

# **立法會**

## ***Legislative Council***

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### **Paper for the House Committee meeting on 18 October 2013**

#### **Report of the Subcommittee on Solicitors (General) Costs (Amendment) Rules 2013**

#### **Purpose**

This paper reports on the deliberations of the Subcommittee on Solicitors (General) Costs (Amendment) Rules 2013.

#### **Background**

2. The Solicitors (General) Costs (Amendment) Rules 2013 ("the Rules") amends the Third Schedule to the Solicitors (General) Costs Rules (Cap. 159 sub. leg. G), which apply to all solicitors' non-contentious business except for any such business which is provided for or regulated by the Solicitors (Trade Marks and Patents) Costs Rules (Cap. 159 sub. leg. I) made under section 74 of the Legal Practitioners Ordinance ("LPO") (Cap. 159).

3. Rule 3 of the Rules repeals paragraph 1 of the Third Schedule, which provides for costs for copying documents, and substitutes it with a new paragraph 1 to -

- (a) remove obsolete types of copies (such as stencilled or carbon copy);
- (b) provide that copies may be provided in the form of "photographic copy, printed (including laser printed) copy or scanned printed copy"; and

- (c) specify the costs for providing copies printed in black ink or colour ink and in different quantities.

4. Rule 3 of the Rules also introduces a new paragraph 6A to the Third Schedule, which provides that for the purpose of the new paragraph 1 referred to in paragraph 3 above, if two or more pages of a document are reduced in size and printed on one page, the costs for copying is to be charged as one page.

5. The Rules will come into operation on a day to be appointed by the President of The Law Society of Hong Kong ("The Law Society") by notice published in the Gazette.

6. In the course of scrutinizing the Rules to assist consideration of the House Committee ("HC") at its meeting held on 28 June 2013, the Legal Service Division of the Legislative Council ("LegCo") Secretariat pointed out that as stated in L.N. 110 of 2013, the Rules were made by the "Costs Committee of The Law Society of Hong Kong under section 74 of the LPO subject to the approval of the Chief Justice". However, the Costs Committee is not a committee of The Law Society. Further, the Rules had apparently been made by the 20 members of the Council of The Law Society. Upon inquiry, The Law Society agreed to liaise with the Costs Committee to arrange for a set of new amendment rules to be published in the Gazette again.

### **The Subcommittee**

7. At the HC meeting held on 5 July 2013, Members agreed that a subcommittee should be formed to consider whether the Rules were properly made and the follow-up actions required. The membership list of the Subcommittee is in the **Appendix**. Under the chairmanship of Hon Dennis KWOK, the Subcommittee has held two meetings, including one meeting with the Administration.

8. A motion was moved by Hon Dennis KWOK, on behalf of the Subcommittee, at the Council meeting of 9 October 2013 to extend the scrutiny period of the Rules from 16 October 2013 to 6 November 2013.

### **Deliberations of the Subcommittee**

9. As the Rules are not made by the proper authority, the Subcommittee considers that the only proper way to deal with the matter

is for the Secretary for Justice ("SJ") to move a motion to repeal the Rules. In response, the Administration has proposed the following options -

Option 1 - Publication of a new set of rules to be made by the Costs Committee with a corrigendum in the Gazette to explain the error

- (a) there are two alternative arguments in support of this option, i.e. the void *ab initio* argument and the proposition on implied repeal of the Rules by the publication of a new set of rules made by the Costs Committee:

The void *ab initio* argument

- (i) it may be argued that the Rules are void *ab initio* because they have not been validly made, and as such, there is nothing validly made under the law to be repealed;
- (ii) such an approach may find support in a previous matter handled by the LegCo Subcommittee in its scrutiny of the Commencement Notice in respect of the Ozone Layer Protection (Controlled Refrigerants) Regulation ("the Ozone Regulation") (L.N. 391 of 1998). A Commencement Notice for the Ozone Regulation was made in 1993 (G.N. 4794 of 1993) but the Administration considered that G.N. 4794 was not valid as it was not laid on the table of LegCo. The Subcommittee concerned took the view that although the G.N. 4794 was not laid on the table of LegCo as required under section 34(1) of the Interpretation and General Clauses Ordinance (Cap. 1) ("the IGCO"), the Notice had been validly made because it was published as a General Notice in the Gazette. The fact that the Administration published a second Commencement Notice (L.N. 391 of 1998) to appoint a fresh commencement date was considered both unnecessary and *ultra vires* and that LegCo could not rely on section 34 of the IGCO to amend or repeal the first Commencement Notice. The Subcommittee

concerned suggested that one of the ways to tackle the issue was to publish a corrigendum notice<sup>1</sup>;

- (iii) another precedent case is the Legal Services Legislation (Miscellaneous Amendments) Ordinance 1997 (94 of 1997). Under section 1(2) of the Ordinance, certain sections of the Ordinance were to come into operation on a day to be appointed by the then Attorney General by notice in the Gazette. Although the Commencement Notice and the Ordinance were published in the Gazette on 30 June 1997, the Commencement Notice was dated 29 June 1997. The Administration took the view that the Commencement Notice might not be valid because on the date of the purported appointment of the commencement date (i.e. 29 June 1997), the Ordinance had not yet come into operation as it had not been published in the Gazette. On 8 August 1997, the second Commencement Notice dated 6 August 1997 was published in the Gazette together with the Corrigendum (L.N. 413 of 1997);

Implied repeal by the publication of a new set of subsidiary legislation made by the Costs Committee

- (iv) alternatively, on the assumption that although the Rules have not been validly made, it remains effective as a piece of subsidiary legislation unless and until it is declared invalid by the court, another possible way of dealing with the Rules is by means of implied repeal by another piece of subsidiary legislation made by the Costs Committee under section 74 of the LPO. The making and gazetting of a new piece of subsidiary legislation by the Costs Committee with a different

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1 The Administration subsequently introduced a scheme of validation under the Statute Law (Miscellaneous Provisions) Ordinance (Ordinance No. 32 of 2000) ("the SLMP Ordinance") to deem certain items of subsidiary legislation which had been gazetted but which had not been laid before LegCo to have been duly laid on the table of LegCo in accordance with the requirements of section 34(1) of the IGCO. The first Commencement Notice of the Ozone Layer Protection (Controlled Refrigerants) Regulation was included in this scheme of validation together with 19 other items of subsidiary legislation. Section 45 of the SLMP Ordinance also contains a declaration to the effect that the second Commencement Notice "is declared to be and always to have been of no force or effect".

enacting formula would have the effect of repealing the Rules by implication.<sup>2</sup> A precedent case for this approach can be found in the Dangerous Drugs (Amendment) (No.2) Ordinance 1994 (63 of 1994) (Commencement) Notice 1998 (L.N. 280 of 1998) and the Corrigendum (L.N. 295 of 1998);

Option 2 - Express repeal of the Rules under section 34 of the IGCO

- (b) although the Rules have not been validly made, they have been published in the Gazette and may have legal effect as a piece of subsidiary legislation. The approach of an express appeal was adopted in the case of the Banking (Specification of Public Sector Entities in Hong Kong) (Amendment) Notice 2004 (L.N. 119 of 2004), albeit the repeal was effected by a piece of subsidiary legislation made by the authorized delegate rather than by a resolution of LegCo made under section 34(2) of the IGCO; and

Option 3 - Validation of the Rules by legislation

- (c) the last option is to introduce a scheme of validation under a principal ordinance to deem the Rules which have been made by The Law Society to have effect as if made by the Costs Committee. A scheme of validation has been introduced by the Administration under the Statute Law (Miscellaneous Provisions) Ordinance (No. 32 of 2000) to deem certain items of subsidiary legislation which had been gazetted but which had not been laid before LegCo to have been duly laid on the table of LegCo in accordance with the requirements of section 34(1) of the IGCO.

10. The Administration has advised that it is more inclined towards Option 1 in the context of the present case for the following reasons -

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2. Section 87 of *Bennion on Statutory Interpretation – A Code* (5<sup>th</sup> edition) at page 34 sets out the principle on "implied repeal" of legislation as follows:

"Where a later enactment does not expressly repeal an earlier enactment which it has power to override, but the provisions of the later enactment are contrary to those of the earlier, the later by implication repeals the earlier in accordance with the maxim *leges posteriores priores contrarias abrogant* (later law abrogate earlier contrary laws)."

- (a) Option 2 rests on the premise that the subsidiary legislation has already had legal effect. Section 1 of the Rules provides that the Rules "come into operation on a day to be appointed by the President of The Law Society of Hong Kong by notice published in the Gazette". No commencement notice has ever been issued in the present case. On the basis of the legal principle that subsidiary legislation which has been passed and which has not yet come into operation does not have the full effect of statute, it is doubtful whether it is necessary to have an express repeal of the Rules; and
- (b) Option 3 was previously adopted for subsidiary legislation referred to in paragraph 9(c) above which had already been in operation for several years before the defect was discovered. In the present case, the Rules have not come into operation. Moreover, it does not seem appropriate to adopt Option 3 to validate the Rules which have been erroneously made by the wrong party.

Assuming that the Subcommittee would agree to the adoption of Option 1, the Costs Committee will be requested to make a set of new amendment rules with a corrigendum explaining the reasons behind the need for the making of the new rules and the mistake made by The Law Society. The new rules to be published in the Gazette will be subject to negative vetting by LegCo.

11. The Legal Adviser to the Subcommittee has advised that he agreed with the Administration that Option 3 is not an appropriate option for the present case. Whilst both Options 1 and 2 are feasible options, it should be pointed out that under common law, decision on whether a piece of law is legally effective rests with the court, rather than with the legislature. In this regard, the adoption of an express repeal approach would avoid any possible infringement of the common law principle.

12. Hon TAM Yiu-chung, Dr Hon Priscilla LEUNG, Hon Paul TSE and Hon James TO prefer Option 1 for the following reasons. Firstly, it is apparent that the Rules are not made by the proper authority vested with the requisite powers under the LPO. Both the Administration and The Law Society admit this to be the case. Secondly, there is no pending or on-going court case to challenge the legal effect of the Rules as a piece of subsidiary legislation. Thirdly, the Rules have not yet come into operation. Fourthly, there are precedent cases on the adoption of Option 1, i.e. publication of a new piece of subsidiary legislation with a

corrigendum in the Gazette to explain the background. Finally, Option 1 is more straight-forward than moving a motion to repeal the Rules under section 34(2) of the IGCO.

13. Hon Ronny TONG and Hon Dennis KWOK are of the view that Option 2 would ensure the most complete legal certainty and finality, having regard to the fact that the corrigendum to be published in the Gazette together with the new set of rules to be made by the Costs Committee would only state the background for making and gazetting the new set of rules and without expressly stating that the Rules are not legally effective and/or are repealed. The possible operation of an implied repeal in these circumstances is unclear, and is based on uncertain legal principles where the applicability of the same is in doubt. Mr TONG and Mr KWOK are also of the view that adopting Option 1 to resolve the problem of a piece of subsidiary legislation erroneously made by the wrong body, and which has already been published in the Gazette, would set a bad precedent if similar incidents are to take place in the future.

14. The majority of the members of the Subcommittee considers that Option 1 should be adopted. Members urge the Administration to request the Costs Committee to expedite the making of a new set of rules together with the publication of a Corrigendum in the Gazette to clarify the matter and to explain the background and history. Members also urge the Administration to request The Law Society to take steps to prevent the recurrence of similar incidents in the future.

### **Follow-up action**

15. The Subcommittee has agreed to request the Panel on Administration of Justice and Legal Services to follow up with the Administration and related parties on the proper procedure for making of subsidiary legislation relating to the legal professional bodies to ensure that similar incidents would not occur in the future.

### **Advice sought**

16. Members are invited to note the deliberations of the Subcommittee.

**Subcommittee on Solicitors (General) Costs (Amendment) Rules 2013**

**Membership List**

**Chairman** Hon Dennis KWOK

**Members** Hon James TO Kun-sun  
Hon TAM Yiu-chung, GBS, JP  
Hon Ronny TONG Ka-wah, SC  
Dr Hon Priscilla LEUNG Mei-fun, SBS, JP  
Hon Paul TSE Wai-chun, JP

Total : 6 Members

**Clerk** Mary SO

**Legal Adviser** Kelvin LEE