APPENDIX
SUMMARIES OF THE CASES COMMENCED FOR INVESTIGATION IN THE AREA OF OMBUDSMAN

Appendix
Summaries of the Cases Commenced for Investigation in the Area of Ombudsman

I. File No. 13/2006

Subject: The academic qualification verification scheme and the appointment of a disciplinary procedure pre-examiner for recruitment purposes.

In the course of handling a case, the CCAC discovered irregularities in Bureau T's academic qualification screening process for the promotion of an employee, as well as in the disciplinary procedure arising from the employee's alleged disciplinary infringement. The CCAC therefore initiated an investigation:

1. On 13th April 2004, the CCAC received a complaint indicating that employee I of Bureau T had been promoted with the aid of "purchased" academic certificates and his connection with "high-ranking officials". Investigations verified that employee I was a junior high school graduate and was employed as a 3rd grade auxiliary officer on contract basis. Following submission to the Bureau of academic qualification documents obtained from the Administrative Management Training Institute of Guangdong Province ("Training Institute"), employee I was immediately promoted to the position of 3rd grade officer. In fact, employee I once applied to the Tertiary Education Services Office for authentication of the said documents. However, in April 2001, his application was rejected because "the Training Institute is not classified as an institute of higher education and as such is not qualified for issuing state-certified academic diplomas". When Administrative Regulation No. 26/2003 ("New Regime") came into effect, employee I had the said documents "authenticated" by a Public Notary in Mainland China and then submitted them to the department concerned in November 2003. The employee was promoted in January 2004. In view of the above, the CCAC investigated the case.

2. The CCAC sent official letters to Bureau T twice, quoting the reasons for which the documents were rejected by the Tertiary Education Services Office, and informed the Bureau of the CCAC findings, obtained with the aid of the law enforcement entities in Mainland China

and confirmed by the Department of Education of Guangdong Province: the Training Institute was not on its own qualified to issue state-certified academic diplomas. The CCAC also urged the Bureau to initiate disciplinary procedure against the employee, who had intentionally concealed the fact that his qualifications were not recognised and had misled the Bureau into believing that he was academically qualified for the position of officer.

3. Bureau T indicated in its reply to the CCAC that the ratification of employee I's academic qualifications was conducted in accordance with the "New Regime". By virtue of the review, the Bureau regarded employee I as qualified for the position he had taken, and confirmed the authenticity of the documents submitted. However, the Bureau finally initiated disciplinary procedure against employee I in September 2005. The Director of the Bureau suggested that the Secretary to whom the Director was subordinate appoint a lawyer as the pre-examiner on the grounds that the case was very special and the enforcement of law and transparency should be ensured, and that the procedure should be initiated as soon as possible. With the Secretary's approval, the Bureau passed to the pre-examiner the two letters from the CCAC and the Bureau's replies.

4. During the pre-examination, on 19th October, employee I claimed in a hearing to the pre-examiner that he went through the verification formalities only because the Mainland Public Notaries certify only those documents issued by accredited institutions. Employee I then applied on the following day to enrol in a graduate programme with the Macau University of Science and Technology. He was notified of admission by the University on 21st October. He immediately submitted a copy of the admission notification to the pre-examiner, claiming that the admission was based on the provision of a certificate of tertiary education, and therefore his academic qualifications were deemed acceptable to the University.

5. The day after the hearing, the pre-examiner sent an email to the Department of Education of Guangdong Province and enquired whether the Training Institute was legally established; whether it had the right to conduct tertiary and technical secondary courses; to which level of academic qualification its diplomas equated, and whether the diploma issued to employee I by the Institute was genuine. However, the pre-examiner never received a reply. The pre-examiner also asked the Tertiary Education Services Office to forward all the documents that the employee had originally filed for authentication of his academic qualifications.

6. The pre-examiner submitted a report after completion of the procedures. The pre-examiner claimed in the report that the reason quoted by the Tertiary Education Services Office in rejecting employee I's application was different to the legal stipulation of "standard in form" in Article 5 Clause 3 of Decree-Law no. 39/93/M (hereinafter referred to as "Old Regime"), which states that "the education institutes from which the applicants obtained their academic qualifications must be officially recognized by the country or region concerned'. It is in the understanding of the pre-examiner that the legal prerequisite for recognizing academic qualifications was that the related institutes be "officially recognized" rather than "qualified to issue academic diplomas".

7. It is worth noting that an education institute established through legal due process means only that it is officially allowed to operate. The courses offered by the recognized tertiary education institutes are still to be assessed and approved by a separate official process, to ensure that their academic levels meet officially prescribed standards. Therefore, the word "recognized" in the clause should be deemed to cover recognition in both of the above mentioned aspects. In addition, Clause 3c of Article 9 of the "Old Regime" stipulated that the applicant should submit documents such as study plan, course curriculum and academic reports when applying for authentication of academic qualifications. It indicates the legislators' intention that the applicants' qualifications be assessed through objective analysis to ensure that non-government educational institutions (even if officially recognized) meet the specified standards.

8. From the above analysis, it becomes obvious that the pre-examiner had made a one-sided interpretation of the clause while neglecting the systematic framework of the norms, purposes and intention of the regulation concerning the recognition of academic qualifications. Based on that interpretation, the pre-examiner challenged the legality of rejecting employee I's application for authenticating qualifications on the part of the Tertiary Education Services Office. That challenge was not well founded.

9. The pre-examiner pointed out that the "New Regime" stipulated that "the assessment of academic qualifications is meant to confirm whether the claimed academic qualifications make the interested party suitable to take a specific public position and be engaged in the professional activities supervised by public entities . . . as well as to verify whether the related academic certificates are appropriate and genuine". Therefore, the pre-examiner inferred that the "New Regime" had abandoned the "criteria in form" specified in the "Old Regime"

and established "substantial criteria" instead. Once Bureau T believed that employee I was academically qualified to take the position while the verification of the academic certificates was proved after "authentication", it should be deemed to meet the "substantial criteria" specified by the "New Regime".

10. Nevertheless, it is necessary to point out that while the "New Regime" requires the employing department - the entity which verifies the academic qualifications - to scrutinize whether the claimed academic qualifications make the interested party suitable to assume a certain public employment, the "New Regime" also requires the department to verify whether the related documents were appropriate and genuine. Whenever the department has doubts about documents, it should proactively take measures to verify those documents, according to Article 59 and Clause 1 of Article 86 of the *Code of Administrative Procedures*. The verification duty must be performed strictly since current regulations stipulate that academic qualification is one of the common prerequisites for taking public employment and one may be exempted only with definite legal permission while meeting the specified premises. If entities are allowed free latitude in assessing academic qualifications, the legal effort to ensure that candidates have proper academic qualifications for public employment may be made in vain.

11. On the other hand, by viewing the documents provided by Bureau T, the pre-examiner should have been aware that the findings notified by the CCAC had been confirmed by the Department of Education of Guangdong Province. Nonetheless, the pre-examiner still enquired from the same Department via email - which was apparently done out of questionable intent - to verify the authenticity of the information provided by the CCAC, or to prove that employee I's academic qualifications did in fact meet the "substantial criteria" apart from the unquestionable fact that "the State does not recognize the qualifications". However, the one who should prove that the certificates provided meet the "substantial criteria" should be the concerned party who intended to benefit from it, rather than an administrative agency, or the pre-examiner, whose duty is to investigate whether a public servant commits malpractice in the process of assessing academic qualifications.

12. Apart from that, the appropriateness and efficacy of the way in which the pre-examiner as a private entity (law firm) sought to obtain information from the Department of Education of Guangdong Province via email is also questionable, as a Mainland official department only handles enquires made through specific official channels. The Department of Education

mentioned above in principle does not directly reply to private email enquiries from Hong Kong, Macao, Taiwan or foreign countries. Even the Tertiary Education Services Office or the CCAC can only access the information through specific official channels. If the pre-examiner deemed it necessary to obtain information, he should have done it through official channels instead of informal means (an email without means of verification of the sender's identity and authority), which resulted in no response.

13. In addition, the pre-examiner did not ascertain how Bureau T and other departments actually exercised the duty of "authenticating whether the related academic certificates are appropriate and genuine" after the "New Regime" came into effect. Neither did the pre-examiner investigate whether bias, fraud or other internal management problems were involved in the case concerned. Without such investigation, there was no way of determining whether employee I or other employees in Bureau T should bear disciplinary responsibility.

14. In regard to authenticating whether the academic certificates submitted by employee I were appropriate and genuine, the pre-examiner should have known that according to Macao's notary regulations notaries are not required to assess the credibility of document-issuing institutes under any circumstances; the pre-examiner did not examine or analyze whether other kinds of regulations existed in the Mainland notary system; nor did he examine the implications of the notary acts performed by Mainland notaries upon academic certificates in the particular case of employee I. The pre-examiner did not take any measures or conduct any analysis to determine that the Mainland notaries were not legally obliged to express any stance about the qualification of the related academic certificates or the credibility of the institute which issued the certificates to be authenticated. On the contrary, merely based on the oral testimony of employee I, the pre-examiner agreed on Bureau T's act of "acknowledging the appropriateness and authenticity of the documents based on the authentication by the notaries". This undoubtedly showed the pre-examiner's indiscretion in investigations and evidence gathering.

15. The pre-examiner regarded the admission notification of the master programme of the Macau University of Science and Technology submitted by employee I as one of the reasons for the Bureau's acknowledgement of the legality of Employee I's academic qualifications. Such an assumption showed that the related outcome and admission standards of student qualification scrutiny applied by a private higher education institute - which can be adjusted to fit its own schooling principles and policies – had been applied by Bureau T to the scrutiny of

academic qualifications conducted by administrative agencies for recruitment and promotion of employees. It seemed that the Macau University of science and Technology was treated as the scrutinizing agency of academic qualifications for administrative entities. Furthermore, even if it was feasible to quote the conclusion of the scrutiny undertaken by the university, it was logically wrong to use the facts that took place afterwards (the qualifications of Employee I submitted in 2003 could 'probably' be recognized by the Macau University of Science and Technology in 2005) as the justification for acts performed beforehand (Bureau T scrutinized the academic qualifications of employee I in 2003).

16. The foregoing scrutiny problems relating to disciplinary procedures can very much be attributed to the appointment of the pre-examiner. According to public service regulations, pre-examiners should in principle be public servants who meet the legal prerequisites . Only in exceptional circumstances may non-public servants act as pre-examiners. The director of Bureau T suggested appointing a non-public-servant (lawyer) as the pre-examiner of the disciplinary procedure in this case. However, the director did not provide any justifications (according to Clause 1e of Article 114 of the *Code of Administrative Procedures*) for such an exception. Instead, the director explained only that "the case was very special and for the purpose of ensuring legality and transparency to expedite the working process." However, the director did not explain further why following the principle – appointing public servants as pre-examiners - would create difficulties in "expediting the working process" and "ensuring legality and transparency". Neither did the director specify in what aspects the case was "special". Thus, the explanation provided for the related suggestion was insufficient. According to Clause 2 of Article 115 of the *Code of Administrative Procedures* it was as though no explanation or reason was provided at all.

17. Many defects exist when appointing non-public-servants as pre-examiners. For example, such individuals are not compelled by any obligation to public service and are therefore easily influenced by various subjective factors. In consequence, it is hard to ensure that they adopt consistent standards, as applied by the authorities in the past, to handle disciplinary problems; in addition, non-public-servants are not familiar with the operation of public administration, creating a disadvantage in the investigation procedure. Moreover, it imposes a heavier financial burden upon the administrative authorities (to pay remuneration of the pre-examiner). In this case, the pre-examiner did not know enough about the mechanics of

public administration. Nor was he familiar with the practical scrutiny of academic qualifications performed by Bureau T and other departments. In addition, the pre-examiner did not understand Mainland official departments' common practices for replying to enquiries. All these factors, of course, cast influence on the pre-examiner's arrangement of different investigation measures during pre-examination. As a result, the conduct of investigation procedure was impeded and the final judgement affected.

18. In terms of the current scrutiny of academic qualifications, the "New Regime" fundamentally changed the stipulation of the "Old Regime" that a specific department be responsible for authenticating all academic qualifications. In other words, it specifies that each recruiting department/entity (or Examination committee) should scrutinize the academic qualifications of the concerned party itself "to confirm whether the claimed academic qualifications make the interested party suitable to take a specific public position and be engaged in the professional activities supervised by public entities" as well as "to verify whether the related academic certificates are appropriate and genuine".

19. However, in practice, many departments encounter difficulties, especially in conducting recruitment examinations. The constitution of the Examination Committee is different every time and the examination procedure is restricted by the legally specified period. Also, the number of examinees is large. All these factors often create obstacles to proper scrutiny. As the "New Regime" does not specify how to conduct the scrutiny of academic qualifications, it is often the case that each department applies different measures - some strict and others lenient.

20. Nevertheless, the level of strictness of the scrutiny can severely influence whether the related party is qualified to take up a certain public post or a higher position. The outcome is easily challenged if only the recruiting department is in charge of conducting scrutiny, especially in recruiting employees without exams. Similarly, the authorities had earlier rejected employee I's application for recognition of academic qualifications. However, his qualifications still passed scrutiny conducted simply by the recruiting department. Such an outcome easily raised suspicions of nepotism and "passing the scrutiny of academic qualifications through offering benefits". The public credibility of the government could have been directly affected.

21. Although the "New Regime" specifies the Tertiary Education Services Office as the department who should "express opinions", the Office stated in principle that it has no right

of intervention in related matters when public departments seek opinions from the Office. The Office only provides the enquiring departments with the data organized in the early days when the "New Regime" was enforced for their references. Many departments think that the data are not practically useful.

22. According to the doctrine, the "opinion" should be the analysis and research conducted on practical cases followed by a conclusion in order to help the responsible departments make decisions or issue orders. For example, the Land, Public Works and Transport Bureau, Health Bureau and Fire Services Bureau have to provide opinions to the Civic and Municipal Affairs Bureau when issuing licenses to food and beverage establishments. In practice, each of these bureaus expresses opinions for or against licence issue with regard to the constructions that take place on the specific site, public health, fire safety and other matters relating to their specific authority. They do not provide opinion-seekers with reference information yet to be judged. Based on the above, the measures adopted by the Tertiary Education Services Office raised doubts about whether it had fulfilled the responsibility of "expressing opinions".

23. The "Old Regime" stipulated that higher education qualifications were recognized by the Tertiary Education Services Office after the Office listened to opinions given by the Recognition Commission of Higher Education Qualifications. Although the related opinions did not carry any power of restriction, the Commission was responsible for the scrutiny of application. Thus, the Tertiary Education Services Office believed that the power of recognition belonged to the Commission and the Office was only responsible for assisting the Commission in the administrative, technical and financial aspects. Therefore, the issue is: after the "New Regime" came into effect, the collegiate organ which the Tertiary Education Services Office used to rely on ceased to exist anymore to exercise the duty of verifying academic qualifications. In this case, is the Tertiary Education Office still qualified to conduct analysis and research, and provide opinions in regard to the cases the departments request assistance for?

24. In the past, the "Old Regime" did not fit the academic system of the universities nowadays and did not consider the actual administrative operations of local and overseas schools and colleges to request all applicants to submit large amounts of data/documents. This resulted in a waste of applicants' time and money, and was often criticized by citizens. As distinct from the "Old Regime", the "New Regime" specifies that the recruiting departments must conduct their own scrutiny of the academic qualifications of applicants. It clearly facilitates the recruit-

ment process and reduces bureaucracy. However, the "New Regime" also stipulates that the Tertiary Education Services Office must provide opinions to departments that request assistance. This shows that legislators deem the Tertiary Education Services Office to be better equipped with resources and conditions to scrutinize higher education qualifications, thus affirming that the Office has the duty to provide assistance to departments encountering difficulties.

25. In this case, Bureau T is the recruiting department. Even though it was reasonable for Bureau T to have failed to realise at the outset that employee I's qualification was not recognized by the Mainland government, it was inappropriate for Bureau T to insist on its stance even upon receiving notification from the CCAC. Since even the local government did not recognize the related qualifications, there was no guarantee with regard to the recognition and quality of the related program. It was hardly convincing that the Macao public department unconditionally recognised the related qualifications without just cause. Neither did the department strictly observe the stipulations of the Macao Public Administration Career Regime on the prerequisite academic qualifications for the officer position. Furthermore, even though the authorities believed that employee I's capability qualified him to take the officer position according to the stipulations of the "New Regime", the authorities should not have casually acknowledged his academic qualifications as "appropriate" since the prerequisite academic qualification required by the related position had not been fulfilled. Neither should the authorities proceed further to confirm that the related qualifications met the legal prerequisites for the officer position.

26. Based on the above, the CCAC took the following measures:

(1) Recommended the related Secretary that he should pay attention to the disciplinary procedures against public servants under his supervision in order to prevent appointing non-public-servants as pre-examiners without just cause; requested the pre-examiner to adopt effective and practical investigation measures according to the law and to carefully analyze the facts and legal grounds, in order to ensure that the administrative authorities handle the disciplinary infringements of public servants impartially and affirm the fulfilment of the obligations of public servants;

(2) Suggested the related Secretary that he command Bureau T to re-examine the academic qualifications of employee I; requested the Tertiary Education Services Office to provide opinions based on Article 5 of Administrative Regulation No. 26/2003 in order

to prevent the scrutiny conducted by the office from being challenged again;

(3) Recommended that the Chief Executive order a review over the current practices of scrutinizing academic qualifications in order to coordinate the functions of the related departments particularly to clearly define the role and duties of the Tertiary Education Services Office.

In response to the CCAC's recommendations, the Secretary stated that he would ask all departments under his supervision to consider carefully whether non-public-servants were qualified for the position of pre-examiner for disciplinary procedures. In addition, the Secretary instructed Bureau T to request the Tertiary Education Services Office to jointly investigate the case of recognition of employee I's academic qualifications. It also requested the Tertiary Education Services Office to analyze the current practices of scrutinizing academic qualifications, to study how to coordinate function of all related departments, the role of the Office, etc. Progress will regularly be reported to the Chief Executive.

II. File No. 22/2006

Subject: The Absence of Pregnant Public Servants Resulting from Prenatal Care/ Checkups

Many public servants reported to the CCAC that public departments/institutions were inconsistent in handling the question of whether pregnant public servants should make up absence hours resulting from "prenatal care/checkups". Some specific departments even had handling standards that were different from those adopted by their subsidiary units, resulting in unfair treatment for pregnant public servants. After its first-stage investigation, the CCAC discovered that such discrepancies did exist and were mainly attributable to the absence of a clear stipulation in the current legal system governing the staff of the public administration. Consequently, departments adopted different standards of law enforcement leading to disparities in treatment.

The CCAC thus commenced its investigations:

1. The General Regulations Governing the Staff of the Public Administration of Macao ("General Regulations") did not stipulate the definitions and standards of "medical consultation" and "outpatient treatment"; neither did the authority issue any related guidelines. As a result, in practices, in some departments it was up to supervisors to decide whether the public servants who were directly subordinate to them need make up their absence hours. Some departments relied on whether the "medical certificate" or "proof of presence" indicated "medical consultation"; other departments relied on whether public servants held an "appointment notice" issued by doctors (i.e. appointment notice of outpatient treatment, to ascertain "outpatient treatment" so as to decide whether related public servants had to make up their hours. In addition, some supervisors in charge of human resources and administrative matters confided to the CCAC that the obscure definitions given by the related regulations and the lack of guidance by the authorities resulted in great obstacles in administrative work. They were sometimes even accused unfairly by their colleagues.

2. In terms of the nature of "prenatal care/checkups", Bureau A - which was responsible for explaining the legal system governing the staff of the public administration- believed that "the monthly prenatal checkups are a kind of outpatient treatment because legislators did not define outpatient treatment by type".

3. Bureau S believed that "prenatal checkups are normal regular check-ups . . . if prenatal syndromes occur, the number of prenatal checkups and subsidiary checkups will increase according to actual circumstances . . . each prenatal checkups, pregnant women will receive a notice of the following outpatient treatment; if other checkups like scans and blood tests are needed, appointment notices for these additional checkups will be issued to the patient. "Consultations" depend on the actual needs of the patient. The doctor concerned will make suitable checkup arrangement'.

4. Even during public introductions of the service of "prenatal care/checkups", Bureau S stressed that females should schedule their first prenatal checkup promptly after confirmation of pregnancy and should follow their doctor's advice to take a series of prenatal care checks regularly. The authorities have been expanding their "prenatal care/checkups" service in Macao gradually since the 1990s. Recently, the Bureau even established the "Macao Prenatal Diagnosis Centre" to further strengthen its work in this field.

5. According to the opinions of an experienced obstetrician specialist in Macao, from

a medical perspective, "prenatal care/checkups" and "outpatient treatments" serve similar functions. Every pregnant woman is likely to have syndromes and thus prenatal checkups are necessary. Nevertheless, the feelings of sickness are subjective and it is up to individuals to decide whether or not to seek treatment.

6. Many experienced obstetrician specialists in Macao, from either governmental or non-governmental medical offices, believe that it is necessary for pregnant women to receive regular "prenatal care/checkups"; it is both their right and obligation to receive "prenatal care/checkups".

7. Both the World Health Organization and the Central Government believe that the State and the government are responsible for ensuring that women receive "prenatal care/checkups" "without obstacles".

8. Based on the above, it is unreasonable to regard "prenatal care/checkups" as ordinary "consultations".

9. It is necessary to emphasize that current regulations stipulate that special protection must be provided to pregnant women, i.e., pregnant, expectant and postnatal women can receive free healthcare. In addition, it is illegal to dismiss female employees during pregnancy and within three months postpartum. In addition, the current legal system governing staff of public administration in Macao provides assurance for female public servants during pregnancy, delivery and baby-nurturing.

10. It is widely accepted throughout the world that it is not only a right but an obligation that females receive regular "prenatal care/checkups" according to medical advice; this affects not only personal and family needs but also the common interests of society as a whole. Thus, pregnant women should not selectively take "prenatal care/checkups" at their own will but should receive treatment/checkups according to the scheduled care/checkup plan. In this way, receiving "prenatal care/checkups" should not be regarded as ordinary "consultation".

11. Furthermore, the current service of "prenatal care/checkups" is provided during normal office hours. As an employer, the administrative authorities request pregnant public servants to carry out a deed that is both their right and obligation - receiving treatment/checkups - yet at the same time request them to make up the related hours which they cannot practically work; by contrast, mothers who choose to breast-feed their babies until their babies are

aged one may be remitted one hour of work. While both circumstances can be accounted for as reasonable absence based on the public interest and the inability to work, public servants should be exempt from making up the absence hours in both situations. Therefore, it is unreasonable to regard "prenatal care checkups" as ordinary "consultations" requiring compensation of working hours. It also deviates from the principle of legal interpretation of the system.

12. Certainly, it is preferable to specify clearly in legal system governing the staff of the public administration that it is regarded as a provision of service for pregnant public servants to be absent due to "prenatal care/checkups". A similar clause is formally stipulated in the current public servant law of Mainland China and Portugal.

13. However, under the circumstances where the law provides no clear stipulation, as an employer the administrative authorities should never utilise a legal interpretation to justify a scheme/plan that contradicts the logic of the law.

14. Therefore, even though the current legal system governing the staff of public administration has not been completely amended, the administrative authorities should proactively provide consistent interpretations and guidelines, allowing public servants to be exempt from work during the period of "prenatal care/checkups". This should be worked out to prevent unfairness with each department applying its own standards. In addition, the administrative authorities can set up a good example as a model employer in the Macao SAR, defend the rights and interests of pregnant women and exercise the governmental responsibility of ensuring the pregnant woman's health in the public interest.

15. Based on the above, the CCAC recommended Bureau A to issue consistent guidelines to all departments/institutions as mentioned above to prevent unfairness with each department applying its own measures and to reduce difficulties in administration. If necessary, Bureau A can turn to Bureau S for assistance.

In response to the CCAC's recommendations, Bureau A agreed that the law should provide protection for pregnant public servants. Bureau A promised to amend the current legal system governing the staff of the public administration to specify such women's rights and interests. In addition, Bureau A also promised to consider the possibility of issuing consistent guidelines to all departments/institutions upon receiving the suggestions of Bureau S.

III. File No. 14/2006

Subject: Stipulations of juvenile responsibility for violations of law in the General Regulations for Public Areas

The CCAC discovered that the General Regulations for Public Areas approved by Administrative Regulation No. 28/2004 on 16th August and the List of Illegal Acts approved by Dispatch No. 106/2005 issued by the Chief Executive regarding the juvenile responsibility for violations of law did not coincide with the current legal system. Accordingly, the CCAC informed the Office of the Secretary for Administration and Justice and the Civic and Municipal Affairs Bureau of the case. However, the formal reply by the Secretariat for Administration and Justice did not resolve the misgivings of the CCAC. The CCAC therefore commenced investigations to find out how the Civic and Municipal Affairs Bureau enforced the law in practice and conduct comprehensive research and analysis.

1. The stipulations of juvenile responsibility for violations of law in the General Regulations for Public Areas and the List of Illegal Acts do not coincide with the current legal system, especially the Juvenile Education Protection System, the General Regime of Administrative Infringements, the *Civil Code* and the *Penal Code*. In August 2005, the CCAC reported the discrepancies to the representatives from the Office of the Secretary for Administration and Justice and from the Civic and Municipal Affairs Bureau ('Civic Bureau'). The Office of the Secretary for Administration and Justice replied by formal letter in January 2006 and attached the related legal opinions (the "Opinions"), stating that there was no conflict between the General Regulations for Public Areas and the Juvenile Education Protection System and that the administrative authorities should not encounter any difficulties or doubts in exercising the General Regulations for Public Areas and in understanding what circumstances the Juvenile Education Protection System covers.

2. However, the analysis and conclusion of the "Opinions" failed to assuage the doubts of the CCAC.

3. The Decree-law No. 65/99 of 25th October stipulated an education and protection system targeting the crimes, minor infringements or administrative infringements committed by juveniles (i.e. the Juvenile Education Protection System). According to this system, related measures of education and protection would be adopted to target administrative infringe-

ments committed by juveniles based on their age: the protection measures are applicable to children under the age of 12; the education measures are applicable to juveniles aged from 12 to 15. The general regime is applicable to juveniles aged 16 or above. Based on the General Regime of Administrative Infringements, the stipulations relating to the age of responsibility in the *Penal Code* are applicable to the circumstances of administrative infringements. Therefore, juveniles aged 16 or above are regarded as persons accountable for legal liabilities and are fined as adults.

4. It merits mention that under the current juvenile-related legal framework, the legal representatives of juveniles, including parents and guardians, despite their responsibilities of disciplining the juveniles, are not regarded as the perpetrators of the related infringements. Nor are they liable to related penalties such as fines or imprisonment.

5. The *Civil Code* stipulates that persons responsible for disciplining juveniles according to the law or juristic acts are liable for the harms that such juveniles may cause to a third party. Such liability is subject to the fact that these people have not fulfilled their duty of disciplining the juveniles. Therefore, when they are able to prove that they have fulfilled the disciplinary duty, or to prove that the harms would still have happened even if they had fulfilled their disciplinary duty, they will not be held liable for the harms that such juveniles cause to a third party. In other words, if the offenders who cause harms to others are juveniles, their guardians are not regarded as offenders even though they are obliged to make compensations for the harms caused.

6. However, according to the General Regulations for Public Areas, juveniles who infringe these regulations and the List of Illegal Acts - juvenile delinquents - are liable to different legal consequences in four age ranges: no penalty for those under the age of 8; no penalty for those aged from 8 to 11 but the "accompanying and disciplining persons" will be sanctioned as offenders; those aged from 12 to 15 will be sanctioned and assume joint responsibility for the fines together with their legal representatives; for those aged from 16 to 17, if the offenders have come of age without any sources of income, they will be sanctioned and assume joint responsibility for the fines together with their legal representatives; if offenders have come of age and have a source of income, they must bear the whole responsibility for the penalties.

7. When comparing the legal consequences for "juvenile delinquents" in the General Regulations for Public Areas with the current Juvenile Education Protection System, the General

Regime of Administrative Infringements and the Penal Code, it is easy to find discrepancies.

8. Most obviously, the General Regulations for Public Areas targets "juvenile delinquents" aged 12 or above and request them to assume responsibility for the fines. Even though the regulations include a mechanism that the legal representatives undertake joint responsibility with offenders who have not come of age and have no source of income, "Juvenile delinquents" aged from 12 to 15 are clearly stipulated as the persons responsible for the concerned administrative fines. However, the existing legal system does not permit such a measure to be implemented.

9. It is noteworthy that according to the Juvenile Education Protection System, juveniles aged 12 or above - especially those aged from 12 to 15 - must receive educational measures determined by the judge if they have committed administrative offences, minor offences or even crimes. Even though it will result in financial loss for the juveniles, this kind of loss is only "to compensate for the harm caused based on the economic capacity of the juveniles". It absolutely does not refer to any responsibility for the fines (administrative or penal) incurred.

10. In addition, the General Regulations for Public Areas regards acts perpetrated by "juvenile delinquents" aged from 8 to 11 as if they were committed by the "accompanying and disciplining persons", i.e., sanctioning the "accompanying and disciplining persons" as offenders. In addition, the regulations also stipulate that if "juvenile delinquents" aged 12 or above have not come of age and have no source of income, their legal representatives must undertake the joint responsibility for the fines for the juveniles' offences. These responsibility-allocation regulations relating to the fines are also not permitted by the legal system formed in the current Juvenile Education Protection System, the General Regime of Administrative Infringements and the *Penal Code*.

11. Therefore, stipulations of penalties in the General Regulations for Public Areas are "innovative".

12. According to article 40 of the Basic Law, the right and freedom possessed by Macao residents cannot be restricted beyond the legal stipulations. However, the General Regulations for Public Areas, as "administrative regulations", have restricted residents' rights and freedoms beyond the current legal stipulations. Its legality should be challenged.

13. The "Opinions" state that the General Regulations for Public Areas regard the "ac-

companying and disciplining persons" as offenders with liability basically because they have not fulfilled their disciplinary duties. The "Opinions" also claim that the details of the related disciplinary duties had been stipulated in the *Civil Code* and therefore the penalty in the General Regulations has a legal foundation.

14. However, such arguments are groundless. First, if the persons who are "obliged to discipline" the juveniles aged 12 or under are responsible for ensuring that juveniles do not infringe the General Regulations for Public Areas, their "disciplinary duties" should be more prominent especially when they are accompanying the juveniles in person. In this way, the General Regulations for Public Areas should not have, on one hand, regarded the "accompanying and disciplining persons" as perpetrators of the offences committed by "juvenile delinquents" aged from 8 to 11, while on the other, failed to regard the "accompanying and disciplining persons" as perpetrators of the offences committed by "juvenile delinquents" under the age of 8, as the "accompanying and disciplining persons" for juveniles under the age of 8 have a much bigger responsibility compared with those for the 8-11 age group. However, according to the General Regulations for Public Areas, even if juveniles aged under 8 infringe related regulations in the company of their parents, the parents will not be penalized. Yet the "accompanying and disciplining persons" for juveniles aged from 8 to 11 will be penalized in the same case. From the perspective of "disciplinary duties", under which circumstances should parents assume greater responsibility? Under circumstances whereby juvenile offenders aged under 8 commit infringements when they are both mentally and physically immature and their actions are more easily controlled? Or under circumstances whereby juveniles aged from 8 to 11 commit offences when they are less easily controlled? It is clear that the "accompanying and disciplining persons" of the former have a greater responsibility.

15. In a deeper sense, the General Regulations for Public Areas simply stipulate that "if the offences are committed by juveniles aged under 12, they are regarded as being committed by the persons responsible for accompanying and disciplining the juveniles". In practice, this results in great doubt regarding decisions of penalty based on the harm, danger and risk caused or increased by the faults, past records and illegal acts. For example, when considering "faults", should it be based on the act of infringing the General Regulations for Public Areas, or on the failing to fulfil "disciplinary duties"? Even the administrative authorities who meted out the penalties can hardly clarify the ambiguity. Another example is that when the authorities consider the "past records" of the offenders should they consider past infringements of the

"accompanying and disciplining persons" against the General Regulations for Public Areas or of the disciplinary duties? When the administrative authorities must also consider "the harm, danger and risk caused or increased by illegal acts", should the standards be based on the harm, danger and risk caused or increased by the juveniles themselves with their offences against the General Regulations for Public Areas, or the harm, danger and risk caused or increased by the failure of the "accompanying and disciplining persons" to fulfil their disciplinary duties? Even the author of the "Opinions" himself has confusions in this matter.

16. Clearly, if the General Regulations for Public Areas regard the "accompanying and disciplining persons" simply as perpetrators of illegal acts and stipulate the related penalties accordingly, the illegality of infringing disciplinary duties will be mixed with the illegality of infringing the General Regulations for Public Areas.

17. According to the disciplinary duties of parents and those who exercise parental rights as stipulated by the *Civil Code*, the disciplinary duties of parents are not reflected simply by whether they accompany their children. If parents cannot accompany and discipline their children themselves and fail to entrust such duties to others and indulge their children aged under 12 in committing infringements in public areas, they have obviously infringed their disciplinary duties. However, the General Regulations for Public Areas do not penalize them accordingly for their infringements of disciplinary duties.

18. In addition, if juveniles aged under 8 are indulged in committing the same infringements as are those aged from 12 to 15, the parents of the former obviously bear greater disciplinary responsibilities than those of the latter do. However, the General Regulations for Public Areas stipulate that no penalty is required for the parents of the former while those of the latter must assume joint responsibility for the fines.

19. Moreover, the "Opinions" say that the General Regulations for Public Areas identify "accompanying and disciplining persons" as parents or legal representatives who are legally obliged to discipline the juveniles. However, the clauses in the General Regulations for Public Areas do not come to such a conclusion. The General Regulations stipulate that the related "accompanying and disciplining persons" are regarded as offenders and must bear the responsibility for any infringements committed by juveniles aged from 8 to 11. However, when it comes to the infringements committed by juveniles aged 12 or above, who have not come of age and have no source of income, the related legal representatives must assume the joint

responsibility for the fines. If the "accompanying and disciplining persons" refer to the legal representatives who accompany the juveniles when they commit offences, rather than the actual "accompanying and disciplining persons", based on the principle that legislators "should know how to articulate the meaning with appropriate terminology", the related clause in the General Regulations for Public Areas should have been written as "the legal representative who accompanies (the juvenile) at the time (of the offence)". Therefore, what the regulations mean by "accompanying and disciplining persons" are naturally perceived as the persons who "actually accompany and discipline" the juveniles when they commit offences.

20. If this argument is valid, the "accompanying and disciplining persons" do not necessarily refer to persons who are legally obliged to discipline the juveniles. Those who temporarily accompany juveniles out of kindness or as neighbours will also become the "accompanying and disciplining persons". In fact, when these individuals temporarily "accompany and discipline" such juveniles, they are also responsible for "keeping them away from danger" in terms of ensuring the personal safety of the juveniles. Thus, they are also obliged to take certain disciplinary action when the personal safety of the juveniles is under threat. Yet such disciplinary action can only be categorized as "keeping juveniles away from danger". If these persons are regarded as "accompanying and disciplining persons" envisaged by the General Regulations for Public Areas and should thereby bear the penalty resulting from the juveniles' offences against the General Regulations for Public Areas, while the parents or guardians who should truly undertake the requisite disciplinary duties do not have to compensate for their failure to fulfil such duties, the situation will be patently unfair.

21. According to the Juvenile Education Protection System, the administrative authorities are obliged to inform the judiciary authorities about the administrative infringements of the juveniles so that the latter can initiate related procedures. It is then up to the judge to decide which education or protection measures to adopt. However, the General Regulations for Public Areas stipulate only that the Civic and Municipal Affairs Bureau is in charge of monitoring and of sanctioning.

22. The General Regulations for Public Areas stipulate that the administrative authorities must observe the stipulations relating to the functions and power of other public departments. However, there is no mention that the Civic and Municipal Affairs Bureau is responsible for informing the judiciary authorities. The "Opinions" say that the administrative authorities will

act according to the Juvenile Education Protection System in regard to "juvenile delinquents" aged from 12 to 15. However, in reality, according to the information obtained from the Civic Bureau, the Civic Bureau has never reported offences to the Public Prosecutions Office per the directives of the Juvenile Education Protection System.

23. Therefore, there are conflicts between the General Regulations for Public Areas and the Juvenile Education Protection System, the General Regime of Administrative Infringements, the *Civil Code* and the *Penal Code*. In practice, the administrative authorities have failed to act according to the Juvenile Education Protection System as the "Opinions" have claimed.

24. Lastly, according to the Basic Law, non-local residents must also abide by the law and stipulations of Macao. When the General Regulations for Public Areas set up the "innovative" penalty rules for juvenile offenders, these rules should also be applicable to non-local residents. According to the General Regime of Administrative Infringements, after the identity of a non-local offender is confirmed, he must provide surety if not paying the fine. If he refuses to provide surety or pay the fine or lodges an appeal against the penalty decision, or if he refuses to pay the fine even after the reason for appeal is proved untenable, he will not be permitted re-entry after leaving Macao until the fine is paid. Therefore, many problems arise during implementation in practical situations when the above Regime for non-local infringers is combined with the stipulations in the General Regulations for Public Areas which specify different handling methods for the juvenile infringers at four age levels. For example, for non-local "juvenile offenders" aged from 12 to 15, their legal representatives are compelled to assume joint responsibility for the fines. However, if the "juvenile offenders" are incapable or refuse to pay the fine and surety, how can the authorities request their legal representatives to fulfil the joint responsibility? If the juvenile offenders finally leave Macao without paying the fine or surety and their legal representatives cannot be found, or if their legal representatives leave Macao without paying the fine or surety, should the juvenile offenders or their legal representatives be prohibited from re-entry? Or should both be prohibited from re-entry? It is doubtful whether the authors of the General Regulations for Public Areas have foreseen the consequences of applying the related regulations to non-local residents.

25. In summary, it is recommended that the authorities review again the General Regulations for Public Areas, especially in regard to the legality and logicality of the fine penalties borne by juveniles as well as the responsibilities borne by the individuals who are responsible

for disciplining the juveniles. The authorities should also refine the General Regime of Administrative Infringements as soon as possible so that the regulations targeting the infringements committed by juveniles can match the civic, administrative and penal nature of the offences under the Macao legal system. It should also be done to ensure that the legality of prosecution and sanction against administrative infringements is not challenged.