

**The work of Legal Service Division
of the Legislative Council Secretariat,
negative vetting of subsidiary legislation
and
legal issues relating to challenging
the decisions of the Legislative Council**

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Outline

- ▶ Background
- ▶ Work of legal service division
- ▶ Negative vetting of subsidiary legislation
- ▶ Challenging the decisions of legislative Council

Background

- ▶ The Legislative Council performs its constitutional functions and exercises its powers through a committee system (委員會制度) (Chapter 6 of “A Companion to the history, rules and practices of the Legislative Council of the Hong Kong Special Administrative Region”).
- ▶ The **committee system** comprises different types of committees:
 - ◆ **Standing committees** (常設委員會) —
 - Finance Committee (財務委員會)
 - Public Accounts Committee (政府帳目委員會)
 - Committee of Members Interests (議員個人利益監察委員會)

Committee System

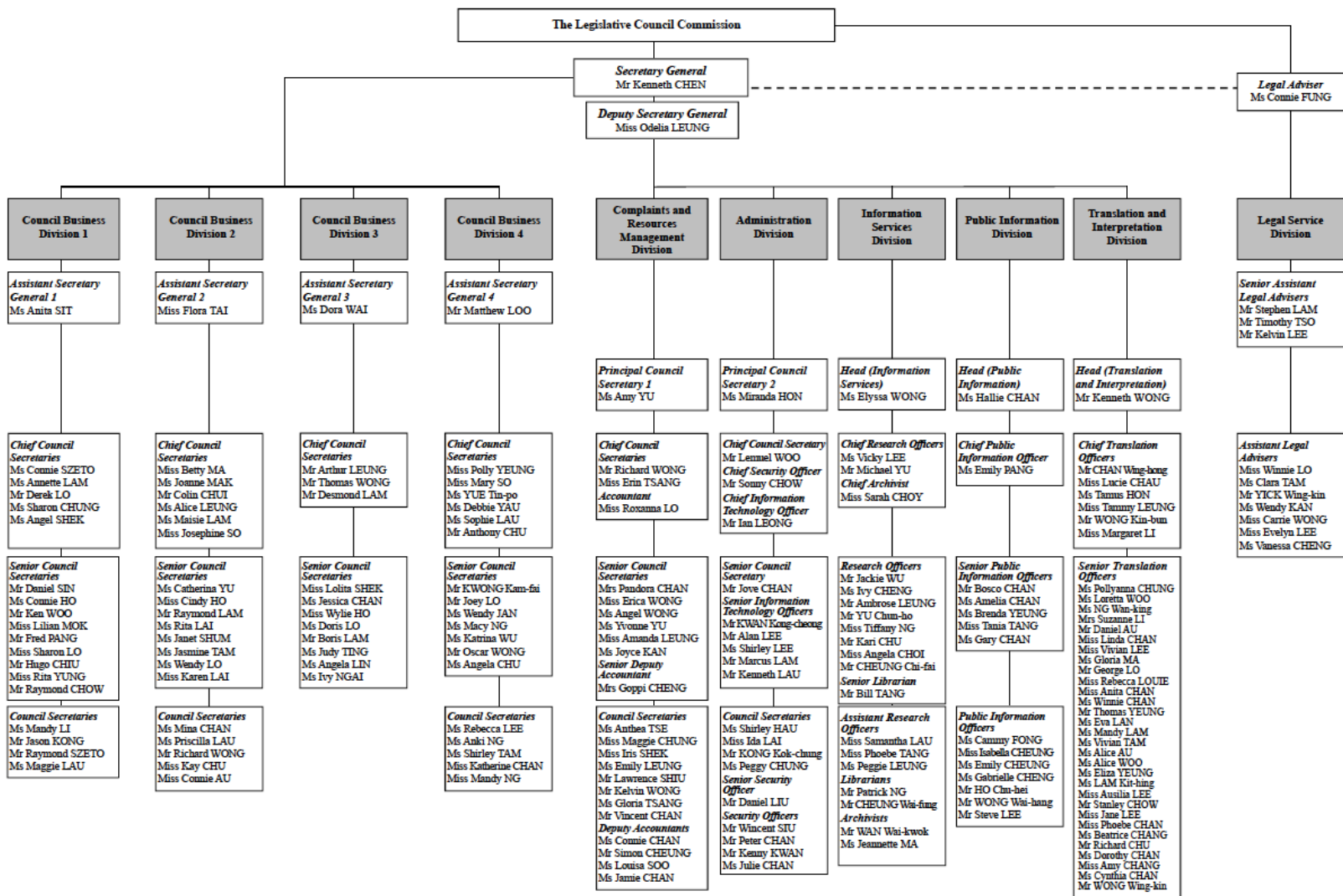
- ◆ House Committee (內務委員會)
- ◆ Bills Committees (法案委員會)
- ◆ Panels (事務委員會)
- ◆ Committee on Rules of Procedure (議事規則委員會)
- ◆ Committee on Access to the Legislature's documents and records (查閱立法機關文件及紀錄事宜委員會)
- ◆ Select Committee (專責委員會)
- ◆ Subcommittees on subsidiary legislation (審議附屬法例小組委員會)
- ◆ Subcommittees on policy issues

The Legislative Council Commission

- ▶ **The Legislative Council Commission** (立法會行政管理委員會)
- ▶ established by section 3(1) of The Legislative Council Commission Ordinance (Cap. 443)
- ▶ **Functions of the Commission** (section 9) :
 - (a) to provide through the Secretariat administrative support and services to the Council;
 - (b) to provide office accommodation to the members of the Council and staff of the Secretariat;
 - (c) to supervise the operation of the Secretariat;
 - (d) to produce an official report of all proceedings in the Council and in any committee of the whole Council; and
 - (e) to perform such other duties as the Council may by resolution determine.

Organization chart of the Secretariat

Organization Chart of the Legislative Council Secretariat (as at 3 August 2015)



Status of the legal service division

- ▶ An independent division of the Secretariat, i.e. it is not subject, whether administratively or otherwise, to any higher instance of the Secretariat
- ▶ Directly answerable to the Commission

Work of the legal service division

- ▶ Scrutinizing of Bills and subsidiary legislation
- ▶ Preparing reports on Bills and subsidiary legislation
- ▶ Providing legal support to committees and subcommittees of LegCo
- ▶ Providing legal support to other divisions of the Secretariat
- ▶ Providing legal services to the Commission and the Secretariat

Negative vetting

- ▶ **Modes of scrutiny** of subsidiary legislation by LegCo
 - *Positive* vetting (先審議 後訂立)
 - *Negative* vetting (先訂立 後審議)
- ▶ **Legal Basis** of negative vetting
 - Section 34 of the Interpretation and General Clauses Ordinance (Cap. 1)

Section 34 of Cap. 1

- (1) All subsidiary legislation shall be laid on the table of the Legislative Council at the next sitting thereof after the publication in the Gazette of that subsidiary legislation.
- (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.
- (3) If the period referred to in subsection (2) would but for this subsection expire-
 - (a) after the last sitting before the end of a session or dissolution of the Legislative Council;
but
 - (b) on or before the day of the second sitting of the Legislative Council in the next session,
that period shall be deemed to extend to and expire on the day after that second sitting.

Negative vetting

- ▶ **Scope of application:** subsidiary legislation

- ▶ **What is subsidiary legislation?**

- Definition in section 3 (1) of Cap. 1

"subsidiary legislation" and "subordinate legislation" (附屬法例、附屬法規、附屬立法) mean any proclamation, rule, regulation, order, resolution, notice, rule of court, bylaw or other instrument made under or by virtue of any Ordinance **and having legislative effect;**

- Dicta in the judgment of the Court of Appeal in *Julita F. Raza & others v. Chief Executive in Council & others* [2006] HKCU 1199 on the indicia of legislative effect

Negative vetting

- To avoid doubt, in recent legislation instruments not intended to be subsidiary legislation it is expressly stated that they are not subsidiary legislation
- **Power of LegCo:** to amend by resolution passed at a sitting of LegCo
- By virtue of section 3(1) of Cap. 1, "amend" (修訂) includes repeal, add to or vary and the doing of all or any of such things simultaneously or by the same Ordinance or instrument

Negative vetting

- ▶ **Limitations on the power:**
- **Time limit:** section 34(2) 28 + 21 = 49 days
- **Substantive limitation:** section 34(2) “amended *in any manner whatsoever consistent with the power to make* such subsidiary legislation”
- ▶ **Effect of amendment:** section 34(2) - 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
- ▶ **Effect of repeal:** same as above
- ▶ **Current arrangement:** subsidiary legislation subject to negative vetting shall not commence before the expiration of 49 days after it is tabled in LegCo

Case illustration

- ▶ An instance of the operation of section 34 : the repeal of the Country Parks (Designation) (Consolidation) (Amendment) Order 2010 (“the Amendment Order”).
- ▶ CE in Council ordered on 25 May 2010 that the Amendment Order should be made under section 14 of the Country Parks Ordinance (Cap. 208) by which an area of 5 hectares was carved out of the Clear Water Bay Country Park to form part of the proposed South East New Territories Landfill extension.
- ▶ The Amendment Order was gazetted on 4 June 2010 and tabled in LegCo on 9 June 2010.
- ▶ The House Committee at its meeting on 11 June 2010 decided to form a subcommittee to study the Amendment Order.
- ▶ At its meeting on 4 October 2010, the Subcommittee resolved that a motion be moved by its chairman to repeal the Amendment Order.

Case illustration

- The Subcommittee reported its deliberations to the House Committee on 8 October 2010.
- The chairman of the Subcommittee gave notice to move the motion to repeal the Amendment Order (rule 29(2) of the Rules of Procedure of LegCo).
- In spite of the objection of the Administration, the President of LegCo ruled that the motion was in order and could be moved.
- The motion to repeal the Amendment Order was passed at the Council meeting on 13 October 2010.

Country Parks Ordinance

- ▶ The Amendment Order was made by CE in Council under section 14 of Cap. 208.
- ▶ **Section 14:** Where CE in Council has approved a draft map under section 13 and it has been deposited in the Land Registry, the Chief Executive shall, by order in the Gazette, designate the area shown in the approved map to be a country park.
- ▶ The CE in Council may only approve a draft map after the steps prescribed in sections 8 to 13 of Cap. 208 have been complied with.
- ▶ The Administration therefore argued that CE has no power to repeal an Order made under section 14 and consequently LegCo has no power to repeal the Amendment Order.

Power to amend

- ▶ The Legal Service Division of LegCo Secretariat advised that CE has power to amend under section 28(1)(c) of Cap. 1.
- ▶ **Section 28(1)(c):** subsidiary legislation may at any time be amended by the same person and in the same manner by and in which it was made
- ▶ The Administration argued that section 14 indicated a **contrary intention** so that section 28(1)(c) should not apply.
- ▶ The President disagreed. Section 14 did restrict CE in Council's power in designating country parks but not the power to repeal an order that CE had made.

President's ruling

- ▶ “In my view, the word “shall” in section 14 of Cap. 208 means three things. First, it stipulates that CE must make the designation, when the two conditions in the section have been met. This is the duty that the Administration has emphasized. Second, it prescribes the only way the designation should be made i.e. by order in the Gazette. Third, CE must designate the area shown in the approved map to be a country park. He cannot designate any area other than an area shown in the approved map to be a country park or to designate any area shown in the approved map not to be a country park.” (para. 24 of the President's ruling)

Challenging the decisions of LegCo

- ▶ **Forms of decisions of LegCo**
 - Bills passed
 - Motions passed => resolution
- ▶ **Challenging Ordinance or subsidiary legislation**
 - “The *primary and normal remedy* in respect of a statutory provision whose content contravenes the Constitution *is a declaration, made after the enactment has been passed, that the offending provision is void.*” (per Lord Nicholls in *The Bahamas District of the Methodist Church in the Caribbean and the Americas v. Speaker of the House of Assembly* (2002-2003) 5 ITELR 311 adopted by Hartmann J in *Leung Kwok Hung v. President of Legislative Council* [2006] 4 HKLRD 211. My emphasis.)

Challenging resolutions of LegCo

- ▶ **Challenging resolutions of LegCo**
- *Glory Success Transportation Limited v. Secretary for Justice* HCAL93/2006 (CFI, Chu J) & HCMP 2059/2008 (CA, Appeals Committee)
- ▶ **Challenging the decisions of a committee of LegCo**
- *Cheng Kar-shun & anor v. Li Fung-ying & ors* [2009] 4 HKC 204 (CFI) & [2011] 2 HKLD 555 (CA)

Who should be the respondent?

- ▶ **Who should be the respondent?**
- LegCo ?
- ◆ LegCo is functus after a Bill has been passed or a piece of subsidiary legislation has been amended
- ◆ LegCo is not a legal entity and cannot be sued as such
- Secretary for Justice?
- Members of LegCo or specific committee?
- ◆ Cessation of office & changes in membership
- ◆ Remedy ineffective

Who should be the respondent?

- President of LegCo?
- ◆ Cessation of office
- ◆ legal basis for being appointed as representative of all other LegCo Members

Reference

- ▶ **Reference:** Report of the Subcommittee to study issues relating to the power of Legislative Council to amend subsidiary legislation accessible at <http://www.legco.gov.hk/yr11-12/english/hc/papers/hc0210cb2-975-appi-e.pdf>

Finis

~ Thank you ~

PLEASE NOTE

The law and procedure on this subject are very specialised. This article is a general explanation for your reference only and should not be relied on as legal advice for any specific case. If legal advice is needed, please contact our solicitors.

請注意

本題目之法律及程序十分專門。此文章只屬一般性之解釋，供你參考，而不應被依賴為關於任何特定事件之法律意見。如需法律意見，請與我所律師聯絡。

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