

For discussion on
28 November 2011

**Legislative Council Panel on
Administration of Justice and Legal Services**

**Proposed Creation of a Supernumerary Post of
Deputy Principal Government Counsel
in the Legal Policy Division of the Department of Justice**

PURPOSE

This paper invites Members' views on the proposed creation of a Deputy Principal Government Counsel (DPGC) (DL2) post in the Legal Policy Division (LPD) in the Department of Justice (DoJ) for a period of five years with effect from April 2012 to head a dedicated unit in LPD to handle the legal work in respect of constitutional development and electoral affairs.

JUSTIFICATION

Current situation

2. The LPD in DoJ provides advice to government bureaux and departments on whether a proposed policy or legislation is consistent with the provisions of the Basic Law, including provisions on human rights. It also provides advice on and promotes understanding of the law of the Mainland, and plays an active part in law reform. The Division also assists in formulating policy particularly in relation to the legal system and the legal profession.

3. The LPD is headed by the Solicitor General who is supported by three Principal Government Counsel (PGC). One of the PGC heads the Legal Policy (Constitutional) Section (the Constitutional Section) which comprises two units, namely the Basic Law Unit and the Human Rights Unit. The heads of these two units are pitched at DPGC rank.

4. Within the DoJ, the work in respect of constitutional development and election matters can be divided into the following two aspects –

- (a) the legal advisory and research work in respect of the development of constitutional and election laws; and
- (b) the advisory work in relation to the application of existing election legislation.

In the previous rounds of Chief Executive (CE), Legislative Council (LegCo), District Council (DC) and Village Representative (VR) elections held after the establishment of the Hong Kong Special Administrative Region (HKSAR), we see a growing, albeit cyclical, workload in relation to the front line legal advisory work, i.e., the advisory work in relation to the application of existing election legislation. Such work has generally been dealt with by counsel in the Civil Division (the Civil Advisory Unit), and where intricate issues are raised, the guidance of the PGC in LPD (Constitutional Section) would be sought. The work in respect of the development of constitutional and election laws has hitherto been dealt with by counsel at various levels, including DPGC, Senior Government Counsel (SGC) and Government Counsel, in LPD (in the Constitutional Section) under the steer of the PGC and included as part of the Basic Law and human rights portfolio.

The Constitutional Section

5. The work of the Basic Law Unit and the Human Rights Unit under the Constitutional Section in LPD focuses on providing specialised advice on constitutional law (Basic Law) and human rights law to ensure the consistency of new government policies and legislation with the requirements of the Basic Law, including the provisions on human rights. These two Units also provide legal advice on the Hong Kong Bill of Rights Ordinance, four anti-discrimination Ordinances and on international human rights treaties extended to the HKSAR, assist in promoting knowledge of the Basic Law, as well as advising and helping the Government defend its position in litigation concerning issues which carry Basic Law and human rights implications. The work in respect of the development of constitutional and election laws is but one facet of the array of duties in the Constitutional Section.

6. In the specific area of constitutional/election law development, the general work currently carried out by the Constitutional Section includes, inter alia, advising the Constitutional and Mainland Affairs Bureau (CMAB) on relevant provisions of the Basic Law, as well as on legislative amendments to be made to the various pieces of election-related legislation, including the Chief Executive Election Ordinance and the Legislative Council Ordinance. An example of such duties is CMAB's proposal to amend the Elections (Corrupt and Illegal Conduct) Ordinance to relax the regulatory regime regarding election advertisements. These duties are currently being carried out by the PGC with support from counsel in the Civil Advisory Unit and the LPD.

7. Against the backdrop of a new constitutional order, the Constitutional Section has seen a significant increase in its existing workload. Coupled with the novel and increased complexity of legal issues raised, as well as the shortening of timeframe for advice, the manpower in the Constitutional Section needs to be strengthened if it is to provide adequate and effective support to the Administration in order to tackle the new challenges associated with the constitutional development and changes that will take place in the near future.

Anticipated substantial increase in demand for legal advice

8. The Basic Law provides, in relation to selection of the CE and the election of members for the LegCo, that the ultimate aim is to elect the CE and the LegCo by universal suffrage, in the light of the actual situation of Hong Kong and in accordance with the principle of gradual and orderly progress. The decision of the Standing Committee of National People's Congress (NPCSC) of 2007 has made clear the universal suffrage timetable: Hong Kong may implement universal suffrage for the CE in 2017 and for the LegCo in 2020.

9. In 2010, the Government's proposed package to enhance the democratic elements of the two electoral methods for 2012 through the participation of elected DC members who have a broad electorate base was passed, and will be implemented, beginning with DC elections held in November 2011. It is anticipated that democratic development for Hong Kong will continue to roll forward now that the way has been paved for determining the universal suffrage models of 2017 and 2020.

10. The work in relation to constitutional development, in particular how to achieve the ultimate aim of selection of the CE by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures, laid down in BL45, is an important and serious task that may involve constitutional legal issues with increasing complexity and, from the legal policy perspective, such task demands the attention of a dedicated team at the right level. It is anticipated that there will be heavy demand for legal advice on the proposed measures, policies or legislative amendments required in order to move forward to meet the ultimate aim. The existing manpower in LPD would not be adequate to cater for such demand. New resources are required.

Advisory work in relation to existing election legislation

11. As mentioned above, the demand for legal advice and services in relation to the application of existing election legislation in the context of elections at various levels has been on the rise and we expect to see a continuous increase in the coming years. The tasks currently being carried out by an SGC in the Civil Advisory Unit include rendering advice on the interpretation and application of the various pieces of election-related legislation to the Electoral Affairs Commission (EAC), CMAB, Registration and Electoral Office (REO), Home Affairs Department (HAD) and the Independent Commission Against Corruption (ICAC).

12. The demand for the above legal advice and services will further increase in the election year in connection with issues such as advising on the criteria for delineation of geographical constituency/DC constituency boundaries; attending briefing of Revising Officers/Returning Officers and Assistant Returning Officers. During the election period, there will be increased demand for advice on candidates' eligibility to stand for election as well as the need to attend briefing sessions for candidates; advice on complaints relating to the election process, etc.

13. Taking the recent DC election as an example, three Government lawyers from the DoJ, namely the PGC in LPD, a DPGC (holding the supernumerary post mentioned in paragraph 14 below) and an SGC in the Civil Advisory Unit, were involved on the DC election polling day on 6 November 2011 as part of the headquarters team in the Central Command Centre to give instant legal advice and support to the Returning Officers or Assistant Returning Officers stationed in the 18 District Offices. On that occasion, 18 Government lawyers also acted as Assistant Returning Officer (Legal) providing legal advice to polling stations in the 18 Districts. After an election, considerable demand for advice relating to election petitions, payment of financial assistance to eligible candidates, destruction of election materials pending Police/ICAC investigation, and candidates' application for relief orders under the Elections (Corrupt and Legal Conduct) Ordinance, etc can be anticipated.

14. In view of the increased demand for advisory service in relation to the application of existing election legislation and the preparation for the coming CE and LegCo Elections in 2012, a supernumerary DPGC post has been created on 1 October 2011 for six months to provide the necessary directorate support for such work.

Proposed creation of a DPGC post

15. In order to provide effective and efficient legal support to the Administration in the important and sensitive task of Hong Kong's

democratisation and determining the universal suffrage models of 2017 and 2020, it is proposed that a dedicated unit (tentatively called the Constitutional Development and Elections Unit (the Unit)) would be formed to cope with the on-going and anticipated caseload in this respect.

16. The Unit is to be headed by a DPGC and supported by an SGC, to be re-deployed from the Civil Division to the Constitutional Section of LPD internally. From the operational point of view, there is good synergy in combining the front line advisory function with the handling of constitutional developmental issues under one single roof with the designated attention of one directorate officer. Such rationalisation of work enables a global view to be taken and would assist in developing legal expertise and ensuring sustainability.

17. The DPGC will be primarily responsible for the provision of legal advice to the Administration relating to constitutional development and electoral affairs. He/She has to provide dedicated legal support and services to the said important task, including researching and advising on legal issues and advising on legislative proposals. He/She has to assist the Administration to explain the legal aspects of the legislative proposals relating to constitutional development and electoral matters in Executive Council, LegCo or any other committees, as required. The importance of the subject matter demands the attention of a dedicated team at the right level. The legal work involved also requires a wide spectrum of knowledge in electoral law, constitutional law and human rights law. In view of the above, it is considered that the work should be handled by an experienced counsel at directorate level.

18. Being the head of the Unit, the DPGC will supervise the SGC to provide legal advice and support to relevant bureaux and departments, including the REO, on the existing election related laws and relevant legislative proposals. The DPGC will also have to supervise the SGC to ensure that effective and efficient legal support and services is provided to HAD in its exercise to review rural elections. The Unit will also deal with the legal issues relating to post-election reviews, complaints and appeals, and where necessary, work with the relevant bureaux on the follow-up amendments to the relevant legislation.

19. There is a rising demand for advisory service in relation to constitutional development and electoral affairs over the years and it is expected that the demand will continue as we move forward to achieve the ultimate aim of universal suffrage. Since the Constitutional Section is expected to meet service needs for a large volume of legal advice of great complexity in a timely manner, the demand on the Constitutional Section will be so demanding that it warrants the reinforcement of manpower through the creation of a dedicated Unit to cope with the increasing workload and to prevent the Constitutional Section from being further strained.

20. We expect that the coming five years from April 2012 to March 2017 will be crucial in terms of developing the universal suffrage models of 2017 and the associated legislation. Once the ground work has been done, the long-term need for this DPGC post should be reviewed. In terms of constitutional development and electoral affairs, 2017 would provide a natural point for reviewing our workload, including whether any adjustment to the composition of our legal team is needed. We therefore propose that the relevant DPGC post should be created for a period of five years starting from April 2012 and a review on the continued need for the post would be conducted in 2016.

Ranking

21. Given the importance of the subject matter and since the legal work involved is highly specialised, technical, requiring expertise in electoral law, constitutional law and human rights law, the post to be created should therefore be pitched at DPGC level in recognition of the knowledge and experience required and the level of responsibility. We propose that the DPGC post concerned should be created for five years starting from April 2012. The requirement for the post will be reviewed in 2016 having regard to the operational needs.

22. The job description of the proposed DPGC post is at **Annex 1**. An organisation chart showing the proposed change is at **Annex 2**.

ALTERNATIVE

23. There is no viable alternative. Other than the creation of the DPGC post, the alternative of staff redeployment has been considered but found to be not feasible. We are not able to meet these new demands from within existing staffing resources without serious disruption and depletion of provision of service in other essential areas. Without the post of DPGC to head the Unit, the existing directorate establishment of LPD will be inadequate to cope effectively with the substantial rise in demand for advice of increasing complexity on constitutional development and electoral affairs on a regular basis.

FINANCIAL IMPLICATIONS

24. The proposed creation of the DPGC post in DoJ will bring about an additional notional annual salary cost at mid-point of \$1,611,600. The full annual average staff cost, including salaries and staff on-cost, is \$2,257,000.

25. In addition, the proposal will necessitate the creation of a time-limited Personal Secretary I (PS I) post to support the proposed DPGC for five years at a notional annual salary cost at mid-point of \$324,360 and a full annual average staff cost, including salaries and staff on-cost, of \$468,000.

26. We will include the necessary provision in the Estimates of 2012-13 and subsequent years to meet the cost of the proposed creation of the DPGC and PS I posts.

ADVICE SOUGHT

27. Members are invited to comment on the proposal. Subject to Members' support, we will proceed to submit the staffing proposal to the Establishment Subcommittee and the Finance Committee.

Department of Justice
November 2011

Job Description
Deputy Principal Government Counsel
(Constitutional Development and Elections)

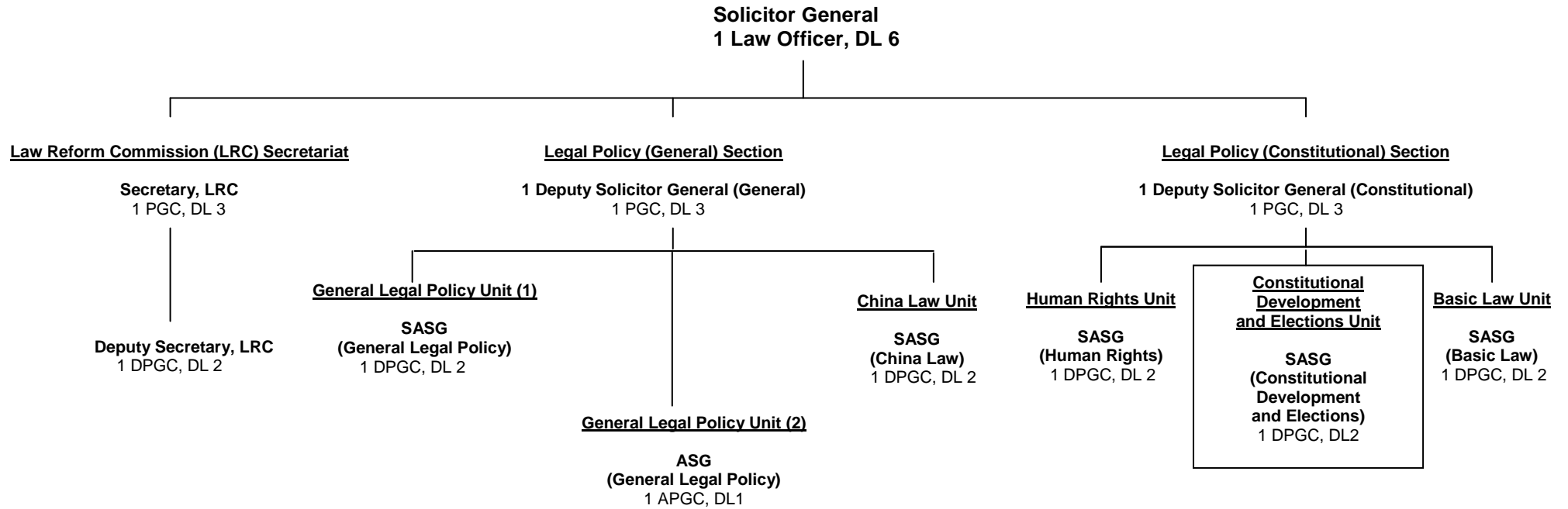
Rank : Deputy Principal Government Counsel (DL2)

Responsible to : Deputy Solicitor General (Constitutional)

Main Duties and Responsibilities –

1. To provide legal advice and services to relevant Government bureaux and departments on matters relating to constitutional development and electoral affairs.
2. To appear before Executive Council, Legislative Council or any other committees, as required, to explain the legal aspects of legislative proposals relating to constitutional development and electoral matters.
3. To supervise and provide guidance to counsel of the Unit in providing legal advice and support to relevant Government bureaux and departments, including Constitutional and Mainland Affairs Bureau; Electoral Affairs Commission; Registration and Electoral Office, on the existing election related laws, and relevant legislative proposals.
4. To deal with matters relating to post-election reviews, complaints and appeals, and follow-up amendments to legislation.
5. To be responsible for the general administration of the Unit.
6. To perform any other duties as and when required in order to assist in the efficient and effective performance of the Legal Policy Division.

Existing and Proposed Organisation Chart of the Legal Policy Division



Legend :

- PGC – Principal Government Counsel
- DPGC – Deputy Principal Government Counsel
- APGC – Assistant Principal Government Counsel
- SASG – Senior Assistant Solicitor General
- ASG – Assistant Solicitor General
- Proposed DPGC post