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本函檔號 Our Ref.: CSBCR/DP/1-010-005/6
來函檔號 Your Ref.: CB1/SS/11/11

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首席議會秘書(小組委員會)1
楊少紅女士

楊女士：

修訂紀律部隊條例規管紀律事宜的附屬法例小組委員會
跟進二零一二年五月十六日的會議

謝謝你五月十七日的來信，現隨函附上當局就跟進行動一覽表中各項問題的回應。

另外，應委員會的要求，隨函夾附相關附屬法例的擬本，在現有條文上標示修訂規例／規則引進的各項主要修訂。

就警務處如何處理已完成紀律個案的問題，我們會另函回覆。

公務員事務局局長
（羅翠薇代行）

二零一二年五月二十四日

連附件

修訂紀律部隊條例規管紀律事宜的附屬法例小組委員會
當局就委員會二零一二年五月十六日會議的提問的回應

A. 有關委任律師及其他形式代表的事宜

1. 終審法院就*林少寶 訴 警務處處長*(終院民事上訴 2008 年第 9 號)一案的裁決

1.1 *林少寶*一案的裁決載於**附件 A**（只有英文本）。

1.2 在*林少寶*一案的裁決中，終審法院裁定由於《警察（紀律）規例》第 9(11)及(12)條訂明禁止被控人員委任律師代表出席紀律聆訊，牴觸《香港人權法案》第十條，故屬違憲及無效。

1.3 終審法院裁定，《香港人權法案》第十條是否適用於紀律處分程序，須視乎有關聆訊是否涉及判定個人的公民權利及義務。就本案而言，終審法院認為，由於林少寶先生所面對的指控的慣常處分是「通常予以免職」，因此《香港人權法案》第十條適用於他的紀律處分程序。

1.4 有關在紀律程序中委任律師代表事宜的普通法規定，終審法院參考其早前在*香港聯合交易所有限公司 訴 新世界發展有限公司及其他人*（終院民事上訴 2005 年第 22 號）一案中的裁決。終審法院裁定***委任律師代表的權利並非絕對***，此事應由審裁小組根據公平原則酌情決定（*林少寶*第 139 段）；終審法院亦裁定審裁小組須視乎公平需要，在全盤考慮有關情況後決定應否容許違紀人員委任律師代表（*林少寶*第 25 段）。

1.5 《警察（紀律）規例》第 9(11)及(12)條***全面禁止***被控人員委任律師代表出席紀律聆訊的條文，阻礙了審裁小組履行為達致公平審訊的需要而准許委任律師代表的責任。因此，有關條文牴觸了《香港人權法案》第十條（*林少寶*第 140 至 142 段）。

2. 申請委任律師代表的行政指引

2.1 相關紀律部隊已就被控人員申請由律師代表出席紀律聆訊以及當局審核有關申請的事宜，發出行政指引／程序，有關指引／程序載於**附件 B1 至 B6**。所有紀律部隊人員均可查閱該等指

引。各紀律部隊亦已為有關人員安排培訓課程／簡報會，解釋經修訂後的紀律程序。

2.2 各紀律部隊的指引按自然公正及公平程序的原則制訂。有關指引採用同一套考慮因素審核委任律師代表的申請，而相關因素是根據終審法院在*香港聯合交易所有限公司*一案的裁決而制訂。在有關申請的機制下，各部隊亦容許被控人員在委任律師代表的申請被拒後，向較批核當局更高級的首長級人員提出上訴。

2.3 為配合個別紀律部隊的運作需要，各部隊的指引存在若干差異，最主要的分別在於擔任批核當局和上訴當局的人員的職位及職級。就懲教署和香港海關而言，委任律師代表的申請由負責該紀律個案的主審人員處理及批核。在其他紀律部隊，有關工作則由總部的指定人員擔任。而各紀律部隊亦是由助理處長至部門首長的不同職級人員，負責處理上訴。

2.4 各紀律部隊在訂立相關行政指引時，已徵詢律政司的意見。當局認為這些指引及相關的修訂規例／規則均符合*林少寶*一案的裁決。

2.5 事實上，在*區慶錫訴警務處處長及其他人士*（高院憲法及行政訴訟 2010 年第 74 號）一案中，原訟法庭確認警務處以行政指引為基礎，審核委任律師代表申請的機制符合憲法要求。有關裁決載於**附件 C**（只有英文本）。

3. 處理申請委任律師代表的考慮因素

3.1 根據*香港聯合交易所有限公司*一案的裁決，審裁小組在處理委任律師代表的申請時，可考慮的一系列因素包括（但不限於）：控罪及可能罰則的嚴重性；個案是否可能涉及法律論點；申請人的陳詞能力；及程序上的困難等。

3.2 要將以上終審法院所引述的考慮因素以量化方式表述並不切實可行。當局是根據公平要求的基本原則，按每宗申請的情況審核有關申請。下文列舉數個例子，展示當局通常會在考慮相關因素後，批准委任律師代表的申請 –

(a) 紀律程序涉及的違紀行為，會使當局質疑被控人員的誠信甚或質疑他是否適合繼續擔當執法任務。有關的違紀行為一旦證明屬實，當局很可能對該員處以免職或降級的懲罰。舉例說，如一名警務人員被控與三合會成員交往的違紀行為，該員便很大可能獲准由律師代表。

(b) 紀律程序中很可能涉及法律觀點的爭論。例如，一名被控人員曾因在調查其財政困難時，未有披露財政狀況而被控以「對良好秩序及紀律有損的行為」，而該員以警方命令其交出個人資料的做法違法為由，質疑紀律程序是否合法和有效，該員其後獲准由律師代表。此外，一名隸屬香港海關的被控人員，被當局指控的違紀行為與《應課稅品條例》及《香港海關條例》之下罪行和法定權力相關，亦獲准由律師代表。

(c) 被控人員的陳詞能力。舉例說，倘若被控人員患有某種疾病、正接受治療，又或能提交醫學證據，證明其難以在聆訊中陳述理據，則很可能獲准由律師代表。

(d) 被控人員很可能面對程序上的困難。例如，有關個案案情複雜，牽涉多名證人和大量證據，而被控人員未能肯定該等證人和證據是否會獲准呈堂等，便很可能獲准由律師代表。

3.3 至於是否應在有關法例中列明上述所有或部分考慮因素，終審法院已在*香港聯合交易所有限公司*一案的裁決中明確表示（以及在*林少寶*一案的裁決中重申）不可能盡列所有考慮因素。普通法制度的公平原則須靈活運作，審裁小組須對每宗個案獲公平審理的要求作合理回應，平衡任何對立的權益，並按此考慮可就委任律師代表事宜施加相稱的限制（若有）（*香港聯合交易所有限公司*第 139 段）。因此，當局不可能把考慮因素一一盡列於法例中。倘若只在法例中列出部分考慮因素，又可能令被控人員感到混亂。此外，當局須不時檢討有關考慮因素，過程中須顧及當局在處理委任律師代表的申請方面所汲取的實際經驗、由法庭案例累積而不停演進的法理基礎，以及職方的意見。在行政指引而並非在相關法例中列明這些考慮因素，可容許各紀律部隊因應情況的轉變，迅速完善有關考慮因素。各紀律部隊有責任依循指引考慮這些相關因素，當局認為沒有需要將它們臚列於法例中。

4. 主審人員在處理委任律師代表申請中的角色

4.1 由主審人員以外的人員審理委任律師代表的申請，合乎法理要求。原訟法庭在*區慶錫*一案的裁決中明確指出，終審法院裁決中引述的「審裁小組」一詞不應以狹義詮釋。行政或紀律審裁小組完全有權把批准委任律師代表的決定，交由主審人員（即審裁小組）以外的其他人士，按照公平原則行事（*區慶錫*第 43 段）。；

4.2 由總部人員審核委任律師代表的申請，有助當局在紀律聆訊開始前完成審核程序，從而令聆訊能迅速進行。主審人員會繼續在決定委任律師代表的整個過程中擔當重要角色。被控人員可隨時在聆訊中經由主審人員重新申請委任律師代表。主審人員如認為基於公平考慮，被控人員的申請應獲批准，便會建議總部的批核或上訴當局批准有關申請，有關當局在作出決定時，須重視主審人員的建議。主審人員亦須因應聆訊的發展，建議被控人員考慮申請委任律師代表。根據警務處的紀錄，處方曾處理一宗被控人員在申請委任律師代表被拒後，在主審人員席前提出申請委任律師代表的個案。主審人員就申請向上訴當局提出建議後，上訴當局最後駁回該員的上訴。

4.3 從*區慶錫*一案中可見，現行規管由審裁小組以外的人員處理委任律師代表的申請的機制已提供一個合適合憲的體制，讓當局按照公平要求考慮委任律師代表的申請。因此，當局不認為現階段有迫切需要授權主審人員審核現時由總部人員處理的委任律師代表的申請。

5. 申請委任律師代表的上訴機制

5.1 各紀律部隊已制訂上訴機制，規定須由一名職級不低於助理處長／助理署長或同等職級的人員考慮和決定，任何不服被否決申請委任律師代表的上訴。

5.2 關於由同一部門人員就上訴個案作出考慮和決定的安排，個別議員對其獨立性和公正程度表示關注。然而，過往法庭所作的裁決顯示，政府人員在同類情況下行使職能時能保持不偏不倚。例如，在*黃得煒訴懲教署署長*（上訴法庭民事上訴 2009 年第 231 號）一案中（關於一名在囚人士就其紀律個案由同一所監獄的懲教事務監督處理一事所提出的司法覆核），上訴法庭

裁定，一名公平公正而又了解案情的旁觀者不會單純因為該監督的職位和職責，或單純因為該監督與下屬人員在同一所監獄工作，便作出該監督會傾向相信或袒護其下屬的結論。相反，該旁觀者會在沒有相反證據的情況下作出以下假定：該監督會認為對監獄的紀律事宜作出公平公正的判決，長遠來說有助良好及有效地管理監獄，對其下屬和在囚人士均有好處（*黃得煒*第 137 段）。上訴法庭繼而指出，公平公正而又了解案情的旁觀者會在現實中發現很多其他的機構（例如學校及商界）也有類似的情況。這一切有助該旁觀者明白何謂構成偏袒情況的合理懷疑（*黃得煒*第 139 段）。上訴法庭總結時指出，公平公正而又了解案情的旁觀者不會單純因為該監督（即主審人員）是有關監獄的監督，以及有關監獄的主管或副主管，便自動作出概括性結論，認為有合理懷疑認定該監督在審理每宗個案時都會有所偏袒（*黃得煒*第 143 段）。

5.3 當局保證，各紀律部隊的負責人員在行使酌情權時，須按照公平原則行事。負責人員亦清楚明白他們的決定會受到職方的密切監察，以及可能面對司法覆核的挑戰。

5.4 紀律部隊首長充分了解其部門的獨特運作需要，並已獲規管紀律的相關附屬法例賦權處理其屬下人員的紀律事宜。因此，處理委任律師代表申請（包括因申請被否決而作出的上訴）的責任，應繼續由各有關部門負責。我們認為不宜由第三者介入處理上訴個案，以免為現時的紀律處分機制帶來根本性的改變。

B. 其他法例修訂

6 明確訂明，被控人員如須出席紀律處分程序，但在無合理辯解的情況下屢次缺席，則紀律審裁小組可在被控人員缺席的情況下進行該等程序的任何部分

6.1 為配合是次法例修訂建議，各紀律部隊會根據**附件 D** 的指引，就決定是否在被控人員缺席的情況下進行紀律處分程序時所須考慮的因素和依循的安排，頒布行政指引。有關指引是經徵詢律政司意見和參考英國法庭相關裁決後制訂的。

6.2 當局曾就有關考慮因素和安排，在二零一零年十二月分別徵詢職方及立法會公務員及資助機構員工事務委員會的意見。該委員會及職方原則上並無異議。

6.3 根據有關指引，主審人員必須確定，要求被控人員在指定日期／時間／地點出席紀律聆訊的通知（包括其後發出的通知），已妥為在所安排的聆訊前送達被控人員。一般來說，有關通知會經由被控人員所屬辦事處送達，或以雙掛號郵件送達該員的通訊地址。

6.4 就「屢次缺席」應當如何理解一事，我們認為每宗個案的情況有所不同。主審人員須按公平原則，根據每宗個案的情況作出考慮。根據 *Shorter Oxford English Dictionary 6th edition*，"repeatedly" 被解釋為"again and again"。因此，主審人員***不得***在被控人員只缺席聆訊一次的情況下便進行聆訊。一般來說，主審人員可在被控人員在無合理辯解的情況下缺席三次，便進行紀律處分程序。

7 「延遲或停止增薪」的懲罰

7.1 我們必須澄清，這***並非***一項單方面更改懲罰的安排。我們已妥為諮詢有關職方，先後在二零一零年五月、同年十二月及二零一二年一月完成了三輪與有關紀律部隊的職工會的諮詢。在每輪諮詢中，我們均事先向職方發出諮詢文件，然後與他們面談討論，職方隨後向當局提交書面意見。我們已就加入「延遲或停止增薪」的懲罰的建議諮詢香港警察員佐級協會（作為警察評議會的屬會），以及香港交通督導員工會。兩者均沒有就此建議提出異議。

7.2 從法律與合約條文的層面考慮，與其他公務員的情況一樣，初級警務人員及交通督導員職系人員的聘用條件中，訂明該等人員須遵守不時由當局頒布的相關法例、政府規例和部門訓令或指示。相關的合約條款已包含更改合約機制，用以修改服務條件。因此，任何對《警察（紀律）規例》及《交通督導員（紀律）規例》作出的修訂，均符合合約規定。有鑑於此，建議加入對初級警務人員及交通督導員職系人員施以「延遲或停止增薪」的懲罰的條文，應不會牴觸《基本法》第一百條[1]或這些人員的聘用條款。

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[1] 《基本法》第一百條訂明，香港特別行政區成立前在香港政府部門任職的公務人員可保留其服務條件不低於原來的標準。

7.3 從有效管理公務員隊伍的實際運作考慮，為配合不斷轉變的社會需要和市民期望，容許修改公務員的服務條件至為重要。

7.4 這項建議是在制訂劃一初級警務人員和督察級警務人員的紀律處分程序的若干安排時提出的。現時，督察級警務人員如被證實干犯不當行為，可被處以「延遲或停止增薪」的懲罰，因此，根據劃一安排的建議，這項懲罰亦應適用於初級警務人員。在落實這項建議後，由於交通督導員職系將會成為唯一不能被施以這項懲罰的公務員職系，我們於是建議這項懲罰應同樣適用於該職系人員。

7.5 「延遲或停止增薪」的懲罰可單獨或與其他懲罰一併使用，以收更佳的阻嚇作用。在其他懲罰單獨使用時未能充分反映違紀行為的嚴重性，但更嚴厲的懲罰又不適用或合適時，將原來的懲罰與「延遲或停止增薪」一併施行便尤其合用。把「延遲或停止增薪」加入可處以的懲罰，可讓紀律處分當局更靈活地施以合適的懲罰，而無須處以更嚴厲的懲罰。舉例說，如案情有此需要，紀律處分當局可考慮以「譴責」加上「延遲或停止增薪」代替「嚴厲譴責」的懲罰。

公務員事務局和
相關紀律部隊

二零一二年五月

Annex A

FACV No. 9 of 2008

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 9 OF 2008 (CIVIL)
(ON APPEAL FROM CACV NO. 340 OF 2005)

Between:

LAM SIU PO **Appellant**

- and -

COMMISSIONER OF POLICE **Respondent**

Court: Chief Justice Li, Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Ribeiro PJ and Lord Woolf NPJ

Dates of Hearing: 10 – 11 March 2009

Date of Judgment: 26 March 2009

J U D G M E N T

Chief Justice Li:

1. I agree with the judgment of Mr Justice Ribeiro PJ.

Mr Justice Bokhary PJ:

2. There can be circumstances in which a hearing would be unfair if legal representation (by which I mean representation by a legal practitioner) is not permitted. The natural expectation is that if and when such unfairness occurs, the courts would provide a remedy to redress the consequences of that unfairness. But what if there appears to be a statutory provision by which legal representation is barred at hearings of the type concerned?

Provision barring legal representation

3. The validity of a statutory bar to legal representation is under challenge in the present case. It is contained in subsidiary legislation, being the one to be found in regulation 9(11) and (12) of the Police (Discipline) Regulations made by the Chief Executive in Council under the regulation-making power conferred by s.45 of the Police Force Ordinance, Cap.232. I will refer to it as "the reg.9(11) and (12) bar". Regulation 9 lays down the procedure to be followed when a defaulter (ie a police officer charged with a disciplinary offence) has pleaded not guilty. Paragraphs (11) and (12) of reg.9 read :

> "(11) A defaulter may be represented by –
>
> (a) an inspector or other junior police officer of his choice; or
>
> (b) any other police officer of his choice who is qualified as a barrister or solicitor,
>
> who may conduct the defence on his behalf.
>
> (12) Subject to paragraph (11), no barrister or solicitor may appear on behalf of the defaulter."

Material facts

4. Shortly stated, the material facts of the present case are as follows. The appellant, a police constable, engaged in stock market dealings. He lost heavily, found himself deeply in debt, petitioned for his own bankruptcy and

was adjudicated bankrupt in September 2000. Consequently he was charged in December that year with a disciplinary offence. It was the offence of contravening Police General Order 6-01(8) ("PGO 6-01(8)") which at that time read :

> "A police officer shall be prudent in his financial affairs. Serious pecuniary embarrassment stemming from financial imprudence which leads to the impairment of an officer's operational efficiency will result in disciplinary action."

PGO 6-01(8) is one of the provisions of the Police General Orders made by the Commissioner of Police under the general order-making power conferred on him by s.46 of the Police Force Ordinance.

Conviction at disciplinary hearing

5. There were two disciplinary hearings. The first hearing ended in the appellant being convicted on 2 March 2001. But that conviction was set aside by the Force Discipline Officer for procedural irregularity. The police officer who had represented the appellant at the first hearing was not available at the second hearing, which commenced on 14 December 2001. That police officer was replaced by another defaulter's representative. But the appellant lost confidence in that replacement. And after being told that he could not engage a legal practitioner to defend him, the appellant appeared in person at the second hearing.

6. On 27 March 2002 the appellant was again convicted. The penalty imposed on him was compulsory retirement with deferred benefits. Originally the penalty was suspended for 12 months. But it was subsequently varied so as to come into earlier effect. Consequently the appellant was compulsorily retired from the Police Force on 23 October 2002 with deferred benefits.

Judicial review fails in the courts below

7. On 21 January 2003 the appellant took out an application for leave to bring judicial review proceedings for the quashing of the decisions by which he was convicted and compulsorily retired. He obtained leave to do so on certain grounds. Then he sought leave to do so on additional grounds as well. The proceedings for which leave had been granted and the application to apply on additional grounds as well were heard together. Both were dismissed with costs *nisi* by Chung J on 23 August 2005. Judgment was not given until that date even though the hearing had ended on 11 November 2004. That lack of expedition is to be contrasted with the expedition displayed when Tang VP delivered the judgment of the Court of Appeal (consisting of himself, Yeung JA and Yam J) on 8 November 2007 after hearing the appellant's appeal to them on the 2nd of that month. They dismissed that appeal with costs *nisi*. By the leave which they granted him, the appellant now appeals to us.

Appellant's argument

8. The argument presented by Prof. Johannes Chan SC for the appellant involves questions as to (i) the validity of the statutory bar against legal representation with which the appellant was confronted and (ii) the elements of the offence of which he was convicted. Shortly stated, the argument runs thus. First, the reg.9(11) and (12) bar is invalid. Secondly, the impairment of operational efficiency is an element of the offence under PGO 6-01(8). Thirdly, legal representation should have been permitted. Fourthly and finally, if the appellant had been legally represented, he might have been acquitted by reason of the evidence as a whole being insufficient to prove that his operational efficiency had been impaired within the meaning of PGO 6-01(8). So there are four parts, so to speak, to the argument.

Vires

9. As I have pointed out, the first part of the argument consists of a challenge to the validity of the reg.9(11) and (12) bar. At first instance and in the appeal to the Court of Appeal, that challenge was made on two bases. These were that the reg.9(11) and (12) bar is (i) *ultra vires* as being beyond the regulation-making power conferred by s.45 of the Police Force Ordinance and (ii) inconsistent with art.10 of the Bill of Rights Not having pursued the *ultra vires* argument when applying for and obtaining the Court of Appeal's leave to appeal to us, the appellant did not include that argument in his printed case. As set out in his printed case, the challenge to the validity of the reg.9(11) and (12) bar rests solely on his submission that it is inconsistent with art.10 of the Bill of Rights. Nevertheless we have heard oral argument on the question of *vires*.

10. The regulation-making power concerned, namely the one conferred by s.45 of the Police Force Ordinance, is in extremely wide terms. It includes "power to make regulations providing for appropriate tribunals to inquire into disciplinary offences by [police officers below the rank of superintendent] and generally for the procedure in cases where [such an officer] is alleged to have committed any of the disciplinary offences specified in the regulations". Regulation 9 has always barred legal representation in defaulter proceedings. That bar was introduced in 1977 when it was provided by reg.9(11) that no barrister or solicitor may appear on behalf of a defaulter. In 1982 it was provided (or perhaps spelt out for the avoidance of doubt) that a defaulter may be represented by a police officer even if that police officer happens to be qualified as a barrister or solicitor. That is not equivalent to being represented by a legal practitioner. So it is not legal representation.

11. On the question of *vires*, Mr Anderson Chow SC for the respondent submits as follows. The *vires* of subsidiary legislation is to be determined by reference to the law as it stood at the time when the subsidiary

legislation in question was made. And as the law stood in 1977 when it was first provided by reg.9 that no barrister or solicitor may appear on behalf of a defaulter, so providing by subsidiary legislation was permitted. That appears by the decisions of the English Court of Appeal in *Fraser v. Mudge* [1975] 1 WLR 1132 and *Maynard v. Osmond* [1977] 1 QB 240.

12. As to the common law's exposure to legislative modification in the absence of any entrenched guarantee against such modification, I do not think that the correctness of those decisions was doubted in Hong Kong in 1977, in 1982 or indeed at any time thereafter. Until the advent of the Bill of Rights in 1991 these things were seen in much the same way as they were seen in 1977. It is therefore necessary to turn to the Bill of Rights.

Article 10 of the Bill of Rights

13. Article 10 of Bill of Rights reads :

> "All persons shall be equal before the courts and tribunals. 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 press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

14. At first instance, the appellant had also relied on art.35 of our constitution the Basic Law, which article reads :

> "Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies.
>
> Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel."

But when this case reached the Court of Appeal, the appellant abandoned his reliance on art.35 because we had by then held in *Stock Exchange of Hong Kong v. New World Development Co. Ltd* (2006) 9 HKCFAR 234 that the reference to "the courts" in art.35 is a reference to the judiciary and nothing else.

Bill of Rights and the ICCPR

15. As is well established, the Bill of Rights is the embodiment of the application to Hong Kong of the International Covenant on Civil and Political Rights ("the ICCPR") from which it is taken almost verbatim. Consequently the Bill of Rights is – and has always been – entrenched. Today it is entrenched by art.39 of the Basic Law which provides, relevantly to present purposes, that the ICCPR as applied to Hong Kong shall remain in force and that the rights and freedoms thereunder may not be restricted. The Bill of Rights was introduced by the Hong Kong Bill of Rights Ordinance, Cap.383, which came into effect on 8 June 1991. By s.3 of that Ordinance, all pre-existing legislation inconsistent with the Bill of Rights was expressly repealed. The legislation thus repealed was of course not revived upon s.3 ceasing to exist as from 1 July 1997. What about subsequent legislation? In pre-handover times (when Hong Kong's constitutional instruments were the Letters Patent and the Royal Instructions) the entrenchment of the Bill of Rights was by art.VII(3) of the Letters Patent. That article was added to the Letters Patent simultaneously with the coming into effect of the Bill of Rights. It prohibited the Legislative Council from making any law that restricts the rights and freedoms enjoyed in Hong Kong in a manner inconsistent with the ICCPR as applied to Hong Kong. That arrangement lasted until 1 July 1997 when the Basic Law came into effect, and art.39 thereof took over the entrenchment of the Bill of Rights.

16. It was said in the course of the argument before us and has often been said before – no doubt truly – that the text of the ICCPR involves a considerable measure of compromise between different systems. The article of the ICCPR from which we got art.10 of the Bill of Rights is no exception to that and is, indeed, a good example of it. But then there is the question of why, despite the differences between their systems, so many nations have set out to achieve, succeeded in achieving and subscribed to the ICCPR. There must have been a powerful idea at work. Perhaps it was the idea that rights and freedoms are shared things, so that unless everyone has them in due measure, nobody's position would be what it should. True it is that some people would, through the possession of raw power, still have privileges. But such privileges would be selfish and ultimately insecure. The ICCPR employs a largeness of language by which fundamental values are appropriately moulded into and presented as enforceable rights and freedoms. Neither its content nor its context suggests anything narrow. Certainly I would not attribute a narrow meaning to any of the rights and freedoms contained in the ICCPR as applied to Hong Kong through the Bill of Rights entrenched by the Basic Law. They are to be approached generously.

17. If there was ever any doubt as to that approach, it was laid to rest by the famous statement of the Chief Justice for the Court in *Ng Ka Ling v. Director of Immigration* (1999) 2 HKCFAR 4 at p.29A that "the courts should give a generous interpretation" to the rights and freedoms contained in the fundamental rights and freedoms chapter of the Basic Law in order to give persons in Hong Kong "the full measure of fundamental rights and freedoms so guaranteed". The rights under art.10 of the Bill of Rights are among those rights, being guaranteed by art.39 of the Basic Law, which article is in that chapter.

Article 10 applies to disciplinary proceedings

18. Article 10 of the Bill of Rights is taken word for word from art.14(1) of the ICCPR and closely resembles art.6(1) of the European Convention on Human Rights. We have been shown what the European Court of Human Rights has said about art.6(1) of that Convention and the Human Rights Committee has said about art.14(1) of the ICCPR. Looking in particular at *Eskalinen v. Finland* (2007) 45 EHRR 43 and *General Comment No.32 (90th Session)* (2008) Vol.15 No.1 IHRR 1, it would appear that the European Court of Human Rights has arrived at the view that art.6(1) has application to proceedings such as disciplinary proceedings while the Human Rights Committee has not – or at least has not yet – arrived at such a view in regard to art.14(1).

19. Mr Chow contends that if it were held that art.10 applies to disciplinary proceedings, the consequences would be (i) that such proceedings must be heard in public and (ii) that the result of such proceedings must be made public subject only to the exceptions spelt out in art.10. Quite simply, I do not think that either of those consequences would ensue. No provision, especially not one that guarantees a fundamental right or freedom, should be interpreted so that its components trip each other up and defeat its purpose. Every provision, especially one of that nature, should be interpreted so that its components operate in harmony to achieve its purpose. Article 10 of the Bill of Rights is entrenched for the purpose of guaranteeing the protection of the individual in an important context. And it is to be interpreted and applied to further that purpose. Fairness at disciplinary hearings is an aspect of that purpose. So is sparing the individual from harmful publicity unless, exceptionally, publicity is in the interest of the individual or is so much in the public interest as to override any individual interest in privacy. There are various types of art.10 suits at law. Disciplinary proceedings are of a sort in

which, while fairness is always needed, privacy is usually appropriate. If art.10 applies to disciplinary proceedings, it would mandate fairness at disciplinary hearings but would not mandate publicity at such hearings or for their results.

20. As to the competence, independence and impartiality required by art.10, there can be no objection in principle to disciplinary proceedings against police officers being heard by tribunals consisting of police officers without any non-police element. Whether any objection can be taken to any given adjudicating police officer in any given case depends on the circumstances.

21. It should be mentioned that an appeal to the courts where such an appeal is available, or judicial review by the courts where no such appeal is available, can supply any essential element such as independence or publicity that might otherwise be missing from a tribunal's arrangements.

22. True it is that legal representation is not permitted at hearings before the Labour Tribunal or the Small Claims Tribunal. But there are in this connection crucial differences between those two tribunals on the one hand and disciplinary tribunals on the other. Neither the Labour Tribunal nor the Small Claims Tribunal award punishment. An element of mediation features prominently in the process of the Labour Tribunal and, in practice, to some extent in the process of the Small Claims Tribunal too. Hearings before each of those two tribunals have an inquisitorial element. Each of them is empowered to transfer claims to a court, whereupon legal representation becomes permissible. And appeals from each of them lie to the courts.

23. The fair hearing clause of art.10 of the Bill of Rights guarantees the fairness of the hearings to which it applies. Whether it applies to disciplinary proceedings depends on whether such proceedings are determinations of rights and obligations in suits at law within its meaning. If they are, then the fairness of such proceedings is secure. Let it be remembered

that fairness does not always carry a right to be legally represented. It only carries a right to be legally represented when denying that right would be unfair. The rights typically involved in disciplinary proceedings are important ones extending to the right to remain in a profession, service or occupation.

24. Having regard to their context, the words "determination of … rights and obligations in a suit at law" call for a generous interpretation. The fundamental question is whether our constitution permits legislation that brings about unfairness at disciplinary proceedings. My answer is that our constitution does not permit that. In my view, disciplinary proceedings – whether in respect of professions, disciplined services or occupations – are determinations of rights and obligations in suits at law within the meaning of art.10. So art.10 applies to disciplinary proceedings. In fairness to the Court of Appeal in the present case, it should be mentioned that they felt bound by their own decision in *Chan King-chau v. Commissioner of Police*, HCMP 2824 of 2004, 29 December 2004 (unreported) that art.10 does not apply to the hearing of defaulter proceedings. Their judgment in the present case was given before we held in *Solicitor (24/07) v. Law Society of Hong Kong* [2008] 2 HKLRD 576 that the Court of Appeal may depart from a previous decision of their own if they are satisfied that it is plainly wrong.

Bar to legal representation has gone. Now a matter of discretion

25. Procedural fairness works because it is flexible. Whether it calls for legal representation in any given instance depends on the circumstances. As a bar to legal representation at defaulter hearings no matter what the circumstance, the reg.9(11) and (12) bar was inconsistent with the fair hearing clause of art.10 of the Bill of Rights. Accordingly the reg.9(11) and (12) bar was repealed by s.3 of the Hong Kong Bill of Rights Ordinance for such inconsistency or, if one does not regard it as having been repealed, is to be

treated as void for unconstitutionality by reason of such inconsistency. Subsidiary legislation that was *intra vires* when made may be impliedly revoked by subsequent legislation inconsistent with it. That was the situation in *Attorney General v. Chan Kei-lung* [1977] HKLR 312 decided by the Court of Appeal. The present situation goes beyond implied revocation, although ever that would be enough. Legal representation at defaulter hearings is now a matter of discretion. Whether a defaulter should be permitted to be legally represented depends on whether fairness so requires in all the circumstances. That is primarily for the disciplinary tribunal to assess. And no court would disturb such an assessment except for plainly compelling reasons.

26. As I see it, the legal position in the present situation bears comparison with the one under the decision of the Court of Appeal in *R v. Man Wai-keung (No.2)* [1992] 2 HKCLR 207. In that case a constitutional challenge was brought against a provision in the Criminal Procedure Ordinance, Cap.221, which barred the awarding of costs to a certain category of appellants whose convictions have been quashed, namely those who have been ordered to be retried. That bar was struck down for inconsistency with the equality clause of art.10 of the Bill of Rights. So the absence of finality due to a retrial having been ordered ceased to be a bar to an award of costs. And it became instead a discretionary factor to be taken into account when deciding whether to withhold costs from an appellant even though his conviction had been quashed. Similarly the repeal of the reg.9(11) and (12) bar does not mean that persons facing disciplinary charges can simply insist on being permitted to be legally represented. What it means is that the disciplinary tribunal has a discretion to permit such a person to be legally represented, and should do so if refusing such permission would be unfair.

27. There are some disciplinary tribunals before which legal representation is quite common. Legal practitioners understand, as they should,

that their duty is not only to their clients but also to those tribunals. Such are the traditions and responsibilities of professional advocates. Their role is a constitutional one, always to be approached as such and never to be abused. Most of them certainly need no reminder of that. But just in case some of them might sometimes need such a reminder, I have seen fit respectfully to issue one, meaning of course no offence thereby.

Assessment primarily for the tribunal to make

28. It is always to be remembered that whether fairness requires that legal representation be permitted at a disciplinary hearing is primarily for the disciplinary tribunal to assess, and that no court would disturb such an assessment except for plainly compelling reasons. It may transpire that defaulter proceedings in which fairness requires that the defaulter be permitted to be legally represented will not be numerous. Anyway it depends on the circumstances of each case.

Impairment of operational efficiency is an element of the offence

29. Being of the view that the appellant's attack against the reg.9(11) and (12) bar – and therefore the first part of his argument – succeeds, I turn to the second part of his argument. It is that the impairment of operational efficiency is an element of the offence under PGO 6-01(8). Since PGO 6-01(8) is a penal provision, any ambiguity in it would have to be resolved in favour of a person charged under it. As it happens however, the appellant does not even need to rely on that canon of construction. PGO 6-01(8) says in plain terms that what will result in disciplinary action is "[s]erious pecuniary embarrassment stemming from financial imprudence which leads to the impairment of an officer's operational efficiency". If the embarrassment does not lead to such impairment, then it is plainly not what PGO 6-01(8) says will

result in disciplinary action. In my view, the impairment of operational efficiency is an element of the disciplinary offence under PGO 6-01(8). It should, in fairness to the Court of Appeal in the present case, be mentioned that they were confronted by previous decisions of theirs, including *Leung Fuk Wah v. Commissioner of Police* [2002] 3 HKLRD 653, to the effect that, as Tang VP put it in the present case, "serious pecuniary embarrassment would *necessarily* lead to impairment of operational efficiency". (Emphasis supplied.)

30. Since the impairment of operational efficiency is an element of the offence, the burden of proving it is on those who bring a charge. As to the standard of proof, nothing need be added to what we said in the *Solicitor (24/07)* case. In so far as Stone J held in *Ng Kam Chuen v. Secretary for Justice* [1999] 2 HKC 291 that the impairment of operational efficiency is an element of the disciplinary offence under PGO 6-01(8), he was right. But I am unable to accept his view (expressed at p.297A-D) that "upon the demonstration of serious pecuniary embarrassment … the evidential burden then shifts to the accused officer to establish that his efficiency as an officer has *not* been impaired" or, alternatively, that there is a "rebuttable presumption" of such impairment. (Emphasis in the original.) In my view, that is not so. The position is straightforward. Drawing inferences is legitimate. But the position is not complicated by any presumption or the shifting of any onus, evidential or otherwise.

Legal representation should have been permitted

31. Having held in favour of the second part of the appellant's argument, I turn to the third part of his argument. It is that he should have been permitted to be legally represented at the disciplinary hearing. Since they regarded the reg.9(11) and (12) bar as valid, neither the disciplinary tribunal nor either of the courts below made an assessment of whether, in the

circumstances of the present case, fairness required that the appellant be permitted to be legally represented at the disciplinary tribunal. Such an assessment has to be made here and now.

32. In granting the appellant leave to appeal to us, the Court of Appeal expressly and rightly declined to treat the appellant's points of law as academic. I am of the view that in all the circumstances fairness required that the appellant be permitted to be legally represented at the disciplinary hearing. Accordingly, I am of the view that the third part of the appellant's argument succeeds.

Might have been acquitted if legally represented

33. What remains is the fourth and final part of the appellant's argument. It is that if he had been legally represented, he might have been acquitted by reason of the evidence as a whole being insufficient to prove that his operational efficiency had been impaired within the meaning of PGO 6-01(8).

34. In this connection, too, it is pertinent to note that in granting the appellant leave to appeal to us, the Court of Appeal expressly and rightly declined to treat the appellant's points of law as academic. Suppose the appellant had been legally represented at the disciplinary hearing. Might he then have been acquitted by reason of the evidence as a whole being insufficient to prove that his operational efficiency had been impaired within the meaning of PGO 6-01(8)? The question of impairment of operational efficiency is of course pre-eminently to be resolved by an assessment to be made by the disciplinary tribunal. A court would normally be very slow to disturb such an assessment since the subject-matter is by definition an operational matter. But in the present case there is a real possibility that the

state of the evidence would have been crucially different if the appellant's defence at the disciplinary hearing had been in the hands of a legal practitioner. In other words, the difference might well have been the difference between an acquittal and a conviction. Accordingly I am of the view that the fourth and final part of the appellant's argument – and therefore the whole of his argument – succeeds.

Equality

35. As Prof. Chan has observed, there is nothing in reg.9 or elsewhere to prevent the case against a defaulter being presented by a Government lawyer or indeed a lawyer in private practice. So the bar to legal representation operates only against defaulters. And that, Prof. Chan said, means that the reg.9(11) and (12) bar is also inconsistent with the equality clause of art.10 of the Bill of Rights even though the invariable practice appears to be for the case against a defaulter to be presented by a police officer. This point as to an inequality of arms does not appear to have been canvassed below. And there is no need to pronounce on it since the challenge to the validity of the reg.9(11) and (12) bar succeeds without it.

Result

36. For the foregoing reasons, I would allow the appeal and quash the decisions by which the appellant was convicted and compulsorily retired. It is accepted on the appellant's behalf that the quashing of those decisions does not preclude a fresh – and fair – hearing before the disciplinary tribunal. Whether that or some other course offers the best way forward hereafter is not a question before the Court. I would make no order as to costs as between the parties but order that the appellant's costs be taxed under the Legal Aid Regulations.

Finally, I wish to express my thanks to both legal teams for the very helpful arguments which they have prepared and presented.

Mr Justice Chan PJ:

37. I agree with the judgment of Mr Justice Ribeiro PJ.

Mr Justice Ribeiro PJ:

38. In this appeal, the applicability and operation of Article 10 of the Bill of Rights ("Article 10") fall to be considered in connection with police disciplinary proceedings. The appellant, a police constable, complains that the exclusion of professional legal representation by the relevant regulations deprived him of a fair hearing. He therefore challenges the constitutional validity of that exclusion and the lawfulness of the disciplinary proceedings.

A. The disciplinary proceedings

A.1 The conduct of the appellant

39. The appellant joined the Force in 1988 and had a commendable record of service, consistently rated as "very good". However, in the six-month period between November 1999 and May 2000, he engaged in speculation on the stock market and incurred significant losses. He had a monthly salary of $22,210 but was placing buy and sell orders in five-figure (and occasionally in low six-figure) amounts. Such trading was initially financed from his own savings, but he went on to incur debts by drawing on seven credit cards and taking personal loans from five finance companies. He bought shares for the total sum of $1,827,508.49 and sold them for $1,340,375.69 and so lost $487,127.80 on his trades. When he realised that his indebtedness had become unmanageable, he made a full report of his situation to his superior officers,

disclosing an indebtedness of $621,404. On 26 September 2000, he was declared bankrupt upon his own petition.

A.2 The policy of the Police Force

40. The appellant is, unfortunately, not the only police officer to find himself in such a predicament. Policies and procedures have been established for dealing with "officers with unmanageable debts", abbreviated in police terminology to "OUDs". It is recognized that an OUD may be compromised or susceptible to corrupt overtures. And in a number of cases, the stresses of such debts have tragically driven officers to suicide. These considerations have resulted in detailed administrative instructions being issued from time to time[1] aimed at preventing officers from incurring unmanageable debts, at identifying and managing those who have done so and at dealing with the disciplinary aspects of such conduct. They provide guidance as to the appropriate deployment of OUDs so as to avoid, for instance, postings where public money may be handled or where greater opportunities may exist for corruption. Consideration also has to be given as to whether an OUD should be allowed to carry firearms.

41. The administrative instructions state that officers have the responsibility not to incur expenses they are unable to afford, including expenses in relation to "speculation in the stock, financial and property market". While a sympathetic view is taken of officers who become indebted due to unforeseen or compassionate circumstances, there is "no sympathy for

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[1] The Administrative Instructions on the Management of Indebtedness distributed under cover of the Commissioner's Memo dated 17 April 2000 were those in force at the relevant time.

officers who ... have had unmanageable debts due to financial imprudence, resulting in the impairment of the officers' operational efficiency".

A.3 The disciplinary provisions

42. The Police Force is of course a disciplined force. By section 30 of the Police Force Ordinance,[2] every police officer is required to obey all lawful orders of his superior officers and to obey and conform to police regulations and orders made under the Ordinance.

43. By section 45, powers are given to the Chief Executive in Council to make regulations including those providing for discipline and punishments, for appropriate tribunals to inquire into disciplinary offences and for the procedure to be followed.

44. Section 46 empowers the Commissioner of Police to make such orders (known as "police general orders" or "PGOs") as he thinks expedient to enable him to administer the police force and render it more efficient.

45. The Police (Discipline) Regulations made under section 45 create disciplinary offences including the offence under regulation 3(2)(e) of "contravention of police regulations, or any police orders, whether written or verbal". The Regulations lay down detailed rules as to the procedure to be followed at disciplinary hearings and, most importantly for present purposes, by regulations 9(11) and 9(12), they provide that:

> "(11) A defaulter[3] may be represented by-
>
> (a) an inspector or other junior police officer of his choice; or

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2 Cap 232.

3 Defined by regulation 2 as "a police officer charged with a disciplinary offence".

(b) any other police officer of his choice who is qualified as a barrister or solicitor,

who may conduct the defence on his behalf.

(12) Subject to paragraph (11), no barrister or solicitor may appear on behalf of the defaulter."

Mr Anderson Chow SC, appearing with Mr Louie Wong SGC for the Commissioner, realistically accepts that these regulations represent a total ban on professional legal representation. An officer who has acquired legal qualifications may have many fine qualities but the services which he can provide cannot in general be equated with professional legal representation. Moreover, legally qualified officers are in any event in very short supply. At present, only one such officer has publicly indicated a readiness to act in the role of representative.

46. The police general order issued in respect of unmanageable debts is PGO 6-01(8) which, in the version applicable at the material time, provided:

> "A police officer shall be prudent in his financial affairs. Serious pecuniary embarrassment stemming from financial imprudence which leads to the impairment of an officer's operational efficiency will result in disciplinary action."

A.4 The disciplinary proceedings

47. The charge against the appellant was that, contrary to regulation 3(2)(e):

> "... on 26 September 2000, in Hong Kong, you did fail to be prudent with your financial affairs by incurring unmanageable debts of about HK$620,000 that resulted in serious pecuniary embarrassment as evidenced by the making of a bankruptcy order against you whereby your operational efficiency as a police officer was impaired contrary to PGO 6-01(8)."

48. In fact, two sets of disciplinary proceedings were held. The first took place in January 2001 before Superintendent Cheng Po-yan sitting as the Adjudicating Officer. The prosecutor was Inspector Yeung Chun-po who

called witnesses including three of the appellant's superior officers, namely, Sergeant Yeung Kai-kwong, Inspector Li Hon-man and Chief Inspector Wong Koon-ho. Pursuant to regulation 9(11), the appellant was represented by Senior Inspector Wong Wai-hung. The appellant was found guilty and on 13 March 2001, he was sentenced to be dismissed. That was the most severe punishment available[4] and would have involved not only termination of the appellant's employment but also the loss of his pension rights.

49. However, on 19 August 2001, the appellant was told that it had been decided to set aside his conviction and to have a re-hearing. He was later told that this was because the Force Discipline Officer considered there to have been procedural irregularities or potential unfairness at the hearing, but that prima facie evidence to support the charge nevertheless existed.

50. The second set of proceedings started in December 2001 and, with various adjournments, ran into March 2002. The Adjudicating Officer this time was Superintendent Lo Tat-fai. The prosecutor and police witnesses called were the same. However, the Senior Inspector who had represented the appellant was not available and the appellant had difficulty finding someone to represent him. He eventually secured the assistance of Senior Inspector Wong Kwok-ming but, lacking confidence in him, asked him to withdraw at an early stage. On 22 January 2002, he asked the tribunal whether he could employ a solicitor (or an auxiliary officer or a civil servant from another department) to represent him and was told that he could only have a solicitor who was a serving regular officer and that otherwise, the answer was "no". He therefore represented himself at the hearings.

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4 Under regulation 13.

51. On 27 March 2002, the tribunal found the appellant guilty and referred the case to a senior police officer[5] for sentence. He was initially given a sentence of compulsory retirement with deferred benefits, suspended for 12 months.[6] However, this was considered inadequate by the Force Discipline Officer who, on 26 July 2002, increased it to an immediate sentence of compulsory retirement with deferred benefits. This meant that the appellant's employment as a police officer was terminated and, while his accrued pension rights were not lost, his pension could not be drawn until he reaches what would have been the normal age of retirement. The sentence was ratified by the Commissioner on 21 October 2002.

B. The appellant's complaint and the decisions below

52. On 21 January 2003, the appellant lodged what was described at first instance as a "homemade" notice of application for judicial review. After legal aid was obtained and various extensions of time granted, a formal application prepared by counsel was lodged on 5 October 2004. This sought orders of certiorari quashing the convictions and sentences and a declaration that regulations 9(11) and 9(12), to the extent that they restricted the appellant's choice of representative at the hearing, are unconstitutional and void.

53. The matter came before Chung J who dismissed the application for judicial review.[7] His decision deals with grounds that are no longer relied on and does not address any of the issues that have become material in the present appeal.

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5 Defined by regulation 2 to mean "a chief superintendent, assistant commissioner or senior assistant commissioner".

6 Suspended sentences are dealt with by regulation 28.

7 HCAL 7/2003 (23 August 2005).

54. In the Court of Appeal,[8] Ms Margaret Ng, then appearing as counsel for the appellant (now assisting Mr Johannes Chan SC on the present appeal), advanced the argument which is at the core of this appeal, namely, that in depriving the tribunal of any discretion to permit legal representation, regulations 9(11) and 9(12) prevented the appellant from having a fair hearing in contravention of Article 10. This was rejected by Tang VP (giving the Court's judgment) on the ground that the Court was bound by the unreported Court of Appeal decision in *陳庚秋 訴 香港警務處處長* (*Chan Keng-chau v Commissioner of Police)*.[9] In that case, Yeung JA considered the protection afforded to an officer on disciplinary charges sufficient on the basis that judicial review was available and that officers in a disciplined force are better equipped and more suitable than judges for determining whether one of their number has breached discipline. He therefore held that Article 10 "does not apply to a police officer facing [a] disciplinary hearing..."[10]

55. Tang VP also rejected the argument that regulations 9(11) and 9(12) are *ultra vires* section 45 of the Ordinance, noting that at the time when the regulations were made, the exclusion of legal representation in disciplinary hearings, especially within a disciplined force, was considered justifiable and would have fallen within relevant rule-making powers, as indicated in *Maynard v Osmond*.[11]

56. The Court of Appeal went on to hold that, in any event, judicial review should be refused since on the construction of PGO 6-01(8) adopted in

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8 [2008] 2 HKLRD 27 (Tang VP, Yeung JA and Yam J).

9 HCMP 2824/2004, Yeung JA and Tang J (29 December 2004).

10 §§48-51.

11 [1977] 1 QB 240.

earlier Court of Appeal decisions[12] and on the admitted facts, the appellant's conviction in the present case was inevitable.

57. However, the Court of Appeal granted leave to appeal to this Court.[13] Three questions of great general or public importance were identified, namely:

> "(1) whether Article 10 is engaged in police disciplinary proceedings;
>
> (2) whether regulations 9(11) and 9(12) are consistent with Article 10; and,
>
> (3) whether it is necessary or permissible to adduce evidence to prove or disprove an 'impairment of operational efficiency' as a police officer (in addition to 'serious pecuniary financial embarrassment stemming from financial imprudence') in establishing a disciplinary offence under PGO 6-01(8)."

C. Article 10 and related treaty provisions

58. Article 10 provides:

> "All persons shall be equal before the courts and tribunals. 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 press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

59. Article 10 is in terms identical to Article 14.1 of the International Covenant on Civil and Political Rights ("ICCPR"),[14] which I will refer to

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12 陳庚秋 訴 香港警務處處長 (*Chan Keng-chau v Commissioner of Police*) HCMP 2824/2004, Yeung JA and Tang J (29 December 2004); and *Leung Fuk Wah v Commissioner of Police* [2002] 3 HKLRD 653.

13 CACV 340/2005 Tang VP, Yeung JA and Yam J (13 May 2008).

14 Adopted and opened for signature, ratification and accession by United Nations General Assembly Resolution 2200 A (XXI) of 16 December 1966.

simply as "Article 14.1". It follows that the General Comments and published Communications of the Human Rights Committee ("HRC") concerning Article 14.1 give guidance to an understanding of Article 10.

60. Article 39 of the Basic Law gives constitutional force to Article 10, stipulating that the ICCPR's provisions "as applied to Hong Kong" shall remain in force and "shall be implemented through the laws of the HKSAR", and that:

> "The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."

61. Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"),[15] which I shall refer to as "Article 6(1)", is in very similar terms:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

62. In my view, the jurisprudence of the European Court of Human Rights at Strasbourg ("the European court" or "the Strasbourg court") in relation to Article 6(1) is of immediate relevance to an understanding of Article 14.1 and Article 10, notwithstanding certain differences in wording.

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[15] Opened for signature by member states of the council of Europe at Rome on 4 November 1950.

63. Differences appear in the English texts of the two treaties particularly in relation to the conditions which trigger engagement of the respective articles.

(a) In Article 6(1), the right to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" is activated if the person claiming its protection faces "a determination of his *civil rights and obligations*".

(b) And in Article 14.1 (and, it goes without saying, in the identical wording of Article 10), the entitlement "to a fair and public hearing by a competent, independent and impartial tribunal established by law" is triggered where the individual concerned faces a "determination of ... his *rights and obligations in a suit at law*".

64. However, the rendering of the words I have italicised is precisely the same in the French texts of both treaties. They both refer to "*droits et obligations de caractère civil*".[16] As the Joint Dissenting Opinion of the European court in *Feldbrugge v The Netherlands*[17] explains, the English text of Article 6(1) had originally also followed the wording of Article 14.1, referring to "rights and obligations in a suit at law". It was changed at the last moment to refer instead to "civil rights and obligations" merely to align the English text

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16 The French text of Article 14.1 relevantly provides: *"*Tous sont égaux devant les tribunaux et les cours de justice. Toute personne a droit à ce que sa cause soit entendue équitablement et publiquement par un tribunal compétent, indépendant et impartial, établi par la loi, qui décidera soit du bien-fondé de toute accusation en matière pénale dirigée contre elle, soit des contestations sur *ses droits et obligations de caractère civil."* And the French text of Article 6(1) relevantly states: *"*Toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et dans un délai raisonnable, par un tribunal indépendant et impartial, établi par la loi, qui décidera, soit des contestations sur ses *droits et obligations de caractère civil,* soit du bien-fondé de toute accusation en matière pénale dirigée contre elle."

17 (1986) 8 EHRR 425 at 444-445, §§20-22.

more closely with the language of the French text and not to effect any substantive change.

65. Moreover, in my view, even without having regard to the drafting history of the two articles, the ordinary meaning of the two phrases in the English text, understood in the context of each article, is the same. They both refer to determinations of civil rights and obligations distinguishing them from determinations of criminal charges which are also dealt with in juxtaposition by the two articles. In other words, the words "suit at law" referred to in the ICCPR are intended to convey the meaning of "a *civil* suit at law", as opposed to the determination of a criminal charge.

D. The legal principles

D.1 When is Article 10 engaged?

66. As noted above, the Article 10 protections come into play (leaving aside criminal charges) when a person is subject to "a determination of his rights and obligations in a suit at law". This formula has spawned considerable uncertainty.

D.1.a Article 10 and the rule of law

67. Article 10 gives effect to the rule of law. When it is engaged, it enables the individual faced with a determination by a governmental or public authority[18] which may affect his civil rights and obligations to say: "I am entitled to the protections of Article 10, including the right to a fair and public hearing by a competent, independent and impartial tribunal established by law".

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[18] This limitation deriving from section 7 of the Bill of Rights Ordinance (Cap 383).

As Lord Hoffmann, referring to Article 6(1), puts it in *Runa Begum v Tower Hamlets LBC*:[19]

> "One of the purposes of article 6, in requiring that disputes over civil rights should be decided by or subject to the control of a judicial body, is to uphold the rule of law and the separation of powers..."

And as the Strasbourg court stated in one of its earlier decisions:

> " ... in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts."[20]

D.1.b A historical gap

68. It is against this backdrop, recognizing the basic importance of Article 10 and its equivalents to the rule of law, that the difficulties encountered in establishing when the protections are engaged should be viewed.

69. Those difficulties stem from a gap in the protections contained in the text of the ICCPR (which, as we have seen, was duplicated in the ECHR). That gap, which has been traced in the international jurisprudence,[21] concerns the scope of the words "rights and obligations in a suit at law" and "civil rights and obligations". To a common lawyer, the existence of such a gap may not be obvious since one might assume that the phrase "civil rights and obligations" encompasses all rights and obligations outside the sphere of the criminal law. However, in many countries subscribing to the ICCPR and the ECHR, "civil rights and obligations" would not be understood to be so all-embracing. Distinctions may be drawn, for instance, between public and private law rights

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19 [2003] 2 AC 430 at 445,§27.

20 *Golder v United Kingdom* (1975) 1 EHRR 524, §34.

21 See the Joint Dissenting Opinion in *Feldbrugge v The Netherlands* (1986) 8 EHRR 425 at 444-445, §§19-22; and the Dissenting Opinion of Ms Ruth Wedgwood in *Wolfgang Lederbauer v Austria*, Communication No 1454/2006 (2008) Vol 15, No 1, IHRR, §§4.1-4.10.

and between the law administered in civil and administrative courts. As Lord Hoffmann explains:

> "... the term 'civil rights and obligations' was originally intended to mean those rights and obligations which, in continental European systems of law, were adjudicated upon by the civil courts. These were, essentially, rights and obligations in private law. The term was not intended to cover administrative decisions which were conventionally subject to review (if at all) by administrative courts. It was not that the draftsmen of the Convention did not think it desirable that administrative decisions should be subject to the rule of law. But administrative decision-making raised special problems which meant that it could not be lumped in with the adjudication of private law rights and made subject to the same judicial requirements of independence, publicity and so forth. So the judicial control of administrative action was left for future consideration."[22]

70. The need for certain administrative processes which affect the rights and obligations of individuals to be dealt with on a separate and different footing was spelt out, for instance, in the Joint Dissenting Opinion in *Feldbrugge v The Netherlands* as follows:[23]

> "The judicialisation of dispute procedures, as guaranteed by Article 6(1), is eminently appropriate in the realm of relations between individuals but not necessarily so in the administrative sphere, where organisational, social and economic considerations may legitimately warrant dispute procedures of a less judicial and formal kind. The present case is concerned with the operation of a collective statutory scheme for the allocation of public welfare. As examples of the special characteristics of such schemes, material to the issue of procedural safeguards, one might cite the large numbers of decisions to be taken, the medical aspects, the lack of resources or expertise of the persons affected, the need to balance the public interest for efficient administration against the private interest. Judicialisation of procedures for allocation of public welfare benefits would in many cases necessitate recourse by claimants to lawyers and medical experts and hence lead to an increase in expense and the length of the proceedings."

71. While common law systems may not distinguish between administrative and "judicialised" processes affecting civil rights and obligations in terms of the structure of their courts or the legal classifications used, the

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22 *Runa Begum v Tower Hamlets LBC* [2003] 2 AC 430 at 445, §28.

23 (1986) 8 EHRR 425 at 443, §15.

distinction between the processes is nevertheless real and the need to avoid the "over-lawyering" or "over-judicialisation" of procedures in certain administrative and disciplinary tribunals is recognised.[24]

72. As the *travaux préparatoires* of the ICCPR[25] show, it was acknowledged by the delegations concerned that the proper approach to determinations of rights and obligations by administrative bodies "had not been fully thrashed out and should be examined more thoroughly". Such "thrashing out" has, however, not occurred – hence, the gap.

D.1.c Filling the gap

73. The existence of such a gap presented a risk that the protections intended to be conferred by Article 10 and its equivalents might be wholly undermined. As the European court stated (in a slightly different context) in *Golder v United Kingdom*:[26]

> "Were Article 6 para 1 (art 6-1) to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government. Such assumptions, indissociable from a danger of arbitrary power, would have serious consequences which are repugnant to the aforementioned principles and which the Court cannot overlook ..."

74. It is accordingly not surprising that the unmistakeable trend of the international jurisprudence has been to close the gap and to extend the protection of the equivalents of Article 10 in a variety of ways. Whereas the drafting history of Article 14.1 and Article 6(1) indicates that the "right to a

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24 Eg, *The Stock Exchange of Hong Kong Ltd and New World Development Co Ltd* (2006) 9 HKCFAR 234 at 271, §109.

25 Relating to the fifth session of the United Nations Commission on Human Rights held on 1 June 1949.

26 (1975) 1 EHRR 524 at §35.

court" provided by those articles was originally not intended to apply to decisions by administrative tribunals or to the legal relations between, for instance, civil servants and the State which employs them, that restrictive approach, as Lord Walker of Gestingthorpe pointed out,[27] "is now of no more than historical interest".

75. A significant early step taken by the European court and the HRC towards enlarging the scope of Article 10 protections involved establishing that the concepts which trigger the protections had an "autonomous" meaning under the conventions and could not be evaded by use of domestic law definitions.[28] As Lord Millett points out:

> "According to the consistent case law of the Strasbourg court the concept of 'civil rights and obligations' is autonomous. Its scope cannot be determined solely by reference to the domestic law of the respondent state... Any other conclusion could lead to results incompatible with the object and purpose of the Convention, since it would be open to contracting states, by reclassifying the rights granted by their own domestic legal systems, to exclude particular categories of civil actions from the operation of article 6(1)."[29]

76. In *Yvon Landry v Canada*,[30] the HRC extended Article 14.1's scope in two additional ways. First, it rejected the governmental or public status of one of the parties as a basis in itself for excluding the protections and secondly, (as was pointed out by Mr Anderson Chow SC) it held that the protections are applicable where a case which might otherwise have fallen

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27 *Runa Begum v Tower Hamlets LBC* [2003] 2 AC 430 at 464, §109, citing Lord Hoffmann in *R (Alconbury Developments Ltd) v Secretary of State for the Environment* [2003] 2 AC 295 at 327-330, §§78-88.

28 *Konig v Federal Republic of Germany* (1978) 2 EHRR 170, §88; *Feldbrugge v The Netherlands* (1986) 8 EHRR 425, §26.

29 *Runa Begum v Tower Hamlets LBC* [2003] 2 AC 430 at 459, §82, citing *König v Federal Republic of Germany* (1978) 2 EHRR 170 at 192-193, §88; and *Benthem v The Netherlands* (1985) 8 EHRR 1 at 9, §34.

30 (Communication No 112/81) (8 April 1986).

outside the article is in fact adjudicated upon by a tribunal having judicial characteristics. The well-known passage in the Communication runs as follows:

> "... the concept of a 'suit at law' or its equivalent in the other language texts is based on the nature of the right in question rather than on the status of one of the parties (governmental, parastatal or autonomous statutory entities), or else on the particular forum in which individual legal systems may provide that the right in question is to be adjudicated upon, especially in common law systems when there is no inherent difference between public law and private law, and where the Courts normally exercise control over the proceedings, either at first instance or on appeal specifically provided by statute or else by way of judicial review. In this regard, each communication must be examined in the light of its particular features."[31]

77. Another step taken towards plugging the gap has involved the Strasbourg court deciding that Article 6(1) is engaged where the determination involves elements of both public and private law, but where the latter are found to be predominant. Thus, in *H v Belgium*,[32] a case concerning the application of a disbarred *avocat* to be readmitted to the roll of *avocats*, the Court found that aspects of the profession of *avocat* and thus of the determination undoubtedly had public law features, but that they were outweighed by other features of a private law character.

78. A major extension was made in *Ringeisen v Austria (No 1)*[33] which was concerned with the regulation of land transfers by a District Land Transactions Commission with an appeal to a Regional Commission. It therefore involved, as Lord Hoffmann notes in *R (Alconbury Developments*

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31 At §9.2. See also the Dissenting Opinion of Ms Ruth Wedgwood in *Wolfgang Lederbauer v Austria*, Communication No 1454/2006 (2008) Vol 15, No 1, IHRR, §§5.5 and 5.6; and *Perterer v Austria*, Communication No 1015/2001 (2005) Vol 12, No IHRR 80, §9.2.

32 (1987) 10 EHRR 339 at 347-349, §§45-48.

33 (1971) 1 EHRR 455.

Ltd) v Secretary of State for the Environment,[34] "a classic regulatory power exercisable by an administrative body". The European court nevertheless held that Article 6(1) was engaged and that it could intervene on the ground that the administrative decision was "decisive" for the enforceability of the private law contract for the sale of land. "Thus," as Lord Hoffmann points out, "a decision on a question of public law by an administrative body could attract article 6(1) by virtue of its effect on private law rights."[35] This has had a major impact since many decisions by administrative bodies and disciplinary tribunals[36] have a direct impact on the civil rights and obligations of the individual concerned, attracting the protection of Article 10.

79. This extended approach has been held to apply to planning cases.[37] It has also been adopted in relation to claims for non-contributory welfare benefits, as in *Salesi v Italy*[38] and *Mennitto v Italy.*[39] As Lord Millett explains in relation to those two cases:

> "The decisions had the effect of extending article 6(1) to disputes in connection with non-contributory welfare schemes. In each case the critical feature which brought it within article 6(1) was that the claimant 'suffered an interference with her means of subsistence and was claiming an individual, economic right flowing from specific rules laid down in a statute giving effect to the Constitution' (26 EHRR 187, 199, § 19)."[40]

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34 [2003] 2 AC 295 at 328, §80.

35 At §80.

36 As in *Konig v Federal Republic of Germany* (1978) 2 EHRR 170.

37 Eg, *Bryan v United Kingdom*(1995) 21 EHRR 342.

38 (1993) 26 EHRR 187.

39 (2000) 34 EHRR 1122.

40 *Runa Begum v Tower Hamlets LBC* [2003] 2 AC 430 at 460-461, §90.

D.1.d The Eskelinen decision

80. In its recent decision in *Vilho Eskelinen v Finland*,[41] the Grand Chamber of the Strasbourg court took a major step towards extending the protection of Article 6(1) to civil servants generally, adopting an approach which may indicate the course which later developments in the jurisprudence might take.

81. As previously noted, the relationship between civil servants and the State as employer had originally not been intended to come within the relevant articles. However, the process of gradual extension of the protections has also occurred in this context. *Lombardo v Italy*,[42] was a case involving the claim for an enhanced pension by a *Carabinieri* officer who had been invalided out of service. The Italian government contended that Article 6(1) was not engaged, arguing that as a civil servant, the claimant's relationship with the State had been of a public law nature, his appointment having been a unilateral act by the State pursuant to special legislation. The Court nonetheless held that Article 6(1) applied, treating the pension claim as a pecuniary or economic claim falling outside the civil service relationship.[43]

82. In *Pellegrin v France*,[44] the European court proceeded to reduce substantially the number of civil servants excluded from protection by propounding a new "functional criterion". It noted that certain civil servants "wield a portion of the State's sovereign power" and reasoned that in relation to that category of persons, the State may have a legitimate interest "in requiring of these servants a special bond of trust and loyalty" thereby justifying the State

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41 (2007) 45 EHRR 43.

42 (1992) 21 EHRR 188.

43 At §17.

44 (2001) 31 EHRR 26.

in removing their relationship with such employees from the scrutiny of an Article 6(1) tribunal. It stated:

> "The Court therefore rules that the only disputes excluded from the scope of Article 6(1) of the Convention are those which are raised by public servants whose duties typify the specific activities of the public service in so far as the latter is acting as the depositary of public authority responsible for protecting the general interests of the State or other public authorities. A manifest example of such activities is provided by the armed forces and the police."[45]

The Court made an exception, even within the excluded category, in respect of pension claims since "on retirement employees break the special bond between themselves and the authorities ..."[46]

83. While the motivation behind this new "functional criterion" was to expand the coverage of Article 6(1), it was plainly not a satisfactory or easily workable means for delineating when the article's protections are engaged. It is inherently discriminatory as between civil servants and based upon the somewhat mystical concept of "a special bond of trust and loyalty" with the State.

84. The unsatisfactory features of *Pellegrin* were prominently exposed in the *Eskelinen* case[47] which involved claims by five police officers and a civilian office assistant working as a public servant for wage supplements as compensation for being posted in a remote part of the country. As the Grand Chamber noted:

> "On a strict application of the *Pellegrin* approach it would appear that the office assistant applicant in the present case would enjoy the guarantees of Art 6(1), whereas

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45 At §66.

46 At §67.

47 (2007) 45 EHRR 43.

there is no doubt that the police officer applicants would not. This would be so irrespective of the fact that the dispute was identical for all the applicants."[48]

85. It observed that:

"Arts 1 and 14 of the Convention stipulate that 'everyone within [the] jurisdiction' of the contracting states must enjoy the rights and freedoms in Section I 'without discrimination on any ground'."

And it expressed the opinion that :

"As a general rule, the guarantees in the Convention extend to civil servants";[49] and that "... there should therefore be convincing reasons for excluding any category of applicant from the protection of Art 6(1)."[50]

86. Accordingly, the *Pellegrin* functional criterion was replaced by a two-fold test:

"...in order for the respondent State to be able to rely before the Court on the applicant's status as a civil servant in excluding the protection embodied in Art 6, two conditions must be fulfilled. First, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest."[51]

Putting it another way:

"There will, in effect, be a presumption that Art 6 applies. It will be for the respondent Government to demonstrate, first, that a civil servant applicant does not have a right of access to a court under national law and, secondly, that the exclusion of the rights under Art 6 for the civil servant is justified."[52]

87. In giving an indication of when objective grounds justifying exclusion might exist, the Court did mention that it would be "for the State to show that the subject matter of the dispute in issue is related to the exercise of

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48 At §51.

49 At §58.

50 At §59.

51 At §62.

52 *Ibid.*

state power or that it has called into question the special bond",[53] a statement relied on by the respondent in the present case. However, as stated above, I find it difficult to give practical meaning to this abstract notion of a "special bond".

88. Of more concrete value is the Court's statement[54] which followed upon its observation that "there should therefore be convincing reasons for excluding any category of applicant from the protection of Art 6(1)". The Court said:

> "In the present case, where the applicants, police officers and administrative assistant alike, had, according to the national legislation, the right to have their claims for allowances examined by a tribunal, no *ground related to the effective functioning of the State or any other public necessity* has been advanced *which might require the removal of Convention protection* against unfair or lengthy proceedings."[55] (italics supplied)

89. The *Eskelinen* case therefore, in my view, lays down the principled approach of (i) placing the onus on the State to specify, in legislation, the particular class of civil servants who are to be excluded from the Convention's protection; and (ii) subjecting such legislation to scrutiny by the Court which asks whether objective grounds related to the effective functioning of the State or some other public necessity which justify removal of Convention protection have been established. As the Grand Chamber stated:

> "If a domestic system bars access to a court, the Court will verify that the dispute is indeed such as to justify the application of the exception to the guarantees of Art 6. If it does not, then there is no issue and Art 6(1)will apply."[56]

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53 At §62.

54 At §59.

55 *Ibid*.

56 At §61.

90. This is clearly an area of developing jurisprudence and the *Eskelinen* decision, although followed in subsequent cases [57] and highly significant, is obviously not the last word on the subject. I pause to note that the HRC has evidently fallen behind the European court in developments in this area. In its General Comment No 32 dated 23 August 2007,[58] it continues to adopt a piecemeal and necessarily disjointed approach to the phrase "in a suit at law", listing various instances when the protections are engaged, including in that list cases involving "the termination of employment of civil servants for other than disciplinary reasons". [59] I would respectfully adopt in preference the *Eskelinen* approach as the more principled. It is obviously more satisfactory not to discriminate against some classes of civil servants in connection with their access to a judicial tribunal unless there is strong justification for doing so. To recognize, as General Comment No 32 does, an entitlement to protection where the employment is terminated for *other than* disciplinary reasons appears to me to acknowledge that entitlement where it is least needed and to refuse protection where (in disciplinary proceedings) it is most likely to be important.

D.1.e Purely disciplinary matters vs civil rights and obligations

91. Since Article 10's engagement depends on whether an individual's civil rights and obligations are to be determined (or whether he is facing a criminal charge) in a specific instance, Article 10 may be engaged only in relation to some, but not all, the matters dealt with by a particular administrative authority or administrative tribunal.

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57 See, eg, *Mitin v Ukraine* [2008] ECHR 38724.02; and *Cvetkovic v Serbia* [2008] ECHR 17271.04.

58 HRC, 90th Session, Geneva, 9 to 27 July 2007.

59 At §16.

92. In other words, a specific charge brought before a particular disciplinary tribunal may or may not attract Article 10 protections depending on whether it involves determination of a criminal charge or of the individual's civil rights and obligations. This is well-recognized in cases concerned with drawing the line between criminal charges and the enforcement of internal discipline[60] and similar considerations arise in relation to disciplinary measures affecting the individual's civil rights and obligations. However, it has been emphasised that it is for the court to decide on which side of the line any particular case falls, whatever the domestic classification of the offence may be. As the Strasbourg court stated in *Campbell and Fell v United Kingdom*:[61]

> "... If the contracting states were able at their discretion, by classifying an offence as disciplinary instead of criminal, to exclude the operation of the fundamental clauses of Arts 6 and 7, the application of these provisions would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the object and purpose of the Convention."

E. Is Article 10 engaged in the present case?

93. In my view, Article 10 is clearly engaged in relation to the disciplinary proceedings in present case. The Administrative Instructions referred to above[62] make it clear that punishment for the disciplinary offence under PGO 6-01(8) with which the appellant was charged is "normally terminatory". Such was in fact the nature of the punishment meted out in this case. Although the relevant jurisprudence is still in the course of development, it has developed sufficiently to enable us to say that the appellant undoubtedly

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60 *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647; *Campbell and Fell v United Kingdom* (1985) 7 EHRR 165; *Ezeh and Connors v United Kingdom* (2004) 39 EHRR 1.

61 (1985) 7 EHRR 165 at §§68-69.

62 At section A.2 of this judgment.

faced a determination of his rights and obligations in a suit at law, meaning his civil rights and obligations.

94. This conclusion can be reached by adopting the approach developed in *Ringeisen v Austria (No 1)*[63] since the disciplinary proceedings have a direct and highly adverse impact on the appellant's civil rights and obligations. As Baroness Hale of Richmond, held in *R (Wright) v Secretary of State for Health*,[64] by analogy with cases in which civil rights and obligations have been held by the Strasbourg court[65] to include the right to practise one's profession: "The right to remain in the employment one currently holds must be a civil right ..." Moreover, where pension rights of civil servants have been affected, the relevant protections have readily been held applicable, as in *Lombardo v Italy*[66] and *Pellegrin v France*.[67]

95. The same conclusion is reached adopting the approach in *Vilho Eskelinen v Finland*,[68] whereby one asks whether the protection of Article 10 has expressly been excluded in respect of police officers such as the appellant facing disciplinary proceedings; and if so, whether the exclusion is justified on objective grounds related to the effective functioning of the State or some other public necessity which justifies removal of the article's protection.

96. In the present case, there has been an express prohibition by subordinate legislation of any legal representation which undoubtedly bears on

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63 (1971) 1 EHRR 455.

64 [2009] 2 WLR 267 at §19.

65 *Le Compte, Van Leuven and de Meyere v Belgium* (1981) 4 EHRR 1; *Bakker v Austria* (2004) 39 EHRR 548.

66 (1992) 21 EHRR 188.

67 (2001) 31 EHRR 26.

68 (2007) 45 EHRR 43.

the right to a fair hearing protected by Article 10 (as further discussed below). To that extent, I am prepared to accept that the first *Eskelinen* condition is complied with. However, the second condition has not been met: the Commissioner has not provided sufficient justification for excluding Article 10 protections in the disciplinary proceedings.

97. The justification offered, as expressed in the Respondent's printed case, is that Article 10's requirements:

> "... would not be compatible with the character of police disciplinary proceedings, which are essentially domestic or internal hearings of a disciplined service where all participants have knowledge and experience of the procedures and demands of the police force, and where proceedings ought to be dealt with expeditiously and with a minimum of formality."

98. That submission echoes views which were current in the English Court of Appeal in the 1970's. Thus, in *Fraser v Mudge*,[69] a case dealing with prison discipline, Lord Denning MR stated:

> "We all know that, when a man is brought up before his commanding officer for a breach of discipline, whether in the armed forces or in ships at sea, it never has been the practice to allow legal representation. It is of the first importance that the cases should be decided quickly. If legal representation were allowed, it would mean considerable delay. So also with breaches of prison discipline. They must be heard and decided speedily. Those who hear the cases must, of course, act fairly. They must let the man know the charge and give him a proper opportunity of presenting his case. But that can be done and is done without the matter being held up for legal representation. I do not think we ought to alter the existing practice."

99. About a year later, in *Maynard v Osmond*,[70] a police discipline case, Lord Denning MR expressed the view that a person on disciplinary charges ought in general to be entitled to legal representation or at least be permitted such representation at the discretion of the tribunal. But his Lordship nevertheless accepted that it was legitimate for Parliament or a minister to

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69 [1975] 1 WLR 1132 at 1133.

70 [1977] 1 QB 240.

decree otherwise, particularly where a disciplined force was concerned.[71] Rejecting the argument that regulations forbidding legal representation were ultra vires, his Lordship stated:

> "In a disciplined force it is important that those responsible for maintaining discipline should have the conduct of disciplinary proceedings. So long as they are conducted fairly and in accordance with natural justice, the trial of disciplinary offences can safely be left to them."[72]

Orr LJ agreed and Waller LJ considered it appropriate to have "a commanding officer dealing with the discipline of his force, facing his men without the intervention of lawyers" as "an extension of everyday discipline."

100. The law has moved on since then. While (as noted above) the need to avoid the "over-lawyering" or "over-judicialisation" of procedures in certain disciplinary tribunals, including those of disciplined services, is fully acknowledged, it has to be recognized that the special needs of such tribunals must be pursued with proper regard for the constitutional safeguards conferred by Article 10.

101. Thus, speaking of prison discipline, the Strasbourg court in *Campbell and Fell v United Kingdom*[73] stated:

> "[The Court] is well aware that in the prison context there are practical reasons and reasons of policy for establishing a special disciplinary regime, for example security considerations and the interests of public order, the need to deal with misconduct by inmates as expeditiously as possible, the availability of tailor-made sanctions which may not be at the disposal of the ordinary courts and the desire of the prison authorities to retain ultimate responsibility for discipline within their establishments.
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> However, the guarantee of a fair hearing, which is the aim of Art 6, is one of the fundamental principles of any democratic society, within the meaning of the Convention ... As the *Golder* judgment shows, justice cannot stop at the prison gate

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71 At 253-254.

72 At 254.

73 (1985) 7 EHRR 165 at §69.

> and there is, in appropriate cases, no warrant for depriving inmates of the safeguards of Art 6."

102. And this Court, noting the special requirements of a disciplinary committee of the Hong Kong Stock Exchange, stated:

> "SEHK's policy, reflected in the Listing Rules and the Disciplinary Procedures, of limiting (at least in the first instance) the role of lawyers at the hearing is based upon the belief that limited representation suffices in most cases; that an informal, expert, lay tribunal, steeped in the ways of the stock exchange, is best placed to deal effectively and swiftly with disciplinary issues; that the public interest in maintaining confidence in the market requires swift investigation and treatment of suspected infringements; and that "over-lawyering" the procedures would undermine many of these objectives, substantially lengthening and complicating proceedings, and making it difficult to persuade qualified individuals to accept unremunerated appointment to a Disciplinary Committee. These are plainly legitimate concerns. But they can only be pursued with proper regard for the needs of procedural fairness and for proportionality in any procedural restrictions imposed."[74]

103. I do not accept that the requirements of the police disciplinary tribunals in Hong Kong justify a total ban on legal representation regardless of the requirements of fairness. There seems to me to be little doubt that the effective functioning of the Police Force as a disciplined service will not be impaired by allowing its disciplinary tribunals a discretion to permit an officer to be legally represented where fairness so dictates. No ground of public necessity has been suggested as a basis for excluding the constitutional protection.

104. It is noteworthy that other police forces permit such legal representation with no apparent difficulty. Thus, in the United Kingdom, under the Police (Conduct) Regulations 1999, where an officer possibly faced the sanctions of dismissal, a requirement to resign or reduction in rank at the hands of the disciplinary tribunal, he had to be given notice of this and allowed to

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74 *The Stock Exchange of Hong Kong Ltd v New World Development Co Ltd* (2006) 9 HKCFAR 234 at 271, §109.

elect to be legally represented at the hearing.[75] And if he did so elect he could be represented by counsel or a solicitor at the hearing.[76] Those arrangements came into force some 10 years ago and were renewed (with some elaboration) in the current Police (Conduct) Regulations 2004.[77] Such renewal suggests that the 1999 Regulations have not had any harmful effect on policing in the United Kingdom.

105. In British Columbia, the courts went further. A provision in the relevant disciplinary regulations excluded legal representation in cases where a police officer was accused of a disciplinary offence carrying a maximum penalty other than dismissal, resignation or reduction in rank. It was held that even this restriction, limited to cases carrying lesser punishments, was incompatible with the requirements of fairness and therefore ultra vires.[78] There is no indication that this has impeded the effective functioning of the British Columbia police force.

106. I therefore conclude that that no objective grounds have been established to justify excluding the disciplinary proceedings in the present case from the protection of Article 10. To the extent that the Court of Appeal held in *陳庚秋 訴 香港警務處處長* (*Chan Keng-chau v Commissioner of Police)*[79] that Article 10 is inapplicable to police disciplinary proceedings, I would overrule that decision.

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75 Regulation 17.

76 Regulation 21.

77 Regulations 18(1)(b), 23(3) and 24(3).

78 *Joplin v Chief Constable of the City of Vancouver* (1985) 20 DLR (4th) 314.

79 HCMP 2824/2004, Yeung JA and Tang J (29 December 2004).

F. Compliance with Article 10 in general

107. Before turning to consider whether Article 10 is contravened in the present case, it is worthwhile considering what that article requires by way of compliance.

108. Where Article 10 is engaged, the person concerned becomes entitled to "a fair and public hearing by a competent, independent and impartial tribunal established by law". This has sometimes been so interpreted as to give rise to an anxiety that giving effect to Article 10 would be to "over-judicialise" and therefore destroy or radically alter the entire administrative system by requiring decisions to be taken publicly by independent and impartial tribunals imported into the administrative structure for that purpose. Such a fear was voiced in the Respondent's printed case:

> "If police disciplinary tribunals are to be chaired or presided by 'independent' persons and conducted in accordance with the requirements of Article 14(1) of the ICCPR (or the equivalent Article 10 of HKBOR), they will lose their essential character of being domestic or internal hearings of a disciplined service and become much more formal and legalistic."

F.1 Compliance viewing the entire determination process

109. It is, however, clear that Article 10 does not operate with such an undesirable effect. It does not require every element of the protections conferred to be present at every stage of the determination of a person's rights and obligations, but only that such protections should be effective when the determination is viewed as an entire process, including as part of that process such appeals or judicial review as may be available.

110. Thus, in *Le Compte, Van Leuven* and *de Meyere v Belgium*,[80] the point was made as follows:

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[80] (1981) 4 EHRR 1 at §51(a).

> "Whilst Article 6(1) embodies the 'right to a court'... it nevertheless does not oblige the Contracting States to submit '*contestations*' (disputes) over 'civil rights and obligations' to a procedure conducted at each of its stages before 'tribunals' meeting the Article's various requirements. Demands of flexibility and efficiency, which are fully compatible with the protection of human rights, may justify the prior intervention of administrative or professional bodies and, *a fortiori*, of judicial bodies which do not satisfy the said requirements in every respect; the legal tradition of many member States of the Council of Europe may be invoked in support of such a system."

111. In *Albert and Le Compte v Belgium*,[81] the Strasbourg court held that Article 6(1) was engaged where a professional association exercised the power of determining the right of a member to practise medicine. It held that this was compatible with the ECHR provided that suitable judicial supervision was in place:

> "... the Convention calls at least for one of the two following systems: either the jurisdictional organs themselves comply with the requirements of Article 6(1), or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6(1)."[82]

112. The HRC has adopted a similar approach to Article 14.1. In *Yvon Landry v Canada*,[83] proceedings before a pension review board were challenged as inconsistent in various ways with Article 14.1. But since the Canadian legal system subjected such proceedings to judicial review and since the complainant had not sought to suggest that the remedies the court could provide "would not have availed in correcting whatever deficiencies may have marked the hearing of his case before the lower jurisdictions", the committee concluded:

> "... the Canadian legal system does contain provisions in the Federal Court Act to ensure to the author the right to a fair hearing in the situation. Consequently, his basic allegations do not reveal the possibility of any breach of the Covenant."

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81 (1983) 5 EHRR 533.

82 At §29.

83 Communication No 112/81 (8 April 1986).

113. As Lord Clyde pointed out in *R (Alconbury Developments Ltd) v Environment Secretary*:[84]

> "... the opening phrase in article 6(1), 'in the determination', refers not only to the particular process of the making of the decision but extends more widely to the whole process which leads up to the final resolution."

His Lordship cited *Zumtobel v Austria*,[85] where the Commission recalled that:

> "... article 6(1) of the Convention does not require that the procedure which determines civil rights and obligations is conducted at each of its stages before tribunals meeting the requirements of this provision. An administrative procedure may thus precede the determination of civil rights by the tribunal envisaged in article 6(1) of the Convention."

114. And as Lord Millett noted in *Runa Begum v Tower Hamlets LBC*:[86]

> "Where an administrative decision is determinative of the claimant's civil rights, including his or her right to social security benefits or welfare assistance, the Strasbourg court has accepted that it may properly be made by a tribunal which is not itself possessed of the necessary independence, provided that measures to safeguard the impartiality of the tribunal and the fairness of its procedures are in place and its decisions are subject to ultimate judicial control by a court with 'full jurisdiction'."

115. I pause to note that in Hong Kong, this approach has been adopted by the Appeal Committee in *Chow Shun Yung v Wei Pih*,[87] and by the Court of Appeal in *Tse Wai Chun Paul v Solicitors Disciplinary Tribunal*.[88]

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84 [2003] 2 AC 295 at 349, §152.

85 (1993) 17 EHRR 116, § 64.

86 [2003] 2 AC 430 at 463, §100.

87 (2003) 6 HKCFAR 299, §37.

88 [2002] 4 HKC 1, §10. The Court of Appeal assumed without deciding that the Solicitors Disciplinary Tribunal was a "public authority" for the purposes of section 7 of the Bill of Rights Ordinance (Cap 383). This issue does not arise on the present appeal and references to the Court of Appeal's decision in the present judgment are not intended to imply acceptance that the Tribunal should be so categorized.

F.2 A "court of full jurisdiction"

116. The position is therefore that Article 10 can be given effect without demanding radical changes to the administrative system provided that the process of determining a person's rights and obligations beginning with the administrative process is subject to control by "a court of full jurisdiction".

117. When then, can a court be said to have "full jurisdiction"? The answer, provided by Lord Hoffmann in *R (Alconbury Developments Ltd) v Environment Secretary*[89] is: When it has "full jurisdiction to deal with the case as the nature of the decision requires":

> "The reference to 'full jurisdiction' has been frequently cited in subsequent cases and sometimes relied upon in argument as if it were authority for saying that a policy decision affecting civil rights by an administrator who does not comply with article 6(1) has to be re-viewable on its merits by an independent and impartial tribunal. ... But subsequent European authority shows that 'full jurisdiction' does not mean full decision-making power. It means full jurisdiction to deal with the case as the nature of the decision requires."

118. A court of full jurisdiction may deal with the case in the manner required in at least two different ways. It may do so by supplying one or more of the protections mandated by Article 10 which were missing below, for instance, by assuming the role of the necessary independent tribunal or by giving the individual concerned the needed public hearing. Or it may do so by exercising its supervisory jurisdiction so as to correct or quash some non-compliant aspect of the determination by the authority or tribunal concerned, for instance, where there has been a want of impartiality or some unfairness in the original process. If in assuming such a role, the court is armed with full jurisdiction to deal with the case as the nature of the challenged decision requires, there is compliance with Article 10's requirements.

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89 [2003] 2 AC 295 at 330, §87.

119. Thus, in *Le Compte, Van Leuven and de Meyere v Belgium*,[90] the Strasbourg court having reiterated that the ECHR does not require the protections to be present at every stage, went on to consider whether the appeals tribunal and subsequently the Court of Cassation supplied the missing elements. It found that both these bodies did provide the necessary independence but that the needed publicity was still wanting.[91]

120. The House of Lords has pointed out that in many situations it is inevitable and in no way improper that the initial administrative determination of a person's civil rights and obligations should be taken by someone who is part of the administrative body concerned and so is plainly not independent. For instance, in the *Runa Begum* case,[92] a decision had to be taken, in the context of a local council's duty to house the homeless, as to whether the accommodation offered to the applicant was suitable and whether it was reasonable for her to accept it. If it was, the authority would be discharged from its duty if the offer was nevertheless refused. That decision was taken by a housing manager who was obviously not independent since, as Lord Millett noted, "She was an officer of the very council which was alleged to owe the duty."[93] However, the Article 6(1) requirement of independence was in the circumstances met by the availability of judicial review.

121. The principle may also be illustrated by reference to the requirement of publicity. As the Strasbourg court recently re-iterated in *Gulmez v Turkey*,[94] publicity is a highly important aspect of a fair trial:

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90 (1981) 4 EHRR 1.

91 At §§57 and 60-61.

92 [2003] 2 AC 430.

93 At §96.

94 [2008] ECHR 16330/02, §34.

> "The Court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in Article 6 § 1. This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention..."

But this does not mean that there must be publicity at the original hearing or at every stage. Where the matter proceeds to a public hearing before a court of full jurisdiction, the protection against secret trials is achieved.[95] This was the approach correctly adopted by the Court of Appeal in *Tse Wai Chun Paul v Solicitors Disciplinary Tribunal*,[96] holding that whereas the Tribunal's hearing had been held *in camera*, the requirement of publicity was fulfilled on the statutory appeal to the Court of Appeal.

122. It should however be stressed that the court giving the complainant the eventual public hearing must be a "court of full jurisdiction" with sufficient powers to "deal with the case as the nature of the decision requires". Where the public hearing comes before a court with limited jurisdiction so that important aspects of the decision cannot be publicly reviewed, the article's requirements may not be met. This is what the Strasbourg court held to have occurred in *Albert and Le Compte v Belgium*,[97] notwithstanding the public hearing before the Court of Cassation:

> "The public character of the cassation proceedings does not suffice to remedy the defect found to exist at the stage of the disciplinary proceedings. The Court of Cassation does not take cognisance of the merits of the case, which means that many aspects of '*contestations'* (disputes) concerning 'civil rights and obligations',

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95 See eg, *H v Belgium* (1987) 10 EHRR 339 at §54.

96 [2002] 4 HKC 1 at §26. See footnote 88 above as to the assumed basis of this decision.

97 (1983) 5 EHRR 533 at §36.

> including review of the facts and assessment of the proportionality between the fault and the sanction, fall outside its jurisdiction."

123. Where the original determination is marred by a lack of impartiality or by unfairness, the court of full jurisdiction may have to quash that determination to ensure compliance. The fact that the reviewing court is itself impartial or will itself act fairly may not be sufficient since the original defects may have resulted, for instance, in skewed factual findings or materials wrongly excluded, preventing the court from fully addressing the decision in the manner demanded.

124. The requirements for proper compliance emerging from the Strasbourg court's jurisprudence are summarised by Lord Hoffmann (in the context of the requirement of independence) as follows:[98]

> "The Strasbourg court ... has said, first, that an administrative decision within the extended scope of article 6 is a determination of civil rights and obligations and therefore prima facie has to be made by an independent tribunal. But, secondly, if the administrator is not independent (as will virtually by definition be the case) it is permissible to consider whether the composite procedure of administrative decision together with a right of appeal to a court is sufficient. Thirdly, it will be sufficient if the appellate (or reviewing) court has 'full jurisdiction' over the administrative decision. And fourthly, as established in the landmark case of *Bryan v United Kingdom* (1995) 21 EHRR 342 , 'full jurisdiction' does not necessarily mean jurisdiction to re-examine the merits of the case but, as I said in the *Alconbury* case [2003] 2 AC 295, 330, para 87, 'jurisdiction to deal with the case as the nature of the decision requires'."

F.3 Compliance through judicial review

125. In Hong Kong, as in the United Kingdom, virtually every administrative determination is potentially subject to judicial review. Given that the court does not, on a judicial review, conduct afresh any fact-finding

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98 *Runa Begum v Tower Hamlets LBC* [2003] 2 AC 430 at §33.

exercise underlying the impugned decision, is the court which exercises its judicial review function to be regarded as a "court of full jurisdiction"?

126. As we have just seen, Lord Hoffmann emphasises that it is erroneous to believe that a decision has to be reviewable on its merits before the reviewing court can be considered a court of full jurisdiction. Furthermore, as we have noted, in *Yvon Landry v Canada*,[99] the HRC considered the availability of judicial review under the applicable Canadian statute sufficient to make the decision-making process compliant with Article 14.1. It is in my view clear, subject to what is stated below, that where a Hong Kong court is able to exercise its full powers on judicial review it is likely to qualify as a court of full jurisdiction for Article 10 purposes. This proposition assumes that there is no statutory restriction on the judicial review powers available to the court, a matter of obvious relevance to the present appeal to which I will return.

127. As Lord Millett points out, judicial review powers are substantial and include powers to intervene based on the decision-maker's unsatisfactory treatment of the facts:

> "A decision may be quashed if it is based on a finding of fact or inference from the facts which is perverse or irrational; or there was no evidence to support it; or it was made by reference to irrelevant factors or without regard to relevant factors. It is not necessary to identify a specific error of law; if the decision cannot be supported the court will infer that the decision-making authority misunderstood or overlooked relevant evidence or misdirected itself in law. The court cannot substitute its own findings of fact for those of the decision-making authority if there was evidence to support them; and questions as to the weight to be given to a particular piece of evidence and the credibility of witnesses are for the decision-making authority and not the court. But these are the only significant limitations on the court's jurisdiction, and they are not very different from the limitations which practical considerations impose on an appellate court with full jurisdiction to entertain appeals on fact or law but which deals with them on the papers only and without hearing oral evidence."[100]

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99 Communication No 112/81 (8 April 1986).

100 *Runa Begum v Tower Hamlets LBC* [2003] 2 AC 430, §99.

128. Such powers have been held sufficient in the international jurisprudence. Thus, in *Bryan v United Kingdom*,[101] the Strasbourg court noted that an appeal to the English High Court on points of law "was not capable of embracing all aspects of the inspector's decision" and that:

> "... there was no rehearing as such of the original complaints submitted to the inspector; the High Court could not substitute its own decision on the merits for that of the inspector; and its jurisdiction over the facts was limited."[102]

However, the breadth of the reviewing court's powers were noted:

> "... apart from the classic grounds of unlawfulness under English law (going to such issues as fairness, procedural propriety, independence and impartiality), the inspector's decision could have been quashed by the High Court if it had been made by reference to irrelevant factors or without regard to relevant factors; or if the evidence relied on by the inspector was not capable of supporting a finding of fact; or if the decision was based on an inference from facts which was perverse or irrational in the sense that no inspector properly directing himself would have drawn such an inference."[103]

Given that there were administrative safeguards at the level of the inspector's decision-making process and that there were no disputes as to primary fact, the argument being largely concerned with questions of policy, the Court held that the powers exercisable on judicial review were sufficient to qualify the process of determination as Article 6(1) compliant.

129. In the *Runa Begum* case, Lord Bingham of Cornhill concluded on the basis of his review of relevant European decisions, that :

> "... taken together they provide compelling support for the conclusion that, in a context such as this, the absence of a full fact-finding jurisdiction in the tribunal to

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101 (1995) 21 EHRR 342.

102 At §44.

103 *Ibid.*

> which appeal lies from an administrative decision-making body does not disqualify that tribunal for purposes of article 6(1)."[104]

130. Lord Hoffmann, in the same case, commented that:

> "An English lawyer can view with equanimity the extension of the scope of article 6 because the English conception of the rule of law requires the legality of virtually all governmental decisions affecting the individual to be subject to the scrutiny of the ordinary courts."[105]

His Lordship's view was that on principle, judicial review, even with its limitations, is generally sufficient:

> "The concern of the court, as it has emphasised since *Golder's* case 1 EHRR 524 is to uphold the rule of law and to insist that decisions which on generally accepted principles are appropriate only for judicial decision should be so decided. In the case of decisions appropriate for administrative decision, its concern, again founded on the rule of law, is that there should be the possibility of adequate judicial review. For this purpose, cases like *Bryan* and *Kingsley* make it clear that limitations on practical grounds on the right to a review of the findings of fact will be acceptable."[106]

131. Lord Hoffmann did, however, make it plain (echoing the Strasbourg court in *Bryan*) that the sufficiency of judicial review is dependent on the subject matter of the challenged decision, the manner in which it was arrived at, its content and the proposed grounds of challenge.[107] Different considerations may apply depending, for instance, on whether the impugned decision relates to administrative policy or to the way the facts were found:

> "If, therefore, the question is one of policy or expediency, the 'safeguards' [in the decision-making process] are irrelevant. No one expects the inspector to be independent or impartial in applying the Secretary of State's policy and this was the reason why the court said that he was not for all purposes an independent or impartial tribunal. In this respect his position is no different from that of the Secretary of State himself. The reason why judicial review is sufficient in both cases to satisfy article 6

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104 [2003] 2 AC 430, §11.

105 *Ibid*, §35.

106 *Ibid*, §57.

107 *R (Alconbury Developments Ltd) v Secretary of State for the Environment* [2003] 2 AC 295, §116.

> has nothing to do with the 'safeguards' but depends upon the *Zumtobel* principle of respect for the decision of an administrative authority on questions of expediency. It is only when one comes to findings of fact, or the evaluation of facts, such as arise on the question of whether there has been a breach of planning control, that the safeguards are essential for the acceptance of a limited review of fact by the appellate tribunal."[108]

132. In *R (Wright) v Secretary of State for Health*, Baroness Hale of Richmond summarises the position as follows:

> "What amounts to 'full jurisdiction' varies according to the nature of the decision being made. It does not always require access to a court or tribunal even for the determination of disputed issues of fact. Much depends upon the subject matter of the decision and the quality of the initial decision-making process. If there is a 'classic exercise of administrative discretion', even though determinative of civil rights and obligations, and there are a number of safeguards to ensure that the procedure is in fact both fair and impartial, then judicial review may be adequate to supply the necessary access to a court, even if there is no jurisdiction to examine the factual merits of the case."[109]

133. The powers enjoyed by a Hong Kong court on a judicial review are very similar to those exercised by the courts of England and Wales which have been held to constitute courts of full jurisdiction. Accordingly, it is my opinion that in Hong Kong, a court exercising its judicial review jurisdiction without statutory interference is likely to qualify for most purposes as a court of full jurisdiction.

G. Has Article 10 been contravened in the present case?

134. Given that the disciplinary proceedings faced by the appellant bring Article 10 into play, was his entitlement to "a fair and public hearing by a competent, independent and impartial tribunal established by law" met, looking at the process as a whole?

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108 *Ibid*, §117.

109 [2009] 2 WLR 267 at §23.

G.1 Matters which are not contraventions

135. The police disciplinary tribunal is obviously "established by law". It has furthermore never been suggested that either of the disciplinary tribunals convened was lacking in competence or impartiality. The only complaint is that the hearing was not fair because of the exclusion of legal representation in circumstances where, the appellant submits, fairness demanded that he be permitted such representation.

136. But before addressing that question, it is worth noting that there might have been a complaint concerning publicity and independence. The proceedings before the tribunal were held in private and the police superintendents who sat as the adjudicating officers cannot be regarded as independent, being officers subordinate to the Commissioner in whose name the disciplinary charges were brought. However, it was in my view right not to contend that those features of the disciplinary proceedings constituted a contravention of Article 10. Viewing the process as a whole, the protections of independence and publicity are achieved without any deficit through recourse to judicial review. Judges in the Court of First Instance and in the appellate courts are plainly independent of the Police Force and of the executive and legislative arms of government in general. The courts are open to the public and every relevant aspect of the charges, the evidence and the rulings made by the disciplinary tribunal can be (and have been) publicly discussed.

G.2 Legal representation and a fair hearing

137. Returning to the central complaint, one must ask: what are the requirements of a fair hearing under Article 10? In particular, what is required in terms of legal representation at disciplinary proceedings such as those under discussion? It is my view that the well-developed common law principles of procedural fairness supply the answer. An arrangement which satisfies the

requirements of the common law will almost certainly conform with the fairness requirements of Article 10.

138. At common law and in the absence of inconsistent legislative intervention, administrative and domestic tribunals are generally regarded as masters of their own procedure possessing a flexible discretion to take whatever procedural course may be dictated by the requirements of fairness.[110]

139. The common law requirements regarding legal representation at disciplinary proceedings were recently examined in *The Stock Exchange of Hong Kong Ltd v New World Development Co Ltd*,[111] and it is unnecessary to repeat the discussion of the authorities to be found in that judgment. The Court decided that there is no absolute right to legal representation, this being a matter to be dealt with in the tribunal's discretion in accordance with principles of fairness. The factors to be taken into account in deciding whether fairness requires such representation to be permitted 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. It was recognized that no list of factors could be exhaustive and that the common law principles 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.[112]

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110 *Enderby Town Football Club Ltd v Football Association Ltd* [1971] Ch 591; *Maynard v Osmond* [1977] 1 QB 240; *R v Home Secretary, ex parte Tarrant* [1985] QB 251.

111 (2006) 9 HKCFAR 234.

112 At §95 to §101.

G.3 Regulations 9(11) and 9(12) inconsistent with Article 10

140. As I noted in section A.3 above, Mr Chow SC realistically accepts that regulations 9(11) and 9(12) impose a blanket restriction on professional legal representation in police disciplinary proceedings. The vice which results is that in a case where the common law principles and compliance with Article 10 compel the conclusion that the tribunal's discretion ought to be exercised in favour of allowing legal representation, regulations 9(11) and 9(12) prevent that course from being followed. In other words, they make it part of the disciplinary scheme that the tribunal is prevented from complying with its duty of fairness where such duty calls for legal representation to be permitted.

141. Furthermore, the regulations prevent the court on a judicial review from remedying non-compliance by quashing the decision on the ground of unfairness. Being sanctioned by subordinate legislation, the refusal of legal representation could not be said to be unlawful as a matter of common law. Therefore, so long as they remain in force, the regulations divest the reviewing court of the status of a "court of full jurisdiction", depriving it of the power necessary to deal with the case as the nature of the decision (involving an unfair refusal of legal representation) requires. Non-compliance would therefore be unremedied unless the regulations are struck down so as to remove the obstacle to conformity with Article 10.

142. Regulations 9(11) and 9(12) are therefore systemically incompatible with Article 10. Pursuant to section 6(1) of the Bill of Rights Ordinance, the Court is empowered to make such order in respect of this violation of the Bill of Rights as it considers appropriate and just in the circumstances. In my view, it is appropriate and just that regulations 9(11) and 9(12) be declared unconstitutional and invalid with the result that the tribunal, as master of its own procedure at common law, is able to exercise a discretion unfettered by those regulations to permit legal or other forms of representation

where fairness requires this. I have been focussing on objections to the exclusion of professional legal representation by regulation 9(12). However, there is no reason why the tribunal should be restricted to permitting non-professional representation only by fellow officers as envisaged by regulation 9(11). The tribunal ought to be able, in its discretion, to permit other appropriate forms of representation if asked for, whether by a fellow officer or by a person from outside the Force who would in a courtroom setting be called a McKenzie friend.[113]

G.4 The appellant did not have a fair hearing

143. If the invalidity of the constraints imposed by the offending regulations had been established before the hearing the tribunal would have been obliged, pursuant to its duty to ensure that the appellant had a fair hearing in accordance with Article 10, to consider, by reference to factors such as those mentioned in the *Stock Exchange* case, whether his was a case calling for legal representation to be permitted.

144. Believing, no doubt on the footing of regulations 9(11) and 9(12), that it had no such discretion, the tribunal never considered the possibility of its exercise and obviously never examined the factors relevant to such exercise. In my view, this omission made the proceedings inherently unfair. On this basis alone, the conclusion must be reached that the appellant was indeed deprived of a fair hearing so that his conviction and sentence must be quashed.

145. I do not consider it necessary for this Court (or any reviewing court) to undertake the exercise of applying relevant discretionary factors to the

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113 *McKenzie v McKenzie* [1971] P 33; *R v Home Secretary, ex parte Tarrant* [1985] QB 251 at 298.

evidence in order to decide whether it would itself, in the tribunal's position, have exercised the discretion in favour of permitting legal representation. Much less do I consider it necessary to demonstrate that a refusal by the tribunal to exercise its discretion would have been irrational. In taking this view, I am respectfully in agreement with the approach adopted by Hartmann J in *Rowse v Secretary for the Civil Service*.[114] As his Lordship pointed out, when deciding whether the requirement of a fair hearing is met, the court is simply concerned with deciding whether the constitutional standard has been complied with. The standard, as his Lordship stated, is one of fairness and not irrationality.

146. Nor do I consider it necessary or profitable to enter into the inevitably speculative realm of trying to determine how the evidence or the case might have progressed differently if a lawyer had been acting for the appellant.

147. I might add that if I had arrived at a different view and decided that this Court ought to examine the factors bearing on the exercise of the discretion, my conclusion would have been that the factors substantially favour allowing legal representation.

(a) The charge and the potential penalty were obviously very serious, punishment for an offence under PGO 6-01(8) being "normally terminatory". The actual sentence was undoubtedly severe, involving the loss of his pensionable employment as a policeman after 12 years of commendable service and deferral for many years of his enjoyment of the pension rights which had so far accrued.

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114 [2008] 5 HKC 405 at 433, §134.

(b) As the Court of Appeal's decision as to the meaning of PGO 6-01(8) (discussed below) shows, a point of law does arise. A sound grasp of the true construction of the PGO was a necessary starting-point for deciding how the evidence should be developed and the case handled.

(c) The fact that a re-hearing was involved with potential inconsistencies in the testimony of witnesses appearing on both occasions, especially viewed against the background of a fresh set of Administrative Instructions, ought to have raised questions as to the appellant's capacity to present his own case.

H. The suggested inevitability of conviction

H.1 The Court of Appeal's approach

148. In the Court of Appeal, Tang VP accepted the argument that there was "a simple answer" to the appeal, namely, that relief by way of judicial review had to be refused since the appellant's conviction was inevitable.[115] As I understand it, his Lordship's approach was that even if regulations 9(11) and 9(12) were to be struck down as unconstitutional, the result would still be no different because, on what he considered to be the true construction of PGO 6-01(8), a conviction was inevitable. The tribunal itself did not adopt the construction advocated by Tang VP, so the present discussion addresses the position adopted by the Court of Appeal in support of its "inevitability" proposition and not the tribunal's position.

149. As noted above, the version of PGO 6-01(8) promulgated on 22 September 1999 ("the 1999 version") defined the disciplinary offence with

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115 [2008] 2 HKLRD 27, §22.

which the appellant was charged as follows :

> "A police officer shall be prudent in his financial affairs. Serious pecuniary embarrassment stemming from financial imprudence which leads to the impairment of an officer's operational efficiency will result in disciplinary action."

150. On its face, the disciplinary offence has three elements: (i) the officer must be guilty of conduct amounting to "financial imprudence"; (ii) such conduct must result in "serious pecuniary embarrassment"; and (iii) the serious pecuniary embarrassment must lead to impairment of that officer's operational efficiency.

151. Tang VP pointed out that there was no dispute as to elements (i) and (ii) and held that this was sufficient, with no need for any evidence of element (iii):

> "This court has consistently held that serious pecuniary embarrassment would necessarily lead to impairment of operational efficiency of a police officer within the meaning of PGO 6-01(8). See, for example, *陳庚秋 [Chan Keng-chau] and Leung Fuk Wah v Commissioner of Police* [2002] 3 HKLRD 653."[116]

His Lordship added:

> "We do not believe legal representation could have resulted in a different outcome. His conviction under PGO 6-01(8) was inevitable. So we would in any event have refused relief."[117]

152. The Court of Appeal's decision regarding the "inevitability" of the appellant's conviction is therefore apparently based (a) on its construction of PGO 6-01(8); (b) on the authority of the *陳庚秋 (Chan Keng-chau)* and *Leung Fuk Wah* decisions; and (c) on a factual observation that an officer who finds himself in serious pecuniary embarrassment necessarily has his operational efficiency impaired.

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116 At §27.

117 At §28.

H.2 Construction of PGO 6-01(8)

153. The construction adopted by the Court of Appeal seems contrary to the ordinary meaning of the words of the applicable version of PGO 6-01(8). As noted above, it has, on its face three elements. Its language suggests that those three elements are causally linked and occur in a sequence: financial imprudence causing serious pecuniary embarrassment causing the impairment of operational efficiency. Thus, the serious pecuniary embarrassment "stems from" financial imprudence and in turn "leads to" the impairment of operational efficiency. The Court of Appeal's approach does not reflect this.

H.3 The two authorities cited

154. The first authority relied on, *Leung Fuk Wah v Commission of Police*,[118] was not in fact concerned with 1999 version of PGO 6-01(8). It was dealing with the preceding version issued on 30 January 1993 ("the 1993 version") which read as follows:

> "A police officer shall be prudent in his financial affairs. Serious pecuniary embarrassment from whatever cause is regarded as a circumstance which impairs the efficiency of an officer."

155. The 1993 version obviously differs significantly from the 1999 version. It centres on serious pecuniary embarrassment as the basis of the disciplinary offence "from whatever cause". The 1999 version, on the other hand, only treats serious pecuniary embarrassment as a disciplinary matter if it stems from financial imprudence. Moreover, while the 1999 version refers to impairment of operational efficiency as something which serious pecuniary embarrassment "leads to", the 1993 uses quite different language. It states that

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118 [2002] 3 HKLRD 653.

serious pecuniary embarrassment "is regarded as a circumstance which impairs the efficiency of an officer".

156. PGO 6-01(8) in its 1993 version was described by the Court of Appeal in *Ng Kam Chuen v The Commissioner of Police*,[119] as suffering from a "lack of clarity", as "not an easy provision to apply" and as "obscure".[120] The Court of Appeal thought its construction was highly arguable and so reversed the earlier judgment of Keith J and granted the applicant leave to apply for judicial review. At the substantive judicial review hearing,[121] Stone J construed the 1993 version as placing an ultimate legal burden on the Commissioner "of establishing both serious pecuniary embarrassment stemming from financial imprudence and consequent impairment of efficiency of the officer" and, upon proof of serious pecuniary embarrassment, as placing an evidential burden on the officer "to establish that his efficiency as an officer has not been impaired".[122]

157. This was the fray which the Court of Appeal in *Leung Fuk Wah* entered. Cheung JA (apparently for the Court) overruled Stone J and held:

> "... as serious pecuniary embarrassment is regarded as a circumstance impairing efficiency, it is not necessary to adduce further evidence on the impairment of efficiency."

Like the earlier cases cited above, this was addressing the meaning and effect of the 1993 version.

158. Since we are only concerned with the 1999 version, I would prefer to say nothing as to the true construction of the 1993 version (as to which we

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119 CACV 241/1997 (17 February 1998), Nazareth VP, Liu and Leong JJA.

120 At pp 5, 6 and 7 respectively.

121 *Ng Kam Chuen v Secretary for Justice* [1999] 2 HKC 291.

122 At 296-297.

have heard no argument). It is relevant to state this because PGO 6-01(8) was in fact further amended on 2 July 2003 (as a result of *Leung Fuk Wah*) to assume a form which has features in common with 1993 version and may require discussion in some future case.

159. The point for present purposes is that since *Leung Fuk Wah* was concerned only with the 1993 version, it is not an authority on the meaning and effect of the 1999 version and provides no support for the Court of Appeal's view as to the inevitability of the appellant's conviction in the present case.

160. In the second authority relied on, *陳庚秋 訴 香港警務處處長* (*Chan Keng-chau v Commissioner of Police)*[123] which was concerned with the 1999 version, the Court of Appeal was alive to the differences in the wording of the 1993 and 1999 versions. However, there was little analysis of the language of the latter. Yeung JA (for the Court) merely pointed to the need for special arrangements to be made for OUDs such as avoiding the handling of money or property or restrictions on carrying firearms and concluded (in translation):

> "It is reasonable for the Commissioner to take the abovementioned measures. As such, it is inevitable that serious pecuniary embarrassment would impair the work efficiency of a police officer."[124]

161. The Court of Appeal in *Chan Keng-chau* did not rule on whether evidence of an impairment of operational efficiency was necessary or whether impairment would be presumed simply from the fact of serious pecuniary embarrassment. Instead, the Court declared itself satisfied that the

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123 HCMP 2824/2004, Yeung JA and Tang J (29 December 2004).

124 At §§34-35.

Commissioner had in fact presented sufficient evidence of such impairment, pointing to various items of evidence adduced.[125]

162. I am therefore not persuaded that these two authorities provide any basis for the Court of Appeal's "inevitability" conclusion.

H.4 Inevitable Impairment as a matter of fact

163. The evidence does not support the conclusion that from the point of view of the Police Force, impairment of operational efficiency inevitably follows whenever an officer finds himself in a state of serious pecuniary embarrassment. On the contrary, the policy statements and other materials current at the time of the appellant's disciplinary proceedings suggest that it was regarded as a question of fact and evidence as to whether there was such impairment. Two examples will serve to illustrate this. I would emphasise that I do not refer to them for any view which they might express as to the proper construction of the relevant PGO but as demonstrating that it was evidently accepted by the Force that impairment of operational efficiency did not necessarily follow but could and should be separately established as a matter of fact.

164. Thus, shortly after Stone J's judgment, a memo from the Commissioner dated 15 April 1999 stated:

> "... automatic restrictions placed on an officer, which flow from establishment of the latter's indebtedness but fail to take into consideration his specific circumstances, may not be capable of supporting a finding of impaired efficiency.
>
> The essence of PGO 6-01(8) is that the officer's inefficiency results from his/her financial imprudence ... not from matters outwith his/her control. ... Where ... a Formation Commander has not considered the officer's ability to perform his duties and has restricted the officer as a 'matter of course', based solely on the officer's

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125 At §37.

> indebtedness, it can be said that the officer's efficiency has been impaired by circumstances outwith his control. This latter situation would not support establishment of the impairment to efficiency 'pillar'." (underlining in the original)

The 1999 version of PGO 6-01(8) was issued a few months later, reflecting this policy.

165. In the Administrative Instructions issued on 17 April 2000, during the period when the appellant was engaging in his share trading, there is discussion of how bankrupt officers (who must be by definition in serious pecuniary embarrassment) are to be treated. Paragraph 81 states that if bankruptcy is due to financial imprudence "which leads to impairment of an officer's operational efficiency, disciplinary action in accordance with PGO 6-01(8) should be contemplated." Significantly, paragraph 82 goes on to state:

> "If there is no evidence to show that the operational efficiency of the bankrupt officer has been impaired but there is evidence that the bankruptcy is due to some reprehensible causes (eg gambling, overspending, high risk speculative investments, etc) ... disciplinary action for an offence of 'Conduct Calculated' [to lower the reputation of the Force], contravening respondent 3(2)(m) of the [Regulations] should be considered."

166. Accordingly, I am with respect unable to accept the Court of Appeal's views as to the "inevitability of conviction". A conviction could not be secured simply by pointing to the absence of dispute as to the elements of financial imprudence and serious pecuniary embarrassment and holding that impairment of operational efficiency followed automatically. Giving effect to the ordinary meaning of the words used in the 1999 version, proof of impairment of the officer's operational efficiency as a separate element of the offence, flowing from his serious pecuniary embarrassment was required. I do not consider that there was any evidential burden on the officer charged. The impairment alleged by the Commissioner had to be proved by him. He would not have lacked the means of doing this as evidence could be adduced from

colleagues and superiors of the officer charged to show the ways in which his operational efficiency was said to have been impaired.

I. Ultra vires

167. In the light of my conclusions, it is unnecessary to deal with the alternative argument that regulations 9(11) and 9(12) are ultra vires the rule-making power in section 45 of the Ordinance.

J. Conclusion

168. For the foregoing reasons, I conclude that:

(a) Article 10 is engaged in respect of the appellant's disciplinary proceedings.

(b) The requirement of a fair hearing means that the disciplinary tribunal ought to have considered permitting the appellant to be legally represented.

(c) In excluding the possibility of the tribunal exercising such a discretion, regulations 9(11) and 9(12) are inconsistent with Article 10 and must be declared unconstitutional, null and void.

(d) Since the tribunal failed to consider and, if appropriate, to permit legal representation for the appellant, he was deprived of a fair hearing in accordance with Article 10 so that the disciplinary proceedings were unlawful and the resulting convictions and sentences must be quashed.

169. I would accordingly allow the appeal and make the following Orders:

(a) That the following orders or decisions be quashed, namely:

(i) The finding dated 2 March 2001 by the Adjudicating Officer that the appellant was guilty of the disciplinary offence charged and the award of dismissal dated 13 March 2001 made pursuant thereto.

(ii) The finding dated 27 March 2002 by the Adjudicating Officer that the appellant was guilty of the disciplinary offence charged, the consequent award of compulsory retirement with deferred benefits suspended for 12 months made on 4 April 2002 and the subsequent increased award of immediate compulsory retirement with deferred benefits made on 26 July 2002 and ratified by the Commissioner on 21 October 2002 to take effect from 23 October 2002.

(b) That a Declaration be granted declaring that regulations 9(11) and 9(12) of the Police (Discipline) Regulations (Cap 232) are inconsistent with Article 10 of the Bill of Rights and Article 39 of the Basic Law and are unconstitutional, null, void and of no effect.

(c) That there be no order as to costs as between the parties, but that the appellant's costs be taxed in accordance with the Legal Aid Regulations.

Lord Woolf NPJ:

170. I agree with the judgment of Mr Justice Ribeiro PJ. Although there are differences in the treatment of some issues in the judgments of Mr Justice Bokhary and Mr Justice Ribeiro PJJ, the differences do not appear to me to be of significance to the outcome of this appeal and I also agree with the

judgment of Mr Justice Bokhary PJ, without expressing any preference as to the views in the judgments as to which there are differences.

Chief Justice Li:

171. The appeal is unanimously allowed. We make the orders set out in the final paragraph of the judgment of Mr Justice Ribeiro PJ.

(Andrew Li)	(Kemal Bokhary)	(Patrick Chan)
Chief Justice	Permanent Judge	Permanent Judge

(R A V Ribeiro)	(Lord Woolf)
Permanent Judge	Non-Permanent Judge

Mr Johannes Chan SC and Ms Margaret Ng (instructed by Messrs Lau Pau & Co and assigned by the Legal Aid Department) for the appellant

Mr Anderson Chow SC (instructed by the Department of Justice) and Mr Louie Wong (of that department) for the respondent

附錄甲

補充指引

有關違紀人員申請
任用《香港海關（紀律）規則》第 6(1) 條
允許人士以外的其他人士作爲辯護代表的聆訊
（香港法例第 342 章附屬法例 B）

目的

本補充指引旨在爲各審裁員、檢控員和違紀人員，就他們在紀律聆訊程序下，有關違紀人員申請任用《香港海關（紀律）規則》(《規則》)（香港法例第 342 章附屬法例 B）第 6 條允許人士以外的其他人士，作爲辯護代表的聆訊中的各自職責提供指引。

背景

2. 終審法院在林少寶對警務處處長（終院民事上訴 2008 年第 9 號）的案件中，一致裁定該違紀人員上訴得直。根據《警察（紀律）規例》(《規例》)（香港法例第 232 章附屬法例 A）對該違紀人員作出的定罪和判刑均獲撤銷。終審法院亦作出聲明，表明《規例》第 9(11) 和第 9(12) 條（內容實際上是禁止違紀人員任用法律代表，除非該名法律代表是一名警務人員），與《人權法案》第 10 條和《基本法》第 39 條有所抵觸，屬於違憲、失效和無效。

終審法院判決的影響

3. 《規則》第 6(2) 條規定“被控人員無權由大律師或律師代表”。這與林少寶案件中被判違憲等的條文相

似。律政司已提出忠告，如果該條文在法庭席前呈遞，法庭很可能對第 6(2) 條作出類似的裁定，因此有關條文實際上應視爲並無效力。終審法院亦認爲《警察（紀律）規例》下的審裁小組沒理由如第 9(11) 條所預設，只限允許同僚作爲非專業的辯護代表。因此，現時《規則》第 6(1) 條所列明，須由海關部屬人員作爲非專業的代表進行辯護的限制亦會放寬。第 6 條須予修訂，以便在紀律處分程序中，爲公平起見而容許違紀人員任用法律代表，或他[1]所選定的人士作爲辯護代表。

4. 由於修訂《規則》將需要一段時間，海關須採取臨時措施，使違紀人員能夠申請任用《規則》第 6 條允許人士以外的法律代表，或他所選定的人士作爲辯護代表。

違紀人員應獲通知

5. 一般來說，違紀人員可提出要求，任用《規則》第 6(1) 條允許人士以外的法律代表，或他所選定的人士作爲辯護代表。關長並無責任邀請違紀人員提出此項要求。然而，基於《規則》第 6[2] 條在字眼上禁止違紀人員任用法律代表，並且只容許海關部屬人員作爲辯護代表，因此有需要向違紀人員表明，他們還有其他選擇。

6. 因此，關長將透過根據《規則》第 5 條發給違紀人員的信件，詢問違紀人員是否希望任用《規則》第 6 條允許人士以外的法律代表，或他所選定的人士作爲辯護代表。爲公平起見，違紀人員應獲通知，**審裁員有酌情權**決定是否容許他選擇辯護代表。如果違紀人員在紀

[1] 在本指引內，"他"指男性及女性。

[2] 第 6 條訂明(1) 關長須委任一名職級不低於被控人員的海關人員爲檢控員，而被控人員則有權由一名他所選擇的海關部屬人員代表他進行辯護。（1989 年第 118 號法律公告）；以及(2) 被控人員無權由大律師或律師代表。

律聆訊開始前仍未申請任用法律代表，紀律聆訊的審裁員會通知違紀人員可於紀律聆訊期間作出申請。

申請

7. 違紀人員若希望任用《規則》第 6 條允許人士以外的法律代表，或他所選定的人士作爲辯護代表，應填妥隨根據《規則》第 5 條發出的信件所夾附的回條（**附件一**）作出申請，並提供理據以供考慮。如果違紀人員於紀律聆訊期間申請任用法律代表，審裁員應在法律程序記錄中記錄違紀人員的申請並押後聆訊，以考慮有關申請。違紀人員應在押後聆訊日期起計 14 天內，按附件一的要求填妥任用法律代表的申請書，向審裁員提供理據及該名法律代表的資料。

考慮申請的批核人員

8. 每宗紀律個案中獲委任的審裁員是有權核准違紀人員遞交的申請的批核人員。批核人員的職責是進行聆訊，並爲公平起見，裁定是否容許違紀人員在紀律聆訊中任用《規則》第 6 條允許人士以外的法律代表，或他所選定的人士作爲辯護代表。

就申請進行聆訊

9. 審裁員會就上文第 7 段所指的申請進行聆訊。

申請由具有法律專業資格的人士作爲辯護代表的考慮因素

10. 終審法院在香港聯合交易所有限公司對新世界發展有限公司（[2006] 2 HKLRD 518）的案件中認爲，普通法的立場是審裁小組視乎公平的需要，有酌情權決定是否允許有法律代表。法院在得到准許的情況下引述一項陳述，意思是紀律審裁小組在行使它們的酌情權，並考慮到包括歐洲法庭曾提及的一系列因素時，必須爲自然公

平原則起見，決定在審裁小組席前應訊的人應否任用法律代表。這是已確立的原則。有關的因素包括－控罪的嚴重性與可能的處分、是否很可能會提出任何法律觀點、違紀人員陳述案情的能力、程序上的困難、需要以合理速度作出裁決；以及需要使各有關的個別人士均獲得公平對待。這一系列因素並非詳盡無遺。法院認爲這類因素難以全部開列，而普通法的公平原則可以靈活運作，要求審裁小組對每宗個案的公平要求作合理的回應，過程中要平衡任何對立的權益，並考慮爲此可能有什麼限制（如有的話）相應施加於法律代表。終審法院在林少寶的案件中再次說明這些原則。

11. 基於以上的司法判決，接獲法律代表要求的審裁員必須基於每宗個案的案情、上文所提及的因素，以及其他可能與爲公平起見，有關聆訊是否容許違紀人員任用法律代表相關的因素，而考慮有關事項。對這些考慮因素施加限制，既無必要，亦不可取。

(A) 違紀人員提出的理由

12. 違紀人員爲在紀律聆訊中任用法律代表而提出的任何相關理由，均須予以考慮。違紀人員提出的大多數理由可能已列於下文的(B)至(G)項。不過，任何因素清單都不可能是詳盡無遺。因此，即使違紀人員沒有明確提到一些與個案明顯相關的事宜，根據公平原則，也應把這些事宜一併考慮。

(B) 控罪的嚴重性與可能的處分

13. 控罪的嚴重性與在相關紀律聆訊程序中可能的處分，是終審法院認爲在林少寶的案件中，《香港人權法案》第十條適用的主要原因。法院在考慮公平原則時，不大可能會認爲這個因素較不重要。因此，如果違紀人員面臨被革職的處分，這項因素將會大大有利違紀人員獲准任用法律代表。

14. 如果違紀人員的失當行爲在裁定成立後可能引致非常嚴重而非革職的處分（例如降級），這項因素亦會有利違紀人員獲准任用法律代表。不過，即使紀律處分程序不會導致革職或非常嚴重而非革職的處分，這一點本身並不妨礙酌情准許違紀人員任用法律代表。所有有關因素均須予以考慮。

(C) 是否很可能會提出任何法律觀點

15. 如在紀律聆訊中很可能會提出法律觀點，這項因素會有利違紀人員獲准任用法律代表，但這並不代表批准任用法律代表是理所當然的事。舉例說，如果違紀人員提出法院已經考慮的論據，或者就不適用於紀律聆訊的證據技術規則而提出論據，那麼便可能沒有強烈理由支持任用法律代表。

(D) 違紀人員陳述案情的能力

16. 違紀人員在紀律審裁小組席前陳述案情可能出現困難，例如他可能有某些健康問題、控罪很複雜等。

(E) 程序上的困難

17. 一般而言，紀律處分程序應在沒有不適當的程序下進行。紀律審裁小組一般被視爲其程序的主宰，可按公平的需要靈活地酌情決定採取任何程序，因此不大可能會出現重大的程序困難，但應考慮違紀人員提出的任何特有困難。

(F) 需要以合理速度作出裁決

18. 紀律處分程序應該是以部門內聆訊或內部聆訊形式進行，以便能有效並快速地處理紀律事宜。不必要地任用法律代表可能會大大延長處分程序的時間，或使處分程序變得複雜。不過，如果很可能會提出複雜的法律

問題，有法律代表出席會使處分程序更爲順利。

(G) 需要使各有關的個別人士均獲得公平對待

19. 若檢控員是法律專業資格人士[3]，爲公平起見，應准許違紀人員任用法律代表。複雜而又需要進行詳細盤問的具爭議事實，或者涉及專家或高級官員作證，這些情況都可歸入這個類別。應謹記審裁員須對每宗個案出現的公平要求作出合理的回應。

20. 法律代表並非公務員，因此，他不受《保安規例》所規管，而他在紀律處分程序中的行爲亦不受任何政府規則和規例所管制。儘管如此，如果違紀人員任用法律代表的申請獲批准，部門會把一份**保密通知書**送達該法律代表。保密通知書旨在提醒法律代表如他未經授權而披露任何於紀律研訊過程中取得的機密資料，他或會因《官方機密條例》（香港法例第 521 章）的規定而遭受檢控，以及／或因洩漏機密而被起訴。

申請任用現職公務員作爲辯護代表的考慮因素

21. 申請任用《規則》第 6(1) 條允許人士以外的現職公務員作爲辯護代表一般應獲批准，但如有任何原因使關長認爲所建議的人士不適宜擔任辯護代表，則可能導致申請不獲批准。有關原因可包括但不限於下列各項－

(a) 出現明顯的利益衝突，例如辯護代表對審裁員或檢控員有直接或間接的督導責任，可能對他們構成不當壓力。

(b) 辯護代表遭停職，或涉及任何違紀控罪、刑事

[3] "法律專業資格人士"是指《法律執業者條例》（第 159 章）第 2 條所指的律師或大律師。

案件或行爲不當的指控。

(c) 有證據顯示辯護代表的品格或操守可疑。

(d) 辯護代表在個人品行方面曾有不良記錄。

22. 檢控員須審查辯護代表的背景。如發現任何與上述相符的資料，檢控員須通知審裁員。

申請任用非法律專業資格人士的非公務員作爲辯護代表的考慮因素

23. 上文第 10 至 22 段提及的考慮因素如果適用的話，亦是同樣重要的。然而，由於審裁員對非法律專業資格人士的非公務員的品格、操守和個人品行一般所知不多，因此在處理任用該等人士作爲辯護代表的申請時應更爲審慎。

24. 由於辯護代表並非公務員，他不受《保安規例》所規管，而他在紀律處分程序中的行爲亦不受任何政府規則和規例所管制。因此，部門會把一份**保密通知書**送達他（如第 20 段所述）。

25. 如所建議的非公務員辯護代表具有特殊的知識或經驗，對違紀人員抗辯起着關鍵的作用，則將是有利申請獲得批准的因素。

準備聆訊時要留意的事項

26. 爲使因上文第 7 段提及的申請而提出的聆訊進行得暢順而有效率，須作出以下安排－

(a) 由於有關控罪的嚴重程度和可能帶來的處分對聆訊結果有重大影響，檢控員應對過往的個案進行研究，以便可就類似的違紀控罪施予適

當的懲罰。

(b) 整個聆訊應予錄音及/或錄影[4]，而審裁員（或審裁員委任的記錄員）應根據《有關紀律聆訊的錄音及錄影指引》爲此作出安排。

聆訊的程序

第一步－聆訊開始並邀請違紀人員陳述他的案情

27. 聆訊開始時，審裁員應向違紀人員解釋聆訊的目的和程序。其後，審裁員應邀請違紀人員陳述他的案情，說明爲何基於公平原則，他的申請需獲得批准。

第二步－記錄違紀人員於聆訊中所作的陳述內容

28. 違紀人員於聆訊中所說明的所有理由，都應記錄在聆訊紀錄中（**附件二**）。當違紀人員完成其陳述後，審裁員應宣讀所記錄的理由，並請申請人在紀錄上簽署。如申請人認爲有需要，可建議對紀錄作出修訂。

29. 如有需要，審裁員可要求檢控員就與須決定事項相關的事宜陳詞。

第三步－發出決定

30. 審裁員通常應在有關申請的聆訊結束時填寫聆訊紀錄的第 III 部來作出決定，並把該紀錄的副本送達違紀人員。違紀人員須於第 IV 部簽署認收。不過，如有需要，審裁員亦可在較後的日期發出決定，聆訊紀錄的副本同樣應立即送達違紀人員，由他／她於第 IV 部簽署認收。

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[4] 當錄影系統及相關的設備／附屬品／場地準備就緒時，部門才會安排將紀律聆訊過程錄影。

聆訊後的工作

31. 審裁員應於切實可行的情況下，在有關申請的聆訊後以口頭方式盡快通知助理關長（行政及人力資源發展）有關決定。助理關長（行政及人力資源發展）會考慮是否有需要覆核審裁員的決定。

32. 如果違紀人員任用法律專業資格人士或**非法律專業資格人士的非公務員**作爲辯護代表的申請獲得批准，部隊人事組（二）助理參事會安排把保密通知書分送予違紀人員（**附件三**）及他的辯護代表（**附件四**）。

33. 如果違紀人員任用法律專業資格人士作爲辯護代表的申請獲批准，部門應安排一名法律專業資格人士擔任審裁員的法律顧問，並安排另一名法律專業資格人士擔任法律顧問，代表檢控員。有關任用法律代表的紀律處分程序指引載於**附件五**。

34. 如果有關申請不獲批准，應把聆訊紀錄的副本送交部隊人事組（二）助理參事。部隊人事組（二）助理參事會與各方協調，訂定在上訴限期屆滿後進行紀律聆訊的日期。

35. 通常毋須爲有關申請的聆訊提供完整的謄本。如有任何爭議，可能需要提供聆訊有關部分的謄本，以供澄清之用。

36. 爲免生疑問，違紀人員應注意不論紀律聆訊結果如何，他均須承擔其辯護代表的費用。如違紀人員在紀律聆訊中任用法律專業資格人士作爲辯護代表，部門須安排一名法律專業資格人士擔任審裁員的法律顧問，並安排另一名法律專業資格人士擔任法律顧問，代表檢控員。

上訴機制

37. 如果違紀人員對審裁員的決定感到受屈，可在收到審裁員的決定後 14 天內，以書面向助理關長（行政及人力資源發展）提出上訴。助理關長（行政及人力資源發展）會把該宗上訴轉交另一名對違紀人員和有關個案沒有督導職責的助理關長。有關的助理關長有權就該宗上訴作出決定，而所作的決定是最終的決定。

部隊行政科
2012 年 3 月

CUSTOMS AND EXCISE DEPARTMENT
HONG KONG
香港海關

回覆

呈：審裁員助理監督 XXX

本人收到助理關長(行政及人力資源發展)於二〇〇X年X月X日發出的信件 [檔號:(XX) in DR X/200X]。

	是*	否*
1. 本人將會就此宗正在向我展開紀律聆訊的案件，申請《香港海關(紀律)規則》(《規則》) 第 6(1)條[#]以外的人士作為辯護代表？	☐	☐
2. [如你於問題 1 選擇「是」，請回答這條問題。] 上述問題 1 所提及的人是否現職公務員？	☐	☐
3. [如你於問題 1 選擇「是」，請回答這條問題。] 上述問題 1 所提及的人是否具有法律專業資格的人士(即是屬《法律執業者條例》(第 159 章) 第 2 條所指的律師或大律師)？	☐	☐

註* 請於適當的☐內填上"✓"號。如你選擇「是」，請填寫下列部份。

在部門對我展開的紀律聆訊中，我認為基於公平原則的考慮，有需要申請《規則》第 6(1)條以外的人士作為辯護代表。理由如下：

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____
_____
_____
_____

我擬任用的辯護代表的個人資料如下：-

姓名 :
身分證號碼 :
職業/部門 :
律師行名稱（如適用） :
關係 :
地址（辦公室或住宅） :
電話號碼 :

簽名 _____

職級/姓名 關員XXXXX（編號XXXXXX）

日期 _____

個人資料(私隱)條例

一、 所索取的資料會被海關關長用作考慮你要求辯護代表的申請，並可能披露予其他政府部門作相關用途。

二、 根據個人資料(私隱)條例，資料當事人有權要求查閱及改正回條上所填報的個人資料。如你欲行使這項權利，請按內部常規通告第 2/2006 號提出。

附件二

香港海關
申請任用香港海關(紀律)規則第 6(1)條以外的人士作爲辯護代表

聆訊紀錄

紀律研訊
個案編號 ：_____

第I部

1. 申請人: 姓名 ： 職級及編號

2. 有關違紀指控 ：_____

3. 違紀行爲簡單陳述 ：_____

_____

_____

_____

4. 牽涉證人數目 控方 ：_____

辯方 ：_____

5. 擬任用的辯護代表的個人資料：

姓名 ：_____

職業 ：_____

律師行名稱 ：_____

地址 ：_____

電話 ：_____

6. 聆訊日期及時間 ：_____

7 聆訊地點 ：_____

8. 審裁員： 姓名 ：_____ 職級 _____

9. 檢控員： 姓名 ：_____ 職級 _____

10. 記錄員: 姓名 ：_____ 職級 _____

第II部

申請人申請任用香港海關(紀律)規則第 6(1)條以外的人士作爲辯護代表的理據如下：

□	有關的控罪非常嚴重，有可能導致免職／降級處分。
□	聆訊過程中極有可能出現法律觀點上的爭議。
□	違紀人員於陳述案情時將會出現困難。
□	聆訊程序繁複。
□	有關人仕具有特殊/專業知識或經驗有助抗辯。
□	其他理由／補充資料：

（□ 於適用的空格內填上“✓”號）

第III部

☐ 審裁員裁定接納有關申請。

☐ 審裁員裁定不接納有關申請，理由如下：

日期：_____ 審裁員姓名：_____ 簽署：_____

第IV部

本人_____已於_____收到有關申請任用香港海關(紀律)規則第 6(1)條以外的人士作爲具有法律專業資格人士作爲辯護代表的裁決。

本人明白如對有關裁決不滿，我必須在收到裁決後十四天內向助理關長（行政及人力資源發展）提出上訴。

日期：_____ 申請人姓名：_____ 簽署：_____

附件三

香港海關
香港中環統一碼頭道 38 號
海港政府大樓

HONG KONG
CUSTOMS AND EXCISE DEPARTMENT
Harbour Building, 38 Pier Road,
Central, Hong Kong

檔案編號 :( ) in DR /
電話 : 2231 4221
傳真 : 2598 4964

[違紀人員的職級及姓名]
[違紀人員的職位]

[ ]先生／女士*：

*[日期]*的申請已經收悉。你在申請中請求部門批准由*[職銜(如可提供)及姓名]*在根據《香港海關(紀律)規則》指控你*[控罪名稱]*而召開的紀律聆訊中協助你。

本函旨在通知你，作爲審裁員的*[職銜及姓名]* 已考慮你的申請和本案情況，並信納應該批准你在聆訊中由上述人士擔任你的代表。他／她*已決定批准有關申請。

請注意，在這紀律研訊過程中，你或你的辯方代表將會／或會*取得機密資料，*包括*[請說明機密資料的性質]*。假如你或你的辯方代表未經授權而披露有關資料，則你或你的辯方代表或會因《官方機密條例》(香港法例第 521 章)的規定而遭受檢控，以及／或因洩漏機密而被起訴。現提醒你促使你的辯方代表注意這一點。

爲免生疑問，請注意一點，你委聘法律代表和使用法律服務的開支完全是你個人的問題。不論紀律研訊的結果如何，政府或香港海關均不會承擔有關費用。

海關關長

(部隊人事組（二）助理參事 代行)

* 請刪去不適用者

二零 XX 年 X 月 X 日

香港海關
香港中環統一碼頭道 38 號
海港政府大樓

HONG KONG
CUSTOMS AND EXCISE DEPARTMENT
Harbour Building, 38 Pier Road,
Central, Hong Kong

檔案編號：(　) in DR　/
電話　　：2231 4221
傳真　　：2598 4964

[地址]
[法律代表／朋友的姓名]

[　]先生／女士*：

*[日期][違紀人員的職級及姓名]*的申請已經收悉。他／她*在申請中請求部門批准由你在根據《香港海關(紀律)規則》指控*[違紀人員的職級及姓名]* *[控罪名稱]*而召開的紀律聆訊中協助*[違紀人員的職級及姓名]*。

本函旨在通知你，作爲適當授權人員的*[審裁員的職銜及姓名]*已考慮有關申請和本案情況。他／她*已決定批准有關申請。

請注意，在這紀律研訊過程中，你將會／或會*取得機密資料，*包括*[請說明機密資料的性質]*。假如你未經授權而披露有關資料，則你或會因《官方機密條例》(香港法例第521章)的規定而遭受檢控，以及／或因洩漏機密而被起訴。

海關關長

(部隊人事組（二）助理參事　　代行)

副本送：*[違紀人員的職級及姓名]*。

* 請刪去不適用者

二零 XX 年 X 月 X 日

根據《香港海關（紀律）規則》
在法律代表在場下進行紀律處分程序

相關事項／程序須知

在法律代表在場下進行聆訊

1. 就違紀人員獲准任用法律代表的案件而言，有關進行聆訊時須注意的事項載述於下文。當局會因應運作經驗，對這些事項作出修訂及更新。

(I) 出席聆訊人士的角色及權利

2. 除審裁員、違紀人員及證人外，其他出席聆訊的人士通常包括：

人士	擔任者、其角色及權利
檢控員	▪ 通常是由部隊檢控課的案件負責人擔任。 ▪ 代表“控方”，並爲聆訊提供後勤支援，包括對違紀人員「朋友」所作出的背景審查等。 ▪ 可指示其法律代表／與其法律代表討論。由於檢控員的訟辯角色會由其法律代表接替，因此他不會向違紀人員、違紀人員的法律代表及證人提問。此外，檢控員不會對審裁員作出回應（如獲邀請作出回應，則不在此限）。
檢控員的法律代表	▪ 通常是由律政司聘用的外判律師擔任。 ▪ 代表檢控員提出提控違紀人員的案（包括個案背景資料、證人及擬提交的文件證據）。若違紀人員（或其法律代表）向審裁員作出任何陳詞，檢控

人士	擔任者、其角色及權利
	員的法律代表會向違紀人員提問。此外，有關法律代表亦會負責訊問、盤問及覆問證人，以及向審裁員作出回應。
違紀人員的法律代表	▪ 在部門批准的情況下，向違紀人員提供協助。 ▪ 代表違紀人員提交證據、訊問／盤問／覆問證人及作出陳詞（註：與此同時，違紀人員也可行使這些權利）。 ▪ 不可代表違紀人員就控罪作出答辯，違紀人員必須親自作出答辯。
審裁員的法律顧問	▪ 通常是由部門聘用的外判律師擔任。 ▪ 在聆訊中就法律觀點或任何與妥善進行聆訊及考慮違紀人員個案相關的事宜，向審裁員提出意見。因此，在審裁員批准的情況下，法律顧問可向檢控員的法律代表、違紀人員及其法律代表提出任何問題，並對違紀人員作出回應。

(II) 注意事項

3. 有關在法律代表在場下進行聆訊的程序，需注意以下事項：

(a) 審裁員仍然負責確保聆訊得以妥善進行，並負責裁斷事實及裁定指控違紀人員的紀律控罪是否成立。審裁員的法律顧問負責就法律觀點或任何與妥善進行聆訊及考慮違紀人員個案相關的事宜，向審裁員提出意見；

(b) 在聆訊的任何時間，審裁員可邀請其法律顧問就任何法律觀點或任何與妥善進行聆訊及考慮違紀人員個案相關的事宜，向審裁員作出回

應。違紀人員、違紀人員及檢控員二者的法律顧問應獲准就審裁員的法律顧問提出的意見向審裁員作出回應（若他們想這樣做）；

(c) 在聆訊的任何時間，若審裁員的法律顧問希望向審裁員作出回應，以及／或向檢控員及／或違紀人員（或兩者的法律代表）提問，應先獲得審裁員的批准方可進行。若審裁員批准，違紀人員、檢控員及違紀人員二者的法律代表應獲准就審裁員的法律顧問提出的觀點向審裁員作出回應，以及／或回答他的提問（若他們想這樣做）；

(d) 違紀人員及／或其法律代表在聆訊時通常會有“最後發言權”。如果審裁員的法律顧問獲准在違紀人員或其法律代表作出最後陳詞後向審裁員作出回應，違紀人員或其法律代表必須獲給予機會在聆訊結束前回應審裁員的法律顧問所提出的觀點（若他想這樣做）；以及

(e) 審裁員與其法律顧問應在違紀人員及其法律代表，以及檢控員及其法律代表在場的情況下，於聆訊期間進行討論。若審裁員認爲有需要在聆訊完結後向其法律顧問徵詢意見，便應重新召開聆訊，並在違紀人員及其法律代表，以及檢控員及其法律代表在場的情況下，徵詢所需的意見。

(III) 推行

4. 《香港海關（紀律）規則》現時並沒有明文規定審裁員的法律顧問或檢控員的法律代表必須於聆訊期間在場，又或規定這些法律顧問及代表必須作出提問／回應。在爲公平起見而批准違紀人員任用法律代表時，上述指引可確保有關法律程序得以妥善進

行。

5. 如果審裁員批准任用法律代表，最好在聆訊開始時將上文第 3(a)至(e)段的主要原則告知所有相關人士，並在繼續進行聆訊前處理由違紀人員及／或其法律代表提出的任何意見。

陳詞、辯護及證人

9-20 (i) 主控官負責陳述案情。主審官可指定證人，主控官和犯過者亦有機會指定證人。主審官須確保證人在展開聆訊前至少三個完整工作日接獲通知出席聆訊的書面通知。如證人無法出席，或展開聆訊後須傳召其他證人，主控官或犯過者可向主審官要求押後聆訊。主審官考慮提出的理由後，可決定是否押後聆訊讓證人出席。 9-20

(ii) 犯過者如希望委託代表於聆訊給予協助，他可委託以下人士擔任代表，但須符合《消防事務手冊(行政)》雜項第 4 章所載的準則及審批程序：

(a) 法律代表；或

(b) 助辯人－助辯人可以是較主審官最少低一個職級的現職屬員，或任何公務員或市民。犯過者可選擇完全由助辯人在聆訊中代表他，或其助辯人僅履行麥堅時友人(McKenzie Friend)[1]的職責，即在聆訊中協助記錄及私下給予意見。

然而，處長可酌情決定是否准許由法律代表，或具有法律專業資格的助辯人(即香港法例第 159 章《法律執業者條例》第 2 條界定的大律師或律師)代表犯過者。

(iii) 由犯過者自行負責委託代表。

(iv) 如准許法律代表或具有法律專業資格的助辯人代表犯過者，則主控官的訟辯工作將由一名政府律師(一般由律政司安排的外判律師擔任)負責，而主控官會負責發出指示，並與該名律師討論

[1] 麥堅時友人(不論是否專業人士)可以任何一方的朋友的身分出席聆訊、作出筆錄、迅速提出建議，以及給予意見。(McKenzie v McKenzie [1973] p.33 at 41)

案情。主審官會繼續履行審裁職責，而處方會安排一名法律顧問，協助主審官進行聆訊。消防區長(管理組)1 將負責作出有關安排。

(v) 主控官和犯過者(或其法律代表／助辯人)須在展開聆訊前告知其證人，聆訊完結前不得與其他人士討論案情。

(vi) 需要以助辯人或證人身分出席紀律聆訊的現職屬員可獲准暫時離開工作崗位而無須放取假期。

1.4 犯過者在紀律研訊中的代表

1.4.1 終審法院對林少寶訴警務處處長案(FACV9/08)的判決帶來多項必要的改變，其中之一是：如果犯過者希望委託代表於聆訊時給予協助，他可獲准委託以下兩類人士擔任代表，惟須符合以下各段訂明的準則和審批程序：

1.4.1.(a) 法律代表

委託法律代表出席聆訊，目的是確保研訊公平，有關要求須事先取得處長的批准；

1.4.1.(b) 助辯人

助辯人可以是現職屬員，職級較主審官至少低一級，或任何公務員或市民。犯過者可選擇由助辯人在聆訊中完全代表他，在此情況下，助辯人會代表犯過者發言，而犯過者會在聆訊期間一直保持緘默，除非是以證人身分作供。犯過者亦可選擇僅讓助辯人擔當「麥堅時友人」(Mckenzie Friend)的角色，即在場筆錄並私下給予意見(「麥堅時友人」是以任何一方的朋友身分出席聆訊的專業或非專業人士[Mckenzie v Mckenzie [1971] p.33 at 41])；

1.4.1.2 如要委託助辯人出席聆訊，事先須取得處長的批准，除非該助辯人爲現職屬員或公務員，且不具有法律專業資格(即香港法例第 159 章《法律執業者條例》第 2 條所指的律師或大律師)。此外，助辯人須不曾參與案件的初步調查，亦毋須以證人身分出席聆訊。

1.4.2 申請及審批法律代表和助辯人的程序如下：

1.4.2.1 紀律聆訊展開前，正如上文第 1.2 段所述，紀律聆訊解說人員在進行解說時會明確詢問犯過者是否希望委託法律代表或由助辯人協助；

1.4.2.2 犯過者應獲告知，是否獲准委託法律代表，或者委託一名市民或具有法律專業資格的公務員作爲助辯人，須由處長酌情決定。如果犯過者希望委託這類代表或助辯人，應該在接到紀律處分控票(FS 2)後的 14 個曆日內，經紀律聆訊解說人員向處長呈交載於附件 A 的申請表。紀律聆訊解說人員須在收到犯過者的申請表後七個曆日內，將其轉交副消防總長(總部)。爲方便查閱，現把各類代表的分類和相關的通知期表列於附錄 2；

1.4.2.3 副消防總長(總部)獲授權決定是否批准此類申請。爲免存有偏見，在任何案件中，倘副消防總長(總部)曾參與決定對有關犯過者採取紀律行動，或者在作出有關決定前曾涉及有關個案，則消防總長(總部)會委任一名無任何關連的副消防總長／副救護總長負責審批申請。若申請被拒，犯過者可以在七個曆日內提出上訴。消防總長(總部)會獲授權覆核上訴，而其決定爲最終決定。紀律聆訊解說人員、主控官、主審官和犯過者會獲告知有關決定；

1.4.2.4 犯過者只可申請委託法律代表，或者申請由一名助辯人協助，不可同時選擇兩者，並應盡量把所需的人數減至最少；

1.4.2.5 是否允許委託法律代表一般會視乎有關違紀行爲會否導致終止僱用或迫令退休。儘管如此，在*林少寶訴警務處處長案*(FACV9/08)中曾提及的以下因素(但不限於這些因素)亦在考慮之列：

(a) 控罪的嚴重性及可能施以的懲罰；
(b) 聆訊是否可能涉及法律論點；
(c) 犯過者自行陳詞的能力；
(d) 程序方面的困難；
(e) 須以合理研訊速度作出判決；以及
(f) 有關人士須獲公平對待。

有關「應否准許犯過者委託法律代表出席紀律聆訊的考慮因素」的指引載於附錄 3。

1.4.2.6 犯過者若申請委託法律代表；或者由一名不具有法律專業資格的非現職屬員或非公務員擔任助辯人，處方在考慮其申請時，會研究與案件有關的種種因素，以決定是否爲求公平起見而准許犯過者委託法律代表或助辯人。此外，考慮因素也包括可能會對主審官造成壓力(例如助辯人雖非本處屬員，但職級很高)，或者可能洩漏敏感或機密資料。

1.4.2.7 犯過者亦應獲清楚告知須自行承擔法律代表的費用。無論紀律研訊的結果爲何，處長和香港特別行政區政府均不會承擔犯過者的法律代表所引致的法律費用。

1.4.2.8 倘犯過者獲准委託法律代表，或者由一名不具有法律專業資格的非現職屬員或非公務員擔任助辯人，聆訊日期會押後，直至已作出合適的安排爲止。

指引

應否准許犯過者委託法律代表出席紀律聆訊的考慮因素

原則

在香港聯合交易所有限公司 訴 新世界發展有限公司 [2006] 2 HKLRD 518 一案中，終審法院裁定，根據普通法，審裁處有權視乎維持公平的需要，決定是否准許委託法律代表。終審法院獲准援引一段聲明，表示已確立的做法是，紀律審裁小組必須運用酌情權，並在考慮多項因素(包括歐洲法院提及的因素)後，決定出庭應訊者是否需要法律代表，方可達致「自然公平」。該等因素包括：控罪的嚴重性及可能施以的懲罰；聆訊是否可能涉及法律論點；犯過者自行陳詞的能力；程序方面的困難；須以合理研訊速度作出判決；以及有關人士須獲公平對待。上述因素並非巨細無遺，法院亦認爲不可能一一將之列明，而普通法公平原則運作具有彈性，要求審裁處處理每宗案件時，爲公平起見，必須合理地回應有關需求；平衡對立的利益，並考慮因此而對法律代表的委託施加合宜的限制。

2. 終審法院在*林少寶訴警務處處長(FACV9/2008)*案中再次述明有關原則。

3. 基於以上的司法判決，有關審裁處或當局在考慮有關委託法律代表的申請時，必須顧及以下事宜：每宗案件的事實、上述因素，以及涉及被控人員是否必須有法律代表，聆訊才會公平等相關因素。本指引述明在參考終審法院的判決及本處的紀律研訊經驗後的考慮因素，以協助紀律審裁處或有關當局對該等事宜作出考慮。

考慮因素

(A)犯過者提出的理由

4. 犯過者提出委託法律代表出席紀律聆訊的任何相關理由，必須予以考慮。下文(B)至(G)項或已涵蓋大部分有關理由，但要把所有因素全數列出並不可能。此外，即使犯過者沒有特別提出，爲公平起見，凡與案件明顯有關的事宜亦應予以考慮。

(B) 控罪的嚴重性及可能施以的懲罰

5. 有關紀律研訊中控罪的嚴重性及可能施以的懲罰，是終審法院在*林少寶一案*裁定《香港人權法案》第十條適用的主要原因。爲了公平起見，

法院不會輕視這個因素。因此，如犯過者面對終止僱用懲罰，則這個因素將會成爲准許法律代表出席聆訊的主要有利因素。

6. 如犯過者的失當行爲一旦裁定有罪，可能被施以非常嚴重的非終止僱用懲罰(例如降級)，這亦是一個准許委託法律代表的有利因素。不過，即使有關紀律研訊不會帶來終止僱用懲罰或非常嚴重的非終止僱用懲罰，當局亦可行使酌情權准許委託法律代表。所有相關因素必須予以考慮。

(C) 聆訊是否可能涉及法律論點

7. 如有關紀律聆訊可能涉及法律論點，這將會是准許委託法律代表的有利因素，但亦並非表示必須准許委託法律代表。例如，如犯過者提出法庭已作出裁決的論點，或就與證據有關的技術性原則提出的論點不適用於紀律聆訊，則准許委託法律代表的理由可能未夠充分。

(D) 犯過者自行陳詞的能力

8. 犯過者在自行陳詞方面可能有困難，例如因爲某些健康問題、控罪複雜等。

(E) 程序方面的困難

9. 一般而言，紀律研訊的進行應該沒有不當的程序。因此，不大可能遇到重大的程序困難；然而，如犯過者發現任何特別困難，亦應予以考慮。

(F) 須以合理研訊速度作出判決

10. 紀律研訊爲內部研訊，旨在有效和迅速處理紀律問題。不必要地委託法律代表可能會大大延長研訊時間或使研訊過程變得複雜。不過，如過程中引起真正的法律問題，委託法律代表可能有助研訊進行。

(G) 有關人士須獲公平對待

11. 如檢控人具有法律專業資格，爲公平起見，應准許犯過者委託法律代表。所爭議的事實爭論點的複雜程度需要詳細盤問，又或涉及的證人爲專家或高級官員，亦可能屬於這類因素。務須緊記一點，處理每宗案件時，爲求公平起見，審裁處必須合理地回應有關要求。

2.6 在聆訊期間要求有法律代表或助辯人

2.6.1 犯過者若在紀律聆訊期間要求有法律代表、或由一名不具備法律資格的現職屬員或公務員的人士擔任助辯人，主審官應要求犯過者詳細陳述其原因。主審官必須將原因清楚記入紀律處分記錄冊，並將聆訊押後。主審官並應將犯過者的要求連同主審官本人的建議轉交副消防總長(總部)以作決定。在考慮有關申請時，副消防總長(總部)會研究上文第 1.4.2.5 及第 1.4.2.6 段載列的因素。然而，如副消防總長(總部)較早前已拒絕犯過者的這項要求，主審官必須釐清提出這次要求的理由是否與上次相同。如有關理由：

(a) 與上次要求相同，主審官會拒絕要求，除非聆訊期間有新證據或有發展，顯示應重新考慮犯過者提出的理由；

(b) 與上次要求不同，主審官會將聆訊押後，並將犯過者的要求連同主審官本人的建議轉交副消防總長(總部)以作決定。

2.6.2 倘若聆訊期間有新證據或有發展，顯示根據上文第 1.4.2.5 及第 1.4.2.6 段載列的因素，該個案可能有理由獲准有法律代表，則主審官必須就研訊的最新發展，明確詢問犯過者是否希望委託法律代表出席聆訊。

2.7 獲准有法律代表或有具備法律資格的助辯人的聆訊安排

2.7.1 若犯過者獲准有法律代表或有具備法律資格的人士爲助辯人，則主控官的角色將由一名政府律師(一般爲律政司安排的外判律師)擔任，而原來的主控官將擔任該律師的輔助人員。主審官會繼續履行審訊職責，但本處會安排一名法律顧問協助主審官進行聆訊。有法律代表的研訊程序載於附錄五。

2.7.2 律政司會協助製備一份外判律師名單供本處選擇，費用由本處自負。消防區長(管理組)1 將負責爲主審官安排法律顧問。

2.7.3 本處委任的紀律聆訊解說人員將針對聆訊程序，分別向外判律師和法律顧問進行解說。

有關由法律代表於紀律聆訊助辯

的問題／程序須知

1. 如犯過者已獲同意由法律代表於聆訊中助辯，當中聆訊的進行須注意下列事項：

(I) 出席聆訊人士的職責和權利

2. 除主審官、犯過者和有關證人外，出席聆訊通常包括以下人士：

人士	職責和權利
主控官	▪ 代表「控方」，負責聆訊的後勤工作。 ▪ 可指示其法律代表行事／與其商議。由於其訟辯角色由其法律代表負責，主控官不會向犯過者、犯過者的法律代表及證人查問。除被邀請外，主控官不會向主審官陳詞。

人士	職責和權利
主控官的法律代表	▪ 一般爲律政司安排的外判律師。 ▪ 代主控官陳述案情(包括案件背景及其欲呈示的證人及文件證據)、查問犯過者(如他或其法律代表向主審官陳詞)、詰問、盤問及覆問證人；以及向主審官陳詞。
犯過者的法律代表	▪ 於聆訊爲犯過者助辯。 ▪ 呈示證據、詰問／盤問／覆問證人及代犯過者向主控官陳詞(注意：犯過者亦可同時行使此權利)。不得爲犯過者對指控作出答辯，犯過者必須親自答辯。
主審官的法律顧問	▪ 一般爲本處安排的外判律師，並由律政司協助覓色合適律師。 ▪ 於聆訊中就法律觀點及與聆訊恰當進行和對犯過者案件作出考慮有關的任何事宜提出意見。在此方面，主審官的法律代表經主審官的同意下，可向主控官的法律代表、犯過者和其法律代表提出任何問題，並向主審官陳詞。

(II)　注意事項

3.　就法律代表出席聆訊的有關程序，當中須注意下列事項：

(a)　主審官仍負責確保聆訊恰當進行、搜尋事實及裁定指控犯過者的違反紀律控罪是否成立。主審官的法律顧問負責就法律觀點及與聆訊的恰當進行和對犯過者案件作出考慮的任何有關事宜提出意見。

(b)　於聆訊進行的任何時間，主審官可邀請其法律顧問就任何法律觀點及與聆訊的恰當進行和對犯過者案件作出考慮的任何有關事宜向其發言。犯過者、犯過者的法律代表和主控官或其法律代表如有意就主審官的法律顧問給予的意見向主審官發言，應獲有關許可。

(c)　於聆訊進行的任何時間，如主審官的法律顧問欲向主審官發言及／或向主控官及／或犯過者或其法律代表提問，他應先取得主審官的有關同意。如主審官許可，犯過者及主控官或其法律代表應獲准就主審官的法律顧問提出的問題向主審官發言，及／或對其問題作出回應(如他們有意

如此)。

(d) 犯過者及／其法律代表於聆訊中永遠有最終發言權。如主審官的法律顧問獲准在犯過者或其法律代表在作出最後陳詞後向主審官發言，犯過者或其法律代表必須在聆訊結束前獲予機會對主審官的法律顧問所提出的問題作出回應(如犯過者或其法律代表有意如此)，以及；

(e) 主審官與其法律顧問之間的討論應在犯過者及其法律代表，以及主控官及其法律代表在場的聆訊中進行。如主審官認爲有必要在聆訊結束後向其法律顧問尋求意見，他應重新召集聆訊，並在犯過者及其法律代表與主控官及其法律代表在場的情況下尋求所需意見。

(III) 實施

4. 在犯過者已獲同意由法律代表出席聆訊的案件中，一個很好的做法是，主審官於聆訊開始時提醒各方以上 3(a)至(e)段的原則，並於進行聆訊前先處理犯過者及／或其法律代表的任何意見。

RESTRICTED (STAFF)

Guidelines on Disciplinary proceedings with representation by a person other than those permitted under the Government Flying Service (Discipline) Regulation

Purpose

The guidelines provide guidance for the disciplinary proceedings with representation by a person other than those permitted under Section 9 of the Government Flying Service (Discipline) Regulation (Cap. 322 sub. leg. A) (GFS(D)R).

Background

2. In *Lam Siu Po v. Commissioner of Police*, FACV No. 9 of 2008, the Court of Final Appeal (CFA) unanimously allowed the Defaulter's appeal. The Defaulter's convictions and sentences under the Police (Discipline) Regulations (Cap. 232 sub. leg. A) were quashed. A declaration was granted declaring that Regulations 9(11) and 9(12) of those Regulations (which in effect prohibited legal representation for the Defaulter except where the legal representative was a police officer) were inconsistent with Article 10 of the Hong Kong Bill of Rights (HKBOR)[1] and Article 39 of the Basic Law[2], and were unconstitutional, null, void and of no effect.

3. The CFA also mentioned there is no reason why the tribunal should be restricted to permitting non-professional representation only by fellow officers as envisaged by Regulation 9(11). The CFA considered that the tribunal ought to be able, in its discretion, to permit other appropriate forms of representation if asked for, whether by a fellow officer or by a person from outside the police force who would in a courtroom setting be called a McKenzie friend[3] .

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[1] Article 10 of the Hong Kong Bill of Rights stipulates that all persons shall be equal before the courts and tribunals. 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 press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

[2] Article 39 of the Basic Law stipulates that the provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.

[3] A McKenzie friend is a person, whether he is a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice – McKenzie v. McKenzie [1971] P 33.

Implications of the CFA's Judgement

4. Section 9(2) of the GFS(D)R stipulates that "Counsel or a solicitor shall not represent the member charged". This is similar to the provisions being ruled to be unconstitutional etc. in *Lam Siu Po*'s case. The Department of Justice (DoJ) has advised that it is very likely that a similar ruling on Section 9(2) would be made by a court if that provision is brought before a court, and therefore it should in practice be treated as ineffective. In view of the CFA's statement mentioned in paragraph 3 above, Section 9(1) of the GFS(D)R which restricts the representative to a member of his choice other than the Controller or a member who may be involved in the proceedings will also be relaxed. Section 9 should be amended to allow the Member Charged to have legal representation or other forms of representation (hereinafter referred to as "Friends") for the Member Charged where fairness so requires in the disciplinary proceedings.

5. Since amendments to GFS(D)R would take considerable time, interim measures have to be put in place to enable the Member Charged to apply for legal representation or representation by a "Friend" other than those permitted by Section 9 of the GFS(D)R.

Interim Measures

6. In general, it is up to the Member Charged to raise requests for legal representation or representation by a "Friend" other than those permitted by Section 9(1) of the GFS(D)R. There is no obligation for the Controller to invite them to do so. However, since Section 9 of the GFS(D)R in its terms prohibits legal representation and allows only representatives who are members, it is necessary to make it clear to the Member Charged that there are other options open to them.

7. Therefore, for new disciplinary cases, the Controller will enquire whether the Member Charged wishes to have legal representation or representation by a "Friend" other than those permitted under Section 9 of the GFS(D)R. In the event that the Member Charged wishes to have legal representation or representation by a "Friend" other than those permitted under Section 9 of the GFS(D)R, he should make an application by completing the return slip (**Annex A**) and provide reasons for consideration.

8. An application by a Member Charged to be assisted by legal representation or representation by a "Friend" other than those permitted under Section 9 of the GFS(D)R will be considered by a GFS Directorate officer delegated the authority by the Controller. To guard against bias, this Directorate Officer should not be involved in any earlier decision of instituting disciplinary action against the Member Charged. A Guide for considering applications for legal representation/ representation by a "Friend" is at **Annex B**.

9. If such application is approved, the Member Charged and his representative will be served with separate **notice of confidentiality in line with the Official Secret Ordinance (Cap. 521)**. Neither the Controller nor the Government of the Hong Kong Special Administrative Region will be responsible for the costs incurred in respect of the legal representation engaged by the Member Charged irrespective of the outcome of the disciplinary proceedings.

Appeal Mechanism

10. If the Member Charged whose application for legal representation or representation by a "Friend" other than those permitted under Section 9 of the GFS(D)R has been rejected by a delegated Directorate Officer is aggrieved by the decision, he may lodge an appeal to the Controller in writing within 14 days after receiving the decision. His application will be considered afresh by the Controller for decision..

Application at the Disciplinary Hearing

11. Request for legal representation or representation by a "Friend" other than those permitted under Section 9 of the GFS(D)R may be raised by the Member Charged before the Disciplinary Tribunal (after rejection by the delegated Directorate Officer or the Controller, or if it has not been raised before). The Disciplinary Tribunal should record the Member Charged's request in the Record of Proceedings and ask the Member Charged to provide his reasons. The Disciplinary Tribunal should then consider whether such representation should be allowed by requesting the Prosecutor to provide him with the required information, in order that he can make his recommendation to the delegated Directorate Officer if the Member Charged has not raised such request before (or the Controller if the request was previously rejected), copied to the Member Charged.

12. On the other hand, if the Member Charged has not requested for legal representation but during the hearing there is information or evidence coming into light (including but not limited to the factors outlined in Annex B) what would indicate such a need, the Disciplinary Tribunal should advise the Member Charged to consider requesting legal representation. If the Member Charged has made such a request, the Disciplinary Tribunal should then make his recommendation to the delegated Directorate Officer. The Disciplinary Tribunal should also make a record in the Record of Proceedings to that effect.

13. Upon receipt of the Disciplinary Tribunal's recommendation, the delegated Directorate Officer or the Controller should give significant weight to the recommendation when making a decision, since the Disciplinary Tribunal should be in the best position to judge whether the fairness of the proceedings to be held before the Disciplinary Tribunal requires legal or other forms of representation.

14. If the Member Charged is aggrieved by the Disciplinary Tribunal's recommendation, he may submit his representations in writing to the delegated Directorate Officer if the Member Charged has not raised such request before (or the Controller if the request was previously rejected) for consideration.

Note on Procedures

15. In the event of approval for legal representation, arrangement should be made to provide a legally qualified person to act as legal adviser to the Disciplinary Tribunal and another legally qualified person to act for the Prosecutor. Note on procedures with regard to disciplinary proceedings with legal representation is at **Annex C**.

Government Flying Service
Updated in March 2012

Government Flying Service
Reply Form of Member Charged
Defence Representative at Disciplinary Hearings

To : Chief Pilot ( )/ Chief Aircraft Engineer

via : _____ (Rank & name of Disciplinary Tribunal)

[Please "✓" (i) or (ii)]

(i) ( ) I do not wish to have any defence representative.

(ii) ( ) I wish to be assisted in my defence in the forthcoming hearing by the following one kind of defence representative: [*You can only opt one of either (a), (b) or (c) below by putting (✓) in the relevant bracket. If you opt for (b) or (c) above, please state in (iii) below your reasons. Options (b) and (c) may be allowed at the discretion of the relevant authority where fairness so requires.]*

(a) ( ) A Representative expressly allowed by section 9 of Government Flying Service (Discipline) Regulation, namely GFS member of my choice other than the Controller or a GFS member who may be involved in the proceedings

Name : _____

Rank : _____

(b) ( ) A Legal Representative (i.e. a solicitor or barrister within the meaning of section 2 of the Legal Practitioners Ordinance (Cap. 159)). (Please see General Note (a))

Name :_____ (_____)

HKID Card No. : _____

Company : _____

(c) ( ) A person who does not fall within (a) and (b) above.

Name : _____ (_____)

HKID Card No. : _____

Occupation : _____

Rank (For public servant only) : _____

Bureau/Department (For public servant only) : _____

(iii) My reasons for applying for representation in the form of options (b) or (c) above (Please see General Note (b))

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

Signature : _____

Name & Rank of Applicant : _____

Contact Tel. No. : _____

Date : _____

General Note

(a) You should take note that neither the Controller, Government Flying Service nor the Government of Hong Kong Special Administrative Region will be responsible for the costs incurred in respect of your engagement of (b) irrespective of the outcome of the disciplinary proceedings.

(b) Factors to be taken into account in deciding whether fairness requires your application should be allowed include but not limited to 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.

Personal Data (Privacy) Ordinance (Cap. 486)

(a) The personal data will be used by the Controller for consideration of your request for defence representative and may be disclosed to other Government Departments for related purposes.

(b) A data subject has the right to request access to or correction of personal data provided on this form in accordance with the Personal Data (Privacy) Ordinance. Such request must be made in writing to the officers designated for handling data access/correction request as promulgated in relevant departmental /internal circulars.

Notice of Confidentiality

(a) Please be notified that confidential information may be acquired by you or your defence representative in the course of the disciplinary proceedings.

(b) You and/or your defence representative may be prosecuted under the Official Secrets Ordinance (Cap. 521) and/or be sued for breach of confidence for any unauthorized disclosure of such confidential information. You are reminded to bring this to the attention of your defence representative.

RESTRICTED (STAFF)

Government Flying Service
Guide for Considering Applications for Legal Representation/ Representation by a "Friend"

On the basis of the court's decision in *The Stock Exchange of Hong Kong Limited v New World Development Company Limited [2006] 2 HKLRD 518* and *Lam Siu Po v. Commissioner of Police, FACV No. 9 of 2008*, the authority before whom a request for legal representation is made must consider the matter in the light of the facts of each case, and the factors listed hereunder and any other factors which might be relevant to the issue of whether fairness of the hearing would require legal representation for the Member Charged :

(a) grounds advanced by the Member Charged;
(b) the seriousness of the charge and potential penalty;
(c) whether any points of law are likely to arise;
(d) the capacity of the individual to present his own case;
(e) procedural difficulties;
(f) the need for reasonable speed in making the adjudication; and
(g) the need for fairness among the individuals concerned.

2. 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 limits, if any, may proportionately be imposed on legal representation in consequence. The same rules also apply when the Member Charged requests representation by a "Friend".

Consideration of an application for Legal Representation

(A) Grounds advanced by the Member Charged

3. Any relevant ground advanced by the Member Charged 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.

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

4. Seriousness of the charge and the potential penalty in the relevant disciplinary proceedings was the main reason why the CFA held in *Lam Siu Po's case* 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 the consideration of fairness. Hence, if a Member Charged is facing a terminatory punishment, this will be a factor which substantially favours the granting of legal representation to the Member Charged.

5. If a Member Charged 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 in 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 be raised

6. 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 Member Charged raises arguments which have already been considered by the court or arguments on technical rules of evidence which are not applicable to disciplinary hearings.

(D) Member Charged's capacity to present his case

7. A Member Charged may have difficulties in presenting his case before the disciplinary tribunal, e.g. he is suffering from certain medical conditions, the charges are complicated, etc.

(E) Procedural difficulties

8. Generally, disciplinary proceedings are to be conducted without undue formality. The disciplinary tribunals are generally regarded as masters of their own procedure possessing a flexible discretion to take whatever

procedural course may be dictated by the requirements of fairness. Therefore there are unlikely to be significant procedural difficulties, but any specific difficulty mentioned by the Member Charged should be taken into consideration.

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

9. Disciplinary proceedings are intended to be domestic or internal hearings for dealing with disciplinary issues effectively and swiftly. Unnecessary legal representation may substantially lengthen or complicate the proceedings. However, if complicated legal issues are likely to be raised, the presence of legal representation will facilitate the proceedings.

(G) Need for fairness among the individuals concerned

10. If the prosecutor is a legally qualified person, legal representation for the Member Charged 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 borne in mind that the authority has to respond reasonably to the requirements of fairness arising in each case.

Consideration of an application for Representation by a "Friend"

11. The factors for considering whether legal representation should be allowed mentioned in paragraphs 3 to 10 above are also applicable in considering whether a "Friend" other than those permitted under section 9 of the GFS(D)R should be allowed.

12. The application may be rejected if there is any reason for the Controller to believe that the proposed person is not suitable to act as a defence representative. Such reasons may include but are not limited to the following –

(a) There is apparent conflict of interest, for instance, the representative has direct or indirect supervisory responsibility over the Disciplinary Tribunal or the Prosecutor which may bring undue pressure on them.

(b) The representative himself is under interdiction or being implicated in any disciplinary offence or criminal case or any allegation of misconduct.

(c) There is evidence pointing to the doubtful character or integrity of the representative.

(d) The representative has adverse record of personal conduct.

13. An application for representation by a non-public servant who is not a legally qualified person should be handled with greater care since normally there would be little information known to the Disciplinary Tribunal of the character, integrity and personal conduct of such a person.

14. As a non-public servant, he is not bound by the Security Regulations and his/her behaviour during the proceedings is not governed by any government rules and regulations. The application will be considered having regard to the circumstances of the case including but not limited to whether sensitive information would be involved in the disciplinary proceedings which should not be released to outside parties and thus rendered representation by such "Friend" undesirable or inappropriate. If the application is accepted, such defence representative will be served with a **notice of confidentiality**.

15. If the proposed non-public servant representative possesses special knowledge or experience which is crucial to the defence of the Member Charged, this would be a factor in favour of the application.

Government Flying Service
June 2010

Disciplinary proceedings with legal representation under the Government Flying Service (Discipline) Regulation

Note on related issues/procedures

Conduct of hearings with legal representation

1. For cases where legal representation for the Member Charged has been granted, some points to note on the conduct of the hearing are given in the ensuing paragraphs. These points are subject to review and may be updated in the light of operational experience.

(I) Roles and rights of those present at the hearing

2. Apart from the Disciplinary Tribunal, the Member Charged and the witnesses, other people present at the hearing will usually be as follows–

Person	Who, role and rights
Prosecutor	▪ A member not below the rank of the Member Charged to be appointed by the Controller. ▪ To represent the "prosecution" and to take care of the logistics for the hearing. ▪ Can instruct/discuss with his legal representative. As his advocacy role is to be taken up by his legal representative, the Prosecutor will not question the Member Charged, the legal representative of the Member Charged and witnesses. The Prosecutor will not address the Disciplinary Tribunal unless invited to do so.
Prosecutor's legal representative	▪ Normally a brief-out counsel engaged by the Department of Justice.

Person	Who, role and rights
	▪ Acting for the Prosecutor in presenting the case against the Member Charged (including the case background and the witnesses and documentary evidence he intends to present), questioning the Member Charged if he (or his legal representative) makes any address(es) to the Disciplinary Tribunal, examining, cross-examining and re-examining witnesses, and addressing the Disciplinary Tribunal.
Legal representative of the Member Charged	▪ To assist the Member Charged at the hearing. ▪ To present evidence, examine/cross-examine /re-examine witnesses and address the Disciplinary Tribunal on behalf of the Member Charged (note : the Member Charged can also exercise these rights at the same time.) ▪ Cannot make plea to the charge(s) for the Member Charged as the latter must do so himself.
Disciplinary Tribunal's legal adviser	▪ Normally a brief-out counsel engaged by the Department. ▪ To advise the Disciplinary Tribunal at the hearing on points of law and on any matters relevant to the proper conduct of the hearing and consideration of the case of the Member Charged. In this respect, with the Disciplinary Tribunal's permission, may raise any questions with the Prosecutor's legal representative, the Member Charged and his legal representative, and address the Disciplinary Tribunal.

(II) Points to note

3. Some points to note on the procedures of hearings with legal representation are set out below.

(a) The Disciplinary Tribunal remains to be responsible for ensuring the proper conduct of the hearing, finding facts and determining whether the disciplinary charges alleged against the Member Charged are established. The Disciplinary Tribunal's legal adviser is responsible for advising the Disciplinary Tribunal on points of law and on any matters relevant to the proper conduct of the hearing and consideration of the case of the Member Charged;

(b) At any time of the hearing, the Disciplinary Tribunal may invite his/its legal adviser to address him/it on any points of law and on any matters relevant to the proper conduct of the hearing and consideration of the case of the Member Charged. The Member Charged and the legal representatives of the Member Charged and the Prosecutor should be allowed to address the Disciplinary Tribunal on the advice given by the Disciplinary Tribunal's legal adviser if they so wish;

(c) At any time of the hearing, if the Disciplinary Tribunal's legal adviser wishes to address the Disciplinary Tribunal and/or raise questions to the Prosecutor and/or Member Charged, or their legal representatives, he should first seek the Disciplinary Tribunal's permission to do so. If the Disciplinary Tribunal grants such permission, the Member Charged and the legal representatives of the Prosecutor and the Member Charged should be allowed to address the Disciplinary Tribunal on the points raised by the Disciplinary Tribunal's legal adviser, and/or respond to his questions if they so wish;

(d) The Member Charged and/or his legal representative will always have the "last word" at the hearing. In cases where

the Disciplinary Tribunal's legal adviser is allowed to address the Disciplinary Tribunal after the Member Charged or his legal representative has made the final address, the Member Charged or his legal representative must be given the opportunity to respond to the points raised by the Disciplinary Tribunal's legal adviser, should he so wish, before the hearing is closed; and

(e) Discussions between the Disciplinary Tribunal and his/its legal adviser should be done at the hearing in the presence of the Member Charged and his legal representative, as well as the Prosecutor and his legal representative. In the event that the Disciplinary Tribunal considers it necessary to seek any advice from his/its legal adviser after the conclusion of the hearing, he/it should re-convene the hearing and seek the required advice in the presence of the Member Charged and his legal representative and the Prosecutor and his legal representative.

(III) Implementation

4. The GFS(D)R do not now expressly provide for the presence of a legal adviser to the Disciplinary Tribunal or a legal representative of the Prosecutor, nor for questions/addresses by these legal advisers and representatives. The above guidelines are introduced for ensuring proper conduct of proceedings where fairness requires that the Member Charged be legally represented.

5. It is a good practice for the Disciplinary Tribunal, in cases where legal representation has been granted, to inform all parties of the broad principles at paragraph 3(a)-(e) above at the beginning of the hearing, and to deal with any views from the Member Charged and/or his legal representative before the hearing proceeds.

Government Flying Service
June 2010

CHAPTER 8

DISCIPLINARY PROCEEDINGS UNDER THE POLICE (DISCIPLINE) REGULATIONS WITH LEGAL AND OTHER FORMS OF REPRESENTATION

This Chapter serves to outline the interim procedures regarding requests for defence representation by the defaulters and the conduct of legally represented disciplinary hearings prior to amendments to the Police (Discipline) Regulations [P(D)R].

8-01 PROCEDURES FOR REQUESTS FOR DEFENCE REPRESENTATION

Appropriate Authority

2. 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).

3. 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.

4. 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

5. 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

6. When a defaulter has requested legal[1] or other forms of representation [except

[1] 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.

those previously allowed under 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 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;
(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.

7. A Guide for considering applications for legal representation is at Annex Z-1. Specimen letters for granting or rejecting an application are at Annexes Z-2 and Z-3.

8. 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.

9. 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. If criminal record check on the "Friend" is warranted, the specimen letter at Annex Z-9 and the consent form at Annex Z-10 will be used. 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. Specimen letters for granting or rejecting an application are at Annexes Z-4 and Z-5.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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 Annex Z-1) 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.

15. 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

16. 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" (Annex Z-6);

(b) Copy of charges; and

(c) "Notes on tape recordings in disciplinary hearings" (Annex I-1).

17. 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.

18. 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.

19. When making his decision, the AA will make reference to the list of factors as set out in paragraph 6 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.

20. 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.

21. 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.

22. 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.

23. 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 Annex Z-1) 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.

24. 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.

8-02 THE CONDUCT OF HEARINGS WITH LEGAL REPRESENTATION

The procedures for disciplinary proceedings (including hearings) against officers of or below the rank of Chief Inspector of Police are provided for under the P(D)R and in the Force Discipline Manual (FDM). However, the P(D)R and the FDM do not currently expressly provide for the presence of a legal adviser to the AO or a legal representative for the PO, nor for questions/addresses by these legal advisers and representatives. In cases where permission for legal representation for the defaulter has been granted, guidelines on the conduct of the hearings are given in the following paragraphs. These guidelines are subject to review and may be revised in the light of experience.

Roles and Rights of those Present at the Hearing

2. Apart from the AO, the defaulter and witnesses, other parties present at the hearing will usually be as follows:-

Party	Who, role and rights
PO	▪ Appointed by the FDO/SPO of the Formation to which the defaulter is attached at the time of the commission of the offence. ▪ To represent the "prosecution" and to take care of the logistics for the hearing. ▪ Can instruct/discuss with his legal representative. As his advocacy role is to be taken up by his legal representative, the PO will not question the defaulter, the defaulter's legal representative and witnesses. The PO will not address the AO unless invited to do so.
PO's legal representative	▪ Normally a briefed-out counsel engaged by the Department of Justice.

Party	Who, role and rights
	▪ Acting for the PO in presenting the case against the defaulter (including the case background and the witnesses and documentary evidence he intends to present), questioning the defaulter if he (or his legal representative) makes any address(es) to the AO, examining, cross-examining and re-examining witnesses, and addressing the AO.
Defaulter's legal representative	▪ To assist the defaulter at the hearing. ▪ To present evidence, examine/ cross-examine/ re-examine witnesses and address the AO on the defaulter's behalf (note : the defaulter may also exercise these rights in the proceedings.) ▪ Cannot make plea to the charge(s). The defaulter must do so himself.
AO's legal adviser	▪ Normally a briefed-out counsel engaged by the HKPF (specimen instructions letter at Annex Z-7). ▪ To advise the AO at the hearing on points of law and on any matters relevant to the proper conduct of the hearing and consideration of the defaulter's case. In this respect, with the AO's permission, he may raise any questions with the PO's legal representative, the defaulter and his legal representative, and address the AO.

Points to Note

3. Some points to note on the procedures for hearings with legal representation are set out below:-

(a) The AO remains responsible for ensuring the proper conduct of the hearing, finding of facts, determining whether the disciplinary charge or charges alleged against the defaulter are established and making awards if the charge or charges are proved;

(b) At any time during the hearing, the AO may invite his legal adviser to address him on any points of law and on any matters relevant to the proper conduct of the hearing and consideration of the defaulter's case. The defaulter and the legal representatives of the defaulter and the PO should be allowed to address the AO on the advice given by the AO's legal adviser if they so wish;

(c) At any time during the hearing, if the AO's legal adviser wishes to address the AO and/or raise questions to the PO and/or defaulter, or their legal representatives, he should first seek the AO's permission to do so. If the AO grants such permission, the defaulter and the legal representatives of the PO and the defaulter should be allowed to address the AO on the

points raised by the AO's legal adviser, and/or respond to his questions if they so wish;

(d) The defaulter and/or his legal representative will always have the "last word" at the hearing. In cases where the AO's legal adviser is allowed to address the AO after the defaulter or his legal representative has made the final address, the defaulter or his legal representative must be given the opportunity to respond to the points raised by the AO's legal adviser, should he so wish, before the hearing is closed; and

(e) Discussions between the AO and his legal adviser should be conducted at the hearing in the presence of the defaulter and his legal representative, as well as the PO and his legal representative. In the event that the AO considers it necessary to seek any advice from his legal adviser after the conclusion of the hearing, he should re-convene the hearing and seek the required advice in the presence of the defaulter and his legal representative and the PO and his legal representative.

4. The above guidelines are to ensure the proper conduct of proceedings where fairness requires that the defaulter be legally represented. It is a good practice for the AO, in cases where legal representation has been granted, to inform all parties of the broad principles at paragraph 3(a)-(e) above at the beginning of the hearing, and to deal with any views from the defaulter and/or his legal representative before the hearing proceeds.

8-03 CONDUCT OF HEARINGS WITH "FRIEND" REPRESENTATION

In general, the conduct of the hearings with "Friend" representation will be similar to those hearings with defence representative previously allowed under Reg. 9(11), 9(12), 19(1) and 19(2) of P(D)R. The major difference is that the "Friend" will assume the full role as defence representative, instead of a police officer, for defaulters subject to disciplinary proceedings processed under P(D)R. He can assist the defaulter at the hearing and to present evidence, examine/ cross-examine/ re-examine witnesses and address the AO on the defaulter's behalf (note : the defaulter may also exercise these rights in the disciplinary proceedings). However, the "Friend" cannot make plea to the charge(s). The defaulter must do so himself.

8-04 UNAUTHORIZED DISCLOSURE OF CONFIDENTIAL INFORMATION BY DEFAULTER'S DEFENCE REPRESENTATIVE

In order to safeguard the confidential information that may be acquired by the defaulter and his legal representative or "Friend" in the course of the disciplinary proceedings, they should be reminded of the legal consequences under the Official Secrets Ordinance (Cap. 521) and/or law suit for breach of confidence for any unauthorized disclosure of confidential information via notification letters at Annex Z-2, Z-4 or Z-8, specifying the nature of confidential information as appropriate.

2. The PO, in consultation with the FDO, should ascertain the nature of the confidential information that is likely to be disclosed in the disciplinary proceedings, and if any, submit such information together with the case details as stipulated in FDM 8-01(6) to SIP HQ P for staffing. If the defaulter's request for legal or "Friend" representation is subsequently approved by AA, SIP HQ P will reply direct to the defaulter using a notification letter, samples of which are at Annex Z-2 or Z-4, as appropriate. A letter as per annex Z-8 to the defaulter's legal representative or "Friend", is only required when confidential information is likely to be disclosed.

Annex Z-1

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.

Annex Z-2

[*File reference*] [*Tel No.*]

[*Fax No.*]

[*Date*]

[*Rank and name of defaulter*]
[*Post of defaulter*]
c/o [*Formation Commander of defaulter*]

Dear Sir/Madam*,

I write with reference to your letter/application of [*date*], seeking authorisation from the Appropriate Authority for you to be assisted by [*title and name, if available*], * [*solicitor or barrister*] at the disciplinary hearing instituted against you for [*name of charges*] under Police (Discipline) Regulations.

This serves to inform you that the [*name and office title of the Appropriate Authority*], the Appropriate Authority, has considered your application and the circumstances of this case, and is satisfied that legal representation for you at your hearing should be allowed. He/she* has decided to grant the authorisation sought.

Please be notified that confidential information *including [*please specify the nature of the confidential information*] will/may* be acquired by you or your legal representative in the course of these disciplinary proceedings. You or your legal representative may be prosecuted under the Official Secrets Ordinance (Cap. 521) and/or be sued for breach of confidence for any unauthorized disclosure of such confidential information. You are reminded to bring this to the attention of your legal representative.

For the avoidance of doubt, please note that the costs incurred in respect of legal representation and other legal services for you is entirely a matter for you, and will not be borne by the Government or the Hong Kong Police Force irrespective of the outcome of the disciplinary proceedings.

Yours faithfully,

(*name of staffing Inspector*)
for Commissioner of Police

c.c. [*Formation Discipline Officer*] (Attn : [*title and name of PO*])

* Delete as appropriate.

Annex Z-3

[*File reference*] [*Tel No.*]

[*Fax No.*]

[*Date*]

[*Rank and name of defaulter*]
[*Post of defaulter*]
c/o [*Formation Commander of defaulter*]

Dear Sir/Madam*,

I write with reference to your letter/application of [*date*], seeking authorisation from the Appropriate Authority for you to be assisted by [*title and name, if available*], *[*solicitor or barrister*] at the disciplinary hearing instituted against you for [*name of charges*] under Police (Discipline) Regulations.

This serves to inform you that the [*name and office title of the Appropriate Authority*], the Appropriate Authority, has considered the merits of your application for legal representation on the basis of the principles of fairness. After taking into account all the factors listed in paragraph 3 below, the Appropriate Authority considered that fairness does not require legal representation at your inquiry hearing. He/she* has decided not to grant the authorisation sought.

In arriving at the above decision, the Appropriate Authority has carefully considered the following factors: –

[Note: The appropriate authority will consider the merit of each application for legal representation for the defaulter on the basis of what fairness requires in the particular case. In considering individual request, the following factors will be taken into account, together with any other factor which may be relevant to the issue of whether fairness in the particular case requires legal representation for the defaulter:–

(a) grounds advanced by the officer;

(b) seriousness of the disciplinary charge(s) laid against the officer and the potential penalty;

(c) whether any points of law are likely to arise;

(d) the officer’s capacity to present his case at the hearing;

(e) existence of any procedural difficulties the officer may face at the hearing (e.g. the need to cross-examine witness/expert witness extensively, difficulties arising from the officer's disabilities, etc.);

(e) the need for reasonable speed to make the adjudication;

(f) the need for fairness among the individuals concerned; and

(i) other matters relevant to the case which would have been evident at the time although not specifically mentioned under the grounds advanced by the officer.]

Yours faithfully,

(*name of Staffing Inspector*)
for Commissioner of Police

c.c. [*Formation Discipline Officer*] (Attn : [*title and name of PO*])

* delete as appropriate

Annex Z-4

[*File reference*] [*Tel No.*]

[*Fax No.*]

[*Date*]

[*Rank and name of defaulter*]
[*Post of defaulter*]
c/o [*Formation Commander of defaulter*]

Dear Sir/Madam*,

I write with reference to your letter/application of [*date*], seeking authorisation from the Appropriate Authority for you to be assisted by [*title and name, if available*], at the disciplinary hearing instituted against you for [*name of charges*] under Police (Discipline) Regulations.

This serves to inform you that the [*name and office title of the Appropriate Authority*], the Appropriate Authority, has considered your application and the circumstances of this case, and is satisfied that representation for you by the aforesaid person at your hearing should be allowed. He/she* has decided to grant the authorisation sought.

Please be notified that confidential information *including [*please specify the nature of the confidential information*] will/may* be acquired by you or your defence representative in the course of these disciplinary proceedings. You or your defence representative may be prosecuted under the Official Secrets Ordinance (Cap. 521) and/or be sued for breach of confidence for any unauthorized disclosure of such confidential information. You are reminded to bring this to the attention of your defence representative.

Yours faithfully,

(*name of staffing Inspector*)
for Commissioner of Police

c.c. [*Formation Discipline Officer*] (Attn : [*title and name of PO*])
* Delete as appropriate.

Annex Z-5

[*File reference*] [*Tel No.*]

[*Fax No.*]

[*Date*]

[*Rank and name of defaulter*]
[*Post of defaulter*]
c/o [*Formation Commander of defaulter*]

Dear Sir/Madam*,

I write with reference to your letter/application of [*date*], seeking authorisation from the Appropriate Authority for you to be assisted by [*title and name, if available*], at the disciplinary hearing instituted against you for [*name of charges*] under Police (Discipline) Regulations.

This serves to inform you that the [*name and office title of the Appropriate Authority*], the Appropriate Authority, has considered the merits of your application for such representation on the basis of the principles of fairness. After taking into account all the factors listed in paragraph 3 below, the Appropriate Authority has decided not to grant the authorisation sought.

In arriving at the above decision, the Appropriate Authority has carefully considered the following factors :–

[Note: The appropriate authority will consider the merit of each application for the defence representation for the defaulter on the basis of what fairness requires in the particular case. In considering individual request, the following factors will be taken into account, together with any other factor which may be relevant to the issue:-

(a) possible confidential issues relating to the case;

(b) possibility of leakage of sensitive information;

(c) the defence representative being senior in rank to the Adjudicating Officer; and

(d) other matters relevant to the case which would have been evident at the time.]

Yours faithfully,

(*name of Staffing Inspector*)
for Commissioner of Police

c.c. [*Formation Discipline Officer*] (Attn : [*title and name of PO*])

* delete as appropriate

Annex Z-6a

RESTRICTED (STAFF)

MEMO

From :	Prosecuting Officer	***To :***	** JPO / Inspectorate Defaulter*
Ref. :	( ) ***in*** XX DR X/200X	***Thro'***	
Tel. No. :	aaaa aaaa ***Fax No***. xxxx xxxx	***Your Ref.***	***in***
E-mail	xxx-x@police.gov.hk	***dated :***	***Fax No. :***
Date :	2009-xx-xx	***Total Pages***	

Notification of Defaulter Proceedings
XX DR X/200X

By service of this memorandum you are officially informed that disciplinary charge(s) will be laid against you. A copy of the charge(s) is attached.

2. You are further notified that :

(a) A Superintendent of Police from FDAU will be appointed as the appropriate tribunal;

(b) The place of hearing will be the office of the Force Discipline Adjudication Unit, 13/F, Arsenal House, 1 Arsenal Street, Wanchai, Hong Kong; and

(c) The date of hearing will be communicated to you in due course [at least seven clear days after (i) the receipt of your acknowledgement receipt and reply memorandum or (ii) the expiry of the 14-days period as stipulated in paragraph 6].

3. You are reminded of your right to :

(a) object to the appropriate tribunal on the grounds of partiality or bias, vide **Regulation 6 / Regulation 18* of the Police (Discipline) Regulations [P(D)R];

(b) be given copies of or reasonable access to such police records and documents as you require and which are necessary for the preparation of your defence, vide **Regulation 7 / Regulation 19(3)*;

and

(c) have a defence representative in the light of what fairness in a particular disciplinary case requires, without being restricted by Regulations 9(11) and 9(12) [1] or Regulations 19(1) and 19(2) of the P(D)R [2]. Representation previously would have been allowed under Reg.9(11), 9(12), 19(1) and 19(2) of the P(D)R continues to be allowed and the related arrangements remain unchanged.

4. Should you wish to exercise your right :

(a) under **Regulation 6 / Regulation 18*, you must set out your grounds in full in writing and deliver them to the appropriate tribunal before the commencement of the hearing;

(b) under *Regulation 7 / Regulation 19(3), you must address the undersigned direct; and

(c) under paragraph 3(c) to have a defence representative [other than representation previously would have been allowed under the Reg.9(11), 9(12), 19(1) and 19(2) of P(D)R], your request will be considered on the basis of whether fairness in the disciplinary case against you requires such representation, and if such representation is allowed, how the disciplinary case should proceed in the light of the form of representation allowed. Please note in particular that whether such representation should be allowed is a matter of discretion, not of right, and furthermore neither the Commissioner nor the HKSARG is responsible for the costs incurred in respect of such representation, irrespective of the outcome of the disciplinary proceedings.

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[1] Reg 9(11) and 9(12) have been expressly declared by the Court of Final Appeal in FACV 9/2008 as unconstitutional, null, void and of no effect. Reg 9(11) provided that a defaulter who is a junior police officer might be represented by an inspector or other junior police officer of his choice, or any other police officer of his choice who was qualified as a barrister or solicitor. Subject to Reg 9(11), Reg 9(12) provided that no barrister or solicitor might appear on behalf of the defaulter.

[2] Under Reg 19(1) a defaulter who is an inspector may be represented by an inspector of his choice, or any other police officer of his choice who is qualified as a barrister or solicitor. Subject to Reg 19(11), Reg 19(12) provides that no barrister or solicitor may appear on behalf of the defaulter. Although not specifically dealt with in the judgment of FACV 9/2008, the Commissioner will now treat Reg 19(11) and 19(12) as ineffective.

5. You are also notified that in order to keep an accurate record of the proceedings, the hearing(s) will be audio-visual recorded and you are entitled to a copy of the audio-visual record at the end of the hearing(s).

6. You are requested to return the attached acknowledgement receipt and reply memorandum to the undersigned by fax ( ), to be received by the undersigned within 14 days of your receipt of this memorandum. You should seek confirmation of receipt of your fax. If the undersigned does not receive your response within this period, arrangement will be made with the Appropriate Tribunal to commence the disciplinary proceedings against you. You will be notified of the date and time of such proceedings in due course.

signed
( )
Prosecuting Officer

c.c. CP (Attn : SP Discipline)
Formation Discipline Officer

[Note: Regulations 6 and 7 apply to junior police officers, and Regulations 18 and 19(3) apply to inspectorate police officers. Please delete as appropriate.]*

Annex Z – 6b

RESTRICTED (STAFF)

MEMO

From :	**JPO / Inspectorate Defaulter*	***To :***	Prosecuting Officer
Ref. :	( ) ***in*** XX DR X/200X	***Thru':***	
Tel. No. :	aaaa aaaa ***Fax No***.	***Your Ref.*** ***in***	
E-mail		***dated :***	***Fax No. :***
Date :	2009-xx-xx	***Total Pages***	

Notification of Defaulter Proceedings
XX DR X/200X

Your memorandum under the reference of ( ) in XX DR X/200X dated 2009-xx-xx refers.

2. I acknowledge receipt of the above referenced memorandum and:

	Yes	No
(a)* [For a defaulter who is a junior police officer] I wish to seek representation by an inspector or other junior police officer of my choice; or any other police officer of my choice who is qualified as a barrister or solicitor.	☐	☐
* [For a defaulter who is an inspector] I wish to seek representation by an inspector of my choice; or any other police officer of my choice who is qualified as a barrister or solicitor .	☐	☐
(b) I wish to seek representation by a legal practitioner.	☐	☐
(c) I wish to seek representation by a person who does not fall within (a) or (b) above.	☐	☐

(*Please "✓" as appropriate*. If your answer is yes for (b) or (c), please complete paragraph 3).

3. My reasons as to how the fairness in the disciplinary case against me requires such representation are as follows :-

[*Note for Defaulter : Please state your full reasons as to how the fairness in the disciplinary case against you requires such representation. The factors to be taken into account in deciding whether fairness requires such representation to be permitted include but are not limited to 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. Each request will be determined on its own merits.]*

4. The particulars of the person whom I wish to act as my representative are as follows (if you have already decided who is to act as your defence representative) :-

Name:
Rank (if the defence representative is a police officer):
HKID No:
Occupation:
Relationship:
Address (Office or Home):
Telephone:

5. I have the following comments (if any) to make:

signed
(Defaulter)

c.c. CP (Attn : SP Discipline)
Formation Discipline Officer

Personal Data (Privacy) Ordinance (Cap. 486)

a) *The requested information will be used by the Commissioner for consideration of your request for defence representation and may be disclosed to other Government Departments for related purposes.*

b) *A data subject has the right to request to access to or correction of personal data provided on this memorandum in accordance with the Personal Data (Privacy) Ordinance. Such request must be made in writing to the officers designated for handling data access / correction request as promulgated in relevant departmental / internal circulars.*

SPECIMEN INSTRUCTIONS LETTER TO
ADJUDICATING OFFICER'S LEGAL ADVISER

[Date]

[Name of Solicitor/Counsel]
[Address]

Dear [ ],

Appointment as Legal Adviser to Adjudicating Officer in
Disciplinary Hearing under Police (Discipline) Regulations
Defaulter: [*Name of the defaulter*]
[*Disciplinary case no.*]

1. As discussed on [*date*], I am writing to confirm the basis upon which we would appoint you as the Legal Adviser to the Adjudicating Officer in the above disciplinary hearing held under Police (Discipline) Regulations (Cap. 232A) [the "P(D)R"] on [*date*] at [*time*] at [*venue*].

Duties

2. As the Legal Adviser to the Adjudicating Officer of this disciplinary hearing, your duties include the following :-

   (a) providing legal advice to the Adjudicating Officer on any points of law and on any matters relevant to the proper conduct of the hearing and consideration of the defaulter's case at the hearing; and

   (b) attending the hearings scheduled for this disciplinary proceedings.

Fees

3. You will be remunerated at a rate of HK$[ ] per hour for services rendered to the Adjudicating Officer. The fee includes all administrative expenses and disbursements.

Parties

4. [*Name of the defaulter*], [*rank*] of [f*ormation*], Hong Kong Police Force ("the Defaulter"**)** is charged as follows :-

   [*charge(s)*]

5. [N*ame and rank of Adjudicating Officer*] is appointed as the Adjudicating Officer to conduct the hearing.

6. [*Name*], [*rank/post of Prosecuting Officer*], is the Prosecuting Officer of the disciplinary hearing. [N*ame*], a *[*practising solicitor/practising barrister*], will provide legal advice to the Prosecuting Officer on matters in relation to the disciplinary hearing, present all the relevant evidence on the charge(s) to the Adjudicating Officer by calling witnesses and producing documentary evidence, and address the Adjudicating Officer on behalf of the Prosecuting Officer at the disciplinary hearing.

7. The Defaulter's application for assistance by a legal representative in the defence in the disciplinary hearing has been allowed. The Defaulter's legal representative, [*name*], is a *[*practising solicitor/practising barrister/a police officer qualified as solicitor/barrister*].

Disciplinary Procedures

8. Under the police disciplinary system, formal disciplinary action is conducted in accordance with the P(D)R which was made by the Chief Executive in Council under Section 45 of the Police Force Ordinance (Cap. 232). The hearing procedures are supplemented by the "Force Discipline Manual" ("the FDM").

9. The P(D)R and the FDM are applicable to all police officers of or below rank of Chief Inspector of Police. For officers of Superintendent rank or above, they are subject to disciplinary provisions in the Public Service (Administration) Order ["the PS(A)O"].

10. *[When it appears to any police officer of or above the rank of sergeant that a disciplinary charge or charges should be laid against a junior police officer (i.e. a police officer below the rank of inspector) subordinate to him in rank, appropriate charge(s) will be entered in a document entitled defaulter report. The defaulter report shall be the records of the case against such police officer. [Regulation 5 of the P(D)R]]

    *[When it appears to a senior police officer (i.e. a chief superintendent, assistant commissioner or senior assister commissioner) that a disciplinary charge or charges should be laid against an inspector, he may direct that

the charge(s) be heard by an appropriate tribunal; or apply to the Commissioner of Police ("the Commissioner) to appoint a board to be the appropriate tribunal. [Regulation 17 of the P(D)R]]

11. The Defaulter in this case is *[a junior police officer/an inspectorate officer]. The disciplinary procedures set out in *[Part II / III] of the P(D)R are applicable in this disciplinary hearing.

12. The Adjudicating Officer of a disciplinary case is appointed to conduct the disciplinary hearing, to ascertain the facts of the case, to determine whether the facts necessary to support the charge(s) have been established, to give a judgment for the charge(s), to give an award if the charge(s) are proved and to ensure that the defaulter is given a fair and impartial hearing. The Adjudicating Officer must deal with the issues of standard of proof and burden of proof in his judgment.

13. A defaulter's legal representative normally presents the defaulter's evidence, questions the witnesses and makes address(es) to the Adjudicating Officer, but the defaulter may be permitted to do so as well.

14. Once a judgment has been made, the defaulter will be called before the Adjudicating Officer who will read out his judgment and announce his finding(s) to each charge. The judgment will be recorded in the Record of Proceedings. The recording of the judgment is important, as it will form the basis of any appeal lodged by the defaulter.

15. If a 'guilty' finding is reached, the Adjudicating Officer will invite the defaulter to make a statement in mitigation before making awards. It is advisable for the Adjudicating Officer to adjourn the hearing in order for him to consider all relevant factors before deciding on the level of awards.

16. The defaulter report will then be submitted to the *[Senior Police Officer and Force Discipline Officer / Deputy Commissioner (Management)] for confirmation or variation.

17. *[A senior police officer has a supervisory role over an adjudicating officer of any disciplinary proceedings against a junior police officer. Under Regulation 14 of the P(D)R, a senior police officer may confirm or vary an adjudicating officer's finding or award within 14 days from the date of the finding or award. The senior police officer is required to review the defaulter report and to ensure that the proceedings have been conducted in a fair, impartial and reasonable manner and in accordance with the rules of natural justice. It must be noted that the senior police officer has to complete his statutory duty required under Regulation 14 of the P(D)R within 14 days from the date of the finding(s), not award, being announced. It is therefore imperative that the Adjudicating Officer gives

his award promptly so that the senior police officer may have a careful consideration on the award before the 14 days' period expires. The senior police officer shall announce personally or communicate in writing to the defaulter the action taken by him and shall forward the defaulter report to the Force Discipline Officer for confirmation or variation.

18. The Senior Police Officer of this case is [*name, rank and post of the Senior Police Officer.*]

19. For detailed procedures, please refer to the P(D)R and the FDM (Chapters [nos.] (Items 1 to 2 of the List of Materials).

Points to Note

Independence and Impartiality of the Hearing

20. To ensure the independence and impartiality of the disciplinary hearing, the Prosecuting Officer/the Prosecuting Officer's legal representative and the Adjudicating Officer should not discuss the evidence to be presented at the disciplinary hearing, nor should they hold any discussion during the hearing except in the presence of the defaulter/the defaulter's legal representative.

Natural Justice

21. The Appropriate Tribunal is not a court of law, and the disciplinary hearing should be conducted without undue formality. The Adjudicating Officer is not bound by any rules of evidence, and may inquire into any matter and take into account any evidence or information which it considers relevant.

22. Nevertheless, the hearing has to be conducted in accordance with the principles of natural justice, including the rule against bias and the right to a fair hearing.

23. The Court of Final Appeal in *Lam Siu Po v. Commissioner of Police* [2009] 4 HKLRD 575 (Item 3 of the List of Materials) held that Article 10 of the Bill of Rights is engaged in disciplinary proceedings if the typical award for the offence that the defaulter faces being "normally terminatory". Regulations 9(11) and 9(12) of the P(D)R applicable to junior police officers have been expressly declared by the Court of Final Appeal as unconstitutional, null, void and of no effect as they excluded the possibility of the tribunal exercising a discretion on whether fairness requires legal representation to be permitted. The applicant was held to have been deprived of a fair hearing in accordance with Article 10 of the Bill of Rights and the disciplinary proceedings were held to be unlawful.

Although Regulations 19(11) and 19(12) of the P(D)R which are similar to Regulations 9(11) and 9(12) but applicable to inspectorate officers were not specifically dealt with in *Lam Siu Po*'s case, the Commissioner now treats Regulations 19(11) and 19(12) as ineffective.

24. Save for those provisions prescribed in the P(D)R, the procedures of the disciplinary hearing stated in the FDM are meant to be followed generally and applied flexibly as required by the principles of natural justice and having regard to the circumstances of each individual case.

Standard of Proof

25. The Court of Final Appeal in *A Solicitor (24/07) v. Law Society of Hong Kong* [2008] 2 HKLRD 567 (Item 4 of the List of Materials) held that the standard of proof for disciplinary proceedings in Hong Kong is the preponderance of probability. The more serious the act or omission alleged, the more inherently improbable must it be regarded. The more inherently improbable it was regarded, the more compelling the evidence needed to prove it.

26. The Court of First Instance, in *Rowse v. Secretary for Civil Service* [2008] 5 HKLRD 217 (Item 5 of the List of Materials) in which the applicant challenged a decision made under Section 10 of the PS(A)O by way of judicial review, also held that the preponderance of probability standard should be applied.

27. Please refer to Annex B of the FDM for elaboration.

Role of the Legal Adviser to the Adjudicating Officer

28. The duty to ensure the proper conduct of the hearing, find facts, determine whether the charge(s) against the defaulter are established and give an award if the charges are proved remains entirely with the Adjudicating Officer. The Legal Adviser to the Adjudicating Officer is engaged to advise the Adjudicating Officer on points of law and on any matters relevant to the proper conduct of the hearing and consideration of the defaulter's case.

29. The Adjudicating Officer may invite the Legal Adviser to advise on any points of law and on any matters relevant to the proper conduct of the hearing and consideration of the defaulter's case. The defaulter/legal representative and the Prosecuting Officer's legal representative should be allowed to address the Adjudicating Officer on the advice given by the Legal Adviser, if they so wish.

30. During the disciplinary hearing, if the Legal Adviser wishes to address the Adjudicating Officer and/or raise questions to the defaulter/the defaulter's legal representative or the Prosecuting Officer's legal representative, he should seek the permission of the Adjudicating Officer to do so. If the Adjudicating Officer grants such permission, the defaulter/the defaulter's legal representative and the Prosecuting Officer's legal representative should be allowed to address the Adjudicating Officer on the points raised by the Legal Adviser and/or respond to the Legal Adviser's questions, if they so wish.

31. The defaulter/his legal representative will always have the "last word" at the disciplinary hearing. In case the Legal Adviser is allowed to address the Adjudicating Officer after the defaulter/legal representative has made the final address, the defaulter/his legal representative must be given an opportunity to respond to the point(s) raised by the Legal Adviser, should he so wish, before the disciplinary hearing is closed.

32. Discussions between the Adjudicating Officer and the Legal Adviser should be done at the hearing in the presence of the defaulter/his legal representative and the Prosecuting Officer and his legal representative.

33. In the event that the Adjudicating Officer considers it necessary to seek any advice from the Legal Adviser after the conclusion of the hearing, the Adjudicating Officer should re-convene the hearing and seek the required advice in the presence of the defaulter/his legal representative and the Prosecuting Officer and his legal representative. The defaulter/his legal representative should be given an opportunity to respond to the advice given by the Legal Adviser.

<u>Confidentiality</u>

34. Any document or information acquired by you in the course of these disciplinary proceedings are to be used solely for the purpose of performing your duties as Legal Adviser to the Adjudicating Officer and are not to be disclosed to any other parties unless with the prior written consent of the Commissioner or required by the law.

35. Any document or information acquired by you in the course of these disciplinary proceedings will not be copied except for performing your duties as Legal Adviser to the Adjudicating Officer.

36. Any document or information acquired by you in the course of these disciplinary proceedings and any reproduced copies made by you will be returned to Hong Kong Police Force once they are no longer required for performing your duties as Legal Adviser to the Adjudicating Officer.

Correspondence

37. We will send all correspondence to you by fax, post, e-mail, hand or courier as the circumstances require. [*Name of Staffing Inspector for Defence Representation*] of the Personnel Wing, Hong Kong Police Force at [*tel no*.] will liaise with you for a briefing on the hearing procedures.

Accounting arrangement

38. Please send us your fee notes to this Headquarters [on a monthly basis/as soon as the case has been completed].

39. We should be grateful if you would confirm that the above terms are accepted.

Yours sincerely,

([*name of SSP HQ P*])
for Commissioner of Police

* Delete as appropriate

List of Materials
for Disciplinary Hearings under the Police (Discipline) Regulations

1. Police (Discipline) Regulations (Cap. 232A)

2. Force Discipline Manual (Chapters (nos))

3. *Lam Siu Po v. Commissioner of Police* [2009] 4 HKLRD 575

4. *A Solicitor (24/07) v. Law Society of Hong Kong* [2008] 2 HKLRD 567

5. *Rowse v. Secretary for Civil Service* [2008] 5 HKLRD 217

Annex Z-8

[*File reference*] [*Tel No.*]

[*Fax No.*]

[*Date*]

[*Name of legal representative/friend*]
[*Address*]

Dear Sir/Madam*,

I write with reference to the letter/application of [*rank and name of defaulter*] dated [*date*], seeking authorisation from the Appropriate Authority for [*rank and name of defaulter*] to be assisted by you at the disciplinary hearings instituted against him/her for [*name of charges*] under Police (Discipline) Regulations.

This serves to inform you that the [*name and office title of the Appropriate Authority*], the Appropriate Authority, has considered the application and the circumstances of this case. He/she* has decided to grant the authorisation sought.

Please be notified that confidential information *including [*please specify the nature of the confidential information*] will/may* be acquired by you in the course of these disciplinary proceedings. You may be prosecuted under the Official Secrets Ordinance (Cap. 521) and/or be sued for breach of confidence for any unauthorized disclosure of such confidential information.

Yours faithfully,

(*name of staffing Inspector*)
for Commissioner of Police

c.c. [*Formation Discipline Officer*] (Attn : [*title and name of PO*])
[Rank and name of defaulter]

* Delete as appropriate.

Annex Z-9

[*Date*]

[*Name of the "Friend"*],
c/o [*Rank and name of defaulter*] or [*Address of the "Friend*]

Dear Sir/Madam,

Disciplinary Hearing under the Police (Discipline) Regulations

The Chief Superintendent Conditions of Service and Discipline of the Hong Kong Police Force has received an application from [rank and name of defaulter] to be assisted by you in his/her defence in the disciplinary hearing [DR reference] against him/her for [name the disciplinary offences] under the Police (Discipline) Regulations (Cap. 232 sub. leg. A, Laws of Hong Kong). For consideration of this application, your consent for the Criminal Records Bureau of the Hong Kong Police Force to release your criminal record, if any, to the above-mentioned Chief Superintendent is hereby requested. If you wish to give your consent, please complete and sign the attached consent form and return it to me on or before [deadline for return]. If I do not receive the consent form from you by this date, I shall assume that you are not willing to give consent.

You are free to decide whether to give your consent. However, if you refuse to give consent, this would be one of the relevant factors which the Chief Superintendent will take into consideration before deciding whether the application from [rank and name of the defaulter] should be approved.

For enquiries on this matter, please contact the undersigned on [*telephone no.*].

By copy of this letter, the defaulter is required to sign as a witness on the consent form.

Yours faithfully,

([*name of the Staffing Inspector*])
for Commissioner of Police

Encl.
c.c. Rank and name of defaulter

Annex Z-10

CONSENT FORM
同意書

I understand that Chief Superintendent Conditions of Service and Discipline of the Hong Kong Police Force has received an application from [rank and name of defaulter] to be assisted by me in his/her defence in the disciplinary hearing [DR reference] against him/her for [name the disciplinary offences] under the Police (Discipline) Regulations (Cap. 232 sub. leg. A, Laws of Hong Kong).

For consideration of this application, I now give consent for the Criminal Records Bureau of the Hong Kong Police Force to release my criminal record (including spent convictions under the Rehabilitation of Offenders Ordinance, Cap 297), if any, to the above-mentioned Chief Superintendent. I also agree to my fingerprint impressions being taken by the Police in connection with this application, if required for the purpose of verifying my criminal record.

I understand that it is not mandatory for me to consent to release of my criminal records (if any) and to provide fingerprint impressions, but if I refuse the refusal would be one of the factors to be considered in relation to the application made by [name and rank of defaulter]. I also understand that my personal data being collected pursuant to this consent will only be used for consideration of the application and as a record of the application, and that such personal data will be erased if they are no longer required for such purposes.

My personal particulars are as follows:-

Name
姓名

Date of Birth
出生日期

HK Identity Card No.
香港身份證號碼 ( )

Passport No.
護照編號

Chinese Commercial Code Nos.
中文商業電碼 / / /

（as recorded on the applicant's HK Identity Card – where applicable）
（按申請人香港身份證上的紀錄－如有的話）

Place of Birth
出生地點

_____
(Signature)
簽署

Date
日期

Witnessed by
見證人簽署 _____

Posting
駐守單位

Rank, UI No. & Name
職級 編號及姓名

第 8 章

按《警察(紀律)規例》進行有法律及其他類別代表的紀律研訊程序

本章旨在概述有關在修訂《警察(紀律)規例》(規例)之前，違紀人員要求委派辯方代表，以及進行涉及法律代表的紀律聆訊的臨時程序。

8-01 要求委派辯方代表的程序

批核當局

2. 總警司(服務條件及紀律)將擔任批核當局，負責考慮違紀人員提出有關在紀律聆訊中，委派具有法律專業資格人員或「朋友」(即並非法律執業者)擔任辯方代表的申請。

3. 處理違紀人員提出有關委派具有法律專業資格人員或「朋友」擔任辯方代表的申請，不會由人事部服務條件及紀律科轄下的紀律組負責，而是由人事部總部負責。總部人員會把所需文件提交批核當局，以供考慮。

4. 爲避免任何偏頗情況，批核當局不得曾經參與過對該違紀人員進行紀律處分的決定，其後也不得參與審核由他擔任批核當局的違紀研訊。

覆核當局

5. 人事及訓練處處長將擔任覆核當局。假如違紀人員不滿批核當局的決定，可向人事及訓練處處長提出申請，要求覆檢批核當局的決定。

現正進行的違紀研訊

6. 當違紀人員要求委派法律[1] 或其他類別的代表〔以前按規例第 9(11)、9(12)、19(1)和 19(2)批准的代表除外〕時，指定的主控人員將代單位紀律主任(或高級警務人員如違紀人員是督察級人員)備妥各項所需的資料(即控罪書副本、案情摘要和違紀人員的服務記錄摘要)，以供批核當局決定是否批准違紀人員有關委派法律代表的要求。在作出決定時，批核當局會參考以下因素，考慮是否批准因公平需要而委派該等代表：

(a) 違紀人員提出的理據；

(b) 控罪的嚴重性和可能的刑罰。而會導致終止服務處分、勒令辭職或降級的個案通常會獲准委派法律代表；

(c) 是否會引起任何法律論點的爭議；

(d) 違紀人員在聆訊中爲其個案辯護的能力；

(e) 任何預見的程序上困難；

(f) 在合理時間內完成審訊的需要；以及

(g) 顧及各有關人士的公平需要。

7. 有關考慮法律代表申請的指引，請參閱附件Z-1。有關批准或拒絕有關申請的信件樣本，請參閱附件Z-2和Z-3。

8. 假如指稱的違紀行爲一旦被證實，可能會導致有關人員被革職、迫令退休或勒令辭職，或被降級，則可能的刑罰的嚴重程度便肯定成爲違紀者被批准委派法律代表的重大有利因素。

9. 至於委派「朋友」擔任代表的要求，批核當局會根據個別個案的公平需要來考慮各宗申請。批核當局還會考慮其他因素，包括個案可能涉及的機密問題、洩露敏感資料的可能性，以及該名「朋友」的職級會否較主審人員爲高等。此外，處方或須查核該名「朋友」的身分，以豁除聲譽或品格欠佳的人士。如有須要查核「朋友」

[1] 法律代表是指由《法律執業者條例》(第 159 章)第 2 條釋義中所述合資格擔任大律師或律師的人士擔任代表：
「大律師」(barrister) 指在大律師登記冊上登記爲大律師，並在此時沒有被暫時吊銷執業資格的人；
「律師」(solicitor) 指在律師登記冊上登記，並在此時沒有被暫時吊銷執業資格的人。

的刑事紀錄時，可使用附件Z-9的信件樣本及Z-10的同意書樣本。該等聲譽或品格欠佳的人士或包括已知的三合會會員、已知的罪犯或參與或與可疑活動和業務有關的人士，或出席紀律研訊可能危及在呈示機密資料的保密性的人士，以及影響研訊可信程度的人士。有關批准或拒絕申請的信件樣本，請參閱附件Z-4和Z-5。

10. 批核當局的決定將以便箋方式通知違紀人員(副本抄送單位紀律主任或高級警務人員如違紀人員是督察級人員)，讓其獲悉其提出有關委派法律或其他類別代表的要求是否獲得批准。如果合適的話，便箋內還會包括有關要求不獲批准的原因。

11. 假如違紀人員不滿批核當局不批准其有關委派法律或其他類別代表的要求，可以向人事及訓練處處長申請覆檢批核當局的決定，並提交申述書，說明自己的理據。

12. 假如批核當局 (或經人事及訓練處處長覆核後)決定：

(a) 不批准有關委派法律代表的要求；或

(b) 批准或拒絕有關委派「朋友」代表的要求；

單位紀律主任(或高級警務人員如違紀人員是督察級人員)會向警務處助理處長(人事)〔高級警司(總部)(人事)〕提出要求，以委任一名主審人員進行聆訊。

13. 假如批核當局 (或經人事及訓練處處長覆核後)決定批准有關委派法律代表的要求，則單位紀律主任(或高級警務人員如違紀人員是督察級人員)會向警務處助理處長(人事)〔高級警司(總部)(人事)〕提出要求，以委任主審人員進行聆訊。此外，高級警司(總部)(人事)會與律政司聯絡，以安排控方的法律代表和主審人員的法律顧問。

14. 倘違紀人員於主審人員面前提出委派法律代表或由「朋友」擔任代表的要求，(而有關要求已被批核當局和人事及訓練處處長拒絕，或違紀人員先前未曾提出過有關要求)，主審人員須在研訊記錄中記錄違紀人員的要求，並要求違紀人員提供原因。然後，主審人員須要求主控人員提供所需資料，以便考慮該等代表是否應獲批准，並向批核當局作出建議(假如違紀人員先前未曾提出過有關要

求)，或向人事及訓練處處長作出建議(假如有關要求先前曾被拒絕)，並把該項決定的副本抄送給違紀人員。批核當局或人事及訓練處處長在作出決定時，須重視主審人員的建議，因爲主審人員應處於最佳位置來判斷違紀者在其將展開研訊的公平需要是否須委派法律或其他類別的代表。另一方面，假如違紀人員沒有要求委派法律代表，但在聆訊期間有資料或證據(包括但不限於附件Z-1所述的因素)顯示有此需要，則主審人員應建議違紀人員考慮要求委派法律代表。如果違紀人員最後提出有關要求，主審人員應向批核當局作出有關建議。主審人員也應在研訊記錄中記錄此事。

15. 假如違紀人員不滿主審人員的建議，而他先前又未曾提出過有關要求，則可向批核當局提交申述書 (如果有關要求先前曾被拒絕，違紀者須把申述書提交人事及訓練處處長)以供考慮。

新的違紀研訊

16. 當單位紀律主任(或高級警務人員如違紀人員是督察級人員)決定向有關人員開展紀律研訊時，指定的主控人員將代單位紀律主任(或高級警務人員如違紀人員是督察級人員)於研訊前向違紀人員送達以下文件：

(a) 「違紀研訊通知」(附件Z-6)；

(b) 控罪書副本；以及

(c) 違紀人員在紀律聆訊中進行錄音的注意事項(附件I-1)。

17. 指定的主控人員會要求違紀人員確認收妥有關文件，並通知違紀人員其享有與紀律聆訊有關的權利。此外，主控人員會邀請違紀人員考慮是否希望委派辯方代表。若是，他希望委派哪一類別的辯方代表。

18. 假如違紀人員希望委派《警察(紀律)規例》第9(11)、9(12)、19(1)和19(2)條先前所豁除的辯方代表，則指定的主控人員將代表單位紀律主任(或高級警務人員如違紀人員是督察級人員)爲批核當局備妥各項所需的資料(即控罪書副本、案情摘要和違紀人員的服務記錄概要)，以便批核當局考慮是否因公平需要而批准違紀人員提出有關委派該等辯方代表的要求。

19. 在作出決定時，批核當局會參考上文第6段所列的各項因素，並會在有需要時從主控人員取得額外資料。批核當局的決定會以便箋方式通知違紀人員(副本抄送單位紀律主任或高級警務人員如違紀人員是督察級人員)。

20. 假如違紀人員不滿批核當局的決定不批准其委派法律或其他類別代表的要求，可以向人事及訓練處處長申請覆檢批核當局的決定並提交申述書，說明自己的理據。

21. 假如批核當局 (或經人事及訓練處處長覆核後)決定：

(a) 拒絕有關委派法律代表的要求；或

(b) 批准或拒絕有關委派「朋友」代表的要求；

單位紀律主任(或高級警務人員如違紀人員是督察級人員)會向警務處助理處長(人事)〔高級警司(總部)(人事)〕提出要求，以委任一名主審人員進行聆訊。

22. 假如批核當局 (或經人事及訓練處處長覆核後)決定批准有關委派法律代表的要求，則單位紀律主任(或高級警務人員如違紀人員是督察級人員)會向警務處助理處長(人事)〔高級警司(總部)(人事)〕提出要求，以委任主審人員進行聆訊。此外，高級警司(總部)(人事)會與律政司聯絡，以安排控方的法律代表和主審人員的法律顧問。

23. 倘違紀人員於主審人員面前提出委派法律代表或由「朋友」擔任代表的要求，(而有關要求已被批核當局和人事及訓練處處長拒絕，或違紀人員先前未曾提出過有關要求)，主審人員須在研訊記錄中記錄違紀人員的要求，並要求違紀人員提供原因。然後，主審人員須要求主控人員提供所需資料，以便考慮該等代表是否應獲批准，並向批核當局作出建議(假如違紀人員先前未曾提出過有關要求)，或向人事及訓練處處長作出建議(假如有關要求先前曾被拒絕)，並把該項決定的副本抄送給違紀人員。批核當局或人事及訓練處處長在作出決定時，須重視主審人員的建議，因爲主審人員應處於最佳位置來判斷違紀者在其將展開研訊的公平需要是否須委派法律或其他類別的代表。另一方面，假如違紀人員沒有要求委派法律代表，但在聆訊期間有資料或證據(包括但不限於附件Z-1所述的因素)

顯示有此需要，則主審人員應建議違紀人員考慮要求委派法律代表。如果違紀人員最後提出有關要求，主審人員應向批核當局作出有關建議。主審人員也應在研訊記錄中記錄此事。

24. 假如違紀人員不滿主審人員的建議，而他先前又未曾提出過有關要求，則可向批核當局提交申述書 (如果有關要求先前曾被拒絕，違紀者須把申述書提交人事及訓練處處長) ，以供考慮。

8-02 進行有法律代表出席的聆訊

規例及《警隊紀律手冊》(紀律手冊)載列就總督察或以下職級的人員進行紀律研訊(包括聆訊)的程序。然而，規例及紀律手冊現時並無訂明主審人員可有法律顧問在場或主控人員可有法律代表在場，亦無訂明這些法律顧問及代表可在紀律聆訊中提問／陳詞。如違紀人員獲許委派法律代表，進行有關聆訊的指引載於下文各段。這些指引會根據日後有關經驗而作出檢討或修改。

出席聆訊人士的角色和權利

2. 除主審人員、違紀人員及證人外，出席聆訊的其他人士通常如下：－

有關各方人仕	身分、角色和權利
主控人員	▪ 由違紀人員犯案時所駐守單位的單位紀律主任或高級警務人員所委任。 ▪ 代表「控方」，負責有關聆訊的後勤事務。 ▪ 可向其法律代表發出指示／與其法律代表討論。由於其訟辯角色會由法律代表擔當，主控人員不會詰問違紀人員、違紀人員的法律代表及證人。除非獲邀陳詞，否則主控人員不會向主審人員陳詞。
主控人員的法律代表	▪ 通常是律政司委聘的外判律師。 ▪ 代表主控人員提出指控違紀人員的個案(包括個案背景和其擬提出的證人及文件證明)；如違紀人員(或其法律代表)向主審人員陳詞，詰問違紀人員；訊問、盤問及覆問證人；以及向主審人員陳詞。
違紀人員的法律代表	▪ 在聆訊中協助違紀人員。 ▪ 提出證據、訊問／盤問／覆問證人，以及代表違紀人員向主審人員陳詞(註：違紀人員亦可在研訊中行使這些權利)。 ▪ 不可就控罪作出答辯。違紀人員必須自己就控罪作出答辯。
主審人員的法律顧問	▪ 通常是香港警務處委聘的外判律師(指示信樣本載於附件 Z-7)。 ▪ 在聆訊中就法律論點、任何有關妥善進行聆訊的事宜和對違紀人員個案的考慮，向主審人員提供意見。就此，他可在獲得主審人員許可的情況下，向主控人員的法律代表、違紀人員及

	其法律代表提問，以及向主審人員陳詞。

注意事項

3. 關於有法律代表出席的聆訊，其程序方面需注意的事項如下：

(a) 主審人員仍負責確保聆訊妥善進行、對事實作出裁斷、裁定違紀人員被指稱觸犯的些違紀控罪是否成立，以及在有關控罪證明屬實時作出判處；

(b) 在聆訊期間，主審人員可隨時就法律論點、任何有關妥善進行聆訊的事宜和對違紀人員個案的考慮而邀請其法律顧問向其陳詞。違紀人員及其法律代表和主控人員應可按其意願獲許就主審人員法律顧問所提出的意見向主審人員陳詞；

(c) 在聆訊期間的任何時間，主審人員的法律顧問如擬向主審人員陳詞，以及／或擬向主控人員及／或違紀人員或他們的法律代表提問，應首先徵求主審人員的許可。如主審人員給予許可，違紀人員和主控人員及違紀人員的法律代表可按他們的意願就主審人員法律顧問所提出的觀點及／或就其提問作答而向主審人員陳詞；

(d) 違紀人員及／或其法律代表在聆訊中有「最後發言機會」。在違紀人員或其法律代表作最後陳詞後，如主審人員的法律顧問獲許向主審人員陳詞，違紀人員或其法律代表在聆訊結束前，可按其意願獲給予機會回應主審人員法律顧問所提出的論點；以及

(e) 主審人員與其法律顧問之間的討論，應在聆訊中違紀人員及其法律代表和主控人員及其法律代表在場的情況下進行。如主審人員在聆訊結束後認爲有需要徵詢其法律顧問的意見，便應重新召開聆訊，在違紀人員及其法律代表和主控人員及其法律代表在場的情況下徵詢所需的意見。

4. 上述指引旨在確保按公平需要而准許違紀人員委派法律代表的紀律研訊能妥善進行。在獲許委派法律代表的個案中，主審人員的良好做法是在聆訊開始時告知參與聆訊的各方有關上文第 3(a)至(e)段所述的大原則，並在聆訊進行前處理違紀人員及／或其法律代表提出的意見。

8-03 進行有「朋友」代表出席的聆訊

一般而言，進行有「朋友」代表出席的聆訊，會與以前按規例第 9(11)、9(12)、19(1)及 19(2)條許可有辯方代表出席的聆訊相若。主要的分別在於根據規例而須接受紀律研訊的違紀人員，會由「朋友」，而非警務人員，全面擔當辯方代表的所有角色。他可在聆訊中協助違紀人員、提出證據、訊問／盤問／覆問證人，以及代表違紀人員向主審人員陳詞(註：違紀人員亦可在紀律研訊中行使這些權利)。不過，「朋友」不可就控罪作出答辯。違紀人員必須自己就控罪作出答辯。

8-04 違紀人員的辯護代表未經授權而披露機密資料

爲保護那些可能會被違紀人員及其法律代表或「朋友」在紀律研訊程序中取得的機密資料，他們將會獲發給載於附件Z-2、附件Z-4或附件Z-8(視乎何者適用而定)的通知書，列明機密資料的性質，以提醒他們根據《官方機密條例》(香港法例第521章)，任何未經授權而披露機密資料的法律後果及／或洩漏機密所引致的訴訟。

2. 主控人員在徵詢其單位紀律主任的意見後，應檢視其個案中可能會在紀律研訊程序時所披露的機密資料。如有的話，應把有關資料連同《紀律手冊》第8-01(6)條所規定的案件詳情提交與高級督察(總部)(人事)處理。如果違紀人員所提出有關委派法律代表或「朋友」的要求其後獲批核當局批准，則高級督察(總部)(人事)會以通知書直接回覆違紀人員。有關通知書樣本載於附件Z-2或Z-4(視乎何者適用而定)。只有在那些有可能會披露機密資料的個案中，高級督察(總部)(人事)才須向違紀人員的法律代表或「朋友」發出載於附件Z-8的信件。

附件 Z-1

有關應否准許違紀人員在紀律聆訊委派法律代表的考慮因素的指引

原則

在香港交易所有限公司訴新世界發展有限公司[2006]2 HKLRD 518 一案中，終審法院認爲根據普通法的立場，審裁體有酌情權可因應公平需要而決定是否批准委派法律代表。法院引用並確認一項陳述，該陳述表明確定紀律審裁體在行使酌情權時，經考慮廣泛的因素(包括歐洲法庭曾提及的因素)後，須按自然公正原則決定，到審裁體席前的人士是否需要法律代表。該些因素包括：控罪的嚴重性和可能的刑罰；會否引起任何法律論點的爭議；有關人士爲其個案辯護的能力；程序上的困難；在合理時間內完成審訊的需要；以及顧及各有關人士的公平需要。上列的因素並非詳盡無遺。法院認爲這些因素無法盡錄，而普通法的公平原則應靈活運用，審裁體須合理地回應每一個案的公平原則要求、平衡各方的利益，以及隨後考慮可對法律代表施加若干相應的限制(如有的話)。

2. 終審法院在 2009 年 3 月 26 日於終院民事上訴 2008 年第 9 號案的判決中曾重述這些原則。

3. 根據上述司法判決，如有人在批核當局或審裁體席前提出委派法律代表的要求，批核當局或審裁體必須考慮有關事宜，並須在考慮時顧及每一個案的實情、上述各項因素，以及其他可能與違紀人員是否需要法律代表才符合公平聆訊原則的相關因素。這份指引所列各項可作考慮的因素，已顧及終審法院的判決、公務員事務局的經驗和警隊在紀律研訊方面的經驗，故有助批核當局或有關紀律審裁體考慮該等事宜。

可供考慮的因素

(A) 違紀人員提出的理據

4. 違紀人員因擬在紀律聆訊中委派法律代表而提出的任何相關理由，必須被納入考慮。下文(B)至(G)部也許已涵蓋大部分違紀人員會提出的理由。然而，有關的考慮因素無法盡錄。此外，爲公平起見，與個案顯然有關的事宜亦應納入考慮，即使違紀人員並無特別提及該等事宜。

(B) 控罪的嚴重性和可能的刑罰

5. 在有關紀律研訊中，控罪的嚴重性和可能的刑罰是終審法院在*終院民事上訴 2008 年第 9 號*一案中裁定《香港人權法案》第十條適用的主要原因。在考慮公平的問題時，法庭不大可能會輕視這項因素。因此，假如違紀人員正面對終止服務的懲罰時，這便會成爲一項在實質上有利於批准委派法律代表的因素。

6. 違紀人員一旦罪名成立，而其不當行爲或會被處以十分嚴重的非終止服務懲罰(例如：降級)，這亦是對委派法律代表有利的因素。但是，若果紀律聆訊在那些不會導致終止服務或十分嚴重的非終止服務懲罰並不會阻止有關方面行使酌情權，批准委派法律代表。所有相關因素必須獲得考慮。

(C) 是否可能引起任何法律論點的爭議

7. 假如在紀律聆訊中可能引起任何法律論點的爭議，這亦是對批准委派法律代表有利的因素，但這並不表示違紀者一定會獲准委派法律代表。例如，倘違紀人員所提出的論據已經被法庭作出判定，或有關證據的技術規則不適用於紀律聆訊的論據，則未必是強烈理據支持委派法律代表。

(D) 違紀人員為其個案作出辯護的能力

8. 違紀人員爲其個案辯護時或會遇到困難，例如他／她正處於某種健康狀況、有關控罪十分複雜等。

(E) 程序上的困難

9. 一般而言，紀律研訊的進行不會涉及繁複的程序。因此，不大可能會出現明顯的程序困難，但有關方面應顧及違紀人員所指出的任何具體困難。

(F) 在合理時間內完成審訊的需要

10. 紀律研訊旨在通過有效和快捷的內部研訊處理紀律問題。不必要的法律代表或會大大加長有關研訊程序或使之複雜化。不過，假如可能會出現真正的法律爭議，則法律代表便可能會在研訊程序中提供協助。

(G) 顧及各有關人士的公平需要

11. 假如檢控官是具有法律專業資格的人士，爲公平起見，違紀人員應獲准委派法律代表。爭辯中所涉及事實問題的複雜程度需要詳細的盤問，或涉及專家或高級官員作爲證人等可能會屬於這一類。必須經常緊記一點，批核當局或審裁體必須就每宗個案的公平需要作出合理回應。

限閱文件(人事)

附件Z-2

[檔案編號]

[電話號碼]

[傳真號碼]

[*違紀人員的職級及姓名*]
[*違紀人員的職位*]
經：[*違紀人員所屬單位的指揮官*]轉交

先生／女士*：

[*日期*]的來信／申請已經收悉。你在信／申請中請求批核當局批准由*[*律師或大律師*][*職銜及姓名(如可提供)*]在根據《警察(紀律)規例》指控你[*控罪名稱*]而召開的紀律聆訊中協助你。

本函旨在通知你，作爲批核當局的[*批核當局的職銜及姓名*]已考慮你的申請和本案情況，並信納應該批准你在聆訊中委派法律代表。他／她*已決定批准有關申請。

請注意，在這紀律研訊過程中，你或你的法律代表將會／或會*取得機密資料，*包括[*請說明機密資料的性質*]。假如你或你的法律代表未經授權而披露有關資料，則你或你的法律代表或會因《官方機密條例》(香港法例第521章)的規定而遭受檢控，以及／或因洩漏機密而被起訴。現提醒你促使你的法律代表注意這一點。

爲免生疑問，請注意一點，你委聘法律代表和使用法律服務所招致的開支完全是你個人的問題。不論紀律研訊的結果如何，政府或香港警務處均不會承擔有關費用。

警務處處長
(*負責督察的姓名*　　代行)

副本送：[*單位紀律主任*](經辦人：[*主控人員的職銜及姓名*])

*　　請刪去不適用者

[日期]

限閱文件(人事)

附件 Z-3

[*檔案編號*]

[*電話號碼*]

[*傳真號碼*]

[*違紀人員的職級及姓名*]
[*違紀人員的職位*]
經:[*違紀人員所屬單位指揮官*]轉交

先生／女士* ：

[*日期*]的來信／申請已經收悉。你在信／申請中請求批核當局批准由*[*律師或大律師*][*職銜及姓名(如可提供)*]在根據《警察(紀律)規例》指控你[*控罪名稱*]而召開的紀律聆訊中協助你。

本函旨在通知你，作爲批核當局的[*批核當局的職銜及姓名*]已根據公平原則考慮你申請法律代表的情由。在考慮下文第 3 段載列的所有因素後，批核當局認爲就公平原則而言，你的紀律聆訊不需有法律代表。他／她*已決定不批准有關申請。

批核當局作出上述決定時，已審慎考慮下列因素：－

[註：批核當局會根據個別案件的公平需要，考慮該宗違紀人員委派法律代表的申請的情由。在考慮個別要求時，批核當局會參酌下列因素，以及是否需因個別案件的公平需要而批准違紀人員委派法律代表這問題相關的其他因素。

(a) 有關人員提出的理據；

(b) 對有關人員提出的違紀控罪的嚴重性和可能的刑罰；

(c) 是否可能引起任何法律論點的爭議；

(d) 有關人員在聆訊中爲其個案作出辯護的能力；

(e) 有關人員在聆訊中可能會遇到的任何程序上的困難(例如需要全面地盤問證人／專家證人、因有關人員的殘障而引致的困難等)；

(f) 在合理時間內完成審訊的需要；

(g) 顧及各有關人士的公平需要；以及

(h) 即使有關人員所提出的理由並無特別提及，但在當時顯然與個案有關的其他事宜。]

警務處處長
〔(*負責督察的姓名*)代行〕

副本送：[*單位紀律主任*] (經：[*主控人員的職銜及姓名*])

[*日期*]

* 請刪去不適用者

附件Z-4

[檔案編號]

[電話號碼]

[傳真號碼]

[*違紀人員的職級及姓名*]
[*違紀人員的職位*]
經：[*違紀人員所屬單位的指揮官*]轉交

先生／女士*：

[*日期*]的來信／申請已經收悉。你在信／申請中請求批核當局批准由[*職銜及姓名(如可提供)*]在根據《警察(紀律)規例》指控你[*控罪名稱*]而召開的紀律聆訊中協助你。

本函旨在通知你，作爲批核當局的[*批核當局的職銜及姓名*]已考慮你的申請和本案情況，並信納應該批准你在聆訊中由上述人士擔任你的代表。他／她*已決定批准有關申請。

請注意，在這紀律研訊過程中，你或你的辯方代表將會／或會*取得機密資料，*包括[*請說明機密資料的性質*]。假如你或你的辯方代表未經授權而披露有關資料，則你或你的辯方代表或會因《官方機密條例》(香港法例第521章)的規定而遭受檢控，以及／或因洩漏機密而被起訴。現提醒你促使你的辯方代表注意這一點。

警務處處長
(*負責督察的姓名*　　代行)

副本送：[*單位紀律主任*] (經辦人：[*主控人員的職銜及姓名*])

*　　請刪去不適用者

[日期]

限閱文件(人事)

附件 Z-5

[*檔案編號*]

[*電話號碼*]

[*傳真號碼*]

[*違紀人員的職級及姓名*]
[*違紀人員的職位*]
經:[*違紀人員所屬單位指揮官*]轉交

先生／女士* ：

[*日期*]的來信／申請已經收悉。你在信／申請中請求批核當局批准由[*稱號及姓名(如可提供)*]在根據《警察(紀律)規例》指控你[*控罪名稱*]而召開的紀律聆訊中協助你。

本函旨在通知你，作爲批核當局的[*批核當局的職銜及姓名*]已根據公平原則考慮你申請委任該代表的情由。在考慮下文第 3 段載列的所有因素後，批核當局已決定不批准有關申請。

批核當局作出上述決定時，已審慎考慮下列因素：－

[註：批核當局根據個別個案件的公平需要，考慮該宗違紀人員委派辯方代表的申請的情由。在考慮個別要求時，批核當局會參酌下列因素和其他相關因素。

(a) 個案可能涉及的機密問題；

(b) 洩露敏感資料的可能性；

(c) 該辯方代表的職級較主審人員爲高；以及

(d) 在當時顯然與個案有關的其他事宜。]

警務處處長
〔(*負責督察的姓名*)代行〕

副本送：[*單位紀律主任*] (經：[*主控人員的職銜及姓名*])

[*日期*]

* 請刪去不適用者

附件 Z-6a

內部文件(人事)

便 箋

發文人：	主控人員	***受文人：***	**違紀的初級警務人員／督察級人員*
檔號：	( ) ***in*** XX DR X/200X	***(經由***	***轉交)***
電話：	aaaa aaaa ***傳真：*** xxxx xxxx	***來函檔號：***	***in***
電郵：	xxx-x@police.gov.hk	***日期：***	***傳真：***
日期：	2009 年 xx 月 xx 日	***總頁數：***	

違紀研訊通知

XX DR X/200X

謹藉送達本便箋，正式通知你有關處方將向你提出的一項(或多項)違反紀律控罪。隨函付上有關控罪的副本。

2. 現進一步通知你以下事項：

(a) 警隊審裁組的一名警司將獲委任爲適當審裁體；

(b) 聆訊地點爲香港灣仔軍器廠街 1 號警政大樓 13 樓警隊審裁組的辦事處；以及

(c) 聆訊日期將於稍後通知你〔最少爲下列情況 7 整天後:(i)處方收到你的確認回條和回覆便箋後，或(ii)下文第 6 段規定的 14 天期限屆滿〕。

3. 現提醒你，你有以下權利：

(a) 以偏袒或偏見爲理由而反對有關適當審裁體，請參閱《警察(紀律)規例》(規例) **第 6 條／第 18 條*；

(b) 如你提出要求，會獲提供你預備答辯所需要的警方記錄及其他文件的副本，或該等記錄及文件的合理取閱權，請參閱規例 **第 7 條／第 19(3)條*；以及

(c) 按個別紀律個案的公平需要委派辯護代表，並無須受規例第 9(11)和 9(12)條[1]或規例第 19(1)和 19(2)條[2]所限。規例 9(11)、9(12)、19(1)

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[1] 規例第 9(11)和 9(12)條已被終審法院在終院民事上訴 2008 年第 9 號一案中明文宣布爲違憲、無效和不具效力。規例第 9(11)條訂明，違紀的初級警務人員，可由其選定的督察或其他初級警務人員，或其選定的任何具有大律師或律師資格的其他警務人員擔任代表。除規例第 9(11)條另有規定外，規例第 9(12)條訂明，大律師或律師不得代表違紀人員出席。

[2] 根據規例第 19(1)條的規定，違紀的督察級人員，可由其選定的督察，或其選定的任何具有大律師或律師資格的其他警務人員擔任代表。除規例第 19(1)條另有規定外，規例第 19(2)條大律師或律師不得代表違紀人員出席。雖然終院民事上訴 2008 年第 9 號一案中沒有特別處理規例第 19(1)和 19(2)條，但警務處處長現將視該兩條爲無效。

和 19(2)條先前所准許的代表繼續獲得准許，而相關的安排亦維持不變。

4. 如果你希望行使你以下權利：

(a) 根據規例 **第 6 條／第 18 條*所述的權利，你必須在聆訊展開前，以書面詳列理由，並送交適當審裁體；

(b) 根據規例 **第 7 條／第 19(3)條*所述的權利，你必須直接與以下簽署人聯絡；以及

(c) 根據上文第 3(c)段所述有關委派一名辯護代表的權利〔但該名代表不屬於規例第 9(11)、9(12)、19(1)和 19(2)條先前所准許的代表〕，處方將根據對你紀律個案的公平需要，考慮你的要求。假如你的要求獲得批准，處方會就批准的代表類別來決定如何展開你的紀律聆訊。請你特別注意，有關代表是否應獲批准屬於酌情決定，而非權利。此外，不論紀律研訊的結果如何，警務處處長或香港特區政府不會負責有關代表所引致的費用。

5. 此外，爲準確記錄研訊程序，有關聆訊將進行錄音及錄影。你有權在聆訊結束時獲得一份錄音及錄影記錄。

6. 你須於收到本便箋日期起計 14 天內，以傳真方式(傳真號碼：xxxx xxxx)把隨付的確認回條和回覆便箋交回以下簽署人。你應確定你的傳真已被收妥。如果以下簽署人沒有於上述期間內收到你的回覆，則處方將會與適當審裁體作出安排，以便展開你的紀律研訊。你將於稍後獲通知有關研訊的日期和時間。

簽署

(　　)

主控人員

副本送： 警務處處長〔經辦人：警司(紀律)〕

單位紀律主任

〔註：規例第 6 和第 7 條條文適用於初級警務人員，而規例第 18 和第 19(3)條條文則適用於督察級警務人員。請刪去不適用者。〕*

內部文件(人事)

便 箋

發文人：	**違紀的初級警務人員／督察級人員*	***受文人：***	主控人員
檔號：	( ) ***in*** XX DR X/200X	***(經由***	***轉交)***
電話：	aaaa aaaa ***傳真：***	***來函檔號：***	***in***
電郵：		***日期：***	***傳真：***
日期：	2009 年 xx 月 xx 日	***總頁數：***	

違紀研訊通知

XX DR X/200X

2009 年 xx 月 xx 日的便箋〔檔號：( ) in XX DR X/200X〕收悉，本人謹此作出確認。此外：

	是	否
(a)* 〔適用於違紀的初級警務人員〕本人希望要求由本人選定的督察或其他初級警務人員，或本人選定的任何具有大律師或律師資格的其他警務人員擔任代表。	☐	☐
* 〔適用於違紀的督察級警務人員〕本人希望要求由本人選定的督察，或本人選定的任何具有大律師或律師資格的其他警務人員擔任代表。	☐	☐
(b) 本人希望要求由一名法律執業者擔任代表。	☐	☐
(c) 本人希望要求由不屬於上文(a)或(b)項所述人士擔任代表。	☐	☐

(*請在適當方格內填上“✓”號。如果(b)或(c)項的答案爲“是”，請填妥下文第 2 段。*)

2. 本人紀律個案就公平需要，要求委派有關代表的理由如下：

〔違紀人員須知：請說明詳盡理由，解釋爲何在公平情況下，你需要就你的紀律個案委派有關代表。處方在決定是否批准因公平需要委派該等代表的考慮因素，包括但不限於控罪的嚴重性和可能刑罰；是否會引起任何法律論點的爭議；有關個別人員爲其個案作出辯護的能力；程序上的困難；以及在合理時間內完成審訊的需要；並且顧及各有關人士的公平需要。各個要求將按照個別個案的情況予以考慮。〕

3. 本人希望下列人士擔任本人代表。其資料如下〔如你已決定辯護代表的人選〕:

姓名:
職級(如果辯護代表是警務人員):
香港身分證號碼:
職業:
關係:
地址(辦事處或住所):
電話:

4. 本人欲發表以下意見(如有):

簽署
(違紀人員)

副本送: 警務處處長〔經辦人:警司(紀律)〕
單位紀律主任

《個人資料(私隱)條例》(香港法例第 486 章)

a) 所需資料將會供警務處處長考慮你對辯護代表的要求,並可能會向其他政府部門披露作相關用途。

b) 資料當事人有權根據《個人資料(私隱)條例》要求查閱或更改其在本便箋所提供的個人資料。有關要求必須以書面方式向有關部門／內部通告公布負責處理資料查閱／更改要求的人員提出。

附件Z-8

[檔案編號] *[電話號碼]*

[傳真號碼]

[*地址*]
[*法律代表／朋友的姓名*]

先生／女士*：

[*日期*][*違紀人員的職級及姓名*]的來信／申請已經收悉。他／她*在信／申請中請求適當授權人員批准由你在根據《警察(紀律)規例》指控[*違紀人員的職級及姓名*] [*控罪名稱*]而召開的紀律聆訊中協助[*違紀人員的職級及姓名*]。

本函旨在通知你，作爲適當授權人員的[*適當授權人員的職銜及姓名*]已考慮有關申請和本案情況。他／她*已決定批准有關申請。

請注意，在這些紀律研訊過程中，你將會／或會*取得機密資料，*包括[*請說明機密資料的性質*]。假如你未經授權而披露有關資料，則你或會因《官方機密條例》(香港法例第521章)的規定而遭受檢控，以及／或因洩漏機密而被起訴。

警務處處長
(*負責督察的姓名* 代行)

副本送： [*單位紀律主任*] (經辦人：[*主控人員的職銜及姓名*])
[*違紀人員的職級及姓名*]

* 請刪去不適用者

[*日期*]

附件 Z-9

[*“朋友”姓名*]
經：[*違紀人員的職級和姓名*]或[*“朋友”的地址*]

先生／女士：

根據《警察(紀律)規例》進行的紀律聆訊

香港警務處總警司(服務條件及紀律)收到[違紀人員的職級和姓名]的申請，要求在根據《警察(紀律)規例》(香港法例第 232 章附屬法例 A)指控他／她[*違紀控罪*]而召開的紀律聆訊[DR 參考編號]中由你爲其辯護。爲考慮有關申請，處方現徵求你同意香港警務處刑事紀錄科向上述總警司發放你的刑事紀錄(如有的話)。如果你同意的話，請填妥和簽署隨付的同意書，並於[交回同意書的限期]或之前交回本人。如果本人於該日或之前沒有收到你的同意書，則本人將假定你不同意這樣做。

你可以自由決定是否同意這樣做。不過，假如你拒絕的話，則會成爲上述總警司考慮是否批准[違紀人員的職級和姓名]的申請的其中一項相關因素。

在收到本函副本後，違紀人員須以證人身分在同意書上簽署。

如對此事有任何查詢，請致電[電話號碼]與本人聯絡。

警務處處長

([負責督察的姓名]　　代行)

連附件

副本送：[違紀人員的職級和姓名]

[*日期*]

附件 Z-10

同意書

本人明白總警司(服務條件及紀律)已收到[違紀人員的職級和姓名]的申請，要求在根據《警察(紀律)規例》(香港法例第 232 章附屬法例 A)指控他／她[*違紀控罪*]而召開的紀律聆訊[DR 參考編號]中由本人爲其辯護。

本人現同意香港警務處刑事紀錄科向上述總警司發放本人的刑事紀錄(包括法例第 297 章罪犯自新條例已失時效的判罪)，如有的話，以便考慮該項申請。如有需要，本人亦同意警務處就此項申請套取本人的指模資料，以核證本人的刑事紀錄。

本人明白並非必定要同意發放本人的刑事記錄(如有的話)和提供指模資料，但假如本人拒絕，這一點將會是有關[違紀人員的姓名和職級]的申請的其中一項考慮因素。本人亦明白以這份同意書爲依據而收集的個人資料，只會用作考慮及記錄有關申請的用途。當該等個人資料無須再作上述用途時，將予以刪除。

本人的個人資料如下：－

Name
姓名

Date of Birth
出生日期

HK Identity Card No.
香港身份證號碼 ( )

Passport No.
護照編號

Chinese Commercial Code Nos.
中文商業電碼 / / /

（as recorded on the applicant's HK Identity Card – where applicable）
（按申請人香港身份證上的紀錄－如有的話）

Place of Birth
出生地點

_____
(Signature)
簽署

Date
日期

Witnessed by
見證人簽署 _____

Rank, UI No. & Name
職級 編號及姓名

Posting
駐守單位

Correctional Services Department

Standing Procedures

20-07 General Rules of Disciplinary Proceedings

(SO/SP)

1 The Officer Charged shall be asked to appear before the hearing by a written notice with time and place of hearings being specified. If he fails to attend the hearing, the hearing will be adjourned. The Prosecuting Officer will serve a further written notice on the Officer Charged, asking him to attend the hearing for a second time. If the Officer Charged fails to appear the second time, he will be served with a written notice for a third time. If the Officer Charged does not appear the third time, the hearing may, subject to paragraph 2 below, continue in his absence as if he has pleaded not guilty to each charge separately and has been given the opportunity to hear all of the evidence against him, to cross-examine any witness giving such evidence and to examine any witness called in his defence as required under PR 246.
[Amended, 1/2010]

2 In the circumstances where the Officer Charged has absented himself thrice from the scheduled hearings as mentioned above without reasonable grounds, the Prosecuting Officer may make a submission to the Adjudicating Officer to request the disciplinary hearing be conducted in the absence of the Officer Charged. The Adjudicating Officer may decide whether a hearing should take place or continue in the absence of an Officer Charged and/or his representative having regard to the circumstances of the case. The discretion must be exercised with great care, particularly when the Officer Charged is unrepresented. In exercising the discretion, fairness to the defence is of prime importance but account also had to be taken of fairness to the prosecution.
[Amended, 1/2010]

3 As provided under PR 255A, a punishment awarded under PR 254 or 255 may include an order for the payment by the Officer Charged for the cost of replacing or repairing any article of clothing, equipment or other property lost or damaged by him and which he has been provided or entrusted by the Government. HoI may draw the attention of staff under his respective charge to the content of this rule.
[Amended, 1/2010]

4 The Adjudicating Officer is required to provide an accurate copy of the record of proceedings to HQ (Attn: SS(HR)). *[Amended, 1/2010]*

5 To standardise entries in all relevant records pertaining to staff disciplinary reports, the date a disciplinary report was finalised shall be taken as the date of conviction of a disciplinary offence. *[Amended, 1/2010]*

6 When making his reply on the charge sheet (PD 41) under PR 244, the Officer Charged may write in the language of his race and a translation in English will be made and signed by the translator. *[Amended, 1/2010]*

7 The witness statement may be written in the language of the witness's race. It should be translated into the language of the Officer Charged, if of a different race, and if such statements are to be adduced in support of the charge, into English and such translations must be signed by the translator. *[Amended, 1/2010]*

8 The Officer Charged shall be given reasonable access to, or copies of such documents as he requires preparing his defence. Upon request and where fairness requires, the documents related to the investigation of alleged misconduct may also be released even though they will not be adduced as evidence in the disciplinary proceedings. The D of J should be consulted where appropriate. *[Amended, 1/2011]*

9 In pursuance of CSR 1111 and the corresponding Civil Service Bureau Circular No. 6/2010, authorised absence may be granted to DR or DW to attend disciplinary hearings. The Prosecuting Officer will endeavor to avoid from having direct contact with DR or DW. It is the Officer Charged's responsibility to inform his DR or DW of the hearing arrangements and provide him with relevant documentary proof from the Prosecuting Officer in support of application for authorised absence. Upon receiving the application from the DR or DW, the leave approving officer should consider the application and notify the DR or DW of the decision the soonest possible before the scheduled hearing. *[Amended, 1/2011]*

10 As a matter of course, all hearings will be audio recorded. After each session of hearing, the officer charged will be given a copy of the audio record unless he does not wish to have it. Video recording may be arranged upon request. *[Amended, 1/2011]*

20-08 Role of DR *[Amended, 1/2010]*

1 The Officer Charged may apply to be represented by a serving CSD staff as stipulated in SP 20-09(3), or a legal representative, or a person as authorized by the CCS or his delegate. If he feels aggrieved by the result of his application, he may lodge an appeal to HQ (Attn : SS(HR)) within 14 days of receiving such result. It is always the onus of the Officer Charged himself to find a DR for his case. The administration has no obligation in providing assistance of any sort to secure a DR for the Officer Charged. While as a commitment, the DR shall attend every session of the hearing punctually, as scheduled. *[Amended, 2/2010]*

2 An Officer Charged who is represented may, himself or by his DR, examine or cross-examine the witnesses. The Officer Charged may also choose to give evidence but then he will be subject to the cross-examination by the prosecution. *[Amended, 1/2010]*

3 After all prosecution witnesses have given evidence and exhibits presented, the adjudicating officer shall take initiative to adjourn the hearing to allow reasonable time for the Officer Charged and his DR to discuss his case in private. *[Amended, 1/2010]*

4 The DR should be allowed to sit beside the Officer Charged throughout the proceedings with desk provided and all necessary stationery allowed. *[Amended, 1/2010]*

20-09 Selection of DR *[Amended, 1/2010]*

1 If the Officer Charged wishes to be represented for such a case, he shall, in replying the charge in accordance with PR 244, inform the senior officer concerned of his intention. He will then be given 2 weeks to find his DR before the adjudication commences. Should the Officer Charged fail to notify the senior officer concerned of the required particulars of that DR e.g. name, rank, institution/department attached, Hong Kong Identity Card Number, company etc., he will be seen as if he has given up his right to be represented and the proceedings will proceed as if there is no DR at all. If he indicates not to be represented, the adjudication will be arranged as soon as possible. *[Amended, 1/2010]*

2 In the event that the Officer Charged chooses not to be represented at the time of returning the charge sheet to the senior officer concerned but later changes his mind to exercise such a right, he may inform the senior officer concerned to this effect at any reasonable time prior to the commencement of the adjudication. He will then be given the time to look for his DR same as described in paragraph 1. Conversely, if the Officer Charged has expressed his wish to be represented but later intends to abandon, he may inform the senior officer concerned again who will make arrangement for the adjudication to be conducted as soon as possible. *[Amended, 1/2010]*

3 The Officer Charged may choose to be represented by a serving CSD staff for defence subject to the following criteria :

- the staff who acts as a representative should normally be in a rank below that of the Adjudicating Officer;

- he agrees to act as the representative on a voluntary basis;

- he has not taken part in the initial investigation of the misconduct or alleged offence prior to the disciplinary hearing; and

- he is not required to stand as witness for either prosecution or defence in the same case. *[Amended, 1/2010]*

4 A staff may not act in more than one case at any one time save that when the adjudication of a case is about to complete and only the finding is pending (in some complicated cases, it might be a long process), the staff will be allowed to take up another case if he so wishes. *[Amended, 1/2010]*

5 Under normal circumstances, an Officer Charged is not allowed to change his DR prior to the commencement of the adjudication unless he is able to furnish a justifiable ground. In such case, the scheduled proceedings will be postponed for 2 weeks to allow the Officer Charged to engage another DR. Nevertheless, this application may only be exercised once so that it will not cause undue delay to the adjudication. *[Amended, 1/2010]*

6 An Officer Charged normally cannot change his DR after the hearing has commenced. He may however apply and subject to the discretion of the adjudicating officer to change his DR under exceptional circumstances such as the latter is granted prolonged SL. On the other hand, the DR may express at any time during the course of the hearing his intention to terminate his role. The Officer Charged may likewise at any time after the commencement of the hearing express his intention to disengage his DR. If so, he will make his own way towards the conclusion of his case. *[Amended, 1/2010]*

Annex A

Correctional Services Department
Guidelines of Considering the Approval of
Legal Representation / Representation by a 'Friend'
at Disciplinary Hearings

On the basis of the decisions in *The Stock Exchange of Hong Kong Limited v New World Development Company Limited [2006] 2 HKLRD 518 and LAM Siu Po v. Commissioner of Police (FACV 9/2008)*, the Adjudicating Officer before whom a request for legal representation is made must consider the matter in the light of the facts of each case, and the factors listed hereunder and any other factors which might be relevant to the issue of whether fairness of the hearing would require legal representation for the Officer Charged:

(a) grounds advanced by the Officer Charged;
(b) the seriousness of the charge and potential penalty;
(c) whether any points of law are likely to arise;
(d) the capacity of the individual to present his own case;
(e) procedural difficulties;
(f) the need for reasonable speed in making the adjudication; and
(g) the need for fairness among the individuals concerned.

2. The list 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. The same rules also apply when the Officer Charged requests representation by a 'friend'.

(A) Grounds advanced by the Officer Charged

3. Any relevant ground advanced by the Officer Charged 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 Officer Charged.

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

4. Seriousness of the charge and the potential penalty in the relevant disciplinary proceedings was the main reason why the CFA held in *Lam Siu Po's case* 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 an Officer Charged is facing a terminatory punishment, this will be a factor which substantially favours the granting of legal representation.

5. If an Officer Charged 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

6. 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 Officer Charged 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) Officer Charged's capacity to present his case

7. An Officer Charged may have difficulties in presenting his case, e.g. he is suffering from certain medical conditions; the charges are complicated, etc.

(E) Procedural difficulties

8. 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 Officer Charged should be taken into consideration.

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

9. 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

10. If the prosecutor is a legally qualified person, legal representation for the Officer Charged 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 Adjudicating Officer has to respond reasonably to the requirements of fairness arising in each case.

Correctional Services Department
March 2010

Sample **Annex B**

Restricted (Staff)

M E M O

From Commissioner of Correctional Service	*To* Department of Justice
Ref. ( ) *in*	*(Attn.:* Mr. Dominic LAI, SALO(CL)(Adv II) *)*
Tel. No.	*Your Ref.*
Fax. No.	*Dated* *Fax. No.* 2869 0670 (Open)
Date	*Total Pages* X + Evidence Folder

Mr. XXX, Assistant Officer II XXX
Disciplinary Proceedings under Prison Rules, Cap. 234A

This is to inform you that permission has been granted to Mr. NNN ("N"), Assistant Officer II XXX of the Correctional Services Department ("CSD"), to be legally represented by Ms. ZZZ ("Z"), a practicing barrister, at the disciplinary hearing scheduled for xx and xx.x.2010 (*Note: Please ensure the availability of the OC when fixing the date*). Your arrangement to engage a legal representative to act for Mr. CCC ("C"), the Prosecuting Officer of this case, at the hearing as scheduled is hereby requested. Attached/appended please find the relevant information for action –

(a)	Disciplinary case no.	:	xxxxxx
(b)	Charges	:	Annex (i)
(c)	N's reply in accordance with rule 244 of Prison Rules, Cap. 234A	:	e.g. Plead guilty to charge (1) and plead not guilty to charges (2)-(4)
(d)	N's Legal Representative	:	Ms. ZZZ Practising Barrister
(e)	Adjudicating Officer ("AO")	:	Ms.AAA

Restricted (Staff)

		:	
(f)	AO's Legal Adviser	:	Mr. JJJ (or information to be provided later, where appropriate)
(g)	Prosecuting Officer	:	Mr. CCC, Principal Officer, Stanley Prison Correctional Services Department (Tel. No. :) (Fax No. :) (Email :)
(h)	Background of the case	:	Annex (ii)
(i)	List of evidence	:	Annex (iii)
(j)	List of witnesses	:	Annex (iv)
(k)	Copy of evidence	:	Folder

2. Please notify me, once available or the latest by *(Note: Please give at least 2 weeks' time for the DoJ to make arrangements)*, of the name and contact telephone number of the legal representative engaged so that I can liaise with him for further arrangements.

3. Please feel free to contact me if you require further information.

(CCC)
for Commissioner of Correctional Services

Encls.

c.c. SS(HR) – w/o encl.

Annex C

Correctional Services Department
Guidelines on Conduct of Hearings with Legal Representation

For cases where legal representation for the Officer Charged ("OC") has been granted, some points to note on the conduct of the hearing are given in the ensuing paragraphs. These points are subject to review and may be updated in the light of operational experience.

Roles and rights of those present at the hearing

2. Apart from the Adjudicating Officer ("AO"), the OC and the witnesses, other people present at the hearing will usually be as follows–

Person	Who, role and rights
Prosecuting Officer ("PO")	▪ Appointed by the Head of Institution or the HQ. ▪ To represent the "prosecution" and to take care of the logistics for the hearing. ▪ Can instruct/discuss with his legal representative. As his advocacy role is to be taken up by his legal representative, the PO will not question the OC, the OC's legal representative and witnesses. ▪ The PO will not address the AO unless invited to do so.
PO's legal representative	▪ Normally a brief-out counsel engaged by the Department of Justice. ▪ Acting for the PO in presenting the case against the OC (including the case background and the witnesses and documentary evidence he intends to present), questioning the OC if he (or his legal representative) makes any address(es) to the AO, examining, cross-examining and re-examining witnesses, and addressing the AO.

Person	Who, role and rights
OC's legal representative	▪ To present evidence, examine/cross-examine /re-examine witnesses and address the AO on the OC's behalf (note : the OC can also exercise these rights at the same time.) ▪ Cannot make plea to the charge(s) for the OC as the latter must do so himself.
AO's legal adviser	▪ Normally a brief-out counsel engaged by the Department. ▪ To advise the AO at the hearing on points of law and on any matters relevant to the proper conduct of the hearing and consideration of the OC's case. In this respect, with the AO's permission, AO's legal adviser may raise any questions with the PO's legal representative, the OC and his legal representative, and address the AO.

Points to note

3. Some points to note on the procedures of hearings with legal representation are set out below:

(a) The AO remains to be responsible for ensuring the proper conduct of the hearing, finding facts and determining whether the disciplinary charges alleged against the OC are established. The AO's legal adviser is responsible for advising the AO on points of law and on any matters relevant to the proper conduct of the hearing and consideration of the OC's case;

(b) At any time of the hearing, the AO may invite his legal adviser to address him on any points of law and on any matters relevant to the proper conduct of the hearing and consideration of the OC case. The OC and the legal representatives of the OC and the PO should be allowed to address the AO on the advice given by the AO's legal adviser if they so wish;

(c) At any time of the hearing, if the AO's legal adviser wishes to address the AO and/or raise questions to the PO and/or OC, or their legal representatives, he should first seek the AO's permission to do so. If the AO grants such permission, the OC and the legal representatives of the PO and the OC should be allowed to address the AO on the points raised by the AO's legal adviser, and/or respond to his questions if they so wish;

(d) The OC and/or his legal representative will always have the "last word" at the hearing. In cases where the AO's legal adviser is allowed to address the AO after the OC or his legal representative has made the final address, the OC or his legal representative must be given the opportunity to respond to the points raised by the AO's legal adviser, should he so wish, before the hearing is closed; and

(e) Discussions between the AO and his legal adviser should be done at the hearing in the presence of the OC and his legal representative, as well as the PO and his legal representative. In the event that the AO considers it necessary to seek any advice from his legal adviser after the conclusion of the hearing, he should re-convene the hearing and seek the required advice in the presence of the OC and his legal representative and the PO and his legal representative.

Correctional Services Department
March 2010

Annex D

Correctional Services Department

Reply Form of Officer Charged on
Defence Representative at Disciplinary Hearing

To : Adjudicating Officer

Via : _____ (Rank & Name of Prosecuting Officer)

of _____ (Institution)

[Please "✓" (i) or (ii)]

(i) ( ) I **do not wish** to have any defence representative.

(ii) ( ) I **wish** to be assisted in my defence in the forthcoming hearing by the following one kind of defence representative:

[You can only opt one of either (a), (b) or (c) below by putting (✓) in the relevant bracket.

If you opt for (b) or (c), please state in item (iii) your reasons for consideration by the disciplinary tribunal. Factors to be taken into account in deciding whether fairness requires your application should be allowed 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.

You should take note that neither the Commissioner of Correctional Services nor the Government of the Hong Kong Special Administrative Region will be responsible for the costs incurred in respect of your engagement of (b) irrespective of the outcome of the disciplinary proceedings.]

(a) ( ) A serving CSD staff as specified in SP 20-09(3).

Name : _____ ( )
Chinese Name

Rank & No. : _____

Institution : _____

Annex D

(b) ( ) Legal Representative [i.e. a solicitor or barrister within the meaning of section 2 of the Legal Practitioners Ordinance (Cap. 159)].

Name : _____ (_____)
Chinese Name

HKID Card No. : _____

Company : _____

(c) ( ) A 'friend' i.e. normally a public servant[1] who is below the rank of the Adjudicating Officer and not a legally qualified person within the meaning of section 2 of the Legal Practitioners Ordinance (Cap. 159); or any other person as may be authorized by the Commissioner of Correctional Services or his delegate.

Name : _____ (_____)
Chinese Name

HKID Card No. : _____

Rank : _____
(For public servant only)

Bureau/Department : _____
(For public servant only)

[1] Any person holding an office of emolument under the Government of HKSAR, whether the office is permanent or temporary, and serving in government bureau or department as specified in section 2 of the Public Service (Administration) Order.

Annex D

(iii) My reasons for applying Legal Representation or representation by a 'friend'

Annex D

Signature : _____

Name of Applicant : _____

Rank & Service No. of Applicant : _____

Institution : _____

Contact Tel. No. : _____

Date : _____

Personal Data (Privacy) Ordinance (Cap. 486)

(a) The personal data will be used by the Commissioner for consideration of your request for defence representative and may be disclosed to other Government Departments for related purposes.

(b) A data subject has the right to request to access to or correction of personal data provided on this form in accordance with the Personal Data (Privacy) Ordinance. Such request must be made in writing to the officers designated for handling data access / correction request as promulgated in relevant departmental / internal circulars.

Notice of Confidentiality

(a) Please be notified that confidential information may be acquired by you or your defence representative in the course of the disciplinary proceedings.

(b) You and/or your defence representative may be prosecuted under the Official Secrets Ordinance (Cap. 521) and/or be sued for breach of confidence for any unauthorized disclosure of such confidential information. You are reminded to bring this to the attention of your defence representative.

Correctional Services Department
August 2010

Annex E

Correctional Services Department
Notes for the Officer Charged [Note 1]

1. The Officer Charged ("OC") will be provided with the following documents –

   (a) A notice notifying the date and time of the hearing.

   (b) Charge sheet of the case with

   - the list and copies of evidence to be presented by the Prosecuting Officer.

   - the list of witnesses to be called by the Prosecuting Officer.

   (c) Reply Form of Officer Charged on defence representative; and

   (d) Notes for witness inviting to attend disciplinary hearing.

2. The OC will be asked to acknowledge receipt of the documents.

3. Before the hearing, the OC will be briefed on the following–

   (a) the hearing will be audio recorded and he will be given a copy of the audio record upon completion of each session of the hearing.

Note 1 Topics listed in this note are for reference only and are not meant to be exhaustive.

(b) the Adjudicating Officer will take notes of every statement made in evidence and he is required to sign on the notes in accordance with rule 246, Prison Rules, Cap. 234A, Laws of Hong Kong.

(c) the language to be used at the hearing and language of the record of proceedings.

(d) parties present at the hearing and their roles.

(e) procedures of the hearing.

(f) his rights at the hearing, i.e. he can –

- admit or deny the charge(s) or any (part) of them
- make oral/written address(es) or remain silent
- challenge the background or any statements to be presented
- cross-examine witness(es) of the Prosecuting Officer
- produce his own evidence and call, examine and re-examine his own witness(es)
- be assisted by a defence representative

(g) it is his duty to inform his defence representative and defence witnesses of the recording arrangements before the commencement of hearing.

Correctional Services Department
August 2010

Annex F

Correctional Services Department
Guide for Audio Recording of Staff Disciplinary Proceedings

Purpose of Audio Recording

Audio recording is an expeditious way to ensure that the record is accurate and that evidence of accuracy would be readily available if required. A court of judicial review may require the audio record of a hearing to be presented to it if the Officer Charged's basis for judicial review is on the proceedings of the hearing or the evidence adduced at the hearing.

2. As a matter of course, audio recording will be arranged at all disciplinary hearings.

Administrative Arrangements

Before the hearing

3. The Prosecuting Officer shall notify the Officer Charged and prosecution witnesses that audio recording will be arranged at the hearing. The Officer Charged shall be clearly told that it is his duty to inform his defence representative and defence witnesses ("DWs") of the recording arrangements before the commencement of the hearing.

4. If any party objects to the arrangement of audio recording before the commencement of the hearing, the Prosecuting Officer concerned should ascertain the reasons for the objection and address the objector's concerns. The Prosecuting Officer is to explain to the objector the merits of having the proceedings audio recorded for both sides. If the objector insists on his objection, the Adjudicating Officer should be so informed with the reasons advanced by the objector. It is a matter for the Adjudicating Officer to decide how the disciplinary hearing should be conducted fairly and whether audio recording is necessary for such purpose in the circumstances of the case.

5. The Prosecuting Officer should put in place appropriate recording devices and other supporting equipments to enable audio recording to be

made and the relevant records be subsequently processed. The Prosecuting Officer should ensure that all the equipments are in good working order and the audio records produced are clearly audible. He should also make ready stand-by equipment to cater for unexpected failure in the recording devices.

6. A notice will be placed in the waiting room for defence representative and DWs, informing them that the disciplinary hearing will be audio recorded. This, together with the arrangement in para. 9 below, is to cater for the scenario where the defence representative and/or DWs have not been informed by the Officer Charged before the hearing commences.

During the hearing

7. As soon as the hearing commences, the Adjudicating Officer should reiterate to all parties present that the hearings are audio recorded throughout.

8. If the objection at para. 4 has not been resolved, or if the party raises objection when the hearing is in progress, the Adjudicating Officer should ascertain the reasons for such objection and address the objector's concerns. He should take into account the reasons advanced by the objector, the need to deal with the hearing expeditiously and other relevant factors as he may reasonably consider relevant. If he decides to overrule/accede to the objection, the reasons for doing so should be conveyed to the objector and properly recorded in the record of proceedings.

9. If the Adjudicating Officer decides to accede to an objection to audio recording, he should also decide and make it clear to all parties present whether only the part involving the objector will not be so recorded or whether the entire hearing will not be so recorded.

10. The storage device (e.g. VCDs/DVDs/memory cards) used for recording at the hearing should be placed in the recording machine(s) in front of the parties present at the hearing and properly labeled for identification purpose.

11. Three audio records should be produced simultaneously for the following purposes:

(i) A sealed main copy for safe custody by the Department;

(ii) A working copy for reference by the Adjudicating Officer or other designated purposes in relation to disciplinary proceedings deemed appropriate; and

(iii) A defence copy for reference by the Officer Charged.

12. The main copy designated for the Department's safe custody should be immediately sealed in tamper-proof envelope(s) ("TPE") in front of the Officer Charged and the Adjudicating Officer. The date and time of the sealing should be clearly marked on the TPE, and the Adjudicating Officer should sign on the sealed TPE.

After the hearing

13. The Adjudicating Officer should take all necessary procedures to ensure the audio records are kept in safe custody and are guarded against editing or unauthorized access. He should ensure that evidence showing the proper handling of audio records will be readily available when required. The provisions of the Personal Data (Privacy) Ordinance, Cap. 486, Laws of Hong Kong, are applicable to the audio data collected at disciplinary hearings. Relevant provisions under the Government's Security Regulations should be observed.

14. Upon providing a defence copy of the audio record to an Officer Charged, the Adjudicating Officer should fully brief the Officer Charged on the proper use and safekeeping of such record. The Officer Charged should be required to acknowledge receipt of the record and sign an undertaking (Sample at Appendix A).

15. If the Officer Charged requests a copy of the record of proceedings, the Adjudicating Officer should ascertain the reasons for such request. He should explain to the Officer Charged that audio record is a full and accurate record which would be made available to him quickly upon the completion of each session of hearing. If the Officer Charged still requests to have the copy of record of proceedings, the Adjudicating Officer will decide his request having regard to the reasons provided.

Correctional Services Department
August 2010

Appendix A

Sample

To : Commissioner of Correctional Services
(Attn : SS(HR))

Through: _____ (Head of Institution)

Usage and Retention of Audio Record of
Disciplinary Hearing No. XXXX
held on xxxx (xx-xx hours)

I acknowledge receipt of (format and serial number) of audio record in respect of the captioned disciplinary hearing.

I hereby undertake that the audio record collected for the purpose of the captioned disciplinary hearing -

(a) will only be used for the purposes of the captioned disciplinary proceedings and legal proceedings (if any) which arise from the disciplinary proceedings;

(b) will not be disclosed or used for any purpose other than those set out in (a) above, except with written consent from other data subjects;

(c) will be destroyed when it is no longer necessary for the purposes set out in (a) above, and such other purposes (if any) for which consent has been obtained in accordance with (b) above;

(d) will be destroyed in a manner that prevents recovery of the information contained therein before they are properly disposed of.

Signature _____

Name _____

Rank and no. _____

Institution _____

Date _____

Correctional Services Department

工作守則

20-07 紀律聆訊的一般規則

(守則/程序)

1 須把聆訊時間和地點通知書送達被控人員，以書面要求被控人員出席聆訊。如被控人員未有出席，須押後進行聆訊。檢控人員須再次以書面通知被控人員，再次要求他出席聆訊。如被控人員在第二次通知後仍未有出席，須第三次把通知書送給他。如被控人員在第三次通知後仍未有出席，聆訊可在符合下文第 2 段的規定下，在他缺席下繼續進行，一如他就每一控罪作不認罪的答辯，並已獲機會根據《監獄規則》第 246 條聆聽所有針對他的證供、盤問作出該等證供的證人及訊問傳召替他辯護的證人。 *[1/2010 修訂]*

2 當被控人員如上文所述三次未有依期出席聆訊而沒有給予合理理由，檢控人員可向主審人員提出，要求在被控人員缺席的情況下進行紀律聆訊。主審人員可考慮個案的情況，然後決定聆訊是否應在被控人員及／或其代表缺席下進行或繼續進行。主審人員在作出決定時須非常審慎，特別是被控人員沒有代表的個案。在決定時，首要考慮對辯方是否公平，但同時亦須考慮對控方是否公平。 *[1/2010 修訂]*

3 監獄規則》第 255A 條規定，根據《監獄規則》第 254 或 255 條判處的懲罰，可包括發出命令，規定被控人員須就他所遺失或毀壞、由政府提供或交託予他的衣物、設備或其他財產，支付替換或修補費用。院所主管可著其轄下職員注意本條規則。 *[1/2010 修訂]*

4 主審人必須向總部(經辦人：高級監督(人力資源))提供一份準確的聆訊記錄副本。 *[1/2010 修訂]*

5 爲統一所有與職員紀律聆訊報告相關的記錄，聆訊報告的完成日期應視作被控人員被判違紀罪成之日。 *[1/2010 修訂]*

6 被控人員依據《監獄規則》第 244 條的規定，在控訴書(PD 41)上答辯時，可使用其本國語言。答辯須譯成英文，並由譯者簽署。 *[1/2010 修訂]*

7 證人的供詞可用其本國語言書寫。若證人本國的語言與被控人員本國的語言不同，便應譯成被控人員的本國語言。若供詞將引用作爲支持檢控的證據，則須再譯成英文，由譯者在譯文上簽署。 *[1/2010 修訂]*

8 被控人員必須有合理的途徑可循，以查閱其自辯所需的文件，或取得這些文件的複印本。如被控人員提出要求，而且爲公平起見，即使在紀律聆訊時不會援引與指控的不當行爲的調查工作相關的文件作爲證據，亦可公開有關文件。如有需要，須徵詢律政司的意見。 *[1/2011 修訂]*

9 根據《公務員事務規例》第 1111 條及公務員事局通告第 6/2010 號的規定，辯方代表或辯方證人可獲准特許缺勤，以出席紀律聆訊。檢控人員會盡量避免與辯方代表或辯方證人直接接觸。被控人員有責任通知其辯方代表或辯方證人關於聆訊的安排及提供由檢控人員發出的相關證明文件，以支持他們申請特許缺勤。批假人員接獲辯方代表或辯方證人的申請後，須考慮有關申請並盡快於編定的聆訊時間前把決定通知辯方代表或辯方證人。 *[1/2011 修訂]*

10 所有聆訊將會錄音。每節聆訊完結後，被控人員會獲發錄音記錄複製品，除非他選擇不要，則作別論。如他要求取得視像記錄，署方會作出安排。 *[1/2011 修訂]*

20-08 辯方代表所擔任的角色 *[1/2010 修訂]*

1 被控人員可根據《工作程序》第 20-09(3)條的規定，申請由一名現職懲教人員、法律代表或經懲教署署長或其受委人授權的人員擔任辯方代表。假如被控人員對申請結果感到受屈，可於接獲有關結果之日起計 14 天內向總部(經辦人：高級監督(人力資源))上訴。爲自己的案件找尋辯方代表，始終是被控人員本身的責任。管方沒有責任爲被控人員提供任何協助，使他找到辯方代表。爲履行承諾，辯方代表須如期準時出席每一節聆訊。 *[2/2010 修訂]*

2 採用辯方代表的被控人員，可親自或由辯方代表詢問或盤問證人。被控人員亦可選擇作供，但這樣便須接受檢控人員的盤問。 *[1/2010 修訂]*

3 所有控方證人作供完畢，而證物亦已呈堂後，主審人員須主動提出休庭，以便被控人員及其辯方代表有合理時間私下討論案件。 *[1/2010 修訂]*

4 在聆訊進行期間，辯方代表應准予坐在被控人員旁邊，並獲安排桌子和一切所需文具。 *[1/2010 修訂]*

20-09 揀選辯方代表 *[1/2010 修訂]*

1 如被控人員欲在案中採用辯方代表，須於根據《監獄規則》第 244 條的規定答辯控罪時，通知有關高級人員他的意向。被控人員可有兩星期時間尋找辯方代表，然後才開始聆訊。如被控人員沒有通知有關高級人員其辯方代表的所需資料，例如姓名、職級和駐守院所／所屬部門、香港身分證號碼、公司等，便會視爲放棄採用辯方代表論，而聆訊的進行方式，就如沒有辯方代表一樣。如被控人員表示不採用辯方代表，聆訊便須盡快展開。 *[1/2010 修訂]*

2 如被控職員／被控人員將控訴書交回有關高級人員時選擇不採用辯方代表，但其後改變主意，決定運用這項權利，他可在聆訊開始前任何合理時間內，通知有關高級人員這項決定，而他亦可按上文第 1 段所述情況，獲給予時間尋找辯方代表。反過來說，如被告曾表示欲採用辯方代表，但其後打算不用，可再通知有關高級人員，由其安排盡快展開聆訊。 *[1/2010 修訂]*

3 被控人員可揀選一名現職懲教人員擔任辯方代表爲其辯護，但須符合下述準則:

- 擔任代表的人員的職級一般應低於主審人員的職級；
- 該人員自願接受該項任務;
- 該人員在聆訊前並未參與對該項失當行爲或指控罪名所作的初步調查工作；以及
- 該人員並不是案中的控方或辯方證人。 *[1/2010 修訂]*

4 紀律人員不可同時在超過一宗案件中擔任辯方代表，除非有關案件即將審結，只待判決(某些複雜案件，可能需時頗長)。在這情況下，紀律人員如欲在另一案件擔任辯方代表，則可獲批准。 *[1/2010 修訂]*

5 在一般情況下，被控人員不得在聆訊開始前撤換辯方代表，除非他能提出合理的原因。如被控人員獲准撤換辯方代表，已安排的聆訊須押後兩星期，讓被告尋找另一辯方代表。不過，這項申請只可提出一次，以免對聆訊造成不必要的延誤。 *[1/2010 修訂]*

6 被控人員一般不可在聆訊開始後撤換辯方代表。然而，在特殊情況下，例如他的辯方代表獲批長期病假，則仍可申請撤換辯方代表，由主審人員酌情決定是否批准。另一方面，辯方代表亦可在聆訊期間，隨時提出終止代表被控人員。聆訊開始後，被控人員同樣可以隨時解除其辯方代表的職責。在這情況下，他便須自行面對聆訊，直至案件結束。 *[1/2010 修訂]*

附件A

懲教署
關於考慮是否批准法律代表／"朋友"出席紀律聆訊的指引

*基於香港聯合交易所有限公司訴新世界發展有限公司([2006]2香港法律匯報與摘錄第518頁)及林少寶訴警務處處長(終院民事上訴2008年第9號)*的判決，如被控人員要求有法律代表，主審人員必須考慮每宗個案的事實、下列各項因素，以及是否需要為公平起見而讓被控人員有法律代表的其他相關因素：

(a) 被控人員提出的理由；
(b) 控罪的嚴重性和可能作出的處分；
(c) 有關個案會否引起任何法律問題；
(d) 有關人士是否有能力作出自辯；
(e) 程序方面的困難；
(f) 在合理時間內作出裁定的需要；以及
(g) 確保有關人士獲得公平對待的需要。

2. 上文所述並非所有可考慮的因素。法院認為沒有列表可以盡列有關因素，以及認為普通法的公平原則的應用靈活，審裁小組須因應每宗個案的公平需要作出合理回應，在對立權益中取得平衡，以及可考慮對法律代表作出相稱規限(如有的話)。如被控人員要求由"朋友"作代表，上述規則同樣適用。

(A)被控人員提出的理由

3. 被控人員就要求在紀律聆訊中有法律代表而提出的相關理由，必須予以考慮。下文(B)至(G)項或已涵蓋大部分可能提出的理由，但始終不能一一盡列。此外，即使被控人員並無明確提述，但為求公平起見，亦應考慮與個案有關的明顯事宜。

(B)控罪的嚴重性和可能作出的處分

4. 在林少寶一案中，終審法院認為《香港人權法案》第十條適用，主要原因是考慮到有關紀律處分程序涉及的控罪的嚴重性和可能作出的處分。法院在考慮公平原則時，相信亦會同樣重視這項因素。因此，如被控人員面對離職處分，這點對被控人員十分有利，支持被控人員可以有法律代表。

5. 被控人員的不當行為一旦確定，或會被判十分嚴重但不屬於離職處分(例如降級)的懲罰，這種情況亦會構成支持被控人員有法律代表。不過，紀律處分程序不會導致離職處分或十分嚴重但不屬於離職處分的懲罰這一點，不能妨礙行使酌情權容許被控人員有法律代表。各項相關因素均須加以考慮。

(C)有關個案會否引起任何法律問題

6. 如在紀律聆訊中很可能出現法律問題，將是容許被控人員有法律代表的有利因素，但這並不表示必然批准有法律代表。舉例來說，如被控人員所提出的論點是法院已作出裁決的，或提出的論點是不適用於紀律聆訊的技術性的證據規則，則被控人員要求有法律代表的理據並不充分。

(D)被控人員是否有能力作出自辯

7. 被控人員可能在自辯方面有困難，例如受患病情況影響，或是控罪複雜等。

(E)程序方面的困難

8. 一般來說，紀律處分程序應在沒有過多形式的情況下進行，因此不太可能在程序方面有重大困難，但被控人員提出的任何具體困難均須予以考慮。

(F)在合理時間內作出裁定的需要

9. 紀律處分程序的原意是作為家事法律程序，以期有效和迅速地處理紀律處分問題。不必要的法律代表可能會大大延長聆訊程序的時間或令程序變得複雜。不過，如聆訊相當可能出現真正的法律問題，則法律代表相當可能有助聆訊程序的進行。

(G)確保有關人士獲得公平對待的需要

10. 如檢控人員是一名具有專業法律資格的人士，則為公平起見，應准許被控人員有法律代表。與事實有關的爭論點如過於複雜而需進行詳細盤問，或涉及的證人是專家或高級官員，這些因素亦可能屬於這個類別。有一點必須留意的是，主審人員須因應每宗個案的公平需要作出合理回應。

懲教署
二零一零年三月

限閱文件(人事)

附件C

懲教署

有法律代表出席的聆訊進行指引

凡被控人員獲准有法律代表出席聆訊的個案，進行聆訊時須注意下文所述要點。有關內容或會根據實際運作經驗予以檢討，以及作出修訂。

出席聆訊的人士的角色及權利

2. 除主審人員、被控人員和證人外，其他一般會出席聆訊的人士包括：

出席人士	身分、角色和權利
檢控人員	▪ 由院所主管或總部委任。 ▪ 代表“控方”及負責聆訊的後勤支援。 ▪ 可向其法律代表發出指示／與其法律代表作出商議。由於其訟辯角色已由其法律代表擔任，檢控人員不會向被控人員、被控人員的法律代表及證人查問。 ▪ 檢控人員不會向主審人員陳詞，除非獲邀發言則例外。
檢控人員的法律代表	▪ 一般由律政司聘請的外判律師擔任。 ▪ 代表檢控人員提控被控人員(內容包括他擬提控的個案背景、傳召的證人及提交的文件證據)，並在被控人員(或其法律代表)向主審人員陳詞的情況下查問被控人員；此外亦訊問、盤問及覆問證人，以及向主審人員陳詞。
被控人員的法律代表	▪ 代表被控人員陳述證據、訊問／盤問／覆問證人及向主審人員陳詞(註：被控人員亦可在同一時間行使這些權利。) ▪ 不得代被控人員就控罪答辯，因為被控人員必須親自就控罪答辯。
主審人員的法律顧問	▪ 一般由懲教署聘請的外判律師擔任。 ▪ 在聆訊時，就法律論點、任何與聆訊恰當進行有關的事宜，以及被控人員個案的考慮因素向主審人員提供意見。在這方面，如主審人員批准，可向檢控人員的法律代表、被控人員和被控人員的法律代表提問，以及向主審人員陳詞。

注意事項

3. 凡有法律代表出席的聆訊須注意以下事項：

(a) 主審人員仍須負責確保聆訊過程恰當進行、裁斷事實及裁定針對被控人員而作出的違紀指控是否成立。主審人員的法律顧問須負責就法律論點、任何與聆訊恰當進行有關的事宜，以及被控人員個案的考慮因素向主審人員提供意見；

(b) 在聆訊期間，主審人員可隨時邀請其法律顧問就法律論點、任何與聆訊恰當進行有關的事宜，以及被控人員個案的考慮因素提供意見。被控人員、被控人員和檢控人員的法律代表如有意就主審人員的法律顧問給予的意見向主審人員陳詞，應獲准許；

(c) 在聆訊期間的任何時間，主審人員的法律顧問如有意向主審人員陳詞及／或向檢控人員及／或被控人員，或他們的法律代表提問，須先尋求主審人員的准許。如主審人員批准，被控人員、檢控人員和被控人員的法律代表均應獲准就主審人員的法律顧問提出的論點向主審人員陳詞，以及／或就該法律顧問的提問作出回應；

(d) 被控人員及／或其法律代表在聆訊中一般享有“最後發言權”。如主審人員的法律顧問獲准在被控人員或其法律代表作出結案陳詞後向主審人員陳詞，而被控人員或其法律代表擬於聆訊結束前回應主審人員的法律顧問提出的論點，則必須獲給予發言機會；以及

(e) 主審人員與其法律顧問如需商議事情，須在聆訊期間在被控人員和其法律代表，以及檢控人員及其法律代表在場下進行。如主審人員在聆訊審結後認為有需要向其法律顧問徵詢意見，須重新召開聆訊，並在被控人員和其法律代表，以及檢控人員和其法律代表在場下徵詢所需意見。

懲教署
二零一零年三月

附件 D

香港懲教署

被控人員回覆表格 - 辯方代表出席聆訊

致： 主審人員

經： _____ (檢控人員的職級及姓名)

_____ (檢控人員所屬院所)

[請在(i)或(ii)旁的括號內加上"√"號]

(i) ( ) 本人**無意**使用任何辯方代表。

(ii) ( ) 本人**請求**在即將進行的聆訊中，由下述其中一類代表協助辯護：

[你只可選擇(a)、(b)或(c)其中一項，請在下列適當括號內加上"√"號。

如你選擇(b)或(c)，請在第(iii)項填寫理由，以供紀律審裁小組考慮。在決定是否基於公平起見而需准許申請時，會考慮多項因素，包括控罪的嚴重性和可能作出的處分、有關個案會否引起任何法律問題、有關人士是否有能力作出自辯、程序方面的困難、在合理時間內作出裁定的需要，以及確保有關人士獲得公平對待的需要。

請注意，無論紀律聆訊的結果為何，懲教署署長或香港特別行政區政府均無須就你聘用(b)法律代表所引致的任何費用負責。]

(a) ( ) 《工作程序》第 20-09(3)條所指明的現任懲教署人員

姓名 : _____ (_____)
英文姓名

職級及編號 : _____

院所 : _____

(b) (　) 法律代表[即《法律執業者條例》(第 159 章)第 2 條所指的大律師或律師]

姓名　：＿＿＿＿＿＿＿＿＿＿＿＿＿＿＿＿(＿＿＿＿＿＿)
英文姓名

香港身分證號碼　：＿＿＿＿＿＿＿＿＿＿＿＿＿＿＿＿

公司　：＿＿＿＿＿＿＿＿＿＿＿＿＿＿＿＿

(c) (　) "朋友"一般須為公務人員[1]，其職級須低於主審人員，以及並非《法律執業者條例》(第 159 章)第 2 條所指具有法律專業資格的人員；或任何其他獲懲教署署長或其受委人授權的人士。

姓名　：＿＿＿＿＿＿＿＿＿＿＿＿＿＿＿＿(＿＿＿＿＿＿)
英文姓名

香港身分證號碼　：＿＿＿＿＿＿＿＿＿＿＿＿＿＿＿＿

職級　：＿＿＿＿＿＿＿＿＿＿＿＿＿＿＿＿
(只供公務人員填寫)

決策局／部門　：＿＿＿＿＿＿＿＿＿＿＿＿＿＿＿＿
(只供公務人員填寫)

[1] 《公務人員(管理)命令》第 2 條所指的任何在特區政府下擔任受薪職位(不論該職位屬永久或臨時性質)，並在政府任何局或部門服務的人。

(iii)申請由“法律代表”或“朋友”代辯的原因

簽署：_____

申請人姓名：_____

申請人職級及職員編號：_____

院所：_____

聯絡電話：_____

日期：_____

《個人資料(私隱)條例》(第 486 章)

(a) 個人資料供懲教署署長考慮你要求代表代為辯護的申請之用，並可能會就有關用途向政府其他部門披露。

(b) 資料當事人有權根據《個人資料(私隱)條例》(第 486 章)要求查閱或更正於本表格所提供的個人資料。有關要求必須以書面向相關部門／內部通告所公布的指定處理查閱／更正資料要求的人員提出。

保密規定

(a) 你或你的辯方代表可能會在紀律聆訊過程中取得機密資料。

(b) 若未經授權披露此等機密資料，你及／或你的辯方代表可能會被當局根據《官方機密條例》(第 521 章)檢控，以及／或可能因泄漏機密而被起訴。請提醒你的辯方代表注意保密規定。

懲教署
二零一零年八月

樣本
限閱文件(人事)

附件E

懲教署
被控人員須知[註1]

1. 被控人員會獲發下列文件:

(a) 聆訊日期及時間通知書;

(b) 個案控訴書,連同:

- 檢控人員擬提交的證據一覽表及副本。
- 檢控人員擬傳召的證人名單。

(c) 被控人員是否選擇有辯方代表的回覆表格;以及

(d) 獲邀出席紀律聆訊的證人須知。

2. 被控人員須確認接獲有關文件。

3. 在聆訊開始前,被控人員會獲告知以下事宜:

(a) 聆訊會安排錄音,而被控人員會在每節聆訊結束後獲得有關錄音記錄複製本;

(b) 主審人員會就提出作為證供的每一項陳述擬備筆記,並須根據《監獄規則》第(234A章)第246條在有關筆記上簽署;

(c) 聆訊過程及聆訊記錄擬使用的語言;

(d) 出席聆訊各方及各方的角色;

(e) 聆訊的程序;以及

(f) 被控人員在聆訊中享有的權利,即他可以:

- 承認或否認控罪或其中任何(部分)控罪

註1 本須知所載資料僅供參考,並非詳盡無遺。

- 作口頭陳述／書面陳述或保持緘默
- 對背景資料或任何供詞提出異議
- 盤問檢控人員所傳召的證人
- 自行提出證據，以及傳召、訊問及覆問其證人
- 由一名辯方代表助辯

(g) 被控人員有責任在聆訊開始前告知辯方代表及辯方證人有關聆訊錄音的安排。

懲教署
二零一零年八月

附件F

懲教署
職員紀律聆訊安排錄音的指引

安排錄音的目的

在聆訊中安排錄音，是確保聆訊記錄準確及在需要時提供證據證明記錄是準確的快捷方法。如被控人員是基於聆訊程序或聆訊時援引的證據而提出司法覆核，負責進行司法覆核的法庭或須要求在庭上呈示有關聆訊的錄音記錄。

2. 部門會安排把所有紀律聆訊錄音。

行政安排

聆訊開始前

3. 在聆訊開始前，檢控人員須告知被控人員及控方證人會將聆訊錄音，以及清楚向被控人員說明，他有責任告知辯方代表及辯方證人有關聆訊錄音的安排。

4. 如任何一方在聆訊開始前就錄音安排提出反對，檢控人員須確定反對者提出反對的理由，並處理所關注的問題，向反對者解釋在聆訊中安排錄音對雙方均有好處。若反對者堅持反對安排錄音，檢控人員須告知主審人員有人提出反對及反對的理由。主審人員將會決定有關紀律聆訊應如何進行才可確保公平，以及因應個案的情況考慮是否需要為公平審訊起見而安排錄音。

5. 為確保聆訊時能進行錄音及其後能整理有關錄音記錄，檢控人員須準備適當的錄音器材及其他輔助設備，確定所有設備操作正常，錄音效果清晰，並須預備備用設備，以應付錄音器材突然故障的情況。

6. 部門會在辯方代表及辯方證人等候室內張貼告示，告知他們紀律聆訊將會安排錄音。此項措施與下文第9段所載安排是針對下述情況而設：在聆訊開始前，被控人員沒有告知有關辯方代表及／或辯方證人會把聆訊錄音的安排。

聆訊期間

7. 主審人員在聆訊開始時,須向出席紀律聆訊各方再次表明會把整個過程錄音。

8. 如上文第4段所述反對尚未解決,或任何一方在聆訊期間提出反對,主審人員須確定有關的反對理由,並處理反對者所關注的問題。其間,主審人員須考慮反對者所提出的理由、是否需要迅速完成聆訊,以及他合理地認為相關的其他因素。主審人員如決定有關反對無效／接納有關反對,須向反對者說明作出有關決定的理由,並在聆訊記錄中妥為記下。

9. 主審人員如決定接納就安排錄音提出的反對,則須作出決定並向出席聆訊各方表明,只是不會把涉及提出反對一方的部分錄音,還是不會把整個聆訊過程錄音。

10. 在聆訊中用作錄音的儲存裝置(例如影像光碟／數碼影像光碟／記憶卡)須在出席聆訊各方面前放入錄音器材,以及妥當貼上標籤以作識別。

11. 錄音記錄須即時製作一式三份,作下列用途:

(i) 密封的主複本,由部門保管;

(ii) 工作複本,供主審人員參考,或用作主審人員認為適當並與紀律聆訊有關的其他指定用途;以及

(iii) 辯方複本,供被控人員參考。

12. 指定由部門保管的主複本須在被控人員及主審人員面前立即以防干擾封套密封,並在封套上清楚註明密封的日期和時間,然後由主審人員在封套上簽署。

聆訊結束後

13. 主審人員須採取所有必要程序,確保已安全保管錄音記錄,以及記錄不會被剪輯改動或有人未經授權取得記錄。他須確保在需要時可隨時提出證據,證明錄音記錄已妥當處理。在紀律聆訊中收集的聲音數據受《個人資料(私隱)條例》(第486章)的條文規管,並須按照政府的《保安規例》的相關規定處理。

14. 提供錄音記錄的辯方複本給被控人員時，主審人員須向他清楚說明須妥當使用和保管有關錄音記錄。被控人員須認收有關錄音記錄，並簽署承諾書(樣本見附錄A)。

15. 如被控人員要求取得聆訊記錄，主審人員須確定有關要求的理由，並向被控人員說明錄音記錄是完整及準確的記錄，會在每節聆訊結束後盡快交給他。如被控人員仍然要求取得聆訊記錄，主審人員會在考慮有關理由後作出決定。

懲教署
二零一零年八月

附錄A

樣本

致： 懲教署署長
(經辦人：高級監督(人力資源))

經： _____(院所主管)

_____年_____月_____日(_____時至_____時)
第_____號紀律聆訊
錄音記錄的使用和保管

本人確認接獲上述紀律聆訊的錄音記錄(儲存模式及編號)。

本人承諾在接獲上述紀律聆訊的錄音記錄後，有關記錄：

(a) 只會用作與上述紀律聆訊有關的用途，以及因上述紀律聆訊而引起的法律程序(如有的話)的相關用途；

(b) 不會因上述(a)項所列以外的用途而披露或予以使用，惟獲其他資料當事人書面同意者除外；

(c) 會在無須再用作上述(a)項所列用途及按(b)項所述獲得許可作其他用途(如有的話)時，予以銷毀；

(d) 會以無法復修資料的方式銷毀，然後才妥為棄置。

簽署：_____

姓名：_____

職級及編號：_____

所屬院所：_____

日期：_____

GUIDELINES ON RELATED ISSUES/PROCEDURES DISCIPLINARY PROCEEDINGS UNDER THE TRAFFIC WARDENS (DISCIPLINE) REGULATIONS WITH LEGAL AND OTHER FORMS OF REPRESENTATION

This guidelines serve to outline the interim procedures regarding requests for defence representation by the defaulters and the conduct of legally represented disciplinary hearings prior to amendments to the Traffic Wardens (Discipline) Regulations [TW(D)R].

I. PROCEDURES FOR REQUESTS FOR DEFENCE REPRESENTATION

Appropriate Authority

2. 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).

3. 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.

4. 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

5. 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

6. When a defaulter has requested legal[1] or other forms of representation (except representation by a senior traffic warden or traffic warden of his choice), the designated Prosecuting Officer (PO), on behalf of the Formation Discipline Officer (FDO), will prepare all the required information (i.e. copy of charges, brief facts of the case and

[1] 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.

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;
(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.

7. A Guide for considering applications for legal representation is at Annex A. Specimen letters for granting or rejecting an application are at Annexes B and C.

8. If the alleged disciplinary offences, if proved, may result in the traffic warden 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.

9. 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. Specimen letters for granting or rejecting an application are at Annexes D and E.

10. The decision by the AA will be communicated to the defaulter (copied to the FDO) 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.

11. 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.

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

13. If the AA (or the DPT, after review) decides that the request for legal representation will be allowed, then the FDO 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 liasie with DoJ for the arrangement of legal representation for the prosecution and a legal adviser for the AO.

14. 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.

15. 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

16. When a FDO decides that formal disciplinary proceedings should be instituted against a traffic warden, the designated PO, on behalf of the FDO, will serve the following documents to the defaulter before the hearing:-

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

17. 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.

18. If the defaulter wishes to have a defence representative who previously would have been excluded by Reg. 8(11) of TW(D)R (except representation by a senior traffic warden or traffic warden of his choice), the designated Prosecuting Officer (PO), on behalf of the Formation Discipline Officer (FDO), 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.

19. When making his decision, the AA will make reference to the list of factors as set out in paragraph 6 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) by way of a notification memorandum.

20. 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.

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

22. If the AA (or the DPT, after review) decides that the request for legal representation will be allowed, then the FDO 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.

23. 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.

24. 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.

II. THE CONDUCT OF HEARINGS WITH LEGAL REPRESENTATION

The procedures for disciplinary proceedings (including hearings) against senior traffic wardens and traffic wardens are provided for under the TW(D)R. However, the TW(D)R do not currently expressly provide for the presence of a legal adviser to the AO or a legal representative for the PO, nor for questions/addresses by these legal advisers and representatives. In cases where permission for legal representation for the defaulter has been granted, guidelines on the conduct of the hearings are given in the following paragraphs. These guidelines are subject to review and may be revised in the light of experience.

Roles and Rights of those Present at the Hearing

2. Apart from the AO, the defaulter and witnesses, other parties present at the hearing will usually be as follows:-

Party	Who, role and rights
PO	▪ Appointed by the FDO of the Formation to which the defaulter is attached at the time of the commission of the offence. ▪ To represent the "prosecution" and to take care of the logistics for the hearing. ▪ Can instruct/discuss with his legal representative. As his advocacy role is to be taken up by his legal representative, the PO will not question the defaulter, the defaulter's legal representative and witnesses. The PO will not address the AO unless invited to do so.
PO's legal representative	▪ Normally a briefed-out counsel engaged by the Department of Justice. ▪ Acting for the PO in presenting the case against the defaulter (including the case background and the witnesses and documentary evidence he intends to present), questioning the defaulter if he (or his legal representative) makes any address(es) to the AO, examining, cross-examining and re-examining witnesses, and addressing the AO.
Defaulter's legal representative	▪ To assist the defaulter at the hearing. ▪ To present evidence, examine/ cross-examine/ re-examine witnesses and address the AO on the defaulter's behalf (note : the defaulter may also exercise these rights in the proceedings.) ▪ Cannot make plea to the charge(s). The defaulter must do so himself.
AO's legal adviser	▪ Normally a briefed-out counsel engaged by the HKPF (specimen instructions letter at Annex H).

Party	Who, role and rights
	▪ To advise the AO at the hearing on points of law and on any matters relevant to the proper conduct of the hearing and consideration of the defaulter's case. In this respect, with the AO's permission, he may raise any questions with the PO's legal representative, the defaulter and his legal representative, and address the AO.

Points to Note

3. Some points to note on the procedures for hearings with legal representation are set out below:-

(a) The AO remains responsible for ensuring the proper conduct of the hearing, finding of facts, determining whether the disciplinary charge or charges alleged against the defaulter are established and making awards if the charge or charges are proved;

(b) At any time during the hearing, the AO may invite his legal adviser to address him on any points of law and on any matters relevant to the proper conduct of the hearing and consideration of the defaulter's case. The defaulter and the legal representatives of the defaulter and the PO should be allowed to address the AO on the advice given by the AO's legal adviser if they so wish;

(c) At any time during the hearing, if the AO's legal adviser wishes to address the AO and/or raise questions to the PO and/or defaulter, or their legal representatives, he should first seek the AO's permission to do so. If the AO grants such permission, the defaulter and the legal representatives of the PO and the defaulter should be allowed to address the AO on the points raised by the AO's legal adviser, and/or respond to his questions if they so wish;

(d) The defaulter and/or his legal representative will always have the "last word" at the hearing. In cases where the AO's legal adviser is allowed to address the AO after the defaulter or his legal representative has made the final address, the defaulter or his legal representative must be given the opportunity to respond to the points raised by the AO's legal adviser, should he so wish, before the hearing is closed; and

(e) Discussions between the AO and his legal adviser should be conducted at the hearing in the presence of the defaulter and his legal representative, as well as the PO and his legal representative. In the event that the AO considers it necessary to seek any advice from his legal adviser after the conclusion of the hearing, he should re-convene the hearing and seek the required advice in the presence of the defaulter and his legal representative and the PO and his legal representative.

4. The above guidelines are to ensure the proper conduct of proceedings where

fairness requires that the defaulter be legally represented. It is a good practice for the AO, in cases where legal representation has been granted, to inform all parties of the broad principles at paragraph 3(a)-(e) above at the beginning of the hearing, and to deal with any views from the defaulter and/or his legal representative before the hearing proceeds.

III. CONDUCT OF HEARINGS WITH "FRIEND" REPRESENTATION

In general, the conduct of the hearings with "Friend" representation will be similar to those hearings with senior traffic warden or traffic warden as defence representative. The major difference is that the "Friend" will assume the full role as defence representative, instead of a senior traffic warden or traffic warden, for defaulters subject to disciplinary proceedings processed under TW(D)R. He can assist the defaulter at the hearing and to present evidence, examine/ cross-examine/ re-examine witnesses and address the AO on the defaulter's behalf (note: the defaulter may also exercise these rights in the disciplinary proceedings). However, the "Friend" cannot make plea to the charge(s). The defaulter must do so himself.

Annex A

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.

Annex B

[*File reference*] [*Tel No.*]

[*Fax No.*]

[*Date*]

[*Rank and name of defaulter*]
[*Post of defaulter*]
c/o [*Formation Commander of defaulter*]

Dear Sir/Madam*,

I write with reference to your letter/application of [*date*], seeking authorisation from the Appropriate Authority for you to be assisted by [*title and name, if available*], * [*solicitor or barrister*] at the disciplinary hearing instituted against you for [*name of charges*] under Traffic Wardens (Discipline) Regulations.

This serves to inform you that the [*name and office title of the Appropriate Authority*], the Appropriate Authority, has considered your application and the circumstances of this case, and is satisfied that legal representation for you at your hearing should be allowed. He/she* has decided to grant the authorisation sought.

* **You are reminded that confidential information protected against unauthorized disclosure under section (13, 14, 15, 16 or 17)* of the Official Secrets Ordinance (OSO) will be acquired by you or your legal representative in the course of the current disciplinary proceedings. You or your legal representative may be prosecuted under OSO or be sued for breach of confidence for any unauthorized disclosure. Please bring this to the attention of your legal representative.***

For the avoidance of doubt, please note that the costs incurred in respect of legal representation and other legal services for you is entirely a matter for you, and will not be borne by the Government or the Hong Kong Police Force irrespective of the outcome of the disciplinary proceedings.

Yours faithfully,

(*name of staffing Inspector*)
for Commissioner of Police

c.c. [*Formation Discipline Officer*] (Attn : [*title and name of PO*])

* Delete as appropriate.

Annex C

[*File reference*] [*Tel No.*]

[*Fax No.*]

[*Date*]

[*Rank and name of defaulter*]
[*Post of defaulter*]
c/o [*Formation Commander of defaulter*]

Dear Sir/Madam*,

I write with reference to your letter/application of [*date*], seeking authorisation from the Appropriate Authority for you to be assisted by [*title and name, if available*], *[*solicitor or barrister*] at the disciplinary hearing instituted against you for [*name of charges*] under Traffic Wardens (Discipline) Regulations.

This serves to inform you that the [name and office title of the Appropriate Authority], the Appropriate Authority, has considered the merits of your application for legal representation on the basis of the principles of fairness. After taking into account all the factors listed in paragraph 3 below, the Appropriate Authority considered that fairness does not require legal representation at your inquiry hearing. He/she* has decided not to grant the authorisation sought.

In arriving at the above decision, the Appropriate Authority has carefully considered the following factors: –

[Note: The appropriate authority will consider the merit of each application for legal representation for the defaulter on the basis of what fairness requires in the particular case. In considering individual request, the following factors will be taken into account, together with any other factor which may be relevant to the issue of whether fairness in the particular case requires legal representation for the defaulter:–

(a) grounds advanced by the defaulter;

(b) seriousness of the disciplinary charge(s) laid against the defaulter and the potential penalty;

(c) whether any points of law are likely to arise;

(d) the defaulter’s capacity to present his case at the hearing;

(e) existence of any procedural difficulties the defaulter may face at the hearing (e.g. the need to cross-examine witness/expert witness extensively, difficulties arising from the defaulter's disabilities, etc.);

(e) the need for reasonable speed to make the adjudication;

(f) the need for fairness among the individuals concerned; and

(i) other matters relevant to the case which would have been evident at the time although not specifically mentioned under the grounds advanced by the defaulter.]

Yours faithfully,

(*name of Staffing Inspector*)
for Commissioner of Police

c.c. [*Formation Discipline Officer*] (Attn : [*title and name of PO*])

* delete as appropriate

Annex D

[*File reference*] [*Tel No.*]

[*Fax No.*]

[*Date*]

[*Rank and name of defaulter*]
[*Post of defaulter*]
c/o [*Formation Commander of defaulter*]

Dear Sir/Madam*,

I write with reference to your letter/application of [*date*], seeking authorisation from the Appropriate Authority for you to be assisted by [*title and name, if available*], at the disciplinary hearing instituted against you for [*name of charges*] under Traffic Wardens (Discipline) Regulations.

This serves to inform you that the [*name and office title of the Appropriate Authority*], the Appropriate Authority, has considered your application and the circumstances of this case, and is satisfied that representation for you by the aforesaid person at your hearing should be allowed. He/she* has decided to grant the authorisation sought.

* **You are reminded that confidential information protected against unauthorized disclosure under section (13, 14, 15, 16 or 17)* of the Official Secrets Ordinance (OSO) will be acquired by you or your defence representative in the course of the current disciplinary proceedings. You or your defence representative may be prosecuted under OSO or be sued for breach of confidence for any unauthorized disclosure. Please bring this to the attention of your defence representative.***

Yours faithfully,

(*name of staffing Inspector*)
for Commissioner of Police

c.c. [*Formation Discipline Officer*] (Attn : [*title and name of PO*])
* Delete as appropriate.

Annex E

[*File reference*] [*Tel No.*]

[*Fax No.*]

[*Date*]

[*Rank and name of defaulter*]
[*Post of defaulter*]
c/o [*Formation Commander of defaulter*]

Dear Sir/Madam*,

I write with reference to your letter/application of [*date*], seeking authorisation from the Appropriate Authority for you to be assisted by [*title and name, if available*], at the disciplinary hearing instituted against you for [*name of charges*] under Traffic Wardens (Discipline) Regulations.

This serves to inform you that the [*name and office title of the Appropriate Authority*], the Appropriate Authority, has considered the merits of your application for such representation on the basis of the principles of fairness. After taking into account all the factors listed in paragraph 3 below, the Appropriate Authority has decided not to grant the authorisation sought.

In arriving at the above decision, the Appropriate Authority has carefully considered the following factors :–

[Note: The appropriate authority will consider the merit of each application for the defence representation for the defaulter on the basis of what fairness requires in the particular case. In considering individual request, the following factors will be taken into account, together with any other factor which may be relevant to the issue:-

(a) possible confidential issues relating to the case;

(b) possibility of leakage of sensitive information;

(c) the defence representative being senior in rank to the Adjudicating Officer; and

(d) other matters relevant to the case which would have been evident at the time.]

Yours faithfully,

(*name of Staffing Inspector*)
for Commissioner of Police

c.c. [*Formation Discipline Officer*] (Attn : [*title and name of PO*])

* delete as appropriate

Annex F1

RESTRICTED (STAFF)

MEMO

From :	Prosecuting Officer	***To :***	** Defaulter*
Ref. :	( ) ***in*** XX DR X/200X	***Thro'***	
Tel. No. :	aaaa aaaa ***Fax No***. xxxx xxxx	***Your Ref.***	***in***
E-mail	xxx-x@police.gov.hk	***dated :***	***Fax No. :***
Date :	2009-xx-xx	***Total Pages***	

Notification of Defaulter Proceedings
XX DR X/200X

By service of this memorandum you are officially informed that disciplinary charge(s) will be laid against you. A copy of the charge(s) is attached.

2. You are further notified that :

(a) A Superintendent of Police from FDAU will be appointed as the appropriate tribunal;

(b) The place of hearing will be the office of the Force Discipline Adjudication Unit, 13/F, Arsenal House, 1 Arsenal Street, Wanchai, Hong Kong; and

(c) The date of hearing will be communicated to you in due course [at least seven clear days after (i) the receipt of your acknowledgement receipt and reply memorandum or (ii) the expiry of the 14-days period as stipulated in paragraph 6].

3. You are reminded of your right to :

(a) object to the appropriate tribunal on the grounds of partiality or bias, vide *Regulation 5* of the Traffic Wardens (Discipline) Regulations [TW(D)R];

(b) be given copies of or reasonable access to such police records and documents as you require and which are necessary for the preparation of your defence, vide *Regulation 6* of TW(D)R;

(c) be assisted in your defence by a senior traffic warden or traffic warden of your own choice. No approval is required if you do not request for legal or "Friend" representation; and

(d) have a defence representative in the light of what fairness in a particular disciplinary case requires, without being restricted by *Regulation 8(11)* of the TW(D)R[1].

4. Should you wish to exercise your right :

(a) under *Regulation 5*, you must set out your grounds in full in writing and deliver them to the appropriate tribunal before the commencement of the hearing;

(b) under *Regulation 6*, you must address the undersigned direct; and

(c) under paragraph 3(d) to have a defence representative, your request will be considered on the basis of whether fairness in the disciplinary case against you requires such representation, and if such representation is allowed, how the disciplinary case should proceed in the light of the form of representation allowed. Please note in particular that whether such representation should be allowed is a matter of discretion, not of right, and furthermore neither the Commissioner nor the HKSARG is responsible for the costs incurred in respect of such representation, irrespective of the outcome of the disciplinary proceedings.

5. You are also notified that in order to keep an accurate record of the proceedings, the hearing(s) will be tape-recorded and you are entitled to a copy of the tape at the end of the hearing(s).

6. You are requested to return the attached acknowledgement receipt and reply memorandum to the undersigned by fax ( ), to be received by the undersigned within 14 days of your receipt of this memorandum. You should seek confirmation of receipt of your fax. If the undersigned does not receive your response within this period, arrangement will be made with the Appropriate Tribunal

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[1] *Under Reg 8(11) of TW(D)R, no barrister or solicitor shall appear on behalf of the defaulter.* Although not specifically dealt with in the judgment of FACV 9/2008, the Commissioner will now treat Reg. *8(11)* as ineffective.

to commence the disciplinary proceedings against you. You will be notified of the date and time of such proceedings in due course.

signed
( )
Prosecuting Officer

c.c. CP (Attn : SP Discipline)
Formation Discipline Officer

Annex F2

RESTRICTED (STAFF)

MEMO

From :	**Defaulter*	***To :***	Prosecuting Officer
Ref. :	( ) ***in*** XX DR X/200X	***Thru':***	
Tel. No. :	aaaa aaaa ***Fax No***.	***Your Ref.***	***in***
E-mail		***dated :***	***Fax No. :***
Date :	2009-xx-xx	***Total Pages***	

Notification of Defaulter Proceedings
XX DR X/200X

Your memorandum under the reference of ( ) in XX DR X/200X dated 2009-xx-xx refers.

2. I acknowledge receipt of the above referenced memorandum and:

		Yes	No
(a)	I wish to seek representation by a senior traffic warden or traffic warden of my choice.	☐	☐
(b)	I wish to seek representation by a legal practitioner.	☐	☐
(c)	I wish to seek representation by a person who does not fall within (a) or (b) above.	☐	☐

(*Please "✓" as appropriate*. If your answer is yes for (b) or (c), please complete paragraph 3).

3. My reasons as to how the fairness in the disciplinary case against me requires such representation are as follows :-

[*Note for Defaulter : Please state your full reasons as to how the fairness in the disciplinary case against you requires such representation. The factors to be taken into*

account in deciding whether fairness requires such representation to be permitted include but are not limited to 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. Each request will be determined on its own merits.]

4. The particulars of the person whom I wish to act as my representative are as follows (if you have already decided who is to act as your defence representative) :-

Name:
Rank (if the defence representative
is a traffic warden):
HKID No:
Occupation:
Relationship:
Address (Office or Home):
Telephone:

5. I have the following comments (if any) to make:

signed
(Defaulter)

c.c. CP (Attn : SP Discipline)
Formation Discipline Officer

<u>Personal Data (Privacy) Ordinance (Cap. 486)</u>

a) *The requested information will be used by the Commissioner for consideration of your request for defence representation and may be disclosed to other Government Departments for related*

purposes.

b) *A data subject has the right to request to access to or correction of personal data provided on this memorandum in accordance with the Personal Data (Privacy) Ordinance. Such request must be made in writing to the officers designated for handling data access / correction request as promulgated in relevant departmental / internal circulars.*

附件 F1

限閱文件(人事)

便 箋

發文人：	主控人員	***受文人：***	**違紀人員*
檔號：	( ) ***in*** XX DR X/200X	***(經由***	***轉交)***
電話：	aaaa aaaa ***傳真：*** xxxx xxxx	***來函檔號：***	***in***
電郵：	xxx-x@police.gov.hk	***日期：***	***傳真：***
日期：	2009 年 xx 月 xx 日	***總頁數：***	

違紀研訊通知

XX DR X/200X

謹藉送達本便箋,正式通知你有關處方將向你提出的一項(或多項)違反紀律控罪。隨函付上有關控罪的副本。

2. 現進一步通知你以下事項：

(a) 警隊審裁組的一名警司將獲委任爲適當審裁體；

(b) 聆訊地點爲香港灣仔軍器廠街 1 號警政大樓 13 樓警隊審裁組的辦事處；以及

(c) 聆訊日期將於稍後通知你〔最少爲(i)處方收到你的確認回條和回覆便箋後，或(ii)下文第 6 段規定的 14 天期限屆滿後 7 整天〕。

3. 現提醒你，你有以下權利：

(a) 以偏袒或偏見爲理由而反對有關適當審裁體，請參閱《交通督導員(紀律)規例》(規例)*第 5 條*；

(b) 如你提出要求，會獲提供你預備答辯所需要的警方記錄及其他文件的副本，或該等記錄及文件的合理取閱權，請參閱規例*第 6 條*；

(c) 由你選定的高級交通督導員或交通督導員在你的辯護中提供協助。假如你不要求委派法律或「朋友」代表，則無須獲得批准；以及

(d) 按個別紀律個案的公平需要委派辯護代表，並無須受規例*第 8(11)條*[1]所限。

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[1] *根據《交通督導員(紀律)規例》第 8(11)條的規定，大律師或律師不得代表違紀人員*。雖然終院民事上訴 2008 年第 9 號一案中沒有特別處理規例第 *8(11)條*，但警務處處長現將視該條爲無效。

4. 如果你希望行使你以下權利：

(a) 根據規例*第 5 條*所述的權利，你必須在聆訊展開前，以書面詳列理由，並送交適當審裁體；

(b) 根據規例*第 6 條*所述的權利，你必須直接與以下簽署人聯絡；以及

(c) 根據上文第 3(d)段所述有關委派一名辯護代表的權利，處方將根據對你紀律個案的公平需要，考慮你的要求。假如你的要求獲得批准，處方會就批准的代表類別來決定如何展開你的紀律聆訊。請你特別注意，有關代表是否應獲批准屬於酌情決定，而非權利。此外，不論紀律研訊的結果如何，警務處處長或香港特區政府不會負責有關代表所引致的費用。

5. 此外，爲準確記錄研訊程序，有關聆訊將進行錄音。你有權在聆訊結束時獲得一份錄音記錄。

6. 你須於收到本便箋日期起計 14 天內，以傳真方式(傳真號碼：xxxx xxxx)把隨付的確認回條和回覆便箋交回以下簽署人。你應確定你的傳真已被收妥。如果以下簽署人沒有於上述期間內收到你的回覆，則處方將會與適當審裁體作出安排，以便展開你的紀律研訊。你將於稍後獲通知有關研訊的日期和時間。

簽署

(　　)

主控人員

副本送：警務處處長〔經辦人：警司(紀律)〕

單位紀律主任

限閱文件(人事)

便 箋

發文人： **違紀人員*		***受文人：***	主控人員
檔號：	( ) ***in*** XX DR X/200X	***(經由***	***轉交)***
電話：	aaaa aaaa ***傳真：***	***來函檔號：***	***in***
電郵：		***日期：***	***傳真：***
日期：	2009 年 xx 月 xx 日	***總頁數：***	

違紀研訊通知

XX DR X/200X

2009 年 xx 月 xx 日的便箋〔檔號：( ) in XX DR X/200X〕收悉，本人謹此作出確認。此外：

		是	否
(a)	本人希望要求由本人選定的高級交通督導員或交通督導員擔任代表。	☐	☐
(b)	本人希望要求由一名法律執業者擔任代表。	☐	☐
(c)	本人希望要求由不屬於上文(a)或(b)項所述人士擔任代表。	☐	☐

(*請在適當方格內填上"✓"號。如果(b)或(c)項的答案爲"是"，請填妥下文第 2 段。*)

2. 本人紀律個案就公平需要，要求委派有關代表的理由如下：

〔違紀人員須知：請說明詳盡理由，解釋因何你的紀律個案的公平需要要求委派有關代表。處方在決定是否批准因公平需要委派該等代表的考慮因素，包括但不限於控罪的嚴重性和潛在刑罰；是否會引起任何法律論點的爭議；有關個別人員爲其個案作出辯護的能力；程序上的困難；以及在合理時間內完成審訊的需要；並且顧及各有關人士的公平需要。各個要求將按照個別個案的情況予以考慮。〕

3. 本人希望下列人士擔任本人代表。其資料如下〔如你已決定辯護代表的人選〕:

姓名：
職級(如果辯護代表是交通督導員)：
香港身分證號碼：
職業：
關係：
地址(辦事處或住所)：
電話：

4. 本人欲發表以下意見(如有)：

簽署
(違紀人員)

副本送： 警務處處長〔經辦人：警司(紀律)〕
單位紀律主任

<u>《個人資料(私隱)條例》(香港法例第 486 章)</u>

a) 所需資料將會供警務處處長考慮你對辯護代表的要求，並可能會向其他政府部門披露作相關用途。

b) 資料當事人有權根據《個人資料(私隱)條例》要求查閱或更改其在本便箋所提供的個人資料。有關要求必須以書面方式向有關部門／內部通告公布負責處理資料查閱／更改要求的人員提出。

NOTE TO DEFAULTER ON TAPE RECORDINGS IN DISCIPLINARY HEARINGS

Tape recording is allowed in all disciplinary hearings in order to keep an accurate record of proceedings. You are entitled to a copy of the tape at the end of the hearings.

2. The Adjudicating Officer will arrange for the tape recording. The tapes recorded in the hearing will be sealed. Force Management will only accept sealed tapes as the official copy. There is also no objection to you or your defence representative making your own tape recording for the preparation of your defence. Neither is the Adjudicating Officer or Force Management liable for any discrepancy between the two sets of tapes. Force Management is not liable for any cost incurred from your own tape recording.

違紀人員在紀律聆訊中進行錄音的注意事項

在所有紀律聆訊中，可以將聆訊過程錄音，以便準確記錄研訊程序。你有權在聆訊結束時獲得一份錄音記錄。

2. 主審人員會安排進行錄音。聆訊過程的錄音帶將會密封。警隊管理層只接受密封的錄音帶作爲正式記錄。處方亦不反對你或你的辯護代表自行錄音，以準備你的辯護。如果兩套錄音帶出現差異情況，主審人員或警隊管理層均無須負責任。警隊管理層不會承擔你自行錄音的任何費用。

Annex H

SPECIMEN INSTRUCTIONS LETTER TO
ADJUDICATING OFFICER'S LEGAL ADVISER

[Date]

[Name of Solicitor/Counsel]
[Address]

Dear [ ],

Appointment as Legal Adviser to Adjudicating Officer in
Disciplinary Hearing under Traffic Wardens (Discipline) Regulations
Defaulter: [*Name of the defaulter*]
[*Disciplinary case no.*]

1. As discussed on [*date*], I am writing to confirm the basis upon which we would appoint you as the Legal Adviser to the Adjudicating Officer in the above disciplinary hearing held under Traffic Wardens (Discipline) Regulations (Cap. 374J) [the "TW(D)R"] on [*date*] at [*time*] at [*venue*].

Duties

2. As the Legal Adviser to the Adjudicating Officer of this disciplinary hearing, your duties include the following :-

   (a) providing legal advice to the Adjudicating Officer on any points of law and on any matters relevant to the proper conduct of the hearing and consideration of the defaulter's case at the hearing; and

   (b) attending the hearings scheduled for this disciplinary proceedings.

Fees

3. You will be remunerated at a rate of HK$[ ] per hour for services rendered to the Adjudicating Officer. The fee includes all administrative expenses and disbursements.

Parties

4. [*Name of the defaulter*], [*rank*] of [f*ormation*], Hong Kong Police Force ("the Defaulter"**)** is charged as follows :-

   [*charge(s)*]

5. [N*ame and rank of Adjudicating Officer*] is appointed as the Adjudicating Officer to conduct the hearing.

6. [*Name*], [*rank/post of Prosecuting Officer*], is the Prosecuting Officer of the disciplinary hearing. [N*ame*], a *[*practising solicitor/practising barrister*], will provide legal advice to the Prosecuting Officer on matters in relation to the disciplinary hearing, present all the relevant evidence on the charge(s) to the Adjudicating Officer by calling witnesses and producing documentary evidence, and address the Adjudicating Officer on behalf of the Prosecuting Officer at the disciplinary hearing.

7. The Defaulter's application for assistance by a legal representative in the defence in the disciplinary hearing has been allowed. The Defaulter's legal representative, [*name*], is a *[*practising solicitor/practising barrister/a police officer qualified as solicitor/barrister*].

Disciplinary Procedures

8. Under the police disciplinary system, formal disciplinary action against traffic wardens is conducted in accordance with the TW(D)R which was made under the repealed Road Traffic Ordinance (Cap 220) and, by virtue of section 36(1) of the Interpretation and General Clauses Ordinance (Cap 1) continue in force and have the like effect as if they had been made under the present Road Traffic Ordinance (Cap 374). The hearing procedures are supplemented by the "Notes on Related Issues/Procedures" for disciplinary proceedings with legal representation under the TW(D)R ("the Notes").

9. The TW(D)R and the Notes are applicable to all senior traffic wardens and traffic wardens.

10. *[When it appears to any police officer of or above the rank of sergeant or any senior traffic warden that a disciplinary charge or charges should be laid against a traffic warden,]

    *[When it appears to any police officer of or above the rank of sergeant that a disciplinary charge or charges should be laid against a senior traffic warden,]

the appropriate charge(s) will be entered in a document entitled defaulter report. The defaulter report shall be the records of the case against such police officer.

11. The Defaulter in this case is *[a senior traffic warden/a traffic warden]. The disciplinary procedures set out in the TW(D)R are applicable in this disciplinary hearing.

12. The Adjudicating Officer of a disciplinary case is appointed to conduct the disciplinary hearing, to ascertain the facts of the case, to determine whether the facts necessary to support the charge(s) have been established, to give a judgment for the charge(s), to give an award if the charge(s) are proved and to ensure that the defaulter is given a fair and impartial hearing. The Adjudicating Officer must deal with the issues of standard of proof and burden of proof in his judgment.

13. A defaulter's legal representative normally presents the defaulter's evidence, questions the witnesses and makes address(es) to the Adjudicating Officer, but the defaulter may be permitted to do so as well.

14. Once a judgment has been made, the defaulter will be called before the Adjudicating Officer who will read out his judgment and announce his finding(s) to each charge. The judgment will be recorded in the Record of Proceedings. The recording of the judgment is important, as it will form the basis of any appeal lodged by the defaulter.

15. If a 'guilty' finding is reached, the Adjudicating Officer will invite the defaulter to make a statement in mitigation before making awards. It is advisable for the Adjudicating Officer to adjourn the hearing in order for him to consider all relevant factors before deciding on the level of awards.

16. The defaulter report will then be submitted to the **Superintendent (if an Inspector is sitting as tribunal) / Senior Police Officer (if a Superintendent is sitting as tribunal) / Deputy Commissioner of Police (Management) (if a Senior Police Officer is sitting as tribunal)* for confirmation or variation.

17. **A Superintendent / Senior Police Officer / Deputy Commissioner of Police (Management)* has a supervisory role over an adjudicating officer of any disciplinary proceedings against a senior traffic warden or traffic warden. Under Regulation 14 of the TW(D)R, he may confirm or vary an adjudicating officer's finding or award within 14 days from the date of the finding or award. He is required to review the defaulter report and to ensure that the proceedings have been conducted in a fair, impartial and reasonable manner and in accordance with the rules of natural justice. It must be noted that he has to complete his statutory duty required under

Regulation 14 of the TW(D)R within 14 days from the date of the finding(s) or award(s), being announced. It is therefore imperative that the Adjudicating Officer gives his award promptly so that he may have a careful consideration on the award before the 14 days' period expires. He shall announce personally or communicate in writing to the defaulter the action taken by him.

18. The **Superintendent / Senior Police Officer / Deputy Commissioner of Police (Management)]* of this case is [*name, rank and post of the Superintendent / Senior Police Officer / Deputy Commissioner (Management).*]

19. For detailed procedures, please refer to the TW(D)R, FDM Chapter Nos. and the Notes attached (Items 1 to 3 of the List of Materials).

Points to Note

Independence and Impartiality of the Hearing

20. To ensure the independence and impartiality of the disciplinary hearing, the Prosecuting Officer/the Prosecuting Officer's legal representative and the Adjudicating Officer should not discuss the evidence to be presented at the disciplinary hearing, nor should they hold any discussion during the hearing except in the presence of the defaulter/the defaulter's legal representative.

Natural Justice

21. The Appropriate Tribunal is not a court of law, and the disciplinary hearing should be conducted without undue formality. The Adjudicating Officer is not bound by any rules of evidence, and may inquire into any matter and take into account any evidence or information which it considers relevant.

22. Nevertheless, the hearing has to be conducted in accordance with the principles of natural justice, including the rule against bias and the right to a fair hearing.

23. The Court of Final Appeal in *Lam Siu Po v. Commissioner of Police* [2009] 4 HKLRD 575 (Item 4 of the List of Materials) held that Article 10 of the Bill of Rights is engaged in disciplinary proceedings if the typical award for the offence that the defaulter faces being "normally terminatory". Regulations 9(11) and 9(12) of the Police Discipline Regulations [P(D)R] applicable to junior police officers have been expressly declared by the Court of Final Appeal as unconstitutional, null, void and of no effect as they excluded the possibility of the tribunal

exercising a discretion on whether fairness requires legal representation to be permitted. The applicant was held to have been deprived of a fair hearing in accordance with Article 10 of the Bill of Rights and the disciplinary proceedings were held to be unlawful. Although Regulations 8(11) of the TW(D)R, which is similar to Regulations 9(11) and 9(12) of P(D)R, is not specifically dealt with in Lam Siu Po's case, the Commissioner now treats Regulation 8(11) of TW(D)R as ineffective.

24. Save for those provisions prescribed in the TW(D)R, the procedures of the disciplinary hearing stated in the Notes are meant to be followed generally and applied flexibly as required by the principles of nature justice and having regard to the circumstances of each individual case.

Standard of Proof

25. The Court of Final Appeal in *A Solicitor (24/07) v. Law Society of Hong Kong* [2008] 2 HKLRD 567 (Item 5 of the List of Materials) held that the standard of proof for disciplinary proceedings in Hong Kong is the preponderance of probability. The more serious the act or omission alleged, the more inherently improbable must it be regarded. The more inherently improbable it was regarded, the more compelling the evidence needed to prove it.

26. The Court of First Instance, in *Rowse v. Secretary for Civil Service* [2008] 5 HKLRD 217 (Item 6 of the List of Materials) in which the applicant challenged a decision made under Section 10 of the Public Service (Administration) Order [PS(A)O] by way of judicial review, also held that the preponderance of probability standard should be applied.

27. Please refer to Annex B of the FDM for elaboration.

Role of the Legal Adviser to the Adjudicating Officer

28. The duty to ensure the proper conduct of the hearing, find facts, determine whether the charge(s) against the defaulter are established and give an award if the charges are proved remains entirely with the Adjudicating Officer. The Legal Adviser to the Adjudicating Officer is engaged to advise the Adjudicating Officer on points of law and on any matters relevant to the proper conduct of the hearing and consideration of the defaulter's case.

29. The Adjudicating Officer may invite the Legal Adviser to advise on any points of law and on any matters relevant to the proper conduct of the hearing and consideration of the defaulter's case. The defaulter/legal representative and the Prosecuting Officer's legal representative should be

allowed to address the Adjudicating Officer on the advice given by the Legal Adviser, if they so wish.

30. During the disciplinary hearing, if the Legal Adviser wishes to address the Adjudicating Officer and/or raise questions to the defaulter/the defaulter's legal representative or the Prosecuting Officer's legal representative, he should seek the permission of the Adjudicating Officer to do so. If the Adjudicating Officer grants such permission, the defaulter/the defaulter's legal representative and the Prosecuting Officer's legal representative should be allowed to address the Adjudicating Officer on the points raised by the Legal Adviser and/or respond to the Legal Adviser's questions, if they so wish.

31. The defaulter/his legal representative will always have the "last word" at the disciplinary hearing. In case the Legal Adviser is allowed to address the Adjudicating Officer after the defaulter/legal representative has made the final address, the defaulter/his legal representative must be given an opportunity to respond to the point(s) raised by the Legal Adviser, should he so wish, before the disciplinary hearing is closed.

32. Discussions between the Adjudicating Officer and the Legal Adviser should only be done at the hearing in the presence of the defaulter/his legal representative and the Prosecuting Officer and his legal representative. The Legal Adviser should not deliberate with the Adjudicating Officer on the disciplinary proceedings other than at the hearing. (*Dr. Chan Hei Ling Helen v. The Medical Council of Hong Kong* [2009] 4 HKLRD 174 – Item 7 of the List of Materials)

33. The Legal Adviser should not be involved in the drafting of the Record of Proceedings or the Defaulter Report (*Dr. Chan Hei Ling Helen v. The Medical Council of Hong Kong*, *supra*).

34. In the event that the Adjudicating Officer considers it necessary to seek any advice from the Legal Adviser after the conclusion of the hearing, the Adjudicating Officer should re-convene the hearing and seek the required advice in the presence of the defaulter/his legal representative and the Prosecuting Officer and his legal representative. The defaulter/his legal representative should be given an opportunity to respond to the advice given by the Legal Adviser.

<u>Confidentiality</u>

35. Any document or information acquired by you in the course of these disciplinary proceedings are to be used solely for the purpose of performing your duties as Legal Adviser to the Adjudicating Officer and

are not to be disclosed to any other parties unless with the prior written consent of the Commissioner or required by the law.

36. Any document or information acquired by you in the course of these disciplinary proceedings will not be copied except for performing your duties as Legal Adviser to the Adjudicating Officer.

37. Any document or information acquired by you in the course of these disciplinary proceedings and any reproduced copies made by you will be returned to Hong Kong Police Force once they are no longer required for performing your duties as Legal Adviser to the Adjudicating Officer.

Correspondence

38. We will send all correspondence to you by fax, post, e-mail, hand or courier as the circumstances require. [*Name of Staffing Inspector for Defence Representation*] of the Personnel Wing, Hong Kong Police Force at [*tel no*.] will liaise with you for a briefing on the hearing procedures.

Accounting arrangement

39. Please send us your fee notes to this Headquarters [on a monthly basis/as soon as the case has been completed].

40. We should be grateful if you would confirm that the above terms are accepted.

Yours sincerely,

([*name of SSP HQ P*])
for Commissioner of Police

* Delete as appropriate

List of Materials for Disciplinary Hearings
under the Traffic Wardens (Discipline) Regulations

1. Traffic Wardens (Discipline) Regulations (Cap. 374J)

2. Force Discipline Manual (Chapters (nos))

3. "Guidelines on Related Issues/Procedures" for disciplinary proceedings with legal representation under the Traffic Wardens (Discipline) Regulations

4. *Lam Siu Po v. Commissioner of Police* [2009] 4 HKLRD 575

5. *A Solicitor (24/07) v. Law Society of Hong Kong* [2008] 2 HKLRD 567

6. *Rowse v. Secretary for Civil Service* [2008] 5 HKLRD 217

7. *Dr. Chan Hei Ling Helen v. The Medical Council of Hong Kong* [2009] 4 HKLRD 174

由此

Annex C

HCAL 74/2010

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

NO. 74 OF 2010

———————

IN THE MATTER of Police (Discipline) Regulations, Cap. 232

and

IN THE MATTER of an application for Judicial Review pursuant to RHC Order 53 r. 3

———————

BETWEEN

AU HING SIK CHARLES 區慶錫 Applicant

and

COMMISSIONER OF POLICE
TANG KING SING 香港警務處長鄧竟成 1st Respondent

CHIEF SUPERINTENDENT OF POLICE
(CONDITIONS OF SERVICE AND DISCIPLINE)
LAM YIU WING 香港警務處林耀榮總警司 2nd Respondent

DIRECTOR OF PERSONNEL AND TRAINING (DPT)
SENIOR ASSISTANT COMMISSIONER OF POLICE
TANG HAU SING
香港警務處鄧厚昇高級助理處長 3rd Respondent

———————

Before: Hon Lam J in Court

Date of Hearing: 6 December 2011

Date of Judgment: 20 December 2011

J U D G M E N T

1. After the decision of the Court of Final Appeal in *Lam Siu Po v Commissioner of Police* [2009] 4 HKLRD 575, Regulations 9(11) and (12) of the Police (Discipline) Regulations Cap.232 became null and void. With intent to give effect to the decision of the Court of Final Appeal as regards the possibility of having legal representation for the defence of a police officer ["a defaulter"] in disciplinary proceedings, the Police Force added a Chapter 8 to the Force Discipline Manual implementing a scheme for assessing whether legal representation should be permitted when a defaulter applies for the same ["the Scheme"]. One of the issues in the present proceedings is whether the Scheme complies with the Court of Final Appeal judgment.

2. In addition, the applicant (who is a defaulter subject to pending disciplinary proceedings) also challenged the actual exercise of discretion against him in respect of his application for legal representation by the 2nd Respondent as the Appropriate Authority and the 3rd Respondent as the Reviewing Authority under the Scheme.

3. For present purposes, I can summarize the background facts as follows. The Applicant joined the Police Force in 1985. He was promoted to the rank of sergeant in 1994 and further to the rank of station sergeant in 2003. He had an unblemished record up to the events which led to him being charged with two disciplinary charges in 2008. According to the summary of his service record prepared by the

prosecuting officer, he had received a number of compliments and awards over the years in connection with his performance in police duties.

4. On 15 December 2008, disciplinary proceedings were commenced by the Police Force against the Applicant on two charges,

(a) Contravention of Police Orders, contrary to Regulation 3(2)(e) of Police (Discipline) Regulations Cap.232 on 14 September 2008;

(b) Making a statement false in a material particular contrary to Regulation 3(2)(j) of Police (Discipline) Regulations on 20 September 2008.

5. The relevant facts for the two charges are set out in the Brief Facts prepared by the prosecuting officer. Paragraphs 2 to 4 of the Brief Facts stated,

> "2. At 1830 hours on 2008-09-14 during the Mid-Autumn Festival Lantern Carnival operation, PW1, with the assistance of WSIP LEE Mei-po (PW2), conducted a final briefing to officers of NCOs and above in Room N1 of Victoria Park Management Office (Loc 1). Def was one of the officers attending the briefing in uniform, and was sitting on a chair on the right hand side facing PW1. The distance between PW1 and Def was about 10 to 15 feet. PW1 saw Def chewing gum throughout the whole briefing, which had lasted for ten minutes. (Charge A)
>
> 3. After the briefing, PW1 and PW2 interviewed Def at Loc 1. PW1 pointed out that Def had chewed gum throughout the briefing. PW1 also recalled that he had previously reminded Def not to chew gum whilst performing duty in uniform on 2008-08-08. Def stated that he was a smoker and used to chew gum when performing plainclothes duty in Task Force NPDIV. Def admitted his guilt to PW1, who told Def that a disciplinary action would be considered against Def.
>
> 4. WIP CHOI Wing-yuk (PW3) was later assigned to interview Def with regard to Def's chewing gum on 2008-08-08 and 2008-09-14. At 0120 hours on 2008-09-20, PW3 interviewed and took a statement from Def inside Room 206, North Point Police Station (Loc 2). During the interview, Def totally denied his misconduct of chewing gum and his admission

> of guilt during the interview with PW1 on 2008-09-14. Def also stated that during the said briefing on 2008-09-14, he sat on the last row in the briefing room at Loc 1, which was opposed to the observation of PW1 i.e. Def sat on the third row of the chairs at Loc 1 on 2008-09-14. (Charge B)"

6. It would appear that the main event which led to the charges was what happened at the briefing on 14 September 2008. According to the Brief Facts, the main prosecution witness would be Superintendent Chan Chun, ex-DVC NPDIV.

7. There were two hearings on 15 January 2009 and 4 March 2009 respectively. At that stage, the Court of Final Appeal had yet to deliver its judgment in *Lam Siu Po*. The Applicant was unrepresented at the first hearing and was represented by a police inspector at the second one. At the second hearing, he pleaded not guilty and the hearing was adjourned.

8. Subsequently, because of the judgment in *Lam Siu Po*, the disciplinary proceedings were suspended for a brief period. After the implementation of the Scheme, the Applicant was invited to make representation on legal representation in his disciplinary proceedings. By a memo dated 11 June 2009, the Applicant indicated to the prosecuting officer that he considered he should be allowed to have legal representation. He gave several reasons in support, amongst which sub-para.(b) are of particular importance,

> "(b) The Reporting Officer of the alleged offences, an officer in the rank of SP, is the major Prosecuting Witness of this disciplinary proceedings; however, my Defence Representation at present is merely an officer in the rank of SIP. Under this circumstances, the latter is not an ideal defence representation and the coming disciplinary hearing will fall unfairness if my request for Legal Representation is ignored."

9. He also referred to *Lam Siu Po* and asserted that there would be points of law in respect of charge (a). Further, he commented that there were insufficient evidence supporting both charges.

10. Upon invitation, the Applicant submitted further reasons in support of his application for legal representation on 30 November 2009. To some extent, he set out his defence to these charges at para. 2(I)(a) to (c),

> "(a) The disciplinary investigation was resulted from:
>
> (i) a dispute over working affairs between the Reporting Officer of this disciplinary investigation, ex-DVC NPDIV and me; and
>
> (ii) my complaint to DC EDIST against an urgent and unfair internal transfer arrangement, which was made by ex-ADVC OPS NPDIV under ex-DVC NPDIV's directive;
>
> (b) Following DC EDIST's enquiry, ex-DVC NPDIV had sent a PEN message to DC EDIST, DDC EDIST and ADC ADM EDIST in which ex-DVC NPDIV defamed me for poor duty performance and fabricated that he had seen me eating chewing gum in uniform on 2008-08-11 and 2008-09-14 respectively. ex-DVC NPDIV misled his seniors resulting in the process of the disciplinary investigation;
>
> (c) Regarding to Charge (B), "Making a Statement False in a Material Particular", there were only three witnesses including ex-DVC NPDIV and ex-ADVC OPS NPDIV (T). The remainder, a SGT of TFSU NPDIV had been under controlled and given his statement faithlessly, As such, the accounts in their statements were unreliable;"

11. The Applicant further expressed his concern on the disparity in ranks of the officer who represented him and the principal prosecution witness at sub-para. (f),

> "(f) The Reporting Officer of the alleged offences, an officer in the rank of SP, is the major Prosecuting Witness of this disciplinary proceedings; however, a defence representation in accordance with the unlawful Regulation 9(11) and (12) of the Police (Discipline) Regulations, Cap 232A, is merely an officer up to the

> Inspectorate. Owing to ranking difference, my previous Defence Representation may fall foul of his senior and lose his confident leading to the failure in my defence. This is unfair to both of my previous Defence Representation and me."

12. He further questioned the integrity of the principal witness and the sufficiency of the investigation. Under Section III in that memo, he raised some points of law pertaining to the charges. He concluded by saying that the proceedings would not be fair if he is denied legal representation.

13. On 17 March 2010, the Applicant was informed that the 2nd Respondent had considered his application for legal representation and concluded that fairness does not require legal representation after taking into account of the factors listed in the letter. The factors stated in the letter were,

(a) The facts of the case are straightforward as is the evidence to be presented;

(b) If the offences are proven, a 'minor' disciplinary award is likely.

14. The Applicant sought a review of that decision. Upon review, the 3rd Respondent upheld the decision of the 2nd Respondent and the Applicant was so informed on 23 April 2010. The 3rd Respondent, at the request of the Applicant, set out his reasons in a letter dated 28 May 2010. In that letter, it was stated that the 3rd Respondent concluded that there were no grounds to overturn the 2nd Respondent's decision due to the following reasons,

(a) The charges are not serious;

(b) The disciplinary awards, if the Applicant were convicted, were likely to be relatively minor; and

(c) The absence of legal representation would not prejudice the Applicant.

The Scheme

15. Since Ms Ng (appearing for the Applicant) challenged the Scheme as being constitutionally non-compliant, I need to set out some relevant provisions in Chapter 8 and the Guide annexed to it.

16. Under the Scheme, a defaulter's application for representation may take the form of representation by lawyers or representation by a friend. Such application would in the first instance be considered by an Appropriate Authority. The Chief Superintendent, Conditions of Service and Discipline is designated as the Appropriate Authority. It is further stipulated that the Appropriate Authority should not have been involved in any earlier decision to institute the relevant disciplinary action, nor should he take part in the subsequent staffing of such proceedings. As mentioned, the decision of the Appropriate Authority can be reviewed if a defaulter is aggrieved by such decision. The Director of Personnel and Training is designated as the Reviewing Authority.

17. Paragraphs 6 to 8 of Chapter 8 of the Manual set out how an application should be processed,

> "6. When a defaulter has requested legal or other forms of representation [except those previously allowed under 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 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;

(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.

7. A Guide for considering applications for legal representation is at Annex Z-1. Specimen letters for granting or rejecting an application are at Annexes Z-2 and Z-3.

8. 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."

18. If legal representation is allowed, paragraph 13 provided for arrangement of legal representation for the prosecution and a legal adviser for the Adjudicating Officer.

19. Paragraphs 14 and 15 of Chapter 8 permitted another application for legal representation to be made before the Adjudicating Officer, who instead of making a decision on the application, would make a recommendation to the Appropriate Authority (or, in cases where legal representation had previously been refused, to the Reviewing Authority).

"14. 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 Annex Z-l) 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.
>
> 15. 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."

20. These paragraphs dealt with pre-existing disciplinary proceedings commenced before the introduction of the Scheme. Similar provisions in other parts of Chapter 8 dealt with new disciplinary proceedings.

21. As mentioned, the Scheme also permitted representation by a "Friend" instead of a lawyer. Paragraph 9 of Chapter 8 set out how an application for representation by a "Friend" should be considered. Though the present proceedings focused on legal representation, in the light of an argument advanced by Mr Chow SC (for the Respondents) as to the option of representation by a "Friend", I would also set out this paragraph below,

> "9. 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. Specimen letters for granting or rejecting an application are at Annexes Z-4 and Z-5."

22. Section 8-02 provided guidance as to the respective roles of different parties, including the legal representatives and the legal adviser at a hearing with legal representation.

23. As provided under paragraph 7, there is a Guide setting out factors for considering whether legal representation should be allowed annexed to Chapter 8. In the Guide, the overriding consideration of fairness is emphasized repeatedly. First, in para.1 the effect of the judgment of the Court of Final Appeal in *SEHK v New World Development* [2006] 2 HKLRD 518 is summarized as follows,

> "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."

24. Then, after stating that the same principles were reiterated in *Lam Siu Po*, the Guide continued at paras. 3 and 4,

> "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."

25. Some factors are set out in the Guide. But it is clear that the list of factors is not meant to be exhaustive and all matters relevant to the overriding consideration of fairness must be taken into account. For example, whilst seriousness of the charge and the potential penalty is referred to in paras. 5 and 6, at the end of para. 6, the Guide expressly reminded those involved in deciding whether legal representation should be allowed: "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 and all relevant factors must be taken into consideration".

26. At the end of the Guide, at para. 11, the requirements of fairness arisen from the individual circumstances of each case is highlighted again. It is also noteworthy, in the context of the present case, para.11 alluded to "complexity of the factual issues in dispute requiring detailed cross-examination, or involvement of witness who are … high-ranking officials" may point to decision allowing legal representation as a matter of fairness.

The challenge to the Scheme

27. In respect of her challenge to the Scheme, the emphasis of Ms Ng in her submissions (both written and oral) is slightly different from those set out in the Amended Form 86. Whilst Grounds 1 to 3 in the Amended Form 86 focused on what are alleged to be discriminatory or unequal treatment stemming from the Scheme and reliance was placed upon Articles 25 of the Basic Law and Articles 1(1) and 22 of the BORO, in her main submissions Ms Ng focused on two specific features in the Scheme which, according to counsel, do not comply with the requirements of a fair hearing as explained by *Lam Siu Po*. The two features are,

(a) Lack of oral hearing before determination by the Appropriate Authority and the Reviewing Authority;

(b) Decision made by an authority other than the Adjudicating Officer.

At the same time, Ms Ng also referred to the arguments on discrimination in her written Reply Submissions.

28. Ms Ng also made other submissions as to the actual implementation of the Scheme. In my judgment, those criticisms were in substance criticisms on the actual exercise of discretion instead of the Scheme itself. One example is counsel's submission that the list of factors became so dominant that in practice they steered the decision maker away from the overriding consideration of fairness. In the light of the repeated emphasis on the requirements of fairness as the ultimate acid test (as explained above), I do not regard Ms Ng's criticism as well-founded insofar as it is intended to be part of her systemic challenge. I will however come back to deal with this criticism when I consider how the discretion was actually exercised in the present case.

29. Before I come to Ms Ng's challenge based on the two specific features, I shall dispose of the other constitutional grounds raised in the Amended Form 86. The starting point is that, as accepted by Ms Ng, there is no absolute right to legal representation in disciplinary proceedings. This is clear from *Lam Siu Po,* see in particular para.139. Further, the Court of Final Appeal also pinpointed legal representation as a potential facet in the requirement of fairness stemming from the right to a fair trial under Article 10 of the BORO. Thus, fairness is the keystone for compliance with Article 10. If fairness requires legal representation be given for a particular set of proceedings, the refusal of such representation would be a breach of Article 10. If fairness does not requires legal representation be given, there is no breach. As discussed above, the Scheme also provided that the requirements of fairness would be the ultimate test.

30. Thus, there would be cases where fairness does not require a defaulter to be legally represented. As I understand Ms Ng's submission,

she did not argue that per se is discrimination. So long as the same criteria of fairness is applied to all applicants, different results reached upon the application of such criteria cannot be characterized as discriminatory or unequal treatment before the law for the purpose of Article 25 of the Basic Law and Articles 1(1) and 22 of the BORO. Otherwise, the right to legal representation would, in substance, be an absolute right and this would not be consistent with the holding of the Court of Final Appeal.

31. Ms Ng's arguments of discrimination and unequal treatment seem to proceed on the basis that because legal representation is not allowed for less serious charges or charges with less serious penalty there is a breach of the Article 25 of the Basic Law and Articles 1(1) and 22 of the BORO. With respect, that is not a correct interpretation of the Scheme. From the provisions in Chapter 8 and the Guide (as highlighted above), it is clear that the Scheme referred to the requirements of fairness as the ultimate test and even for less serious charges legal representation should be allowed if fairness so requires. I therefore do not see any room for systemic challenge based on these constitutional provisions.

32. Turning to the challenge based on the lack of oral hearing, the Scheme is silent as to whether there would be any oral hearing before the Appropriate Authority or the Reviewing Authority makes a decision on legal representation. There has not been any request for oral hearing by the Applicant in the present case. According to the evidence filed on behalf of the Respondents, if there is a request for oral hearing by a defaulter, it would be considered by such authorities and if fairness requires oral representation would be entertained.

33. Further, there would be an oral hearing before the Adjudicating Officer and on that occasion a defaulter can renew his or her application for legal representation pursuant to Paragraph 14 of Chapter 8.

34. I have considered the need for oral hearing as a facet of fair trial in *Liu Pik Han v Hong Kong Federation of Insurers Appeals Tribunal* HCAL 50 of 2005, 11 July 2005. Though it was a decision before *Lam Siu Po*, I believe what I said at para.33 in that judgment remains good law (and counsel do not suggest otherwise),

> "From the authorities, it is clear that there is no absolute rule that a tribunal must give a party an oral hearing in order to satisfy the requirement of Article 10. Where the submissions of the parties do not raise any issue of fact or of law which were of such a nature as to require an oral hearing for their disposition, oral hearing could be dispensed with (see *Allan Jacobsson v Sweden (No 2)* ECHR Case 8/1997/792/993). However, as observed by Ribeiro PJ, when there are dispute of facts, especially when the resolution of such dispute may hinge on one's impression as to the credibility of a witness or a party, a fair hearing within the meaning of Article 10 involves an oral hearing being held (see *Fredin v Sweden (No 2)* ECHR Case 20/1993/415/494)."

35. Again the ultimate criterion is the requirements of fairness.

36. At para. 37 in that judgment, I explained why in that case I did not regard the lack of request for oral hearing by the applicant as significant. The more important consideration, as I said at para. 38, is whether the issues could be fairly and properly disposed of without any oral hearing.

37. At this stage I confine my consideration on lack of oral hearing to the challenge to the Scheme as a whole as opposed to the application of the Scheme in the present case. Bearing in mind the availability of oral hearing before the Adjudicating Officer at which a

defaulter can renew his or her application for legal representation[1], and bearing in mind that the issues that need to be resolved in terms of permission for legal representation would usually fall within a narrow compass (mostly a matter of value judgment as to what fairness requires on the facts of the case), together with the availability of opportunity for a defaulter to make representations on paper on the grounds supporting the request for legal representation, it would only be in rare cases where fairness requires separate oral hearing to be held before a decision is made by the Appropriate Authority or the Reviewing Authority. In any event, the Scheme does not exclude the possibility of having an oral hearing if the Appropriate Authority or the Reviewing Authority deems it necessary for the sake of fairness. In those circumstances, I do not think the lack of reference in the Manual for holding an oral hearing before the Appropriate Authority or the Reviewing Authority renders the Scheme unfair and as such non-compliant with Article 10 of the BORO.

38. I now turn to the second specific complaint of Ms Ng: the determination of legal representation by an authority other than the Adjudicating Officer. Under the Scheme, the actual decision on legal representation would in the first instance be made by the Appropriate Authority and on review by the Reviewing Authority. Neither of them would act as the Adjudicating Officer in the disciplinary proceedings. Even in the context of paragraph 14 when a defaulter renews a request for legal representation at the hearing before the Adjudicating Officer, the latter would make his own recommendation to either the Appropriate Authority or the Reviewing Authority for final decision.

[1] Subject to the issue as to the legality of the limitation of the power of the Adjudicating Officer to the making of recommendations, which I shall consider below.

39. In the evidence of the Respondents, it was explained that the Scheme was designed in this way so as to avoid the Adjudicating Officer seeing the service record of a defaulter which might be prejudicial to him. However, when an application for legal representation is renewed before the Adjudicating Officer under paragraph 14, Mr Chow informed the court that the required information to be placed before him would include such service record though in such event a defaulter may apply for change of Adjudicating Officer if he feels being prejudiced. Another justification for this design is to foster consistency in decisions as to legal representation.

40. But the important question is not the justifications for this feature. Rather, we must consider whether the requirements of fair trial dictate that decision pertaining to legal representation must be made by the Adjudicating Officer. As observed by Lord Mustill in *Ex p Doody* [1994] 1 AC 531 at p. 560H to 561A,

> "… it is not enough for [an applicant] to persuade the court that some procedure other than the one adopted by the decision-maker would be better or more fair. Rather, they must show that the procedure is actually unfair."

41. Ms Ng submitted that the deprivation of the Adjudicating Officer the discretion for granting legal representation is unfair. Counsel read the following dicta in *Lam Siu Po* as laying down that the discretion must be exercised by the Adjudicating Officer.

42. At para. 138 Ribeiro PJ said,

> "At common law and in the absence of inconsistent legislative intervention, administrative and domestic tribunals are generally regarded as masters of their own procedure possessing flexible discretion to take whatever procedural course may be dictated by the requirements of fairness."

There was another reference to the tribunal's discretion at para.139. Counsel also referred to para.28 where Bokhary PJ said,

> "It is always to be remembered that whether fairness requires that legal representation be permitted at a disciplinary hearing is primarily for the disciplinary tribunal to assess, and that no court would disturb such an assessment except for plainly compelling reason."

43. With respect, I cannot agree with Ms Ng. First, their Lordships were not concerned with the question whether the discretion as to permission for legal representation must be exercised by the same officer responsible for the substantive adjudication of the case. The references to the tribunal in these dicta should not be read narrowly. It is perfectly open for an administrative or disciplinary tribunal to entrust the task of determining legal representation to an authority other than the adjudicating officer provided that the task is performed with the requirements of fairness in mind.

44. Second, I do not think it is inherently unfair simply because the task is entrusted to an authority other than the adjudicating officer. In many cases the adjudicating officer would be more familiar with the conduct of the hearing and the intricacies stemming from the forensic approach adopted by the parties at the trial and therefore to that extent he is in a more advantageous position to assess the need for legal representation in terms of fairness. However, Paragraph 14 of Chapter 8 ensures that the Adjudicating Officer can share that advantage with the Appropriate Authority or the Reviewing Authority in the form of his recommendation. In fact, paragraph 14 sets a positive duty on the Adjudicating Officer to advise a defaulter to consider requesting legal representation in the light of developments in the course of trial. Thus, the Adjudicating Officer also plays an important role in the whole process of determination on legal

representation. With such measure in place, I would not characterize the design of the Scheme as unfair.

45. At the hearing, I raised this query: would it be unfair if the recommendation of the Adjudicating Officer is overridden by the determination of the Appropriate Authority or Reviewing Authority? Mr Chow informed the court that in most cases the Adjudicating Officer is likely to be less senior than the Authority. Even so, Paragraph 14 provides that these authorities must give significant weight to the recommendation of the Adjudicating Officer. Mr Chow said the occasion where a recommendation for legal representation is overridden would be rare. And on such rare occasions, one would expect cogent reasons being given by the Authority. Further, as submitted by Mr Chow, the decision of the Authority can be challenged by judicial review. Against such background, I conclude one cannot simply infer that whenever there were disagreement between the Adjudicating Officer and the Authority the decision on legal representation is unfair.

46. As held in *Lam Siu Po*[2], whether a system is Article 10 compliant must be examined against the process in its entirety. On the whole, I am of the view that the Scheme does provide a proper system for considering a request for legal representation in accordance with the requirements of fairness. Therefore the systemic challenge fails.

The challenge to the actual exercise of discretion

47. Though I find the Scheme to be Article 10 compliant, the exercise of discretion in individual cases can still be challenged on traditional public law grounds in a judicial review. In the present case, the

[2] At para.109

Applicant contended that the decisions of the 2nd and 3rd Respondents are unfair (in that no oral hearing was given to him before the making of the decisions) and that they failed to apply the overriding criterion of fairness properly (in their assessment, fairness were overshadowed by consideration as to the seriousness of the charges and the likely penalties) or otherwise being *Wednesbury* unreasonable.

48. Ms Ng also submitted that they were wrong in forming the view that the penalties were likely to be relatively minor. She also complaint that the Reviewing Officer failed to give reasons for his decision.

49. Before I discuss these challenges, I would address a point raised in the course of the hearing. Because of the present proceedings, the trial of the disciplinary proceedings has not yet taken place. Thus, by virtue of Paragraph 14 of Chapter 8, the Applicant still has the opportunity to apply before the Adjudicating Officer for legal representation. Though Mr Chow did not argue that judicial review is premature in the present instance (and he is probably right in view of the constitutional challenge to the Scheme as a whole), it does not mean that in the future this court would entertain these challenges before a defaulter exhausts all avenues for seeking legal representation under Chapter 8. Surely the recommendation of the Adjudicating Officer would be of some importance and in general the court would like to take such recommendation into account.

50. That brings me to the challenge as to the lack of oral hearing. I have already observed that oral hearing would only be required for a determination on legal representation in exceptional cases. Having regard to the circumstances of the present case, including the grounds advanced by the Applicant in support of his application (which were clearly and fully

canvassed in his memos and do not involves complicated arguments that required oral elaboration), I do not regard oral hearing to be necessary in order to fulfill the requirements of fairness. In any event, the Applicant would have an oral hearing when he renewed his application before the Adjudicating Officer under paragraph 14.

51. Though the Reviewing Authority did not give his reasons in the letter of 23 April 2010, I do not think the court would intervene on this ground since it was a review exercise in a summary process where reasons had already been given by the Appropriate Authority and reasons were subsequently given in the letter of 28 May 2010. Further, as there could still be further application under paragraph 14, the decision of the Reviewing Authority at this stage should only be regarded as an interim decision.

52. As regards the nature of the potential penalties, Mr Chow reminded this court that the comparables relied upon by Ms Ng were not put before the Appropriate Authority or the Reviewing Authority. I have considered the cases highlighted in the table, in particular those set out in the list handed by Ms Ng to the court during the hearing. Whilst there are indeed cases where a charge of making a false statement did result in heavier penalties than reprimand, the facts of those cases are obviously more serious than the present allegations against the Applicant. Given the wide spectrum of cases falling within the scope of such a charge, I doubt whether it is useful to make comparisons without full regard to the facts of each case. Even taking those cases into account, I do not think this court should intervene with the decisions of the 2nd and 3rd Respondents on the basis that they erred in saying that the penalties would be relatively minor.

53. Coming to the question of the application of the criteria of fairness, generally it is for the relevant authority to assess the requirements of fairness on the facts of the case and the court would not usurp the function of the authority in respect of the merits of a decision. However, in the present case, the following matters indicated that the 2nd and 3rd Respondents had not applied that criteria properly,

(a) In their reasons for their respective decisions, they focused on the minor nature of the potential penalties and the lack of serious nature of the charge and it appear that no consideration has been given to the difficulty arising from rank differential pinpointed in the Applicant's submission in the presentation of his case (and cross-examination of witnesses) by a police officer when the principal prosecution witness is a much more senior officer, particularly when the case against the Applicant on the first charge depended wholly on the oral testimony of this witness. As such, their decisions are vitiated by the failure to take material matter into account;

(b) Though the 2nd Respondent referred to the evidence being straightforward and the 3rd Respondent referred to the lack of prejudice in the absence of legal representation, they apparently said so in terms of the evidence supporting the prosecution case. However, as elaborated by the Applicant in his memo of 30 November 2009, his case is that there were pre-existing personal grudge between him and the principal prosecution witness. He had complaint about a transfer made by the witness and he said the present charges were fabricated against him. If the nature of the defence case is taken into account, it is not as straightforward as it would otherwise

appear and the absence of legal representation (resulting in the Applicant having to be represented by either a police officer or a friend with no legal training who would need to cross-examine a superintendent on his integrity) cannot be said to be non-prejudicial. The absence of any reference to this aspect of the case in the reasons for decision again suggests that the Respondents failed to take this relevant factor into account;

(c) Even though, as suggested by Mr Chow, the Applicant can apply to be represented by a friend, there is no guarantee that the application would be allowed. Further, a friend without legal training is likely to be less effective than a lawyer in challenging the integrity of a senior police officer before a tribunal made up of police officer;

(d) Though the charges themselves appear to be not serious, given the significance the Police Force attached to discipline and obedience, a conviction could have substantial impact on the hitherto unblemished record and thus, the future career of the Applicant. This is particularly so in the light of the nature of his defence as mentioned. Whilst focusing on the potential penalty, the Respondents did not appear to give consideration to the impact of such conviction from this angle;

(e) In view of the challenge to the integrity of a senior police officer, it would be in the interest of justice as well as the integrity of the Police Force that not only the defence shall have legal representation but also to have the prosecution conducted by a lawyer. Again this does not appear to have been considered;

(f) If these relevant matters are taken into account, in my view it is *Wednesbury* unreasonable to conclude that it would not be unfair to deny legal representation to the Applicant.

Results

54. For these reasons, I would dismiss the application for declaration as to the unconstitutionality of the Scheme but grant a certiorari quashing the decisions of the 2nd and 3rd Respondents. Ms Ng did not pray for any mandamus in the Form 86 and in her submissions. But it is necessary to have a decision on legal representation by the Reviewing Authority in order to trigger the mechanism under paragraph 13 of Chapter 8. The 3rd Respondent has retired since the making of the decision. In the light of that, subject to comments from the parties (if any, such comments should be lodged within 14 days from the delivery of this judgment), I shall grant a mandamus directing the current Reviewing Authority to make a decision on legal representation for the Applicant in accordance with this judgment.

55. On the question of costs, the Respondents are successful in resisting the challenge to the Scheme whilst the Applicant is successful in getting legal representation in the present instance. I would make an order nisi that each party shall pay his own costs.

(M H Lam)
Judge of the Court of First Instance
High Court

Ms Margaret Ng instructed by Messrs Lau Paul & Co assigned by the Legal Aid Department, for the Applicant

Mr Anderson Chow, SC instructed by the Department of Justice, for the Respondents

附件 D

缺席聆訊

建議考慮因素及相關安排

根據附屬規例第 xx 條，違紀人員如沒有按該條文規定出席聆訊，紀律聆訊的主審當局有酌情權決定是否在違紀人員缺席的情況下，展開或繼續聆訊，並作出各項有關聆訊的決定。主審當局必須慎重地行使酌情權，並只用於少數例外的個案。主審當局在行使酌情權時，必須考慮對違紀人員是否公平，並顧及個案的所有情況，包括但不限於以下因素：

(a) 主審當局確信，要求違紀人員在指定日期／時間／地點出席紀律聆訊的通知（包括其後發出的通知），已妥爲在所安排的聆訊前送達違紀人員；

(b) 違紀人員缺席聆訊的行爲的性質及情況，特別是違紀人員的行爲是否蓄意和自願，以致清楚顯示他／她已放棄出席聆訊的權利；

(c) 如違紀人員是由律師或其他形式的代表在聆訊中助辯，而該人員缺席紀律聆訊，他／她的代表是否能在聆訊期間得到該人員的指示，以及他／她的代表能爲該人員抗辯的程度；

(d) 因應指控違紀人員的證據的性質，違紀人員沒有出席紀律聆訊對其有何不利；

(e) 再度押後紀律聆訊會否對處理該紀律個案有幫助，例如是否會令違紀人員自願出席聆訊；

(f) 聆訊須再度押後多久；

(g) 爲公眾利益，尤其是證人的利益着想，紀律聆訊應在事發後的合理時間內進行；以及

(h) 延遲紀律聆訊對證人記憶的影響。

2. 如主審當局決定在違紀人員缺席的情況下展開或繼續紀律聆訊，在情況許可下應盡量公平處理，並按照以下安排行事：

(a) 主審當局應在紀律聆訊時採取合理步驟，揭示有關指控的弱點，並在有證據支持的情況下代表違紀人員提出論點；

(b) 主審當局應緊記，違紀人員缺席聆訊不等於認罪，亦不會加強檢控理據；以及

(c) 如有關部門知道違紀人員的下落，須安排把在違紀人員缺席的情況下進行的每次聆訊的錄音記錄副本，盡快及最遲於下次聆訊日期（如有）前送交違紀人員（例如送往其最後報稱地址）。