

立法會
Legislative Council

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by the Administration)

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**Subcommittee on Amendments to Subsidiary Legislation on Discipline
Made under Disciplined Services Ordinances**

**Minutes of meeting
held on Wednesday, 16 May 2012, at 8:30 am
in Conference Room 3 of the Legislative Council Complex**

Members present : Hon LAU Kong-wah, JP (Chairman)
Dr Hon Margaret NG
Hon James TO Kun-sun
Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP
Hon LI Fung-ying, SBS, JP
Hon Cyd HO Sau-lan
Dr Hon PAN Pey-chyou

Member absent : Hon Mrs Regina IP LAU Suk-ye, GBS, JP

**Public officers
attending** : **Agenda item II**

Ms Shirley LAM
Deputy Secretary for the Civil Service 3
Civil Service Bureau

Ms Ivy LAW
Principal Assistant Secretary (Conduct and
Discipline) Civil Service Bureau

Mr Sunny CHAN
Senior Assistant Law Draftsman
Department of Justice

Ms Carmen CHAN
Government Counsel
Department of Justice

Mr WOO Ying-ming
Assistant Commissioner
(Human Resource)
Correctional Services Department

Mr LAM Wai-kwong
Superintendent
(Staff Administration)
Correctional Services Department

Ms KWOK Ngan-ping
Assistant Commissioner (Administration and Human
Resource Development)
Customs and Excise Department

Mr LAU Tak-choi
Senior Staff Officer
(Service Administration)
Customs and Excise Department

Mr LI Kin-yat
Assistant Director (New Territories)
Fire Services Department

Mr TSANG Wing-hung
Acting Senior Divisional Officer
(Kowloon South)
Fire Services Department

Mrs Pauline NG
Assistant Commissioner of Police (Personnel)
Hong Kong Police Force

Mr Kenny TSE
Superintendent of Police
(Discipline) (Special Duties)
Hong Kong Police Force

Mr Jimmy KWAN
Senior Aircraft Engineer
(Maintenance)1
Government Flying Service

Clerk in attendance : Miss Polly YEUNG
Principal Council Secretary (Subcommittee)1

Staff in attendance : Mr YICK Wing-kin
Assistant Legal Adviser 8

Mr KWONG Kam-fai
Senior Council Secretary (Subcommittee)2

Mr Fred PANG
Council Secretary (Subcommittee)

Ms Sharon CHAN
Senior Legislative Assistant (Subcommittee)1

Action

I Election of Chairman

Dr Margaret NG, the member with the highest precedence among those at the meeting, presided over the election of the Chairman of the Subcommittee. She invited nominations for the chairmanship of the Subcommittee. Mr LAU Kong-wah was nominated by Dr PAN Pey-chyou and the nomination was seconded by Ms LI Fung-ying. Mr LAU Kong-wah accepted the nomination. There being no other nomination, Mr LAU Kong-wah was declared Chairman of the Subcommittee. Members agreed that there was no need to elect a Deputy Chairman.

II Meeting with the Administration

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| (L.N. 58 of 2012 | -- Fire Services Ordinance
(Amendment of Second
Schedule) Regulation 2012 |
| L.N. 59 of 2012 | -- Police (Discipline)
(Amendment) Regulation 2012 |
| L.N. 60 of 2012 | -- Prison (Amendment) Rules
2012 |
| L.N. 61 of 2012 | -- Government Flying Service
(Discipline) (Amendment)
Regulation 2012 |

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| L.N. 62 of 2012 | -- Traffic Wardens (Discipline) (Amendment) Regulation 2012 |
| L.N. 63 of 2012 | -- Customs and Excise Service (Discipline) (Amendment) Rules 2012 |
| CSBCR/DP/1-010-005/6 | -- The Legislative Council Brief |
| LC Paper No. LS56/11-12 | -- Legal Service Division Report |
| LC Paper No. CB(1)1859/11-12(01) to (06) | -- Marked-up copy of the Rules and Regulation |
| LC Paper No. CB(1)1859/11-12(07) | -- Letter dated 10 May 2012 from Assistant Legal Adviser to the Civil Service Bureau |
| LC Paper No. CB(1)1859/11-12(08) | -- Civil Service Bureau's response to Assistant Legal Adviser's letter dated 10 May 2012 |
| LC Paper No. CB(1)1854/11-12 | -- Background brief prepared by the Legislative Council Secretariat) |

2. The Subcommittee deliberated (Index of proceedings attached at **Appendix**).

Admin Follow-up actions to be taken by the Administration

3. The Administration was requested to provide:
- (a) the Court of Final Appeal's judgment in the case of *Lam Siu Po v Commissioner of Police* (C of P) in March 2009 (CFA Judgment);
 - (b) the set(s) of administrative guidelines/procedures currently used by relevant disciplined services departments (DSDs) on allowing a civil servant subject to disciplinary proceedings to apply for legal representation at disciplinary hearings and on the factors taken into consideration in approving such applications; and
 - (c) an explanation on how the set(s) of guidelines were common in spirit but with some variations to meet their respective needs of the DSDs.

4. To facilitate the Subcommittee's consideration, the Administration was asked to set out in a readable format the major changes brought about by the amendment regulations/rules vis-à-vis the existing provisions.

5. The Administration and ALA8 were requested to give their views on whether the current administrative guidelines/procedures used by relevant DSDs and the amendment regulations/rules were in compliance with the ruling/decisions in CFA Judgment.

6. It was noted that the disciplinary authority might take into account, but was not limited to, a host of factors when considering an application for legal representation (paragraph 6 of the Legislative Council Brief). The Administration was asked to

- (a) inform the Subcommittee of the quantifiable criteria, if any, currently adopted by the DSDs in considering factors such as "the capacity of the applicant to present his/her own case" and the other factors which were couched in abstract terms; and
- (b) consider specifying all, or some, of these factors in the relevant subsidiary legislation.

7. In respect of those disciplinary cases decided before the handing down of the CFA Judgment, the Police was requested to:

- (a) provide information on its current administrative measures (including the factors taken into account) on handling and considering the request of a police officer (former or existing) to review his/her case where the police officer had not been legally represented at the disciplinary hearing; and
- (b) advise on the number of requests in (a) above received after the CFA Judgment, and the decisions on such requests.

8. As the Subcommittee had been informed that C of P did not have the statutory power to overturn or change the findings and awards made in past disciplinary cases, notably those decided before the CFA Judgement, the Administration was asked to explain how it would seek to redress past cases in which the defaulters had been unfairly denied legal representation, given that the outcomes of these cases might be very different if the defaulters concerned had been legally represented, and that many of these officers had been compulsorily retired and suffered financial hardship.

9. It was noted that the adjudicating officer/tribunal could make recommendation on whether the defaulters appearing before it should be legally represented. The Police was asked to:

- (a) advise on the total number of cases in which the adjudicating officer/tribunal had made such recommendation, and the number of these cases in which legal representation was subsequently approved; and
- (b) consider the suggestion to also empower the adjudicating officer/tribunal to approve such requests.

10. On the relevant review authority/body appointed by DSDs to handle defaulters' appeals against the decision to reject their requests for legal representation, the Administration was asked to provide its view on some members' suggestion of including an independent third party (e.g. an external party outside the Administration or an officer from Civil Service Bureau (CSB)) as a member of such authority/body.

11. On the amendments to stipulate that an adjudicating officer/tribunal might proceed with the disciplinary proceedings in the absence of an accused if the latter failed to appear repeatedly without reasonable justifications, the Police was asked to:

- (a) provide the documented guidelines on the factors to be considered and arrangements to be observed by the adjudicating officer/tribunal when deciding whether or not to proceed with the aforesaid disciplinary proceedings; and
- (b) explain how to implement the arrangements in (a) above (e.g. the procedures/measures required to ensure the timely delivery of the notices requiring the accused's attendance at the disciplinary hearing).

12. The Administration was requested to:

- (a) provide further information on its consultations with the staff side regarding the proposed amendment to include "deferment or stoppage of increment" as one of the possible punishments for disciplinary cases involving junior police officers (JPOs) and the Traffic Warden grade, including the views of the staff and the outcomes of such consultations; and;
- (b) explain the basis (legal or otherwise) for the Administration's view that the proposed amendment did not amount to a unilateral change

of terms/conditions of service for JPOs and the Traffic Warden grade, and that this change was in conformity with Article 100 of the Basic Law.

III. Any other business

Invitation for views and date of next meeting

13. Members agreed to invite relevant organizations to give views on L.N. 58 to L.N. 63 of 2012 at the next meeting to be held on 26 May 2012. In line with the usual practice, an invitation notice would also be posted on the Legislative Council website to invite public views.

14. Members noted the proposed list of organizations to be invited to give views (which was tabled at the meeting), and agreed that the organizations set out in the list should be invited. Dr Margaret NG suggested and members agreed to invite the Mutual Rights Organization to give views at the meeting on 26 May 2012.

(Post-meeting note: The list of organizations to be invited to give views at the meeting on 26 May 2012 was circulated to members vide LC Paper No. CB(1)1897/11-12 on 16 May 2012.)

Legislative timetable

15. To allow time for scrutiny of the six items of subsidiary legislation, members agreed that the Chairman of the Subcommittee would move a motion at the Council meeting of 23 May 2012 to extend the scrutiny period of the six items of subsidiary legislation from 30 May 2012 to 20 June 2012 (the motion).

(Post-meeting note: The motion could not be dealt with at the Council meetings that commenced on 23 and 30 May 2012 respectively owing to the heavy agenda for these meetings. As the motion was not passed at the Council meeting that commenced on 30 May 2012, the 28-day negative vetting period expired under section 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1) without being extended.)

16. There being no other business, the meeting ended at 10:26 am.

Proceedings of the Subcommittee on Amendments to Subsidiary Legislation on Discipline Made under Disciplined Services Ordinances

**First Meeting on Wednesday, 16 May 2012, at 8:30 am,
in Conference Room 3 of the Legislative Council Complex**

Time Marker	Speaker	Subject(s)	Action Required
000356 – 000404	Dr Margaret NG Mr James TO Dr PAN Pey-chyou Ms LI Fung-ying Mr LAU Kong-wah	Election of Chairman	
000404 – 000611	Chairman Dr Margaret NG	Invitation of views Date of next meeting	Clerk to issue invitation letters and post invitation notice on LegCo website.
000612 – 001050	Chairman Civil Service Bureau	Briefing by the Administration on the amendments to subsidiary legislation on discipline made under Disciplined Services Ordinances, namely L.N. 58 to L.N. 63 of 2012 (the amendment regulations/rules).	
001051 – 002845	Chairman Dr Margaret NG Civil Service Bureau Hong Kong Police Force	Dr Margaret NG's views – (a) The Administration should ensure that the administrative guidelines put in place by the disciplined services departments (DSDs) for considering applications for legal or other forms of representation at disciplinary hearings were in compliance with the judgment of the Court of Final Appeal in <i>Lam Siu Po v Commissioner of Police</i> (FACV 9/2008) in March 2009 (CFA Judgment).	The Administration to take follow-up action as stated in paragraphs 3(a) and 3(b) of the minutes. The Administration and ALA8 to take follow-up action as stated in paragraph 5

Time Marker	Speaker	Subject(s)	Action Required
		<p>(b) The Police should review past cases in which police officers had been unfairly denied legal representation in the disciplinary cases decided before the handing down of the CFA Judgment.</p> <p>The Administration's responses –</p> <p>(a) The host of factors that the relevant disciplinary authority would take into account when considering applications for legal representation at disciplinary hearings were drawn up on the basis of the Court of Final Appeal's judgment in <i>The Stock Exchange of Hong Kong Ltd v New World Development Co Ltd and Others</i> (FACV 22/2005).</p> <p>(b) CFA Judgment was specific to the case of <i>Lam Siu Po v Commissioner of Police</i>. The Commissioner of Police (C of P) did not have the statutory power to overturn or change the findings and awards made in past disciplinary cases. However, C of P would examine each request for review on its merits.</p> <p>Dr Margaret NG was disappointed that C of P had no plan to review his decisions in past disciplinary cases. Members were concerned about the factors that would be taken into account by the Police in considering the requests for review of completed disciplinary cases.</p>	<p>of the minutes.</p> <p>The Police to take follow-up action as stated in paragraph 7 of the minutes.</p>
002846 – 004610	Chairman Ms LI Fung-ying Civil Service Bureau Hong Kong Police Force	<p>Ms LI Fung-ying's views –</p> <p>(a) Some of the factors for considering applications for legal representation at disciplinary hearings, such as the defaulter's capacity to present his/her case at the hearing, were couched in</p>	<p>The Administration to take follow-up action as stated in paragraphs 3(c), 6(a) and 12 of</p>

Time Marker	Speaker	Subject(s)	Action Required
	<p>Fire Services Department Customs and Excise Department Government Flying Service Correctional Services Department</p>	<p>abstract terms and might give rise to different interpretation by DSDs.</p> <p>(b) Regarding the amendment to stipulate that an adjudicating officer might proceed with a disciplinary hearing in the absence of an accused if the accused had repeatedly failed to appear at scheduled sessions without reasonable justifications, the Administration should state clearly what constituted "repeated" failure so that consistency among DSDs could be achieved.</p> <p>(c) The proposed inclusion of "deferment or stoppage of increment" as one of the possible punishments for disciplinary cases involving junior police officers (JPOs) and staff of the Traffic Warden grade might amount to a unilateral change in terms of employment resulting in less favourable terms of service for these officers.</p> <p>The Administration's responses –</p> <p>(a) The set of factors for consideration of applications for legal representation at disciplinary hearings was common among DSDs. However, to cater for specific operation of individual DSDs, there were some variations among the administrative guidelines.</p> <p>(b) The number of occasions of absence that would constitute "repeated" failure to appear at disciplinary hearings would depend on the circumstances of each case. Fairness required adjudicating officers to examine each case on its own merits.</p>	<p>the minutes.</p> <p>The Police to take follow-up action as stated in paragraph 11 of the minutes.</p>

Time Marker	Speaker	Subject(s)	Action Required
		<p>(c) The provisions in the terms of employment of JPOs and staff of the Traffic Warden grade had already included a mechanism for making changes to the conditions of service. The Junior Police Officers' Association and the Hong Kong Traffic Wardens Union had been consulted and had not raised any objection to the proposed amendment.</p>	
004611 – 005811	<p>Chairman Mr James TO Civil Service Bureau Hong Kong Police Force</p>	<p>Mr James TO's views/enquiries –</p> <p>(a) The factors (or the important ones) in considering applications for legal representation at disciplinary hearings should be specified in the relevant legislation.</p> <p>(b) Whether or not a retired police officer with qualifications of a barrister or solicitor would be accepted as a defence representative.</p> <p>(c) The Administration should seek to redress past disciplinary cases in which the police officers felt that they had been prejudiced by being denied legal representation at disciplinary hearings.</p> <p>The Administration's responses –</p> <p>(a) There was practical difficulty in setting out in the relevant legislation an exhaustive list of factors in considering applications for legal representation. Setting out the factors in DSDs' administrative guidelines instead would allow these factors to be reviewed and refined promptly where necessary.</p>	<p>The Administration to take follow-up action as stated in paragraphs 4, 6(b) and 8 of the minutes.</p>

Time Marker	Speaker	Subject(s)	Action Required
		<p>(b) The Police confirmed that the accused might apply for approval for a retired police officer to assist him/her at disciplinary hearings as a "Friend".</p>	
005812 – 010713	<p>Chairman Dr PAN Pey-chyou Civil Service Bureau</p>	<p>Dr PAN Pey-chyou's view that to enhance the independence and impartiality of the current disciplinary regime, the review authority that handled defaulters' appeals against the decision to reject their requests for legal representation should include an independent third party as a member.</p> <p>The Administration's responses –</p> <p>(a) Disciplinary cases were primarily internal matters arising from the employer-employee relationship between DSDs and the relevant disciplined services staff, and should be dealt with by the department(s) concerned in accordance with the principle of fairness.</p> <p>(b) To include an independent third party as a member of the review authority would entail a fundamental change to the current disciplinary regime.</p>	<p>The Administration to take follow-up action as stated in paragraph 10 of the minutes.</p>
010714 – 012808	<p>Chairman Dr Margaret NG Hong Kong Police Force</p>	<p>Dr Margaret NG's view that as adjudicating officers were familiar with details of the disciplinary cases before them, they should be empowered to decide on applications for legal representation.</p> <p>The response of the Police that in <i>Au Hing Sik v Commissioner of Police and Others</i> (HCAL 74/2010), the Court of First Instance had affirmed that the current mechanism governing the consideration of an officer's application for legal representation at disciplinary hearings was not unconstitutional. The</p>	<p>The Police to take follow-up action as stated in paragraph 9 of the minutes.</p>

Time Marker	Speaker	Subject(s)	Action Required
		<p>current mechanism of entrusting the task to a senior officer at the departmental headquarters would help achieve consistency, and enable legal representation to be granted prior to the conduct of the disciplinary hearing, hence facilitating the hearing to proceed promptly.</p> <p>Discussion on whether individual Subcommittee members had any pecuniary interest to declare in relation to the scrutiny of the amendment regulations/rules.</p>	
012809 – 013325	Chairman Mrs Sophie LEUNG	<p>Mrs Sophie LEUNG's view –</p> <p>Where justified, the Police should review past disciplinary cases decided before the CFA Judgment. It was not the purpose of the Subcommittee to pursue these cases on an individual basis.</p>	
013326 - 015734	Chairman Ms LI Fung-ying Civil Service Bureau Dr PAN Pey-chyou Dr Margaret NG Mrs Sophie LEUNG	<p>Members reiterated the need for the Administration to consider including an independent third party, such as an external party outside the Administration or an officer from Civil Service Bureau, as a member of the review authority that handled defaulters' appeals against their decision to reject the requests for legal representation.</p> <p>Members noted the legislative timetable for scrutiny of the amendment regulations/rules, and urged the Administration to provide written responses to members' queries early.</p>	