

# 立法會 *Legislative Council*

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

### **Background brief prepared by the Legislative Council Secretariat**

#### **Purpose**

This paper provides background information on the following amendment regulations/rules which introduce amendments to the subsidiary legislation on discipline (collectively referred to as Subsidiary Regulations) made under various Ordinances governing the relevant disciplined services (collectively referred to as Disciplined Services Ordinances):

- (a) Fire Services Ordinance (Amendment of Second Schedule) Regulation 2012 (L.N.58);
- (b) Police (Discipline) (Amendment) Regulation 2012 (L.N.59);
- (c) Prison (Amendment) Rules 2012 (L.N.60);
- (d) Government Flying Service (Discipline) (Amendment) Regulation 2012 (L.N.61);
- (e) Traffic Wardens (Discipline) (Amendment) Regulation 2012 (L.N.62); and
- (f) Customs and Excise Service (Discipline) (Amendment) Rules 2012 (L.N.63).

It also summarizes the views and concerns raised by the Panel on Public Service (PS Panel) when being consulted on the proposed legislative amendments.

## Background

2. At present, formal disciplinary action in respect of civil servants in civilian grades and generally senior ranking civil servants in the disciplined services grades is taken in accordance with relevant provisions in the Public Service (Administration) Order and the Public Service (Disciplinary) Regulation. Disciplinary matters of middle and junior ranking civil servants in the disciplined services grades are governed by the Ordinances on respective disciplined services, namely, the Customs and Excise Service Ordinance (Cap. 342), Fire Services Ordinance (Cap. 95), Government Flying Service Ordinance (Cap. 322), Immigration Service Ordinance (Cap. 331), Police Force Ordinance (Cap. 232), Prisons Ordinance (Cap. 234), as well as rules and regulations made under such Ordinances and the Traffic Wardens (Discipline) Regulation (Cap. 374 sub.leg. J) (collectively referred to as Disciplined Services Legislation).

3. L.N. 58 to L.N.63 were made after a review had been conducted by the Administration on the Disciplined Services Legislation following a decision of the Court of Final Appeal (CFA) in *Lam Siu Po v. Commissioner of Police* [2009] 4 HKLRD 575 in March 2009 (the CFA judgement). According to the CFA judgement, the prohibition against legal representation provided in regulation 9(11) and (12) of the Police (Discipline) Regulations (Cap. 232 sub. leg. A) (P(D)R) is inconsistent with Article 10 of the Hong Kong Bill of Rights<sup>1</sup> (HKBOR), and is thus unconstitutional, null and void. It also held that legal representation is a matter for the disciplinary authority to consider under its discretion in accordance with the principle of fairness in common law and that the disciplinary authority ought to be able to exercise discretion to permit appropriate forms of representation other than legal representation, whether by fellow officers or other persons, at a disciplinary hearing.

## Discussion at the Panel on Public Service

### To allow legal or other forms of representation at a disciplinary hearing where fairness so requires

4. At its meetings held on 20 April 2009 and 21 June 2010, the PS Panel discussed with the Administration and representatives of the staff sides of the disciplined services about the necessary remedial actions arising from

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<sup>1</sup> Article 10 of HKBOR provides (insofar as material): "All persons shall be equal before the courts and tribunal. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. ..."

the CFA judgement. According to the Administration, it had identified the provisions in the Subsidiary Regulations that would require amendments. Pending introduction of the legislative amendments, the various disciplined services departments had put in place interim administrative measures and promulgated guidelines to allow a civil servant subject to formal disciplinary proceedings under the Subsidiary Regulations to apply for legal or other forms of representation at disciplinary hearings and to approve such applications where fairness so required<sup>2</sup>.

5. On 20 December 2010, the PS Panel was consulted on the Administration's proposal to provide explicitly in the Subsidiary Regulations that a civil servant subject to formal disciplinary proceedings would be allowed to apply for, subject to the approval of the disciplinary authority concerned, legal or other forms of representation at his/her disciplinary hearing. Concern was raised about the many factors that the disciplinary authority might take into account when considering an application for legal representation at the disciplinary hearing, and whether they were too demanding. According to the Administration, the factors had been drawn up to facilitate consideration. There was no need for all the factors to be met before approval could be given for legal representation. For example, if the misconduct in question was so serious that the potential penalty would be dismissal, this factor alone might justify legal representation.

6. In response to members' concern about the availability of appeal channels if the civil servant's application for legal representation was rejected, the Administration advised that arrangement had been put in place for a more senior officer to handle the objection raised against the disciplinary authority's decision to reject his/her application for legal representation.

7. Some members considered that the relevant trade union or staff association should be allowed to send representative(s) to assist the civil servant concerned at the disciplinary hearing, given their understanding of the arrangements of civil service disciplinary proceedings.

8. Regarding the fees incurred from legal representation at disciplinary hearings, some members opined that where the civil servant concerned was subsequently acquitted of the misconduct, the legal fees he/she had incurred should be reimbursed to him/her similar to the practice adopted by the court in the trial of a case. However, the Administration advised that that it would

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<sup>2</sup> A paper entitled "Procedures on Requests for Defence Representation from Officers subject to Disciplinary Action under the Police (Discipline) Regulations, Cap. 232A" provided by the Civil Service Bureau was issued to members of PS Panel vide LC Paper No. CB(1)2370/10-11(01) on 2 June 2011.

only be fair for each party to the relevant disciplinary hearing to bear its own legal fees regardless of the outcome of the disciplinary proceedings. For instance, a civil servant found guilty of the misconduct would not be required to reimburse the legal fees incurred by the other parties to the hearing. The Administration was asked to find out whether it was the practice of overseas jurisdictions to reimburse the civil servant with the fees incurred for legal representation at the disciplinary hearing if he/she was subsequently acquitted of the charges made against him. The Administration subsequently informed the Panel that researches on the practices of Australia, Canada, the United Kingdom and Singapore had been conducted. According to the information collected, only the Australian government would reimburse a civil servant with the legal fee incurred for engaging legal representation at disciplinary hearing if the civil servant was subsequently cleared of the alleged misconduct. If the civil servant was found culpable of the misconduct, he/she would be required to bear the costs of legal representation incurred by the Australian government. There were no reimbursement arrangements in other three countries.

To stipulate that a record of the proceedings of a disciplinary hearing shall be in written form as supplemented by audio-record (or video-record if arranged)

9. At the meeting of the PS Panel on 17 November 2008, some members drew the Administration's attention to the discrepancy that while some disciplined services were allowed to make video or audio recordings during disciplinary proceedings, other disciplined services could not do so. The Administration informed the PS Panel on 20 April 2009 that a task group was examining the relevant arrangements. It further reported on 21 June 2010 that the disciplined services departments had issued administrative guidelines to ensure that audio recording would be arranged as a standing arrangement for disciplinary hearings processed under the Subsidiary Regulations. Owing to resource and venue constraints, video recording would only be arranged at the request of the civil servant concerned.

10. At the meeting of the PS Panel on 20 December 2010, members noted the Administration's proposal to stipulate clearly in the Subsidiary Regulations that the record of the proceedings (RoP) shall be in written form as supplemented by audio-record (or video-record, if arranged). The Administration also confirmed in reply to a member that in the event of discrepancy between the written record and the audio-record of the disciplinary proceedings, the audio-record should in general prevail.

11. In response to members' concern about the retention of the record of disciplinary proceedings instituted against a civil servant subsequently cleared of the misconduct, the Administration advised that there would not be any record of the disciplinary proceedings in the officer's personal file. Only when the civil servant concerned was found guilty would the relevant punishment be so recorded. Regarding the handling of the records of disciplinary cases, the Administration subsequently informed the Panel that according to the guidelines put in place governing the management of records, irrespective of whether an officer had been cleared of the misconduct charged after disciplinary proceedings, disciplinary records of the officer concerned should be destroyed one year after the officer had left the service or one year after resolution of any claim/appeal/complaint, whichever was the later. Any request for access to the audio-record and/or video-record of disciplinary proceedings would be processed having regard to the requirements of the Personal Data (Privacy) Ordinance. Consent from the officer concerned would be sought as necessary.

To provide explicit provisions for an adjudicating officer/tribunal to commence or proceed with a disciplinary hearing in the absence of a defaulter if the defaulter repeatedly fails to appear at scheduled sessions without reasonable justifications

12. Noting the Administration's proposal to provide explicitly for hearing in absentia, members enquired about the channel, if any, for appeal against a ruling made against the civil servant at the disciplinary hearing in his absence. According to the Administration, the civil servant could either lodge an appeal to the adjudicating officer/tribunal against the decision to commence or proceed with a disciplinary hearing in his/her absence once he/she became aware of such a decision; or he/she could appeal to the relevant authority against the ruling made in his absence.

13. Members noted that the disciplined services departments would promulgate administrative guidelines on the factors to be taken into consideration and the arrangements to be observed by the adjudicating authority in making a decision to commence or proceed with a disciplinary hearing in the absence of the civil servant concerned<sup>3</sup>.

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<sup>3</sup> See LC Paper No. CB(1)783/10-11(03).

To amend the English and Chinese versions of the offence of "conduct calculated to bring the public service into disrepute" (其行為刻意致使公共服務聲譽受損) in the P(D)R and the Traffic Wardens (Discipline) Regulations

14. The P(D)R and Traffic Wardens (Discipline) (Cap. 374 sub. Leg. J) (TW(D)R) stipulate "conduct calculated to bring the public service into disrepute" (the calculated offence) as one of the disciplinary offences for police officers and traffic wardens. There are similar offences in other Subsidiary Regulations but without the word "calculated". In *Chiu Hoi Po v. Commissioner of Police* (CACV 200/2006), the Court of Appeal pointed out that the English word "calculated" meant "likely" in the context of the P(D)R pursuant to previous court judgements; and that as a matter of purposive interpretation, the interpretation of the calculated offence could not have been intended to be confined to the limited situation of a subjective intention. The Administration therefore proposed to introduce amendments to P(D)R and TW(D)R to put it beyond doubt for both the management and staff sides of the disciplined services departments.

15. In this context, Dr Margaret NG opined that "可能" might not be the accurate translation of "likely", and asked the Administration to review the Chinese expression. The Administration undertook to convey her view to the Department of Justice for consideration. It is noted that the Chinese expression of "likely" as appeared in relevant provisions in L.N. 59 and L.N.62 is "相當可能".

To harmonize certain arrangements of disciplinary proceedings for junior police officers under Part II of the P(D)R with those for inspectors under Part III of P(D)R

16. The procedures on investigation into disciplinary offences, punishment and appeals in respect of junior police officers (JPOs) and inspectors are governed by Part II and III of the P(D)R respectively. In order to enhance efficiency and overall fairness, the Administration proposed to introduce amendments to align certain arrangements and procedures of disciplinary proceedings for JPOs with those for inspectors.

17. On whether there would be a unified disciplinary code for all police officers as a result of the proposed amendments to P(D)R, the Administration informed the PS Panel that there was no consensus among the four staff associations of the Police Force Council on this subject. The Administration undertook to continue to work with the management and the staff sides of the

Police Force to identify further improvements to P(D)R after completion of the forthcoming legislative amendments.

The timetable and scope of the legislative amendment exercise

18. At its meeting on 20 December 2010, the PS Panel had no objection in principle to the Administration's proposals to amend the Subsidiary Regulations. Noting the Administration's plan to introduce the relevant legislative proposals into the Legislative Council in mid-2011, the Panel Chairman urged the Administration to expedite its work with a view to introducing the amendments earlier.

19. The PS Panel also noted from the joint written submission from the Junior Police Officers' Association, the Overseas Inspectors' Association and the Superintendents' Association that they supported the Administration's proposals. The written submission of the Hong Kong Police Inspectors' Association however advocated a comprehensive review of P(D)R, instead of introducing piecemeal amendments. As advised by the Administration at the meeting on 20 December 2010, the issues raised in the submission of the Hong Kong Police Inspectors' Association had not received a consensus from all the four staff associations and the management side of the Police Force. The Administration nevertheless assured members that upon completion of the current legislative amendment exercise, it would proceed to the next stage of the review of the Disciplined Services Legislation.

**Relevant papers**

20. A list of relevant papers is at the **Appendix**.

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

**List of relevant papers**

Committee	Date of meeting	Paper
Panel on Public Service (PS Panel)	17.11.2008	Minutes of meeting (LC Paper No. CB(1)560/08-09) <a href="http://www.legco.gov.hk/yr08-09/english/panels/ps/minutes/ps20081117.pdf">http://www.legco.gov.hk/yr08-09/english/panels/ps/minutes/ps20081117.pdf</a>
PS Panel	20.4.2009	Administration's paper on Disciplinary mechanism and related procedures for disciplined services and civilian grades (LC Paper No. CB(1)1260/08-09(04)) <a href="http://www.legco.gov.hk/yr08-09/english/panels/ps/papers/ps0420cb1-1260-4-e.pdf">http://www.legco.gov.hk/yr08-09/english/panels/ps/papers/ps0420cb1-1260-4-e.pdf</a>
		Paper on civil service disciplinary mechanism prepared by the Legislative Council Secretariat (Background brief) (LC Paper No. CB(1)1297/08-09) <a href="http://www.legco.gov.hk/yr08-09/english/panels/ps/papers/ps0420cb1-1297-e.pdf">http://www.legco.gov.hk/yr08-09/english/panels/ps/papers/ps0420cb1-1297-e.pdf</a>
		Administration's response on Disciplinary mechanism and related procedures for disciplined services and civilian grades (LC Paper No. CB(1)1718/08-09(01)) <a href="http://www.legco.gov.hk/yr08-09/english/panels/ps/papers/ps0420cb1-1718-1-e.pdf">http://www.legco.gov.hk/yr08-09/english/panels/ps/papers/ps0420cb1-1718-1-e.pdf</a>
		Minutes of meeting (LC Paper No. CB(1)1690/08-09) <a href="http://www.legco.gov.hk/yr08-09/english/panels/ps/minutes/ps20090420.pdf">http://www.legco.gov.hk/yr08-09/english/panels/ps/minutes/ps20090420.pdf</a>



Committee	Date of meeting	Paper
PS Panel	21.6.2010	<p>Administration's paper on Disciplinary mechanism and progress on various disciplinary matters (LC Paper No. CB(1)2225/09-10(01)) <a href="http://www.legco.gov.hk/yr09-10/english/panels/ps/papers/ps0621cb1-2225-1-e.pdf">http://www.legco.gov.hk/yr09-10/english/panels/ps/papers/ps0621cb1-2225-1-e.pdf</a></p>
		<p>Paper on disciplinary mechanism and proposed amendments to disciplined services legislation prepared by the Legislative Council Secretariat (Background brief) (LC Paper No. CB(1)2227/09-10) <a href="http://www.legco.gov.hk/yr09-10/english/panels/ps/papers/ps0621cb1-2227-e.pdf">http://www.legco.gov.hk/yr09-10/english/panels/ps/papers/ps0621cb1-2227-e.pdf</a></p>
		<p>Submission on disciplinary mechanism and progress on various disciplinary matters from Police Force Council Staff Side (LC Paper No. CB(1)2236/09-10(01)) <a href="http://www.legco.gov.hk/yr09-10/english/panels/ps/papers/ps0621cb1-2236-1-e.pdf">http://www.legco.gov.hk/yr09-10/english/panels/ps/papers/ps0621cb1-2236-1-e.pdf</a></p>
		<p>Submission on disciplinary mechanism and progress on various disciplinary matters from Government Disciplined Services General Union (Chinese version only) (LC Paper No. CB(1)2338/09-10(01)) <a href="http://www.legco.gov.hk/yr09-10/chinese/panels/ps/papers/ps0621cb1-2338-1-c.pdf">http://www.legco.gov.hk/yr09-10/chinese/panels/ps/papers/ps0621cb1-2338-1-c.pdf</a></p>
		<p>Administration's response on disciplinary mechanism and progress on various disciplinary matters (follow-up paper) (LC Paper No. CB(1)2757/09-10(01)) <a href="http://www.legco.gov.hk/yr09-10/english/panels/ps/papers/ps0621cb1-2757-1-e.pdf">http://www.legco.gov.hk/yr09-10/english/panels/ps/papers/ps0621cb1-2757-1-e.pdf</a></p>
		<p>Minutes of meeting (LC Paper No. CB(1)201/10-11) <a href="http://www.legco.gov.hk/yr09-10/english/panels/ps/minutes/ps20100621.pdf">http://www.legco.gov.hk/yr09-10/english/panels/ps/minutes/ps20100621.pdf</a></p>

Committee	Date of meeting	Paper
PS Panel	20.12.2010	<p>Administration's paper on proposed amendments to subsidiary regulations on discipline to disciplined services legislation (LC Paper No. CB(1)783/10-11(03))  <a href="http://www.legco.gov.hk/yr10-11/english/panels/ps/papers/ps1220cb1-783-3-e.pdf">http://www.legco.gov.hk/yr10-11/english/panels/ps/papers/ps1220cb1-783-3-e.pdf</a></p>
		<p>Paper on disciplinary mechanism and proposed amendments to disciplined services legislation (Updated background brief) (LC Paper No. CB(1)691/10-11)  <a href="http://www.legco.gov.hk/yr10-11/english/panels/ps/papers/ps1220cb1-691-e.pdf">http://www.legco.gov.hk/yr10-11/english/panels/ps/papers/ps1220cb1-691-e.pdf</a></p>
		<p>Submission on proposed amendments to subsidiary regulations / rules of disciplined services legislation and traffic wardens (discipline) regulations from Police Force Staff Associations (LC Paper No. CB(1)783/10-11(04))  <a href="http://www.legco.gov.hk/yr10-11/english/panels/ps/papers/ps1220cb1-783-4-e.pdf">http://www.legco.gov.hk/yr10-11/english/panels/ps/papers/ps1220cb1-783-4-e.pdf</a></p>
		<p>Submission on proposed amendments to subsidiary regulations on discipline to the disciplined services legislation from Hong Kong Police Inspectors' Association (Chinese version only) (LC Paper No. CB(1)831/10-11(01))  <a href="http://www.legco.gov.hk/yr10-11/chinese/panels/ps/papers/ps1220cb1-831-1-c.pdf">http://www.legco.gov.hk/yr10-11/chinese/panels/ps/papers/ps1220cb1-831-1-c.pdf</a></p>
		<p>Administration's supplementary information to the agenda items on "Progress update on proposed amendments to subsidiary regulations on discipline to the disciplined services legislation" and "Overview of civil service disciplinary matters" (Follow-up paper) (LC Paper No. CB(1)2866/10-11(01))  <a href="http://www.legco.gov.hk/yr10-11/english/panels/ps/papers/ps1220cb1-2866-1-e.pdf">http://www.legco.gov.hk/yr10-11/english/panels/ps/papers/ps1220cb1-2866-1-e.pdf</a></p>

Committee	Date of meeting	Paper
PS Panel	18.4.2011	Administration's paper on overview of civil service disciplinary matters (LC Paper No. CB(1)1858/10-11(05)) <a href="http://www.legco.gov.hk/yr10-11/english/panels/ps/papers/ps0418cb1-1858-5-e.pdf">http://www.legco.gov.hk/yr10-11/english/panels/ps/papers/ps0418cb1-1858-5-e.pdf</a>
		Minutes of meeting (LC Paper No. CB(1)2445/10-11) <a href="http://www.legco.gov.hk/yr10-11/english/panels/ps/minutes/ps20110418.pdf">http://www.legco.gov.hk/yr10-11/english/panels/ps/minutes/ps20110418.pdf</a>
		Administration's paper on procedures on requests for defence representation from officers subject to disciplinary action under the Police (Discipline) Regulations (Cap.232A) (LC Paper No. CB(1)2370/10-11(01)) <a href="http://www.legco.gov.hk/yr10-11/english/panels/ps/papers/ps0620cb1-2370-1-e.pdf">http://www.legco.gov.hk/yr10-11/english/panels/ps/papers/ps0620cb1-2370-1-e.pdf</a>

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