particular law enforcement agency may or may not enjoy the common powers, which includes the power to stop, search, inspect, investigate, and, if satisfied that sufficient has been gathered, arrest and lay charges. The extent of the same power, for example the conditions precedents to allow the officer to stop and search a person, would also differ among different law enforcement agencies.

(a) Hong Kong Police Force

1.037 **General.** The HKPF is regulated by the Police Force Ordinance (Cap.232) (PFO). The duties of the HKPF are the most general, out of all the law enforcement agencies. PFO, s.10 stipulates that its duties are, *inter alia*, to take lawful measures to detect and prevent and crimes and offences, without any restrictions on the types and scopes of offences.

1.038 **Powers.** The PFO confers wide powers of stop, detain and search on a police officer. The exact scope of the power depends on the level of suspicion of the police officer. If a police officer finds a person acting in a suspicious manner, he may, pursuant to PFO s.54(1):

(1) stop the person for the purpose of inspecting his proof of identity;
(2) detain the person for a reasonable period of time while the officer enquires whether or not he is suspected of having committed any offence at any time; and
(3) if necessary, search the person for anything that may present a danger to the police officer and detain the person for a reasonable period for such a search.

1.039 The relevant powers are wider if the police officer not only finds a person to be suspicious but also reasonably suspects him of having committed, or of being about to commit or of intending to commit any offence. In such cases, apart from the powers stated in aforementioned clauses (1) and (2), the police officer may also search the person for anything that is likely of value (whether by itself or together with anything else) to the investigation of any offence the person has committed, or is reasonably suspected of having committed, or of being about to commit or of intending to commit and detain the person for such a reasonable period for such a search: PFO s.54(2).

1.040 Under the Public Order Ordinance (Cap.245) (POO), where a police officer reasonably believes that offensive weapons have been or may be used in the course of the commission of the offence of "unlawful assembly" (POO s.18) or "riot" (POO s.19), he may stop and search any person in the vicinity to ascertain whether that person has been guilty of the offence of possession of offensive weapons in a public place: POO s.33.

1.041 A police officer's lawful power of arrest is triggered when he harbours a reasonable suspicion that a person will be charged with or is guilty of an offence for which the sentenced is fixed by law (under which the court has no discretion to impose a sentence outside the prescribed boundaries) or for which a person may (on a first conviction for that offence) be sentenced to imprisonment: PFO s.50(1). In *HKSAR v Yeung May Wan*,[22] it was held that a reasonable belief that the person will be charged *per se* is

[22] (2005) 8 HKCFAR 137.

insufficient; it must be coupled with a reasonable suspicion of guilt of that person. Sufficient facts amounting to the material elements of the offence must be known to the arresting officer. If the arrest was unlawful, any subsequent detention constitutes false imprisonment, and a citizen is entitled to resist such unlawful arrest.

1.042 A police officer may search for and seize any chattel which that officer reasonably suspects to be of value (whether by itself or together with anything else) to the investigation of any offence that the person has committed or is reasonably suspected of have committed: PFO s.50(6). If the item of value is within any building, vessel or place, a warrant must be obtained from the magistrate before the police officer may enter the place to search and seize: PFO s.50(7). It was held that the principle of legal professional privilege applies to the seized properties, despite the silence of the relevant section: *Shun Tak Holdings Ltd v Commissioner of Police*.[23]

1.043 **To Be Delivered to Custody Upon Arrest.** Pursuant to PFO s.51, an arrested person shall be forthwith delivered into the custody of the officer in charge of a police station. The section also states that the police should grant bail to the arrested person, unless the offence appears to the officer in charge to be of a serious nature or he reasonably considers that person ought to be detained. If police bail is not granted (i.e., the person is detained in custody), he shall be charged or brought before a magistrate as soon as practicable and in any event no later than 48 hours of detention; otherwise, he must be released.

1.044 **The Police General Orders.** The Commissioner of Police may from time to time make Police General Orders to regulate the police force: PFO s.46. Police General Orders are not subsidiary legislations and do not have the force of law. They contain many provisions on how a police officer is to exercise the powers, for example providing that a frisk or wall search shall not be conducted by officers of the opposite sex: Police General Orders, Chapter 44-05. Only certain chapters of the Police General Orders are made available to members of the public.

(b) Customs and Excise Department

1.045 **General.** The Customs and Excise Department (C&E) is regulated by the Customs and Excise Service Ordinance (Cap.342) (CESO). The C&E is established by virtue of CESO s.3, which stipulates that its function is to enforce the Hong Kong laws pertaining to dutiable commodities, importation, exportation and smuggling.

1.046 **Powers.** A C&E officer has the power to stop, search and arrest any person whom he reasonably suspects of having committed an offence under a particular list of ordinances related to their scope of duties, and search and seize items on the arrested person which is reasonably suspected to be connected with the offence he was arrested for: CESO s.17A. A person arrested by a C&E officer shall be taken to a police station to be dealt with under the PFO, subject to the power to first take the arrested person to an office of the C&E for further enquiries: CESO s.17C(1). In any event, such arrested persons shall not be detained for more than 48 hours without being released, charged

[23] [1994] 2 HKC 363, [1995] 1 HKCLR 48.

or brought before a magistrate: CESO s.17C(3). CESO s.17BA confers on the C&E officers the power to search and examine without warrant items baggage, cargo, vessels, etc. that enter or exit Hong Kong.

(c) Immigration Department

1.047 **General.** The Immigration Department (ID) is mainly regulated by the Immigration Service Ordinance (Cap.331) (ISO) and the Immigration Ordinance (Cap.115). It is established pursuant to ISO s.3.

1.048 **Powers.** Under ISO s.12, a member of the ID has the power to stop, detain and search any person whom he reasonably suspects of being guilty of a scheduled offence and arrest such person if the offence is one for which the person may on conviction be sentenced to a term of imprisonment. The section also confers a power to search and seize items on that person of value (whether by itself or together with anything else) to the investigation of the offence for which the person was arrested.

1.049 A person arrested by a member of the ID may be taken to an office of the ID and/or be taken to a police station to be dealt with under the PFO: ISO s.13A(1). This is distinguished from the power of detention of the C&E, wherein the arrested person must be brought to a police station after enquiries. Where an arrested person is taken to an office of the ID, he may be granted bail by the ID, or if a member of or above the rank of Chief Immigration Officer considers it necessary for inquiry, he may be detained: ISO s.13A(2). Such arrested persons must be released, charged or brought before a magistrate after not more than 48 hours of detention. Unlike the PFO and the CESO, the ISO specifically includes the period of detention immediately prior to the arrest within 48 hours: ISO s.13A(7).

1.050 An immigration officer or an immigration assistant may also examine any person entering or exiting Hong Kong or examine any person at any time if he reasonably believes that person to have landed in Hong Kong unlawfully or has contravened a condition of stay, etc.: Immigration Ordinance s. 4. Such members of the ID may also examine the proof of identity of any person to determine whether he has entered Hong Kong unlawfully or contravened a condition of stay (Immigration Ordinance s.17E) and arrest such persons (Immigration Ordinance s.17D).

(d) The Independent Commission against Corruption

1.051 **General.** Prior to the establishment of the Independent Commission against Corruption (ICAC), the Royal Hong Kong Police Force (now the HKPF) had been responsible for investigation of corruption offences. In 1973, the corruption scandal of the then Chief Superintendent Godber spurred the then Governor Sir MacLehose to order a Commission of Inquiry under Sir Blair-Kerr, the then Senior Puisne Judge of the Supreme Court of Hong Kong. The First Report of that Inquiry recommended that a separate law enforcement body be established to combat corruption offences. Consequently, the ICAC was established in 1974 pursuant to the Independent Commission against Corruption Ordinance (Cap.204) (ICACO) s.3, and till this date the ICAC is regulated by the ICACO.

1.052 Pursuant to ICACO s.12, the duty of the Commissioner of the ICAC, on behalf of the Chief Executive (CE), is to receive and investigate any complaints of alleged corruption practices and investigate any alleged or suspected offence or a particular list of offences related to corruption. The focus on offences and corruption practices "alleged" by the general public, instead of just those "suspected" by the ICAC, is reflected in the ICAC's long-standing and prominent campaigns for the public to actively report corruption practices in order to build a corruption-free society. Apart from law enforcement, the ICAC also performs certain advisory and educational functions.

1.053 **Organisation and Structure.** The ICAC consists of the Operation Department, the Prevention of Corruption Department and the Community Relations Department, apart from an administrative branch. The ICAC boasts a unique three-pronged approach to tackling corruption, which is more than investigation and law enforcement, as evidenced by its three departments.

1.054 **Powers.** An officer authorised by the Commissioner has the power to arrest a person if he reasonably suspects him to be guilty of a specific list of offences: ICACO s.10(1). Similar to the case of ID, a person arrested by the ICAC may be taken to the police station to be dealt with in accordance with the PFO or with the offices of the ICAC: ICACO s.10A(1). The ICAC may release the arrested person brought to their offices on bail, or, if an officer in the rank of Senior Commission against Corruption Officer or above considers it necessary for the purposes of further inquiries, the person may be detained: ICACO s.10A(2). The detained person shall be brought before a magistrate as soon as practicable and in any event no later than 48 hours after detention: ICACO s.10A(6). An authorised officer also has powers of search and seizure relevant to those offences: ICACO s.10C.

1.055 An officer authorised by the Commissioner also has special powers to conduct an inquiry or examination and obtain access to or require the production of government documents: ICACO s.13. Further, there are investigative powers regarding offences under Part III of the Prevention of Bribery Ordinance (Cap.201) (POBO).

(e) Other law enforcement agencies

1.056 Apart from the major law enforcement agencies discussed above, three other law enforcement agencies which have the power to initiate prosecutions are discussed briefly hereunder. The power of these law enforcement agencies to prosecute criminal offences is all without prejudice to the power of the DoJ to prosecute criminal offences.

1.057 **Securities and Futures Commission.** The Securities and Futures Commission (SFC) was established, pursuant to the now repealed Securities and Futures Commission Ordinance (Cap.24) s.3. It is now governed by the Securities and Futures Ordinance (Cap.571) (SFO). The SFC is mainly a regulatory body aimed at promoting the fairness and efficiency etc. of the Hong Kong securities and futures industry and protecting members of the public when participating in the financial markets: SFO s.4. If it appears to the SFC that market misconduct has or may have taken place, it may institute proceedings in the Market Misconduct Tribunal: SFO s.252(1). The Market Misconduct Tribunal is not a criminal tribunal and can only make orders such as disallowing persons with market misconduct from dealing with securities, requiring him to pay to

on indictment, the DoJ has the sole discretion to choose which way the offence should be tried. Hence, an indictable offence (i.e. an offence that is "triable on indictment only" or "triable either summarily or on indictment") shall not be dealt with summarily without the consent of the prosecutor: MO s.94A. As discussed below, the classification of an offence limits the discretion of the DoJ in selecting which court to try the defendant and, consequently, may have an impact on the maximum sentence imposable on the defendant should he be convicted.

1.075 **Right of Audience of Legal Practitioners.** Barristers have an unlimited right of audience; they may appear before any level of court. Insofar as criminal litigation is concerned, solicitors have a right of audience in the Magistracy and the DC and Magistracy Appeals in the CFI which are not appeals reserved for hearing or directed to be heard before the CA: MO s.118. Solicitors have no general right of audience in the CA and the CFA. Following the trend in other common law jurisdictions to achieve fusion or at least a partial fusion between barristers and solicitors, the Higher Rights Assessment Board was established. The Board may grant rights of audience in the High Court and the CFA to solicitors with sufficient litigation experience: Legal Practitioners Ordinance (Cap.159) (LPO) s.39E. Exceptionally, *ad hoc* admission of overseas counsel is allowed for a particular case in the High Court and the CFA. Application should be made pursuant to LPO, s.27. The admission must be in the public interest and the case must involve unusually complex legal issues and principles involved: *Re Flesh QC*[28] and *Re McGregor QC*.[29]

1.076 **Language of Proceedings.** Both English and Chinese are official languages in court proceedings: Official Languages Ordinance (Cap.5) (OLO) s.3. There is no statutory definition or authority that "Chinese" means only "Cantonese/Punti". Although, in practice, virtually all "Chinese" trials are conducted in "Cantonese/Punti", practitioners are advised to be equipped and prepared to conduct proceedings in "Putonghua/Mandarin" as well. The court has a final discretion to use English, or Chinese, or both languages, in court proceedings: OLO s.5. The court may also require a certified translation of documents not in the language of the proceedings: Official Languages (Translation) Rules (Cap.5B Sub. Leg.) s.1. Practice Directions 10.2 and 10.3 should be consulted for requirements on translation of documents and authorities cited. In practice, unless the defendant cannot speak Punti, virtually all criminal trials in the Magistrates' Courts and the DC are listed before a bilingual judge and conducted in Chinese (Punti).

(a) The Magistracy

1.077 **The Magistracy as "Elementary Court".** The Magistracy is the first-tier court within the Hong Kong criminal justice system. It only has a criminal jurisdiction, that is, it does not have jurisdiction to handle any civil proceedings. The Magistracy is not a court of record. Magistrates are not required by law to give written verdicts and reasons for verdicts, and the judiciary has no usual practice to publish them on its website, although, in practice, many magistrates now prepare detailed written reasons for verdict before

[28] [1999] 1 HKLRD 506.
[29] [2003] 3 HKLRD 585.

they deliver them in court. In some controversial or high-profile cases, the judiciary also publish the reasons for verdict/statement of findings written by the magistrate online. Judiciary also sometimes publish the transcripts of the reasons for verdict or reasons for sentence online.

Constitution of the Magistracy. Currently, seven Magistrates' Courts in Hong Kong constitute the Magistracy: 1.078

(1) the Eastern Magistrates' Court (which is the only Magistrates' Court on Hong Kong Island);
(2) the Kowloon City Magistrates' Court;
(3) the Kwun Tong Magistrates' Court;
(4) the West Kowloon Magistrates' Court;
(5) the Shatin Magistrates' Court;
(6) the Tuen Mun Magistrates' Court; and
(7) the Fanling Magistrates' Court.

1.079 There is no difference in jurisdiction of Magistrates' Courts of different locations. Typically, which Magistrates' Court to which a criminal case is allocated depends on the location of the police station first involved in that criminal case.

Permanent Magistrates and Special Magistrates. The MO provides for two types of Magistrates: Permanent Magistrates and Special Magistrates. Both are appointed by the CE under MO s.5(1), upon the recommendation of the Judicial Officers Recommendation Commission: BL art.88. 1.080

Principal Magistrates and the Chief Magistrate. Each Magistrates' Court is supervised by a Principal Magistrate (PM). The Magistracy as a whole is overseen by the Chief Magistrate (CM). The CM and the PMs are Permanent Magistrates. The CM also oversees the Small Claims Tribunal, the Labour Tribunal, Obscene Articles Tribunal and the Coroner's Court. Although not part of the Magistracy, their hearings are all presided over by a single Magistrate. In the case of the Obscene Articles Tribunal, the Magistrate is joined by a panel of two or more lay adjudicator, and in the case of the Coroner's Court, a panel of five jurors. 1.081

Deputy Magistrates and Deputy Special Magistrates. The Chief Justice (CJ) may also appoint Deputy Permanent Magistrates and Deputy Special Magistrates, who shall have the same qualification requirements, privileges and jurisdictions as their permanent counterparts, save that they shall be appointed for a specific period of time as stated in their warrants: MO s.5A. 1.082

Qualification of a Permanent Magistrate. A person who is qualified as a barrister or solicitor in Hong Kong or any other common law jurisdiction, or has served as a Special Magistrate for a period of at least five years is eligible to be appointed as a Permanent Magistrate: MO s.5AA. 1.083

Jurisdiction of a Permanent Magistrate. A Permanent Magistrate can impose a maximum sentence of two years' imprisonment and a fine of HK$100,000: MO s.92. When two or more terms of imprisonment are imposed by a Permanent Magistrate and are ordered to run consecutively in whole or in part, the aggregate shall not exceed three 1.084

years: MO s.57. These are subject to the sentencing restrictions imposed by statute on a particular offence.

1.085 **Qualification of a Special Magistrate.** A person who is qualified as a barrister or solicitor in Hong Kong or any other common law jurisdiction, who has either practiced as such for a period of at least five years or has served as a court prosecutor, court interpreter or judicial clerk in Hong Kong courts totalling at least five years, is eligible to be appointed as a Special Magistrate: MO s.5AB. That said, in July 1998, the Judicial Officers Recommendation Commission proposed that more legally qualified person should be appointed as Special Magistrates. The proposal was made in light of the fact that there were an increasing number of defendants who were represented by lawyers when attending trials before Special Magistrates. The appellate courts have also highlighted the need for the high standards that can be expected from Permanent Magistrates to be rendered by the Special Magistrates as well.

1.086 **Jurisdiction of a Special Magistrate.** A Special Magistrate can impose a maximum sentence of six months' imprisonment and a fine of HK$50,000: MO s.91. When two or more terms of imprisonment are imposed by a Special Magistrate and are ordered to run consecutively in whole or in part, the aggregate shall not exceed 12 months: MO s.57. The jurisdiction of a Special Magistrate is further subject to the provisions of his warrant of appointment by the CE: MO s.5. In practice, Special Magistrates are tasked with handling minor offences such as hawking, traffic contraventions and littering and cannot impose a prison sentence. These are subject to the sentencing restrictions imposed by statute on a particular offence.

1.087 **Magistracy as a "Trial Court".** A Magistrate may only try cases summarily (and may not try cases upon indictment). This implies that he may only try offences that are either "triable summarily only" or "triable either summarily or upon indictment" (and the DoJ decides to have that case tried summarily). In practice, a trial in a Magistrates' Court is substantially the same as a trial in the DC. For the procedures of a summary trial, see MO s.19 (see also Chapter 13: Trials before a Single Judge or a Magistrate).

1.088 **Power to Review.** A Magistrate may review his own determinations or have his own determinations reviewed — a procedure unique to the level of the Magistracy, connected with the summary manner of a Magistrate's exercise of jurisdiction and to allow the correction of mistakes in a speedy manner. See also Chapter 16: Reviews and Appeals against Convictions, Sentences, and Acquittal.

1.089 **Magistracy as a "Triage Court".** As discussed above, all criminal cases must be commenced in the Magistracy. By performing the "triage court" function, the Magistracy shall deal with preliminary matters of cases where it is not the ultimate venue for trial, and then "send" these cases to the appropriate courts. For cases which have to be "sent" to the CFI, the Magistrate would conduct a committal proceeding. For more details, see Chapter 8: Subsequent Appearances before a Magistrate. For cases which have to be "sent" to the DC, the Magistrate would conduct a transfer of papers proceeding. In *Chiang Lily v SJ*,[30] the CFA made it clear that, unlike the position in England and Wales,

[30] (2010) 13 HKCFAR 208.

a defendant has no right to elect to be tried by a jury, and the SJ has the sole discretion to select the venue of trial: see also *Tong Ying Kit v SJ* [2021] HKCA 912.

1.090 **The Juvenile Court.** The Juvenile Court is constituted under the Juvenile Offenders Ordinance (Cap.226) (JOO) and shall consist of a Permanent Magistrate appointed by the CJ: JOO s.3A. It has exclusive jurisdiction in criminal cases against defendants under the age of 16, except in homicide cases, and has the same jurisdiction as a Permanent Magistrate does. See Chapter 23: Dealing with Clients of Special Needs, for a more detailed discussion on the Juvenile Court and criminal proceedings involving a juvenile defendant.

(b) The District Court

1.091 **DC as "Court of Record".** The DC is established by the District Court Ordinance (Cap.336) (DCO). DC is a court of record in that the judiciary has the practice to publish written reasons for verdicts and sentences given by District Judges: DCO s.3(2). The DC has both civil and criminal jurisdictions, and only its criminal jurisdiction shall be discussed hereunder.

1.092 **Constitution of a DC.** The DC consists of District Judges, who are appointed by the CE upon the recommendation of the Judicial Officers Recommendation Commission: DCO s.4 and BL art.88. The DC is overseen by the Chief District Judge (CDJ), who is also a District Judge. The CJ may also appoint Deputy District Judges, who shall have the same qualification requirements, privileges and jurisdictions as their non-deputised counterparts, save that they shall be appointed for a specific period of time as stated in their warrants: DCO s.7.

1.093 **Qualification of a District Judge.** Similar to a Permanent Magistrate, a person is eligible to be appointed as a District Judge if he has been a qualified barrister or solicitor in Hong Kong or any other common law jurisdiction for a minimum of five years or is qualified and has served in certain judicial offices for a minimum of five years: DCO s.5.

1.094 **Jurisdiction of a District Judge.** A District Judge enjoys a maximum sentencing power of seven years' imprisonment, which applies to a single offence, as well as the aggregate term of imprisonment for two or more offences: DCO s.82. These are subject to the sentencing restrictions imposed by statute on a particular offence.

1.095 **DC as a Trial Court.** Within its criminal jurisdiction, the DC can try all indictable offences, except those listed in MO Part III of Sch.2 (which includes the most serious offences such as murder, manslaughter and rape). It may also try any offence that can only be tried summarily if the person is also charged with those offences: DCO s.88. DC Judges sit alone and, like Magistrates, perform the dual function of a judge of law and a judge of fact: DCO s.79(1). See also *HKSAR v Egan*.[31]

[31] (2010) 13 HKCFAR 314

young male offenders. While the exact term shall be determined by the CSD, subject to the health and conduct of the offender, an offender between 14 and 20 years of age shall serve a period of no less than one month and not more than six months, while an offender between 21 and 24 years of age shall serve a period of no less than three months and not more than 12 months: DCsO s.4(2).

1.134 **Post Release.** After release, the offender shall be subject to a supervision order for 12 months, within which aftercare officers of the CSD shall have regular contact with him and his family to provide any necessary support: DCsO s.5. A breach of the supervision order warrants a recall order, pursuant to which the released person shall be arrested and taken back to the Detention Centre: DCsO s.6.

1.135 **Facilities.** Currently, the only Detention Centre is Sha Tsui Correctional Institution.

(c) Rehabilitation centre

1.136 **Eligibility.** RCs are governed by the Rehabilitation Centres Ordinance (Cap.567) (RCO). A detention order under the RCO is available, in lieu of any other sentence, to an offender not less than 14 but under 21 years of age on the date of conviction, where a short-term custodial sentence is apparently appropriate: RCO s.4(1), 4(2)(a) and 4(2)(e). The young offender must not be currently serving or have previously served a sentence of imprisonment, or detention in Detention Centre, TC or DATC: RCO s.4(2)(b) and 4(2)(c). Report from the CSD must first be sought to determine the suitability of such sentence, pending which the young offender may be remanded for up to three weeks: RCO s.4(3). In practice, the YOAP, jointly established by the CSD and the Social Welfare Department, shall provide a coordinated professional view on the appropriate sentence.

1.137 **Nature and Length.** In the first phase, offenders shall be detained in an RC for a period determined by the CSD taking into account their conduct and progress, but not less than two months and not exceeding five months: RCO s.4(6)(a) and 4(5)(a). The aim of this phase is to rehabilitate the young offenders on socially acceptable behaviour to prevent further commission of crimes. In the second phase, offenders shall reside in a designated hostel or halfway house for a period determined by the CSD, taking into account their needs and progress, but not less than one month and not exceeding four months: RCO s.4(6)(b) and 4(5)(b). In this phase, young offenders may go to school or work, or conduct other approved activities with leave from the CSD: RCO s.5(1). Combining both phases, the aggregate length of an RC detention order is no less than three months but not more than nine months: RCO s.4(4).

1.138 **Post Release.** After both phases, the offender is released, and he shall be subject to a supervision order for one year: RCO s.6(1). A breach of the supervision order warrants a recall order, pursuant to which the released person shall be arrested and taken back to the RC: RCO s.7(1).

1.139 **Facilities.** Currently, there are four RCs: Lai Hang Rehabilitation Centre and Lai Chi Rehabilitation Centre for males; Chi Lan Rehabilitation Centre and Wai Lan Rehabilitation Centre for females.

(d) Training centre

1.140 **Eligibility.** TCs are governed by the Training Centres Ordinance (Cap.280) (TCO). Sentence of detention in a TC is available, in lieu of any other sentence, to an offender not less than 14 but under 21 years of age on the date of conviction, to whom such sentence is expedient for his reformation and prevention of crime: TCO, s.4(1). Report from the CSD must first be sought to determine the suitability of such sentence, pending which the young offender may be remanded for up to three weeks: TCO s.4(3). In practice, the YOAP, jointly established by the CSD and the Social Welfare Department, shall provide a coordinated professional view on the appropriate sentence.

1.141 **Nature and Length.** While in detention, offenders are subject to half-day educational classes and half-day vocational trainings. Activities like scouting or "Outward Bound" would also be provided. The aim is to improve the offenders' educational standing and equip them with vocational skills before their release. While the exact term shall be determined by the CSD, the length shall be no less than six months but no more than three years: TCO s.4(2). The expected term of TC is significantly longer than that of Detention Centre; it is aimed at young offenders of more serious offences or with a more sophisticated criminal background. The two types of centres provide "different forms of treatment" for "particular needs of the individual offender": *R v Wong Kwon-in*.[34]

1.142 **Post Release.** After release, the offender shall be subject to a supervision order for up to three years, within which guidance and support shall be provided to the released person: TCO s.5(1). A breach of the supervision order warrants a recall order, pursuant to which the released person shall be arrested and taken back to the TC: TCO s.5(2).

1.143 **Facilities.** Currently, there are two TCs: Cape Collinson Correctional Institution for males and Lai King Correctional Institution for females.

(e) Drug addiction treatment centre

1.144 **Eligibility.** DATCs are governed by the Drug Addiction Treatment Centre Ordinance (Cap.244) (DATCO). It is available, in lieu of any other sentence, for an offender of an offence punishable by imprisonment, whom having regard to his previous conduct and character, such a sentence is in his interest and the public interest: DATCO. Report from the CSD must first be sought to determine the suitability of such sentence, pending which the offender may be remanded for up to three weeks: DATCO s.4(3).

1.145 **Nature and Length.** When detained in DATC, the focus shall be cure and rehabilitation from drug addiction. While the exact term is determined by the CSD, having regard to health and progress and likelihood of remaining free from addiction of dangerous drugs, the length shall be no less than two months but not more than 12 months: DATCO s.4(2). When a person is sentenced to DATC, no conviction shall be recorded against that person, unless the circumstances of the offence so warrant: DATCO s.4(4).

[34] [1986] 5 HKLR 910.

3.041 **Making a Timely Complaint of Ill-Treatment.** Challenging the admissibility of a record of interview at trial is a common occurrence. The Judge or Magistrate has to determine admissibility based on evidence. A record of interview may more likely be ruled inadmissible if there is evidence of an early complaint about ill-treatment and medical evidence in support. A solicitor must:

(1) ask if there are any complaints about his or her treatment in police custody;
(2) record the reply, even if there are no complaints;
(3) record details of any complaint and examine any visible injuries;
(4) sketch or photograph these injuries;
(5) with the arrested person's permission, make a formal complaint to the DO who has the responsibility of recording such matters; and
(6) record that fact if the arrested person does not give permission to make a formal complaint.

3.042 **Importance of Making a Timely Complaint.** The importance of making a timely complaint cannot be overstated:

(1) *It protects the arrested person*. The solicitor may be called by a Defendant at trial as a witness to give evidence about what injuries were observed, the nature of any complaint and the action(s) taken. It may be necessary to refer to the interview notes when giving evidence. A complaint of ill-treatment raised for the first time at a trial may be attacked as a recent fabrication. The solicitor's evidence and notes will help negate that suggestion.
(2) *It protects the solicitor*. The client may not complain at the time of the interview but ill-treatment may be raised later in an attempt to exclude an inculpatory statement from evidence. It may be suggested that a complaint was made to the solicitor who failed either to record or act upon it. A record, showing that the arrested person was asked about any complaints and replied that there were none, will help rebut any allegations of professional negligence or incompetence.

3.043 **Burden of Proving Voluntariness of Admissions.** The burden of proving the voluntariness of a record of interview rests with the Prosecution. The Prosecution must negate defence allegations that the admissions were improperly obtained and satisfy the court that the record of interview was made voluntarily. One way the Prosecution may discredit such allegations is to show that a lack of early record of a complaint of ill-treatment either to the DO, to the CAPO or on the first appearance in court. In the absence of such a record, the prosecutor will suggest that the allegations against the Police are fabricated recently and, by implication, unsubstantiated. To rebut such allegations, the solicitor must discuss with the arrested person the importance of making a complaint to the DO, to the Magistrate at the first appearance in court and possibly to the CAPO. The solicitor must record on the file that this advice is given. If the advice is rejected, then that should also be recorded. The arrested person should be asked to sign the record to avoid possible later misunderstandings or accusations that the solicitor failed to give such advice.

3.044 **Solicitor Required to Give Evidence for the Client.** When a solicitor is required to give substantial information as to circumstances that arise when the client is giving evidence at trial, the solicitor should seriously consider whether it is still appropriate to act for the client at trial. Chapter 10.13 of *The Solicitors' Guide* provides that a solicitor must not accept instructions to act for a client as an advocate (or to continue to act) if he or she or a member of the firm will be called as a witness, unless the evidence is purely formal.

3.045 **Recording a Complaint about Police Conduct.** If there is a complaint about police conduct, whether during the arrest or later, the solicitor must ask the arrested person about such details and record:

(1) the time, date and place of the incident;
(2) the number of police officers involved, their identities and service numbers or, if this is not possible, their physical descriptions or any nicknames;
(3) particulars of the conduct complained of, including details of violence inflicted, by whom, where it was inflicted and how;
(4) if threats or inducements were made, the words used;
(5) details of any oppressive or unpleasant conduct;
(6) whether any injuries were sustained and if so their nature and extent (photographs would be particularly useful);
(7) whether any complaint has been made and if so the nature of the complaint, when and to whom it was made;
(8) whether medical attention has been requested or received;
(9) whether medical attention is now sought;
(10) whether there are any independent witnesses and their identities, if known; and
(11) whether the arrested person agrees that the complaint should be placed on record at the police station.

3.046 At this stage, it is not always possible or desirable to get a full and detailed account of the alleged misconduct. The time available for the interview may be limited and the arrested person may feel inhibited from giving details while still in custody. However, it is important to obtain enough information to:

(1) register a complaint with the DO;
(2) give sufficient details of the complaint to the Magistrate at the first court appearance so that it can be placed on record; and
(3) be able to give evidence, if required, to confirm that a complaint was made at the time of the interview and the essential features of that complaint.

3.047 **Interpreter.** If the solicitor does not speak the same language as the arrested person and is accompanied by an interpreter, the interpreter could be called as a witness at a subsequent trial. Care should be taken to ensure that any injuries are seen and recorded by the interpreter.

3.048 **Drawing a Sketch to Record Visible Injuries.** Where there are visible injuries, they should be accurately recorded. A sketch showing the position, nature and extent of injuries may be useful for substantiating improper police conduct.

of the Prosecution when officers from CAPO interview the police officers named in the complaint. Those officers will be forewarned of the allegations in advance of the trial. Where a complaint is made to CAPO, but the client does not wish to give a statement, the solicitor may write to CAPO explaining that the client wishes to proceed with the complaint but only after the trial has been completed. If a complainant wishes to register a complaint but delays making the statement until after trial, then CAPO would classify the complaint as "not pursuable". This is likely to be taken as confirmation that the complaint lacked substance or was not made seriously. In any event, even if a complaint was supported by a statement, action may not be taken against the officer concerned until after the trial of the complainant was completed. The problems arising from the need to support the complaint with a statement has led many practitioners to question the benefit of advising clients to make statements to CAPO. The arrested person must be fully advised about the implications of making a complaint to CAPO and the solicitor must make a record that this has been done. If the arrested person is clear about the matters complained of, understands the implications, wishes to proceed and is confident he or she can ensure that the CAPO officers conducting the interview will record the details of the complaint fully and clearly, then the complaint may be lodged and the supporting statement given. If the arrested person is not confident about that, then it is best to advise that a complaint should be lodged with the DO but that a statement should not be given at this stage. It can be explained at trial why a statement has not yet been given to CAPO.

3.060 **Making Complaint to a Magistrate on First Appearance.** The arrested person must be told that the first court appearance before a Magistrate provides an opportunity to give brief details of any complaint regarding ill-treatment by the Police to the Magistrate. The solicitor should explain to the client that under MO, s.34, the Magistrate must make a note of the proceedings and such a note would include complaints about the ill-treatment by the Police. Most proceedings are now recorded on audiotape and a transcript of the proceedings can be obtained if necessary: MO s.35A. Some Magistrates will ask an unrepresented Defendant on the first appearance whether there are any complaints about police treatment. Others will simply ask whether he or she has anything to say. Complaining to a Magistrate about the treatment received in custody is an effective way of recording the complaint, without going through the CAPO procedure. There will be no need to go into detail, but it is important that the Magistrate is given the time and place of the ill-treatment, its nature, whether injuries were sustained and their nature and, if possible, the identities of the persons involved.

3.061 **Not to Talk about the Case with Others.** It is important to warn the arrested person not to discuss the case with anyone else, including other detainees. An arrested person who talks to other detainees risks information detrimental to his or her defence coming to the attention of the Police. There have been cases where undercover police officers have posed as prisoners. Those undercover officers have been permitted to give evidence at trial about what the arrested person said to them or about what they overheard the arrested person say to others in the cells. (For cases where police officers gave evidence about overheard conversations, see *HKSAR v Ng Wai Man*[5] and *HKSAR v*

[5] [1998] 2 HKLRD 1.

Lee King Man[6]) Passive eavesdropping is normally acceptable. The type of questioning without caution discussed in *Secretary for Justice v Lam Tat Ming*[7] is not. It is important to ensure the arrested person understands that police cells are neither safe areas for conversations nor forbidden areas for gathering evidence by the Police. Fellow detainees may be rewarded for passing on information to the authorities. Assistance to the authorities can be a relevant factor in mitigation of their sentences. No admissibility issue will arise in these situations. The person relaying the conversation is giving direct evidence as a fact of what was heard.

4. Obtaining Identifying Particulars from Arrested Persons

What are Identifying Particulars. The arrested person may want advice from the solicitor or for the solicitor to be present if the Police intend to take fingerprints, photographs or a sample for DNA or other scientific testing. Following an arrest, the Police will obtain "identifying particulars" from an arrested person to assist in the investigation of the offence or any other offences that may have been committed by the arrested person. **3.062**

The Law. An arrested person cannot refuse to provide the identifying particulars listed in the Police Force Ordinance (Cap.232) (PFO) s.59. These identifying particulars are: **3.063**

(1) photographs;
(2) fingerprints;
(3) palm prints;
(4) weight and height measurements; and
(5) sole prints and toeprints.

Use of Identifying Particulars after Investigation. Arrested persons should also be advised that, their identifying particulars will be destroyed or returned to them as soon as possible if they are not charged with any offence or if they are charged but not convicted. This includes all copies of the identifying particulars. **3.064**

Under PFO s.59(3), however, identifying particulars may be retained where the arrested person: **3.065**

(1) has previously been convicted of any offence; or
(2) is the subject of a removal order under the Immigration Ordinance (Cap.115).

Under PFO s.59(4), where an arrested person is under 18 years of age, the identifying particulars may be retained until the arrested person: **3.066**

(1) attains 18 years of age; or
(2) if not charged, but given a Superintendent's Caution for the offence, for two years after the caution.

[6] (CACC 96/2005, [2008] HKEC 346).
[7] (2000) 3 HKCFAR 168.

3.067 Non-intimate and intimate samples may be taken from arrested persons during the investigative process. PFO s.59G provides that DNA information derived from an intimate sample or a non-intimate sample may be stored on a DNA database maintained by the Government Chemist.

3.068 **Non-Intimate Samples.** Non-intimate samples may be taken from arrested persons whether they consent or not. Non-intimate samples are defined in PFO s.3as:

(1) a sample of head hair;
(2) a sample taken from a nail or under a nail;
(3) a swab taken from the mouth or from the body (but not from a private part or any other body orifice);
(4) saliva;
(5) an impression of any part of the body other than a private part;
(6) an impression of the face; or
(7) the identifying particulars discussed in para.3.065 above.

The most commonly used non-intimate samples taken from arrested persons are swabs taken from inside the mouth. This is usually referred to as a "buccal swab". There is no point in objecting to the taking of this sample. The police are empowered to use reasonable force to obtain the sample under PFO s.59C(8).

3.069 **Intimate Samples.** The police are also empowered to take intimate samples from arrested persons. The person taking an intimate sample, other than a sample of urine, must be a registered medical practitioner: PFO s.59A(7). Intimate samples are defined in PFO s.3 as:

(1) a sample of blood, semen or any other tissue fluid, urine or hair other than head hair;
(2) a dental impression (which must be taken by a registered dentist); and
(3) a swab taken from a private part of a person's body or from a person's body orifice other than the mouth.

Intimate samples are rarely taken nowadays, as a non-intimate sample is sufficient for obtaining a person's DNA.

3.070 **Destroying Samples as Soon as Practicable.** Intimate and non-intimate samples and any information derived from them must be destroyed as soon as is reasonably practicable where:

(1) the arrested person is not charged with any offence;
(2) the charge(s) are withdrawn;
(3) the arrested person is discharged by a court before conviction; or
(4) the arrested person is acquitted of the charge(s).

However, this shall not affect any DNA information which has already been permanently stored in the DNA database.

3.071 **Analysing Identifying Particulars.** The Police will obtain and analyse identifying particulars, intimate and non-intimate samples where this will assist the Prosecution case. The Prosecution has no obligation to analyse fingerprints on an exhibit, for example a packet containing dangerous drugs, where there is other evidence the arrested person possessed that exhibit. If the Defence considers confirmation that the arrested person's fingerprints were not on the packet will materially assist a denial of possession, the Defence should arrange for its own experts to examine the packet: see, for example, *HKSAR v Lai Tsan Kin*.[8]

5. Obtaining Police Bail

3.072 **Bail as the Immediate Concern.** The most immediate concern for the arrested person and his or her friends or relatives is whether or not bail will be granted by the Police. At this stage of the proceedings, the question of bail is governed by the PFO. The provisions about court bail contained in the CPO only apply once the arrested person is charged and brought before a Magistrate. As such, bail should always be requested, unless it is obviously out of the question either because of the serious nature of the offence or the client's circumstances.

3.073 **Bringing the Arrested Person before a Magistrate.** Any person who is detained in police custody must be brought before a Magistrate as soon as practicable, according to PFO s.52(1). The PFO does not contain a specific time for production. In practice, arrested persons will normally be brought before a Magistrate within 24 hours of being charged, unless they are charged on a Saturday or a Sunday, in which case they will be brought before a Magistrate on the following Monday.

3.074 **The Law.** As a general principle, persons charged with criminal offences should be given police bail except where:

(1) the offence is serious;
(2) the arrest is under a warrant which does not permit bail;
(3) there is a history of absconding or repeating offences while on bail;
(4) there is a real likelihood of interfering with Prosecution witnesses, impeding the investigation or obstructing the course of justice; or
(5) the detention is in the arrested person's interests, for example for self-protection or protection from others.

3.075 **Obtaining Preliminary View of Bail from the Police.** It should be appreciated that at this stage of the proceedings there may be considerable uncertainty: (1) police inquiries may be at an early stage; (2) other suspects may still be at liberty; or (3) the full nature of the injuries to the victim of a violent crime may not be known. These factors will affect the way in which the Police view bail. If the solicitor has spoken to the OC Case before seeing the arrested person, the Police's attitude towards bail will be known. The

[8] [2007] 3 HKC 395.

(5) the history of any previous admission to bail of the accused;

(6) the character, antecedents and previous convictions, if any, of the accused;

(7) the nature and weight of the evidence; and

(8) any other thing that appears relevant.

9.007 As such, bail cannot be refused simply because the offence is serious, the prosecution case appears strong or the Defendant has previous convictions. Such matters, however, go to whether the Defendant will surrender to bail, commit another offence while on bail or interfere with witnesses. This is a distinction that must be appreciated.

2. Prepare for an Application for Bail

(a) General points to note

9.008 **Do Not Lecture the Magistrate.** While practitioners must be conversant with the statutory provisions relating to bail, successful applications are based upon common sense. It is not helpful to lecture the Magistrate on constitutional rights or the right to bail under CPO Part 1A. The Magistrate will already be familiar with these statutory provisions.

9.009 In most cases, the Magistrate's main concern is whether the Defendant will abscond (i.e. a failure to surrender to custody on the appointed date). The objective must be to persuade the Magistrate that if bail is granted, the Defendant will appear on the date of the next court hearing. Even though bail is a right and not a privilege, the application must be approached with this practicality firmly in mind.

9.010 There is no set formula for making a bail application. Every advocate develops a personal style. For an advocate with little or no court experience, it is advisable to plan the application to ensure all relevant points are made without repetition. The following structure may be adopted:

(1) Briefly inform the court of the Defendant's personal particulars, emphasising those points which suggest that the Defendant will comply with any conditions that may be imposed.

(2) Address the particular objections raised by the Prosecution and try to counter them.

(3) Put forward realistic suggestions for possible terms of bail.

9.011 **Not to advance the Defence.** On an application for bail, it is unwise to positively advance the Defendant's case when dealing with the reliability of the Prosecution's case at trial on an application for bail. A short discussion with the Defendant in the court cells does not provide a sound basis upon which a legal representative can assert a case for the Defendant's acquittal. The Magistrate will not be receptive to a long discourse about the unfairness of remanding the Defendant in custody when there will inevitably be an acquittal, or how it will adversely impact the Defendant's human rights and/or the rights of the Defendant's family.

9.012 **Preparation Work before the Application for Bail.** To facilitate prompt release should the court grant bail, the solicitor should contact a friend or family member of the client to ensure that:

(1) cash can be deposited with the Registry for the amount ordered by the court;

(2) the Defendant's travel documents are available for surrender, if required; and

(3) the surety is in court and able to attend to complete the required formalities for bail.

(b) Personal particulars of the defendant

9.013 **Take Instructions.** Details of the Defendant's character and background will have to be obtained during the interview in the cells. Confirmation of any previous criminal convictions and advance notice of the Prosecution's objections to bail should have to be obtained from the prosecutor. Particulars, such as how much cash the Defendant can raise, persons who may stand as sureties, and whether travel documents can be surrendered, should be obtained from the Defendant, family members, or those giving instructions. Sample Document for Duty Lawyer [Green Sheet] might be useful.

9.014 **Brief Background of the Defendant.** Address the court briefly on the Defendant's character. Certain points may be highlighted to show that the Defendant is unlikely to abscond. Relevant factors would be that the Defendant:

(1) was born in Hong Kong or has lived here for many years and has substantial family and/or business links in Hong Kong;

(2) has a fixed address and has lived there for a particular length of time, owns the property or it is a public housing property granted to him or her;

(3) is married and resides with his or her spouse and children;

(4) has no criminal convictions in Hong Kong (this becomes more relevant the longer the Defendant has lived in Hong Kong);

(5) (should there be previous convictions) had not committed similar offences, or that the offences committed were relatively minor in nature, or that they occurred some considerable time ago; and

(6) has regular employment, has been in that employment for a number of years and has regular earnings.

(c) Responding to grounds of objections to bail

9.015 Prosecutors may advance one or more of the following arguments why bail should be refused. They are not in themselves grounds to refuse bail. The Prosecution will, however, put them forward in an attempt to persuade the Magistrate that bail should be withheld under s.9G(2).

9.016 **Lengthy Imprisonment Leading to Risk of Absconding.** The gravity of the alleged offence may be difficult to deny; however, it is often a question of degree. For example, all robberies are serious, but how serious depends on factors such as whether (and if so, what type of) weapons were used, whether violence was included, the extent of any injuries caused to the victim, and whether the robbery occurred in residential premises. It may be possible to point out that the offence is not the most serious of its kind and argue that while there is always a risk of absconding, it is unlikely in the circumstances of the case.

9.017 **Likelihood of Interfering with Witnesses.** The court will be concerned with preventing Defendants from interfering with witnesses. However, this objection may be countered by suggesting that it be made a condition of bail that the Defendant shall not contact prosecution witnesses directly or indirectly. The Prosecution may suggest that this condition would be ineffective because the Defendant works or lives near the witness. If the concerns raised by the Prosecution appear reasonable, it is best to acknowledge the problem and suggest solutions. It may be necessary for the Defendant to reside at another address or to find work elsewhere if bail would not be granted otherwise.

9.018 **Strong Evidence and Likeliness of Conviction.** The Prosecution has the advantage of knowing the evidence against the Defendant. The defence solicitor should be alert for any weaknesses or inaccuracies in the claims made by the Prosecution, for example:

(1) Are the witnesses for the Prosecution independent, or are they accomplices giving evidence in the hope of securing a lenient sentence?

(2) Will admissions (if any) made by the Defendant be challenged?

(3) Is the evidence of identification of the Defendant reliable? Having attended the identification parade (ID Parade), for example, the solicitor may know that the witness only claimed the Defendant might be the culprit. This is not a positive identification. This knowledge might be used to weaken the Prosecution assertion of a strong case.

9.019 **For Further Investigation and/or ID Parade.** It is necessary to consider whether the Prosecution claim is reasonable and well founded. If the police have had ample time to question the Defendant on the offences charged, they might intend to ask about other offences in hopes of obtaining admissions to unsolved crimes. Equally, a claim that a remand in police custody is necessary for the Defendant to be put on an ID Parade is not a valid objection to bail. The Defendant cannot be compelled to attend an ID Parade. In any event, suspects on bail routinely attend police stations to take part in ID Parades. Arrangements can be made for persons in jail custody to participate in ID Parades.

9.020 **Likelihood to Commit Offence Whilst On Bail.** A Magistrate will be reluctant to grant bail if a Defendant is likely to commit further offences. That the Defendant was on bail when arrested is not conclusive evidence of likelihood to re-offend. The two offences may be very different. The second offence may be out of character and unlikely to be repeated. However, the commission of further offences when on bail is an aggravating factor for sentence in the event of conviction and arguably this increases the risk the Defendant will not answer to bail.

9.021 **Previous History of Abscondence.** A court will be reluctant to grant bail to a Defendant who has previously abused the trust of the court by absconding from bail. The court will be more ready to conclude that the Defendant cannot be trusted. However, it may be possible to argue that the Defendant's circumstances have changed significantly since that abscondence, for example:

(1) the Defendant may have absconded years ago but is now married and has children and stable employment;

(2) the earlier offence may have been more serious than the present one; and

(3) looking at all the circumstances, the Defendant will appear for trial if released on bail.

(d) Conditions of Bail

9.022 In granting bail, a Magistrate may impose one or more conditions.

(i) Cash

9.023 **Depositing Cash with Court.** This is the most common condition. Defendants can be required to deposit cash with the court. That cash is liable to be forfeited if the Defendant absconds or fails to comply with the bail conditions. The deposit of cash operates as an incentive to comply. There is no fixed amount for any particular offence. The amount should be a "reasonable sum" and only for the purpose of securing the surrender to custody of the person granted bail.

9.024 In fixing the amount of the cash deposit, the Magistrate will take into account all relevant circumstances, such as the Defendant's income and other financial resources, the seriousness of the offence, the apparent strength of the prosecution evidence, the Defendant's previous convictions and any history of abscondence. The advocate should be prepared to address the Magistrate on all these matters.

9.025 **Solicitor Prohibited to Advance Money to Defendant to Meet Condition of Cash Bail.** A solicitor is prohibited from acting as a surety for bail. Similarly, a solicitor should not advance money to a Defendant or to a surety to meet a condition of a cash deposit: CPO s.9F; *The Solicitors' Guide*, Chapter 10.19.

(ii) *Sureties*

9.026 **Surety to Ensure Compliance with Bail Obligations.** One or more persons may act as sureties to ensure that the Defendant complies with the obligations of bail. If the Defendant fails to do so, the sureties risk forfeiture of the amount of cash deposited or the amount pledged by their recognisances. A recognisance is a promise to pay all or part of a stated sum of money if a specified event occurs, that is the Defendant's failure to surrender to bail when required or the breach of conditions attached to bail.

9.027 **Address Surety's Resources.** The advocate should be prepared to address the Magistrate on the surety's resources, the surety's influence and control over the Defendant

grounds may be advanced in opposition to an application for bail, however, not all will apply to a particular case. Once the precise grounds of objection are known, they can be attacked in a structured, and hopefully short, application.

9.050 **Essential Skills of Making an Application for Bail.** The Plea Court deals with a large number of cases each day. The solicitor's objective is to persuade a busy Magistrate to take a calculated risk by granting bail to the Defendant. A structured application advanced clearly, without repetition, will be better received than a long, directionless speech. To achieve this objective, the solicitor should:

(1) prepare a note, which can be referred to during the application, of the points to be made;

(2) speak slowly, clearly and loudly enough so that everyone in court, including those in the public gallery, can hear;

(3) deal concisely with each ground of objection to bail;

(4) make each point clearly and without repetition;

(5) use simple, uncomplicated language;

(6) never become impatient or visibly irritated;

(7) avoid emotional identification with the Defendant;

(8) avoid making simple protestations of innocence as a reason for bail;

(9) avoid pre-judging issues of guilt or innocence;

(10) pay particular attention to the Magistrate and be prepared for questions from the bench; and

(11) sit down once all relevant points have been made.

(b) Bail refused

9.051 **Jail Custody versus Police Custody.** If bail is not granted, there may still be a question of whether the remand should be in police custody or jail custody. A remand in police custody will not generally be in the best interests of the Defendant. Particularly where the Defendant complains of mistreatment, the solicitor should request jail custody and ensure the details of the complaint are noted by the Magistrate.

9.052 **State Complaints (If Any).** If the Prosecution asks, for example, for a remand of three days in police custody, it may be better to emphasise at the outset why this is objected to and state the complaints about treatment in police custody before making the application for bail.

9.053 **Eight-day Right.** If the Defendant has to be committed to the Court of First Instance (CFI) for trial, the Magistrate may, if he or she considers it necessary or desirable to defer any stage of the committal proceedings or examination of witnesses in the preliminary inquiry, remand the accused to jail or police custody. The accused may not be remanded for a period exceeding eight clear days unless the accused and the Prosecution consent to a longer remand: MO s.79(1). Before the expiration of the time for which the accused is remanded, the Magistrate may order the accused to continue and keep the accused in custody or admit him to bail. Thus, the practical effect of the provision is that the accused has a right to his bail application reviewed every seven days.

(c) Bail granted

9.054 **Conditions of Bail.** If bail is granted, any conditions imposed will be explained to the Defendant by the Magistrate. The Defendant will be asked whether these conditions are understood and whether the Defendant is willing to comply with them. The Magistrate will also warn the Defendant that failure to surrender to custody on the date and time appointed is in itself a criminal offence: CPO s.9L(1). Once the Defendant confirms that this is understood, he or she will be taken back to the court cells. The court clerk will require the Defendant to sign the appropriate forms and comply with any conditions that are required before release on bail, such as surrender of travel documents. Pay attention to the bail conditions imposed on the Defendant and make sure the Magistrate did not pronounce any conditions (e.g. time of curfew, police station which the Defendant should report to) mistakenly.

(d) After bail application

9.055 **Explain to the Client.** Whether or not bail has been granted, the solicitor should visit the Defendant in the cells. It is important to make an accurate note of the Magistrate's ruling. If bail is granted, the specific terms should be recorded so that they can be explained to the Defendant, any sureties and friends or family. If bail is not granted, reasons for the refusal should be noted. The solicitor should emphasise to the Defendant, who has been granted bail, that failure to surrender to bail is a criminal offence. Any bail conditions should be explained. If bail is not granted, the Defendant's right to apply bail in the CFI should be explained.

9.056 **Explain to the Client's Family and Friends.** Outside the courtroom, the Magistrate's decision should be explained to any of the Defendant's family and friends who have attended court. If bail has been granted, there will be a short delay between the bail forms being prepared for the Defendant's signature and the Defendant being taken to the cells. This delay should be used to explain the terms of bail to the Defendant. Sample Document 9.1: Extract of Record of Bail Proceedings provides an example of a court bail form.

9.057 **Offence of Breaking Conditions of Bail.** Defendants should be warned that they may be arrested if a police officer "has reasonable grounds for believing that any condition has been or is likely to be broken". The police need not wait until there has been a breach of condition of bail. Where there is a condition not to leave Hong Kong, the purchase of an airline ticket may trigger an arrest, especially if it is a one-way ticket.

9.058 **Subsequent Bail Applications to a Judge of the CFI.** A subsequent application for bail can be structured to deal with the reasons for the refusal of bail. If the Defendant applies directly to a Judge of the CFI for bail, it will be necessary to deal with the reasons for the Magistrate's refusal of granting bail when preparing submissions before the CFI Judge. In these situations, the record will be important.

10.008 **Plea Bargains.** The solicitor should always consider whether the Prosecution might be persuaded to accept a plea to a less serious offence than the one charged. For example, assault occasioning actual bodily harm may be reduced to common assault, wounding reduced to assault occasioning actual bodily harm or robbery reduced to theft. Negotiations should start well before the trial. Consideration needs to be given in each case to the most effective way of conducting those negotiations, whether verbally or by letter.

10.009 Where the defendant faces a number of charges, the Prosecution may agree to drop some of them in return for guilty pleas on the remainder. This may reduce the overall criminality and justify a lower sentence than would otherwise have been the case. Advice to plead guilty may be more attractive if it is accompanied by an indication that the Prosecution would drop some of the charges in return for guilty pleas on the remainder. Approaching the Prosecution to consider such an arrangement might be in the best interests of the client. If the arrangement reduces the scope of the criminal activity, then sentence will be reduced accordingly.

10.010 As confirmed by *HKSAR v Anthony Uchenna Elezie*,[1] it is not necessary to obtain the defendant's authorisation before approaching the Prosecution with a proposal, though it is best to do so. Anything said during such negotiations cannot be used against the accused. If the Prosecution is prepared to reach an agreement, then the defendant must be informed and given an opportunity either to accept or to reject the proposed agreement. Whatever decision the defendant makes must be recorded in writing in the defendant's own language and signed by the defendant.

10.011 **Proof of Evidence.** A defendant's proof of evidence for a guilty plea should include:

(1) full name, address and Hong Kong Identity Card number;

(2) place and date of birth;

(3) educational background;

(4) occupation(s) since leaving school;

(5) current employment and salary;

(6) marital status and number of children;

(7) previous criminal convictions and sentences imposed;

(8) circumstances leading to the commission of the offence and whether there was any premeditation;

(9) whether the offence is out of character;

(10) behaviour since the commission of the offence, for example:

(a) whether admissions have been made to the Police after the arrest;

[1] (CACC 340/1999, [1999] HKEC 677).

(b) whether the defendant has assisted the authorities in their investigation of other suspects either in the particular case or in another case;

(c) whether the defendant has given evidence against other persons;

(d) the risk to the defendant and/or family members consequent upon such cooperation;

(e) whether restitution has been made or is offered;

(f) details of time already spent in custody;

(g) any other matter the defendant wants to bring to the court's attention, (e.g. previous service to the community);

(h) particulars of anyone the defendant wants to call as a character witness (e.g. an employer); and

(i) any "injustice" the defendant has suffered, for example delays by the Prosecution which have not been caused by or contributed to by the defendant: *Secretary for Justice v Hui Siu Man*.[2]

10.012 It will be necessary to confirm facts in the client's favour. For example, if the client is charged with theft and claims to have made full restitution to the victim, the Prosecution should be asked to confirm that fact.

10.013 In most cases, the client would not be called to give evidence after a guilty plea, but it is still a good practice to prepare a "proof of evidence". This ensures that both the defendant and the solicitor address their minds to the mitigating factors to be advanced to the court. The proof will form the basis of the defendant's instructions for the mitigation hearing. It will also protect the solicitor against possible allegations of negligence or failing to put forward matters according to instructions.

10.014 **Where Defendant Provided Assistance to the Authority.** Special considerations are required where the defendant claims to have assisted the Police or another law enforcement agency, either in connection with the instant or other cases. The Police or the law enforcement agency concerned must be asked to confirm that the defendant did provide assistance, as well as the extent and value of such. It must also be inquired whether special measures are required to protect the defendant from retribution: *HKSAR v Tse Ka Wah*;[3] *R v Sivan*.[4]

10.015 **Character Witness.** It is possible to call character witnesses after a plea of guilty. Character witnesses may show that what the defendant did was out of character, which might assist in mitigation.

10.016 **Considerations in Calling Character Witness.** A character witness may be cross-examined as to his or her credibility, save as to questions which might tend to expose him or her to criminal proceedings. The potential witness must be warned about this. He or she must be asked about details of any previous criminal convictions or current criminal Prosecutions. The circumstances leading up to a sudden early retirement from

[2] [1999] 2 HKLRD 236.
[3] [1998] 1 HKLRD 925.
[4] (1988) 10 Cr App R (S) 282.

employment followed by an unexplained long period of unemployment might also raise questions about the quality of the character witness.

10.017 A character witness will be of little value if the Prosecution can show by cross-examination that the witness was convicted for dishonesty or is currently the subject of a criminal investigation, particularly if that investigation involves allegations of dishonesty. Hence, if there is any doubt about the personal quality of a potential character witness, the client should be advised not to call that witness.

10.018 Upon the advice of the solicitor, the defendant should make the decision on whether to call any character witness, and who to call, if yes. The decision should be confirmed in writing and signed by the defendant.

10.019 **Proof of Evidence of Character Witness.** A full statement, or "proof", of the evidence of any potential witnesses should be prepared. The character witness should be asked to sign each page of his or her statement in the same way that the defendant should sign his or her proof of evidence. Where there is any possible weakness in the background of a character witness, this should be addressed in the proof of evidence.

2. Binding Over

10.020 **Power to Bind Over.** The power to bind over is provided by Criminal Procedure Ordinance (CPO) s.109I:

> A judge, a District Judge or a Magistrate shall have, as ancillary to his jurisdiction, the power to bind over to keep the peace, and power to bind over to be of good behaviour, a person who or whose case is before the court, by requiring him to enter into his own recognisances or to find sureties or both, and committing him to prison if he does not comply.

10.021 Magistrates Ordinance (MO) s.61(1) also provides similar powers to a Magistrate.

10.022 **Consequences of Binding Over.** The defendant would need to admit to the Prosecution's statement of facts in open court. However, this does not mean that the defendant pleads guilty. In fact, the defendant pleads not guilty, he or she shall be acquitted and no conviction shall be entered against him or her.

10.023 Binding over is a promise to keep the peace and to be of good behaviour supported by a recognisance for a specified amount of money. The defendant may, for example, be bound over in his or her own recognisance of $1,000 to keep the peace and be of good behaviour for a period of 12 months. No money is paid when the binding over order is made. If, however, the defendant fails to keep the peace or fails to be of good behaviour during that 12 months (e.g. by committing another criminal offence), all or part of the $1,000 may be forfeited.

10.024 **Negotiating Binding Over.** Bind overs should not be seen as a convenient way of disposing of charges without the inconvenience and costs of a trial. They do, however, provide an opportunity to resolve relatively minor cases where, a criminal conviction is not necessary or not in the public interest.

10.025 Where the offence in question is of minor seriousness, the Prosecution may be prepared to accept a bind over rather than to go through a lengthy trial. For example, the first offence of shop theft, where the value of the item was low, where the defendant is elderly or a young person and has not previously been in trouble may be a suitable case for a bind over. Important considerations will be the likely sentence the court would impose upon conviction after trial and the time and costs saved by the defendant being bound over.

10.026 Mitigating factors may emerge during the preparation of the case for trial which, if it had been known to the Police at the time, might have led the Police to decide against prosecuting. The defence should also approach the Prosecution for binding over in these situations.

10.027 The defence solicitor should negotiate with the OC Case, or more likely with the CP, for the Prosecution to offer no evidence in return for the defendant agreeing to be bound over. Alternatively, the solicitor could send a letter proposing a bind over and the supporting reasons to the Department of Justice (DoJ).

10.028 Negotiation of a bind over order could also include negotiations on a statement of facts that the Prosecution accepts and the defendant is also willing to agree to.

10.029 **Procedures of the Bind over Order.** If the Prosecution accepts the proposal to bind over, it would tell the court that the Prosecution would offer no evidence on condition that the defendant agrees to be bound over to keep the peace and to be of good behaviour. The defendant will then be asked to plead to the charge. Once the defendant pleads not guilty, the prosecutor offers no evidence and the defendant is acquitted.

10.030 The Prosecution would read the statement of facts to the defendant, and he or she would need to state his or her understanding of the facts to agree to it. The defendant would then be asked whether he or she agrees to be bound over. The Judge or Magistrate would specify the period of the bind over and the amount of the recognisance. The Judge or Magistrate shall explain the consequences of binding over, and also the consequences of breaching such order. If the defendant agrees to be bound over, he or she shall sign Form 36 of the Magistrates (Forms) Rules (Sample Document 10.1) in the court office, and then he or she shall be free to leave the court.

10.031 **Consequences of Breach of Bind over Order.** Records of bind overs are kept by the Prosecution. If the defendant is convicted of a criminal offence committed during the period of the bind over, the prosecutor will tell the Judge or Magistrate the defendant is in breach of a binding over order. The Judge or Magistrate then asks the defendant if the breach of the bind over is admitted.

10.032 If the breach is admitted, the defendant or his or her solicitor can address the court and put forward in mitigation any reasons for the breach. The Judge or Magistrate then decides whether all or part of the recognisance will be forfeited. However, a breach of a binding over order does not reopen the question of sentence for the offence which led to the bind over. The offence cannot be reopened as the Prosecution will have offered no evidence on that charge and the defendant will have been acquitted. The acquittal cannot be set aside.

The time limit in MO s.114(b) is mandatory. The Registrar of the High Court monitors the progress of Magistracy appeals and will require an explanation from the Magistrate for any delay. The Statement of Findings required by MO s.114(d) will contain a summary of the evidence, the facts which the Magistrate found proved and the reasons for the conviction. Where the appeal is against sentence, the Statement of Findings will set out the reasons for sentence. The Statement of Findings is the starting point for argument on the hearing of the appeal.

16.075 **The Basic Appeal Bundle.** The Appeals Clerk of the Magistrates' Court in which the proceedings were heard will prepare a Basic Appeal Bundle for the hearing of the appeal. Practice Direction 9.6 (Appendix C), which deals with appeals from Magistrates to the CFI, provides that the contents of the Basic Appeal Bundle shall be determined in accordance with the nature of the appeal. Sample Document 16.10 is an example of the index of a Basic Appeal Bundle.

16.076 In an appeal against conviction, the Basic Appeal Bundle consists of:

(1) Notice of Appeal;

(2) charge sheet/summons to Defendant/consent to prosecution (if any);

(3) summary of facts as prosecution opening;

(4) agreed/admitted facts;

(5) records of interview admitted into evidence;

(6) written prosecution/defence closing submissions;

(7) Certificate of Conviction or Order;

(8) Statement of Findings (with Reasons for Verdict);

(9) list of exhibits and documentary exhibits; and

(10) transcript of proceedings, which will include the plea, oral closing submissions, verdict and Reasons for Verdict/order.

16.077 In an appeal against sentence, the Basic Appeal Bundle consists of:

(1) Notice of Appeal;

(2) charge sheet/summons to Defendant/consent to prosecution (if any);

(3) agreed/admitted facts;

(4) records of interview admitted into evidence;

(5) written prosecution/defence closing submissions;

(6) Certificate of Conviction or Order;

(7) Statement of Findings (with reasons for sentence);

(8) reports for sentence;

(9) record of previous convictions;

(10) list of exhibits and documentary exhibits; and

(11) transcript of proceedings, which includes the plea, oral closing submissions, mitigation, sentence and reasons for sentence.

16.078 When the appeal is against both conviction and sentence, the Basic Appeal Bundle will contain a combination of the documents listed in the two previous paragraphs. The Magistrate's clerk must send the Notice of Appeal and the Basic Appeal Bundle to the Registrar of the High Court. The Registrar will allocate a case number and a hearing date for the appeal. The Registrar will then give notice to the parties of the date fixed for the hearing of the appeal and the case number and send out the Basic Appeal Bundle.

16.079 **Application for Transcript of the Proceedings.** An appellant is not entitled, as of right, to a full transcript of the proceedings. If a transcript is required in addition to what is provided in the Basic Appeal Bundle, an application may be made by letter to the Registrar of the High Court (Magistracy Appeals) (see Practice Direction 9.6 (Appendix C)). A party to the proceedings may, subject to payment of the necessary fee, obtain a transcript or audio CD recording of the hearing(s) before a Magistrate. Obtaining a copy of the audio CD recording of the hearing is inexpensive and may be helpful when deciding which, if any, further transcripts are required to argue the appeal. If there has been an s.104 review hearing, a full transcript of that hearing will be provided. Review hearings are treated as part of the reasons for conviction/sentence.

16.080 **Advice to the Defendant.** If a Defendant is represented at conviction and sentence, the advocate has a responsibility to advise:

(1) on the prospects of an appeal;

(2) on the time limits for lodging a Notice of Appeal;

(3) that the right to appeal may be lost unless the time limits are complied with;

(4) of the provisions about abandonment of the appeal if the Statement of Findings and the minute (record) of the proceedings, when received, show that an appeal is hopeless; and

(5) on the availability of legal aid and how to apply.

16.081 The preliminary advice should be given immediately after the case is completed. Once that has been done, the solicitor's responsibility is at an end, unless the firm is retained for an appeal. In that event, a new r.5D letter will be needed. Where a custodial sentence is imposed, preliminary advice about an appeal should be given before the client is taken away from the court. If the preliminary advice is to appeal conviction and/or sentence, the client can lodge the Notice of Appeal through the correctional services staff at the place of detention.

16.082 **Perfected Grounds of Appeal**. Where the Notice of Appeal is signed by a solicitor, Practice Direction 4.2 on criminal appeals must be followed (Appendix C). That direction imposes a duty upon a solicitor or counsel who settles grounds of appeal to ensure that:

(1) grounds are only put forward where the solicitor or counsel is satisfied that they are arguable;

(2) unarguable grounds are not put forward merely because the client wants those grounds to be put forward;

(3) grounds are not put forward unless they are "reasonable", that is, there is some real prospect of success;

(4) grounds are not put forward unless they are supportable by oral argument and are particularised; and

(5) the grounds put forward are settled with care and accuracy.

16.083 **Initial/General Grounds of Appeal.** It may be difficult to formulate detailed grounds of appeal until the Magistrate's Statement of Findings and a copy of the minute (record) of proceedings have been received. Although Magistrates are encouraged to give reasons in court for their decisions to convict, they do not always do so. Therefore, it may be appropriate to file a Notice of Appeal with initial grounds of appeal to obtain a written Statement of Findings from the Magistrate. Once that is obtained, the prospects of success of the appeal can be considered. Before proceeding, the client should be advised of the costs involved, and if the Magistrate's reasons show there is no realistic prospect of success, the appeal should be abandoned. MO s.114 requires the Notice of Appeal to state the general grounds of appeal. What those grounds are will depend on each case. It is not, however, sufficient to simply state that "there was no or no sufficient evidence to justify the conviction". A solicitor who conducted the trial should be in the position to formulate these initial grounds. More detailed grounds of appeal could follow when the Magistrate's Statement of Findings has been received and considered. Sample Document 16.11 is an example of Perfected Grounds of Appeal against conviction by a Magistrate.

16.084 **Fees.** If the fees for the conduct of the appeal have not yet been agreed, legal aid is being applied for or counsel has not yet been instructed, the client should sign the Notice of Appeal in person. It is only possible for a firm to come off the record in the CFI with the court's leave; however, it is easy to go on to the record at a later date by simply filing a Notice to Act.

(c) Receiving instructions and instructing counsel

16.085 **Before Receiving the Basic Appeal Bundle.** As with taking over a case from another firm prior to trial, it is necessary to consider very carefully whether to accept instructions to act on an appeal. The same considerations apply as for taking over any other criminal litigation (see Chapter 10: Taking Instructions and Advising on Plea). The r.5D procedure must also be complied with, as with any new instructions in a criminal case. The client must be advised to file a Notice of Appeal within the time limit. The client must also be advised, in writing, that it is not possible to properly advise on the prospects of a successful appeal until the Basic Appeal Bundle has been obtained. A copy of the audio CD recording of the hearing before the Magistrate should be obtained to assist in advising on the prospects of a successful appeal. If the Notice of Appeal is signed by the client, advise the client that when the Basic Appeal Bundle is received, it must be given to the solicitor immediately.

16.086 **After Receiving the Basic Appeal Bundle.** Upon receiving the Basic Appeal Bundle, the solicitor should carefully read the documents and then advise the client of the prospects of a successful appeal. The solicitor should seriously consider instructing a barrister experienced in appellate advocacy to read the bundle and to advise on the merits of an appeal. This should be explained to the client. The client's agreement should be obtained and funds paid on account to cover counsel's advising fees. It may be necessary to go beyond the material in the Basic Appeal Bundle if the client is to be properly advised on the prospects of a successful appeal. This will depend upon what the client says has gone wrong while the previous solicitors were acting. The client's authority must be obtained for the former solicitors to hand over the file. One must keep an open mind about criticism of the previous solicitors until the client's file(s) and the Basic Appeal Bundle have been received and considered. Mistakes made during the case by the client's previous solicitors will only provide grounds of appeal where there has been flagrantly incompetent advocacy: see for example *R v Lau Sui Fu*;[21] *R v Clinton*; *Sankar v Trinidad and Tobago*.[22]

16.087 **Whether to Continue to Act.** Where the appeal will involve matters that should have been dealt with at trial but were not, the solicitor should carefully consider whether to continue to act for the client. It may be in the best interests of the client to be represented by new solicitors. This is particularly relevant if the client is alleging negligence in the way in which he or she was represented at trial. In addition to advising the client to instruct new solicitors, it may be appropriate for the firm to notify insurers of a potential negligence claim.

16.088 **Whether to Instruct Counsel for the Appeal.** Appellate work requires special skills that are different from the skills needed for conducting a trial. The solicitor should instruct an experienced appellate counsel at an early stage. Counsel can advise on the merits of the appeal, and whether the appeal is against conviction, sentence or both. The counsel may be the same counsel who conducted the trial if that counsel has suitable experience of appellate advocacy. The advantage of instructing counsel who appeared before the Magistrate to conduct the appeal is that he or she is already familiar with the case and how the trial was conducted. There may, however, be valid reason for not instructing that counsel, for example, where:

(1) the client has lost confidence in that counsel;

(2) that counsel is not suitably experienced in appellate work; and

(3) the appeal will involve matters that should have been dealt with at trial but were not.

16.089 It should also be noted that the same considerations apply to instructing counsel on an appeal as to instructing counsel for trial. The requirements of the Bar Code must be observed.

16.090 **Matters Left for Counsel.** If a barrister is instructed to conduct the appeal hearing, the perfected grounds of appeal should be settled by the barrister (see Sample Document 16.11 for an example of Perfected Grounds of Appeal against conviction). While a solicitor does have a right to argue an appeal under MO s.113 before a CFI Judge,

[21] [1997] HKLRD 323.
[22] [1995] 1 WLR 194.

it should be considered carefully. It is not recommended that a solicitor who is newly qualified or has little experience of court procedure, including appellate advocacy, takes on this responsibility. Solicitors contemplating appearing before a CFI Judge on the hearing of an s.113 appeal must carefully consider whether they comply with the Solicitors' Guide, Chapter 6.

16.091 **Obtaining Advice and Further Actions**. Once the Basic Appeal Bundle has been received and the choice of counsel has been discussed with the client, the solicitor should negotiate with counsel:

(1) a fee for reading the papers and for advising on the merits of the appeal both against conviction and sentence; and

(2) a fee for settling perfected grounds of appeal and conducting the appeal hearing, whether against conviction and/or against sentence, if the advice is favourable.

16.092 If the counsel's advice is that there are no arguable grounds for an appeal against conviction and/or sentence, the appellant can decide to either abandon the appeal or seek advice from another counsel. Sometimes, counsel may advise that there are arguable grounds of appeal against conviction but not against sentence. Despite that, the client may insist on going ahead with the appeal against sentence. In that situation, it would be appropriate for the solicitor and counsel to act only in the appeal against conviction and for the client to argue the appeal against sentence in person. A similar situation could arise where the barrister advises that there is no arguable ground on conviction but that there are arguable grounds for an appeal against sentence. The court must be informed by letter of such an arrangement.

16.093 Once the legal fees have been agreed with the client, a r.5D letter has been completed and the fees paid, a Notice to Act should be filed without delay. If the date for the appeal hearing has not yet been fixed, a letter can be sent to the Registrar advising the name of the counsel retained on the appeal and asking that a date be fixed to suit counsel's availability (see Sample Document 16.12: Notice of Abandonment of Appeal Against Conviction/Sentence).

(d) Abandonment of appeals from Magistrates

16.094 **Meritless Appeals.** Having studied the appeal papers, if it appears that there is no realistic prospect of success on appeal, the client must be told. An advocate may only advance grounds of appeal that are arguable. If there are no arguable grounds, it is a waste of the court's time and the client's money to proceed to a hearing. The client should be advised to abandon the appeal. A meritless appeal against either conviction or sentence may result in loss of time. This means that the CFI Judge may order the sentence to run from a date later than the date when the client was imprisoned: see for example *HKSAR v Hau Kin*;[23] *Chau Ching Kay v HKSAR*.[24]

[23] (2005) 8 HKCFAR 63.
[24] (2002) 5 HKCFAR 540.

16.095 **Notice of Abandonment**. Under MO s.117(1), an appeal may be abandoned by giving a written notice to the clerk of the Magistrate against whose determination the appeal is brought. The Notice of Abandonment must be given not less than two clear days before the date fixed for the appeal hearing. The Magistrate's clerk must give notice of abandonment to the respondent and to the Registrar of the High Court. It is, however, a good practice for the solicitor's firm to send a copy of the Notice of Abandonment to the Registrar of the High Court and the respondent at the same time that the Magistrate's clerk is notified.

16.096 There is no prescribed Notice of Abandonment in the Magistrates (Forms) Rules. Notices of Abandonment should follow the format of Form VII Notice of Abandonment in the Schedule to the Criminal Appeal Rules (Cap.221A, Sub.Leg.). Separate notices should be prepared for the abandonment of an appeal against conviction and the abandonment of an appeal against sentence to avoid any confusion over what is, or is not, being abandoned.

16.097 **Time Frame**. If the notice of abandonment is given at least two clear days before the date fixed for the hearing, the appeal process is terminated, and the appeal is removed from the list for hearing. If less than two clear days' notice is given, the appeal may only be abandoned with leave of the judge hearing the appeal. If the Notice of Abandonment of Appeal against Conviction is not given on time, leave to abandon the appeal has to be sought. There is then a risk that the judge will direct the appeal hearing to proceed. The advocate would have to concede that there were no arguable grounds. The court could then order loss of time and/or costs against the appellant and perhaps consider a wasted costs' order against the legal representatives (see Chapter 17: Costs).

16.098 **Dismissal of the Appeal.** If the Notice of Abandonment is given on time, the appeal is marked as being dismissed. The Registrar of the High Court sends a memorandum of the judge's dismissal of the appeal to the Magistrate's clerk. Under MO s.117(2), the Magistrate may then:

(1) issue process to enforce the decision against which the appeal was brought;

(2) on the application of the respondent to the appeal, order the appellant to pay the respondent such costs as the Registrar shall determine to be just and reasonable in respect of expenses justifiably incurred by the respondent to the appeal prior to the notice of abandonment; and

(3) deal with the recognisance to prosecute the appeal.

16.099 Where an appeal is abandoned, the Magistrate may order the forfeiture of any recognisance entered into by an appellant in respect of an appeal by case stated or by the alternative procedure in accordance with MO s.65(1). Payment of forfeited recognisances may be enforced as if the sum in question was a fine to be paid by the appellant. Any costs ordered to be paid upon abandonment of an appeal are enforceable as a civil debt. No other means of enforcement is provided: MO s.117(3).

(e) Appeal to the Court of First Instance

16.100 **The Appeal Hearing.** The Appellant addresses the court first, whether the appeal is by case stated or alternative procedure and whether it is against conviction and/or sentence.

(c) Duty Lawyer preparing for trial

18.019 **Preparing for Trial.** Where a defendant will be represented by the Duty Lawyer on a not-guilty plea before a Magistrate, the defence case will be prepared by the Court Liaison Office. The barrister or solicitor assigned to the case will not be involved in the case preparation, in the same way as in a privately funded case. The Duty Lawyer will receive the case papers before the trial date. Upon receiving them, the Duty Lawyer must read them thoroughly. The initial question is whether the statements made by witnesses substantiate the charges brought against the Defendant. The next question is whether the Defendant's statement shows a potential defence. If it does, the third step is how that defence can be best advanced to the trial court.

18.020 **Pre-Trial Conference.** The Duty Lawyer shall normally have a conference with the Defendant before a CMC and/or the trial. If the Defendant is in jail custody, the conference will take place at the Correctional Services institution in which the Defendant has been remanded. The Duty Lawyer has the same obligation as a privately funded lawyer to ensure client confidentiality during a conference with the client in Correctional Services custody. The Duty Lawyer may also discuss any issues in the case with the Defendant at court on the trial date. Discussions at court are no substitute, however, for a conference with the Defendant before the trial. After a pre-trial conference, the Duty Lawyer needs to complete a PTC form: see Sample Document 18.5 PTC Follow-up Form.

18.021 **Duty in Trial.** The responsibilities and obligations of the Duty Lawyer during trial before a Magistrate are the same as those of the privately funded lawyer. Whether or not the Defendant chooses to give evidence at trial, the Duty Lawyer should ensure that the Defendant states his or her decision on and sign the DLS Instructions Sheet (Sample Document 18.6 DLS Instructions Sheet (PNG Form)). If the Defendant is convicted after trial, the Duty Lawyer will then make a plea in mitigation for the Defendant, just as a privately funded lawyer will.

18.022 **Costs Incurred before DLS Take Over.** If the Defendant is acquitted, the Duty Lawyer should consider applying for costs under the Costs in Criminal Cases Ordinance. Duty Lawyer should be aware of any expenses the defendant has incurred on private representation before representation though the DLS was obtained. Ideally, the DLLO should contact the solicitors concerned and obtain copies of the relevant bills. In the event of an acquittal, the court can be asked to order the Prosecution to pay those costs. If the only expenditure the Defendant has incurred is the DLS handling fee, then that is the only costs that can be asked for (see Chapter 17: Costs).

18.023 **Duty after Conviction and/or Sentence.** The Duty Lawyer should advise the Defendant about the prospects of appealing against conviction and/or sentence. The Duty Lawyer is in the same position as the privately funded lawyer. If the Defendant is given a non-custodial sentence, the Duty Lawyer has the same responsibilities to explain the sentence and relevant conditions to the Defendant and, for juveniles, their parents or guardian, as a privately funded lawyer. Unlike the privately funded lawyer, the Duty Lawyer is not required to comply with the r.5D procedures. On the contrary, the Duty Lawyer is required to complete the Case Report Form (Sample Document 18.7 Case Report Form (PNG Form)).

3. The Legal Aid Department

18.024 **Important Legislations and Documents**. All solicitors undertaking Criminal Legal Aid Cases must be familiar with:

(1) the Legal Aid Ordinance (Cap.91) (LAO);

(2) the Legal Aid in Criminal Cases Rules (Cap.221D, Sub.Leg.) (the Rules); and;

(3) the Guidance Notes to Solicitors Handling Criminal Cases issued by the Legal Aid Department (the Guidance Notes).

18.025 **Means Test**. Legal aid may be granted to accused persons and appellants in criminal cases, if the DLA is satisfied that the person's financial resources do not exceed the limits specified in LAO s.5. Even if the person's financial resources exceed the limits, legal aid may still be granted if the DLA is "satisfied that it is desirable in the interests of justice": the Rules r.15(2).

18.026 **Contribution.** Persons granted legal aid can be required to pay a financial contribution, depending upon their financial means.

18.027 **The Legal Aid Panel.** Persons granted legal aid may be represented by a solicitor and, if necessary, by counsel who are on the Legal Aid Panel maintained by the DLA. Not all counsel or solicitors who undertake criminal defence work are on the Legal Aid Panel.

18.028 **Nominating Solicitor/Counsel.** A person applying for legal aid may nominate the solicitor and/or counsel who will act for them. Only solicitors and counsel who are on the Legal Aid Panel can undertake legally aided criminal defence work. The DLA may assign the solicitor and/or counsel whom the applicant asks for if he or she is on the Legal Aid Panel but need not do so.

18.029 **Scope of Service.** The proceedings for which criminal legal aid may be granted include:

(1) committal proceedings in Magistrates' Courts, including an application for a discharge after a committal without consideration of the evidence and any appeal therefrom;

(2) preparation and conduct of the defence and plea in CFI trials;

(3) preparation and conduct of defence and plea in proceedings transferred to the CFI under Complex Commercial Crimes Ordinance (Cap.394) s.4, including an application for discharge and any appeal therefrom;

(4) preparation and conduct of the defence and plea in District Court (DC) trials;

(5) appeals to the Court of Appeal (CA) from the CFI and the DC;

(6) resistance against an appeal by case stated from the DC;

(7) resistance against a review of sentence by the CA;

(8) appeal against a conviction and/or sentence by a Magistrate;

(9) resistance against a Prosecution appeal from a Magistrate by case stated; and

(10) applications for leave to appeal and appeals to the Court of Final Appeal (CFA).

18.030 **Solicitors and Counsel Fees**. Solicitors and barristers who are on the Legal Aid Panel and assigned to act for an accused person or an appellant under a Legal Aid Certificate are paid at rates set out in the Rules r.21 and Part 2 of the Schedule.

(a) Practical considerations for accepting Legal Aid Cases

18.031 **Advantage of Accepting Legal Aid Cases.** One advantage is that solicitors will have more opportunities to act for persons charged with serious offences than if they only accept instructions in privately instructed cases. Most persons charged with murder and other serious crimes will not have the means to privately instruct their own defence lawyers. Trials for the most serious crimes usually involve clients who have been granted legal aid.

18.032 **Disadvantages of Accepting Legal Aid Cases.** The major disadvantage is that legally aided criminal cases are poorly paid when compared with privately instructed cases or even civil legal aid cases. Solicitors often end up having to carry out far more work on a case than anticipated when they agree to act for an accused. They may not be properly paid for that work. For example, where expert is needed, considerable preparation will have to be done by the solicitor (see para 18.049). However, the solicitor is unlikely to receive adequate compensation for his or her work, even though it has to be done to ensure that the accused person is adequately represented. To that extent, by agreeing to act under a Legal Aid Certificate, the solicitor enters into an open-ended financial commitment.

18.033 **Same Standard of Duties.** Solicitors acting in criminal legal aid cases are subject to the same professional standards as when acting for any other client. This frequently leads to situations where solicitors, acting in the legally aided client's best interests, are acting to their own financial disadvantage. In these situations, the client's interests must always come first. If work necessary to ensure that the accused is adequately represented is not carried out, the solicitor is open to allegations of professional misconduct. The solicitor could also be sued for breach of contract and/or negligence. It is no defence that necessary work was not done because it would not be fully remunerated. That is something that should have been considered before accepting instructions to act for the legally aided client. Solicitors are bound by their professional duty to carry out necessary work even though they will not be adequately remunerated. In these circumstances, solicitors are subsidising the Legal Aid Fund.

18.034 **Practical Approach**. For the reasons stated above, undertaking legally aided criminal defence work will likely be commercially unattractive and sometimes simply not viable for a firm. Solicitors should consider carefully before agreeing to accept instructions in criminal cases from the DLA. They should discuss the matter with the firm's partners. Spending considerable hours and the firm's resources on work that may not be

adequately compensated can impose strains on the firm's cash flow and upon relations between its fee-earners.

18.035 **Assignment of Counsel without Consultation.** A counsel may be assigned by the DLA without reference to the solicitor. In privately funded cases, the solicitor acting for the client brings the counsel into the case after consultation with the client. *The Solicitors' Guide*, Chapter 12.03, Commentary 1 emphasises that, when bringing counsel into a case, solicitors should take care to select a counsel with sufficient competence and sufficient experience to undertake the case. There is no requirement for the DLA to discuss the choice of counsel with the solicitor. There is often no consultation between the solicitor and the legally aided person about the choice of counsel. This contradicts the traditional practice of the solicitor bringing counsel into the case after consultation with the client.

18.036 **Problems Arising from Assignment by DLA.** Assigning counsel without consulting the solicitor conducting the case can create problems. This is especially so where the counsel assigned would not have been instructed by the solicitor in a privately funded case. Simply because the counsel assigned is on the Legal Aid Panel does not mean that he or she is automatically the right person for the particular case. The solicitor who has the primary responsibility for preparing the case for the legally aided client has the added difficulty of working with a counsel who would not ordinarily have been instructed. In those situations, tensions may arise between the counsel and the solicitor.

18.037 **Solicitors' Duty to Report Problems**. Where the solicitor considers the assigned counsel is not competent for the particular case and/or that the necessary working relationship cannot be achieved, the solicitor must report this to the DLA without delay. The DLA can then consider a change in counsel or a change in solicitor. If there is no change in counsel and the solicitor feels that continuing to work with the assigned counsel is not in the best interests of the client, the solicitor has no option but to withdraw from acting.

(b) The Guidance Notes

18.038 **The Guidance Notes and Other Documents.** Solicitors who accept criminal legal aid assignments must be familiar with the Guidance Notes issued by the DLA (see Appendix E). The Guidance Notes are not exhaustive. They cover the main points that solicitors should pay attention to when acting for a legally aided client. Solicitors should also consider *The Solicitors' Guide*, all relevant Practice Directions and Law Society circulars, as well as applying their common sense to each case. Solicitors must read the Guidance Notes themselves and in full. However, the following points are particularly important.

18.039 **The Legal Aid Certificate.** Solicitors receive instructions from the DLA by a letter which encloses a Legal Aid Certificate. For examples of a letter of assignment and a Legal Aid Certificate, see Sample Documents 18.8 and 18.9. The Certificate is the authority for the solicitor to act. Its wording must be checked. Solicitors will not be paid for work carried out that is beyond the scope of the Certificate. For example, when

a Legal Aid Certificate is issued for an accused facing trial in the CFI, it will usually contain the following limitation:

> "This Certificate does not extend to the making of applications prior to the hearing."

18.040 This means that the Legal Aid Certificate would not include an application to a CFI judge for bail pending trial.

18.041 **Enlarging the Legal Aid Certificate.** If the accused wanted the solicitor to apply for bail, it would be necessary to apply to enlarge the Legal Aid Certificate. Under the Rules r.4, where a person has been granted legal aid for a matter, then he or she may also be granted legal aid for proceedings arising out of or connected with the matter. This may include an application for bail. If approved, either an additional or an amended Legal Aid Certificate would be issued to cover a bail application.

18.042 **Acknowledgement of Assignment.** The solicitor should acknowledge receipt of the letter of instructions and the Legal Aid Certificate as soon as practicable and in any event within seven days. If the solicitor decides not to accept the instructions, then any delay in communicating that decision to the LAD would also delay the accused having legal representation.

18.043 **Solicitor to Obtain Instructions from Aided Client.** The Guidance Notes state that the solicitor should obtain instructions from the aided client and complete all necessary preparation as soon as practicable. This is good professional practice and is particularly appropriate for criminal legal aid cases. Legal aid is granted at a relatively late stage of the litigation process, usually long after the person has been charged. Sometimes it is after committal for trial in cases to be heard in the CFI, or after transfer to the DC in cases to be tried in the DC. Solicitors in criminal legal aid cases will have less time to take instructions and prepare the defence than a privately instructed lawyer who has represented an accused from the time of arrest.

18.044 **Report to the DLA.** The assigned solicitor is required to report to the DLA, in practice the assigning legal aid counsel, not later than two weeks before the Pre-Trial Review on whether:

(1) a proof of evidence has been taken from the legally aided person;

(2) witnesses have been interviewed;

(3) if counsel has been assigned, that counsel has been briefed;

(4) a conference has been held between counsel and the legally aided person.

18.045 **Ongoing Duty to Report to DLA.** The assigned solicitor should keep the DLA informed about the progress of the case. In particular, the solicitor must inform the DLA if the legally aided person fails to give instructions or acts in a way that adversely affects the proper discharge of the solicitor's duties. Further, the solicitor must immediately notify the DLA if proceedings are brought against the solicitor for:

(1) any professional disciplinary proceedings; and/or

(2) any criminal charges which involve dishonestly or may bring the legal profession into disrepute.

If the solicitor is a senior partner of the firm or is the sole proprietor, he or she must report to the DLA any such proceedings against any of the firm's personnel. 18.046

Interpreter. If the assigned solicitor wishes to engage an interpreter, this should be done only with the prior approval of the DLA. The interpreter should normally be registered with the Registrar of the High Court. The LAD will provide an up-to-date list of registered interpreters, if requested. The solicitor should keep an accurate record of the hours worked by the interpreter and should certify the accuracy of the interpreter's fee notes when submitting them to the LAD for payment. 18.047

Translator. The DLA's approval is required if the assigned solicitor wishes to engage a translator. A quotation will have to be submitted before approval is given. Again, the accuracy of the contents of the translator's fee notes should be certified by the solicitor before it is submitted to the LAD for payment. 18.048

Experts. Prior approval from the DLA must be obtained before the assigned solicitor engages an expert. The cost of employing an expert can be substantial. Compiling the instructions to the expert can be exacting and time-consuming and there may be no suitable expert in Hong Kong. Besides formulating the instructions to the expert, considerable time may have to be spent on: 18.049

(1) locating a suitable expert overseas;

(2) obtaining permission to engage that expert from the DLA;

(3) agreeing the expert's fees with the DLA;

(4) arranging the expert's accommodation and flights;

(5) applying to the Immigration Department for an employment visa so that the expert can perform his or her services in Hong Kong; and

(6) dealing with the experts' tax affairs for work carried out in Hong Kong with the Inland Revenue Department.

The solicitor must also follow the detailed provisions of the Guidance Notes when instructing an expert. 18.050

Other Unusual Expenses. The assigned solicitor should obtain the DLA's approval before incurring any unusual expenses. 18.051

Transcripts. Transcripts of court proceedings are often required in appeals. For privately funded clients, the cost of obtaining a transcript can be very substantial. The transcripts are provided free of charge by the court if the appellant has been granted legal aid. The assigned solicitor should, nevertheless, only request those parts of the transcript that are necessary for arguing the appeal. Although the court does not charge for the transcript, the cost of preparation has to be paid by taxpayers. In addition, a transcript takes a long time to prepare. Applying for unnecessary transcripts delays the appeal process. 18.052

Conclusion of Case. Upon the conclusion of the case, the assigned solicitor must: 18.053

(1) assist the assigned counsel in making any application for the legally aided person's costs; and

23.058 Parents or guardians should be present at every appearance. However, if the appearance is required only as a formality, the court may be asked to excuse their attendance. Involvement in criminal proceedings is a serious matter and attendance demonstrates concern. This is an important consideration for the court in determining sentence.

23.059 **Trial Procedure.** The Juvenile Court follows the same procedure as a Magistrates' Court but is much more relaxed. There is greater emphasis on guidance and rehabilitation rather than punishment and deterrence. Juveniles are asked whether the charge is admitted or denied rather than to plead guilty or not guilty. There are findings of guilt rather than convictions. Familiar names are often used. Defendants remain seated except when pleas are taken, the verdict is delivered or sentence is pronounced.

23.060 Even though the Juvenile Court is not open to public, the Magistrate may, for reasons of practicality, announce that the court will sit in private and that persons not connected with the case must leave. A practitioner has the responsibility of ensuring that the protection granted by the JOO is effective. Consequently, he or she should question the presence of persons in court who have no apparent connection with the case.

23.061 Once the Magistrate is satisfied that the correct Defendant and the parent(s) or guardian are present, the Magistrate will explain in simple language the substance of the alleged offence to the Defendant: JOO s.8(1). This must be done even if the juvenile is represented. If the court is satisfied that the juvenile understands the nature of the alleged offence, then, unless the offence is homicide, the court must ask the juvenile whether or not the offence is admitted: JOO s.8(2). This too must be done even if the juvenile is represented. If the juvenile is represented, the court may ask if the plea accords with the advocate's instructions.

23.062 If the juvenile admits the offence, the usual procedure is for the court to receive a Statement of Facts from the prosecutor. If the court is satisfied that the offence is made out, the Statement of Facts will be read to the juvenile and, if necessary, explained in simple language. The juvenile will then be asked whether the facts are admitted. This also must be done even if the juvenile is represented.

23.063 If the facts are accepted and the court finds the offence is proven, it will then proceed to sentence; if the offence is not admitted, or if the court is not satisfied that the juvenile understands the nature of the alleged offence, the court will hear the evidence of witnesses in support of the complaint: JOO s.8(3).

23.064 Even where the juvenile is represented, the Magistrate will intervene more frequently than his or her counterpart in a Magistrates' court. The court has a duty to put to witnesses such questions as appear to be necessary in the interests of the juvenile: JOO s.8(6).

23.065 At the close of the evidence in chief of each witness, the court will ask the juvenile, or the parents or guardians, whether they wish to question the witness. If the juvenile wants to make a statement instead of asking questions, the court will allow this: JOO s.8(3). If the juvenile is represented, the Magistrate will tell the juvenile that the advocate may question the witness.

23.066 A no-case-to-answer submission may be made at the end of the Prosecution case (see Chapters 13 and 14). At the end of the prosecution case, if it appears to the court that a *prima facie* case has been made out, the juvenile can give evidence and call defence witnesses but is not required to do so.

23.067 The Juvenile Court has an obligation, as is the case in a Magistrates' court, to explain a defendant's rights to the juvenile. The procedure for the defence case is the same as in the Magistrates' court, but the court may put such questions to the juvenile as it deems necessary to assist the juvenile in his or her defence: JOO s.8(5).

23.068 If the offence is admitted or proven, or the juvenile has been remitted to the Juvenile Court for sentence under JOO s.3F, the juvenile or the legal representative has an opportunity to address the court in mitigation of sentence: JOO s.8(7).

23.069 **Remand in Custody.** If it is necessary to adjourn the proceedings against a juvenile whether in the Juvenile Court or in any other court, or if a juvenile is committed to the CFI or transferred to the District Court (DC) for trial, the juvenile can either be granted bail or remanded in custody. In the case of the latter, a child will be sent to a place of detention, whereas a young person will be sent to a place of Detention or a Training Centre: JOO s.7(1).

23.070 Persons who are of such an unruly character that they cannot be safely detained in a Training Centre, or who are of such depraved character that they are not fit to be so detained, may be committed to prison: JOO s.7(2). Whether a young person comes into this category will depend on the circumstances of each case. It will be for the prosecutor to put the relevant details before the court to justify the departure from JOO s.7(1).

(h) Sentencing options

23.071 **Remitting a Juvenile to the Juvenile Court for Sentencing.** JOO s.3F imposes a duty on any court that has convicted a juvenile of any offence, other than homicide, to remit the case to a Juvenile Court for sentence, unless it is satisfied that it would be undesirable to do so. Reference to "any" court includes the CFI and the DC, including where:

(1) a juvenile was charged jointly with a person who has attained 16 years of age;

(2) where a person who has attained 16 years of age is charged at the same time with aiding, abetting, counselling, procuring, allowing or permitting the offence committed by the juvenile; or

(3) where an adult court discovered that the defendant is a juvenile but continued with the trial.

23.072 Generally, it is in the interests of the juvenile to be remitted to the Juvenile Court for sentence. On remission, the Juvenile Court can deal with the juvenile as if it had convicted the juvenile. This means that, regardless of the sentencing powers the convicting court might have had, sentence on the remitted juvenile is limited to the maximum the Juvenile Court can impose. The Juvenile Court is established to deal with juvenile offenders only and this specialisation is another reason why it can only be in the interests of the juvenile to be remitted to the Juvenile Court for sentence.

23.073 **Factors to Be Considered.** In deciding whether to remit to a Juvenile Court for sentence, the trial court should consider:

(1) the nature and circumstances of the offence;

(2) the offender's personal circumstances; and

(3) the overall public interest.

23.074 The remitting court will specify the date and the Juvenile Court to which sentence is remitted. The juvenile remitted may be either remanded in custody or be released on bail. Whenever necessary, practitioners should bring JOO s.3F to the trial court's attention.

23.075 Pursuant to JOO s.3F(3), when a juvenile is remitted to the Juvenile Court for sentencing, the trial court is required to provide the Juvenile Court with a certificate setting out the nature of the offence. The certificate would also state that the Defendant has been found guilty of that offence and has been remitted to the Juvenile Court for sentence. In practice, the trial court will also send a statement of the facts found at trial, setting out the role played by the juvenile and any aggravating or mitigating circumstances which may be relevant to sentencing. There is no right to appeal against the order of remission to the Juvenile Court: JOO s.3F(2)(a).

23.076 **Right to Appeal.** The juvenile remitted for sentence retains all rights of appeal against the conviction: JOO s.3F(2)(b). The time for appealing against a conviction does not begin to run until the completion of sentencing by the Juvenile Court. Similar to appeals from a Magistrates' court, appeals from the Juvenile Court go to a single CFI Judge. The juvenile remitted for sentence has the same right to appeal against any order of the Juvenile Court as if there had been a finding of guilt by that court: JOO s.3F(2)(a). The provisions on appeals by way of case stated, appeals by way of the alternative procedure, and, reviews of determinations in the MO apply to the Juvenile Court, as do the provisions on a review of sentence stipulated in CPO s.81A. (emphasis added)

23.077 **Sentencing of Juveniles.** The Juvenile Court is required by JOO s.8(8) to arrive at a sentence that is in the best interests of the juvenile. The section requires the Juvenile Court to obtain readily available information about such matters as the juvenile's:

(1) general conduct;

(2) home surroundings;

(3) school records; and

(4) medical history.

23.078 The juvenile may be remanded on bail or to a place of detention to enable reports to be obtained.

23.079 **Imprisonment of Juveniles.** JOO s.11 restricts the imprisonment of juveniles and instead emphases on their long-term reform and rehabilitation. The section provides that:

(1) no child shall be sentenced to imprisonment or committed to prison in default of payment of a fine, damages or costs;

(2) no young person shall be sentenced to imprisonment if they can be dealt with by any other method; and

(3) a young person sentenced to imprisonment shall not be allowed to associate with adult prisoners.

23.080 The power to imprison a juvenile (a person between 14 and 16 years of age) remains available to the court, but imprisonment is a punishment of last resort that can only be imposed where the nature and seriousness of the offence makes imprisonment necessary in the public interest, or where the offence merits imprisonment and all other methods of disposal have been excluded.

23.081 **The Sentencing Powers of Juvenile Courts.** JOO s.15(1) provides that a juvenile may be dealt with by one or more of the following methods:

(1) by dismissing the charge;

(2) by a discharge upon entering into a recognisance;

(3) by a probation order (PO) under Probation of Offenders Ordinance (POOO);

(4) on a bond of responsibility for good behaviour under MO s.96(b);

(5) by an order under PWJO s.34, if the Juvenile Court is satisfied that a child or juvenile is in need of care and protection;

(6) by a reformatory school order under the Reformatory Schools Ordinance (Cap.225) (RSO);

(7) by a fine, or damages or costs;

(8) by ordering the parent or guardian to pay a fine, damages or costs;

(9) by ordering a parent or guardian to give security for good behaviour;

(10) by an order for custody in a place of detention;

(11) by an order in the case of a young person (14 to 16 years of age) for imprisonment or detention in a Training Centre;

(12) by ordering detention in a Detention Centre for a male offender who has attained 14 years of age;

(13) in the case of a young person (14 to 16 years of age), by an order for community service under the Community Service Order Ordinance (CSOO); or

(14) any other disposal which is legally available.

23.082 The reference to "any other disposal which is legally available" includes a Rehabilitation Centre Order. A child (10 to 14 years of age) cannot be sentenced to imprisonment: