

For information

LEGISLATIVE COUNCIL PANEL ON PUBLIC SERVICE

**Commencement of Legislative Amendments made in 2012
to Subsidiary Legislation on Discipline
made under Disciplined Services Ordinances**

PURPOSE

This paper informs Members of the Government's plan to appoint 15 October 2021 as the commencement date for a set of amendment regulations / rules made by the Administration in 2012 for amending the subsidiary legislation on discipline made under various ordinances governing the relevant disciplined services (collectively referred to as Disciplined Services Legislation ("DSL"))¹.

AMENDMENT REGULATIONS / RULES MADE IN 2012

2. The Court of Final Appeal ("CFA") ruled in *Lam Siu Po v. Commissioner of Police* (FACV 9/2008) that the provision explicitly prohibiting legal representation ("LR") of an accused² at disciplinary proceedings under the Police (Discipline) Regulations ("P(D)R") was inconsistent with Article 10 of the Hong Kong Bill of Rights concerning the right to fair and public hearing, and was thus unconstitutional, null and void ("CFA judgment").

3. At the same time, the CFA judgment made it clear that there is no absolute right to LR at a disciplinary hearing. LR is a matter for the tribunal to deal with under its discretion in accordance with the principle of fairness. CFA also held that the tribunal ought to be able to exercise discretion to permit appropriate forms of representation other than LR, whether by fellow officers or other persons, at a disciplinary hearing. The CFA judgment has read-across implications for some DSL which contain similar prohibition clauses. Following the CFA judgment, disciplined

¹ Formal disciplinary action in respect of middle and junior ranking civil servants in the disciplined services grades is generally taken in accordance with the provisions under the respective DSL and the related subsidiary regulations on discipline. In this paper, DSL refers to the Customs and Excise Service (Discipline) Rules (Cap. 342B), the First to Fourth Schedules to the Fire Services Ordinance (Cap. 95), the Government Flying Service (Discipline) Regulation (Cap. 322A), the Police (Discipline) Regulations (Cap. 232A), the Prison Rules (Cap. 234A) and the Traffic Wardens (Discipline) Regulations (Cap. 374J).

² An accused means an officer against whom disciplinary proceedings have been instituted.

services departments (“DSDs”)³ have put in place interim administrative arrangements to allow an accused to apply for legal or other forms of representations at disciplinary hearings, and process such applications based on fairness requirements⁴.

4. To address the CFA judgement concerning the unconstitutionality of the relevant existing provisions, the Government made a set of amendment regulations / rules (as listed below) in 2012 –

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

The legislative amendments proposed therein sought to amend the various pieces of DSL by removing the prohibition clauses and providing explicit provisions to allow an accused to apply for legal or other forms of representation at a disciplinary hearing. The Government also took the opportunity to make some other technical amendments. The key proposals covered by such legislative amendments are summarised in the **Annex** (further details on each of these key proposals are set out in the Legislative Council Brief issued by the Administration on 25 April 2012).

CURRENT STATUS OF THE AMENDMENT REGULATIONS / RULES

5. At the Legislative Council House Committee meeting held on 4 May 2012, Members agreed to form a subcommittee to study the above amendment regulations / rules made by the Administration. The Subcommittee held four meetings. While the Subcommittee would like to extend the scrutiny period from 30 May to 20 June 2012, the motion which sought to extend the scrutiny period could not be timely dealt with at the Council meetings that commenced on 23 and 30 May 2012 respectively owing to the heavy agenda for these meetings. Under such circumstances, the 28-day negative vetting period expired under section 34(2) of the Interpretation and General

³ Namely, the Customs and Excise Department (“C&ED”), Correctional Services Department (“CSD”), Fire Services Department (“FSD”), Government Flying Service (“GFS”) and Hong Kong Police Force (“HKPF”).

⁴ In considering an application for LR, the disciplinary authority may take into account, but not limited to, the seriousness of the disciplinary charge and the potential penalty; whether any points of law are likely to arise; the capacity of the civil servant concerned to present his/her own case; and the need for fairness among the parties involved in a disciplinary hearing, etc.. In considering an application for other forms of representation, the disciplinary authority will consider the circumstances of the case, the requirements of natural justice and fairness, and other appropriate factors, such as the possibility of leakage of sensitive information.

Clauses Ordinance (Cap. 1) without being extended.

6. While no amendment was made to the amendment regulations / rules upon the expiry of the 28-day negative vetting period on 30 May 2012, the Government agreed to continue to process applications for LR administratively in accordance with the fairness requirement, and not to bring the amendment regulations / rules into operation at that time, so that the Government may consult the management and staff sides of DSDs on the matter. The amendment regulations / rules have not yet been brought into operation so far.

ENHANCED ADMINISTRATIVE ARRANGEMENTS

7. In continuing to process applications for LR administratively, some DSDs (viz. HKPF, C&ED and FSD) have enhanced their administrative arrangements since financial year 2014-15. Under the enhanced administrative arrangements for processing LR applications, the relevant DSD would make an initial assessment on the likely punishment before a disciplinary hearing is conducted, and if the likely punishment is assessed to be dismissal, compulsory retirement, reduction in rank or an order to resign (collectively referred to as Specified Punishments)⁵ on establishment of the disciplinary charge after the proceedings, the department would so inform the accused. This arrangement aims at providing more information to the accused to facilitate his/her consideration of applying for LR. If he/she decides to apply for LR in these cases, his/her application will be approved.

8. In case the likely punishment falls within the scope of Non-Specified Punishments (i.e. outside the scope of Specified Punishments) and if the accused applies for LR, the relevant authority will determine whether the application should be approved on a case-by-case basis having regard to a series of factors, such as the seriousness of the charge and potential penalty, whether any point of law is likely to arise, the officer's capacity to present his/her case, etc.. An accused whose LR application has been rejected can ask for a review which will be considered afresh by a more senior officer at the directorate level.

9. The feedback from the staff sides towards the enhanced administrative arrangements has been generally positive as they considered that the arrangements could enable the accused to make a better-informed decision in considering whether to apply for LR in handling disciplinary proceedings. Indeed, we observe that most of the accused would only consider applying for LR if the likely punishment is Specified Punishment and that all their applications were approved. This reflects that the enhanced arrangements are effective to address the staff sides' concern regarding LR in disciplinary proceedings and are also in line with the CFA judgment that LR

⁵ The punishment of "order to resign" is applicable to junior police officers and traffic wardens only. Moreover, in HKPF, Specified Punishments also include an award affecting the accused's confirmation in rank or renewal of contract.

should be allowed at disciplinary proceedings when fairness so requires. With the success of the enhanced administrative arrangements, we intend to extend the same to all DSDs on a long-term basis, upon commencement of the amendment regulations / rules.

10. Moreover, having regard to staff feedback, we also intend to introduce two further enhancements in all DSDs on a long-term basis, upon commencement of the amendment regulations / rules –

- (a) Arrangements concerning change of assessment / punishment from Non-Specified Punishment to Specified Punishment: In the event that there is a change in the assessment of the likely punishment from a Non-Specified Punishment to a Specified Punishment due to new evidence or development of a case, on fairness consideration, the accused should be so informed and given the opportunity to re-consider whether he/she should apply for LR if he/she has not previously engaged LR for the case. If the accused decides not to apply for LR, the disciplinary authority will proceed to determine the case in accordance with established procedures. If the accused decides to apply for LR, the application will be approved.
- (b) Representation by a disciplined services officer during disciplinary hearing: In response to the Subcommittee’s discussion in 2012⁶, DSDs would grant blanket approval for the accused to be represented by a disciplined services officer of the department who is a barrister or solicitor at a disciplinary hearing except where there is conflict of interest involved⁷. The serving officer representing the accused should nonetheless be junior in rank to the adjudicating officer (“AO”) hearing the case so as to avoid placing undue pressure on the AO, and to ensure that the AO can, if necessary, give directions to all parties to facilitate fair conduct of the hearing. The accused is only required to notify the department of his/her wish to be so represented.

11. The enhanced administrative arrangements and the further enhancements mentioned in paragraphs 7-8 and 10 above respectively can be implemented without further amendments to the amendment regulations / rules made by the Administration in 2012.

⁶ There was discussion at LegCo Subcommittee on whether an accused may be represented, without approval, by disciplined services officer of the department who is a barrister or solicitor as in the case of police officers under P(D)R.

⁷ For traffic wardens, they would be allowed to be represented by a traffic warden, senior traffic warden, junior police officer or inspector who may or may not be a barrister or solicitor at a disciplinary hearing.

CONSULTATION WITH STAFF ASSOCIATIONS OF DSDs

12. We conducted a consultation with the staff associations of DSDs in December 2017. We also met with the staff associations of DSDs in the first half of 2018 to gauge their views. The staff associations generally showed support or no objection to the commencement of the amendment regulations / rules without further amendments, coupled with implementation of the enhanced administrative arrangements and the further enhancements set out in paragraphs 7-8 and 10 above respectively. Since then, we have kept the staff sides, through the Police Force Council and the Disciplined Services Consultative Council, informed of the smooth implementation of the administrative arrangements from time to time, and have not received any objection to the commencement of the amendment regulations / rules.

COMMENCEMENT DATE

13. While the administrative arrangements have been working smoothly, it remains necessary for the amendment regulations / rules to come into operation to address the CFA judgment concerning the unconstitutionality of the relevant existing provisions and to take forward the other technical amendments. In view of the feedback from the staff sides as mentioned in paragraph 12 above, the Secretary for the Civil Service intends to appoint 15 October 2021 as the commencement date of the amendment regulations/rules⁸, by notice published in the Gazette on 23 July 2021. Upon commencement of the amendment regulations / rules, DSDs will stipulate the administrative arrangements in the departmental manuals, standing procedures or internal guidelines as appropriate. Going forward, we will continue to monitor closely the operation of the enhanced administrative arrangements and the further enhancements as mentioned in paragraphs 7-8 and 10 above respectively. We will also keep in touch with management and staff sides of DSDs.

14. Members are invited to note the content of this paper.

Civil Service Bureau
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⁸ As provided in the amendment regulations / rules, the authority to appoint a day for them to come into operation by notice published in the Gazette lies with the Secretary for the Civil Service.

Summary of the key proposals covered by the amendment regulations / rules made by the Administration in 2012

- (a) To allow legal or other forms of representation at a disciplinary hearing for an accused where fairness so requires;
- (b) To stipulate that a written record of the proceedings of a disciplinary hearing is to be made and that the adjudicating officer / tribunal may cause to make an audio recording or an audio and visual recording of the whole or part of a disciplinary hearing;
- (c) To provide explicit provisions for a disciplinary tribunal to proceed with any part of the disciplinary proceedings in the absence of an accused if the accused is required to appear in those proceedings but, without reasonable justifications, repeatedly fails to appear;
- (d) To amend the offence of “conduct calculated to bring the public service into disrepute” (by replacing the word “calculated” by “likely”) in the Police (Discipline) Regulations (“P(D)R”) and the Traffic Wardens (Discipline) Regulations (“TW(D)R”);
- (e) To transfer the functions of the Chief Secretary for Administration under P(D)R to the Secretary for the Civil Service or the Chief Executive’s Office;
- (f) To align certain arrangements of disciplinary proceedings for junior police officers under Part II of P(D)R with those for inspectors under Part III of P(D)R;
- (g) To amend TW(D)R to give an accused (instead of a prosecutor) the final address at a disciplinary hearing and to include “deferment or stoppage of increment” as one of the possible punishments; and
- (h) To repeal a provision in the Government Flying Service (Discipline) Regulation which prohibits an officer under interdiction to leave Hong Kong without the permission of the Controller of the Government Flying Service.