

For discussion on
20 July 2015

Legislative Council
Panel on Administration of Justice and Legal Services
Procedure for the Making of Subsidiary Legislation
Relating to the Legal Professional Bodies

Purpose

This paper briefs Members on the procedure for the making of subsidiary legislation relating to the legal professional bodies, the role of the Department of Justice (“**DoJ**”) in the making of such subsidiary legislation, and the measures that have been adopted by DoJ to assist the legal professional bodies in preparing their subsidiary legislation. This paper also informs Members of the specific measures adopted by the Law Society of Hong Kong (“**the LawSoc**”) in their making of subsidiary legislation.

Background

2. The Solicitors (General) Costs (Amendment) Rules 2013 (“**the 2013 Rules**”) were published in the Gazette on 21 June 2013 as L.N. 110 of 2013 and were tabled before the Legislative Council (“**LegCo**”) on 26 June 2013.

3. At the meeting of the House Committee held on 5 July 2013, Members of the Committee noted that the 2013 Rules had not been made by the right party, namely that they had apparently been made by the Council of the LawSoc rather than by the Costs Committee as provided under section 74 of the Legal Practitioners Ordinance (Cap. 159) (“**LPO**”). A subcommittee (“**Subcommittee**”) was then formed under the House Committee to study the validity of the 2013 Rules and the follow-up actions to be taken.

4. The Subcommittee, which was chaired by Hon Dennis Kwok,

finished its deliberations and submitted its report (LC Paper No. CB(4)29/13-14 dated 16 October 2013) to the House Committee. The majority of the Members of the Subcommittee urged 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 explain the error. A new set of rules entitled the “Solicitors (General) Costs (Amendment) Rules 2014” were duly made by the Costs Committee and published in the Gazette on 13 June 2014 as L.N. 93 of 2014. A Corrigendum explaining the error in relation to the 2013 Rules was also published in the Gazette on the same date.

5. In its report, the Subcommittee also requested the Panel to follow up with the Administration and related parties on the proper procedure for making of subsidiary legislation relating to the legal professional bodies.

Delegation of legislative power to the legal professional bodies

6. The practice of the legislature delegating the power to make subsidiary legislation to another body is a long-standing one in common law jurisdictions. In Hong Kong, LegCo has delegated the power to make and amend subsidiary legislation under various ordinances to authorities including the Chief Executive in Council, the Chief Executive, a Director of Bureau or a Head of Department. Rule-making power has also been delegated to non-Government bodies including statutory bodies, committees and professional bodies etc.

7. Insofar as the legal profession is concerned, Part VII of the LPO delegates the power to the legal professional bodies to make subsidiary legislation relating to legal professional practice. For example, section 72AA confers the power on the Council of the Hong Kong Bar Association (“**Bar Council**”) to make rules in respect of, *inter alia*, the professional practice, conduct and discipline of barristers and pupils. Sections 73 and 73A confer the power on the Council of the LawSoc to make rules, including those providing for solicitors’ professional practice, conduct and discipline, and those concerning indemnity against loss arising from claims in respect of civil liability incurred by solicitors in connection with their practice. Sections 73D and 73E confer similar rule making powers on the Council of

the Society of Notaries (“**Council of the Notaries Soc**”) to make rules regulating the professional practice, conduct and discipline of notaries public and provide for indemnity against loss arising from claims in respect of civil liability incurred by notaries public in connection with their practice. All the rules made by the relevant legal professional bodies under the above provisions are subject to the prior approval of the Chief Justice (see sections 72AA, 73(2), 73A(6), 73D(3) and 73E(5)).

8. Apart from the above, Part VII of the LPO also confers the power to make rules relating to the legal profession on the Chief Justice¹, the Higher Rights Assessment Board established under section 39E of the LPO and the Costs Committee established under section 74 of the LPO. The rules made by the Costs Committee are also subject to the prior approval of the Chief Justice (see section 74(4)).

Control over the exercise of delegated legislative power by the legal professional bodies

9. While the rule-making power is delegated to the relevant legal professional bodies, LegCo retains ultimate control over subsidiary legislation made by those bodies through a combination of means, including control over the primary legislation (i.e. the LPO) and the procedures for scrutiny of subsidiary legislation as provided in section 34 of the Interpretation and General Clauses Ordinance (Cap. 1) (“**IGCO**”).

10. Pursuant to section 28(1)(b) of the IGCO, no subsidiary legislation shall be inconsistent with the provisions of any ordinance. In making subsidiary legislation, the legal professional bodies must act within their powers as conferred by the relevant provisions of Part VII of the LPO. Failing that, the subsidiary legislation would be *ultra vires* and could be subject to legal challenge and struck down under the court’s judicial review power.

11. Under the existing provisions of Part VII of the LPO, the rules made by the legal professional bodies are subject to the negative vetting

¹ Under section 72 of the LPO, CJ may make rules providing for the admission of solicitors and barristers, and appointment of notaries public.

procedure set out in section 34 of the IGCO. All subsidiary legislation made by the legal professional bodies shall be laid on the table of LegCo at the next sitting thereof after the publication of that subsidiary legislation in the Gazette. LegCo may, by resolution, not later than 28 days (or such extended period) after the sitting provide that such subsidiary legislation shall be amended or repealed in any manner whatsoever consistent with the power to make such subsidiary legislation without prejudice to anything done under the subsidiary legislation.

The role of DoJ

12. DoJ recognises the statutory roles and functions of the legal professional bodies in regulating their fellow professional members and the legal professional bodies' authority under the LPO to make rules relating to their professional practice. As the rule-making powers are vested with the legal professional bodies, it is important that the legal professional bodies would ensure that the rules made by them comply with relevant legal requirements. The legal professional bodies may seek the assistance and advice of their professional members, legal advisors and experts when exercising the delegated legislative power.

13. DoJ does not have a formal role in such process and it is generally not appropriate for DoJ to intervene in the legal professional bodies' exercise of their delegated legislative power, subject to the limited role of the Law Drafting Division ("**LDD**") of DoJ as mentioned in paragraphs 14-18 below.

Law Drafting Division of DoJ

14. LDD is responsible for drafting all legislation proposed by the Government and has a limited role in the preparation of subsidiary legislation by the legal professional bodies.

15. For a non-Government Bill, rule 51(2) of the Rules of Procedure of the Legislative Council ("**LegCo Rules**") requires that the Bill be accompanied by a certificate signed by the Law Draftsman certifying that the Bill conforms to the requirements of rule 50 of the LegCo Rules as to the

“Form of Bills” and the requirements of the “general form” of Hong Kong legislation. For issuing the certificate, LDD vets all non-Government Bills.

16. However, there is no such formal role for the Law Draftsman with regard to non-Government subsidiary legislation. A non-Government body that is empowered by an ordinance to make subsidiary legislation is responsible for drafting the subsidiary legislation. The established practice is for the non-Government body to send the draft subsidiary legislation to LDD for vetting. LDD offers formatic and drafting comments on the draft subsidiary legislation to make sure that the format and styles comply with the current drafting practice in Hong Kong, and are consistent with those of Hong Kong legislation in general. LDD prepares the faired final draft of the subsidiary legislation for further action by the non-Government body. The non-Government body remains fully responsible for the contents, legal effect and merits of the subsidiary legislation. It is also responsible for the making of the subsidiary legislation and the arrangement for gazettal.

17. When LDD vets draft subsidiary legislation for a non-Government body, LDD’s role and the body’s responsibility as described above is clearly explained in the correspondences with the non-Government body.

18. The above arrangement applies to subsidiary legislation made by the Council of the LawSoc or the Costs Committee under sections 73, 73A or 74 of the LPO and to subsidiary legislation made by the Bar Council under section 72AA of the LPO. The arrangement also applies to subsidiary legislation made by the Council of the Notaries Soc under section 73D or 73E of the LPO.

Measures adopted by DoJ

19. Having regard to the limited role of DoJ in the legislative exercise promoted by the legal professional bodies as described above, several measures have been adopted by LDD to assist the legal professional bodies in preparing their subsidiary legislation.

Legislative drafting guide

20. In 2012, LDD published 2 books entitled “香港法律草擬 — 文體及實務指引” and “Drafting Legislation in Hong Kong — a Guide to Styles and Practices”. The 2 books explain drafting styles and practices in general terms, illustrating them with examples. They provide comprehensive, systematic and user-friendly guidelines to styles and practices on drafting bilingual legislation in Hong Kong. The books were published to assist the legal professional bodies and other non-Government bodies in the proper preparation of their own legislation.

Written reminder

21. All subsidiary legislation contains enacting words to show the authority under which the subsidiary legislation is made (“**enacting formula**”). The enacting formula specifies the maker and cites the enabling provision.

22. Beginning in February 2015, when LDD sends the faired final draft of subsidiary legislation to a legal professional body, the covering letter will contain a reminder that the subsidiary legislation should be made by the authority specified in the enacting formula as the maker. This will assist the legal professional bodies in their proper preparation of subsidiary legislation.

23. The same reminder will also be issued for subsidiary legislation to be made by any other non-Government body.

Protocol

24. LDD and the LawSoc are working on a Protocol for processing subsidiary legislation promoted by the LawSoc, including those made by the Council of the LawSoc or the Costs Committee under section 73, 73A or 74 of the LPO. The Protocol is intended to provide a clear and authoritative guide for reference of the counsel in LDD and officers of the LawSoc involved in the preparation of such subsidiary legislation. Its contents are based on the understanding between LDD and the LawSoc about the procedures of, and the respective roles of LDD and the Secretariat of the

LawSoc in, the vetting of those subsidiary legislation. The Council of the LawSoc has endorsed the Protocol.

Measures adopted by the Law Society

25. In view of the request of the Subcommittee, we have approached the LawSoc and sought their views as to the suitable measures that could be or have been taken to ensure that proper procedures are followed in the making of subsidiary legislation in future. In response, the LawSoc have advised that the error relating to the 2013 Rules was an unfortunate isolated incident. After that incident, the LawSoc has included an item on the relevant enabling provision in their internal checklist for legislative amendments to ensure that this aspect would be specifically checked in future. The legislative amendment process is a very elaborated process involving vetting at various stages by different stakeholders. The LawSoc have assured us that they would use their best endeavours to prevent the recurrence of similar incidents. A copy of the LawSoc's letter of 9 January 2015 is at **Annex**.

Department of Justice
July 2015



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9 January 2015

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Dear Ms. Wan,

Re: Solicitors (General) Costs (Amendment) Rules 2013 –
 Follow up by LegCo Panel on Administration of Justice and Legal Services

Thank you for your letter dated 19 December 2014.

The task of reviewing the Legal Practitioners Ordinance and the subsidiary rules under the Ordinance falls on the Standards and Development Department within the Law Society. The responsible staff are all qualified Hong Kong solicitors who are familiar with the Ordinance and its subsidiary rules and with the rule making procedures.

The error relating to the Solicitors (General) Costs (Amendment) Rules 2013 was an unfortunate isolated incident. After this incident, an item on the relevant enabling provision had been included in our internal checklist for legislative amendments to ensure that this aspect would be specifically checked in future.

All proposed legislative amendments will first be considered and reviewed by the relevant Law Society Committees and Working Parties, then by the Standing Committee on Standards and Development and the Council before the Law Society liaises with external bodies in accordance with the required procedure for legislative amendments. For example, where applicable, the proposed amendments will then be submitted to the Chief Justice for his approval-in-principle. After the Chief Justice has granted his approval-in-principle, the Law Society will liaise with the Drafting Division of the Department of Justice which will review the drafting of the proposed amendments. Upon finalization of the draft legislation, the Law Society will apply to the Chief Justice for his final approval prior to gazettal.

The Law Society of Hong Kong

The legislative amendment process is thus a very elaborate process involving vetting at various stages by different stakeholders. We will use our best endeavours to prevent the recurrence of similar incidents.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Heidi Chu', with a stylized flourish at the end.

Heidi Chu
Secretary General