立法會
Legislative Council

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seen by the Administration)

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Subcommittee
to study issues relating to the tabling of
subsidiary legislation in Legislative Council

Minutes of meeting held on
Tuesday, 2 February 1999, at 10:45 am
in Conference Room A of the Legislative Council Building

Members present : Hon Ronald ARCULLI, JP (Chairman)
Hon LEE Kai-ming, JP
Hon Margaret NG
Hon LAW Chi-kwong, JP

Members absent : Hon James TO Kun-sun

Public officers attending : Mrs Carrie YAU
Director of Administration

Ms Miranda CHIU
Deputy Director of Administration

Mr Jacky LUM
Assistant Director of Administration

Mr David J MORRIS
Deputy Law Draftsman (Legislation)
Department of Justice

Mr Michael R SCOTT
Senior Assistant Solicitor General
Department of Justice

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Clerk in attendance : Miss Odelia LEUNG, Chief Assistant Secretary (1)1

Staff in attendance : Mr Jimmy MA, Legal Adviser
Mr LAW Kam-sang, Deputy Secretary General
Ms Pauline NG, Assistant Secretary General 1
Miss Anita HO, Assistant Legal Adviser 2
Mrs Betty LEUNG, Chief Assistant Secretary (3)1
Mrs Mary TANG, Senior Assistant Secretary (1)2

I Election of Chairman

Mr Ronald ARCULLI was elected Chairman of the Subcommittee.

II Meeting with the Administration

Background

2. The Chairman briefed members on the background leading to the setting up of this Subcommittee. At the meeting of the Subcommittee on Ozone Layer Protection (Controlled Refrigerants) Regulation (Commencement) Notice 1998 on 21 January 1999, the Legal Service Division of the LegCo Secretariat drew members' attention to 19 pieces of subsidiary legislation which were gazetted on 27 June and 30 June 1997 and had not been tabled in the Provisional LegCo. There had been a difference of opinion between the Administration and the Legal Service Division of the LegCo Secretariat on the tabling requirement of subsidiary legislation. The Administration took the view that tabling in LegCo was mandatory in the law-making process, failing which the subsidiary legislation would have no legal effect. The Legal Service Division, on the other hand, was of the view that the provision for tabling under section 34(1) of Cap. 1 was directory only, such that non-tabling of subsidiary legislation in LegCo would not affect the validity of the subsidiary legislation. The Chairman informed members that when dealing with a piece of subsidiary legislation made pursuant to Regulation 35 of the Rabies Regulation in 1997, the Administration then took the view that the legislative effect was not dependent on the tabling of that subsidiary legislation in LegCo. The issue was brought to the attention of the House Committee on 22 January 1999 and members decided to set up a new Subcommittee to look into the question of tabling of subsidiary legislation. The Chairman said that apart from the issue of the tabling requirement, this Subcommittee would also examine the responsibility for tabling of subsidiary legislation.

Tabling requirement - mandatory or directory

3. The Director of Administration (D of A) referred members to paragraph 3 of the Administration's paper (Appendix IV to LC Paper No. CB(1)830/98-99) which set out its position regarding the issue of mandatory vis-a-vis directory in respect of the tabling requirement. The Administration's view was that the authorities as to whether or not a duty to lay was mandatory or directory were not conclusive one way or the other. There was therefore a risk that the validity of the subsidiary legislation in question might be challenged in court.

4. The Deputy Law Draftsman (Legislation) (DLD) elaborated that the Administration took the view that the requirement to table was mandatory because this seemed to be the intention of section 34 of Cap. 1. This was a logical conclusion because under the Basic Law, only the legislature was empowered to make legislation. LegCo could delegate its power to the executive authorities for making subsidiary legislation. In doing so, it was reasonable for LegCo to retain the supervisory authority to scrutinise subsidiary legislation. Moreover, the mandatory requirement was evident from the language of section 34 which stated that "All subsidiary legislation shall be laid .....". The word "shall" indicated an obligation. The Administration had looked at case law but it was not definitive. The authorities referred to by the Administration generally took the view that the tabling requirement was mandatory. With this conclusion, the Administration had to consider the effect of failure to comply with the obligation. The basic difference between mandatory and directory was that non-compliance with a directory obligation would not invalidate the exercise of the power but a breach of a mandatory obligation would render the action invalid. Under the law, if something was declared as invalid, it could mean that it was either void or voidable. If something was voidable, it would not be void until declared void by the court. The Administration submitted that failure to table subsidiary legislation rendered it voidable but unless and until it was declared void by the court, it was still effective.

5. The Chairman remarked that the concept of "void or voidable" in contract law was not relevant to the issue of law-making process.

6. At the invitation of the Chairman, Legal Adviser (LA) explained his view on the issue. He said that the tabling requirement under section 34(1) was a statutory mechanism to enable the legislature to supervise its delegates in the exercise of power in making subsidiary legislation. It imposed a requirement upon the delegates to inform the legislature about the exercise of its authority in order that the legislature could make amendments to subsidiary legislation when it saw fit. The process for the making of subsidiary legislation was actually completed upon the publication of the subsidiary legislation in the Gazette. It would therefore be irrelevant to consider whether

the tabling requirement was mandatory or directory when examining the validity of a piece of subsidiary legislation published in the Gazette.

7. Members noted LA's advice that if the Administration's views was accepted it would give rise to the issue of whether there was an apparent conflict between section 28 and 34 of Cap. 1. They sought the Administration's legal opinion on the effect of section 28 read together with section 34.

8. DLD said that he would find it odd if LegCo took the view that it was not necessary for legislation to be tabled in LegCo. He pointed out that although section 28(3) provided that subsidiary legislation would come into operation on the day it was published, that did not mean that it could not be repudiated later. If the subsidiary legislation was made without authority, and was ultra vires, the court could declare the legislation to be invalid. The fact that it came into force on a certain date would not make it difficult for the court to rule that it was invalid. Striking a legislation down on the ground of it being ultra vires was similar to striking it down for failure to comply with a statutory obligation.

9. Miss Margaret NG said that the question boiled down to what the legislative process was and when it had been completed. The power to make subsidiary legislation was delegated to certain executive authorities. The authorities then exercised this power, subject to supervision by way of tabling of subsidiary legislation in LegCo. LegCo could exercise the supervisory power to prohibit the legislation from coming into effect. It followed that something had come into being and was valid, otherwise it could not be invalidated, or LegCo could not amend or repeal it. The legislative process should therefore be considered completed when the relevant authorities made the subsidiary legislation and published it in the Gazette.

10. In this connection, the Chairman enquired how the court would rule if an offence under a subsidiary legislation was committed during the scrutiny period and the subsidiary legislation was subsequently amended by resolution passed by LegCo under section 34(2).

11. The Senior Assistant Solicitor General said that under section 34(2), if LegCo passed a resolution to amend a piece of subsidiary legislation, the subsidiary legislation would be deemed to be amended as from the date of publication in the Gazette of such resolution. Anything done under the subsidiary legislation before it was amended by LegCo would not be prejudiced.

12. Miss Margaret NG said that if an offence was committed before the day of publication of the said resolution and a person could be prosecuted under the original provisions of the subsidiary legislation, the conclusion could

only be that the legislative process was complete upon gazettal of the subsidiary legislation and that the subsidiary legislation was valid unless and until it was invalidated. Miss NG said that since tabling was not part and parcel of the legislative process, LegCo should exercise great care in deciding whether to delegate its power to the executive authorities to make subsidiary legislation when examining empowering provisions in proposed primary legislation.

13. DLD explained that there were different ways by which a legislature could exercise its supervisory power. A legislature could require that subsidiary legislation be laid in draft. This was the way adopted by the United Kingdom. In Australia, subsidiary legislation would not take effect until laid. The normal practice was to prescribe a commencement date beyond the scrutiny period. This would overcome the problem of a change in law during the scrutiny period by the legislature.

14. LA said that the confusion about the effective date of subsidiary legislation stemmed from the terminology used. The commencement date of subsidiary legislation referred to the date when the subsidiary legislation come into operation. There was another concept about implementation or execution date of the law. When an item of subsidiary legislation had a commencement provision, it would either specify a definitive date for commencement or confer the power to a public officer to appoint a day for commencement. Where a piece of newly introduced legislation would affect the operation of a trade, the authorities would normally allow a grace period for implementing the legislation.

15. The Chairman however did not see any difference between the commencement date and the implementation date of a law. He pointed out that where a grace period was considered desirable, the commencement date would normally be deferred to coincide with the end of the grace period. Very rarely would LegCo agree to an arrangement whereby a piece of legislation should commence operation but would not be implemented for a period of time.

16. To ensure scrutiny of subsidiary legislation by LegCo before they came into effect, Mr LAW Chi-kwong suggested amending section 28(3) (a) of Cap. 1 to the effect that subsidiary legislation would come into operation on a date which would not prejudice the operation of section 34(2). This would allow LegCo adequate time to scrutinize subsidiary legislation before they came into effect. The Chairman said that such an approach would require amendments to the law. The readily available means was to request the Administration to rely on section 28(3)(b) by making a commencement provision in subsidiary legislation so that subsidiary legislation only came into operation on an appointed date.

17. Miss Margaret NG said that LegCo could choose not to delegate its power to make subsidiary legislation when examining the primary legislation. However, in doing so, LegCo would be obliging itself to examine each and every subsidiary legislation under the positive vetting procedure. Members should consider very carefully whether the law should be changed to make tabling become part of the legislative process.

18. D of A said that the problem about non-tabling of subsidiary legislation rarely happened and had only occurred during the changeover of sovereignty. Negative vetting was a useful mechanism that had served members well so far. It would not overload legislators with the unnecessary work of scrutinizing legislation which was routine or technical in nature. The majority of the 19 pieces of subsidiary legislation in question were commencement notices. While the Administration was open-minded on any suggestion to change the law, she hoped that members would treasure the tool of negative vetting procedures. In any case, if LegCo considered that a subject would likely be controversial, members could require the making of the relevant subsidiary legislation be subject to the positive vetting procedure in scrutinizing the primary legislation.

19. Miss Margaret NG said that should the Government be found to be abusing the delegated power of making subsidiary legislation, LegCo could always amend the law to require tabling of subsidiary legislation in the law-making process. The Chairman agreed that members should not deprive themselves of the flexibility in delegating power to make subsidiary legislation.

20. Summing up the discussion, the Chairman concluded that upon publication of the subsidiary legislation in the Gazette, it would start to have legal effect. D of A agreed.

Responsibility for tabling subsidiary legislation

21. On the responsibility for tabling subsidiary legislation, members noted that under the current practice, the Government Printer sent copies of the Gazette to the LegCo Secretariat. The Clerk to LegCo then tabled the Legal Notices contained in Legal Supplement No. 2 of the Gazette at the next following LegCo meeting. The Chairman said that there was no doubt that the responsibility for gazetting of subsidiary legislation rested with the Administration. It would be strange if the tabling was to be decided by the Clerk to LegCo. Since the LegCo Secretariat provided supporting services and did not have a statutory legislative function, it was not right to put the burden of deciding on which subsidiary legislation to be tabled on the LegCo Secretariat. The Chairman further pointed out that the Government Printer only performed a mechanical job in delivering copies of the Gazette to the LegCo Secretariat. This could not in any way be considered as constituting sufficient notice to the Clerk to LegCo for the purpose of compliance with

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section 34(1) of Cap. 1. Miss Margaret NG said that the executive had a general responsibility to facilitate the legislature in the performance of its duties, and in the present case, the exercise of its supervisory power over the making of subsidiary legislation by the authorities delegated with such power.

22. D of A said that the Administration had all along been willing to facilitate LegCo in discharging its duties. There were a number of alternative ways to achieve the purpose. For example, D of A could assume the responsibility for sending Legal Supplement No. 2 to the LegCo Secretariat; or the relevant Bureaux could send separate memoranda to the Clerk to LegCo informing him what should be tabled. The latter approach would result in considerable increases in the exchange of correspondences. D of A said that the existing system had worked well for years. Before contemplating any change, there was a need to find out what had gone wrong on that particular occasion when certain subsidiary legislation published in the Gazette had not been tabled.

23. At the invitation of the Chairman, the Deputy Secretary General said that not all the Legal Notices contained in the Legal Supplement No. 2 of the Gazette need to be tabled in LegCo. Certain Legal Notices, such as executive orders made by the Chief Executive, should not be tabled. It was not easy for the Clerk to LegCo to identify what should or should not be tabled. Moreover, some subsidiary legislation were made by public bodies. The Government Printer should not convey on behalf of these bodies notices for tabling their subsidiary legislation. A proper machinery should be set up whereby the relevant authorities who had exercised the delegated power to make subsidiary legislation should give proper notice to the Clerk to LegCo on items of subsidiary legislation that should be tabled. LA supplemented that executive orders made by the Chief Executive and resolution passed by LegCo in relation to the making of rules of procedure or the extension of the scrutiny period of a piece of subsidiary legislation were published in the Gazette as Legal Notices but these were not subsidiary legislation.

24. DLD said that the law had not specified the authority for the actual tabling of subsidiary legislation. Upon publication of the subsidiary legislation in the Gazette, the Government Printer delivered the Gazette to the Clerk to LegCo who was then responsible for placing the subsidiary legislation on the agenda for a LegCo meeting.

25. Miss Margaret NG said that there should be no dispute on whom the responsibility shall fall for tabling of subsidiary legislation in LegCo. The question was whether the existing arrangement constituted good tabling. In her view, the existing arrangement in which the Government Printer delivered the subsidiary legislation in a bundle to the LegCo Secretariat was ineffective. She considered it necessary to devise a better system to ensure that all that need to be tabled was tabled and what was tabled was right to be tabled.

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26. LA said that the purpose of working out an effective system was to enable the executive, not the LegCo Secretariat, to better perform its functions. He also clarified that his view that the public officer or other authorized person who made the relevant subsidiary legislation should be responsible for tabling it was based on well-established legal principles, not assumptions as alleged by the Administration in its paper.

27. To improve the existing arrangement, members proposed for the Administration's consideration the following options -

(a) The D of A to co-ordinate the giving of notice by the relevant policy secretaries to the Clerk to LegCo in respect of subsidiary legislation that should be tabled; or

(b) all items of subsidiary legislation that should be tabled to be contained in a separate supplement of the Gazette; or

(c) the Administration to issue a letter to the Clerk to LegCo advising that subsidiary legislation contained in certain pages of the Gazette should be tabled in LegCo.

28. D of A agreed to consider ways to streamline the existing process including the tabling of subsidiary legislation made by non-government organizations.

Admin.

Rectification

29. Miss Margaret NG said that although members formed the view that the non-tabling of the 19 items of subsidiary legislation in question did not render them ineffective, the fact remained that these subsidiary legislation had not been tabled. The Subcommittee should consider whether anything need or could be done to rectify this missing step.

30. The Chairman pointed out that if members agreed that the non-tabling did not render the subsidiary legislation ineffective, there was no need for rectification.

31. D of A said that to put beyond doubt that the 19 items of subsidiary legislation were valid, and to avoid the possibility of future challenge, the Administration could consider confirming retrospectively the validity of the subsidiary legislation by way of a validation ordinance.

32. The Chairman queried the need for a validation ordinance given the view formed by the Subcommittee that the subsidiary legislation in question were valid. He was also concerned about the retrospectivity of a validation

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ordinance. D of A advised that any retrospective measure would not apply to any provision involving a criminal sanction. The Administration would consider whether any of the subsidiary legislation in question had that effect.

Admin.

33. In response to Miss Margaret NG's question as to whether anything should be or could be done to make good the failure to table, LA said that as the statutory timeframe for the tabling of the subsidiary legislation had long passed, LegCo could not scrutinize the subsidiary legislation now. LegCo was not a competent authority to adjudicate on the validity or otherwise of the subsidiary legislation in question. The Subcommittee could only express a view that the subsidiary legislation in question were valid. It was incumbent upon the Administration to propose measures to resolve the situation. The key thing was to avoid any confusion or challenge which might frustrate the original intention of the subsidiary legislation. LA said that on the side of caution, he would support the introduction of a validation ordinance to put matters straight.

34. DLD said that a person prosecuted under the subsidiary legislation in question could argue in court that the subsidiary legislation did not have legal effect as it had not been tabled. To avoid this challenge and to protect the law and the persons acted under the law, the Administration was of the view that the introduction of a validation ordinance was desirable.

35. LA agreed that the introduction of a validation ordinance was to remove doubt about the validity of the subsidiary legislation in question. A validation ordinance could also forestall possible defences raised in criminal proceedings under the subsidiary legislation.

36. Miss Margaret NG said that if the Subcommittee accepted the view that these 19 items of subsidiary legislation were valid and that nothing could be done under section 34 to make up for the missing step, then it could only at best consider the proposal of a validation ordinance. A validation ordinance, however, was not to rectify the omission of tabling under section 34(1) but to serve as an additional assurance. She, nevertheless, pointed out that the validation process might run the risk of creating new problems.

37. The Chairman said that depending on its scope, a validation ordinance could be open to challenge. Miss Margaret NG concurred that there would be problems associated with the deeming provisions of a validation ordinance. She requested the Administration to consider the following questions -

(a) if the subsidiary legislation were held to be valid, why was there a need to validate;

(b) if a validation ordinance was considered necessary, when did the subsidiary legislation take effect; whether it should be from the

date of validation or from the date of the original gazettal; and

(c) whether a validation ordinance having retrospective effect would breach the provisions of the International Covenant on Civil and Political Rights.

To resolve the problem of retrospectivity, the Chairman suggested that the Administration might consider dealing separately with items of subsidiary legislation to which retrospectivity would or would not apply.

38. As regards the Ozone Layer Protection (Controlled Refrigerants) Regulation (Commencement) Notice 1994, LA advised that since the law did not specify whether the notice should be in the form of a Legal Notice or General Notice, as long as the Notice was published in the Gazette, the condition for making the subsidiary legislation was satisfied. As such, the Commencement Notice 1994 was validly made and there was no legal basis on the part of the Administration for making a second commencement notice i.e. the Commencement Notice 1998.

39. DLD accepted that the publication of the Commencement Notice 1994 in the Gazette had met the legal requirement. However, the non-tabling of the Notice had deprived LegCo of the chance to scrutinize it. Since no one had been prosecuted under the Ozone Layer Protection (Controlled Refrigerants) Regulation and to prevent future challenge, the Administration had chosen to publish another commencement notice and table it to enable members to scrutinize it.

40. The Chairman was of the view that confusion had been caused by the publication of a second commencement notice on the same Regulation which appointed a different commencement date. There would be difficulty in deciding whether the effective date of the Regulation should be 1 January 1994 (according to the first commencement notice) or 1 January 1999 (according to the second commencement notice).

41. LA suggested that the issue of a corrigendum notice might solve the confusion created by the Commencement Notice 1998. The corrigendum notice would be recorded in the statute book and this would clarify any doubt as to the commencement date of the Regulation. LA pointed out that some corrigendum notices had been issued recently in respect of three pieces of subsidiary legislation.

42. Miss Margaret NG said that the Administration might consider seeking a declaration by the Court.

43. Summing up the deliberations, the Chairman said that the Subcommittee formed the view that the Commencement Notice 1994 was valid

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and it was not necessary and indeed ultra vires on the part of the Administration to publish the Commencement Notice 1998. In the absence of a proper authority to publish the Commencement Notice 1998, the legal effect of this piece of subsidiary legislation was in doubt. LegCo therefore could not rely on section 34 to amend or repeal it. Members agreed that it was necessary to put on record the views of the Subcommittee on the validity of the Commencement Notice 1994 at a Council meeting before the expiry of the scrutiny period of the Commencement Notice 1998 on 10 February 1999 and that a report should be made to the House Committee on 5 February 1999 on the deliberations of the Subcommittee.

44. D of A said that the Administration would need time to consider how the situation should best be handled. The Chairman requested and D of A agreed to relay the decision of the Subcommittee on the validity of the Commencement Notice 1998 to the Secretary for Planning, Environment and Lands.

Admin.

[*Post-meeting note* : the Chairman presented the report on the Subcommittee on Ozone Layer Protection (Controlled Refrigerants) Regulation (Commencement) Notice 1994 at the Council meeting on 10 February 1999.]

II Any other business

45. There being no other business, the meeting ended at 12:45 pm.

Legislative Council Secretariat
19 April 1999