CRIMINAL LIABILITY AND TYPES OF PENALTIES I. CRIMINAL LIABILITY AND TYPES OF PENALTIES Criminal liability is generally made up of two elements: (1) the guilty act or omission known as the "actus reus", and (2) the prohibited state of mind or guilty mind known as the "mens rea". The mental element generally requires the proof of an intention on the part of the person who commits the criminal act . Most criminal offences require the co-existence of the above two elements (i.e. actus reus and mens rea) at the same time. The concept is derived from the Latin expression " actus non facit reum nisi mens sit rea ", which means that "the act will not make a person guilty unless the mind is also guilty". For example, a person is not guilty of murder if he caused the death of another person by accidentally knocking him down with his car. The mens rea for the offence of murder requires an intention to kill another person or cause him very serious bodily injury, which is lacking in this example. However, this person may have committed the offence of dangerous driving causing death because the mens rea requires in such an offence is an intention to drive the car, which is present in the example. Whether this person is guilty of that offence depends on whether he committed the actus reus , i.e. whether he drove his car in a dangerous manner as defined in the legislation (see question 4 under Case Illustration). In some special cases, known as "strict liability offences", there may not be any prohibited state of mind necessary and only a guilty act is sufficient for criminal liability. An example can be found in sections 8 and 10 of the Water Pollution Control Ordinance. Under these sections, any person commits an offence if he discharges any polluting matter into the waters of Hong Kong in a water control zone. There is no need to prove that the offender knew the existence of pollutants in the materials he discharged or that he intended to pollute the water. It should also be noted that under the Hong Kong legal system, everyone is presumed innocent until the person has been proven guilty. Hence a person will only be treated as guilty of an offence if he or she is convicted by the court. Upon conviction, that person will be sentenced (i.e. punished) by the court (see question 2 below). CRIMINAL RECORDS AND THE REHABILITATION OF OFFENDERS ORDINANCE II. CRIMINAL RECORDS AND THE REHABILITATION OF OFFENDERS ORDINANCE POLICE POWERS III. POLICE POWERS As an ordinary citizen, it is possible that you might be stopped, questioned and even searched by the police while you are walking on the street. You may have questions as to why the police would do this to you, or under what circumstances the police can exercise such powers. This section contains some general information about police powers in the following areas: stopping and questioning a person; searching a person; entering private premises, searching and seizing items inside; arresting a person; and detaining a person at a police station and taking statements. 1. WILL A CHILD BE GUILTY OF AN OFFENCE? 1. WILL A CHILD BE GUILTY OF AN OFFENCE? It depends on the age of the child. According to section 3 of the Juvenile Offenders Ordinance, no child under the age of 10 years can be guilty of an offence. 2. WHAT TYPES OF PENALTIES ARE THERE FOR COMMITTING A CRIMINAL OFFENCE? 2. WHAT TYPES OF PENALTIES ARE THERE FOR COMMITTING A CRIMINAL OFFENCE? The maximum penalty for committing a particular offence is usually set out in the legislation of the relevant offence. The court will decide what sentence (i.e. penalties) to be imposed on an offender by taking into consideration all the relevant factors including for example the nature of the offence, the maximum penalty set out in the legislation, why and how the offence was committed, and the individual circumstances of the offender. The following list explains the usual types of penalties (i.e. sentencing options) that the courts in Hong Kong may impose on an adult offender : Imprisonment : In Hong Kong , the death penalty has already been abolished. Imprisonment is therefore the heaviest penalty and involves incarceration of the convicted offender in a prison for a fixed period of time. The heaviest form of imprisonment is life imprisonment. Normally the offender needs not serve the full length of the actual term of imprisonment imposed by the court. According to rule 69 of the Prison Rules(Cap. 234A of the Laws of Hong Kong), the period of imprisonment may be subsequently reduced if the conduct of a prisoner is good. The maximum amount of reduction should not exceed one-third of the actual term of imprisonment. In practice, a prisoner will normally be given the full one-third reduction unless he or she behaves poorly or violates any prison rules. Hence, if a person is sentenced by the court to serve 3 years' imprisonment, that prisoner will

usually be released from prison after two years. Rule 69 does not apply to a prisoner serving a sentence of imprisonment for life. Suspended Sentence : The court may impose a fixed term of imprisonment and then order that the sentence shall not take effect for a fixed period of 1 to 3 years. This is called a suspended sentence and the practical effect is that the offender needs not serve any prison sentence unless that offender commits an offence again within the prescribed period of time during which the sentence is suspended. Suspended sentences cannot be imposed in respect of certain offences , known as "excepted offences", which are set out in Schedule 3 of the Criminal Procedure Ordinance. They include robbery, indecent assault and other serious crimes. Moreover, suspended sentences are only applicable for those offenders who are sentenced to not more than two years imprisonment Discharge (with or without conditions) : A discharge is the release of an offender without imposing any penalty after convicting him or her of an offence . This is an exceptional order and may be made if the Magistrate takes the view that it is inexpedient to inflict any punishment other than a nominal punishment on the offender (having regard to the character, antecedents, age, health or mental condition of the offender or to the trivial nature of the offence or to the extenuating circumstances under which the offence was committed) (see section 36 of the Magistrates Ordinance). An absolute discharge bears no conditions, although a criminal conviction is still recorded against the offender. Where a conditional discharge is given by a Magistrate, the offender is required to enter into a recognizance, with or without sureties, in a sum not greater than $2000, to be of good behaviour by not doing certain prohibited acts, and to appear for sentence when called on at any time during a fixed period up to three years. If the offender commits the prohibited acts during the prescribed period, that offender may be required to pay the recognizance amount or be punished by the court for the original offence. A judge of the District Court or the Court of First Instance of the High Court also has the power to order conditional discharge of an offender after conviction under section 107 of the Criminal Procedure Ordinance and the recognizance amount may even exceed $2,000. Binding Over : A bind-over order is not a form of punishment but a preventive measure whereby the court requires a person to enter into a recognizance , with or without sureties, in a fixed sum, to be of good behaviour or to keep the peace for a period not exceeding 3 years. The Court of Final Appeal has held in Lau Wai Wo v HKSAR that a requirement in general terms that the person is to be of good behaviour or to keep the peace is too vague. Hence the bind-over order must also make clear what the person must not do during the prescribed period. For example, if a bad-tampered person has assaulted another in public, the court may order that person to be “bound over in the sum of $1,000 for one year to be of good behaviour and to refrain from engaging in fighting in public”. If that person fights in public within the one-year period, the court will order him to pay $1,000. The court may make a bind-over order against an accused person with or without convicting him, and may even be against a witness or a complainant who misbehaves in a court hearing. For a person who has no previous criminal record and has committed an offence which is not too serious (e.g. common assault or fight in public place without any weapon), the prosecution may agree to offer no evidence against that person on condition that the person agrees to be bound over by the Magistrate. The advantage of this procedure (commonly called “O.N.E. Bind Over”) from the accused person's viewpoint is that he is technically acquitted of the criminal charge and so will not have any criminal conviction record. On the other hand, the interest of justice is satisfied by subjecting the accused person to a court order of a preventive nature so that he will not commit similar wrongdoing again. This O.N.E. Bind Over procedure generally requires the consent of both the prosecution and the accused person with the approval of the Magistrate. Community Service Order : A community service order is an alternative to imprisonment whereby the offender is required to perform unpaid work in the community. The work is administered by the probation service. The maximum length of such a sentence is 240 hours. Not all offenders are suitable for such orders, and suitability reports are called for before such orders are made. Breaches of community service orders will usually be dealt with by the imposition of an immediate custodial sentence. Drug Addiction Treatment Centre Order : The court may order offenders who are addicted to

dangerous drugs to receive treatment and rehabilitation in drug addiction treatment centres. Such orders are not suitable for all offenders and suitability reports are called for before such orders are made. Offenders are kept in prison or in a reception centre whilst awaiting the report. Probation Order : Probation is a form of punishment primarily aimed at the rehabilitation of offenders. A probation order can last for one to three years. Whilst it is not precluded as a sentencing option for serious crimes, a probation order is unlikely to be made in respect of serious crimes. A probation order may only be made if the convicted offender consents to it. Persons under probation orders are required to be of good behaviour and to remain in contact with a probation officer as may be required. People on probation may also be required to reside in an approved institution. If a probationer re-offends whilst on probation (that is, the probation order has not yet expired), or breaches the conditions of the probation order, that person may be re-sentenced for the original offence. A second probation order may be made, which subsumes the first one. Probation orders cannot be combined with sentences of imprisonment or community service orders. For example, a guilty offender cannot be sentenced to both a community service order and a probation order at the same time. Fine : A fine is a monetary penalty which may be imposed in lieu of or in addition to other forms of penalty. Failure to pay a fine will result in imprisonment, usually for a period of time which accords with the amount of the unpaid fine. Fines may be ordered to be paid by instalments. Compensation Order : Where a person is convicted of an offence, the Court may order that person to pay to the aggrieved party compensation for personal injury or loss or damage to property, or both, as the Court thinks reasonable. Restitution Order : A restitution order is an order under which the offender is compelled to return any "ill-gotten gains" to such person or persons as the Court deems fit. If restitution is made voluntarily, it becomes a mitigating factor that the court may take into account when sentencing the convicted offender. Forfeiture : Under a forfeiture order, property is confiscated (taken away) from an offender. Where another person is entitled to that property, the Court will order it to be returned to that person. If an owner cannot be identified, under the forfeiture order the property may be sold or retained by the government or destroyed if it is of no value. The Court's power to order forfeiture does not extend to land or the buildings standing on it. Disqualification from driving : For driving offences, disqualification from driving is considered a severe penalty. Usually it is imposed only where the legislation governing the offence expressly requires it or where the Court finds that the offender poses a danger to the public if that person continues to drive. Disqualification of company directors : Under certain sections of the Companies Ordinance (Cap. 622), the Court may disqualify a guilty offender from holding the position of company director. Disqualification may be for periods of over 10 years in the case of particularly serious offences. Hospital Order : This Order applies to a person with mental problems. Detention in a hospital with police security is provided for under the Mental Health Ordinance (Cap.136). Where the crime is serious, and where doctors cannot predict when the offender may be fit for release, the period of detention is usually left indeterminate. 3. ARE THE PENALTIES FOR YOUNG OFFENDERS DIFFERENT FROM THOSE FOR ADULTS? 3. ARE THE PENALTIES FOR YOUNG OFFENDERS DIFFERENT FROM THOSE FOR ADULTS? It depends on the actual age of the young offender. As explained in the answer to Question 1 above, a child under the age of 10 cannot be guilty of any offence. Under section 11 of the Juvenile Offenders Ordinance, no child aged between 10 and 13 can be sentenced to imprisonment; and no young person aged between 14 and 15 can be sentenced to imprisonment if that person can be suitably dealt with in any other way. Under section 109A(1) of the Criminal Procedure Ordinance, no offender aged between 16 and 20 can be sentenced to imprisonment unless no other method of dealing with the person is found to be appropriate. However, section 109A(1) does not apply to certain offences known as "excepted offences", which are set out in Schedule 3 of the Criminal Procedure Ordinance. These excepted offences include manslaughter, robbery, indecent assault and other serious crimes. Subject to the above, the sentencing options (or penalties) explained in Question 2 above for adult offenders may in general also be imposed on a juvenile or young offender. However, the objective of the penalties on a young person is

more on helping the person to get back on the right track (i.e. rehabilitation) than on punishment. The following list explains the usual types of penalties (i.e. sentencing options) that the courts in Hong Kong will impose on juvenile or young offenders: Detention Centre Order : Detention centres are an alternative to imprisonment for male offenders only from the age of 14 to 24. Emphasis is placed on hard physical labour and discipline in order to administer a short sharp shock on the offender so that he will not re-offend again. Detention centre orders are not available as a sentencing option for offenders who have previously served a prison sentence or training centre order. The period of detention will be decided by the Commissioner of Correctional Services, who will consider the conduct of the offender during detention. For offenders aged between 14 and 20, the minimum period of detention is one month and the maximum is 6 months. For offenders aged between 21 and 24, the period of detention is from 3 months to 12 months. Upon release, the offenders may be subjected to a supervision period of one year when they need to obey certain requirements such as a requirement that they have to stay at home during certain time at night. Failure to comply with the supervision requirements may result in the offenders being sent back to the detention centre. Training Centre Order : Training centres are another alternative to imprisonment for both male and female offenders aged from 14 to 20. Emphasis is placed on rehabilitation, and offenders are trained in a trade. The period of detention will be decided by the Commissioner of Correctional Services, who will consider the conduct of the offender during detention. The minimum period of detention is six months and the maximum is 3 years. Upon release, the offenders may be subjected to a supervision period of three years when they need to obey certain requirements such as a requirement that they have to stay at home during certain time at night. If the offenders fail to comply with the supervision requirements, they may be recalled to the training centre and be detained there for another 6 months or up to three years after they were first sent to the training centre (whichever is the later). Rehabilitation Centres : This is a new alternative to imprisonment that came into being in 2002 for both male and female offenders aged 14 to 20. It is aimed at offenders whose offences call for a short custodial sentence, but who are not suited to detention centre or training centre orders. The objectives are to deter further criminal conduct and to rehabilitate detainees in terms of socially acceptable behaviour. Rehabilitation centre orders are not available to offenders who have previously served a prison sentence or a detention in a training centre, detention centre or drug addiction and treatment centre. The offenders will first be detained full time at a rehabilitation centre for a period between 2 months and 5 months, to be determined by the Commissioner of Correctional Services by considering the conduct and progress of the offenders. Then they will be subjected to a period of residence at another rehabilitation centre when they may be permitted to go out during certain hours to study, work or do other approved activities. The period of residence is between one month and 4 months, to be determined by the Commissioner of Correctional Services by considering the needs and progress of the offenders. Upon release, the offenders may be subjected to a supervision period of one year when they needs to obey certain requirements such as a requirement that they have to stay at home during certain time at night. Failure to comply with the supervision requirements may result in the offenders being sent back to the rehabilitation centre. Reformatory School : This is for male offenders aged 10 to 15 and is administered by the Social Welfare Department. Emphasis is placed on rehabilitation and changing the offenders' behaviour and social attitude through social work approach. The period of stay is from one to three years depending on behaviour during the stay. Remand Home : The remand home is a place of detention that may be ordered by the court under the Juvenile Offenders Ordinance for male and female offenders aged 10 to 15. The remand home is administered by the Social Welfare Department. The emphasis is on rehabilitation through short-term custodial care and training, in order to help the offenders develop a regular life pattern and self-discipline. The maximum period of detention is 6 months. Orders against parents or guardians : Under Sections 9 and 10 of the Juvenile Offenders Ordinance, parents and guardians of young offenders aged between 10 and 15 can be compelled to attend court when their child is dealt with. Such parents and guardians can also be ordered to give

security for the child's behaviour or can be ordered to pay a fine. Such fines and security, if not paid, can be recovered from the parent or guardian by way of distress (seizing their properties and converting them into cash) or an imprisonment order as if the parent or guardian had been convicted of the offence. Probation : see Question 2 Drug Addiction Treatment Centre Order : see Question 2 Fine : see Question 2 Discharge : see Question 2 4. UNDER WHAT CIRCUMSTANCES COULD THE CRIMINAL RECORD BE DELETED? 4. UNDER WHAT CIRCUMSTANCES COULD THE CRIMINAL RECORD BE DELETED? Once a person has been convicted of a criminal offence, the criminal record cannot be deleted from the police or court files (unless the offender successfully appealed against the conviction). However, under section 2 of the Rehabilitation of Offenders Ordinance (Cap. 297) , if a person who has not previously committed any offence before that person is convicted of an offence and is not sentenced to imprisonment exceeding three months or a fine exceeding $10,000, that person's conviction record will be considered as "spent" if he has not re-offended within a period of three years. The effect of a spent conviction is that in general that person should be regarded as not having been convicted of the offence. Hence, if that person is asked by his potential employer or other person whether he has committed any offence before, he can simply say "No". He cannot be dismissed by his employer on the ground that he did not disclose his criminal record or on the ground that he has a conviction. However, this spent conviction scheme is subject to a number of exceptions. For example, it does not apply if that person wants to apply for some high ranking jobs in the Government or if he wants to become a lawyer, accountant, an insurance broker or the director of a licensed bank (see sections 3 and 4 of the Rehabilitation of Offenders Ordinance for further details of the exceptions). Moreover, if that person applies for a Certificate of No Criminal Conviction from the police for emigration purposes, the police will still disclose such criminal record in the Certificate with a note that the relevant conviction is regarded as spent under Hong Kong Law. A. CRIMINAL RECORDS A. CRIMINAL RECORDS The most serious criminal offences in Hong Kong, such as murder, manslaughter and rape are triable only upon indictment before a judge and jury in the Court of First Instance. Some offences, such as theft and robbery, are triable in either the Court of First Instance, the District Court or the Magistrates' Courts. Where an offence can be tried in any one of the three, the prosecution decides which court will deal with the offence based upon the likely sentence upon conviction after trial. If the likely sentence will not exceed two years' imprisonment, the case will be dealt with in the Magistrates' Courts. If the likely sentence will be between two and seven years' imprisonment, the case will be dealt with in the District Court. If the likely sentence will exceed seven years' imprisonment, the case will be dealt with in the Court of First Instance. Some offences, such as resisting public officers in the lawful execution of their duty, contrary to section 23 of the Summary Offences Ordinance (Cap. 228), can be tried summarily only in a Magistrates' Court. The common characteristic of offences which can be tried only before a magistrate is that the Ordinance creating the offence imposes a maximum penalty of two years' imprisonment. Criminal prosecutions in Hong Kong start with an arrest, followed by a charge or by the issue of a summons. More serious criminal offences, such as theft, start with an arrest, followed by a charge. Less serious criminal offences, such as careless driving, contrary to section 38 of the Road Traffic Ordinance (Cap. 374), which carries a maximum imprisonment of six months, normally start with the issue of a summons. Whether a criminal prosecution starts with an arrest followed by a charge or by the issue of a summons, the result is the same. The convicted person, whether on a guilty plea or after trial, will have a criminal record. It does not matter what penalty is imposed by the convicting court. A criminal conviction can be quashed on appeal. A conviction which is not quashed on appeal cannot be erased. Traditionally, the criminal record remains with the offender for life. 1. FIXED PENALTY TICKETS 1. FIXED PENALTY TICKETS Fixed-penalty notices, for littering or illegal parking, for example, are a fact of contemporary life. They are designed to reduce paperwork and expense by allowing police officers and certain other public officers to deal with certain low level anti-social behaviour with on-the-spot penalties. The fixed-penalty notice is not a fine or a criminal conviction. A person issued with a fixed-penalty notice can opt not to pay

it and challenge it in court. If the fixed-penalty notice is neither paid nor challenged in court within the time allowed in the notice, the penalty, and any additional penalty prescribed by the relevant Ordinance, may be enforced in the same way as fines are enforced. Even so, this is not a conviction. Section 2(3) of the Rehabilitation of Offenders Ordinance (Cap. 297) ("RHO") provides that the payment or recovery of a fixed penalty, or any additional penalty, under the Fixed Penalty (Traffic Contraventions) Ordinance(Cap. 237), the Fixed Penalty (Criminal Proceedings) Ordinance (Cap. 240), the Fixed Penalty (Public Cleanliness Offences) Ordinance (Cap. 570), the Fixed Penalty (Smoking Offences) Ordinance (Cap. 600) or the Motor Vehicle Idling (Fixed Penalty) Ordinance (Cap. 611) is not a conviction for the purposes of section 2(1) or 2(1A) of the RHO. Correspondingly, except for the purposes of recovery of the fixed penalty and any additional penalty due for late payment, no evidence is admissible in any proceedings which tends to show that that individual has paid, or been ordered to pay, a fixed-penalty notice. Payment of, or an order to pay, a fixed penalty notice, or any failure to disclose a fixed penalty notice is not a lawful or proper ground for dismissing or excluding a person from any office, occupation or employment or for treating them less favourably than other employees because of the fixed-penalty notice. 2. BIND OVERS 2. BIND OVERS A Bind Over is neither a conviction nor a punishment. It is a preventative measure whereby a person enters into a recognisance before the court (gives a promise) to engage in good behaviour and to keep the peace for a period not exceeding three years. The recognisance is a promise to pay a specified sum of money if the recognisance is breached. The bind over specifies the conduct which must not be committed during the period of the bind over. Two drivers may have argued, for example, over a parking space. One driver may have pushed the other and been arrested for common assault or even assault occasioning actual bodily harm. If that driver is a first offender who has led an otherwise blameless life, the prosecution may be prepared to accept a not-guilty plea in return for a bind over to keep the peace and not to engage in a further fight in a public place for 12 months. In this case the driver is acquitted of assault and therefore has no criminal record. The procedure is a convenient way of dealing with comparatively minor offences which are not likely to be repeated. If the recognisance is breached, the driver will be ordered to pay all or part of the recognisance entered into at the time of the bind over. Orders made for payment of all or part of the recognisance if the bind over is breached are similarly not criminal convictions. The driver is simply paying all or part of the money he has undertaken to pay if the promise to the court to engage in good behaviour and keep the peace is not honoured. 3. POLICE SUPERINTENDENT' S DISCRETION SCHEME 3. POLICE SUPERINTENDENT' S DISCRETION SCHEME Persons under 18 who have committed a criminal offence might be dealt with by a procedure known as Police Superintendent's Discretion. Rather than being brought before a court, the offenders are cautioned. The offenders are then placed under police supervision for a period of two years or until they reach 18 years of age, whichever is sooner. The preconditions for a caution are: there is sufficient evidence to support a prosecution; the offenders must admit the offence; and the offenders and their parents or guardians must agree to the cautioning. The nature, seriousness and prevalence of the particular offence is considered, as is any previous criminal record. If there was a previous conviction, it is unlikely there will be a caution. The attitude of the offenders and their parents or guardians, and the views of the victim of the offence are also taken into account. A caution under Police Superintendent's Discretion Scheme is not a criminal conviction. Therefore, there is no obligation to disclose it, and the offender has a clear record. The police, however, keep records of these cautions. There is nothing to prevent the police or other disciplined services from checking whether an applicant for employment with them has received a Superintendent' s caution and taking this into account when considering an employment application. B. THE REHABILITATION OF OFFENDERS ORDINANCE B. THE REHABILITATION OF OFFENDERS ORDINANCE As criminal law is concerned with the rehabilitation of offenders rather than simply punishment, in certain limited situations, convictions may become "spent". A spent conviction is a conviction which, under the provisions of the Rehabilitation of Offenders Ordinance (Cap. 297) ("RHO"), is, subject to some exceptions, ignored after

a specified period of time. The objective of the RHO is to allow offenders to put a past mistake behind them. When a conviction has become “spent” under the RHO, offenders can, subject to exceptions set out in the RHO, claim not to have a criminal record, and the spent conviction cannot be held against them. Unless convictions are regarded as spent, they remain on the offenders’ records for the rest of their lives. The spent conviction provisions of the RHO apply only within Hong Kong. Even when a conviction is spent under the RHO, applicants for visas to visit a foreign country are required to disclose any convictions they have. Under section 2(1) of the RHO, subject to certain exceptions, the conviction of a person who is not sentenced to imprisonment exceeding three months, whether that sentence takes effect immediately or is suspended, or to a fine exceeding $10,000, and who has not previously been convicted in Hong Kong of any offence will be treated as spent once three years has elapsed without another conviction for an offence in Hong Kong. The “spent” conviction provisions of the RHO are very limited. They apply only if there has not been a previous conviction, if the present conviction is dealt with by imprisonment not exceeding three months or a fine not exceeding $10,000, and if the person is not convicted of a subsequent offence within the three-year qualifying period. If a conviction has become spent section 2(1)(c)(i)(ii)(iii) of the RHO provide that, subject to section 3(3) and (4)of the RHO, no evidence about that conviction is admissible in any proceedings. Neither the spent conviction nor any failure to disclose it justifies dismissal or exclusion from any office, profession, occupation or employment or any form of prejudice in that office, profession, occupation or employment. It is the length of the prison sentence imposed that counts, not the actual time served. Under Rule 69 of the Prison Rules (Cap. 234A), a person sent to prison for a period of more than one month may, on the ground of industry and good conduct, be granted remission of sentence. That remission cannot exceed one third of the sentence imposed by the court. For example, a person sentenced to imprisonment for 120 days (i.e. four months) might, allowing for good conduct, be released after serving 80 days (less than three months). However, the conviction cannot become spent because the sentence imposed exceeded three months’ imprisonment. If an offender is convicted of more than one offence at the same court hearing, the spent conviction provisions in section 2 of the RHO still apply, provided the sentence for each offence does not exceed three months’ imprisonment or a fine of $10,000. In addition, the aggregate sentence cannot exceed three months’ imprisonment or a fine of $10,000, irrespective of whether the sentences run concurrently or consecutively (one after the other). 1. SUSPENDED SENTENCES 1. SUSPENDED SENTENCES A suspended sentence is a sentence of imprisonment for the purposes of the RHO. When a sentence is suspended, the court imposes a prison sentence, but does not order it to take effect immediately. Under s. 109Bof the Criminal Procedure Ordinance (Cap. 221), a court which imposes a sentence of not more than two years’ imprisonment may suspend that sentence for a period of not less than one year and not more than three years. The prison sentence is left hanging over the head of the offender for the period of the suspension. A suspended sentence which does not exceed three months’ duration can become spent under s. 2(1) of the RHO; a longer sentence cannot. 2. ORDERS FOR DETENTION 2. ORDERS FOR DETENTION For the purposes of the RHO, “imprisonment” does not include orders for detention in a reformatory school, a detention centre, training centre, rehabilitation centre or place of detention. These orders relate to offenders under 25. With these offenders, the emphasis is on long-term reform and rehabilitation, rather than punishment. They are indeterminate sentences in the sense that the court makes an order confining the offender to a reformatory school, detention centre, training centre, rehabilitation centre or other place of detention without specifying the duration of the detention. Subject to serving a minimum period of detention, such offenders are released when the Commissioner for Correctional Services is satisfied they are fit to be released. Training centre, detention centre and rehabilitation centre orders involve post-release supervision, which is an important part of long-term reform and rehabilitation. This post-release supervision affects the calculation of the three-year period for spent convictions. Under s. 2(2)of the RHO, the conviction of a person sentenced to a training centre, detention centre or rehabilitation centre becomes spent only after three years

from the end of the period of post-release supervision. Training centre orders can be made for males and females aged between 14 and 21 who have committed an offence punishable with imprisonment, except where the sentence is fixed by law. An example of a sentence fixed by law is murder, for which the only penalty is life imprisonment. Offenders can be detained in a training centre for a maximum of three years. A minimum period of six months' detention must be served before the offender can be considered for release. Detention centre orders may be made for males aged between 14 and 25 convicted of an offence punishable by imprisonment, except where the sentence for the offence is fixed by law. Offenders aged 21 or over are detained in a detention centre for not less than three months or more than 12 months. Offenders aged under 21 are detained for not less than one month and not more than six months. A Rehabilitation Centre Order can be made for males and females aged between 14 and 21. Offenders are detained for not less than three months and not more than nine months. The period of post-release supervision to which offenders released from a training centre, detention centre or rehabilitation centre are subject means that the three-year qualifying period for the conviction to become spent runs only from the completion of the period of post-release supervision. An offender sent to a training centre could be released, for example, after nine months, provided the Commissioner for Correctional Services considers he or she fit for release. However, under s. 5 of the Training Centres Ordinance (Cap.280), that offender may be subject to supervision by a probation officer for a period of up to three years from the date of release. The conviction which led to the training centre order becomes spent only three years after the post-release supervision period has ended. 3. COMMUNITY SERVICE ORDERS 3. COMMUNITY SERVICE ORDERS A Community Service Order requiring the performance of a specified number of hours of unpaid work as recompense for committing a criminal offence made under the Community Service Orders Ordinance (Cap. 378) is not a prison sentence. A community service order can become spent three years after the conviction. Once spent, the order need not be revealed except in situations covered by s. 4 of the RHO concerning applications for positions specified in that section. 4. PROBATION ORDER 4. PROBATION ORDER A conviction leading to a probation order becomes spent three years after the conviction. Once spent, the order need not be revealed except in situations covered by s. 4 of the RHO: applications for positions specified in that section. C. IMPLICATIONS OF SPENT CONVICTIONS C. IMPLICATIONS OF SPENT CONVICTIONS Subject to some important exceptions in s. 4 of the RHO, where a conviction is spent, no evidence tending to show that the person was convicted in Hong Kong is admissible in any proceedings in Hong Kong. Subject to the exceptions in s. 4 of the RHO, the conviction, or its non-disclosure, is not a lawful or proper ground for dismissal or exclusion from any office, profession, occupation or employment or for prejudice against that person in the person's office, profession, occupation or employment. This means that an employee with a spent conviction must not be treated less favourably than other employees because of that conviction. Section 3(1) of the RHO provides that the provisions about spent convictions in s. 2(1) of the RHO do not affect the recovery of any fine ordered on that conviction. An offender given time to pay might, for example, leave Hong Kong without paying the fine. The fine is still enforceable even if that person returns to Hong Kong more than three years after the date of the sentence. Even if the conviction is spent under s. 2(1) of the RHO, there is still an obligation to pay the fine. Section 3(3) of the RHO states that previous convictions, even if spent, can come into evidence on sentencing for subsequent offences. It is important that the court has the full picture of an offender before sentencing. Though a previous record is not a reason to increase a sentence, a repeat offender cannot expect to be treated as a first offender. However, in practice courts tend to disregard spent convictions, especially if there has been a long period between the offences. D. DISCLOSURE OF SPENT CONVICTION D. DISCLOSURE OF SPENT CONVICTION 1. DISCLOSURE OF SPENT CONVICTIONS IN COURT PROCEEDINGS 1. DISCLOSURE OF SPENT CONVICTIONS IN COURT PROCEEDINGS Section 3(2)(a), (aa), (b) and (c) of the RHO allow spent convictions to come into evidence in proceedings relating to the interests of an infant and in applications to become a foster parent. In proceedings relating to infants, the welfare of the infant is the first and paramount consideration. In these

situations, it is right that the court should have access to all material that could be relevant to the decision it has to make. Spent convictions can also be introduced as evidence in child-custody hearings in divorce proceedings. What, if any, effect the spent conviction has in those proceedings depends upon the circumstances of each case and the offence leading to the conviction. A conviction for careless driving, for example, is unlikely to have any relevance in custody proceedings. Similarly, in applications to become a foster parent, a broad view needs to be taken to ensure that children's interests are protected. Again, the effect, if any, of the spent conviction depends on the offence and how long ago it was. A spent conviction for a sexually related offence or an offence of dishonesty would, depending on the circumstances of the particular case, be more relevant than a conviction for a motoring offence. Spent convictions can also come into evidence if the convicted persons consent to the admission of evidence relating to those convictions or want to bring the convictions into evidence for their own reasons, or in any proceedings where the tribunal is satisfied that justice cannot be done except by admitting evidence relating to the convictions. 2. SITUATIONS WHERE SPENT CONVICTIONS MUST BE DISCLOSED 2. SITUATIONS WHERE SPENT CONVICTIONS MUST BE DISCLOSED There are many situations in the RHO where convictions must be disclosed even though they are spent. In these situations, there is no protection from disclosure of the criminal record. These situations relate to particularly sensitive areas or where the public interest justifies the requirement to disclose all convictions even if they are spent. Under s. 4 of the RHO, all previous convictions, including spent convictions, must be disclosed when an application is made for employment as a police officer, a correctional services officer, a fire services officer, a barrister, a solicitor or an accountant. All previous convictions, including spent convictions, must be disclosed in disciplinary proceedings against a person practising as a barrister, a solicitor or an accountant, and in disciplinary proceedings against persons holding the prescribed offices set out in the Schedule to the RHO, such as a police officer, a correctional services officer or certain high ranking government employees. Similarly under s. 4 of the RHO, all previous convictions must be disclosed by anyone applying to become a trustee or controller for a Mandatory Provident Fund, a bank controller, a judicial officer or a probation officer; an employee of the Hong Kong Monetary Authority, Mandatory Provident Fund Schemes Authority, or Office of the Commissioner of Insurance and Securities and Futures; or Government officials who are paid on any Directorate or Directorate Pay Scale, or those above point 27 on the Master Pay Scale. In all of the above cases, the overwhelming public interest in ensuring that only suitable people are appointed to those positions justifies full disclosure of any criminal convictions. The requirement to disclose does not automatically mean the application for employment will be rejected. Full disclosure is required so that the applicant's suitability for the position applied for can be properly assessed. Failure to disclose will justify termination of employment and possibly amount to the criminal offence of obtaining pecuniary advantage by deception, contrary to s. 18 of the Theft Ordinance (Cap. 210). Failure to disclose convictions which should be disclosed could lead to obtaining employment or a position which would not otherwise have been obtained. The pecuniary advantage gained by the failure to disclose is the opportunity to earn remuneration in that employment or position. 3. PENALTIES FOR WRONGFUL DISCLOSURE OF SPENT CONVICTIONS 3. PENALTIES FOR WRONGFUL DISCLOSURE OF SPENT CONVICTIONS Section 6(1) of the RHO makes it an offence for any person who has custody of, or access to, any records kept by a public officer relating to persons convicted of any offence to disclose that information other than in the course of his or her duties as a public officer. Offenders are liable to a fine at level 4 in the Schedule to the Criminal Procedure Ordinance (Cap. 221) ("CPO"), currently $25,000. The protected information is any information which tends to show that a named or identifiable person whose conviction has become spent and is therefore rehabilitated was charged with, prosecuted for, convicted of, or sentenced for that offence. It is similarly an offence to obtain information from records kept by a public officer which tends to show that a named or identifiable individual whose conviction has become spent and is therefore considered rehabilitated was charged with, prosecuted for, convicted of, or sentenced for an

offence by means of fraud or dishonesty. This offence is punishable by a fine at level 5 of the Schedule to the CPO, currently$ 50,000, and imprisonment for six months. 4. THE RHO AND SEXUAL CONVICTION RECORD CHECK SCHEME 4. THE RHO AND SEXUAL CONVICTION RECORD CHECK SCHEME Under the Sexual Conviction Record Check Scheme, prospective employers of persons undertaking child-related work and work relating to mentally incapacitated persons can ask the prospective employee to undergo a sexual convictions record check. This scheme helps employers better assess the suitability of persons applying for work with children or mentally incapacitated persons for that employment. The Scheme is available only to prospective employees seeking work which provides services to children or mentally incapacitated persons: teachers, cleaners, school bus drivers and bus assistants, for example. The prospective employee can apply at the Sexual Conviction Record Check Office at Police Headquarters in Wan Chai. The check covers convictions under sections 47 to 126 of the Crimes Ordinance (Cap.200) . The offences under these sections range from rape to indecent conduct towards a child under sixteen years of age. Whether or not there are such convictions is disclosed only to the prospective employee, who may then authorise the prospective employer to check the result through an Auto Telephone Answering Service. The prospective employer is told either that the prospective employee has a conviction record for offences under sections 47 to 126 of the Crimes Ordinance or that there is no conviction record for these offences. Details of any convictions are not disclosed. Convictions for offences (including sexual offences) which have become spent under s. 2(1) of the RHO will not be disclosed. E. THE REHABILITATION OF OFFENDERS ORDINANCE APPLIES ONLY TO HONG KONG E. THE REHABILITATION OF OFFENDERS ORDINANCE APPLIES ONLY TO HONG KONG The RHO does not apply outside Hong Kong. Simply because a conviction is spent in Hong Kong does not mean it will be ignored by another jurisdiction. This is particularly relevant for applications for a travel visa or for immigration. Criminal records are maintained by the Hong Kong Police Force. A person wishing to immigrate to another country will be asked to provide confirmation that they do not have any criminal convictions. That can be done only by obtaining a Certificate of No Conviction from the Hong Kong Police. If there are previous convictions, the Hong Kong Police will not provide a Certificate of No Conviction, however long ago the convictions were. The Hong Kong Police will refuse to issue a Certificate of No Conviction even though the conviction is spent in accordance with s. 2 of the RHO. 1. UNDER WHAT CIRCUMSTANCES CAN THE POLICE STOP AND QUESTION ME IN A PUBLIC PLACE? MUST I ANSWER THEIR QUESTIONS? 1. UNDER WHAT CIRCUMSTANCES CAN THE POLICE STOP AND QUESTION ME IN A PUBLIC PLACE? MUST I ANSWER THEIR QUESTIONS? Stopping and questioning Under section 54(1) of the Police Force Ordinance (Cap. 232 Laws of Hong Kong), it is lawful for a police officer to stop a person who is acting in a suspicious manner. The police officer may require that person to produce proof of identity (i.e. by showing a Hong Kong ID card or passport), and detain that person on the spot for a reasonable period to make enquiries into whether or not the person is suspected of having committed any offence at any time. What constitutes a "suspicious manner" is based only on the subjective assessment of the police officer. However, the police officer must, in fact, have a genuine suspicion Section 49 of the Public Order Ordinance (Cap. 245) permits a police officer to require any person to produce proof of his identity for inspection for the purpose of preventing, detecting or investigating any offence. A failure by that person to produce proof of identity under these circumstances constitutes an offence. The police and immigration officers also have power under section 17C(2) of the Immigration Ordinance (Cap. 115) to demand any resident in Hong Kong aged 15 or above to produce proof of his identity for inspection. A failure by that person to produce proof of identity as required without reasonable excuse constitutes an offence. It should be noted that this provision does not apply to foreign visitors who are staying in Hong Kong for not more than 180 days. The right to silence The police have the power to question anyone in accordance with the above rules. On the other hand, the common law as well as Article 11(2g) of section 8 of the Hong Kong Bill of Rights Ordinance (Cap. 383) provide that a person has the right not to be compelled to testify against himself or to confess guilt, i.e. every person in Hong Kong has the right to silence. By virtue of that right, a person may in general refuse to answer any question

posed by a police officer. However, the driver of a vehicle who is suspected of committing a road traffic offence or being involved in a traffic accident must give his name, address and driving licence number to the police upon request (section 63 of the Road Traffic Ordinance, Cap. 374). 2. UNDER WHAT CIRCUMSTANCES CAN THE POLICE STOP AND SEARCH ME IN A PUBLIC AREA? 2. UNDER WHAT CIRCUMSTANCES CAN THE POLICE STOP AND SEARCH ME IN A PUBLIC AREA? As mentioned in the previous Q&A;, police officers may stop a person acting in a suspicious manner. In addition to stopping and questioning, the police officers can search that person for anything that may present a danger to the police officers. Under section 54(2) of the Police Force Ordinance (Cap. 232), police officers may also stop a person whom they reasonably suspect of having committed, or being about to commit, or intending to commit, an offence. The police officers may require that person show his ID card or passport and may detain that person on the spot for such time as is reasonable to make inquiries. The police officers can also search that person for anything likely to be of value to the investigation of the suspected offence. The suspicion on the part of the police officers in these circumstances must be “reasonable”, which is to be judged on an objective basis with valid reasons. For example, the actions of a person who is carrying a knife and waiting nervously outside a jewellery shop may give rise to a reasonable suspicion. No matter whether the police officers exercise their power to search a person under section 54(1) or (2) of the Police Force Ordinance (Cap. 232), there is no power to seize anything found on the person being searched. The police also have the power to stop, search and detain any vehicle in or upon which there is reason to suspect that anything stolen or unlawfully obtained may be found (section 55 of the Police Force Ordinance). Where the police reasonably believe an unlawful assembly or riot has occurred, is occurring, or may occur in any place, and offensive weapons have been or may be used during such an offence, they may stop and search any person in a public place within the vicinity to ascertain whether or not that person is guilty of such an offence (section 33(6) of the Public Order Ordinance, Cap. 245). A person can be searched only by a police officer of the same sex . If there is no female police officer on the spot to search a female suspect, that woman should be brought to the nearest police station so that the search can be carried out by a female officer. Under section 50(6) of the Police Force Ordinance, police officers may search an arrested person and take possession of anything they may reasonably suspect to be of value to the investigation of the suspected offence. 3. DO THE POLICE HAVE POWER TO SEARCH AND EXAMINE THE DIGITAL CONTENT OF A MOBILE PHONE FOUND ON THE ARRESTED PERSON? 3. DO THE POLICE HAVE POWER TO SEARCH AND EXAMINE THE DIGITAL CONTENT OF A MOBILE PHONE FOUND ON THE ARRESTED PERSON? A police officer has power to do so if he has a warrant. When it is not reasonably practicable to obtain such warrant before a search is conducted, the police officer must also have a reasonable basis for having to conduct the search immediately as being necessary (i) for the investigation of the offence(s) for which the person was suspected to be involved, including the procurement and preservation of information or evidence connected with such offences; or (ii) for the protection of the safety of persons (including the victim(s) of the crime, members of the public in the vicinity, the arrested person and the police officers at the scene). Other than a cursory examination for filtering purpose, the scope of the detail examination of the digital contents of a phone should be limited to items relevant to the objectives. In addition, a police officer should make an adequate written record of the purpose and scope of the warrantless search as soon as reasonably practicable after the performance of the search and a copy of the written record should be supplied forthwith to the arrested person unless doing so would jeopardize the ongoing process of criminal investigation. The arrested person is under no legal obligation to unlock his password-protected mobile phone despite the request of the police officer. 4. WHAT ARE THE CONSEQUENCES IF I REFUSE TO COOPERATE WITH THE POLICE WHEN THEY ARE EXERCISING THEIR POWERS TO STOP, QUESTION OR SEARCH ME? 4. WHAT ARE THE CONSEQUENCES IF I REFUSE TO COOPERATE WITH THE POLICE WHEN THEY ARE EXERCISING THEIR POWERS TO STOP, QUESTION OR SEARCH ME? It first depends on whether or not the police have proper legal basis to do the act concerned (see the earlier Q&As; as to the circumstances when the police can lawfully stop, question or search a person). If not,

then the police officers concerned are not acting in due execution of their duties, and one may refuse to cooperate. If yes, then one must in general cooperate with the police, as it is an offence for a person to assault, resist or deliberately obstruct the police in the execution of their lawful duties (see for example, section 63 of the Police Force Ordinance and section 36 of the Offences Against The Person Ordinance). The maximum penalty for such an offence is imprisonment of two years. Moreover, any Hong Kong resident aged 15 or above who without reasonable excuse fails to produce proof of identity (showing his ID card or passport) for inspection by the police upon demand commits an offence and is liable to a fine of $5,000 (section 17C of the Immigration Ordinance). However, even if the police can lawfully ask you questions, you have a right to silence and so may refuse to answer any questions posed by the police (except that you may need to provide your name and address to the police). 5. IF I DON'T WANT TO BE SEARCHED IN PUBLIC BY THE POLICE, WHAT CAN I DO? 5. IF I DON'T WANT TO BE SEARCHED IN PUBLIC BY THE POLICE, WHAT CAN I DO? If the situation allows, the police should try to conduct the search in a more private or discreet place. You may also request the police to carry out the search at the nearest police station. However, the law in general gives the police a wide discretion to decide where the search is to be conducted in a particular case. The police officers may therefore insist on conducting the search on you in public despite your request, if they have reason to do so (e.g. they suspect that you may have weapons). 6. UNDER WHAT CIRCUMSTANCES CAN THE POLICE ENTER AND SEARCH MY HOME OR OFFICE? MUST THE POLICE OBTAIN A "SEARCH WARRANT" BEFORE TAKING SUCH ACTION? WHAT WOULD BE THE CONSEQUENCES IF I REFUSE THEIR ENTRY? CAN THE POLICE SEIZE ANYTHING INSIDE MY FLAT? 6. UNDER WHAT CIRCUMSTANCES CAN THE POLICE ENTER AND SEARCH MY HOME OR OFFICE? MUST THE POLICE OBTAIN A "SEARCH WARRANT" BEFORE TAKING SUCH ACTION? WHAT WOULD BE THE CONSEQUENCES IF I REFUSE THEIR ENTRY? CAN THE POLICE SEIZE ANYTHING INSIDE MY FLAT? Power of Entry and Search The police can enter and search any premises with a warrant issued by a Magistrate. In order to obtain such a search warrant, the police must generally provide evidence on oath to the Magistrate to show that there is a reasonable cause to suspect that there is any article or document in any building or place which is likely to be of value to the investigation of any offence. Under the warrant, the police may break into the premises if necessary. While the search is being carried out, the police may also detain any person who may have such articles or documents in his possession or control in order to prevent any hindrance to the search (section 50(7) of the Police Force Ordinance). The police can also enter and search any premises without a warrant , if they have reason to believe that a person to be arrested is inside the premises. Otherwise the police have no general power to enter into private premises without the consent of the owner or occupant. Consequences of Refusal If you are simply asked by police officers for consent to allow them entry into your premises, you may choose to refuse. However, if the police officers produce a search warrant issued by a Magistrate, or demands that you open the door on the ground that they reasonably believe a person to be arrested is inside your premises, then you must cooperate. Otherwise, you may be guilty of the offence of resisting or obstructing the police officers in the due execution of their duties and they may also break open the door for their entry. Power of Seizure The police officers may be authorised under the search warrant to take possession of articles or documents inside the premises. Moreover, following the arrest of a person on the premises, the police officers may take possession of any item they find on the person or inside the premises which they reasonably suspect to be of value to the investigation of the suspected offence. 7. UNDER WHAT CIRCUMSTANCES CAN THE POLICE ARREST ME? MUST THEY OBTAIN A WARRANT OF ARREST BEFOREHAND? 7. UNDER WHAT CIRCUMSTANCES CAN THE POLICE ARREST ME? MUST THEY OBTAIN A WARRANT OF ARREST BEFOREHAND? The police may arrest a person according to a warrant issued by a Magistrate under sections 31, 72, 73 or 74 of the Magistrates Ordinance. For example, an arrest warrant may be issued if an accused person does not appear in Court when he is due to answer a charge. However, an arrest warrant is not always necessary. Under section 50(1) of the Police Force Ordinance, a police officer can "apprehend" (i.e. arrest) a person if he reasonably suspects the person being arrested is guilty of an offence. Whether there is such a reasonable suspicion in a particular case is to be

determined objectively by reference to facts and information which the arresting officer has at the time of the arrest. It is not necessary that the officer knows the exact statutory provision that the suspect has violated, so long as the officer reasonably suspects that the suspect has done something amounting to an offence. A person should be informed of the offence or the crime for which he is suspected to have committed when he is arrested. The arrested person must be told in simple, non-technical language that he could understand, the essential legal and factual grounds for his arrest. 8. WHAT ARE MY RIGHTS IF I AM BEING ARRESTED? 8. WHAT ARE MY RIGHTS IF I AM BEING ARRESTED? First, you have a right to be informed by the police officer of the reason for arresting you. If the police officer fails to tell you the reason at the time of the arrest, the arrest is generally unlawful. If, however, you try to run away or the situation is such that it is impractical for the officer to tell you the reason, then the officer may inform you the reason at a later time after the arrest. Secondly, you have a right to silence. Immediately after the arrest, the police must inform you of your right to remain silent. The police officer will caution you by saying, "You are not obliged to say anything unless you wish to do so but whatever you say will be put into writing and may be given in evidence." You may therefore choose whether or not to answer any questions posed by the police (except that you may need to provide your name and address to the police). You should also note that under section 101A of the Criminal Procedure Ordinance, any person effecting an arrest may use such force as is reasonable. What constitutes reasonable force depends on the circumstances. A police officer may, for example, employ handcuffs or other means of restraint where it is necessary to prevent escape. Section 50(2) of the Police Force Ordinance also allows the police officer to use all means necessary to effect an arrest if the suspect forcibly resists or attempts to evade the arrest. 9. IF THE POLICE MERELY ASK ME TO GO TO A POLICE STATION TO ASSIST WITH THEIR INVESTIGATION, AM I OBLIGED TO GO? CAN THEY DETAIN ME INSIDE THE STATION? 9. IF THE POLICE MERELY ASK ME TO GO TO A POLICE STATION TO ASSIST WITH THEIR INVESTIGATION, AM I OBLIGED TO GO? CAN THEY DETAIN ME INSIDE THE STATION? When you are simply asked to assist in an investigation, you are under no legal obligation to assist or go to the police station. You are free to decide whether you wish to assist on a voluntary basis, and you may choose to leave at any time. However, if the police formally arrest you, then you must go with them to the police station (see the previous Q&A; on your rights upon an arrest). 10. IF I HAVE BEEN ARRESTED AND DETAINED AT THE POLICE STATION, IS THERE A MAXIMUM PERIOD OF DETENTION? UNDER WHAT CIRCUMSTANCES CAN THE POLICE DETAIN ME FOR A LONGER PERIOD? 10. IF I HAVE BEEN ARRESTED AND DETAINED AT THE POLICE STATION, IS THERE A MAXIMUM PERIOD OF DETENTION? UNDER WHAT CIRCUMSTANCES CAN THE POLICE DETAIN ME FOR A LONGER PERIOD? A person who is detained in custody by the police shall be brought before a Magistrate as soon as practicable and generally within 48 hours from the time of the arrest. This period can be extended to 72 hours if a warrant for arrest and detention in respect of deportation is applied for. If the police want to detain you for a longer period, they must first bring you before a Magistrate and make the relevant application. You may object to such an application and ask for bail (see Q&A; 14). 11. IF I AM DETAINED BY THE POLICE IN THE POLICE STATION AND AM ASKED TO MAKE A STATEMENT, WHAT ARE MY RIGHTS? MUST I ANSWER EVERY QUESTION RAISED BY THE POLICE DURING THE INTERVIEW? 11. IF I AM DETAINED BY THE POLICE IN THE POLICE STATION AND AM ASKED TO MAKE A STATEMENT, WHAT ARE MY RIGHTS? MUST I ANSWER EVERY QUESTION RAISED BY THE POLICE DURING THE INTERVIEW? In general, the rights of a person under detention are set out in a document called "Notice to Persons in Custody". This document should be prominently displayed inside any interview room of a police station. The police should also explain to the detained person the basic contents of this document before the interview, and should give a copy to the detained person. The detained person's rights include: Requesting that the detained person's relatives or a friend be informed of the detention; Communicating and consulting with a legal adviser (unless any unreasonable delay or hindrance will likely be caused to the processes of investigation or the administration of justice); Asking to be released on bail; Being provided with drinking water upon request, adequate food and refreshment as well as medical care if necessary. The questioning of the detained person may be carried out by way of a video-taped

interview (depending on the circumstances so required). Before taking a statement from the detained person, the police officer must caution that person as set out above (please refer to question 8). You may choose whether or not to answer any question asked by the police, as you have a right to silence. You may also request to obtain legal advice before deciding whether or not to answer any questions. You may also have your lawyer present during the questioning and taking of any statement. If you choose to answer any of the police officer's questions, all the questions and answers will be written down as a "Record of Interview" (often referred to as a "cautioned statement"). Upon conclusion of the interview the police have an obligation to provide you with a copy of this Record of Interview. 12. IF THE POLICE FAIL TO COMPLY WITH ANY OF THE RULES GOVERNING THE PROCEDURES RELATING TO QUESTIONING, SEARCHING, ARRESTING, DETAINING PERSONS OR THE SEIZING OF ARTICLES, WHAT ARE THE POSSIBLE CONSEQUENCES? 12. IF THE POLICE FAIL TO COMPLY WITH ANY OF THE RULES GOVERNING THE PROCEDURES RELATING TO QUESTIONING, SEARCHING, ARRESTING, DETAINING PERSONS OR THE SEIZING OF ARTICLES, WHAT ARE THE POSSIBLE CONSEQUENCES? It depends on the nature and extent of the non-compliance. It may result in the court refusing to admit the evidence obtained if the case goes to a criminal trial. On the other hand, it may allow you to start a civil action against the police for compensation. It may also result in a disciplinary action against the police officer concerned. 13. IF I AM DETAINED BY THE POLICE IN THE POLICE STATION, HOW CAN I FIND A LAWYER? CAN I OBTAIN FREE LEGAL SERVICES AT THIS STAGE IF I CANNOT AFFORD A PRIVATE LAWYER? 13. IF I AM DETAINED BY THE POLICE IN THE POLICE STATION, HOW CAN I FIND A LAWYER? CAN I OBTAIN FREE LEGAL SERVICES AT THIS STAGE IF I CANNOT AFFORD A PRIVATE LAWYER? You may ask the police for a list of solicitors whom you can consult. The police have a duty to provide the list to you upon request, and allow you to telephone the solicitor unless this will seriously prejudice their investigation. However, free legal services are not available to you at this stage. The Legal Aid Scheme and Duty Lawyer Service are only available after you have been charged with an offence and brought before the court. You can apply to the Duty Lawyer Service in order to seek free legal representation at your first hearing or subsequent hearings in a Magistrates' Court. For hearings at the District Court or the Court of First Instance, you can apply to the Legal Aid Department for free or subsidised legal services. For more information about the Duty Lawyer Service or the Legal Aid Scheme, please view another topic - Legal Aid. 14. IF I AM DETAINED IN THE POLICE STATION AND I WANT TO BE RELEASED, WHAT SHOULD I DO? 14. IF I AM DETAINED IN THE POLICE STATION AND I WANT TO BE RELEASED, WHAT SHOULD I DO? You should first ask the police whether you can be released on bail. The police should grant bail to an accused person unless the alleged offence is serious or there is other good reason to detain the accused. Bail will usually be granted subject to a cash deposit or conditions of recognizance. The police will direct the accused to return to the police station or to appear in court on a specified date. If bail is not granted by the police, then the police will have a duty to bring the accused to the Magistrates' Court as soon as practicable (normally in the following morning). The accused may apply to the Magistrate for bail at the first hearing. If bail is refused by the Magistrate, the accused may apply to a judge of the Court of First Instance of High Court for the grant of bail. Bail should generally be granted by the court unless there is substantial ground for believing that the accused will fail to appear at the next scheduled hearing, or commit other offences whilst on bail, or interfere with witnesses or the investigation. For more details on this matter, please refer to section 9D and section 9G of the Criminal Procedure Ordinance. 15. IF I HAVE BEEN ILL-TREATED BY THE POLICE, HOW CAN I LODGE A COMPLAINT AGAINST THE POLICE? 15. IF I HAVE BEEN ILL-TREATED BY THE POLICE, HOW CAN I LODGE A COMPLAINT AGAINST THE POLICE? Complaints can be lodged with the Complaints Against Police Office (CAPO) in person or by post to any police station or at the Complaints Against Police Reporting Centre on G/F, Annex Block, Caine House, No.3 Arsenal Street , Wanchai, Hong Kong . Complaints can also be made by telephone, fax or via the internet. The details are as follows: Tel: 2866 7700 Fax: 2200 4460; 2200 4461; 2200 4462 e-Report Room: http://www.police.gov.hk/ppp_en/02_er_room/ On completion of the investigation, CAPO must pass the results to the Independent Police Complaints Council (IPCC) for

endorsement. The IPCC is completely independent of the Police. The IPCC will review each case received from CAPO by examining the investigation files and other relevant documents . For further information on the complaint procedures, please go to the CAPO's webpage. It is also possible for you to make a civil claim against the police for compensation. But you should first seek legal advice before you decide whether or not to take any legal action. POWERS OF INDEPENDENT COMMISSION AGAINST CORRUPTION (ICAC) IV. POWERS OF INDEPENDENT COMMISSION AGAINST CORRUPTION (ICAC) The Independent Commission Against Corruption was set up in 1974 to fight corruption through effective law enforcement, education and prevention. The ICAC functions as an independent organ of the public service and is headed by a Commissioner who is directly responsible to the Chief Executive of the HKSAR Government. The general powers and duties of the ICAC are set out in the Independent Commission Against Corruption Ordinance (the ICAC Ordinance, Cap. 204) . The offences that the ICAC is empowered to investigate are those set out in the ICAC Ordinance, the Prevention of Bribery Ordinance (Cap. 201), and the Elections (Corrupt and Illegal Conduct) Ordinance (Cap. 554). 1. UNDER WHAT CIRCUMSTANCES CAN THE ICAC OFFICERS ENTER A PRIVATE PREMISES AND SEARCH FOR ITEMS INSIDE? MUST THE ICAC OFFICERS OBTAIN A WARRANT BEFOREHAND? 1. UNDER WHAT CIRCUMSTANCES CAN THE ICAC OFFICERS ENTER A PRIVATE PREMISES AND SEARCH FOR ITEMS INSIDE? MUST THE ICAC OFFICERS OBTAIN A WARRANT BEFOREHAND? Entry and search with a court warrant The ICAC officers can enter and search any premises with a search warrant. According to section 17 of the Prevention of Bribery Ordinance, an ICAC officer may apply to a Magistrate or a Judge of the High Court for a warrant to search any private premises. In order to obtain the search warrant, the officer must satisfy the c ourt that there are reasonable grounds to believe that there is evidence of an offence under the Prevention of Bribery Ordinance inside such premises. In urgent cases, the search warrant can be granted by the Commissioner of the ICAC instead of the court. Where the Commissioner reasonably believes the making of an application for the issue of such a warrant would seriously hinder the investigation, he may issue his own search warrant to direct his ICAC officers to enter and search the premises or place. A further power of search can be found in section 10B of the ICAC Ordinance. A search warrant may be granted by a Magistrate for the purpose of entering and searching premises or places for evidence of specified offences under section 10 of the ICAC Ordinance (e.g. offences under the Prevention of Bribery Ordinance or the Elections (Corrupt and Illegal Conduct) Ordinance; or offences of theft, fraud, false accounting etc). Entry and Search without any court warrant However, it is not always necessary for the ICAC officers to obtain a search warrant. Under section 10(3) of the ICAC Ordinance, the ICAC officers may enter and search private premises without warrant for the purpose of arrest ing a person if they reasonably believe that person is in side the premises . The officers must first identify themselves and state the purpose of the search. The officers must also produce their warrant cards upon request. Otherwise the ICAC officers have no general power to enter into private premises without the consent of the owner or occupant. 2. UNDER WHAT CIRCUMSTANCES CAN THE ICAC OFFICERS ARREST A PERSON? MUST THEY OBTAIN A WARRANT OF ARREST BEFOREHAND? 2. UNDER WHAT CIRCUMSTANCES CAN THE ICAC OFFICERS ARREST A PERSON? MUST THEY OBTAIN A WARRANT OF ARREST BEFOREHAND? A warrant of arrest is not required. The ICAC officers may arrest a person they reasonably suspect of being guilty of an offence under the Independent Commission Against Corruption Ordinance, the Prevention of Bribery Ordinance, or the Elections (Corrupt and Illegal Conduct) Ordinance. What constitutes reasonable suspicion in a particular case is to be judged on an objective basis with valid reasons. Examples of these offences include: a civil servant accepted advantages without the Chief Executive's permission when performing an official duty, or staff of a private company released tendering information to bidders in return for some advantages and such information has assisted those bidders in securing a contract. If you want to view more examples concerning corruption, please visit the ICAC webpage. The ICAC officers have a duty to explain to the person under arrest the reason for the arrest, and to inform the arrested person that he has a right to remain silent. Hence, the arrested person can choose not to answer any questions asked by the ICAC officers . It should be noted that a person is not under arrest if that person is merely asked by

the ICAC officers to assist in their investigation or to go to the ICAC Office. Unless the person is formally arrested, he is free to decide whether or not to go with the ICAC officers, and is free to leave at any stage. 3. WHAT WILL NORMALLY HAPPEN AFTER A PERSON IS ARRESTED BY THE ICAC OFFICERS? WHAT ARE HIS RIGHTS DURING DETENTION AND QUESTIONING BY THE ICAC OFFICERS? 3. WHAT WILL NORMALLY HAPPEN AFTER A PERSON IS ARRESTED BY THE ICAC OFFICERS? WHAT ARE HIS RIGHTS DURING DETENTION AND QUESTIONING BY THE ICAC OFFICERS? Detention A person arrested by the ICAC may be taken to a police station and dealt with under the Police Force Ordinance, or may be taken to an ICAC office. If an arrested person is taken to an ICAC office, he may be detained there if an officer of the rank of a Senior Commission Against Corruption Officer or higher considers it necessary for the purpose of further inquiries. The rights of a person in ICAC custody can be found in the Independent Commission Against Corruption (Treatment of Detained Persons) Order (Cap. 204A) . According to the Order, a "Notice to Persons Detained" setting out the general rights of a detained person must be conspicuously displayed in every detention room. These rights include: Requesting that the detained person's relatives or a friend be informed of the detention; Communicating and consulting with a legal adviser (unless unreasonable delay or hindrance will likely be caused to the processes of investigation or the administration of justice); Asking to be released on bail; Being provided with drinking water upon request, adequate food and refreshment as well as medical care if necessary. Detailed contents of the Notice to Persons Detained can be found here. An arrested person may be released from custody on the deposit of a reasonable sum of money. The amount of such a sum is determined by a Senior Commission Against Corruption Officer or an officer of higher rank. A person may also be released on bail by providing such recognizance, with such sureties, as the senior officer deems necessary. Persons released on bail must further attend the offices of the ICAC as specified or appear before a M agistrate as required. Failure to attend will result in the forfeiture of the deposited sum or recognizance. If bail is refused, the detained person must be brought before a Magistrate as soon as practicable and in any event within 48 hours after arrest. Questioning and Interviewing by ICAC officers The questioning of the detained person is usually done by the ICAC officers by way of a video-taped interview. Before questioning and interviewing the detained person, the ICAC officers must caution that person by saying, "You are not obliged to say anything unless you wish to do so but whatever you say will be put into writing and may be given in evidence." The detained person has a right to remain silent, and may therefore choose whether or not to attend the video-taped interview or answer any questions posed by the ICAC officers . The detained person may also request to obtain legal advice before deciding whether or not to answer any questions. The detained person may also have his lawyer present during the questioning and taking of any statement. Upon conclusion of the interview , the ICAC officers must provide the interviewee with a copy of the taped interview or the written statement (as the case may be). 4. I SUSPECT THAT SOMEONE HAS COMMITTED AN OFFENCE INVOLVING CORRUPTION OR BRIBERY. HOW CAN I REPORT THIS TO THE ICAC? 4. I SUSPECT THAT SOMEONE HAS COMMITTED AN OFFENCE INVOLVING CORRUPTION OR BRIBERY. HOW CAN I REPORT THIS TO THE ICAC? You can lodge the complaint in person at the ICAC Report Centre (24-hours service) or tele phone its hotline at 2526 6366. The address of the ICAC Report Centre is G/F, 303 Java Road, North Point, Hong Kong. For more details, please read the FAQs provided by the ICAC. 5. IF I WAS ILL-TREATED BY ICAC OFFICERS, HOW CAN I LODGE A COMPLAINT AGAINST THE ICAC? 5. IF I WAS ILL-TREATED BY ICAC OFFICERS, HOW CAN I LODGE A COMPLAINT AGAINST THE ICAC? Complaints against the ICAC are handled by an independent ICAC Complaints Committee chaired by an Executive Council member. You may lodge the complaint in person, by post or by telephone. The contact details of the ICAC Complaints Committee are: Room 2559, 25/F, Central Government Offices, 2 Tim Mei Avenue, Tamar, Hong Kong (Tel: 3655 5503). You will be informed of the outcome of your complaints after the investigations are completed and a decision is made. For further information on the complaint procedures, please go to the ICAC webpage. It is also possible for you to make a civil claim against the ICAC for c ompensation. But you should first seek legal advice before you decide whether or not to take any legal action. COURT PROCEDURE - CRIMINAL CASES V. COURT PROCEDURE - CRIMINAL CASES The

Department of Justice of the HKSAR Government is responsible for the conduct of criminal prosecutions in Hong Kong. In the discharge of that function the Department enjoys an independence which is guaranteed by Article 63 of the Basic Law. Not all persons suspected of criminal offences will automatically be prosecuted. No prosecution should be made unless in the professional judgment of the prosecutor, there is sufficient evidence so that there is a reasonable prospect of a conviction. If there is sufficient evidence, the prosecution further needs to consider whether it is in the public interest to prosecute. In determining where exactly the public interest may lie, the prosecutor must examine all the factors and the circumstances (e.g. the nature of the offence, the age and mental state of the suspect, the likely penalty upon a conviction). For example, it may not be in the public interest to prosecute if the consequence of prosecution is out of proportion to the gravity/seriousness of the offence. In general, the more serious the offence, the more likely it is that the public interest will require a prosecution. For more details of the prosecution policy, please see "Prosecution Code" issued by the Department of Justice. In Hong Kong , any person charged with an offence shall be presumed innocent until that person is convicted by the court. The presumption of innocence is the most basic right of an accused person, given under the common law and Article 87 of the Basic Law of Hong Kong. In general, the court will first ask the accused person whether he or she pleads guilty to the offence (Note : The person being charged is formally called "the accused person" in the District Court or the High Court, and such a person is normally referred to as "the defendant" in the Magistrates' Courts. To avoid confusing laymen, persons being charged in all courts are collectively called "the accused persons" or "the accused" in this topic.). If the accused person pleads guilty, the court will convict that person without a trial so long as the summary of facts prepared by the prosecution and agreed by him/her are sufficient to show the commission of the offence. If the accused person pleads not guilty, then a trial becomes necessary to determine whether or not that person is guilty of the offence. At the trial, the burden of proof is generally on the prosecution, which has to convince the court that the accused person is guilty of the offence beyond reasonable doubt . That means the prosecution must present sufficient evidence to the court so that the court can be sure that all the ingredients of the offence charged against the accused have been proven. If there is any reasonable doubt that a particular ingredient of the offence may not have been proven, then the accused person should be acquitted of the offence. The accused person is not required to prove that he or she is not guilty, and can decide whether to give evidence at the trial or not. Criminal trials in Hong Kong are conducted in open court where the public and the press can attend. They are either heard by a Magistrate or a District Court Judge alone without a jury, or by a High Court Judge sitting together with a jury. 1. INTRODUCTION TO THE CRIMINAL COURTS IN HONG KONG 1. INTRODUCTION TO THE CRIMINAL COURTS IN HONG KONG Magistrate's Court There are seven Magistrates' Courts in Hong Kong and the Magistrates hear a wide range of summary and indictable offences. The maximum sentence a Magistrate can impose generally is two years imprisonment for a single offence, and three years imprisonment where there are two or more indictable offences being dealt with at the same time. The Magistrate may also in general impose a maximum fine of $100,000. However, some Ordinances give Magistrates a greater power to sentence up to three years imprisonment and a fine of $5,000,000. Magistrates hear cases without a jury. Minor offences such as hawking, traffic contraventions and littering are heard in the Magistrates' Courts by Special Magistrates. In theory, Special Magistrates can impose a sentence of imprisonment up to 6 months for one offence or up to 12 months for more than one offence (see section 91 and section 57 of the Magistrates Ordinance, Cap. 227). However, in practice Special Magistrates will not be trying any offence which will likely result in imprisonment and so they will not impose any prison sentence. The maximum fine that Special Magistrates can impose is up to $50,000. The Magistrates' Courts also deal with certain preliminary procedures before the more serious indictable offences are transferred to the District Court or the Court of First Instance of the High Court. The procedure to be conducted by the Magistrate before transferring a case to the Court of First Instance is called the "Committal proceeding". This is basically a screening test to make sure that cases will

only be "committed" for a trial with jury in the Court of First Instance if the prosecution can provide enough evidence before the Magistrate to establish a prima facie case against the accused person. Juvenile Court The Juvenile Court is located in the Magistrates' Court and hears charges against young people between the age of 10 and 15 (unless it is a case of murder or manslaughter). District Court The District Court deals with indictable offences and may hear all serious criminal cases except manslaughter, murder and rape. The maximum term of imprisonment a District Court judge can impose is seven years. District Court judges also hear cases without a jury. Court of First Instance of the High Court The Court of First Instance deals with indictable offences . There is no general limit as to the length of imprisonment that the Court of First Instance may impose, so that it can impose the maximum penalty that is set out in the legislation creating the offence. Judges of the Court of First Instance hear criminal cases together with a jury. They also hear Magistrate Appeals, where a judge will sit alone and determine appeals from decisions of the Magistrates' Courts. Court of Appeal of the High Court The Court of Appeal hears appeals from the District Court and the Court of First Instance. The Court of Appeal generally consists of three judges sitting together to hear a case. Court of Final Appeal The Court of Final Appeal is the highest appellate court in Hong Kong , and hears appeals from the Court of First Instance and the Court of Appeal. Leave (i.e. permission) to appeal must first be obtained from the three-member Appellate Committee of the Court of Final Appeal. The Court of Final Appeal consists of five judges sitting together to hear a case. For more information on the courts of Hong Kong , you can visit the Judiciary webpage. 2. I HAVE HEARD OF "SUMMARY OFFENCES" AND "INDICTABLE OFFENCES". WHAT ARE THE DIFFERENCES BETWEEN THE TWO AND WHICH COURT CAN TRY THESE OFFENCES? 2. I HAVE HEARD OF "SUMMARY OFFENCES" AND "INDICTABLE OFFENCES". WHAT ARE THE DIFFERENCES BETWEEN THE TWO AND WHICH COURT CAN TRY THESE OFFENCES? Broadly speaking, "summary offences"represent the less serious offences, while "indictable offences"represent the more serious offences. Summary offences can only be tried in Magistrates' Courts. The only exception is that a summary offence can be tried in the District Court if the accused person is also charged with an indictable offence. Examples of summary offences include littering, careless driving, and falsely pretending to be a public officer. If the legislative provision creating the offence contains the words "upon indictment" or "on indictment", then the offence is an indictable offence. Most indictable offences can be tried in the Magistrates' Courts, the District Court or the Court of First Instance of the High Court. The choice of venue of the trial of an indictable offence rests on the prosecution (section 14 of the Criminal Procedure Ordinance, Cap. 221), who will normally consider the complexity of the case and the likely sentence to be imposed on the offender upon conviction. For example, if the likely sentence is an imprisonment for four years, then the prosecution will probably choose the District Court for the trial, as it can impose a maximum sentence of 7 years. Magistrates' Courts are not suitable for the trial of such an offence because their maximum sentencing power is only 2 years imprisonment for a single offence. There are some serious indictable offences which cannot be tried in the Magistrates' Courts. They are set out in Part I of the Schedule 2 to the Magistrates Ordinance (Cap. 227) and include for example drug trafficking offence and shooting another person. The most serious indictable offences set out in Part III of the Schedule 2 to the Magistrates Ordinance can only be tried in the Court of First Instance of the High Court with a jury (e.g. murder or manslaughter). The time limit for prosecution of a summary offence is generally within 6 months of the commission of the offence (unless otherwise specified in the legislation creating the offence). For an indictable offence, there is no formal time limit for the commencement of a prosecution. 3. I WILL ATTEND A COURT HEARING SOON. WHAT IS THE PROCEDURE DURING A CRIMINAL HEARING? 3. I WILL ATTEND A COURT HEARING SOON. WHAT IS THE PROCEDURE DURING A CRIMINAL HEARING? Due to the complexity of criminal procedures and the risk of conviction, you are strongly recommended to appoint a lawyer to represent you. The following chart briefly sets out normal court procedure in a criminal case: First Hearing No matter how serious the offence is, the accused person will in general be brought to a Magistrates' Court to attend the first hearing. If the prosecution needs further time to investigate or seek legal advice, or if the

prosecution decides to transfer the case for trial in the District Court or the Court of First Instance of the High Court, then the prosecutor will seek an adjournment (to postpone the hearing). Otherwise, the charge is read to the accused person at the first hearing, who is then asked to plead guilty or not guilty to the offence. If the accused person pleads not guilty, then the case will usually be adjourned to another date for trial. Upon adjournment of the case, the accused person may apply to the Magistrate for bail. Bail should generally be granted by the Magistrate unless there is substantial ground for believing that the accused will fail to appear at the next scheduled hearing, or commit other offences whilst on bail, or interfere with witnesses or the investigation. The accused person has the right to submit an application for bail on further appearances before the Magistrate if bail was refused at the previous hearing(s). He may also apply to the Court of First Instance of the High Court for bail upon refusal by the Magistrate. For more details on this matter, please refer to section 9Dand section 9G of the Criminal Procedure Ordinance. Plea of Guilty (the accused admits guilt) The accused person who pleads guilty is not yet convicted of the offence until he is formally convicted by the Court. On a plea of guilty, the brief facts of the case on which the accused is to be convicted will be read in open court. If the accused agrees with the brief facts, then the Court will formally convict him (unless the Court is not satisfied that the agreed brief facts show the commission of the offence). Where the accused does not agree with the prosecution's brief facts (or part of them), the Court will hear evidence from the prosecution and the accused to decide the facts. Such a hearing is called a "Newton Hearing". After the Court has made a decision on the facts, it will formally convict the accused (unless the Court is not satisfied that the decided facts show the commission of the offence). Upon conviction, the prosecution will inform the Court the relevant background of the accused person in particular whether he has any previous criminal records. The Court will then allow the accused person or his lawyer to tell the Court matters which may persuade the Court to impose a more lenient sentence. This process is called a plea in mitigation . The Court may then pass a sentence (i.e. decide the penalty) on the accused person or it may call for some reports (e.g. probation report, Community Service Order report or psychiatric report etc) before it decides the proper sentence. Plea of Not Guilty (the accused does not admit guilt) On a plea of not guilty, the case will be adjourned for trial. A number of procedures may take place before the trial e.g. for application for bail, for amendment to the charge, pre-trial review, etc. Well in advance of the trial, the prosecution must provide the accused person (or his lawyer) with all documents and materials which are or possibly relevant to the case, whether they are for or against the prosecution's case. In general, these materials include all the written statements and criminal records of the prosecution witnesses; all written statements given by other persons to the law enforcement agencies whom the prosecution does not intend to call as a witness at the trial; all materials which the prosecution intends to rely on at the trial; and all materials which the prosecution does not intend to use but which may assist the accused in his defence. The prosecution however has no duty to disclose materials which only affect the credibility of a defence witness (e.g. Immigration records which show that a defence witness was in Macau at the time when he said he met the accused person in Hong Kong). Any failure by the prosecution to provide the accused with the relevant materials before trial may be a valid ground of appeal against any conviction. Trial The prosecution opens its case and adduces/submits evidence. The prosecutor will call witnesses one by one to give evidence to establish the offence. Each witness will first be questioned by the prosecutor (examination-in-chief by the prosecution). The witness will then be questioned by the accused or his lawyer (cross-examination by the defence). If necessary, that witness may be re-examined by the prosecutor afterwards. After all the prosecution witnesses have given evidence, the prosecution closes its case. The defence may then make a submission of "no case to answer" , which is an argument that the prosecution's evidence is insufficient to make out a prima facie case. If this submission is accepted by the Court, the accused is acquitted . The accused may then apply to the Court to recover his legal costs from the prosecution. If the Court finds that there is a "case to answer" (i.e. the prosecutor has established a prima facie

case), the defence will open its case and call its witnesses. The accused can: a) give evidence personally and call other witnesses; b) choose not to give evidence personally but only call other witnesses to give evidence; OR c) choose to do neither of the above. The accused person usually needs to decide whether or not to give evidence personally before any defence witness is called. This is because the accused is generally required to testify before other defence witnesses. Where witnesses are called by the defence, the defence witnesses are examined in chief by the defence. They may then be cross-examined by the prosecution, and may be re-examined by the defence. After all the defence witnesses have given their evidence, the defence closes its case. Other than those witnesses called by the prosecution or the defence, the Court has the discretion to order that someone must be called as an additional witness. However, this discretion is rarely exercised. Closing Submissions and Verdict The trial will then proceed to the closing speeches by both the prosecution and the defence, (although the prosecution often does not make a closing speech) after which the Court will deliver its verdict (i.e. decision). The Court will either convict or acquit the accused and give reasons for its decision. In general, the reasons given by the Magistrate will be rather brief at this stage. The Magistrate will provide fuller reasons with more detailed analysis at a later stage if the accused appeals against the conviction. If the accused is acquitted, he may apply to the Court to recover his legal costs from the prosecution. If the accused is convicted, the case will proceed to mitigation and sentencing. Hearings in District Court or Court of First Instance of the High Court The trial process in the District Court is similar to that in the Magistrates' Courts. However, the trial in the Court of First Instance of the High Court is conducted by the Judge sitting together with the jury , and so there are some differences in the process. If the accused does not admit guilt, a jury will be empanelled. The members of the jury are ordinary citizens in Hong Kong selected by lottery from the jury pool. Both the prosecution and the defence may object to any member of the jury pool becoming empanelled as a juror. The defence can object to no more than five potential jurors without giving reasons and can object to any additional ones if valid reasons are given. Normally seven jurors are selected, although for long or complex trials a jury of nine members can be formed. The trial then proceeds in similar manner as in the Magistrates' Court or District Court. The jury is responsible for deciding whether or not the accused person is guilty , while the Judge determines the law and procedures. Hence, the Judge of the Court of First Instance will regulate the conduct of the trial procedures and the jury will general sit there listening attentively to the evidence given by the witnesses (through examination-in-chief, cross-examination, and re-examination conducted by the prosecution and the defence). Sometimes the Judge will ask the jury to leave the courtroom if there are any legal issues or arguments that need to be resolved without the present of the jury (e.g. whether the jury should be allowed to hear certain evidence, or whether the defence's submission of no case to answer is successful). After closing speeches have been made to the jury by the prosecution and the defence, the Judge will sum up the case to the jury (summarising the evidence and the arguments made by both sides). The Judge will usually explain to the jury what the prosecution must establish before the accused can be convicted. But in general the Judge must leave it for the jury to decide who is telling the truth and whether the accused is guilty of the offence. In certain exceptional cases, the Judge may direct the jury to acquit the accused if he is satisfied that it is not safe to convict the accused based on the available evidence. The jury will then retire to consider its verdict (i.e. to decide whether or not the accused is guilty of the offence). Based on the verdict of the jury, the Judge will formally convict or acquit the accused. If the accused is acquitted, he may apply to the Court to recover his legal costs from the prosecution. If the accused is convicted, the case will proceed to mitigation and sentencing. It is the Judge instead of the jury who is responsible for sentencing the convicted offender. 4. WHAT ARE THE EFFECTS ON THE LEVEL OF SENTENCE IF THE ACCUSED PLEADED GUILTY? 4. WHAT ARE THE EFFECTS ON THE LEVEL OF SENTENCE IF THE ACCUSED PLEADED GUILTY? A plea of guilty is a significant mitigating factor, as it may reflect the remorse of the accused and save the trouble and expenses of a trial. The court may take into account the guilty plea when deciding whether or not

an imprisonment sentence should be imposed on the accused. If it is appropriate to sentence the accused to imprisonment, then usually the court will give a one-third discount to the length of imprisonment (e.g. an original sentence of 3 years imprisonment will become two years) if the accused pleads guilty at the earliest reasonable opportunity (e.g. at the first hearing or well in advance of the trial) . Lesser discounts may be given if the accused pleads guilty after the trial has begun. But all such discounts are at the discretion of the judge. 5. HOW DOES THE JURY GIVE ITS VERDICT? 5. HOW DOES THE JURY GIVE ITS VERDICT? Once the jury has reached its verdict, the foreman of the jury will inform the usher, who will inform the Court. The parties will be called back to Court, and the Court clerk will ask the foreman of the jury to state the verdict in open court. Juries must reach a majority verdict as to whether the accused is or is not guilty of the offence. In a jury of seven members, the Court will accept a unanimous verdict, a verdict of 6 - 1 or 5 - 2. If the jury cannot reach a majority verdict, the Judge may ask them to retire again and give them more time to discuss, but the Judge must not put pressure on them to reach a majority verdict. If at the end the jury still cannot reach a majority verdict, the Judge will have to dismiss the jury and decide whether or not to order a re-trial before another panel of jury. For more details about the duty and eligibility of jurors, please go the Judiciary webpage. 6. IF I AM CONVICTED AND I WANT TO LODGE AN APPEAL, WHAT SHOULD I DO? CAN I APPEAL AGAINST THE CONVICTION OR SENTENCE OR BOTH? 6. IF I AM CONVICTED AND I WANT TO LODGE AN APPEAL, WHAT SHOULD I DO? CAN I APPEAL AGAINST THE CONVICTION OR SENTENCE OR BOTH? You can lodge an appeal against either or both the conviction and the sentence. You must however bear in mind the time limits for filing the appeal documents, and consider carefully whether or not you have proper grounds for the appeal. Extension of these time limits will only be given in special circumstances. For an appeal against a Magistrate's decision, the time limit is 14 days from the date when the Magistrate passed the sentence (or penalty), and the appeal will be made to the Judge of the Court of First Instance of the High Court. Alternatively, you may within the 14 days' period apply to the Magistrate who convicted you for a review of his decision. If the review is unsuccessful, you may then appeal to the Judge of the Court of First Instance within 14 days from the review decision. For an appeal against the verdict of the District Court or the Court of First Instance, the time limit is 28 days and the appeal goes to the Court of Appeal of the High Court. Technically, the Court of Appeal will first decide whether or not to grant leave (i.e. permission) to appeal before hearing the actual appeal. However, the Court of Appeal will often combine the application for leave and the actual appeal together at one hearing. You should not proceed with an appeal without considering carefully in advance whether you have proper grounds for the appeal. There is a possibility that you may be worsen off. For example, if you appeal against the sentence, the higher court which hears the appeal may impose a heavier sentence if it takes the view that the original sentence is too lenient. Moreover, if the Court of Appeal considers that the appeal is unmeritorious (or unreasonable), it has the power to order that certain period that the convicted offender spent in prison between his conviction and the appeal be disregarded in calculating his original sentence (see section 83W of the Criminal Procedure Ordinance). Hence, it is important that you consult your lawyer or seek Legal Aid before you decide whether or not to lodge or continue with your appeal. You may abandon your appeal by serving a written notice to the Court before the appeal hearing (if on further consideration you accept that you do not have proper grounds for the appeal). CASE ILLUSTRATION VI. CASE ILLUSTRATION There is an endless list of situations relating to possible criminal offences and procedures. The following scenarios are merely examples: 1. I HAVE COMMITTED THE CRIMINAL ACTS (E.G. STOLEN A WATCH, WOUNDED A PERSON OR WHATEVER) AND I HAVE TOLD MY LAWYER ALL THE FACTS. HOWEVER, I DO NOT WANT TO PLEAD GUILTY TO THE OFFENCE. WILL MY LAWYER STILL DEFEND ME AT TRIAL, OR ONLY SAY SOMETHING IN MITIGATION? IS MY LAWYER BOUND TO REPORT MY OFFENCE TO THE COURT AFTER I TELL HIM THE TRUTH? You have the right to plead NOT guilty even if you have committed the criminal acts. You also have the right to legal representation in that situation. Under the Hong Kong legal system, the burden is on the prosecution to provide satisfactory evidence to the Court to prove that you are guilty of the offence

beyond reasonable doubt. Hence, your lawyer may still defend you on the basis that the prosecution cannot satisfy this burden of proof by testing the prosecution's evidence. However, your lawyer must also follow some professional ethics and he can only run your defence on a limited basis, as he cannot conduct your defence on a basis that is contrary to what you have told him. For example, your lawyer can challenge a prosecution witness's memory, but he cannot put forward a defence that you were not present at the scene of crime or that it is another person who committed the offence. While you have the right not to plead guilty and ask your lawyer to continue to defend you, you should consult your lawyer whether it is in your best interest to do so. Given what you have told your lawyer, he can only run your defence on a rather limited basis, and this may affect the chance of a successful defence. If you are convicted by the Court after trial, you will not receive the normal one-third discount on sentencing upon a guilty plea (see above question and answer). You should therefore carefully consider whether you wish to plead guilty to the charge and ask your lawyer to mitigate on your behalf. All information that you have told your lawyer would be kept strictly confidential. Without your consent, your lawyer cannot tell the Court or others that you have committed the criminal acts. Hence, you should be honest and truthful with your lawyer so that he can give you the proper legal advice. 2. I AM FACING A CRIMINAL CHARGE AND I HAVE TO ATTEND THE HEARING SOON. CAN I CHOOSE NOT TO GIVE ORAL EVIDENCE IN COURT? WHAT ARE THE ESSENTIAL THINGS THAT I NEED TO BE AWARE OF IF I CHOOSE TO GIVE EVIDENCE? Under Article 11(2g) of section 8 of the Hong Kong Bill of Rights Ordinance, you have the right not to be compelled to testify against yourself or to confess guilt - the right to silence . By virtue of that right, you are generally not required to give evidence at trial. In deciding whether or not to give evidence, your lawyer should advise you of the advantages and disadvantages of giving evidence. In some cases, it may be necessary for you to give evidence or call witnesses, e.g. where you have an "alibi" (evidence showing that you were not at the scene of the crime when the crime happened). On the other hand, if you choose to give evidence, you run the risk that you may weaken your own defence during cross-examination by the prosecution. The prosecution may be able to weaken your credibility if you answer the questions poorly or inconsistently. 3. I AM JUST A WITNESS WHO IS GOING TO GIVE EVIDENCE IN COURT. WILL I INCUR CRIMINAL LIABILITY IF I INTENTIONALLY OR CARELESSLY GIVE FALSE STATEMENTS? Any person sworn as a witness who makes statements in a judicial proceeding which he knows to be false or does not believe to be true commits the offence of perjury under section 31 of the Crimes Ordinance (Cap. 200of the Laws of Hong Kong). A conviction for perjury is punishable by a fine and an imprisonment up to 7 years. In case you are not sure about an answer, simply say so. If you want to know more about the formalities for giving evidence in Court, you can visit the Hong Kong Police webpage. 4. I ACCIDENTALLY KNOCKED DOWN A LADY BY MY CAR AND SHE SUBSEQUENTLY DIED. WILL I BE CHARGED WITH MANSLAUGHTER OR MURDER OR OTHER OFFENCES? If it is an accident and there is no evidence that you have any intention to injure that lady, then you will not be charged with murder or manslaughter. However, if the accident occurred as a result of your serious fault in driving, then you may be charged with dangerous driving causing death under section 36 of the Road Traffic Ordinance (Cap. 374 of the Laws of Hong Kong). A person is considered to be driving dangerously if the way that person drives falls far below what would be expected of a competent and careful driver, and it would be obvious to the competent and careful driver that driving in such a way would be dangerous. It is also dangerous driving where it would be obvious to the competent and careful driver that the motor vehicle's condition was so bad that it would be dangerous to drive such a vehicle. The offence of dangerous driving causing death carries a penalty of a fine (of up to HK$50,000) and imprisonment for up to ten years. Such a driver shall also be disqualified from driving for a period of not less than two years for the first such offence, and not less than three years for any subsequent offences. If you were only careless at that time, then you may be charged with careless driving under section 38 of the Road Traffic Ordinance. A person is considered to be driving carelessly if that person drives without due care and attention i.e. failing to exercise the degree of care and attention that a reasonable, competent and prudent driver would exercise. A person is also considered to be driving carelessly where that

person drives without reasonable consideration for other persons using the road. The offence of careless driving carries a maximum penalty of an imprisonment for 6 months. 5. I HAVE PREVIOUSLY CLAIMED THAT I WAS A MEMBER OF A TRIAD SOCIETY BUT IN FACT I WAS NOT. I JUST WANTED TO THREATEN SOMEONE. HAVE I COMMITTED AN OFFENCE? Under section 20(2) of the Societies Ordinance (Cap. 151 of the Laws of Hong Kong), any person who is, acts, professes or claims to be a member of a triad society is guilty of an offence. Hence, you might have committed this offence by claiming to be a member of a triad society even though you are not actually a member. Even an empty threat of belonging to a triad society is an offence. You may also be guilty of criminal intimidation. 6. I HAVE SOME OVERDUE PAYMENTS IN RESPECT OF A BANK LOAN. RECENTLY, I HAVE RECEIVED MANY TELEPHONE CALLS FROM A PERSON CLAIMING TO BE COLLECTING THE PAYMENTS ON BEHALF OF THE BANK. HE USED SOME FOUL LANGUAGE BUT DID NOT MAKE ANY THREATS TO KILL ME. WOULD SUCH CONDUCT CONSTITUTE "CRIMINAL INTIMIDATION" OR SOME OTHER CRIMINAL OFFENCE? Only using foul language without any threatening words (such as those relating to injury, damage to property or reputation) does not amount to the offence of criminal intimidation under section 24 of the Crimes Ordinance(Cap. 200 of the Laws of Hong Kong) . However, he may be guilty of an offence of sending message by telephone which is grossly offensive or is of an indecent, obscene or menacing character under section 20 of the Summary Offences Ordinance (Cap. 228). 7. I AM FACING A CRIMINAL CHARGE AND I AM HAVING DIFFICULTY FINDING A DEFENCE WITNESS. HOWEVER, I REMEMBER THAT THERE WAS A TEENAGER AT THE SCENE. THAT TEENAGER APPEARS TO BE UNDER THE AGE OF 16, BUT HIS TESTIMONY MAY PROVE THAT I AM NOT THE OFFENDER. CAN I CALL HIM AS MY DEFENCE WITNESS IN COURT? The law does not prevent young people under the age of 16 to be witnesses in legal proceedings. With reference to section 3 of the Evidence Ordinance (Cap. 8 of the Laws of Hong Kong), only persons of unsound mind and who appear incapable of answering questions about the relevant case shall be incompetent to give evidence in any proceedings. You can try to ask that teenager to be your defence witness. You may also issue him a witness summons to ensure that he attends court. A witness summons is a document (issued by an order of a court) that compels a witness to attend a trial. 8. I AM THE VICTIM OF A CRIME. I KNOW THAT THE OFFENDER HAS BEEN CONVICTED AND SENTENCED TO PRISON. DO I HAVE ANY RIGHT TO KNOW WHEN THE OFFENDER WILL BE RELEASED FROM PRISON? I AM AFRAID THAT THE OFFENDER MAY TAKE REVENGE ON ME. As a victim of the crime, you have a right to ask the Commissioner of Correctional Services (either directly or through the police officer who handles your case) to inform you when the offender will be released from prison. You must however provide the Commissioner your contact address and telephone. If you have proper reason to suspect that the offender may take any revenge on you, you may seek help from the police. If you want to know more about a victim's rights and obligations in a criminal case, please see the Victims of Crime Charter issued by the Department of Justice.