature and when it would be appropriate for the legislature to delegate such power to the executive arm of the government or other bodies. The Subcommittee notes that the *Guide to Making Legislation* prepared by the Secretariat to the Legislation Committee of

Cabinet ("the UK Cabinet Guide") identifies the following as some of the factors to consider when deciding to make provisions in subsidiary legislation -

(a) the matters in question may need adjusting more often than it would be sensible for Parliament to legislate for by primary legislation;

(b) there may be rules which will be better made after some experience of administering the new Act and which it is not essential to have as soon as it begins to operate;

(c) the use of delegated powers in a particular area may be well precedented and uncontroversial; and

(d) there may be transitional and technical matters which it would be appropriate to deal with by delegated powers.

4.11 The Subcommittee also notes that on the other hand, the matters, though detailed, may be so much of the essence of the Bill that Parliament ought to consider them along with the rest of the Bill; and the matter may raise controversial issues running through the Bill which it would be better for the Parliament to decide once in principle rather than arguing several times over.

4.12 Both the Subcommittee and the Administration consider that the factors identified in the UK Cabinet Guide would be useful principles to refer to in similar situations in Hong Kong. In UK, these factors are only guidelines and not prescriptive rules. At the Subcommittee's request, the Administration has provided examples in relation to these factors, which are set out in **Appendix XII**.

4.13 The Subcommittee further notes the view expressed by the editor of *Odgers' Australian Senate Practice* that "while the Parliament deals directly with general principles, the executive, or other body empowered to make subordinate legislation, attends to matters of administration and detail". The Canadian *Guide to Make Federal Acts and Regulations* states that matters of fundamental importance should be dealt with in the bill (primary legislation) so that parliamentarians have a chance to consider and debate them. The bill should establish a framework that limits the scope of regulation making powers to matters that are best left to subordinate law-making delegates and processes. Similarly, the New Zealand Government also states in its *Cabinet Manual 2008* that "In general, the principles and policies of the law are set out in Acts of Parliament. … Regulations usually deal with matters of detail or implementation, matters of a technical nature, or matters likely to require frequent alteration or updating."

4.14 The Subcommittee agrees that as a general rule, matters of principle should be included in the primary legislation whereas matters of operational details or procedures should be set out in the subsidiary legislation.

What is "subsidiary legislation"?

4.15 The Subcommittee has considered the difficulties in identifying subsidiary legislation. It notes[7] that in Hong Kong, "subsidiary legislation" is defined in section 3 of 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"[8]. The statutory test for determining whether an instrument made under an Ordinance is subsidiary legislation is whether such an instrument has "legislative effect". It is important to determine whether a rule or an instrument is subsidiary legislation because apart from a few exceptions (e.g. section 3 of FOO and section 3 of UNSO), when a piece of subsidiary legislation is identified as such, it is subject either to negative vetting under section 34 or positive vetting under section 35 of Cap. 1. However, the expression "legislative effect" is not statutorily defined.

Factors indicative of an instrument as having legislative effect

4.16 The Subcommittee notes that there are situations in which it is obvious that an instrument has legislative effect and is therefore subsidiary legislation. The following may be indicative of an instrument as having legislative effect -

(a) where the instrument extends or amends existing legislation (or alters the common law);

(b) where the instrument has general application to the public or a class of public as opposed to individuals. This is not conclusive, but if the instrument has general application to the public or to a class of the public, the instrument is more likely to be held to be subsidiary

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7 Information provided by the LegCo Secretariat in LC Paper No. CB(2)852/10-11.

8 Under pre-1948 statutes, UK essentially has the same test as that used in Hong Kong in determining whether an instrument is "legislative". Subsidiary legislation made under post-1947 statutes is expressly provided for in the statutes as "Statutory Instruments". In New Zealand, it is defined in the form of a definition of "regulations" in the Regulations (Disallowance) Act 1989. The test is fairly mechanical. In Australia, "subsidiary legislation" is named "legislative instrument" and is defined in the Legislative Instruments Act 2003. The definition employs the concept of "legislative character" and sets out some features of such character. In Malaysia and Singapore, "subsidiary legislation" is defined essentially in the same way as in Hong Kong.

legislation[9]; and

(c) where the instrument formulates a general rule of conduct without reference to particular cases. In general, a legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases[10].

Difficulties in determining whether an instrument is subsidiary legislation

The Administration's views

4.17 According to the Administration, the following criteria may also be relevant in determining whether an instrument has legislative effect -

(a) whether the measure is legally binding as opposed to providing guidance only;

(b) whether the instrument is subject to parliamentary control; and

(c) whether the legislative intent is to treat the instrument as subsidiary legislation.

In addition, *the Australian case of RG Capital Radio v Australia Broadcasting Authority* (2001) 113 FRC 185 (referred to the Court of Appeal's judgment of *Julita F. Raza & others v. Chief Executive in Council & others* [2006] HKCU 1199) (see **Appendix XIII** for further information on the judgment) also suggests other indicia for determining whether an instrument has legislative effect or is an administration act, such as whether the executive has power to vary or control the instrument in question and whether the decision of the executive is subject to merit review by the administrative appeal tribunal. If so, this might suggest the instrument to be of an administrative nature.

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9 In the New Zealand case of *Fowler & Roderique Ltd v. the Attorney General* [1987] 2 NZLR 56, one of the issues was the status of a notice published in the New Zealand Government Gazette declaring a fishery to be a controlled fishery and limiting the number of boat fishing licences for the fishery to the number existing at the time of the notice. The Court of Appeal held that the notice was a general piece of delegated legislation as it had effect against the whole world notwithstanding that it significantly protected the 23 boats that previously did fishing there.

10 For example, notice made under section 17C of the Wild Animals Protection Ordinance (Cap. 170) (Wild Animals Protection (Approval of Hunting Appliances) Notice (Cap. 170A)), notice made under section 7 of Cap. 170 (Prohibition of Feeding of Wild Animals Notice 1999 Cap. 170B). In *Commonwealth v Grunseit* (1943)67 CLR58 at 83, Chief Justice Latham of the High Court of Australia stated that: the general distinction between legislation and the execution of legislation is that legislation determines the content of the law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases.

4.18 The Administration has stated that each criterion may not necessarily be conclusive on its own; nor are the criteria in paragraphs 4.16 to 4.17 above exhaustive. Besides, whether or not an instrument is subsidiary legislation should be considered in the light of the legislative framework set up by the primary legislation under which the instrument is to be made. While it may not always be easy to apply the criteria in discerning whether an instrument has legislative effect, in many instances, it will be obvious from the nature and contents of the instrument whether this is the case. Moreover, the legislative intent in treating the instrument in question as subsidiary legislation or otherwise would be a highly relevant factor. Since October 1999, the Administration has adopted the approach whereby in cases where there may be doubt as to the nature of an instrument to be made pursuant to an ordinance, an express provision would be included in the primary legislation indicating whether or not the instrument is subsidiary legislation, in order to clarify the position.

The Bar's views

4.19 The Bar is of the view that the most fundamental question in examining LegCo's power to amend subsidiary legislation falls on whether or not an instrument constitutes subsidiary legislation. Referring to the definition of subsidiary legislation provided in section 3 of Cap. 1, the Bar has pointed out that whether an instrument is subsidiary legislation lies in whether it has "legislative effect", a concept which is not statutorily defined. The Bar considers that the Administration's approach since October 1999 of including in the principal ordinance an express provision declaring or clarifying the character of an instrument (paragraph 4.18 above refers) could facilitate LegCo's deliberations at the law-making stage on the crucial question of what power (legislative or administrative) it intends to confer on the Administration through the principal ordinance, and the possible consequences thereof. This could also reduce the potential for dispute after the principal ordinance is passed, for the intent of the Legislature as expressed in the legislative provisions would be an important pointer in the legislative and administrative distinction.

4.20 The Bar has, however, pointed out the problem as to how to ascertain the nature of an instrument where the intent is not clear, especially with respect to legislation passed before October 1999, such as CPO. In the controversy surrounding the Amendment Order, both the Administration and LegCo proceeded on the basis that the Amendment Order is subsidiary legislation which has to be tabled for LegCo's scrutiny under section 34 of Cap. 1. However, taking into account the general principles adopted in *Julita F. Raza*, as well as the overall statutory scheme and the purpose of CPO, plausible arguments could be advanced to the effect that the Amendment Order constitutes an administrative rather than a legislative instrument.

The Subcommittee's views

4.21 The Subcommittee agrees with the Bar's view that the difficulty with the "legislative effect" test is that there is no statutory definition of the expression "legislative effect". To add to the problem is the fact that there is also no direct judicial pronouncement on the precise meaning of "legislative effect".

4.22 In studying the issue, the Subcommittee has taken note of the approach in UK, Australia, Canada and New Zealand for discerning whether an instrument is treated as subsidiary legislation or an administrative act. A table summarizing the approach in these jurisdictions provided by the Administration is in **Appendix XIV**.

4.23 It appears to the Subcommittee that in all the four jurisdictions, the legislative or administrative character of the instrument is considered relevant in determining whether it is in substance an item of subsidiary legislation. That notwithstanding, in UK and New Zealand, a formalistic approach has been adopted to determine whether an instrument is a piece of subsidiary legislation. This approach looks at the form of the instrument, for example, whether the primary legislation delegates a power to make "regulations", "rules" or "bylaws" to determine if the instrument is an item of subsidiary legislation.

4.24 The Subcommittee agrees with the Bar's view on the problem in ascertaining the nature of an instrument, especially the legislation passed before October 1999. The Subcommittee considers that the Administration's approach of including in the legislation an express provision declaring or clarifying the character of an instrument in cases of doubt (paragraph 4.18 above refers) should continue. Once enacted, the provision can be regarded as expressing the legislative intent as to the nature of the instrument. Dr Hon Margaret NG has pointed out that there has been different interpretation as to whether an instrument is subsidiary legislation. The Amendment Order is an example where both LegCo and the Administration are of the view that it is subsidiary legislation, the Bar considers otherwise.

LegCo's power to amend subsidiary legislation

The Administration's views

4.25 The Administration has pointed out that under section 34(2) of Cap. 1, LegCo may amend an item of subsidiary legislation in any manner whatsoever consistent with the power to make such subsidiary legislation. Section 28(1)(c) of Cap. 1 provides that subsidiary legislation may at any time be amended by the same person and in the same manner by and in which it was made. When read with section 28(1)(c) of Cap. 1, LegCo's power to amend an item of subsidiary legislation under section 34(2) has to be consistent with the delegate's power to make the subsidiary legislation as set out in the primary legislation. The scope of LegCo's amendment powers is primarily a matter of statutory interpretation of section 34(2) as read with section 28(1) of Cap. 1 and the empowering provision in the primary legislation which delimits the power of the maker of that subsidiary legislation. Any perceived restriction on LegCo's power to amend the subsidiary legislation may be the result of the interpretation and application of section 34(2) of Cap. 1 in the particular context of the primary legislation.

The Bar's views

4.26 The Bar has pointed out that section 28(1)(b) of Cap.1 provides that no subsidiary legislation shall be inconsistent with the provisions of any Ordinance. There is also a proviso under section 34(2) of Cap. 1 that subsidiary legislation shall be amended in any manner whatsoever consistent with the power to make such subsidiary legislation. During the controversy surrounding the Amendment Order, the Administration relied 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 law-making power. Such a construction means that LegCo's power to amend subsidiary legislation would vary according to the provisions in the principal ordinance which empowers the making of the subsidiary legislation.

4.27 The Bar does not consider the aforesaid construction to be objectionable in principle. In the Bar's view, legislative power is supposed to be delegated through a principal ordinance for a legitimate reason. In cases where the application of section 34(2) of Cap. 1 leads to an undesirable outcome, the remedy should probably lie in the amendment of the empowering provisions in the principal ordinance so as to expand the scope of LegCo's vetting power. If the subject matter of an item of subsidiary legislation is considered to be of significant public interest or concern, there is the option of positive vetting under section 35 of Cap. 1.

The Subcommittee's views

4.28 The Subcommittee has taken note of the enabling provisions in ordinances in relation to the scrutiny of subsidiary legislation. For subsidiary legislation subject to negative vetting under section 34 of Cap. 1, common formulations of their enabling provisions are set out in Part I of **Appendix XV**, while formulations of enabling provisions which are expressed to be not subject to section 34 of Cap. 1 are in Part II. Whether LegCo has power to amend subsidiary legislation when section 34 of Cap.1 does not apply is a matter of statutory interpretation and may only be ascertained by a careful reading of the actual statutory provisions[11].

4.29 The Subcommittee is satisfied that the vetting procedure set by section 34 of Cap.1 has functioned effectively and there is no problem with the provisions of the section. The Subcommittee agrees with the Bar's proposed remedy to amend the empowering provision in the principal ordinance should the provision contained therein restrict LegCo's vetting power on the subsidiary legislation made. Dr Hon Margaret NG has, however, pointed out the difficulties for LegCo Members to introduce a bill to amend the empowering provisions in the principal ordinance, given the provisions in BL 74[12]. While recognizing that LegCo's power to amend subsidiary legislation cannot exceed the scope of the empowering provisions in the principal ordinance, Dr NG disagrees with the Administration's interpretation of section 28(1)(c). Dr NG has pointed out that it may be impossible for LegCo Members to amend an item of subsidiary legislation "in the same manner by and in which it was made". Citing the making of rules under the High Court Ordinance (Cap. 4) as an example, when submitted, if LegCo considers it necessary to amend the rules passed by the Rules Committee of the High Court, LegCo will not consult the Rules Committee before proposing amendments.

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11 Examples of such statutory provisions have been discussed in paragraphs 3.10 to 3.11 in Chapter 3.

12 BL 74 provides that Members of LegCo may introduce bills in accordance with the provisions of BL and legal procedures. Bills which do not relate to public expenditure or political structure or the operation of the government may be introduced individually or jointly by Members. The written consent of CE shall be required before bills relating to government policies are introduced.

Proposal 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

The Bar's views

4.30 In the Bar's view, where LegCo and the Administration differ on the interpretation of an empowering provision which purports to limit LegCo's power to amend the subsidiary legislation, such as the controversy surrounding the Amendment Order, it would be good practice for both sides to substantiate their position with full legal reasons, and engage in deliberations that are timely, open and transparent to the public.

4.31 The Bar has suggested that judicial determination should be seriously considered if the difference between LegCo and the Administration on the interpretation of a provision cannot be resolved. Taking the controversy surrounding the Amendment Order as an example, the Administration considered LegCo's resolution to repeal the Amendment Order to be lacking any legal basis, but nevertheless decided not to seek judicial review. The Bar has strong reservations about the Administration's approach, as it means effectively that the Administration is leaving on the books in Hong Kong a resolution passed by LegCo the legal validity of which it expressly disputes. The situation is unsatisfactory under the principle of legal certainty. In the Bar's view, judicial determination of the matter should be seriously considered.

The Administration's views

4.32 The Administration shares the Bar's view on enhancing its communication with LegCo when both sides have differences in the interpretation of an empowering provision. The Administration will endeavour to work more closely with the Legal Adviser of LegCo to identify potential differences and possible remedies.

4.33 Regarding the Bar's suggestion of seeking judicial determination, the Administration does not dispute that generally speaking, legal proceedings (including judicial review applications where appropriate) are often the ultimate method to resolve disputes between parties and should be seriously considered. That notwithstanding, it is well established that judicial review should normally be considered as a remedy of last resort where the parties have exhausted all other means to resolve their differences or settle their disputes.

4.34 In the case of the Amendment Order, the Administration considers that

the crux of the issue is whether five hectares of the country park land should be used as landfill site. Realizing the strong local objections to the proposed use of a portion of country park as landfill site, the Environment Bureau has conducted a review and assessment of the ways as to how the solid waste disposal problem could be dealt with. Having taken all matters into account, the Administration decided to alter the proposal of the SENT Landfill Extension to dispense with the use of the five hectares of country park land as landfill site. As a result of that decision, there was no longer a need for the Administration to commence legal action to pursue the use of the five hectares of country park land for landfill purpose.

4.35 The Administration has also stated that different parties may have different views on the interpretation of a statutory provision. It is not unusual for different judges sitting on the same appellate court to come to a different interpretation of a particular provision. The fact that different parties may have different views on the proper interpretation of the law does not necessarily mean that the law is invalid. As referred to by the House of Lords in *Factortame Ltd. v Secretary of State,* there is a presumption that "the delegated legislation is valid unless and until declared invalid". With the presumption of validity in place, there is no legal uncertainty regarding the Resolution, given the Resolution was passed in accordance with the Rules of Procedure ("RoP") of LegCo.

4.36 On whether judicial declaration is applicable to resolving differences over the interpretation of legislation provisions between LegCo and the Administration, the Administration has pointed out that -

(a) under the common law, where there is on-going litigation, the court has wide powers to grant appropriate declaratory relief on any application to safeguard the due process of law under its inherent jurisdiction;

(b) it appears that the Hong Kong courts have been cautious about granting declaratory relief on hypothetical or academic issues which may never arise or are yet to arise for adjudication by the courts. However, if the question which originally drove the parties to the litigation has only become hypothetical or academic and is no longer in existence between the parties at the time of the hearing, the court still has jurisdiction to hear and determine the question in issue; and

(c) outside the litigation context, it appears that at the constitutional level, the Hong Kong judiciary has explored the idea of introducing a procedure for a constitutional reference to the Court of Final Appeal but finally decided against such a procedure.

4.37 In the Administration's view, it appears that the court has jurisdiction to give advisory opinion, in the form of a declaration in case of an important point of public interest even if the issue in question has become academic between the immediate litigating parties. It is a matter of discretion which the court will only exercise in exceptional circumstances. Outside the litigation context, it appears that the court would be wary of providing an advisory opinion even if the issue concerns matters of constitutional importance. Further details are set out in **Appendix XVI**.

4.38 Regarding the seeking of judicial review referred to in paragraph 4.40(h) below, the Administration has advised that it does not foresee a problem and will seek legal advice as necessary in identifying the appropriate respondent(s) if the Administration wishes to seek judicial review against a resolution of LegCo. It further notes that in practice there is yet to be a case where the Administration sought judicial review against a resolution of LegCo.

The Subcommittee's views

4.39 The Subcommittee notes that as indicated in Appendix I, the possibility of repeal of the Amendment Order was first raised at the meeting of the Country Parks Subcommittee held on 29 July 2010. It was not until early October 2010, after the Subcommittee resolved a motion to be moved by its Chairman to repeal the Amendment Order, that the Administration informed the Subcommittee for the first time of its view that LegCo did not have the power to do so. The Subcommittee is of the view that the Administration should enhance its communication with LegCo. When LegCo and the Administration differ on the interpretation of an empowering provision which limits LegCo's power to amend the subsidiary legislation, the Administration should inform LegCo in the first instance its position with full legal reasons in order for both sides to engage in deliberations in a timely, open and transparent manner.

4.40 In considering the Bar's suggestion of seeking judicial determination, the Subcommittee has made reference to the legal principles of judicial review in relation to LegCo identified by the legal adviser to the Subcommittee in past cases, and come up with the following observations -

The courts' intervention

(a) the recent case of *Cheng Kar Shun & Anor v. Honourable Li Fung-ying & Ors* [2009] 4 HKC 204 affirmed two principles. First, unless there is contravention of BL, LegCo has exclusive control over the conduct of its own business. Secondly, when the question of whether there is contravention of BL arises, the courts will only intervene when it is necessary to do so to uphold the supremacy of BL;

Whether LegCo could be respondent

(b) since LegCo is an unincorporated body and cannot be a respondent to legal proceedings, judicial review proceedings could not be commenced against LegCo as a body;

Ordinances enacted by LegCo

(c) the end result of legislative acts of LegCo could be an Ordinance or a resolution with legislative effect. Hence, very often when such Ordinance or resolution is being challenged in the courts, it is the act of an officer who, or a department of the Administration, which is acting pursuant to an empowering provision of an Ordinance or a piece of subsidiary legislation that is called into question;

(d) the case of *Ng Ka Ling & Ors v Director of Immigration* (1999) 2 HKCFAR 4 has affirmed the principle that any Ordinance that is inconsistent with BL is invalid. This is an application of the classic doctrine of *ultra vires*, i.e. any Ordinance that is *ultra vires* of BL is invalid. Hence, the results of the legislative acts of LegCo are subject to judicial review on the basis of the doctrine of *ultra vires*. In cases where judicial review was sought against the validity of an Ordinance, the Secretary for Justice was named as the respondent. This is consistent with the pre-1997 practice;

Resolutions with legislative effect passed by LegCo

(e) resolutions with legislative effect passed by LegCo include resolutions approving subsidiary legislation[13], amending

13 For example: under section 9A of the Criminal Procedure Ordinance (Cap. 221); section 29 of the Product Eco-Responsibility Ordinance (Cap. 603); section 29 of the Pharmacy and Poisons Ordinance (Cap. 138); and section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525).

Ordinances[14], repealing subsidiary legislation[15] and approving RoP and any amendments to RoP. The doctrine of *ultra vires* applies equally to all these resolutions. In this context, *ultra vires* can occur in two different senses: first, where the resolution is inconsistent with BL and secondly, where the resolution goes beyond the enabling or empowering statutory provision;

(f) the case of *Leung Kwok Hung v President of Legislative Council*, [2006] 4 HKLRD 211 involves a claim of inconsistency with BL. The challenge was directed at rule 57(6) of RoP. RoP were approved by a resolution of LegCo pursuant to BL 75. The judgment of Hartmann J (as he then was) affirmed the jurisdiction of the court over the matter albeit having regard to the sovereignty of LegCo under BL, it is a jurisdiction that should only be exercised in a restrictive manner. The case is also the authority on the question of the appropriate remedy in respect of a statutory provision whose content contravenes BL. The learned judge cited the Privy Council case of *The Bahamas District of the Methodist Church in the Caribbean and the Americas v Speaker of the House of Assembly* (2002-2003) 5 ITELR 311 and adopted the observation of Lord Nicholls that "[t]he primary and normal remedy in respect of a statutory provision whose content contravenes the Constitution is a declaration, made after the enactment has been passed, that the offending provision is void";

(g) there is as yet no decided case in which a resolution of LegCo is alleged to be *ultra vires* of the empowering provision[16]; and

(h) if any judicial review proceedings were to be instituted in respect of a resolution of LegCo, neither LegCo[17] nor the President[18] should be a respondent. The question of who could be made the respondent

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14 For example: under section 87(2) of the Disability Discrimination Ordinance (Cap. 487); section 7 of the Legal Aid Ordinance (Cap. 91); section 48A of the Employees' Compensation Ordinance (Cap.282); and section 8 of the District Councils Ordinance (Cap. 547).

15 For example: under section 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1); and section 3(3) of the Fugitive Offenders Ordinance (Cap. 503).

16 On *ultra vires* of delegated legislation made by the Administration, there are numerous cases. The leading case perhaps remains that of *Singway Co Ltd. v Attorney General* [1974] HKLR 275, in which notes inserted in an outline zoning plan were held *ultra vires* section 4(1) of the Town Planning Ordinance (Cap. 131).

17 Reason is given in paragraph 4.40(b) of this Chapter.

18 The President, who is a Member of LegCo, cannot be made a respondent in legal proceedings against LegCo as a whole. He enjoys the same privileges and immunities as other Members under BL and the Legislative Council (Powers and Privileges) Ordinance (Cap. 382). Section 23 of Cap. 382 further provides that the President is not subject to the jurisdiction of any court in respect of the lawful exercise of any power conferred on or vested in the President by or under Cap. 382 or RoP. Only when it is alleged that the President's exercise of power is unlawful, could the jurisdiction of the court be invoked.

would not be easy to answer if it is the Administration who seeks judicial review of the resolution.

4.41 The Subcommittee agrees with the Bar that judicial review could be considered only when it is necessary to do so. The Subcommittee has pointed out that in the rare occasion where there is a need to seek judicial review by the Administration of a resolution with legislative effect passed by LegCo, the question of who would be the proper respondent would have to be resolved. In this regard, the Subcommittee does not accept the Administration's view in paragraph 4.38 above. The Subcommittee takes the view that the Administration should thoroughly study the legal and procedural issues involved as soon as practicable.

4.42 The Subcommittee has considered whether judicial declaration is applicable to resolving differences over the interpretation of legislative provisions between LegCo and the Administration. The Subcommittee notes that the court has jurisdiction to give advisory opinion, in the form of a declaration. However, the court is disinclined to act as legal adviser in giving an advisory opinion on the correct interpretation of a legislative provision if there is no legal issue or dispute before it.

Chapter 5 - Recommendations

5.1 Having studied the views of the Administration, the Bar and legal adviser to the Subcommittee on various issues relating to LegCo's power to amend subsidiary legislation, the Subcommittee has come to a number of observations and recommendations. This Chapter sets out the Subcommittee's observations and recommendations.

Observations

5.2 The Subcommittee has the following observations -

(a) the Subcommittee and the Administration agree that in general, matters of principle should be provided in the primary legislation whereas matters of operational details or procedures should be set out in the subsidiary legislation. When delegating its power to an Executive Authority or other body to make subsidiary legislation, LegCo has in accordance with BL 73(1) the power and duty to control the exercise of delegated legislative powers;

(b) the Administration has not always stated in LegCo briefs on subsidiary legislation whether LegCo has the power to amend or repeal the subsidiary legislation concerned, but, as the case of the Amendment Order has demonstrated, can allow LegCo to remain unaware of its position up to the last moment;

(c) the vetting procedure set by section 34 of Cap. 1 has functioned effectively and there is no problem with the provisions of the section;

(d) where the empowering provision in the principal ordinance restricts LegCo's power to amend the subsidiary legislation made thereunder, amending the principal ordinance could be considered so as to expand the scope of LegCo's vetting power. However, it is difficult for LegCo Members to introduce an amendment bill for the purpose given the provisions in BL 74; and

(e) the inclusion in the principal ordinance a provision for the disapplication of sections 34 and 35 of Cap. 1 altogether will give rise to grave concern that LegCo has no means to scrutinize the exercise of delegated legislative powers.

Recommendations

5.3 The Subcommittee has made the following recommendations -

(a) in the absence of a statutory definition of the expression "legislative effect", there is difficulty in determining whether an instrument has legislative effect and therefore is subsidiary legislation. In view of this difficulty, the Administration's approach since October 1999 of including in the legislation an express provision declaring or clarifying the character of the instrument in cases of doubt (paragraph 4.18 above refers) should continue;

(b) in delegating its power to an Executive Authority or other body to make subsidiary legislation, LegCo should consider thoroughly, when formulating the principal ordinance, the level of scrutiny it wishes to preserve over the subsidiary legislation that would be made, having regard to the proviso under section 34(2) of Cap. 1, the overall statutory scheme and the purpose of the principal ordinance; any proposal to disapply the scrutiny procedures provided for in sections 34 and 35 of Cap. 1 must be considered with extreme care;

(c) to avoid incident similar to the case of the Amendment Order from happening again, the Administration should enhance its communication with LegCo. The Administration should state clearly in each LegCo Brief on subsidiary legislation to be tabled in the Council its position as to whether LegCo has the power to amend or repeal the subsidiary legislation concerned. Whenever LegCo and the Administration differ on the interpretation of an empowering provision which limits LegCo's power to amend the subsidiary legislation, the Administration should inform LegCo in the first instance its position with full legal reasons in order that both sides could engage in deliberations in a timely, open and transparent manner; and

(d) if warranted, judicial review may be considered as a means to resolve the differences between LegCo and the Administration or settle their disputes. However, if the dispute is about a resolution with legislative effect passed by LegCo and the Administration wishes to institute judicial review proceedings against the resolution, the question of who should be the proper respondent would need to be resolved. In this regard, the Administration should thoroughly study the legal and procedural issues involved and take appropriate legislative measures, if required. LegCo should follow up on the

matter.

Council Business Division 2
Legislative Council Secretariat
9 February 2012

A summary of the controversy over the resolution to repeal the Country Parks (Designation) (Consolidation)(Amendment) Order 2010

On 25 May 2010, the Executive Council advised and the Chief Executive ("CE") ordered that the Country Parks (Designation) (Consolidation) (Amendment) Order 2010 ("Amendment Order") should be made under section 14 of the Country Parks Ordinance (Cap. 208) ("CPO"). The Amendment Order sought to amend the Country Parks (Designation)(Consolidation) Order (Cap. 208 sub. leg. B) to replace the original approved map in respect of the Clear Water Bay Country Park ("CWBCP") with a new approved map, for the purpose of excising an area of five hectares from the original approved map of CWBCP to form part of the proposed South East New Territories ("SENT") Landfill Extension. The Amendment Order was intended to come into operation on 1 November 2010.

2. The Amendment Order was gazetted on 4 June 2010 and tabled in the Legislative Council ("LegCo") on 9 June 2010. At the House Committee meeting on 11 June 2010, Members formed a subcommittee to study it. Under the chairmanship of Hon Tanya CHAN, the Subcommittee on the Country Parks (Designation) (Consolidation)(Amendment) Order 2010 ("the Country Parks Subcommittee") had examined the environmental impact arising from the operation of the existing SENT Landfill including odour management and control measures, monitoring of such measures, the delivery of waste by refuse collection vehicles and the justifications for and alternatives to extending the SENT Landfill. Members of the Subcommittee considered that the Administration had not effectively resolved the odour problem in Tseung Kwan O, and noted that local residents and the Sai Kung District Council ("SKDC") objected to the proposed extension of the SENT Landfill. At the meeting on 29 July 2010, the Subcommittee requested the Administration to draw up concrete odour abatement measures with implementation timetable in order to secure the support of SKDC and local residents. Otherwise, the Subcommittee might consider repealing the Amendment Order. The Subcommittee passed a motion on 27 September 2010 requesting CE to repeal the Amendment Order.

3. In its response to the enquiry of the Chairman of the Country Parks Subcommittee on the legal consequence of the repeal of the Amendment Order, the Administration advised that according to section 23 of the Interpretation and General Clauses Ordinance (Cap. 1), "where an Ordinance repeals in whole or in part any other Ordinance, the repeal shall not revive anything not in force at the time at which the repeal takes effect". As such, if the repeal of the Amendment Order took effect before its commencement date on 1 November 2010, the original approved map of CWBCP would not be affected. However, pursuant to the statutory mechanism under section 13(4) of CPO, the new map CP/CWB^{D}

approved by CE in Council and signed by the Country and Marine Parks Authority had been deposited in the Land Registry. There might be a problem unless a new map would be available under section 15 of CPO to replace the map CP/CWB^{D} deposited at the Land Registry.

4. The Country Parks Subcommittee did not subscribe to the Administration's view. The Subcommittee took note of the view of its legal adviser that the map CP/CWB^{D} deposited at the Land Registry was meant for public inspection and the depositing of the map itself had no legislative effect. The Amendment Order sought to replace the original approved map in respect of CWBCP with the new approved map. If the Amendment Order was repealed before the commencement date, the original approved map remained effective.

5. At its meeting on 4 October 2010, the Country Parks Subcommittee resolved that a motion be moved by its Chairman to repeal the Amendment Order. On 5 October 2010, the Administration provided to the Subcommittee its written view on the legal implications concerning repeal of the Amendment Order. At the meeting on 6 October 2010, the Administration informed the Subcommittee that LegCo did not have the power to repeal the Amendment Order. The Administration's view is based on its interpretation of section 14 of CPO which provides that "Where the CE in Council has approved a draft map under section 13 of the Ordinance, and it has been deposited in the Land Registry, CE shall, by order in the Gazette, designate the area shown in the approved map to be a country park."

6. The Administration argued that since the provision is cast in mandatory terms, CE is bound to make the Amendment Order. According to the Administration, LegCo when exercising its power to amend under section 34(2) of Cap. 1 has the same power as the original maker of subsidiary legislation and is subject to the same statutory constraints as the original maker. As CE does not have the power to repeal the Amendment Order, LegCo equally has no such power. If the Amendment Order is repealed, the repeal would have no effect in law and the Amendment Order would remain in force.

7. In the view of the Legal Adviser to the Council, by virtue of the interpretive provisions of Cap. 1, the expression "amend" includes "repeal". Section 34(2) of Cap. 1 gives LegCo the power to amend, and therefore repeal, subsidiary legislation. The limitations imposed by section 14 of CPO only apply to CE in making an order of designation and there is nothing in section 14 that rules out repeal. The arguments of the Administration would render the power of negative vetting by LegCo nugatory.

8. The Country Parks Subcommittee was concerned about the Administration's legal views, which seemed to suggest that CE but not LegCo had the ultimate power to make laws, and that LegCo might not have the power to vet or amend certain subsidiary legislation subject to the negative vetting procedure. As this would have constitutional and legal implications, the Subcommittee expressed grave reservations about the Administration's legal position on the matter. After deliberations, the Subcommittee reaffirmed its decision to move by its Chairman a motion to repeal the Amendment Order.

9. The Country Parks Subcommittee reported on its deliberations to the House Committee on 8 October 2010. The House Committee noted the decision of the Subcommittee to move by its Chairman a motion to repeal the Amendment Order. The House Committee also noted the different views held by the Subcommittee and the Administration on the legal effect of repealing the Amendment Order and the lawfulness of the repeal of the Amendment Order. Members of the Country Parks Subcommittee expressed grave dissatisfaction with the Administration's way of handling the Amendment Order in that the Administration had not raised its legal views until the Subcommittee had decided to move a motion to repeal the Amendment Order. Members considered that such an approach had adversely affected the relationship between the Executive and the Legislature. The House Committee noted that Hon Tanya CHAN, Chairman of the Country Parks Subcommittee, had given notice to move a motion to repeal the Amendment Order at the Council meeting on 13 October 2010.

The President's ruling on the proposed resolution to repeal the Amendment Order

10. In considering whether Hon Tanya CHAN's proposed resolution was in order under the Rules of Procedure, the President had invited the Administration to comment on the proposed resolution and Hon Tanya CHAN to respond to the Administration's comments. The President also referred to the advice of LA and an independent legal opinion from Senior Counsel Mr Philip Dykes. Details of the views considered are provided in the President's ruling in **Annex I**. The legal opinion given by Mr Philip Dykes is in **Annex II**.

11. In gist, the President held the opinion that LegCo has the constitutional duty to scrutinize subsidiary legislation and correspondingly has the power to amend or repeal when it is appropriate to do so. The statutory provisions in any ordinance which grant powers to make subsidiary legislation should not in the absence of clear words or manifest legislative intention be interpreted to mean that the Council has abdicated its control over the exercise of those powers.

12. In the President's opinion, the powers which CE should have, in the discharge of his duty under section 14 of CPO, include the power to determine when an order for the designation should be made and come into effect, and to initiate a motion in the Council to repeal the order which he has already made, if there are good reasons to do so. The repeal of the Amendment Order by the Council's exercise of its power to amend under section 34(2) of Cap. 1 will not go against the mandatory obligations of CE as signified by the expression "shall" in section 14 of CPO. Section 14 of CPO does not rule out CE's power to move a motion of repeal. The President was also satisfied that repeal of an order made under section 14 will not lead to non-compliance with the requirements in CPO or result in unreasonable consequences.

13. Based on the above analysis, the President was of the opinion that neither section 14 of CPO nor CPO when read as a whole expresses or manifests any contrary intention that the power of the Council to amend, and therefore repeal, subsidiary legislation under section 34 of Cap. 1 has been displaced. He ruled that Hon Tanya CHAN's proposed resolution was in order and could be moved.

Motion to repeal the Amendment Order

14. The proposed resolution to repeal the Amendment Order ("the Resolution") was moved and passed by the Council at its meeting of 13 October 2010. The Resolution was published in the Gazette on 15 October 2010 as Legal Notice No. 135 pursuant to section 34(5) of Cap. 1.

Further developments

15. On 4 January 2011, the Chief Secretary for Administration ("CS") wrote to the President informing the Administration's decision not to seek judicial review of the Resolution. In his letter, CS reaffirmed the Administration's view that the Resolution lacked legal basis. The Administration has decided not to take out judicial review application on the grounds that it attaches great importance to maintaining a good relationship between the Executive Authorities and the Legislature. CS also stated that the dispute between the Government and LegCo on CPO and the repeal of the Amendment Order relates mainly to the interpretation of CPO and does not involve any fundamental difference on the constitutional issue of LegCo's powers and functions under the Basic Law. Moreover, the Administration has decided to alter the proposal of the SENT Landfill Extension to dispense with the use of the country park land concerned as landfill site. CS has emphasized that the Administration's decision should not be taken to mean that the Government accepts what LegCo did has sufficient legal backing.

16. At the House Committee meeting on 7 January 2011, Members noted CS's letter and expressed grave concern over the manner in which the Administration questioned the legality of the Resolution. Members stressed that LegCo had, by virtue of the powers vested under Cap. 1, followed the due process in the passage of the Resolution to repeal the Amendment Order. The Resolution was published in the Gazette in accordance with section 34(5) of Cap. 1 and has the full force of law. Members considered it necessary that the President should write to CS and convey their concern. The President wrote to CS on 11 January 2011 to convey Members' concern.

President's ruling on proposed resolution to repeal the Country Parks (Designation) (Consolidation) (Amendment) Order 2010 proposed by Hon Tanya CHAN

Hon Tanya CHAN has given notice to move a proposed resolution to repeal the Country Parks (Designation) (Consolidation) (Amendment) Order 2010 ("Amendment Order") at the meeting of the Legislative Council ("LegCo") on 13 October 2010. In considering whether the proposed resolution is in order under the Rules of Procedure, I have invited the Administration to comment on the proposed resolution and Hon Tanya CHAN to respond to the Administration's comments, and sought the advice of Counsel to the Legislature ("Counsel"). I have also obtained a legal opinion from Senior Counsel Mr Philip Dykes.

Country Parks (Designation) (Consolidation) (Amendment) Order 2010

2. According to the LegCo Brief on the Amendment Order, the latter seeks to amend the Country Parks (Designation) (Consolidation) Order (Cap. 208 sub leg B) to replace the original approved map in respect of the Clear Water Bay Country Park ("CWBCP") with a new approved map, for the purpose of excising the area to form part of the proposed South East New Territories ("SENT") Landfill Extension from the original approved map of CWBCP. The Amendment Order is to come into operation on 1 November 2010.

3. The Administration explains in the LegCo Brief that the SENT Landfill will be full by around 2013-2014. The Environmental Protection Department ("EPD") has proposed to extend the lifespan of the SENT Landfill by another six years by expanding it by 50 hectares ("ha"). The 50 ha extension includes an encroachment of about five ha of land of CWBCP[1]. EPD consulted the Country and Marine Parks Board ("CMPB") several times since December 2005 on the encroachment. Taking into account the advice of CMPB, the Director of Agriculture, Fisheries and Conservation, as the Country and Marine Parks Authority ("the Authority"), sought permission from the Chief Executive ("CE") in Council to invoke section 15 of the Country Parks Ordinance (Cap. 208) to refer the original approved map of CWBCP to the Authority for replacement by a new map so as to excise from the original approved map the encroachment area. A draft replacement map was prepared by the Authority in accordance with Cap. 208 and made available for public inspection[2].

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[1] The other areas covered by the 50 ha extension are 30 ha of piggy-backing over the existing SENT Landfill and 15 ha of the adjoining Tseung Kwan O Area 137.

[2] The draft replacement map was made available for public inspection for a period of 60 days with effect from 14 November 2008.

4. According to the LegCo Brief, CMPB rejected all objections to the draft map on 30 March 2009 after having considered all the written objections, the opinions of those attending the hearing sessions, the Authority's representations and EPD's explanations. CE in Council approved the draft map of CWBCP on 30 June 2009 under section 13(1) of Cap. 208. In accordance with section 13(4) of Cap. 208, the Authority deposited the new approved map in the Land Registry on 17 July 2009. On 25 May 2010, the Executive Council advised and CE ordered that the Amendment Order should be made under section 14 of Cap. 208.

Hon Tanya CHAN's proposed resolution

5. Hon Tanya CHAN's proposed resolution seeks to repeal the Amendment Order.

The Administration's comments

6. The Administration submits that it is unlawful for a LegCo Member to propose a resolution to repeal the Amendment Order as to do so would be inconsistent with the power to make the Amendment Order under section 14 of Cap. 208. The Administration's view is based on its interpretation of the provisions of sections 28(1)(b) and 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1). Section 28(1)(b) provides that "no subsidiary legislation shall be inconsistent with the provisions of any Ordinance", while section 34(2) provides that "[w]here subsidiary legislation has been laid on the table of the Legislative Council under subsection (1), the Legislative Council may, by resolution passed at a sitting of the Legislative Council …… provide that such subsidiary legislation shall be amended in any manner whatsoever consistent with the power to make such subsidiary legislation……". By virtue of section 3 of Cap. 1, the expression "amend" in section 34(2) includes "repeal".

7. The Administration argues that section 14 of Cap. 208 is cast in mandatory terms by using the term "shall", which means "must" in this context. CE's power under the section is limited and he is bound to implement the decision of CE in Council under section 13 by making the Amendment Order. Further, it could not have been the statutory intention and the purpose of Cap. 208 to empower CE to repeal the Amendment Order and undo the elaborate statutory process for the designation which covers several stages, i.e. preparation of a draft map; public consultation; adjudication of objections; submission and approval of the draft map; deposit of the approved map; and designation of country park, as set out in sections 8 to 14 of Cap. 208. Hence, CE's power to make the Amendment Order does not include the power to repeal it. "Amend" in section 28(1)(b) of Cap. 1 in the context of Part III

(i.e. sections 8 to 15) of Cap. 208 does not include "repeal" as there is contrary intention in Cap. 208.

8. The Administration also argues that CE's power to designate is expressed as a duty imposed by section 14 of Cap. 208. CE shall designate the area shown in the new map as it has been earlier approved by CE in Council and deposited in the Land Registry. If he were not to do so, it would be contrary to his duty and in fact would be in defiance of the statutory scheme and, in particular, the decision of CE in Council under section 13 of Cap. 208. The Administration considers that if CE is allowed to refuse to order the designation resulting from the elaborate statutory process or to repeal it, it would lead to the absurd consequence that CE would be empowered to undo the statutory process and set at naught years of work carried out in accordance with the statutory provisions.

9. The Administration submits that CE cannot on his own initiative repeal the Amendment Order without going through the same statutory process. LegCo therefore equally has no power to stop altogether the area shown in the new approved map from becoming a country park, as LegCo's power to amend the Amendment Order must be in a manner "consistent with the power to make such subsidiary legislation", as provided in Cap. 34(2) of Cap. 1. While CE has the power to change the commencement date of the Amendment Order as this would not be inconsistent with section 14 of Cap. 208, any amendment on the commencement date cannot be made in such a way as to make the Amendment Order inconsistent with the statutory duty imposed by Cap. 208. Hence, although LegCo can amend the commencement date of the Amendment Order, LegCo cannot amend it in such a way as to negate the statutory duty imposed on CE by Cap. 208. Neither can LegCo amend the commencement date in such a way as to make the Amendment Order inconsistent with that statutory duty imposed by Cap. 208, or frustrate the statutory duty imposed by Cap. 208, or delay the date of commencement unduly.

10. The Administration has also advanced other supporting arguments in its submission which I shall not repeat here. A copy of the submission is in the **Appendix**.

Hon Tanya CHAN's comments

11. Hon Tanya CHAN submits that the Administration's position that LegCo does not have the power to repeal the Amendment Order is premised solely on its interpretation of section 14 of Cap. 208, with which she does not agree. She further submits that the explicit limitations imposed by section 14 are that before CE could make any order to designate, two conditions must have been fulfilled, i.e. a draft map has been approved under section 13; and the approved map has been deposited in the Land Registry. Under section 14, CE has no power to designate any area other than an area shown in the

approved map to be a country park or to designate any area shown in the approved map not to be a country park. In this sense, CE has no discretion in the designation, and for this matter, CE must make the designation by order in the Gazette.

12. Miss CHAN considers that the statutory duty alleged to have been imposed on CE by the word "shall" in section 14 of Cap. 208 could not have overridden CE's duty to decide on government policies under the Basic Law ("BL"). In her view, it is plainly absurd to see section 14 as having imposed an overriding duty on CE that requires him to ignore everything else.

13. Miss CHAN points out that section 15 of Cap. 208 allows CE to refer an approved plan under section 13 to the Authority for it to be replaced by a new map or amended. In such a case, provisions contained in sections 8 to 14 of Cap. 208 will apply, and there is no requirement that such a referral could only be made after a designation under section 14 has been made. She considers that it is lawful for CE to make the referral without making a designation after a map has been approved under section 13.

14. Miss CHAN also considers that the Administration has made an unwarranted assumption that any repeal of an order of designation whether in operation or not is a refusal to order designation and would undo the elaborate statutory process and set at naught years of work carried out in accordance with the statutory provisions. In her view, repeal of a designation will legally be no bar to the making of another order to designate the area shown in the same map approved by CE in Council under section 13 to be a country park.

My opinion

15. By virtue of Article 66 of BL, LegCo is the legislature of the Hong Kong Special Administrative Region ("HKSAR"). Under Article 73(1) of BL, the powers and functions of LegCo include "to enact, amend or repeal laws in accordance with the provisions of this Law and legal procedures". The difference of views between the Administration and the subcommittee formed to scrutinize the Amendment Order as represented by its Chairman, Hon Tanya CHAN, brings into focus the constitutional role and power of LegCo to intervene under the negative vetting procedure as stipulated by section 34 of Cap. 1.

16. In his legal opinion, Mr Philip Dykes, SC, has stated the applicable constitutional principle that "LegCo must have effective oversight of the exercise of all legislative power and relevant legislation governing the exercise of law-making powers, such as the IGCO [Cap. 1] should be construed so as to give effect to this principle". He points out that the use of statutory provisions to delegate law-making power to third parties, such as government officials, public bodies and private bodies, is necessary for effective law making, and

that there should be no constitutional objection to CE or CE in Council possessing such devolved authority, as long as LegCo can scrutinize the laws made under such authority. In his view, "[t]o construe a statute in such a way as to permit the donee of a legislative function the power to legislate and be immune from such scrutiny would be to undermine the constitutional legislative authority of LegCo". For this reason, section 34 of Cap. 1 is important because it is one of the means by which LegCo controls the product of a devolved legislative authority.

17. Mr Dykes also makes the point that it would be anomalous to the extreme if LegCo identified a legal flaw in the decision-making process leading to the making of subsidiary legislation but could not do anything about it. He considers that the legislature should be the body primarily responsible for quality control of the laws made in the legislative process, and that it should be able to rectify as of right perceived defects and not have to wait upon the courts for remedies.

18. My view is that LegCo has the constitutional duty to scrutinize subsidiary legislation and correspondingly has the power to amend or repeal when it is appropriate to do so. The statutory provisions in any ordinance which grant powers to make subsidiary legislation should not in the absence of clear words or manifest legislative intention be interpreted to mean that LegCo has abdicated its control over the exercise of those powers. It is only reasonable that Members will be wary if LegCo's power to intervene in the process of law making under delegated authority were to be restricted beyond what is permissible under BL.

19. My view set out above is in agreement with my predecessor's ruling made in May 1999 when the effect of section 34(2) of Cap. 1 on the power of LegCo to amend a piece of subsidiary legislation was considered. The issues then considered concerned the admissibility of a motion proposed to repeal certain clauses of a bill scheduled to an order made by CE under section 2 of the Public Revenue Protection Ordinance (Cap. 120). My predecessor has usefully set out the relevant principles that should apply: "[i]n a normal case where the Legislative Council is seeking to amend a piece of subsidiary legislation under section 34(2) of Cap. 1, as long as the proposed amendment conforms with requirements of the Rules of Procedure, the Legislative Council would be able to amend by way of repeal, addition or variation of the subsidiary legislation in question. However, because of the requirement in section 34(2) of Cap. 1 that an amendment to a piece of subsidiary legislation can only be made consistent with the power to make the subsidiary legislation in question, the true extent of the Legislative Council's power to amend the Order has to be examined in the context of the ……Ordinance".

20. The key question that I have to consider now is whether in the passage of Cap. 208, in particular section 14, LegCo had agreed to abdicate its control over the power for CE to make orders under section 14, which reads: "[w]here

the Chief Executive in Council has approved a draft map under section 13 and it has been deposited in the Land Registry, the Chief Executive shall, by order in the Gazette, designate the area shown in the approved map to be a country park".

21. To assist me in answering this question, I have made comparison with the relevant provisions of the Town Planning Ordinance (Cap. 131) which deal with the notification in the Gazette of plans submitted by the Town Planning Board and approved by CE in Council. Section 9(5) of Cap. 131 stipulates: "[o]n such approval being given [by CE in Council] the approved plan shall be printed and exhibited for public inspection at such place as the Board may consider suitable and the fact of such approval and exhibition shall be notified in the Gazette". Counsel advises me that upon approval by CE in Council, the statutory process for approval of plans is complete. Such notices in the Gazette are not subject to section 34 of Cap. 1 and LegCo has no power of intervention.

22. I have asked myself whether in the case of section 14 of Cap. 208, LegCo similarly has no role to intervene when an order is made under section 14. I find that there is an obvious difference between the two cases. Unlike plans approved by CE in Council under section 9(2) of Cap. 131, the statutory process for the designation of a country park is not yet complete when CE in Council approves the draft map. The final step in the statutory process for the designation of a country park is for CE to make a designation order under section 14 of Cap. 208. Such designation is made by an order published in the Gazette which is subject to LegCo's scrutiny under section 34(2) of Cap. 1. This is different from making a notification in the Gazette of the approved plans as in the case under Cap. 131. I am satisfied that the publication of an order made under section 14 of Cap. 208 is not merely for the purpose of notification.

23. The Administration contends that because of the use of the word "shall", section 14 of Cap. 208 has imposed on CE a duty that he must discharge without any discretion. CE must make an order when the two aforesaid conditions specified in the section have been met, and cannot do anything to stop or amend the designation, including moving a motion to repeal an order he has made under that section. The Administration argues that the power to repeal under section 28(1)(c) of Cap. 1 is thus displaced by contrary intention in section 14. These interpretations clearly render the negative vetting procedure ineffective and deprive LegCo of its function of overseeing the exercise of powers in relation to subsidiary legislation. I have to be satisfied that section 14 does manifest a contrary intention that the statutory provisions that empower CE and LegCo to amend, and therefore repeal, an order made under the section should not apply.

24. In my view, the word "shall" in section 14 of Cap. 208 means three things. First, it stipulates that CE must make the designation, when the two

conditions in the section have been met. This is the duty that the Administration has emphasized. Second, it prescribes the only way the designation should be made i.e. by order in the Gazette. Third, CE must designate the area shown in the approved map to be a country park. He cannot designate any area other than an area shown in the approved map to be a country park or to designate any area shown in the approved map not to be a country park.

25. Counsel advises me that any statutory duty should carry with it powers incidental to the discharge of that duty unless such powers are displaced by clear wording in or necessary implication of the statute which imposes such duty. The authority responsible for discharging the duty has to ensure that the duty is properly discharged in pursuance of the purposes of the relevant statutory provisions. In my opinion, the powers which CE should have, in the discharge of his duty under section 14, include the power to determine when an order for the designation should be made and come into effect, and to initiate a motion in LegCo to repeal the order which he has already made, if there are good reasons to do so. Moreover, the repeal of the Amendment Order by LegCo's exercise of its power to amend under section 34(2) of Cap. 1 will not go against the mandatory obligations of CE as signified by the expression "shall". I am not convinced that section 14 of Cap. 208 rules out CE's power to move a motion of repeal.

26. I have also asked myself whether repeal of an order made under section 14 of Cap. 208 will lead to non-compliance with the requirements in Cap. 208, or result in such unreasonable consequences that any reasonable person would construe that retaining the power to repeal such an order could not have been the original intention of LegCo. The Administration argues that the repeal of the Amendment Order would put the statutory process for the designation that has gone before to naught. Counsel advises me that if the Amendment Order is repealed by LegCo, the Amendment Order would be taken as if it had never been made, and CE may make another order under section 14 of Cap. 208.

27. I note that section 15(1) of Cap. 208 allows CE in Council to refer an approved map made under section 13 to the Authority for it to be replaced by a new map or amended. In such a case, provisions in sections 8 to 14 of Cap. 208 will apply. Counsel advises that there is no requirement in Cap. 208 that such a referral may only be made after an order under section 14 has been made by CE. In view of Counsel's advice, I am satisfied that repeal of an order made under section 14 will not lead to non-compliance with the requirements in Cap. 208 or result in unreasonable consequences. If the Administration fails to persuade LegCo not to exercise its power to repeal an order made by CE under section 14 for the designation of a country park, referrals may be made under section 15(1) after taking into account the views of LegCo. Such a scenario may be considered as an example of how LegCo may effectively oversee the exercise of delegated legislative power by the

executive authorities.

28. As a result of my above analysis, I am satisfied that neither section 14 of Cap. 208 nor Cap. 208 when read as a whole expresses or manifests any contrary intention that the power of LegCo to amend, and therefore repeal, subsidiary legislation under section 34 of Cap. 1 has been displaced.

My ruling

29. I rule that Hon Tanya CHAN's proposed resolution is in order under the Rules of Procedure and may be moved at the LegCo meeting on 13 October 2010.

(Jasper TSANG Yok-sing)
President
Legislative Council

11 October 2010

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7 October 2010

Urgent by email

Clerk to the Legislative Council
Legislative Council Building
8 Jackson Road
Central
Hong Kong

(Attn : Ms Miranda HON)

Dear Ms Hon,

Proposed resolution under section 34(2) of the Interpretation and General Clauses Ordinance

I refer to your letter of 5 October 2010 inviting the Administration's comments on whether, according to the Administration's assessment, the proposed resolution to be moved by Hon Tanya CHAN to repeal the Country Parks (Designation) (Consolidation) (Amendment) Order 2010 will have any charging effect as described in Rule 31(1) of the Rules of Procedure.

As explained to you over the phone yesterday, the Administration wishes to make detailed submission to the President of the Legislative Council not only on the charging effect but also on the other legal issues concerning the proposed resolution.

I attach herewith the English version of the Administration's detailed response which has been prepared in consultation with Mr Michael Thomas, Q.C., S.C. and should be grateful if you would place the same before the President for his consideration. As you may be aware, the Administration has, at the request of Hon Tanya CHAN, provided a summary of Mr Michael Thomas, Q.C., S.C.'s advice on this matter to the Subcommittee to facilitate its discussion at its meeting held on 6 October. A copy of the said summary is also attached for the President's reference.

As regards the point about charging effect, I confirm that it is the assessment of the Administration that the proposed resolution does not have any charging effect.

I take this opportunity of thanking you for your kind indulgence in extending the deadline until 2 p.m. today. We are still working on the Chinese version of our Submission and I will let you have same as soon as possible. Many thanks.

Yours sincerely,

(Cathy WONG)
Deputy Law Officer (Civil)(Advisory)

Encl.

c.c. Director of Administration

Member's Proposed Repeal of the
Country Parks (Designation) (Consolidation) (Amendment)Order 2010

Administration's Submission to the President of the Legislative Council

This submission addresses the following question:

Is it lawful for a Member of the Legislative Council ("LegCo") to propose a resolution to repeal the Country Parks (Designation)(Consolidation) (Amendment)Order 2010, L.N. 72 of 2010?

Summary of our submission

The Administration as advised by Mr Michael Thomas, QC, SC is firmly of the view that the answer is in the "**Negative"** as to do so would be inconsistent with the power to make subsidiary legislation under s.28(1)(b) and s.34(2) of Cap. 1 -

- S.14 of Cap. 208 is cast in mandatory terms by using "shall" which means "must" in this context.
- The power of the CE under s.14 of Cap. 208 is limited and he is bound to implement the decision of the CE in Council under s.13 by making the Designation Order.
- It could not have been the statutory intention and purpose of Cap. 208 to empower the CE to undo the elaborate statutory process by repealing the Designation Order.
- The power of the LegCo to amend under s.34(2) of Cap. 1 the Designation Order must be in a manner "consistent with the power to make such subsidiary legislation".
- Power to amend under s.28(1)(c) and s.34(2) of Cap. 1 is subject to contrary intention of the specific Ordinance (i.e. Cap 208 in the present case) and "amend" does not include "repeal" upon a proper construction of the statutory context of Part III of Cap. 208.
- It follows that the LegCo's power to amend is no wider than the power the CE has under Cap. 208.
- There are fundamental flaws in the argument that since the Designation Order has not yet commenced, it can be repealed without affecting any designation.
- Any purported repeal of the Designation Order is a purported repeal of the designation of the country park.

- It is not disputed that the LegCo can seek to amend the commencement date of the designation for a reasonable period of time as the CE so can do and hence the negative vetting power of LegCo is not rendered nugatory.

<u>Our detailed submission</u>
Common grounds

2. For present purpose, we assume the following propositions not to be in dispute:

   (a) that L.N. 72 of 2010 is "subsidiary legislation" within the meaning of s. 34(1) of the Interpretation and General Clauses Ordinance (Cap 1) ("Designation Order");

   (b) that the power of repeal conferred by s. 34(2) upon LegCo is as broad in scope as, but is no broader than, the scope of the power of the Chief Executive (CE) under section 14 of the Country Parks Ordinance (Cap 208);

   (c) that upon the tabling of any resolution proposing to repeal the L.N. 72 of 2010, the President of LegCo is bound to consider and to form an opinion on what is essentially a matter of law, namely whether the proposed repeal is consistent with the power of the CE to make the L.N. 72 of 2010; and

   (d) that if the President forms an opinion that the proposed repeal is inconsistent, it will follow that no amendment can be lawfully proposed by a member.

The issue

3. The current issue to be addressed is, therefore, whether the proposed repeal of the L.N. 72 of 2010 is consistent with the power to make the L.N. 72 of 2010 within the meaning of s. 34(2) of Cap 1.

Inconsistency with the power to make subsidiary legislation and section 34(2) of Cap 1

4. S.28(1)(b) of Cap.1 provides that "no subsidiary legislation shall be inconsistent with the provisions of any Ordinance". S. 34(1) of Cap. 1 empowers the LegCo to amend subsidiary legislation tabled before it "in any manner whatsoever consistent with the power to make such subsidiary legislation".

5. The proposed repeal of the L.N. 72 of 2010 is objectionable because it is inconsistent with the provisions of s. 14 of Cap 208, and hence, is not "consistent with" the power to make the subsidiary legislation L.N. 72 of 2010 and goes beyond the power conferred by s. 34(2) of Cap 1.

The statutory scheme for the designation

6. The designation by L.N. 72 of 2010 was an act of the CE performed pursuant to s. 14 of Cap 208.

7. S.14 of Cap 208 does not provide the CE with unlimited power to make an order designating any area in an approved map to be a country park nor an option to refuse to designate a new plan once it has been approved by the CE in Council.

8. The designation order only forms part of the statutory scheme provided under Part III of Cap 208, and any designation of any area in an approved map (including amendment/replacement of an approved map) as a country park must follow the statutory scheme.

9. The statutory scheme for the designation of a country park under Part III of Cap 208 comprises the following stages –

(A) Preparation of a draft map stage

(a) The Authority (i.e. Director of Agriculture, Fisheries and Conservation) shall consult the Country and Marine Parks Board on the preparation of a draft map (s. 8 of Cap 208).

(B) Public consultation stage

(b) A draft map prepared by the Authority shall be published by notice in the Gazette (s.9(2)(a) of Cap 208);

(c) A copy of the notice shall be published in 3 issues of one English language and 2 Chinese language daily newspaper and be displayed in some conspicuous part of the proposed country park (s.9(2)(b) of Cap 208);

(d) A copy of the draft map shall be made available for public inspection at the offices of the Government for a period of 60

days from the date of the publication of a notice (s. 9(3) of Cap 208).

(e) Any new development to be carried out within the area of the proposed country park shall require an approval of the Authority (s. 10 of Cap 208).

(C) Adjudication of objections stage

(f) During the 60-day public inspection period, any person aggrieved by the draft map may send to the Authority and the Secretary of the CMPB a written statement of his objection (s.11(1) of Cap 208);

(g) The Secretary of the CMPB shall fix a time and place for the hearing of the objection by the CMPB (s. 11(4) of Cap 208);

(h) The CMPB shall make a determination after hearing an objection whether it may –

(i) reject the objection in whole or in part; or
(ii) direct the Authority to make amendment to the draft map to meet such objection in whole or in part. (s.11(6) of Cap 208).

(D) Submission and approval of the draft map stage

(i) The draft map (including a schedule of objections and representations made under s. 11) shall be submitted to the CE in Council for approval (s. 12 of Cap 208);

(j) The CE in Council, upon submission of a draft map under s. 12, shall -

(i) approve the draft map;
(ii) refuse to approve it; or
(iii) refer it to the Authority for further consideration and amendment.

(s. 13 of Cap 208)

(E) Deposit of the approved map stage

(k) The map approved by CE in Council shall be signed by the Authority and be deposited in the Land Registry (s. 13(4) of Cap 208).

(F) Designation of country park stage

(l) After the approval of the map by CE in Council and deposit of such map in the Land Registry, the CE shall by order in the Gazette, designate the area shown in the approved map to be a country park (s. 14 of Cap 208).

10. It is clear from the above that designating a country park is the final stage of the statutory process, following preparation of a draft map of the proposed country park, public consultation on the draft map, consideration of any objections raised in respect of the draft map by the CMPB, adjudication of the objections by CMPB and consideration regarding the approval of the draft map by the CE in Council.

11. The designation power of the CE under s.14 of Cap. 208 is limited. All that the CE can do under s.14 of Cap. 208 is to implement the decision made by the CE in Council under s.13 of Cap. 208 by ordering that the area shown in the approved map be designated as a country park. This coincides with the statutory wording in s. 14 of Cap 208, which provides that –

> "Where the Chief Executive in Council has approved a draft map under section 13 and it has been deposited in the Land Registry, the Chief Executive **shall**, by order in the Gazette, designate the area shown in the approved map to be a country park". (emphasis added)

12. Put simply, the CE is **bound** (and has no option but to proceed) to make a designation under s.14 of Cap 208 where the CE in Council has approved a draft map and that such map has been deposited in the Land Registry. If s.14 of Cap 208 were to be construed otherwise, thereby allowing CE to refuse to order the designation resulting from the elaborate statutory process or to repeal it, the work of the Authority in preparing, and of the CE in Council in approving a draft map, and also the deposit of the signed map in the Land Registry would have no legal effect, and the public consultation through the objections system as well as the adjudication made by the CMPB in respect of any objections raised in relation to a draft map would also be rendered futile. Such a construction would lead to the

absurd consequence that the CE would be empowered to undo and set at nought years of work carried out in accordance with the statutory provisions. That simply could not have been the statutory intention and purpose of Cap 208.

LegCo's powers

13. The factual background leading to the making of the L.N. 72 of 2010 is set out at the Annex for easy reference.

14. S. 34(2) of Cap. 1 provides that "[w]here subsidiary legislation has been laid on the table of the Legislative Council under subsection (1), the Legislative Council may, by resolution passed at a sitting of the Legislative Council … provide that such subsidiary legislation shall be amended in any manner whatsoever consistent with the power to make such subsidiary legislation …". Because of the definition in s. 3 of Cap. 1, 'amend' must include 'repeal'.

15. Taken on its own, the phrase 'amended in any manner whatsoever' in s. 34(2) may suggest that LegCo has a wide power to stop or delay the newly mapped area from becoming a country park in the present case. But the very next words have a severely limiting effect on that power. LegCo's resolution may only amend (or repeal) the L.N.72 of 2010 'in a manner …. consistent with the power to make such subsidiary legislation.' 'Consistent' must mean in this context 'compatible'. So the intention is that LegCo can only do what the CE is himself empowered or enabled to do.

16. That takes one back to s. 14 of Cap. 208 and its context. First, the CE's power to designate is expressed as a duty imposed by the section. The CE shall (which means in the context 'must') designate the newly mapped area as it has been earlier approved by the CE in Council, and shown in the signed and deposited plan. If he were not to do so, it would be contrary to his duty and in fact, would be in defiance of the statutory scheme and in particular, the decision of the CE in Council under s. 13 of Cap 208. Similarly, without going through the same statutory process, the CE cannot on his own initiative repeal the Designation Order made under s.14 of Cap 208 in accordance with the decision made by the CE in Council in respect of an approved map under s. 13 of Cap 208.

17. The exercise of the LegCo's power under s. 34(2) of Cap 1 in the present case shall be consistent with the power of the CE to make the L.N. 72 of 2010. Put simply, LegCo has no power to stop altogether the newly

mapped area from becoming a country park (by resolving to repeal the order). The simple reason is: CE could not do that and neither can LegCo.

18. Cap. 208 provides a mechanism for changing a designation of a country park under s.15. This involves going through the statutory procedure set out in ss. 8 to 14 including consultations and objections. The CE cannot simply repeal a designation order under s.14. He must follow the statutory procedure as required by s.15.

Response to LegCo legal adviser's views (as contained in LC Paper No. LS99/09-10 dated 5 October 2010)

Statutory duty on CE to order the designation by gazette

19. Under **s.28(1)(b)** of the Interpretation and General Clause Ordinance, Cap.1:

> "Where an Ordinance **confers power on a person to make subsidiary legislation**, the following provisions shall have effect with reference to the subsidiary legislation- …. **no subsidiary legislation shall be inconsistent with the provisions of any Ordinance**".

20. As stated in para. 12, s. 14 of Cap. 208 imposes a duty on the CE, as maker of the order in the Gazette to designate the area shown in the approved map to be a country park. The CE, as the maker of that order (as subsidiary legislation), cannot amend (or repeal) the order in such a way as to make it inconsistent with that statutory duty imposed by Cap.208, i.e. to designate the area approved by the CE in Council as country park.

21. LegCo's legal adviser accepted that: "under section 14 CE has no power to designate any area other than an area in the approved map to be a country park or to designate any area not to be a country park. In this sense, CE has no discretion in the designation. **For this matter, CE must make the designation by order in the Gazette**. These are the explicit limitations imposed by section 14." (*emphasis added*)

22. The CE clearly has the power to change the commencement date of the Designation Order as this would not be inconsistent with the provision in s. 14. But even so the amendment on the commencement date cannot be in such a way as to make the Order inconsistent with the statutory duty

imposed by Cap.208. For example, the Designation Order cannot be amended to commence only in the far distant future, for the CE has the statutory duty to designate the area by order in the Gazette within a reasonable period.

Power of LegCo to amend the designation order gazetted

23. It is common ground that the power of LegCo to amend the designation order gazetted must be **in a manner "consistent with the power to make such subsidiary legislation"** (s.34 (2) of Cap.1).

24. In other words, the power LegCo has to amend any subsidiary legislation must be consistent with, and therefore not wider than, the power the maker of the subsidiary legislation has.

25. Such a limitation on LegCo's power pursuant to s.34 of Cap.1 is trite and is not disputed. See President's ruling dated 3 May 1999 on proposed resolutions under s. 34(2) of Cap 1 to amend the Public Revenue Protection (Revenue) Order 1999 and advice of LegCo Assistant Legal Adviser in respect of the mechanism for toll variation under s. 36 of the Tate's Cairn Tunnel Ordinance (Cap. 393) and s. 55 of the Eastern Harbour Crossing Ordinance (Cap. 215) contained in paras. 6 & 7 of LC Paper No. CB(1)2150/09-10 and para. 4 of LC Paper No. CB(1)2153/04-05.

26. Applying s.34 of Cap.1, in seeking to amend the designation order gazetted, LegCo's power must be consistent with, and therefore not wider than, the power the CE has under Cap.208. Therefore, LegCo:

    (1) cannot amend (including repeal) the order in such a way as to negate the statutory duty imposed on CE by Cap.208, i.e. to designate the area approved by the CE in Council as country park;

    (2) can amend the commencement date of the order. But even so the amendment on the commencement date cannot be in such a way as to make the order inconsistent with that statutory duty imposed by Cap. 208. Even so, the amendment of the commencement date cannot be done in such a way as would frustrate the statutory duty imposed by Cap. 208, or delay the date of commencement unduly (i.e. beyond a reasonable time).

The alleged distinction between "the order in the gazette" and "the designation"

27. The argument put forward by LegCo's legal adviser, as we understand it, is as follows:

    (1) The limitations on the LegCo's power to amend the gazetted order imposed by section 14 of Cap.208 "only require that the consequence of a repeal is not to affect **any** designation of country park" (para.4 of LegCo's paper).

    (2) The LegCo's power to amend (including repeal) is subject to the limitations mentioned above. There is nothing in section 14 that rules out repeal so long as the limitations set out above are not infringed.

    (3) The arguments of DoJ would render the power of negative vetting by LegCo **nugatory**.

    (4) The gazetted order has not yet come into operation. The commencement date stated in section 1 is 1 November 2010. This means that the designation made under the Amendment Order is not yet **effective**. Any repeal of the Amendment Order will not be a repeal of any designation. The designation made in respect of plan CP/CWB^{B} approved on 18 September 1979 by Governor in Council remains in full force.

Not any designation of country park, but designation of the area approved by CE in Council as country park

28. With respect, the above views of the LegCo's legal adviser have ignored the statutory duty imposed by s.14 on the CE. It is not just to order in the gazette the designation of any area approved by CE in Council as country park (such as the designation of the approved plan back in 1979). The duty imposed by s.14 on the CE is to "**by order in the Gazette**, designate **the area shown in the approved map** to be a country park." (i.e. **the map CP/CWB^{D} approved on 30 June 2009 by the CE in Council**). If the LegCo purports to repeal the gazetted order, it would definitely affect and defeat the designation of **the area shown in the approved map** (approved by CE in Council on 30 June 2009) to be a country park.

Gazetted order already effective to create the designation

29. LegCo's legal adviser seems to take the view that **because the commencement date has not yet arrived**, the gazetted order is not legally effective to create the designation. Since the order is not effective to create the designation, the repeal of the gazetted order itself does not have the effect of repealing the designation. Therefore there is no infringement of the limitations on the power of the LegCo in making any amendment (including repeal).

30. With respect, there are fundamental flaws in this analysis:

(1) It would be illogical to split the gazetted order from the designation. The CE designates a country park by making the order in the gazette. The only purpose and effect of the gazetted order is the designation of the country park as approved by CE in Council. There is nothing in Cap.208 supporting such a distinction or creating additional hurdles to clear before the gazetted order can effect the designation. There is nothing in Cap.208 or Cap.1 or elsewhere providing that the gazetted order can only effect a designation upon, say, completion of negative vetting by LegCo, or upon the order coming into operation on the commencement date.

(2) The designation of the country park is already complete, valid and effective in law once the CE's order is gazetted. The fact that it does not come into operation immediately upon publication of the gazette but only upon the commencement date on 1 November 2010 does not in any way affect its validity and effectiveness as the instrument to designate the area approved by CE in Council as country park.

(3) The provision in the gazetted order of a specific commencement date itself cannot possibly be the decisive factor creating a fundamental difference to the power on the part of the CE or the LegCo to amend (including repeal) the order or the designation.

(4) Whether the CE or LegCo can amend or repeal the Designation Order does not depend on whether the Designation Order has come into operation or not. For under Cap.208, the CE **shall** gazette the order to implement the decision of the CE in Council. He has no power to do anything to prevent the

implementation of the approved plan by designation, though he has power to select an appropriate date on which the change shall take effect.

(5) The legislative process to designate must have been completed at the time when the Designation Order is published in gazette. It is valid and effective in law, albeit not having yet come into operation. Otherwise, there is no point to talk about amendment or repeal. One amends or repeals a piece of legislation which is already complete in law, not something in the making. This is also borne out by s.32 of Cap.1, which shows that postponing the operation of an Ordinance does not mean the Ordinance is incomplete or ineffectual.

> "(1) Where an Ordinance is to come into operation on a day other than the day of its publication in the Gazette, a power to do anything under the Ordinance may be exercised at any time after its publication in the Gazette.
>
> (2) An exercise of a power under subsection (1) is not effective until the provision in the Ordinance to which it relates comes into operation unless the exercise of the power is necessary to bring the Ordinance into operation."

(6) Nor can the fact that the gazetted order is subject to negative vetting affect the validity and completeness of the gazetted order as subsidiary legislation. This is clear from the wording of s.34(2) of Cap.1 itself:

> "(2) Where subsidiary legislation has been laid on the table of the Legislative Council under subsection (1), the Legislative Council may, by resolution passed at a sitting of the Legislative Council held not later than 28 days after the sitting at which it was so laid, provide that such subsidiary legislation shall be amended in any manner whatsoever consistent with the power to make such subsidiary legislation, and if any such resolution is so passed the subsidiary legislation shall, **without prejudice to anything done thereunder**, be **deemed to be amended as from the date of publication in the Gazette of such resolution**.

(7) Any purported repeal of the gazetted order is a purported repeal of the designation of country park.

Negative vetting power of LegCo not rendered nugatory

31. Negative vetting power of LegCo is not rendered nugatory. As mentioned, without being inconsistent with the provisions of s.14 of Cap.208, LegCo can seek to amend the commencement date of the designation.

"Amended" in s.28(1)(c) of Cap. 1 does not in the context of Part III of Cap. 208 include "repealed"

32. LegCo's legal adviser further argues that the CE, as the maker of the Designation Order, has power to repeal because of s. 28(1)(c) of Cap 1. This argument fails to take into account that the exercise of the power of s. 28(1)(c) of Cap 1 is premised on the original power of the specific ordinance and is in fact subject to any contrary intention as provided in such specific ordinance (see s. 2(1) of Cap 1 and s. 28(1)(b) of Cap 1). In the present case, the exercise of the power in s. 28(1)(c) by the CE (if required) is subject to the intention of Cap 208. S.15 provides a statutory mechanism for changing a designation of a country park and replacement of an approved plan which displaces any general power. In any event, any power of repeal derived from ss. 28(1)(c) or 34(2) would still be subject to the restriction imposed on the CE, as maker, under s.14 and the statutory framework of Cap. 208. Consequentially, "amended" in s.28(1)(c) and "amend" in s.34(2) do not in the context of Part III of Cap. 208 include "repealed" or "repeal".

Whether "excision" of land from country park a permissible exercise of power under s.15 of Cap. 208 ?

33. It has been suggested that according to the construction of Cap 208, land within the boundary of a country park can only be extended, but not excised. With respect, we do not agree. It is clearly provided in s. 15 that the CE in Council may refer any map approved by him under s. 13 to the Authority for replacement of a new map or for amendment and there is nothing in Cap. 208 which suggests that such replacement or amendment can only be used for the extension of the boundary. Hence, such replacement or amendment of the map can be for the extension or excision of any map approved under s. 13 of Cap 208.

34. A similar issue was dealt with in the case *Lai Pun Sung v the Director of Agriculture, Fisheries and Conservation and the Country and Marine*

Parks Board, HCAL 83/2009. In that case, the applicant challenged that the land previously designated as country park could not be switched to other land-use, like landfill purpose. The court in considering the construction of s. 15(1) of Cap 208 said that -

> "...the only point that I need to consider in the present proceedings is whether, assuming it can be demonstrated or it has been demonstrated that there is an overriding need for use of the land as a landfill site, it is still beyond the power of the Chief Executive in Council under section 15(1) to refer the matter to the Authority for a replacement or amendment of the map for the country park designating its parameters. As I said, there is nothing in the Ordinance which suggests that this cannot be done."

Department of Justice

7 October 2010

Annex

Factual background leading to the making of the L.N. 72 of 2010

1. The making of the Designation Order in the L.N.72 of 2010 in the present case forms the last step of the statutory scheme for the designation of the area in the map approved by CE in Council as the Clear Water Bay Country Park (CWBCP).

2. After many many rounds of discussion with the District Council and CMPB (including site visits to SENT Landfill) and numerous items of improvement works done by the Administration, the CMPB on 11 September 2008 recommended the excision of the proposed encroached area from the approved map of the CWBCP by invoking the statutory procedure under section 15 of Cap 208.

3. Pursuant to section 15 of Cap 208, CE in Council on 21 October 2008 referred the original approved map of the CWBCP to the Authority for replacement of a new map to excise the relevant 5 hectares of land affected by the proposed SENT Landfill Extension from the approved map.

4. In accordance with sections 8 and 9 of Cap 208, the draft replacement map was prepared and made available for public inspection for a period of 60 days with effect from 14 November 2008.

5. A total of 3,105 objections (the bulk of them are proforma objections) were received during the objection period. By exercise of the power of the CMPB under section 11(6) of Cap 208, the hearing of the objections to the draft map took place in six sessions in March 2009. After considering all the written objections, the views of those attending the hearing sessions, the Authority's representations and the explanation of the Environmental Protection Department (EPD) as the project proponent, the CMPB agreed to the excision of the 5 hectares of land from the CWBCP and rejected all objections on 30 March 2009 and issued a position statement to objectors while notifying them in writing of its decision. In response to the CMPB's

recommendation for enhancing the facilities of the CWBCP to provide better enjoyment for park visitors as compensatory measures for the loss of five hectares of country park land, the Authority has suggested, and EPD has agreed to, implement the following enhancement measures -

(a) Ecological enhancement by inter-planting of native species in some 5 hectare of exotic woodland in the CWBCP to support various forms of wildlife;
(b) Upgrading of educational displays in the CWBCP Visitor Centre;
(c) Setting up of interpretative signs at Tai Hang Tun to provide better education facilities for park visitors; and
(d) Provision of guided tours at the Visitor Centre for the public.

6. Pursuant to section 12 of Cap 208, the draft map with the five hectares of land excised from the approved map together with the schedule of objections and representations made under section 11 were submitted to CE in Council for consideration.

7. On 30 June 2009, after considering the submission made under section 12 of Cap 208, CE in Council in exercise of the power under section 13(1)(a) of Cap 208 approved the draft replacement map.

8. According to section 13(4) of Cap 208, the replacement map approved by CE in Council under section 13(1) was deposited in the Land Registry on 17 July 2009.

9. On 25 May 2010, the CE ordered that the Country Parks (Designation)(Consolidation)(Amendment) Order 2010 should be made under section 14 of Cap 208 to designate the area in the replacement map approved by CE in Council as the CWBCP. The Designation Order in the legal notice (LN72/2010) was accordingly made and published in the Gazette on 31 May 2010.

10. The statutory scheme under Part III of Cap 208 (see paragraph 10 above) has all along been followed in the making of the Designation Order. In other words, the draft map had gone through the stages of

public consultation and adjudication of objection by the CMPB. It was also approved by the CE in Council and was deposited in the Land Registry. It comes to the last stage of the statutory scheme that designation shall be made by the CE in relation to the area in the map approved by the CE in Council as the CWBCP.

11. The foregoing reinforces our submission that the CE at this stage is bound, as he so did, to make a designation under s.14 of Cap 208 in respect of the area shown in the map no. CP/CWB$_D$ approved by the CE in Council as the CWBCP and it is not open to him nor the LegCo to undo the entire statutory process by repealing the Designation Order at this stage.

12. It is understood that no person would be pleased to have a waste disposal facility built or extended in his/her backyard. However, it is the hard fact that the SENT Landfill would reach its full capacity in the next 3 to 4 years and there would be a real waste disposal problem in Hong Kong as the SENT Landfill would reach its full capacity in 2013-14 and the alternative long term waste disposal facilities (such as the construction waste management facility) has yet to be in place. The Administration faces an imminent need to extend the SENT Landfill (including encroaching 5 hectares of land of the CWBCP situated next to it) so that the SENT Landfill extension could operate for six more years pending the introduction of alternative long term waste disposal facilities.

ADVICE CONCERNING A PROPOSED LEGCO MOTION TO REPEAL AN ORDER MADE UNDER S. 14 COUNTRY PARKS ORDINANCE

1. I have been instructed to advise the Secretariat of the Legislative Council ('Legco') on a topic of great importance and topicality. It is whether Legco has the power to repeal a statutory order made by the Chief Executive ('CE') under s.14 of the Country Parks Ordinance, Cap. 208 ('CPO').

2. That provision says: *Where the Chief Executive in Council has approved a draft map under section 13 and it has been deposited in the Land Registry, the Chief Executive shall, by order in the Gazette, designate the area shown in the approved map to be a country park.*

3. The CE has made an order under this section. It is the 'Country Parks (Designation) (Consolidation) (Amendment) Order 2010 [L.N. 72 of 2010]' (the Order').

4. The Administration says that Legco cannot repeal the Order. The Legal Adviser to Legco disagrees. There is an impasse. It is in these circumstances that I have been asked to advise as a matter of urgency because a Legco member may move to repeal the order next Wednesday and the President of Legco will have to rule on the legal basis for such a motion before then.

The Factual Background

5. The background to the issue can be taken shortly because, as will appear below, this problem has arisen because of the way a delegate has been given the power to make subsidiary legislation. The problem could re-occur in another statutory context if the same statutory formula for delegation was used.

6. The Government wants to extend a landfill site in the New Territories by carving out space in the Clearwater Bay Country Park for waste disposal activities. In order for the Administration to excise the proposed landfill site from the country park it must follow certain procedures in order to change the map that currently delineates the boundaries of the country park.

7. Maps of country parks are drawn up, scrutinized by the Chief Executive-in-Council under s. 13 CPO and, if approved, then deposited in the Land Registry. The provisions of s. 14 then come into play. After the map has been deposited in the Land Registry, the '[CE] shall, by order in the Gazette, designate the area shown in the approved map to be a country park'. The Order is the end product of this process.

8. The proposed extended landfill has met with objections from persons living nearby to the site. Some Legco members are against it too and hence the proposal to amend the Order by repeal proposed by the Hon. Tanya Chan next Wednesday.

Status of the Order and Legco's Power of Repeal

9. The Administration and the Legal Adviser to Legco both agree that the Order is a type of subsidiary legislation within the meaning of s. 3 Interpretation & General Clauses Ordinance, Cap. 1 ('IGCO') and, as such, must be laid before Legco under s. 34(1) IGCO for approval.

10. Under s. 34(2), Legco may choose to amend the subsidiary legislation if it wishes. 'Amend' is defined in s. 3 so as to include 'repeal' and so Legco, if it wants to reject the Order, has only to pass the motion of the Hon. Tanya Chan.

The Administration's Argument

11. The Administration says that Legco's power to amend under s. 34(2) is subject to an important rider, namely that the power to amend must be exercised in a 'manner whatsoever consistent with the power to make such subsidiary legislation'. In other words, if the power to make subsidiary legislation is subject to certain manner and form requirements, Legco must abide by those requirements and not go further than the original power conferred on the delegate to make subsidiary legislation.

12. In this case the CE must make the order after the acts of approval and depositing in the Land Registry under s.13. Section 14 imposes a duty on him to make an order when those requirements have been met. The limitation in s. 34(2) IGCO means that Legco is in no different position than the CE and, because he cannot refuse to

make an order, Legco cannot repeal an order. Legco's power is limited to amending the implementation provisions only, i.e. it can choose a different date from the one selected by the CE as the CE is given a relatively free hand in this regard by virtue of the commencement provisions of s. 38(4) IGCO which allow him to choose a commencement date.

Analysis

13. The starting point of any analysis of the issue must be Chapter IV, Part III of the Basic Law. Articles 66 and 73(1) are relevant. Article 66 provides that Legco shall be the legislature of the HKSAR and Article 73(1) requires Legco to 'enact, amend or repeal laws in accordance with the provisions of [the Basic Law] and legal procedures'. Together, these articles make Legco the only source of written law- i.e. ordinances and subordinate legislation-in the HKSAR, subject only to the preservation of compliant laws made by the colonial legislature under Article 8 Basic Law.

14. The CE is on the other hand, only responsible for implementing the Basic Law and other laws that are consistent with the Basic Law: see Articles 48(2).

15. The constitutional principle is therefore that Legco must have effective oversight of the exercise of all legislative power and relevant legislation governing the exercise of law-making powers, such as the IGCO should be construed so as to give effect to this principle. (Section 2A(1) IGCO states this principle of conformity as regards laws existing before 1997, which includes the IGCO itself.)

16. It is not disputed that effective law making requires, in many cases, the use of statutory provisions to delegate law-making power to third parties. Delegates can be Government officials, public bodies and even private bodies. There is no constitutional objection to the CE or the Chief Executive-in-Council possessing such devolved legislative authority, so long as Legco can scrutinise the product of such devolved authority. To construe a statute in such a way as to permit the donee of a legislative function the power to legislate and be immune from such scrutiny would be to undermine the constitutional legislative authority of Legco.

17. It is for this reason that s. 34 IGCO is important. It is one of the means by which the reserve legislative power of Legco--the power to recall the product of a devolved legislative authority is expressed. If the s. 34 IGCO scrutiny power cannot be construed to do this, then, in my opinion, it is inconsistent with the Basic Law. (In fact, I do not think that inconsistency exists, as will be made apparent below.)

Constitutional Anomaly: Judicial Power Wider than that of Legco

18. It is an accepted feature of our system of law that subsidiary legislation is amenable to judicial review on the ground that the donee of a limited legislative authority has exceeded the remit of the legislative power originally conferred. The principles on which courts operate are set out in Section 58 *Bennion Statutory Interpretation* (5th) at pages 254-262. Basically, the courts work on the principle that the will of the legislature, incorporating the will of an electorate, must be given recognition when delegates make subordinate legislative instruments and that the delegates must therefore keep within the boundaries set for them in the primary legislation.

19. It would be anomalous in the extreme if Legco identified a legal flaw in the decision-making process leading to the making of delegated legislation but could do nothing about it, but the judicial arm could intervene many months later on. The legislature should be the body primarily responsible for quality control of the product of its legislative processes and should be able to remedy as of right perceived defects and not have to wait upon the judiciary to exercise a remedial jurisdiction which is at bottom discretionary, meaning that a court may, because of delay and other factors, not always quash defective subordinate legislation which the legislature itself might have recalled by repeal or amendment when it was still in the legislative process.

20. The constitutional concern that the delegate has kept within his devolved legislative powers is one of the concerns of the UK Joint Committee on Statutory Instruments. This committee, established under Standing Orders of the House of Commons and House of Lords, is charged to consider subordinate legislation and one of the criteria in its terms of reference that calls for especial consideration of a piece of delegated legislation is that 'there appears to be a doubt whether it is intra vires or that it appears to make some

unusual or unexpected use of the powers conferred by the statute under which it is made' A judge in the Court of First Instance would use the same criterion when considering whether to grant an applicant leave to apply for judicial review. If satisfied that the donee of legislative powers had indeed overstepped the mark, the judge would normally go on to quash (but not always: see paragraph 19) the unlawful subsidiary legislation.

21. The same terms of reference contain other legal and non-legal criteria which are consistent with close oversight and retention of original authority, including criteria relating to fees and charges, limitations on rights of access to the courts, poor drafting and delay in bringing the particular piece of subsidiary legislation before Parliament. They likewise serve the wider public interest in ensuring that delegated legislation complies with the standards acceptable to legislators who entrusted the power to delegates in the first place. [The criteria used by this committee can be found at 6.2.16, *Craies on Legislation* (9th) at pages 310-311]

Legco Disapproval Inconsistent with Statutory Scheme

22. I see that the Administration makes the point that the process leading up to the making of the Order involved complex decision-making and public consultation and that it cannot have been the intention of the legislature to permit the CE to derail this process at the last minute by him not making the Order and, so the argument goes, Legco should not be able to do the same.

23. The answer to this is that if there are legal flaws in the decision-making process, then the end product of a complex administrative process may be quashed by a court. If Legco can intervene for the same reason at an earlier stage and before the delegated legislation is promulgated then that is all to the good.

24. There may be other good policy reasons for objecting to delegated legislation as identified in the criteria used by the UK Parliamentary body referred to in paragraph 20 above. The fact that these criteria exist does not mean that the power of amendment under s. 34(2) will necessarily be used. Legco can be trusted not to use the power unless there is a very good reason to use it. *Craies on Legislation* (9th) says that although it is common for resolutions for annulment of statutory instruments to be debated once or twice

in a Session of Parliament in the UK but they are very rarely passed and the last successful annulment that was contested was in 1979 (see 6.2.13.2 at page 308).

Close Analysis of Administration's Argument

25. The Administration's argument is that the 'manner' limitation in s. 34(2) is engaged. That is predicated on a 'power' to make subsidiary legislation. But, the Administration then says, the CE enjoys no discretion under s. 14 CPO. He has to make the order when the preconditions exist, i.e. approval of a map by the CE in Council, and its deposit in the Land Registry. He has a duty to make the Order.

26. If the CE makes the Order because he has to by virtue of a peremptory statutory rule in s. 14 then, arguably, no 'power' exists and, on the face of things, s. 34(2) is not engaged at all. However, I see that no one is suggesting that the Order is not subsidiary legislation as defined in s. 3 and I suppose that the reasoning for this may be that the word 'shall' in s. 14 CPO does not mean that the CE is absolutely required to make an Order in the sense that not making one would invalidate all that had gone beforehand. The requirement is directory only and not mandatory: see *Bennion* at Section 10, pages 44-57. This is, on one view, sufficient to categorise the making of an order under s. 14 as the product of a power and not a duty.

27. The alternative way of identifying a power is to treat the Chief Executive in Council and the CE together as authors of the Order. This accords with reality. If something was seriously amiss with the decision-making under s 13(1) CPO then, although the target of a judicial review would be the Order, the grounds of review would concentrate on the acts and omissions of the Chief Executive in Council. Putting it another way, it should not be possible for the real decision-maker behind a piece of delegated legislation to escape scrutiny by a purely formal statutory device whereby a third party is mandated to make the legislative instrument that incorporates the decision of the decision-maker.

28. The Administration may counter this argument by saying that it was the legislature that chose to construct sections 13 and 14 CPO in this way so that there was a formal separation between the decision to approve a draft map and the making of the legislative

instrument giving effect to that decision and, if that means that Legco has passed up the chance to scrutinize the Order, then that should have been foreseen when the CPO was before Legco in bill form.

29. The surrender of law-making powers to the executive may be permissible in countries where there are no clear constitutional rules on the respective functions of the legislature and the executive, but even then the devolution of legislative power without the possibility of recall is controversial and special oversight is required. In the United Kingdom, where Parliament is supreme and so can divest itself of law-making powers, provisions in an enabling Act that confer a power on a delegate to amend the enabling Act itself are called "Henry VIII clauses" because of their autocratic nature in by-passing Parliament. An important safeguard against their misuse is that it is accepted by the Government there that when such powers are used then the legislative products should generally be submitted to Parliament under the affirmative procedure to ensure a more exacting scrutiny: see *Craies on Legislation* at 6.2.3 at page 298 at fn. 41.

30. For the reasons outlined at paragraphs 13 to 17 above, I do not think that Legco could devolve the capacity to make written law and not retain the reserve ability to scrutinize the product of the delegate. If sections 13 and 14 CPO have that effect, then they are unconstitutional to that extent. However, as I will make clear later on in this advice, I do not think that it is necessary to go that far.

31. I agree with the Legal Adviser to Legco that if a power to make subsidiary legislation is engaged by s. 14 CPO then s. 28(1)(c) IGCO is engaged. That provision allows the maker of subsidiary legislation to amend it 'in the same manner by and in which it was made'. 'Amend' means repeal in this context.

32. The manner in which the Order was a simple executive act made was on the happening of the two conditions precedent, namely the approval of a draft and the depositing of it in the Land Registry. If the CE made the Order but, a week later, discovered that there had been serious non-compliance with the requirements of an earlier stage in the process, for example, at the s. 11 CPO objection stage, it is absurd to say that it is too late for him to do anything about it and that the Order must be promulgated and given effect, even though it is a sitting target for a later judicial review. In those

circumstances, the thing to do is either repeal the order or to encourage Legco to use its s.34 power to repeal it. (See 6.2.13.2 at fn. 75, page 308 in *Craies on Legislation* (9th) for a rare example of the Government moving that two orders should be annulled because it was conceded that they were defective.)

33. I have seen the Administration's counter-arguments on this point. They are at paragraph 32 of its submissions dated 7 October 2010. They are, with respect, somewhat convoluted and technical. The point made there is that the CE has a limited role as the donee of a simple subsidiary law-making power he can only make an order in the terms of a previous decision. That may be so but, as a delegate of legislative power, he is not a mere cipher.

34. If there are problems with the Order that only become apparent shortly after gazetting, I see no 'contrary intention' in the CPO that the CE must sit on his hands and let an unlawful legislative instrument sail on to a certain judicial review. Indeed, CE has a constitutional responsibility to implement the Basic Law and other laws under Article 48(2) Basic Law and that cannot mean that he has the responsibility to implement legislative instruments that are known by him to be legally defective.

35. There are two rules of interpretation in play here. Given the constitutional requirement that Legco should be the only author of written law in the HKSAR, there is a very strong presumption that that constitutional rule is engaged and that it was not the intention of the legislature to have the courts pick up the pieces if invalid subsidiary legislation slipped through the grasp of Legco because of the particular construction of a provision concerning the making of subordinate legislation. See Section 328 *Bennion* at 1042-1050: 'Unless the contrary intention applies, an enactment by implication imports any principle or rule of constitutional law (whether statutory or non-statutory) which prevails in the territory to which the enactment extends and is relevant to the operation of that enactment in that territory.' As I have said at paragraph 17 above, if this presumption appears to be displaced by a particular statutory provision then the legislation is almost certainly unconstitutional.

36. The other is the presumption against absurdity in the sense used in *Bennion* in Part XXI (pages 969-1008), that is to say avoiding inconvenient, anomalous and impracticable results. If there is an obvious problem with a piece of subsidiary legislation, then a

construction of a statute that allows the problem to be cured earlier, rather than later, when persons may have acted to their prejudice in relying on the legislative provision, is the construction to be preferred.

Consequences of Repeal of Order

37. The Order has not yet come into operation. This means that the designation made under the Order is not yet legally effective. The effect of repeal of the Order would be a reversion to the *status quo ante*, i.e. to the lawful designation of a country park made as long ago as, I understand, 1979. It would not have the effect suggested by the Administration of undoing the entire legislative scheme underpinning the original designation of the Clearwater Bay Country Park as a country park under the CPO.

Conclusion

38. I am of the view that the CE, limited as his role is as the delegate of a subordinate law-making power, could recall the Order using powers of amendment under s. 28(1)(c) IGCO and, indeed, would be obliged to recall the Order if he was satisfied that the Order was legally defective because he has a constitutional duty to implement the laws of the HKSAR which must mean implementing laws that conform with the Basic Law and the relevant principles of public law.

39. I believe that Legco has the same power of recall using powers of amendment under s. 34(2) and that, for the reasons identified above, any legislation that purports to deny such a power is inconsistent with the relevant provisions of the Basic Law requiring Legco to be responsible for all written law in the HKSAR.

40. The consequences of Legco repealing the Order will not be to dismantle the original designation order but will result in a reversion to it. The draft map deposited in the Registry incorporating the revised boundaries may remain on the files but it is not effective as it has not been gazetted.

41. This advice deals with the existence of a power to amend. It does not attempt to say how the power of amendment under s. 34 IGCO should be used. If it is used to derail legislative instruments that are

the product of prolonged and complicated legal processes merely because of a disagreement with some underlying policy, the power may generate tensions with the executive arm of government. The need for self-restraint is obvious and the criteria used by UK Joint Committee on Statutory Instruments to scrutinize delegated legislation reflect recognition of the fact that delegates must have room to pursue political objectives through delegated legislation.

Dated this: 9th October 2010

P. T. Dykes

Philip Dykes, S.C.

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

Membership list

Chairman	Dr Hon Margaret NG
Members	Ir Dr Hon Raymond HO Chung-tai, SBS, S.B.St.J., JP Dr Hon Philip WONG Yu-hong, GBS Hon LAU Kong-wah, JP Hon Emily LAU Wai-hing, JP Hon Cyd HO Sau-lan Dr Hon Priscilla LEUNG Mei-fun, JP Hon IP Kwok-him, GBS, JP Hon Tanya CHAN (Total : 9 Members)
Clerk	Mrs Sharon TONG
Legal Adviser	Mr KAU Kin-wah
Date	4 July 2011

Appendix III

A list of organizations which have been invited to give views on the issues of study by the Subcommittee

1. Hong Kong Bar Association

2. The Law Society of Hong Kong

3. Faculty of Law, The University of Hong Kong

4. Faculty of Law, The Chinese University of Hong Kong

5. School of Law, City University of Hong Kong

Appendix IV

A list of the documents which have been considered by the Subcommittee

Papers provided by the Administration

1. Delegation by the Legislature of the Power to Make Subsidiary Legislation to an Executive Authority or Other Body (LC Paper No. CB(2)1558/10-11(01))

2. Principles Underlying the Cases Quoted in the LegCo Secretariat's Information Paper LC Paper No. CB(2)852/10-11 (LC Paper No. CB(2)1558/10-11(02))

3. Supplementary Information on the Principles and Policies for Delegating Power to Make Subsidiary Legislation to an Executive Authority or Other Body (LC Paper No. CB(2)1974/10-11(01))

4. Power of Legislature to Amend Subsidiary Legislation - Differences between the Parliament of the United Kingdom and the Hong Kong Legislature (LC Paper No. CB(2)1974/10-11(02))

5. Administration's Response to the Views of the Hong Kong Bar Association dated 8 April 2011 (LC Paper No. CB(2)1974/10-11(03))

6. Administration's response to issues raised at the meeting of 10 June 2011 (LC Paper No. CB(2)2414/10-11(01))

Submission from the Hong Kong Bar Association

7. Views of the Hong Kong Bar Association
(LC Paper No. CB(2)1525/10-11(01))

Papers prepared by the Legislative Council Secretariat

8. Paper entitled "Appointment of a subcommittee to study issues relating to the power of the Legislative Council to amend subsidiary legislation" for the House Committee meeting on 21 January 2011 (LC Paper No. CB(2)852/10-11)

9. Judicial Review and the Legislative Council (LC Paper No. LS 73/10-11)

10. Information Note on remedial measures for subsidiary legislation not tabled in LegCo after gazettal (LC Paper No. LS 74/10-11)

Examples of including in an empowering provision the procedure to be followed in making and amending subsidiary legislation

According to the Administration, 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. For example, under section 73(2) of the Legal Practitioners Ordinance (Cap. 159), any rules made by the Council of The Law Society of Hong Kong 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 dispute resolution 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. and the Chief Executive ("CE") 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 CE.

Practices adopted by the Administration to deal with subsidiary legislation

For subsidiary legislation subject to negative vetting, notwithstanding section 28(3)(a) of Cap. 1 which allows subsidiary legislation to commence on the day of gazettal, it is the Administration's 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 scrutiny period (including possible extension if practicable), i.e. 28 days plus 21 days, from laying before the Legislative Council ("LegCo"), in order to enable Members to have sufficient time for scrutiny.

2. For subsidiary legislation subject to positive vetting, the Administration first gives notice of a motion to approve a piece of such subsidiary legislation. Once LegCo has decided to form a subcommittee to scrutinize the piece of subsidiary legislation, the current practice is for the Administration to withdraw the notice of the relevant motion. The Administration will give a fresh notice to move the motion after the relevant subcommittee has completed its scrutiny.

Chapter:	503	Title:	FUGITIVE OFFENDERS ORDINANCE	Gazette Number:	8 of 2002
Section:	3	Heading:	**Chief Executive in Council may apply Ordinance**	Version Date:	03/05/2002

(1) Subject to subsection (9), the Chief Executive in Council may, in relation to any arrangements for the surrender of fugitive offenders, by order- (Amended 71 of 1999 s. 3)

> (a) reciting or embodying the terms of the arrangements;
> (b) specifying the extent, if any, to which any relevant enactment specified in the order is to be repealed or amended,

direct that the procedures in this Ordinance shall apply as between Hong Kong and the place outside Hong Kong to which the arrangements relate, subject to the limitations, restrictions, exceptions and qualifications, if any, contained in the order.
(2) An order under subsection (1) shall be published in the Gazette and shall be laid on the table of the Legislative Council at the next sitting day after it is published.
(3) The Legislative Council may, within the period of 28 days beginning on the date it is laid, by resolution, repeal an order under subsection (1).
(4) If the period referred to in subsection (3) would but for this subsection expire-

> (a) after the last sitting before the end of a session or dissolution of the Legislative Council; but
> (b) on or before the day of the second sitting of the Legislative Council in the next session,

that period shall be deemed to extend to and expire on the day after that second sitting.
*(5) Before the expiry of the period referred to in subsection (3) or that period as extended by virtue of subsection (4), the Legislative Council may by resolution in relation to an order specified therein-

> (a) in the case of the period referred to in subsection (3), extend that period to the first sitting of the Legislative Council held not earlier than the twenty-first day after the day of its expiry;
> (b) in the case where the period referred to in subsection (3) has been extended by virtue of subsection (4), extend that period as so extended to the first sitting of the Legislative Council held not earlier than the twenty-first day after the day of the second sitting in that next session. (Replaced 8 of 2002 s. 24)

(6) A resolution under subsection (3) or (5) shall be published in the Gazette within 14 days after it is passed or such further period as the Chief Executive may allow. (Amended 71 of 1999 s. 3)
(7) An order under subsection (1) shall not come into operation before the expiry of the period within which the Legislative Council may under this section repeal the order.
(8) Without prejudice to the operation of subsection (7), an order under subsection (1) may specify that it shall come into operation on a day-

> (a) specified in the order; or
> (b) to be appointed by the Secretary for Security by notice in the Gazette.

(9) The Chief Executive in Council shall not make an order under subsection (1) unless the arrangements for the surrender of fugitive offenders to which the order relates are substantially in conformity with the provisions of this Ordinance. (Amended 71 of 1999 s. 3)
(10) Any relevant enactment specified in an order under subsection (1) is hereby repealed or amended-

> (a) to the extent specified in the order; and
> (b) with effect on the day on which the order comes into operation.

(11) (Repealed 25 of 1998 s. 2)
(12) A copy of an order under subsection (1) shall be conclusive evidence that-

(a) the arrangements for the surrender of fugitive offenders to which the order relates are substantially in conformity with the provisions of this Ordinance; and
(b) the procedures in this Ordinance apply in the case of any place outside Hong Kong to which the order relates.

(13) Where a provision of any enactment makes any reference to any relevant enactment which has been repealed or amended under subsection (10), that provision shall be read and have effect with such modifications as may be necessary to take account of such repeal or amendment and, accordingly, that reference may, where appropriate, be read and have effect as if it were a reference to this Ordinance or to the arrangements for the surrender of fugitive offenders to which the order under subsection (1) which gave rise to such repeal or amendment relates. (Amended 25 of 1998 s. 2)
(14) Where any arrangements for the surrender of fugitive offenders cease to relate to, or become related to, a place outside Hong Kong, the Chief Executive may, by notice in the Gazette, amend the order under subsection (1) which relates to those arrangements to specify- (Amended 71 of 1999 s. 3)

(a) that those arrangements have ceased to relate to, or have become related to, as the case may be, that place; and
(b) the date on which the event referred to in paragraph (a) occurred.

(15) Sections 34 and 35 of the Interpretation and General Clauses Ordinance (Cap 1) shall not apply to a notice under subsection (14).
(16) In this section-
"relevant enactment" (有關成文法則) means-

(a) any Ordinance relating to the surrender of fugitive offenders;
(b) any imperial enactment,

and, without prejudice to the definition of "Ordinance" in section 3 of the Interpretation and General Clauses Ordinance (Cap 1), includes any part or provision of any such Ordinance; (Replaced 25 of 1998 s. 2)

"sitting" (會議), when used to calculate time, means the day on which the sitting commences and only includes a sitting at which subsidiary legislation is included on the order paper.

Note:
*** For the transitional provision relating to this subsection as amended by section 24 of the Extension of Vetting Period (Legislative Council) Ordinance 2002 (8 of 2002), see section 25 of that Ordinance.**

Examples of subsidiary legislation where the Legislative Council's power to amend may be restricted or there is controversy as to whether the subsidiary legislation is subject to amendment by the Legislative Council

Subsidiary legislation in respect of which the Legislative Council's ("LegCo") power to amend may be restricted

Notice under section 55 of Eastern Harbour Crossing Ordinance (Cap. 215) ("EHCO") (e.g. L. N. 37 of 2005)

Under section 55 of EHCO, the tolls which may be collected shall be those specified in the Schedule to EHCO. The tolls specified in the Schedule may be varied by agreement between the Chief Executive ("CE") in Council and the New Hong Kong Tunnel Limited, or in default of agreement, by submission of the question of the variation of tolls to arbitration. Under section 55(5) and (6) of EHCO, the tolls shall be varied in compliance with such agreement or award. The Commissioner for Transport ("C for T") shall by notice in the Gazette, as soon as is practicable after such agreement or arbitration award, amend the Schedule to EHCO.

2. According to section 34(2) of Cap. 1, LegCo's amending power of subsidiary legislation has to be consistent with the power to make such subsidiary legislation. As the power of C for T to make the Notice is restricted by section 55(5) and (6) of EHCO and does not cover the determination of toll levels and the timing for implementation of new tolls, LegCo's power to amend this Notice is similarly restricted. In other words, there is little room for LegCo to amend the Notice other than minor technical amendments. Hence, LegCo may not repeal the Notice as the exercise of such power would be inconsistent with the power to make such subsidiary legislation.

Notice under section 36 of Tate's Cairn Tunnel Ordinance (Cap. 393) ("TCTO") (e.g. L.N. 67 of 2010)

3. The procedures for toll variation under section 36 of TCTO is the same as that provided under section 55 of EHCO. Under section 36 of TCTO, the tolls specified in the Schedule may be varied by agreement between CE in Council and the Tate's Cairn Tunnel Company Limited, or in default of agreement, by submission of the question of the variation of tolls to arbitration. Under section 36(6) and (7) of TCTO, the tolls shall be varied in compliance with such agreement or award and C for T shall by notice in the Gazette, as soon as is practicable after such agreement or arbitration award, amend the Schedule to TCTO. Hence, there is little room for LegCo to amend the Notice except for

minor technical amendments or to repeal the Notices as the exercise of such power would be inconsistent with C for T's power to make such Notice.

Controversy as to whether the subsidiary legislation is subject to amendment by LegCo

Order made under section 14 of the Country Parks Ordinance (Cap. 208) ("CPO")

4. Section 14 of CPO provides that where CE in Council has approved a draft map under section 13 and it has been deposited in the Land Registry, CE shall, by order in the Gazette, designate the area shown in the approved map to be a country park. CE's order is considered the final step in an elaborate process for designating an area to be a country park. This process begins with the preparation of a draft map (section 8) which may be inspected by the public (section 9), followed by the hearing of objections (section 11) by the Country and Marine Parks Board and its submission of the draft map (together with a schedule of objections and amendments) to CE in Council for approval (sections 12 and 13). Once the draft map has been approved and deposited, CE is required to publish an order in the Gazette to designate the relevant area to be a country park (section 14). An order published by CE under section 14 is subsidiary legislation and is subject to amendment by LegCo. The controversy over LegCo's power to repeal the Amendment Order is set out in Appendix I.

Order made under section 15 or section 16(8) of the Marine Parks Ordinance (Cap. 476)

5. A similar process for the designation of a marine park is set out in sections 7 to 15 of the Marine Parks Ordinance (Cap. 476). The process begins with the preparation of a draft map (section 7) which is available for inspection at the Land Registry (section 8). Any person proposing new development must seek approval from the Country and Marine Parks Authority ("CMPA") and may appeal to the Administrative Appeals Board against CMPA's decision (sections 10 and 11). Meanwhile, CMPA will consider objections by persons aggrieved by the draft map (section 12), and submit the draft map (together with a schedule of objections and amendments) to CE in Council for approval (sections 13 and 14). Under section 15, where CE in Council has approved the draft map and it has been properly deposited in accordance with the prescribed requirements, CE shall, by order in the Gazette, designate the area shown in the approved map to be a marine park or marine reserve. Section 16(8) imposes a similar requirement on CE in respect of an approved replacement map. An order published by CE under section 15 or section 16(8) is subsidiary legislation and is subject to amendment by LegCo. Since the relevant provisions of the Ordinance

are similar to sections 8 to 14 of CPO, the Administration may doubt LegCo's power to repeal in the light of its interpretation of the provisions of CPO.

Examples of delegating powers to make subsidiary legislation in Hong Kong

The following examples are cited by the Administration -

(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 of Hong Kong pursuant to section 73 of the Legal Practitioners Ordinance (Cap. 159);

(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 Western Harbour Tunnel Company Limited 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).

Appendix X

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, 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	- 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	- 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	- 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,	- 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, *inter alia*: (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)
	any provision."[15] - 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]		after they are made.[19]	Parliament. These aspects concern, *inter alia*, (i) Canada's federal-provincial or (ii) international affairs (same as above) or injustice/undue hardship to any person/body.[20]
4. Legislative vetting				
(i) Guidelines on which vetting procedure to use (if at all	- The HC Information Office states that the type of vetting mechanism "will usually be prescribed in the parent Act."[21] - Craies on Legislation: the	- Subject to specified exceptions or where a certain parent Act specifies	- All "regulations" will be subject to the negative vetting mechanism under the RDA.[30] RDA provides no	- 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)
used)	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] - 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	otherwise, legislative instruments are subject to the negative vetting mechanism under the LIA (see mechanism below).[29] - No noticeable guidance is found on when the authorities will consider using positive instead of negative vetting.	exceptions to its application. See (ii) below however. - 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	be subject to the negative vetting mechanism under the SIA.[33] - No noticeable guidance is found on when the authorities will consider using positive instead of negative vetting.

	UK	Australia (federal)	New Zealand	Canada (federal)
	regulations which increase taxes or charges."[25] - 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		New Zealand Government generally agreed with the committee's recommendations.[32]	

	UK	Australia (federal)	New Zealand	Canada (federal)
	instruments.[28]			
(ii) No vetting	- 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]	- 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	- 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	- 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, *inter alia*, 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]	
(iii) Negative vetting	- 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 Gazatte unless the House of Representatives "disallows" it in accordance with the RDA.[41]	revoke it in accordance with the SIA.[42]
(iv) Positive vetting	- 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]
(v) Power to amend subsidiary legislation	- 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)
	- 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.			regulation while scrutinising it.[51]
5. Relevant statistics	- 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	- 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]	- 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]	- 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/l07.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&sbpidx=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",

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).

[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/l07.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/l07.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).

[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 LRRA. 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/l07.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/l07.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/l07.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 LRRA (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&sbpidx=1&Language=E&Mode=1).

A summary of issues of concern examined by the Subcommittee to Examine the Implementation in Hong Kong of Resolutions of the United Nations Security Council in relation to Sanctions

The House Committee agreed at its meeting held on 8 October 2004 to form a subcommittee to examine the arrangement for implementing in Hong Kong the sanctions imposed through resolutions of the Security Council of the United Nations ("the UN Sanctions Subcommittee"). The UN Sanctions Subcommittee had studied during the 2004-2008 legislative term a number of legal and constitutional issues relating to the arrangement of implementing UN sanctions in Hong Kong, including the constitutional basis of the current regulation-making power conferred on the Chief Executive ("CE") to give effect to the Ministry of Foreign Affairs's ("MFA") instructions and the Legislative Council's ("LegCo") constitutional role or the absence of such a role under the United Nations Sanctions Ordinance (Cap. 537) ("UNSO").

LegCo's constitutional role as the law-making body in the Hong Kong Special Administrative Region ("HKSAR")

2. The UN Sanctions Subcommittee was gravely concerned that section 3(5) of UNSO might have deprived LegCo of its constitutional role in scrutinizing and, where necessary, amending subsidiary legislation, thereby placing the legislative powers in the hands of the executive government. As the purpose of the regulations made under section 3(1) was to fulfil Hong Kong's international obligations to implement UN sanctions, members were keen to ascertain the constitutionality of the current arrangement, lest the regulations made under UNSO might be challenged as being legally ineffective if the statutory basis on which they had been made was unconstitutional.

3. In considering the constitutional role of LegCo, the UN Sanctions Subcommittee had made reference to the Basic Law ("BL") 16, 17 and 19 on the separation of the executive, legislative and judicial powers respectively; as well as BL 73 which defines the function of LegCo as "to enact, amend or repeal laws in accordance with the provisions of this Law and legal procedures". The UN Sanctions Subcommittee also noted the view of Professor Yash Ghai, former Sir Y K Pao Chair of Public Law at the University of Hong Kong, that while "there is interaction between the executive and the legislature, each has its own institutional autonomy" and that "the principle of the separation of powers underlies BL". His conclusion was that "the power to scrutinize and if necessary, amend subsidiary legislation is vested with LegCo"; and "an Ordinance which takes away the power of LegCo to vet or amend subsidiary legislation is void".

4. In its written response on Professor Yash Ghai's views to the UN Sanctions Subcommittee, the Administration agreed that there was a division of powers and functions among various organs of the HKSAR under BL, but took the view that "BL does not institute a rigid separation of powers". The Administration stated that before the reunification on 1 July 1997, neither the British nor the Hong Kong systems were based on a rigid separation of powers. The absence of a rigid separation of powers in BL was therefore consistent with the theme of continuity to ensure a smooth transition. The Administration referred to the Court of Appeal's decision in *HKSAR v David Ma [1997] HKLRD 761* in which it was highlighted, inter alia, that both the Joint Declaration and BL carried the overwhelming theme of a seamless transition.

Delegation of legislative power and scrutiny of subsidiary legislation

5. Another issue of concern pursued by the UN Sanctions Subcommittee was whether it was proper for LegCo to delegate the regulation-making power to the executive government and to exclude itself from the vetting of subsidiary legislation made under UNSO. In this respect, members noted Professor Yash Ghai's view that the power to make laws was granted to LegCo and that "BL gives no power to make laws to CE, although it gives a considerable role to CE in the legislative process" such as the signing or veto on bills. In fact, those national laws as listed in Annex III of BL were to be applied locally by way of promulgation or legislation, not by direct application. In short, he considered that the intention for adopting this method was to "maintain the integrity and coherence of the Hong Kong legal system based on the common law. The implication is that all the normal processes of law making must be adhered to, including that relating to subsidiary legislation".

6. As BL vests LegCo with the authority and the responsibility to keep control over subsidiary legislation, Professor Yash Ghai advised that "[A]n Ordinance that takes away from LegCo the ultimate control over the enactment of subsidiary legislation would therefore be unconstitutional. LegCo has been given its legislative responsibilities by the National People's Congress and it cannot divest itself of that power". He was of the opinion that the "exclusion by UNSO of sections 34 and 35 [of Cap. 1] is unconstitutional".

7. The Administration, however, opined that while LegCo was entrusted with the power and function to enact laws, BL did not prohibit the delegation of law-making power/function to other bodies or persons to make subsidiary legislation. This exclusionary power predated 1 July 1997 was evidenced in section 3(15) of the Fugitive Offenders Ordinance (Cap. 503) which is similar to section 3(5) of UNSO. According to the Administration, the continuation or

exercise of such exclusionary power after reunification was considered to be in line with the theme of continuity under BL.

8. Another argument put forward by the Administration was that since the regulations made under UNSO were to implement MFA's instructions in respect of UN sanctions which were foreign affairs for which the Central People's Government was responsible under BL 13(1), it must be lawful and constitutional for LegCo to authorize the HKSAR Government to make subsidiary legislation without any vetting requirement. In the Administration's view, this also reflected the fact that although legislative authority derived from LegCo, the subject matter was outside the high degree of autonomy conferred on the HKSAR.

9. On whether the current arrangement would affect LegCo's constitutional role in exercising its powers and functions under BL 73(5) and (6), namely, to raise questions on the work of the Government and to debate any issue concerning public interests, the Administration considered that LegCo was at liberty to raise questions on, or debate, subsidiary legislation made under UNSO even if it had no power to vet it.

Implementation of UN sanctions before and after the handover

10. The Administration stated that implementation of UN sanctions had always been a matter of foreign affairs, both before and after the handover. Prior to 1 July 1997, UN sanctions were implemented in Hong Kong by the UK Government by way of Orders in Council under the United Nations Act 1946. The Orders in Council were required to be laid before the UK Parliament but were not subject to any parliamentary procedure to amend or repeal them. As far as Hong Kong was concerned, LegCo also did not have any vetting power over such Orders.

11. Members queried whether it was appropriate to compare the legislative framework for implementing UN sanctions as provided under UNSO with that which applied in Hong Kong before the handover for the purpose of determining the constitutionality or otherwise of the current arrangement because the two systems were totally different. They noted the observation of Dr Hon Margaret NG, Chairman of the UN Sanctions Subcommittee, that before the handover, the Orders in Council took effect as UK legislation, not Hong Kong legislation. This was very different from the post-handover arrangement whereby regulations were made under UNSO, which purported to be Hong Kong legislation.

12. On the parliamentary procedure, the UN Sanctions Subcommittee noted that the Orders in Council were required to be laid before the UK Parliament. However, the Regulations made under UNSO were not required to be laid before

LegCo. In this connection, members noted that after the Orders in Council made under the United Nations Act 1946 were laid before the UK Parliament, they would be studied by a Joint Committee on Statutory Instruments. The Joint Committee might make recommendations to the UK Government on the legal and drafting aspects of such Orders, but did not have power to annul them.

Vetting of subsidiary legislation by LegCo

13. The UN Sanctions Subcommittee was also concerned about the total absence of LegCo in the regulation-making process under UNSO. The Administration's view was that the disapplication of the positive or negative vetting procedure was permissible under the laws of Hong Kong and at common law. Examples cited by the Administration were the English Schools Foundation Ordinance (Cap. 1117), the Hong Kong Institute of Education Ordinance (Cap. 444), the Vocational Training Council Ordinance (Cap. 1130) and the Fugitive Offenders Ordinance (Cap. 503). Members did not subscribe entirely to the Administration's view and noted that for the former three Ordinances, the subject matters mainly concerned the internal regulation and management of the respective institutions only. As for the Fugitive Offenders Ordinance, although section 3(15) had an exclusionary provision similar to section 3(5) of UNSO, the section merely provided for CE to make a Notice to reflect any changes of the parties to the relevant convention. The regulations made under section 3(1) of UNSO, however, often created new offences, purported to have serious penal effect and conferred vast investigation and enforcement powers. Members noted that normally, subsidiary legislation of such a nature should be subject to vetting by the Legislature.

14. At its meeting on 20 June 2008, the House Committee endorsed the following recommendations put forward by the UN Sanctions Subcommittee to improve the regulation-making process -

(a) the Administration should include more background information in the LegCo Brief in respect of each regulation made and gazetted under UNSO to facilitate scrutiny by Members; and

(b) a dedicated subcommittee should be set up under the House Committee to deal with Regulations made under UNSO. Under this standing arrangement, gazetted Regulations in the future would be considered by Members at meetings of the House Committee, and where necessary, the Regulations would be referred to the dedicated subcommittee for further scrutiny.

15. In the Fourth LegCo, Members agreed at the meeting of the House

Committee on 7 November 2008 that a dedicated subcommittee should be set up in the light of the recommendations made by the former UN Sanctions Subcommittee. A subcommittee was formed on 1 December 2008 to deal with Regulations made under UNSO and follow up the aforementioned recommendations. The Subcommittee is continuing its work.

Examples in relation to factors identified in the United Kingdom Cabinet Guide when deciding to make secondary legislation

The Administration has provided the following examples in relation to factors identified in the UK Cabinet Guide -

Matters requiring more frequent adjustment

(a) on matters requiring more frequent adjustment as stated in paragraph 4.10(a) in Chapter 4, examples are regulations made under the Merchant Shipping (Safety) Ordinance (Cap. 369). That Ordinance empowers the Secretary for Transport and Housing to make regulations relating to various aspects of marine safety, e.g. radio safety and life saving appliances. Section 112A(4) provides that such regulations may provide for the adoption of standards, specifications or codes of practice issued by the International Maritime Organization. Another example is the Poisons List Regulations (Cap. 138, sub. leg. B) made under the Pharmacy and Poisons Ordinance (Cap. 138). Section 29 of that Ordinance authorizes the Pharmacy and Poisons Board to make regulations prescribing a list of poisons and to amend the regulations. Similarly, section 9 of the Prevention and Control of Disease Ordinance (Cap. 599) empowers the Director of Health to prescribe by order measures to implement temporary recommendations made by the World Health Organization under the International Health Regulations;

Use of delegated powers in a particular area

(b) with regard to the factor referred to in paragraph 4.10(c) in Chapter 4, the use of delegated legislation by professional bodies to regulate professional practice is well precedented and uncontroversial in Hong Kong. Examples are the Professional Accountants By-laws (Cap. 50 sub. leg. A) made by the Hong Kong Institute of Certified Professional Accountants pursuant to section 8 of the Professional Accountants Ordinance (Cap. 50) and the Solicitors' Practice Rules (Cap. 159 sub leg. H) made by the Council of The Law Society of Hong Kong pursuant to section 73 of the Legal Practitioners Ordinance (Cap. 159). Other examples can be found in licensing or permit schemes which contain detailed provisions on the operation of such schemes. For instance, the Hazardous Chemicals Control (General) Regulation (Cap. 595 sub. leg. A) contains provisions concerning the application for permits under the principal Ordinance concerned; and

Transitional and technical matters

(c) regarding the transitional and technical matters referred to in paragraph 4.10(d) in Chapter 4, the more common practice in Hong Kong is to include transitional matters in the primary legislation itself, mostly in a Schedule to the Ordinance, instead of setting them out in subsidiary legislation. There are, however, cases of delegation of powers to make transitional provisions. Examples are section 14A of the Road Traffic Ordinance (Cap. 374), section 97 of the Trade Marks Ordinance (Cap. 559), section 283 of the Copyright Ordinance (Cap. 528) and section 158 of the Patents Ordinance (Cap. 514). As regards examples of technical matters, one of the main reasons for using subsidiary legislation is to set out technical details. For example, rules relating to the conduct of court or other proceedings are highly technical or procedural in nature and it is often appropriate for such rules to be dealt with by subsidiary legislation. Rules made under the High Court Ordinance (Cap. 4), the District Court Ordinance (Cap. 336), the Criminal Procedure Ordinance (Cap. 221) and the Administrative Appeals Board Ordinance (Cap. 442); and rules made by the Equal Opportunities Commission, e.g. the Sex Discrimination (Formal Investigations) Rules (Cap. 480 sub. leg. A). Where the legal rules in question are highly technical or operational in nature, it would also be appropriate for them to be made by persons who have expertise in the field (examples on the regulations made by the various professional bodies to regulate professional practice are given in paragraph (b) above).

The Court of Appeal's judgment in *Julita F. Raza & others v. Chief Executive in Council & others* [2006] HKCU 1199 concerning indicia of legislative effect

In *Julita F. Raza & others v. Chief Executive in Council & others* [2006] HKCU 1199, the Court of Appeal ("CA") had to decide whether the Chief Executive's approval of the labour importation scheme was subsidiary legislation. It considered the question from the perspective of finding a principle or definition to distinguish a legislative decision from an administrative one. CA cited with approval the Australian case, *RG Capital Radio v. Australia Broadcasting Authority* (2001) 113 FCR 185, which comprehensively reviewed a list of suggested relevant indicia of a legislative decision, while agreeing that no one factor is likely to be conclusive as emphasized in the Australian judgment. The relevant indicia referred to are -

(a) the most commonly stated distinction between the two types of decisions is that a legislative decision determines the contents of rules of general, usually prospective, application whereas an administrative decision applies rules of that kind to particular cases[1];

(b) a hallmark of legislation is parliamentary control, although its absence is not conclusive[2];

(c) whether the decision involves complex policy considerations for if so, that might suggest that the act, the determination, is one of a legislative character;

(d) whether there is a power vested in the executive to amend, vary, or control the plan or act in question, for if so that would tend to suggest a matter of an administrative kind; and

(e) whether the measure has a binding quality or effect as opposed to one that provides guidance only.

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1 In *Commonwealth v. Grunseit* (1943) 67 CLR58 at 83, Chief Justice Latham of the High Court of Australia stated that: the general distinction between legislation and the execution of legislation is that legislation determines the content of the law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases.

2 In *English Schools Foundation & Anor v. Bird* [1997] 3 HKC 434, CA held that notwithstanding that the regulations made by the Foundation were not required to be published in the Gazette and therefore not subject to scrutiny of the Legislative Council under section 34 of Cap. 1, they were subsidiary legislation.

Appendix XIV

Comparative Research on Subsidiary Legislation – Whether an Instrument is Subsidiary Legislation

The following table summarises whether a particular instrument is considered a piece of subsidiary legislation in the United Kingdom ("UK"), Australia, New Zealand and Canada.

	UK	**Australia (federal)**	**New Zealand**	**Canada (federal)**
Guidelines/ Legislation	- Wade and Forsyth understand the definition of 'statutory instrument' in the Statutory Instrument Act of 1946[1](**"SIA 1946"**) covers three categories of 'subordinate legislation' made under the authority of some statute: (i) Orders in Council, (ii) Ministerial powers stated in the statute to be exercisable by statutory instrument, and (iii) future rules made under past statutes to which the Statutory Instrument Act of 1893 applied.[2] Bradley and	- If an instrument is in a class of instruments listed or is described as a regulation in the Legal Instrument Act 2003 (**"LIA"**),[6] then it is a "legislative instrument" for the purposes of the LIA's mechanism of Parliamentary scrutiny. Section 7 of the LIA provides that an instrument is not a legislative instrument for the purpose of the Act if it is included in the table	- The Interpretation Act 1999,[9] the Acts and Regulations Publications Act 1989[10] and the Regulations (Disallowance) Act 1989 (**"RDA"**)[11] define 'regulations' as including "regulations, rules, or bylaws made under any Act by the Governor- General in Council or by a Minister of the Crown" and an Order in Council, Proclamation, notice, Warrant, or instrument, made under	- Statutory Instruments Act 1985 (**"SIA 1985"**) has elaborate definition of the terms "regulation" and "statutory instrument", e.g. a "regulation" means a statutory instrument "made in the exercise of legislative power conferred by or under an Act of Parliament" or "for the contravention of which a penalty, fine or imprisonment is prescribed by or under

	UK	Australia (federal)	New Zealand	Canada (federal)
	Ewing criticise that "despite the [SIA 1946], terminology is often confusing."[3] The 1946 Act differentiates between statutes made before 1 January 1948 and after that date. For statutes made after the relevant date, there is a clear-cut definition depending on whether the primary legislation requires the instrument to be subsidiary legislation. For statutes made before the relevant date, the older test which focuses on the legislative effect of the instrument would continue to apply. - The Interpretation Act 1978 defines "subordinate legislation" as "Orders in Council, orders, rules,	in that section, these include, inter alia, ministerial directions to a Commonwealth company and decisions and orders of Fair Work Australia. - Moreover, if an instrument is "of a legislative character" and "is or was made in the exercise of a power delegated by the Parliament," then that instrument is *also* a legislative instrument. An instrument is "of a legislative character" if "it determines the law or alters the content of the law, rather than applying the law in a particular	an enactment that varies or extends the scope of provisions of an enactment. The RDA itself gives no guidelines when an instrument will be made a regulation. - 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 RDA. It however recognizes that there are a very few cases with good reasons which may allow departure from this general rule:	an Act of Parliament."[13] Section 2(a) defines "statutory instrument" to mean "any rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument made in the execution of a power under an Act of the Parliament or under the authority of the Governor in Council but section 2(b) provides that "statutory instrument" does not include any instrument referred to in (a) and made by a corporation

	UK	Australia (federal)	New Zealand	Canada (federal)
	regulations, schemes, warrants, byelaws and other instruments made or to be made under any Act."[4] - Commenting on the definition of "statutory instrument" under s. 1 of the 1946 Act, Wade and Forsyth opine that "Parliament has abandoned the attempt to define subordinate legislation by its substance, since this could never achieve precision."[5] - It is noted the above Acts give no guidelines when a maker of an instrument will be made a regulation.	case"; and "it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right."[7] (See the Federal Court's discussion in *RG Capital Radio v Australia Broadcasting Authority* (2001) 113 FCR 185.) - A "Legislative Instruments Handbook" suggests that other factors indicative of legislative character include: (i) whether the instrument is	(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. The Ministry of Justice opines that: "In broad terms, an instrument is legislative in nature if it regulates the public generally or any class of the public (including an occupational class); and prescribes or imposes obligations, confers	incorporated under an Act of Parliament unless other conditions apply. The Act itself gives no guidelines when an instrument will be made a regulation. - In determining whether a directive made by the executive is a regulation or statutory instrument, the Federal Court of Canada has decided that it is significant that there is no provision for penalty concerning the breach of the directive in dispute. This leads to the conclusion that the directive is of an administrative, not a

	UK	Australia (federal)	New Zealand	Canada (federal)
		binding, (ii) "if an instrument applies an existing principle it is more likely to be administrative, but if it establishes a new regime it is legislative", and (iii) instruments having effect of imposition of penalty or setting mandatory standards will be legislative instrument.[8]	entitlements, or creates benefits or privileges."[12]	legislative, nature. (*A-G of Canada v Gaeten Plante* 29 WCB (2d) 299, as summarised in *Raza v Chief Executive-in- Council* [2005] 3 HKLRD, p. 601.)

Notes

[1] Statutory Instruments Act 1946.
[2] W. Wade and C. Forsyth, "Administrative Law" (10th ed.), Oxford : Oxford University Press, 2009, p.760.
[3] A. Bradley & K. Ewing, "Constitutional and Administrative Law" (14th ed.), Harlow, England ; New York : Pearson Longman (2007), p.680.
[4] Section 21(1), Interpretation Act 1978.
[5] W. Wade and C. Forsyth, "Administrative Law" (10th ed.), Oxford : Oxford University Press, 2009, p.760.
[6] Section 6, Legislative Instruments Act 2003.

[7] Section 5, Legislative Instruments Act 2003.
[8] "Legislative Instruments Handbook: A Practical Guide for Compliance with the Legislative Instruments Act 2003 and Related Matters", Office of Legislative Drafting and Publishing in the Australian Attorney-General's Department (2004), pp. 9 – 10 (http://www.ag.gov.au/www/agd/rwpattach.nsf/vap/(cfd7369fcae9b8f32f341dbe097801ff)~11li+handbook_v3_1_1204.pdf/$file/11li+handbook_v3_1_1204.pdf).
[9] Section 29, Interpretation Act 1999.
[10] Section 2(2), Act and Regulations Publication Act 1989.
[11] Section 2, Regulations (Disallowance) Act 1989.
[12] "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#legislative-instrument-definition).
[13] Section 2(1), Statutory Instruments Act.

FORMULATIONS OF EMPOWERING PROVISIONS

PART I Common formulations for subsidiary legislation subject to section 34 of Cap. 1

Item	Formulation (with examples of variations)	Examples of relevant provisions	Examples of L.N.
1.	**"may by notice…"**		
	(a) "… in the Gazette, amend"	s. 31(2) of the Employees Retraining Ordinance (Cap. 423)	75, 76 & 99 of 2010
	(b) "… in the Gazette specify"	s. 2(2A) of the Trade Descriptions Ordinance (Cap. 362)	115 & 116 of 2010
	(c) " …in the Gazette declare"	s. 2A of the Antiquities and Monuments Ordinance (Cap. 53)	59 of 2007 & 21 of 2008
	(d) " … published in the Gazette amend"	s. 15 of the Prevention and Control of Disease Ordinance (Cap. 599)	117 of 2010
	(e) " … published in the Gazette, designate"	s. 3(1AB) of the Smoking (Public Health) Ordinance (Cap. 371)	100 of 2010
	(f) " … published in the Gazette, determine"	s. 12(1)(ea) of the Dutiable Commodities Regulations (Cap. 109A)	35 of 2010
2.	**"may by order…"**		
	(a) " … amend, or add to or delete from"	s. 106(6) of the Public Health and Municipal Services Ordinance (Cap. 132)	40 of 2010
	(b) " … , declare"	s. 36(2) of the Rating Ordinance (Cap. 116)	19 of 2010
	(c) " … designate"	s. 32I(1) of the Telecommunications Ordinance (Cap. 106)	62 & 63 of 2010
	(d) " … direct"	s. 3(1) of the Fugitive Offenders Ordinance (Cap. 503) ***[s. 3(3) : LegCo only has power to repeal]***	43 of 2010
	(e) " … exclude"	s. 3(1) of the Clubs (Safety of Premises) Ordinance (Cap. 376)	130 of 2010

Item	Formulation (with examples of variations)	Examples of relevant provisions	Examples of L.N.
	"may by order…"		
	(f) " … provide for"	s. 35(1) of the Immigration Ordinance (Cap. 115)	14 & 15 of 2010
	(g) " … replace…or amend"	s. 6B(1) of the Import and Export Ordinance (Cap. 60) ***[s. 6B(3) : LegCo only has power to repeal]***	45 of 2010
	(h) " … specify"	s. 2(2)(b) of the Trade Descriptions Ordinance (Cap. 362)	112, 113 & 114 of 2010
	(i) " … set aside"	s. 106(1) of the Public Health and Municipal Services Ordinance (Cap. 132)	39 of 2010
	(j) " … in the Gazette, direct"	s. 11(1) of the Census and Statistics Ordinance (Cap. 316)	7 of 2010
	(k) " … published in the Gazette amend "	s. 50(2) of the Dangerous Drugs Ordinance (Cap. 134)	64 of 2010
	(l) " … published in the Gazette, declare"	s. 3(1) of the Port Control (Cargo Working Areas) Ordinance (Cap. 81)	98 of 2010
	(m) " … published in the Gazette, designate"	s. 105K(1) of the Public Health and Municipal Services Ordinance (Cap. 132)	22, 42 & 86 of 2010
	(n) " … published in the Gazette exclude"	s. 11(1) of the Electronic Transactions Ordinance (Cap. 553)	54 of 2010
	(o) " … published in the Gazette provide for"	s. 4 of the Prisons Ordinance (Cap. 234)	13 & 38 of 2010
3.	**"may by regulation…"**		
	(a) " … prescribe or provide for"	s. 6(1) of the Dutiable Commodities Ordinance (Cap. 109)	21 of 2010
	(b) " … provide for"	s. 33(1) of the Waste Disposal Ordinance (Cap. 354)	83 & 84 of 2010

Item	Formulation (with examples of variations)	Examples of relevant provisions	Examples of L.N.
4.	**"may make…"**		
	(a) " … by-laws"	s. 8(1) of the Professional Accountants Ordinance (Cap. 50)	44 of 2010
	(b) " … regulations"	s. 37(1) of the Waterworks Ordinance (Cap. 102)	129 of 2010
	(c) " … rules"	s. 51(1) of the Deposit Protection Scheme Ordinance (Cap. 581)	131 of 2010

PART II Formulations for subsidiary legislation/instruments which are expressed to be not subject to section 34 of Cap. 1

Item	Formulation	Relevant provision	Examples of L.N.
1.	**"may by notice** published in the Gazette amend…"	s.16(2) of Tung Chung Cable Car Ordinance (Cap. 577)	-
2.	**"shall by notice…"**		
	(a) "……. published in the Gazette amend"	s.52(1) of Western Harbour Crossing Ordinance (Cap. 436)	107 of 2010
	(b) "…….published in the Gazette amend"	s.45(1) of Tai Lam Tunnel and Yuen Long Approach Road Ordinance (Cap. 474)	109 of 2010
	(c) "……. published in the Gazette, announce"	s.21(1) of Carriage By Air Ordinance (Cap. 500)	251 of 2009
3.	**"may by order…"**		
	(a) "…….amend"	s.35(2) of Volunteer And Naval Volunteer Pensions Ordinance (Cap. 202)	106 of 2010
	(b) "…….revoke"	section 27(1) of Tung Chung Cable Car Ordinance (Cap. 577)	-

Item	Formulation	Relevant provision	Examples of L.N.
4.	**"may make rules"**	s. 51 of Professional Accountants Ordinance (Cap. 50)	-
5.	**"shall make regulations…"**	s. 3 of United Nations Sanctions Ordinance (Cap. 537)	111 of 2010
6.	**"may by bylaw…."**	s.13 of Hong Kong Academy of Medicine Ordinance (Cap. 419)	-

Details of the Administration's view regarding judicial opinion

According to the Administration, under the common law, where there is on-going litigation, the court has wide powers to grant appropriate declaratory relief on any application to safeguard the due process of law under its inherent jurisdiction. The scope of the court's power to grant declaratory relief under its inherent jurisdiction has been evolving. The jurisprudence in Hong Kong in this regard has understandably been much influenced by the case law in the United Kingdom all along. In particular, the Hong Kong courts have often made reference to and relied on the following passage of Lord Diplock's judgment in *Gouriet v Union of Post Office Workers* [1978] AC 435 at 510D 6 -

> "…But the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else."[1]

2. It appears that the Hong Kong courts have been cautious about granting declaratory relief on hypothetical or academic issues which may never arise or are yet to arise for adjudication by the courts. In *Charter View Development Limited v Golden Rich Enterprises Limited & Another*[2], the Court refused to grant a declaration to the effect of "an advisory opinion based on a hypothetical course of action which may or may not eventuate" and "[t]he court declines to act as legal adviser in such cases."[3]

3. The Court of Appeal considered the discretion to make an advisory declaration in *Chit Fai Motors Co Ltd v Commissioner for Transport*[4]. Ma CJHC, as he then was, considered whether the court has jurisdiction to provide an advisory opinion for hypothetical or academic issues. His lordship opined that where a question is purely hypothetical or academic in the sense that there are simply no events that have occurred that form the basis for the question to be

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1 In *In re S (Hospital Patient: Court's Jurisdiction)* [1996] 3 WLR 78, the Court of Appeal considered that Lord Diplock's speech in *Gouriet* can no longer be taken to be exhaustive description of the circumstances in which declaratory relief can be granted today. The court held that a dispute between rival claimants as to the care of an adult patient incapable of expressing his wishes in respect of treatment or care was a justiciable issue in respect of which the court's advisory declaratory jurisdiction could properly be invoked. See also the discussion in Zamir J & Lord Woolf, *The Declaratory Judgment*, 3rd ed., Sweet & Maxwell: London, 2002, 140-145. The learned authors commented that "[w]hile the courts remain conscious of the dangers of advisor opinions, they have also recognized that there may be special circumstances, particularly in the field of public law, where the advantages of certainty stemming from the grant of declaratory relief may outweigh the disadvantages." (At p. 142).

2 CACV 42/2000, 13 March 2000.

3 Ibid, para. 32. See also paras. 14 and 15.

4 [2004] 1 HKC 465, 472-473.

answered, the court will not have any jurisdiction to determine the question. However, if the question which originally drove the parties to the litigation has only become hypothetical or academic and is no longer in existence between the parties at the time of the hearing, the court still has jurisdiction to hear and determine the question in issue. In deciding whether or not to do so, the court will closely examine the relevance or utility of any decision. In the public law sphere where the duties of public bodies fall to be exercised on a continuing basis, it may be easier to demonstrate the relevance or utility of a decision[5].

4. Outside the litigation context, it appears that at the constitutional level, the Hong Kong judiciary has explored the idea of introducing a procedure for a constitutional reference to the Court of Final Appeal but finally decided against such a procedure. According to former Chief Justice Li[6] -

> "Constitutional references are often made in the heat of political controversy and this may put the Court in a delicate position. In my view, it suffers from two main disadvantages. First, the constitutional questions will be considered divorced from any actual factual situation. This is unsatisfactory. Having a real situation usually enables the court to focus better on the question of law raised. Secondly, on a constitutional reference, the court will be exercising an original jurisdiction. It will not have the benefit of the judgments of the lower courts. These judgments, together with the refinement of the arguments by the lawyers through the experience of the hearings in the lower courts, are of great assistance to a final appellant court."

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5 See also *Secretary for Security v Prabakar* (2003) 6 HKCFAR 397. In that case, the CFA held that even though the question before the court is no longer a live issue between the parties but has become academic by the time of the hearing, the court may still make a decision on the question if there is a sufficiently great public interest to be served. On academic questions, see also *Leung v Secretary for Justice* [2006] 4 HKLRD 211, paras. 24-29. On the English court's approach to academic questions, see *R v Home Secretary ex parte Salem* [1999] 1 AC 450. There the House of Lords held that it had discretion to hear the appeal even if there was no longer a *lis* to be determined directly affecting the parties' rights. But the discretion was to exercise with caution and academic appeals should not be heard unless there was a good reason in the public interest for so doing.

6 Chief Justice Li, "Reflections on the retrospective and prospective effect of Constitutional Judgments", *The Common Law Lecture Series 2010*, edited by Jessica Young and Rebecca Lee, Faculty of Law, The University of Hong Kong, 2011, 21- 55, at 49.

5. It appears in the light of the above discussion that the court has jurisdiction to give advisory opinion, in the form of a declaration in case of an important point of public interest even if the issue in question has become academic between the immediate litigating parties. It is a matter of discretion which the court will only exercise in exceptional circumstances[7]. Outside the litigation context, it appears that the court would be wary of providing an advisory opinion even if the issue concerns matters of constitutional importance.

7 *Leung v Secretary for Justice* [2006] 4 HKLRD 211, para. 28(7)-(8).

（譯文）

2012 年 2 月 29 日的立法會會議
吳靄儀議員就
"研究與立法會修訂附屬法例的權力有關的事宜
小組委員會報告"
動議的議案

議案措辭

本會察悉研究與立法會修訂附屬法例的權力有關的事宜小組委員會報告。

Motion on
"Report of the Subcommittee to Study Issues Relating to the Power of the Legislative Council to Amend Subsidiary Legislation"
to be moved by Dr Hon Margaret NG
at the Council meeting of 29 February 2012

Wording of the Motion

That this Council notes the Report of the Subcommittee to Study Issues Relating to the Power of the Legislative Council to Amend Subsidiary Legislation.