

## WHEN DOES AN INSTRUMENT MADE UNDER PRIMARY LEGISLATION HAVE “LEGISLATIVE EFFECT”?<sup>1</sup>

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### Introduction

According to constitutional theory (as propounded by Dicey (1959)), legislatures are assumed under the Westminster system of government to be the supreme law-making authorities, but, even if Dicey’s theory were ever valid, the reality is now different. All the evidence shows that legislatures have only limited control over legislation they have enacted once they have delegated to executive governments and their agencies power to make subsidiary legislation. An obvious manifestation of this development has been increased use of powers to make “quasi-legislation”. The use of these powers has enabled the executive and its agencies to circumvent scrutiny and control by the legislature.

In most if not all Commonwealth countries statutory provision is made for the publication of subsidiary legislation. Similar provision is made for subsidiary legislation to be tabled in the legislature within a specified number of sitting days after the subsidiary legislation is made and most enable motions for disallowance to be moved within a further number of specified sitting days. In at least three Commonwealth jurisdictions, New Zealand, Western Australia and Hong Kong, the legislature cannot only disallow subsidiary legislation, but it can amend that legislation as well.

Despite various legislative changes that have taken place in recent years to enhance the accountability to legislatures of the exercise by executive governments and their agencies of powers to make subsidiary legislation, significant problems remain, most of which have implications for the accountability to legislatures of executive governments and their agencies for the exercise of delegated legislative authority. One such problem is the question of whether or not an instrument made under primary legislation has legislative effect. Many instruments are made under the authority of primary legislation, but whether, in the Hong Kong context, instruments are “subsidiary legislation” is by no means always clear as I shall demonstrate. An instrument that does not have legislative effect is not subject to scrutiny and control by the legislature, so the question is by no means an academic one<sup>3</sup>. The purpose of this paper therefore is to consider this question and to suggest a possible solution to it. It is taken as given that executive governments and their agencies should be accountable to the

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<sup>3</sup> At least not in Hong Kong. The question is also important in some Australian jurisdictions, which have tabling requirements and disallowance provisions for statutory rules and whether or not an instrument is a statutory rule is determined by whether or not it has “legislative effect”.

relevant legislature, as representing the people.

## Subsidiary legislation in Hong Kong

All subsidiary legislation made under Hong Kong Ordinances is required to be published in the Hong Kong Government Gazette<sup>4</sup> and then to be tabled in the Hong Kong Legislative Council when it next sits<sup>5</sup>. When any such legislation has been tabled, the Council can, within 28 days after the date on which it was tabled<sup>6</sup>, amend it. Section 34(2) of the Interpretation and General Clauses Ordinance provides as follows:

- (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.

(It should be noted that section 3 of the same Ordinance defines “amend” as including “repeal, add to and vary”.)

But what is “subsidiary legislation” in this context? Section 3 of that Ordinance defines “subsidiary legislation” as “...any proclamation, rule, regulation, order, resolution, notice, rule of court, bylaw or other instrument made by virtue of any Ordinance *and having legislative effect*”. Unfortunately, as an examination of the relevant cases will show, it is far from clear what the italicised words mean. But, in the Hong Kong context and also in the context of many other Commonwealth jurisdictions, it is crucial that the phrase should have a precise meaning. If an instrument is made under an Ordinance:

- it must be published in the Hong Kong Government Gazette;
- it must be laid before the Legislative Council within the prescribed period; and
- it is subject to scrutiny and possible amendment (including repeal) by that Council.

If the instrument, despite being called a proclamation, rule, regulation, order, resolution, notice or bylaw, does not have “legislative effect”, then none of those requirements apply. This means that, if a person who has authority to issue an instrument mistakenly assumes that an instrument does not have legislative effect when the reality is that it does have that effect, the instrument may be void or at least ineffective<sup>7</sup>.

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<sup>4</sup> Section 28(2) of the Interpretation and General Clauses Ordinance.

<sup>5</sup> Section 34(1) of the Interpretation and General Clauses Ordinance.

<sup>6</sup> Section 34(3) of the Interpretation and General Clauses Ordinance to be extended if the period ends after the end of Legislative Council session or after the Council is dissolved.

<sup>7</sup> The position in Hong Kong is far from clear. Section 46A of the Acts Interpretation Act 1901

Recently, the question arose as to whether a commencement notice was subsidiary legislation and thus capable of being amended by the Hong Kong Legislative Council. Section 1(2) of the *Disability Discrimination Ordinance* provided for the Ordinance to come into operation on a day to be appointed by the Secretary for Health and Welfare by notice in the Gazette. It further allowed different days to be appointed for the commencement of different provisions. Section 1(2) of the *Sex Discrimination Ordinance* was to similar effect, except that responsibility for making the commencement notice was given to the Secretary for Home Affairs. Commencement notices were made under section 1(2) of the *Disability Discrimination Ordinance* and section 1(2) of the *Sex Discrimination Ordinance*, but these commenced only some of the provisions of those Ordinances. Those provisions were of a machinery nature and the substantive provisions, which were intended to create legally enforceable rights and obligations, remained uncommenced.

Although it had been the practice for over 29 years for commencement notices to be laid on the table of the Legislative Council, no member of the Council had ever sought to take any legislative action on a commencement notice. In accordance with the usual practice, the notices were tabled in the Council. A member of the Council then sought to move amendments to the commencement notices<sup>8</sup>. The amendment sought to bring the substantive provisions of the two Ordinances into force on the same day as the machinery provisions.

So were the commencement notices “subsidiary legislation”? In order to be subsidiary legislation an instrument had to be a “proclamation, rule, rule, regulation, resolution, notice, rule of court, bylaw or other instrument made under or virtue of an Ordinance”. The instrument also had to have *legislative effect*. Commencement notices are clearly instruments within the definition of that expression because they are made “under or by virtue of an Ordinance” but the question still remains: do they have legislative effect?

### **The relevant cases**

There are relatively few cases that provide guidance on the point, but it may be reasonably assumed that in enacting the definition of “subsidiary legislation” the Hong Kong legislature did not intend instruments that had an administrative or judicial effect to be subsidiary legislation<sup>9</sup>. The distinction

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(Commonwealth) makes it clear that, if a statutory rule (the Australian equivalent of subsidiary legislation) is not tabled in Parliament within the requisite period, the rule is void.

<sup>8</sup> The member also sought to amend the District Court Equal Opportunities Rules which had been tabled in the Legislative Council on 5 June 1996, but there is little doubt that the rules were “subsidiary legislation”.

<sup>9</sup> In *Lim Chin Aik v The Queen* [1963] AC 161, the Privy Council in discussing a contention that an order of a Minister against a person was the exercise of delegated legislation with certain results maintained that there was a difference between the exercise of a legislative function of the Minister as distinct from his executive or administrative functions.

between instruments that have a legislative, administrative or judicial effect is often blurred. Judicial bodies can make instruments (such as rules of court) that have a legislative effect and executive bodies can make instruments that may have a legislative effect. In *The Queen v Wright: ex parte Waterside Workers Federation of Australia* (1955) 93 CLR 528, at 521, the High Court noted that the orders made by the Australian Stevedoring Board and the Industrial Court under sections 13 and 34 of the Stevedoring Industry Act 1949 “may be general so that they govern the conduct to which they apply of persons at large”. The Court held that, even though made by “a court”, orders under section 34 were not “curial orders” and said that the power to make such orders might be described as administrative, but “it is rather one of subordinate legislation”.

The question of whether an instrument has a legislative effect is of particular relevance in Australia<sup>10</sup>. This is for two reasons. An instrument of a legislative character is disallowable under section 46A or Part XII of the *Acts Interpretation Act 1901* of the Commonwealth. The question could also be relevant to determining whether a decision to make an instrument may be a decision of an administrative character that can be reviewed under the *Administrative Decisions (Judicial Review) Act 1977* of the Commonwealth.

In *Minister for Industry and Commerce v Tooheys Ltd* [1981] FLR 325, the question arose as to whether a refusal of the Minister to make a determination under section 273 of the *Customs Act 1901* of the Commonwealth relating to the admission to Australia of certain goods was “a decision of an administrative character” within the meaning of the *Administrative Decisions (Judicial Review) Act 1977*. If it was, did the Minister’s decision “making, or forming part of the process of making, or leading up to the making of .... calculations of.... duty” under the *Customs Act 1901* within the meaning of paragraph (e) of Schedule 1 to the 1977 Act and therefore not a decision to which that Act applied. The appellant argued that the refusal of the Minister to make a determination under section 273 of the 1901 Act was not a decision of an administrative character. Subsection (3) of that section provided that, where the Minister made a determination under the section that an item or proposed item of a customs Tariff should apply to goods, the item applied as if the goods were specified in a bylaw made for the purposes of that item. The failure of the Minister to make a decision meant that no bylaw was made for the purpose of the relevant item. The parties agreed that, because of section 273(3), a determination by the Minister that an item should apply to goods had the same effect as a bylaw. At first instance, the judge held that the refusal of the Minister to make a determination under section 273 was “a decision of an administrative character” within section 3(1) of the 1977 Act. In dismissing the appeal, the Full Court of the Federal Court of Australia held that the Minister’s decision was such a decision. Although that expression is not defined in the 1977 Act, its very use indicated that the Commonwealth Parliament intended to exclude from the 1977 Act other kinds of decisions, such as those having a legislative or judicial character. The Court rejected the appellant’s submission that the decision involved in the present case was of a legislative and not of an administrative character. The Full Court found that a determination under section 273 of the 1901 Act was not a

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<sup>10</sup> There appears to be no material difference between the expressions “instrument having legislative effect” and “instrument of a legislative character” (which is the expression mostly used in Australia).

legislative act which the Commonwealth Parliament could have done itself but chose to delegate to the Minister. It also ruled that a determination under that section did not have the effect of changing the relevant law. The Full Court declared that the distinction between legislative and administrative acts is essentially between—

- the creation or formulation of new rules of law having general application, and
- the application of those rules to particular cases.

The decision of the Minister under the 1901 Act did not amount to changing the law: he was simply applying the law to a particular set of circumstances. Although the Court acknowledged that, by exercising his powers under the Act, the Minister may have been doing the work that Parliament might have done if it had been equipped to specify in advance all of the goods that it intended the law to apply to, it did not follow that the Minister's decision was of a legislative character. Thus the decision of the Minister not to make a determination under section 273 of the 1901 Act did not fall within paragraph (e) of Schedule 1 to the 1977 Act because that paragraph was directed to the process whereby the liability to customs duty was calculated in a particular case, whereas a decision to make a bylaw or determination was a decision that affected liability. It was not a decision involving the calculation of liability. The Court also held that the purpose of paragraph (e) was to exclude from the classes of decisions that could be reviewed under the 1977 Act decisions that were reviewable by courts or by boards of review or both. (This was designed to prevent aggrieved citizens from having “two bites of the cherry”.)

The decision in *Tooheys Ltd.* followed the earlier decision of the High Court of Australia in *Commonwealth v Gruneit* (1943) 67 CLR 58. In that case, the Minister for the Army, in accordance with the power conferred by regulation 8 of the *National Security (Aliens Service) Regulations*, directed that every male refugee alien of a particular class should perform a specified service (not being service in the Armed forces) that the alien was, in the opinion of the Minister, capable of performing. Section 5(4) of the *National Security Act 1939-40* of the Commonwealth provided for certain provisions of section 48 of the *Acts Interpretation Act 1901* of the Commonwealth to apply to “orders, rules and bylaws, which are of a legislative character and not of an executive character, in like manner as they apply to regulations”. Those provisions included section 48(1)(c) and (3), which respectively required regulations to be laid before each House of Parliament within a specified time and provided that, if they were not so laid, they should be void. The Minister's direction was not laid before either House of Parliament and so the plaintiff claimed that the direction was void. Section 5(4) of the Act of 1939-40 was based on the proposition that a distinction could be drawn between orders, rules and bylaws that had a legislative character and those that had an executive character. As the Court acknowledged, it is not always easy to discern the difference. Although, generally speaking, describing an instrument as a rule or bylaw suggests that the instrument is of a legislative character, this is not always the case as can be seen from *Minister for Industry and Commerce v Tooheys Ltd.* Moreover, it was clear from section 5(4) that those instruments could be executive rather than legislative. In the case of orders, some would be clearly executive, as, for example, where under a legislative power a particular person was ordered by another person to perform a specified act. As the Chief Justice pointed out (at p. 82):

The general distinction between legislation and the execution of legislation is that legislation determines the content of a law as a rule of conduct or a declaration as a power, right or duty, whereas executive authority applies the law in particular cases.

In the course of his judgement, the Chief Justice also referred to an American decision, *J. W. Hampton Jr & Co v United States* (1928) 276 US 407. In referring to the distinction between a legislative, executive and judicial power, it was stated that “The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law.”

The upshot was that the Court held that the direction was of an executive, and not a legislative, character and, therefore, did not fall within the ambit of section 5(4).

In *Hamblin v Duffy* (1981) 50 FLR 310, another case concerned with determining whether or not a decision was a “decision of an administrative nature” within the meaning section 3(1) of the *Administrative Decisions (Judicial Review) Act 1977* of the Commonwealth, Lockhart J. expressed the view that legislative acts usually involved the formulation of new rules of law having general application. He admitted though that the earlier cases illustrated the difficulty of expounding definitive meanings of “legislative”, “judicial”, “ministerial” or “administrative”. The difficulty, he said, was compounded by the fact that a particular category of decision tended to overlap or merge with another. The circumstances surrounding the notices commencing provisions of the Hong Kong *Sex Discrimination Ordinance* and the *Disability Discrimination Ordinance* are surely manifestations of this difficulty.

The High Court of Australia has, in two other cases, addressed the question of whether an order made under legislative authority is executive, and not legislative, in character. Those cases were *Arnold v Hunt* (1943) 67 CLR 429 and *Arthur Yates & Co Pty Ltd v the Vegetable Seeds Committee and others* (1946). However, neither of those decisions adds anything significant to what I have already said. In *Arnold v Hunt*, the Court merely stated that the relevant orders were executive in character without analysing the basis for doing so. Nevertheless, the case does highlight the confusion surrounding the expression “legislative character” because the court disagreed with the judge at first instance who found that the relevant instrument was of such a character! In *Yates*, on the other hand, the High Court seemed to think that the determining factor was the nature of the authority in whom the power was reposed rather than on the characteristics of the power to be exercised<sup>11</sup>. However, although the principal roles of the executive, the legislature and the judiciary may be to exercise executive, legislative and judicial powers respectively, those organs of government also exercise other kinds of

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<sup>11</sup> See dictum of Dixon J. at p. 60 where he said: “it will depend rather upon the nature of the authority in whom the power is reposed and upon the measure and extent of the power, its subject matter and its limitations and the conditions in or upon which it is exercisable”.

powers<sup>12</sup>, so any attempt to classify an instrument as being of an executive, legislative or judicial character by reference to those functions alone is clearly doomed to failure<sup>13</sup>.

The question was also canvassed in *McEldowney v Forde* [1971] AC 633, but the House of Lords, by a majority, merely held that the making of the relevant regulations (proscribing named organisations) was a legislative act that fell within section 1(3) of the *Civil Authorities (Special Powers) Act 1922* and not an executive act within the meaning of section 1(1)<sup>14</sup>. Again, the majority did not specify reasons for their finding, presumably because it was thought that they were self evident.

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 (at p. 74) said:

In the instant case the Gazette notice is *ex facie* general in its terms. It extends to all who propose to dredge for oysters in the area which it defines. *It had effect against the whole world* notwithstanding that it significantly protected the 23 boats previously fishing once the policy directive was made. In short, the notice was a general piece of delegated legislation.

So the fact that an instrument “has effect against the whole world” seems to be a factor in determining the instrument’s status as a legislative instrument.

More recently, the decision of the House of Lords in *R v Secretary of State for the Home Department, ex parte Fire Brigades Union and others* [1995] 2 All ER 244 was directly concerned with the status of commencement orders<sup>15</sup>. Sections 108-117 of, and Schedules 6 and 7 to, the Criminal Justice Act 1988 provided for the establishment of a new criminal injuries compensation scheme. Those sections and Schedules did not come into operation immediately but section 171 of the Act provided for them to come into force on a day to be appointed by the Secretary of State for Home Affairs by order made by statutory instrument. In the meantime, the Secretary of State decided that the scheme was too expensive to operate and purported to establish another criminal injuries compensation scheme under the royal prerogative. The Fire Brigades Union and some other trades unions applied for judicial

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<sup>12</sup> For instance, the executive and the judiciary both make subsidiary legislation and the legislature issues instruments of an administrative nature.

<sup>13</sup> Also see Whitmore and Aronson, 12.

<sup>14</sup> Accordingly, the proviso to section 1(1) of the Act (which directed that the ordinary course of law and avocations of life and the enjoyment of property were to be interfered with as little as may be permitted by the exigencies of the steps required to be taken under the Act) was not applicable.

<sup>15</sup> It may be assumed that nothing turns on the fact that in Hong Kong the day for commencing an Ordinance is usually fixed by a notice, whereas in the United Kingdom the day for bringing into operation an Act is often by order. In some Australian jurisdictions, the day on which an Act is to commence is fixed by proclamation.

review of the Secretary of State's decision, claiming that the decisions of the Secretary of State not to bring into force the relevant provisions of the 1988 Act and to implement the non-statutory scheme were unlawful. Relief was refused at first instance but on appeal to the Court of Appeal that Court, by a majority, held that the Secretary of State had an unfettered discretion to decide when to bring the relevant provisions into force. However, he was not, while those provisions remained unrepealed, free to exercise prerogative powers to introduce a different scheme. On appeal from the Court of Appeal, the House of Lords affirmed that Court's decision, holding that the courts could not intervene to compel the Secretary of State to bring those provisions into operation since they would then be interfering in the legislative process. It could not, be right, their lordships said, that the Secretary of State was under a duty, irrespective of any change in circumstances since the passing of the legislation, to bring into operation legislation that might then be inappropriate<sup>16</sup>.

So what light do these decisions throw on the status of the commencement notices under section 1(2) of the *Disability Discrimination Ordinance* and section 1(2) of the *Sex Discrimination Ordinance*? In *Tooheys Ltd*, it was stated that an act was legislative in character if it involved the creation or formulation of new rules of law having general application. On the other hand, application of those general rules to *particular cases* was to be regarded as an act of an administrative nature. A commencement notice clearly does not have the effect of applying the relevant statutory provisions to particular cases. And, although such a notice does not itself formulate statutory provisions, it can be said to create them by bringing them into effect.

Similarly in *Grunseit*, the High Court of Australia held that legislation determines the content of the law as a rule of conduct or declares a power, right or duty whereas, as in *Tooheys Ltd*, the execution of legislation involves the application of the law in particular cases. Although a commencement notice does not itself contain the content of the law, it has a direct effect on determining its content because legislation cannot exist in a vacuum. Legislation can only exist as law when either the legislature or a delegate of the legislature has acted to bring the legislation into force. A commencement notice is just one way of bringing enacted legislation into operation. The legislature could just as easily have retained responsibility for commencing the legislation. And if it had done so, surely no one would suggest that this was not a legislative act?

It will be recalled that in the New Zealand decision in *Fowler & Roderique Ltd* the crucial attribute of whether an instrument was of a legislative, rather than an administrative, character was whether or not it had effect "against the whole world". There must surely be little doubt that a commencement notice has such an effect.

In *Ex parte Fire Brigades Union*, whether or not a commencement order had legislative effect was

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<sup>16</sup> However, the House of Lords (Lords Keith and Mustill dissenting) further held that the Secretary of State's discretion was not unfettered and he was, while the relevant statutory provisions remained unrepealed, required to keep the question of when they were to be brought into operation under review. It was, the majority held, an abuse or excess of power for him to exercise the prerogative power in a manner inconsistent with that duty. It followed that his decision not to implement the statutory scheme but to implement a non-statutory scheme instead was unlawful.

only indirectly in issue. However, it is clear that the House of Lords would not, in the absence of some indication from Parliament that the courts should do so, intervene to require the Secretary of State for Home Affairs to commence the operation of the provisions of the Criminal Justice Act 1988 that prescribed the criminal injuries compensation scheme. This was because by doing so the courts would be interfering with the legislative process. As Lord Mustill pointed out<sup>17</sup>, Parliament has its own special means of ensuring that the executive, in the exercise of delegated functions, performs in a way which Parliament finds appropriate. He went on to say that, ideally, it was those latter methods which should be used to check executive errors and excesses, because it was the task of Parliament and the executive in tandem, not the courts, to govern the country<sup>18</sup>. One must conclude from this that their lordships were of the view that a commencement order was an instrument having a legislative effect<sup>19</sup>. The comments of another law lord, Lord Nicholls, are also apt. At p. 275, he had this to say:

.... a court order compelling a minister to bring into effect primary legislation would bring the courts right into the very heart of the legislative process. But the legislative process is for the legislature not the judiciary. The courts must beware of trespassing upon ground which, under this country's constitution, is reserved exclusively to the legislature. Clearer language, or a compelling context, would be needed before it would be right to attribute to Parliament an intention that the courts should enter upon this ground in this way.

The comments of Lord Mustill and Lord Nicholls are equally relevant to the Hong Kong environment, with the Hong Kong Legislative Council having its own mechanisms under the Interpretation and General Clauses Ordinance (Cap.1) to ensure that the Government exercises the functions delegated by the legislature in a manner that the Council considers to be appropriate.

### **The ruling of the President of the Hong Kong Legislative Council**

After careful consideration, the President took the view that the well established practice in the Legislative Council, whereby commencement notices were treated as subsidiary legislation, should not be overturned. In arriving at this conclusion, he took into account that the Commonwealth of Australia's *Legislative Handbook* stated that a commencement notice was of an executive rather than

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<sup>17</sup> Ibid at p. 268.

<sup>18</sup> i.e. the United Kingdom

<sup>19</sup> See dictum of Lord Browne-Wilkinson at p. 252 where he said: "In my judgement it would be most undesirable that .... the court should intervene in the legislative process by requiring an Act of Parliament to be brought into effect. That would be for the courts to tread dangerously close to the area over which Parliament enjoys exclusive jurisdiction, namely the making of legislation". Also see dictum of Lord Mustill at p. 263 where he said: "For the courts to grant relief of this kind would involve a penetration into Parliament's exclusive field of legislative activity far greater than any that has been contemplated even during the rapid expansion of judicial intervention during the past 20 years".

of a legislative character. However, he preferred the view expressed in Erskine May<sup>20</sup> that “the commencement of a statute may be more conveniently provided for by delegated legislation”. He also took into account that Francis Bennion<sup>21</sup>, the English guru on legislation, had classified commencement orders as delegated legislation.

Having decided that commencement notices were “subsidiary legislation”, the President then had to rule on the question of whether the motions to amend the two sections providing for the commencement of the *Disability Discrimination Ordinance* and the *Sex Discrimination Ordinance* by bringing all of the provisions of those Ordinances into force on the same date were in order. The motions would quite clearly extend the effect of the original notices tabled in the Legislative Council which provided only for the commencement of those provisions establishing the Hong Kong Equal Opportunities Commission. It will be recalled that section 34(2) of the *Interpretation and General Clauses Ordinance* (so far as material) enables the Legislative Council to amend subsidiary legislation “in any manner whatsoever consistent with the power to make such subsidiary legislation”. The President ruled that this phrase had to be interpreted in the context of the making of the subsidiary legislation, so that, if the delegate had not exercised the power to fix a commencement day for particular provisions of the relevant Ordinance, it was not in order for the Council to use section 34(2) to amend the commencement notice by adding further provisions of that Ordinance to the notice for the purpose of commencing those provisions on the same day as the provisions originally specified in the notice. His interpretation was based on the notion that the Legislative Council consciously gave itself no powers to determine a commencement day for a provision of the relevant Ordinance until a commencement notice was made in respect of that provision. Consequently, if a commencement notice brought into operation only some of the provisions of that Ordinance, the Council did not thereby acquire the power to extend the notice to the other provisions. The amendments were thus out of order and could not be considered by the Council.

### **Criticism of the ruling**

I believe that the President adopted an unduly narrow view of section 34(2) of the *Interpretation and General Clauses Ordinance*, particularly bearing in mind that section 19 of that Ordinance requires an Ordinance to “receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit”. This phrase must surely mean that the Legislative Council can take such action as it thinks appropriate so as to put itself in the same position as the delegate and to exercise the power in any way in which the delegate could have exercised it. I suggest that the purpose of section 34(2) must be to enable the Legislative Council to amend<sup>22</sup> the subsidiary legislation by:

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<sup>20</sup> Erskine May (1938, 38).

<sup>21</sup> However, having searched Bennion's *Statute Law* (1983) assiduously I found nothing to support this statement.

<sup>22</sup> Section 3 of the *Interpretation and General Clauses Ordinance* defines “amend” as including “repeal, add to or vary”.

- omitting any of the text of the subsidiary legislation;
- substituting for any of the existing text any text that the delegate could have included in that legislation; or
- adding to that legislation any text that the delegate could have included.

Applying this reasoning to the motions to amend the commencement notices, since the Legislative Council could, when passing the legislation, have specified particular dates for the commencement of all of the provisions of the legislation, it must have been lawful for the Council to amend the notices by adding commencement days for provisions other than those specified in the notices by the delegates. It is surely irrelevant that, when passing section 34(2), the Legislative Council (surely the legislature?) consciously gave itself no powers to interfere with a commencement day for a provision of an Ordinance until a commencement notice was made with respect to that provision. The purpose of section 34(2) is to confer on the Legislative Council a power that will enable it to supervise the exercise by delegates of the power to make subsidiary legislation, so that, if in relation to a particular Ordinance the Council is not satisfied with the action that the delegate has taken with respect to subsidiary legislation made under that Ordinance, it can take control of the situation by exercising its power to amend that legislation. The use of the phrase “in any manner whatsoever” in section 34(2) in my view makes it doubly clear that this was the way that the legislature must have intended that provision to operate.

### **Should "legislative effect" be defined?**

It is apparent from the cases and from the circumstances surrounding the notices commencing the two anti-discrimination Ordinances that there is considerable uncertainty as to when an instrument has legislative effect or not.

There are (at least) three possible approaches that might be taken to address the first issue. Firstly, the definition of “subsidiary legislation” might, as is now the case in some Commonwealth jurisdictions<sup>23</sup>, be based on a formal description of the instrument (regulations, rules, bylaws, ordinances, etc) - the so called “key word” tests. Apart from regulations, rules, bylaws and ordinances, other instruments include proclamations, orders, tariffs and determinations, as well as those documents mentioned above that fall within “quasi-legislation”.

Another approach would be to simply redefine “subsidiary legislation” as any instrument made under an Ordinance that is of a legislative character, unless expressly excluded by its enabling provision. The expression “legislative” would not be defined, but to assist the Executive and Government agencies in deciding whether an instrument is “legislative”, the essential characteristics of legislative instruments would be set out in a legislation handbook. This approach was proposed by the Australian Administrative Review Council (“the ARC”) in its report “Rule Making by Commonwealth Agencies” (1992). Presumably it would be left to the courts to determine borderline cases.

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<sup>23</sup> Such as the Australian Commonwealth and some Australian states, such as New South Wales.

A third approach would be based on the substantive character of the instrument. If this approach were to be adopted, subsidiary legislation might be defined as any instrument that lays down a rule of conduct by conferring a legally enforceable right on members of the public or members of a specified section of the public or that impose a legally enforceable obligation on them. Alternatively, it might be defined as an instrument made under an Act that:

- has the effect of determining the content of the law (as opposed to actually applying the law) or declares a particular power, right or duty<sup>24</sup>; and
- establishes a rule or rules of a binding nature (as opposed to mere guidelines that may be disregarded at the discretion of the person or body to whom they are directed);
- is of general application (rather than applying in a particular case)<sup>25</sup>.

The problem with the first approach is obvious. It is virtually impossible to prevent the invention of new labels for “legislative instruments” that are not covered by a wider definition of “statutory rule” (or some equivalent term). The use of this approach would (and in those jurisdictions where the “key word” approach is used, there is evidence that it does) enable the executive and its agencies to avoid being accountable to the legislature by the use of instruments that do not fall within the key word test.

A label that has been applied to legislative instruments that fail the “key word” test is “quasi-legislation”. Megarry (1944) identified two forms of what he called “administrative quasi-legislation”.

First, there is the State-and-subject type, consisting of announcements by administrative bodies of the course which it is proposed to take in the administration of particular statutes<sup>26</sup>. The second category of administrative quasi-legislation is the subject and subject type, consisting of arrangements made by administrative bodies which affect the operation of the law between one subject and the others<sup>27</sup>.

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<sup>24</sup> See dictum of Latham CJ in *Commonwealth v Grunseit* (1943) 67 CLR 58 at 82.

<sup>25</sup> See *Ministry for Industry and Commerce v Tooheys Ltd* (1982) 42 ALR 260 at 265. In that case, the Federal Court said: “The distinction between legislative and administrative acts is essentially between the creation or formulation of new rules of law having general application and the application of those rules to particular cases.”

<sup>26</sup> As examples of this first category, Megarry mentioned “practice notes” issued to explain how certain provisions of the War Damage Act would be interpreted and pronouncements by the British Inland Revenue Commissioners as to the circumstances in which particular tax concessions would be allowed.

<sup>27</sup> As an example of the second category of quasi-legislation, Megarry referred to an agreement which the Home Office had negotiated with private insurance companies under which the companies agreed that they would not raise a particular defence in proceedings seeking workers’ compensation.

Examples of common quasi-legislation include codes of practice, guidance notes, guidelines, directions, declarations, orders, technical standards determination, standards, arrangements<sup>28</sup>, circulars<sup>29</sup>, principles, White Papers, development control policy notes, memoranda, authorisations, designations, practice statements, taxation rulings, codes of conduct, codes of ethics and conventions. Generally speaking, quasi-legislative instruments consist of those documents that are made by persons or bodies who are authorised by the primary legislation to “direct”, “determine”, “notify”, “order”, “instruct”, or “declare” that particular action must be taken in particular circumstances.

Quasi-legislation has recently been the subject of severe criticism by Justice McHugh of the High Court of Australia<sup>30</sup>. After warning that executive government may be supplanting Parliament’s law-making function, he pointed out that many Acts granted Ministers and their officers “quasi-legislative” powers, which meant that they, and not Parliament, were exercising the law-making role. He acknowledged that Ministers could not lawfully exceed the powers conferred by Parliament, but in most cases the discretions given to them were so open-ended that it is they and not the Parliament who are really making the rules that bind the citizen. While recognising that Parliament did not have time to legislate for every detail of a policy that it sought to implement, he nevertheless thought that Parliament should closely monitor the way in which Ministers and others prescribed rules that have the force of law. It was, he thought, a short step from the granting of these wide powers to the abrogation by Parliament of its role as the body democratically responsible for the creation of substantive law. I share Mr Justice McHugh’s sentiments.

One of the fundamental problems with quasi-legislation can be its relative inaccessibility. This is mainly because instruments that do not have a legislative effect do not have to comply with the publication requirements applicable to subsidiary legislation<sup>31</sup>. This makes it difficult to know who made the law or why and, even if one did know, it is even more difficult than usual to know what the law actually is. Consequently, as much of this law is not properly published, members of the public will have great difficulty finding out the current state of the law<sup>32</sup>. However, this is not a major problem in Hong Kong where, in a case of a doubtful instrument, there is a tendency to publish it in the Hong Kong Government Gazette rather than not publish it.

It has been suggested that the increased use of quasi-legislation is part of a plot to avoid parliamentary

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<sup>28</sup> For example, see the Coal Compensation Arrangements 1985 (NSW). Although clearly a legislative instrument, it is neither required to be published nor subject to parliamentary disallowance.

<sup>29</sup> See dicta of Scott LJ in *Blackpool Corporation v Locker* [1948] 1 KB 349.

<sup>30</sup> Delivering the 1994 Sir Ninian Stephen Lecture at the University of Newcastle’s Law School.

<sup>31</sup> See the Statutory Rules Publication Act 1903 (Commonwealth); section 41 of the Interpretation Act 1987 (NSW); sections 40 and 41 of the Legislative Instruments Act 1992 (Qld); section 11 of the Subordinate Legislation Act 1978 (SA); section 47 of the Acts Interpretation Act 1931 and the Rules Publication Act 1953 (Tas); section 4 of the Subordinate Legislation Act 1962; section 41 of the Interpretation Act 1984 (WA).

<sup>32</sup> Whalan (1990).

scrutiny<sup>33</sup>. Robert Wiese (1991), a member of the Western Australian Parliament's Joint Standing Committee on Delegated Legislation, has expressed similar sentiments. At the third biennial conference of Australian delegated legislation committees, he said:

.... it is a matter for real concern that government departments will knowingly seek to reduce a parliamentary committee's jurisdiction by adopting forms of statutory instrument that are not caught by the definition "regulation" in the empowering Act.

In England, concern about the tendency, whether by design or otherwise, to avoid parliamentary scrutiny was expressed as long ago as 1948. In the course of giving judgement in the celebrated case of *Blackpool Corporation v. Locker* [1948]1 KB 349, Scott LJ had this to say:

I am tempted to wonder whether someone in the Ministry of Health thought the name "circulars" would save them from recognition as delegated legislation!

Argument (1993) has rather cynically described quasi-legislation as a "Trojan Horse", a "devious tactic by the bureaucracy, which has developed it for its own ends". The real reason for the growth of quasi-legislation in the Australian federal jurisdiction is, he suggests, that it is the Australian Government bureaucracy's response to the increased scrutiny which the so-called "new administrative law" has brought to bear on bureaucratic decision making since the late 1970s. The theory is that, with the enactment of the *Administrative Appeals Act 1975*, the *Ombudsman Act 1976*, the *Administrative Decisions (Judicial Review) Act 1977* and the *Freedom of Information Act 1982*, the Australian government and its agencies have become much more accountable for their decisions. Not only were they to be more exposed to scrutiny by the legislature and the public but there was a much greater possibility that they could and would be challenged in legal proceedings.

The difficulty with the second approach is that, although the word "legislative" has a core of certainty, it also has a penumbra of uncertainty. The ARC recognised the difficulty and recommended in its report on rule making by Australian Commonwealth agencies that the Commonwealth *Legislation Handbook*<sup>34</sup> should be amended to include criteria on which to determine whether or not an instrument

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<sup>33</sup> Senator Ian Wood, Chairman of the Senate Standing Committee on Regulations and Ordinances, who warned the Senate about "instruments in writing" being used in preference to regulations or ordinances in order to evade the Committee's scrutiny. There is substantial evidence that high ranking members of the Australian federal bureaucracy are not satisfied with the way in which administrative law has developed in recent years. They claim that the principles of administrative law are incompatible with the so-called "new managerialism" in the Australian Public Service in that it is a barrier to "can do" managers who in essence are told "you cannot do that!"

<sup>34</sup> The *Legislation Handbook* is an Australian Commonwealth publication that deals with the process of preparing legislation for introduction into the Federal Parliament. It is prepared by the Department of the Prime Minister and Cabinet for use by Commonwealth Government agencies concerned with the development of legislation. A similar handbook is being prepared for New South Wales legislation, but I am not aware that any other Australian jurisdiction produces a similar document.

is in fact “legislative in character”. This recommendation is problematic, bearing in mind that it would be left to the bureaucracy to determine whether a particular instrument should become subject to the onerous requirements that would (assuming that the report were to be implemented) be imposed by the proposed *Legislative Instruments Act*. In attempting to address this point, the report said that a comparable issue had already arisen under the *Administrative Decisions (Judicial Review) Act 1977*, which applies to all decisions of an *administrative character*. The meaning of that expression, the report points out, has been partly elucidated by case law. The report claimed that, by extension, this elucidation had helped to develop the meaning of the corresponding expression “legislative character”. Unfortunately (and the report acknowledged this), failure to recognise that a particular instrument was of a legislative character would have substantive consequences (assuming the instrument had not been exempted from the operation of the proposed *Legislative Instruments Act*). Any action taken under the instrument would be rendered ineffective. This is because, not having been published in the proposed legislative instruments register, the instrument would never have come into operation. The ARC, however, did not believe that this would be a problem in practice. Nevertheless, it is difficult not to conclude that the ARC was being unduly optimistic, particularly having regard to the findings of the Pearce Report (1993). Moreover, it is unlikely that Government agencies, even if benevolently motivated, could be reasonably expected to determine correctly in every case whether or not the relevant instrument was in fact “legislative in character” merely on the basis of recent Australian Federal Court decisions<sup>35</sup>. Furthermore, there would be the difficulty that possibly invalid instruments would retain their validity for as long as they remained unchallenged, leaving those who questioned the instruments to take the initiative by means of court proceedings. While this may be acceptable in the case of proceedings involving wealthy industrial undertakings, it is rather less so when those proceedings involve people with few means.

In 1994 the Australian Federal Government adopted the third approach. In that year a *Legislative Instruments Bill* was introduced into the Federal Parliament. Clause 4(1) of this Bill provided as follows:

- 4 (1) Subject to subsection (3) and to section 6, a legislative instrument is an instrument in writing:
- (a) that is or was made in the exercise of a power delegated by the Parliament; and
  - (b) that determines the law or alters the content of the law, rather than stating how the law applies in a particular case; and
  - (c) that has the direct or indirect effect of imposing an obligation, creating a right, varying or removing an obligation or right; and

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<sup>35</sup> For example, see *Queensland Medical Laboratory and others v. Blewitt and others* (1988) 54 ALR 615; *Austral Fisheries Pty Ltd v. Minister for Primary Industries and Energy* (1992) 37 FCR 463; *Re Sanyo Australia Pty Ltd and the Comptroller of Customs and Latitude Fishers v. Crean* (unreported) but see (1992) 32 *Admin Review* at p. 68 and 85 *Australian Administrative Law Bulletin* 2986.

(d) that is binding in its application.

(2) Without limiting the generality of subsection (2), each of the following instruments is, subject to subsection (3) and section 6, a legislative instrument:

(a) an instrument:

- (i) made in the exercise of a power delegated by the Parliament before, on or after the commencing day; and
- (ii) described as a regulation by the enabling legislation;

(b) an instrument:

- (i) made in the exercise of a power delegated by the Parliament before, on or after the commencing day in an Act providing for the government of a non self-governing Territory; and
- (ii) described in that Act as an Ordinance or as rule, regulation or by-law made under such an Ordinance;

(c) an instrument, other than a regulation:

- (i) made in the exercise of a power delegated by the Parliament before the commencing day; and
- (ii) required to be published as a statutory rule under the Statutory Rules Publication Act 1903 as in force at any time before the commencing day;

(d) an instrument made in the exercise of a power delegated by the Parliament before the commencing day and, in accordance with a provision of the enabling legislation:

- (i) declared to be a disallowable instrument for the purposes of section 46A of the Acts Interpretation Act 1901 as in force at any time before the commencing day; or
- (ii) otherwise able to be disallowed under Part XII of the Acts Interpretation Act 1901 as in force at any time before the commencing day;

(e) a Proclamation made under enabling legislation,

whether the instrument is made before, on or after the commencing day.

*[Proposed subsection (3) specified certain instruments that were declared not to be legislative instruments for the purposes of the operation of the proposed Act. A similarly, proposed section 6 declared rules of court not to be legislative instruments for those purposes.]*

The 1994 Bill was subsequently superseded by the *Legislative Instruments Bill 1996*, which lapsed with the dissolution of the previous Commonwealth Parliament in that year. Proposed section 4 of the

1996 Bill (which was modified as a result of recommendations of the Senate Standing Committee on Legal and Constitutional Affairs) provides (so far as relevant) as follows:

(1) Subject to subsection (3) and to section 6, a legislative instrument is an instrument in writing:

- (a) that is of a legislative character; and
- (b) that is or was made in the exercise of a power delegated by the Parliament.

(1A) Without limiting the generality of subsection (1), an instrument is taken to have a legislative character if:

- (a) it determines the law or content of the law, rather than the applying the law in a particular case; and
- (b) it has the direct or indirect effect of affecting a privilege or interest, or imposing an obligation, creating a right, or varying or removing an obligation or right.

Proposed sections 4(3) and (6) and proposed section 6 are essentially the same as the corresponding provision in the 1994 Bill. One of the significant changes to be noted is the omission from proposed section 4(1) of that Bill of paragraph (d) (that, in order to be a legislative instrument, the instrument had to be binding in its application). The effect of excluding that provision was probably designed to ensure that certain quasi-legislation (such as administrative rules, guidelines and codes or practice) would be brought within the definition of “legislative instrument”.

A modified version of the third approach seems to offer the best way forward for Hong Kong. I would envisage the addition to section 3 of the *Interpretation and General Clauses Ordinance* of new subsections along the following lines:

(2) For the purposes of the definition of “subsidiary legislation” in subsection (1), an instrument made under or, virtue of an Ordinance has a legislative effect if it determines the law or alters the content of the law, rather than applying the law in a particular case.

(3) An instrument referred to in subsection (2) includes, but is not limited to:

- (a) an instrument that includes one or more provisions directly or indirectly creating or affecting the rights, freedoms or privileges of persons generally or of persons of a specified class;
- (b) an instrument that includes one or more provisions directly or indirectly conferring powers or imposing duties that affect or may affect persons, or the interests of persons, generally or persons, or the interests of persons, of a specified class or regulates the exercise of those powers or the performance of those duties;
- (c) an instrument that includes one or more provisions directly or indirectly imposing an obligation on persons or on persons of a specified class or

- varying or removing such an obligation or determining the manner in which such an obligation should be fulfilled;
- (d) an instrument that includes one or more provisions directly or indirectly imposing a liability on persons generally or on persons of a specified class or determining the effect of such a liability;
  - (e) an instrument that includes one or more provisions prohibiting, either conditionally or unconditionally, persons generally or persons of a specified class from engaging in specified conduct or doing a specified act or thing;
  - (f) an instrument that includes one or more provisions imposing, or authorising a specified person to impose, a penalty for contravening or failing to comply with a provision of the instrument or of another instrument that has a legislative effect (including an Ordinance);
  - (g) an instrument that includes one or more provisions otherwise establishing norms of conduct that persons generally or persons of a specified class are expected to observe;
  - (h) an instrument that commences the operation of an Ordinance or part of an Ordinance, or of any other part of an instrument that has a legislative effect, or repeals or suspends the operation of an Ordinance, part of an Ordinance, or of such an instrument or part of such an instrument.

If a particular kind of legislative instrument were to be identified as one that should definitely be excluded from the definition of “subsidiary legislation”, this could be specified in a further subsection which would be inserted in section 3 for the purpose.

It is important that executive government and its agencies should be able to identify all instruments that have a legislative effect. Although it would be impossible to remove the uncertainty entirely, the enactment of the proposed subsections would, I suggest, go a long way towards doing so. However, the proposed subsections should not define “instrument having legislative effect” exhaustively, because to do so would mean running the risk of not catching all the legislative instruments that were intended to be caught. Hopefully, this approach would provide the best of both worlds in so far as there would be reasonably specific guidance as to what instruments had a legislative effect and were thus “subsidiary legislation”, but at the same time the door would be left open for the inclusion of any legislative instruments that were intended to be caught. I do not envisage that this would lead to significant litigation.

Finally, it is also important that delegates exercising powers delegated under primary legislation should be accountable to the legislature for the exercise of those powers. I believe that the inclusion of the proposed new subsections in section 3 of the Interpretation and General Clauses Ordinance would contribute to enhancing the accountability of those delegates to the legislature and facilitate the effective supervision of the executive by the legislature.

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