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31 May 2011

Ms Joanne MAK  
Clerk to Panel on Public Service  
Legislative Council Building  
8 Jackson Road, Central  
Hong Kong

Dear Ms MAK,

**Information on  
Procedures on requests for defence representation  
from officers subject to disciplinary action  
under the Police (Discipline) Regulations, Cap. 232A**

As spoken, the Hon Margaret NG has suggested us to pass the captioned information to the Panel for Members' reference. A copy is now attached for your follow-up action please.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Ivy LAW'.

( Ms Ivy LAW )  
for Secretary for the Civil Service

c.c. The Hon Margaret NG - w/o encl.  
Legislative Councillor

**Procedures on Requests for Defence Representation  
from Officers subject to Disciplinary Action  
under the Police (Discipline) Regulations, Cap. 232A**

**Appropriate Authority**

The Chief Superintendent, Conditions of Service and Discipline (CSP CS&D) will act as the Appropriate Authority (AA) to consider a defaulter's application for defence representation at a disciplinary hearing by a legally qualified person or "Friend" (i.e. not a legal practitioner).

2. The staffing of the defaulter's application for defence representation by a legally qualified person or "Friend" will not be conducted by the Discipline Division of the CS&D Branch of Personnel Wing (P Wing). It will be staffed by the Headquarters Group of P Wing who will submit the required documents to the AA for his consideration.

3. To guard against bias, the AA should not have been involved in any earlier decision to institute disciplinary action against the defaulter, nor should he take part in the subsequent staffing of any defaulter proceedings for which he has acted as the AA.

**Reviewing Authority**

4. The Director of Personnel and Training (DPT) will act as the Reviewing Authority. If the defaulter is aggrieved by the AA's decision, he may apply to the DPT for a review of the AA's decisions.

**On-going Defaulter Proceedings**

5. When a defaulter has requested legal<sup>1</sup> or other forms of representation [except those previously allowed under Reg. 9(11), and 19(1) of P(D)R], the designated Prosecuting Officer (PO), on behalf of the Formation Discipline Officer (FDO) (or Senior Police Officer (SPO) for inspectorate defaulter), will prepare all the required information (i.e. copy of charges, brief facts of the case and defaulter's summary of record of service) for the AA to decide whether the defaulter's request for legal representation will be allowed. When making his decision, the AA will make reference to the list of factors as below, having regarded to whether fairness requires such representation to be allowed:-

- (a) the grounds advanced by the defaulter;
- (b) the seriousness of the charges and potential penalty. Legal representation will usually be granted for those cases which may result in a terminatory award, order to resign or reduction in rank;

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<sup>1</sup> Legal representation refers to representation by a person who is qualified as a barrister or solicitor within the definitions in Section 2 of the Legal Practitioners Ordinance (Cap. 159):  
"barrister" means a person who is enrolled as a barrister on the roll of barristers and who, at the material time, is not suspended from practice;  
"solicitor" means a person who is enrolled on the roll of solicitors and who, at the material time, is not suspended from practice.

- (c) whether any points of law are likely to arise;
- (d) the defaulter's capacity to present his case at the hearing;
- (e) any anticipated procedural difficulties;
- (f) the need for reasonable speed in making the adjudication; and
- (g) the need for fairness to the individual concerned.

6. A Guide for considering applications for legal representation is at the attached Annex.

7. If the alleged disciplinary offences, if proved, may result in the officer being removed from public service by dismissal, compulsory retirement or an order to resign, or being reduced in rank, the seriousness of the potential penalty is a factor which substantially favours legal representation being allowed.

8. For requests for representation by a "Friend", the AA will consider the merits of each application on the basis of what fairness requires in the particular case. Additional factors to be considered by the AA may include possible confidential issues relating to the case, the possibility of leakage of sensitive information, and the possibility of a "Friend" being senior in rank to the Adjudicating Officer (AO) etc. Checks may also need to be conducted on the "Friend" in order to exclude those unsuitable persons with doubtful reputations or characters. Persons with doubtful reputations or characters may include, for example, known triad members, known criminals or those persons who are engaged in or connected to dubious activities and business, or those whose attendance at disciplinary proceedings may compromise the confidentiality of information presented therein, as well as undermining the credibility of the proceedings.

9. The decision by the AA will be communicated to the defaulter (copied to the FDO or SPO for inspectorate defaulter) by way of a notification memorandum informing him whether his request for legal or other forms of representation will be allowed, and if appropriate will include an explanation regarding why the request was not allowed.

10. If the defaulter is aggrieved by AA's decision not to allow his request for legal or other forms of representation, he may apply to the DPT for a review of the AA's decision by submitting his representations in writing, explaining his grounds.

11. If the AA (or the DPT, after review) decides that:-

- (a) the request for legal representation is not allowed; or
- (b) the request for "Friend" representation is allowed or rejected;

the FDO (or SPO for inspectorate defaulter) will forward a request to ACP P (SSP HQ Personnel) for the appointment of an AO to conduct the hearings, in the normal manner.

12. If the AA (or the DPT, after review) decides that the request for legal representation will be allowed, then the FDO (or SPO for inspectorate defaulter) will forward a request to ACP P (SSP HQ Personnel) for the appointment of the AO to conduct the hearing. In addition, SSP HQ Personnel will liaise with DoJ for the arrangement of legal representation for the prosecution and a legal adviser for the AO.

13. Where the request for legal representation or representation by a "Friend" is

raised by the defaulter before the AO (after rejection by the AA and the DPT, or if it has not been raised before), the AO should record the defaulter's request in the Record of Proceedings and ask the defaulter to provide his reasons. The AO should then consider whether such representation should be allowed by requesting the PO to provide him with the required information, in order that he can make his recommendation to the AA if the defaulter has not raised such request before (or the DPT if the request was previously rejected), copied to the defaulter. The AA or the DPT should give significant weight to the AO's recommendation when making a decision, since the AO should be in the best position to judge whether the fairness of the proceedings to be held before him/her requires legal or other forms of representation. On the other hand, if the defaulter has not requested for legal representation but during the hearing there is information or evidence coming to light (including but not limited to the factors outlined in the Annex) that would indicate such a need, the AO should advise the defaulter to consider requesting legal representation. If the defaulter has made such a request, the AO should then make his recommendation to the Appropriate Authority. The AO should also make a record in the Record of Proceedings to that effect.

14. If the defaulter is aggrieved by the AO's recommendation, he may submit his representations to the AA if the defaulter has not raised such request before (or the DPT if the request was previously rejected) for consideration, in writing.

#### **New Defaulter Proceedings**

15. When a FDO (or SPO for inspectorate defaulter) decides that formal disciplinary proceedings should be instituted against an officer, the designated PO, on behalf of the FDO (or SPO for inspectorate defaulter), will serve the following documents to the defaulter before the hearing:-

- (a) "Notification of Defaulter Proceedings";
- (b) Copy of charges; and
- (c) "Notes on tape recordings in disciplinary hearings".

16. The designated PO will ask the defaulter to acknowledge the receipt of the documents and inform him of his rights relating to the disciplinary hearing. In addition, the PO will invite the defaulter to consider whether he wishes to have a defence representative and if so what kind of defence representative he wishes to have.

17. If the defaulter wishes to have a defence representative who previously would have been excluded by Reg. 9(11), 9(12), 19(1) and 19(2) of P(D)R, the designated Prosecuting Officer (PO), on behalf of the Formation Discipline Officer (FDO) or SPO for inspectorate defaulter, will prepare all the required information (i.e. copy of charges, brief facts of the case and defaulter's summary of record of service) for the AA, so that consideration can be made by the AA as to whether the defaulter's request for defence representation will be allowed, having regard to whether fairness requires such representation to be allowed.

18. When making his decision, the AA will make reference to the list of factors as set out in paragraph 5 above, and will obtain additional information, if required, from the PO. The decision by the AA will be communicated to the defaulter (copied to FDO or SPO for inspectorate defaulter) by way of a notification memorandum.

19. If the defaulter is aggrieved by the AA's decision in not allowing his request for legal or other forms of representation, he may apply to the DPT for a review of the AA's decision by submitting his representations in writing, explaining his grounds.

20. If the AA (or the DPT, after review) decides that:-

- (a) the request for legal representation is rejected; or
- (b) the request for "Friend" representation is allowed or rejected;

the FDO (or SPO for inspectorate defaulter) will forward a request to ACP P (SSP HQ Personnel) for the appointment of an AO to conduct the hearings, in the normal manner.

21. If the AA (or the DPT, after review) decides that the request for legal representation will be allowed, then the FDO (or SPO for inspectorate defaulter) will forward a request to ACP P (SSP HQ Personnel) for the appointment of an AO to conduct the hearing. In addition, SSP HQ Personnel will liaise with DoJ for the arrangement of legal representation for the prosecution and a legal adviser for the AO.

22. Where the request for legal representation or representation by a "Friend" is raised by the defaulter before the AO (after rejection by the AA and the DPT, or if it has not been raised before), the AO should record the defaulter's request in the Record of Proceedings and ask the defaulter to provide his reasons. The AO should then consider whether such representation should be allowed by requesting the PO to provide him with the required information, in order that he can make his recommendation to the AA if the defaulter has not raised such request before (or the DPT if the request was previously rejected), copied to the defaulter. The AA or the DPT should give significant weight to AO's recommendation when making a decision, since the AO should be in the best position to judge whether the fairness of the proceedings to be held before him/her requires legal or other forms of representation. On the other hand, if the defaulter has not requested for legal representation but during the hearing there is information or evidence coming to light (including but not limited to the factors outlined in the Annex) that would indicate such a need, the AO should advise the defaulter to consider requesting legal representation. If the defaulter has made such a request, the AO should then make his recommendation to the Appropriate Authority. The AO should also make a record in the Record of Proceedings to that effect.

23. If the defaulter is aggrieved by the AO's recommendation, he may submit his representations to the AA if the defaulter has not raised such request before (or the DPT if request was previously rejected) for consideration in writing.

**Guide**  
**Factors for Considering Whether**  
**Legal Representation for the Defaulter**  
**at Disciplinary Hearings Should Be Allowed**

**Principle**

In *The Stock Exchange of Hong Kong Limited v New World Development Company Limited* [2006] 2 HKLRD 518, the Court of Final Appeal ("CFA") held that the common law position is that tribunals have a discretion whether to permit legal representation, depending on the needs of fairness. The court cited with approval a statement to the effect that it is established that disciplinary tribunals have, in the exercise of their discretion, and having regard to a broad range of factors including those mentioned by the European Court, to decide whether natural justice requires that a person appearing before the tribunal should be legally represented. Such factors include: the seriousness of the charge and potential penalty; whether any points of law are likely to arise; the capacity of the individual to present his own case; procedural difficulties; the need for reasonable speed in making the adjudication; and the need for fairness among the individuals concerned. This is not intended to be an exhaustive list. The court considered that no list of such factors can be comprehensive and that the common law principles of fairness operate flexibly, requiring the tribunal to respond reasonably to the requirements of fairness arising in each case, balancing any competing interests and considering what, if any, limits may proportionately be imposed on legal representation in consequence.

2. These principles were stated again by the CFA in *FACV 9/2008* on 2009-03-26.

3. On the basis of the above judicial decisions, the Appropriate Authority or tribunal before whom a request for legal representation is made must consider the matters in the light of the facts of each case, the factors mentioned above and any other factors which might be relevant to the issue of whether fairness of the hearing would require legal representation for the defaulter. This Guide serves to provide assistance to Appropriate Authority or the disciplinary tribunals concerned in considering such

matters, by indicating factors which may be taken into consideration, having regard to the CFA's judgments, the experience by the Civil Service Bureau and our experience in disciplinary proceedings.

**Factors for Consideration**

**(A) Grounds advanced by the defaulter**

4. Any relevant ground advanced by the defaulter for legal representation at the disciplinary hearing must be taken into consideration. It may be that most grounds to be advanced would have been covered in (B) to (G) below. However, no list of factors could be exhaustive. Further, matters relevant to the case which are evident should also be taken into account as a matter of fairness, even if not specifically mentioned by the defaulter.

**(B) Seriousness of the charge(s) and the potential penalty**

5. Seriousness of the charge and the potential penalty in the relevant disciplinary proceedings was the main reason why the CFA held in *FACV 9/2008* that Art. 10 of the HKBOR was applicable. It would be unlikely that the court would give lesser weight to this factor when it comes to consideration of fairness. Hence, if a defaulter is facing a terminatory punishment, this will be a factor which substantially favours the granting of legal representation.

6. If a defaulter whose misconduct may warrant a very serious non-terminatory punishment (e.g. reduction in rank) once his guilt has been established, this is also a factor in favour of legal representation. However, the fact that the disciplinary proceedings will not result in terminatory punishment or very serious non-terminatory punishment does not of itself prevent discretion to be exercised to allow legal representation. All relevant factors must be taken into consideration.

**(C) Whether any points of law are likely to arise**

7. If points of law are likely to arise at the disciplinary hearing, this will be a factor in favour of allowing legal representation, but this does not mean legal representation must be granted as a matter of course. For example, there may not be a strong basis for legal representation where the defaulter raises arguments which have

already been decided by the court or arguments on technical rules of evidence which are not applicable to disciplinary hearings.

**(D) Defaulter's capacity to present his case**

8. A defaulter may have difficulties in presenting his case, e.g. he is suffering from certain medical conditions; the charges are complicated, etc.

**(E) Procedural difficulties**

9. Generally, disciplinary proceedings are to be conducted without undue formality. Therefore there is unlikely to be significant procedural difficulties, but any specific difficulty identified by the defaulter should be taken into consideration.

**(F) The need for reasonable speed to make the adjudication**

10. Disciplinary proceedings are intended to be domestic proceedings for dealing with disciplinary issues effectively and swiftly. Unnecessary legal representation may substantially lengthen or complicate the proceedings. However, if genuine legal issues are likely to arise, legal representation is likely to facilitate the proceedings.

**(G) Need for fairness among the individuals concerned**

11. If the prosecutor is a legally qualified person, legal representation for the defaulter should be allowed for fairness. Complexity of the factual issues in dispute requiring detailed cross-examination, or involvement of witnesses who are experts or high-ranking officials may also fall within this category. It should always be remembered that the Appropriate Authority or the tribunal has to respond reasonably to the requirements of fairness arising in each case.