

**For discussion
on 19 January 2000**

EC(1999-2000)35

ITEM FOR ESTABLISHMENT SUBCOMMITTEE OF FINANCE COMMITTEE

HEAD 92 - DEPARTMENT OF JUSTICE Subhead 001 Salaries

Members are invited to recommend to Finance Committee the creation of the following permanent post in the Legal Policy Division of the Department of Justice with effect from 1 March 2000 -

1 Deputy Principal Government Counsel
(DL2) (\$116,650 - \$123,850)

PROBLEM

The existing supernumerary post of Deputy Principal Government Counsel (DPGC) (DL2) created to head the Basic Law Unit in the Legal Policy Division of the Department of Justice (the Department) will lapse on 1 March 2000. However, there is a continuing need to provide a legal advisory service in respect of the Basic Law and related constitutional issues.

PROPOSAL

2. The Secretary for Justice (SJ) proposes to create a permanent post of DPGC in the Legal Policy Division with effect from 1 March 2000 to provide continued directorate support to cope with the increasing demands for advice on the Basic Law and other constitutional issues.

/JUSTIFICATION

JUSTIFICATION

The Basic Law Unit

3. We established a Basic Law Unit in the Legal Policy Division in March 1997 to provide specialised advice on the Basic Law to both the Administration and internally within the Department. The Basic Law Unit is headed by a supernumerary post of DPGC, designated as DPGC/Basic Law (DPGC/BL). Through internal redeployment of resources, DPGC/BL is currently supported by two Senior Government Counsel (SGC) and four Government Counsel (GC) (including one temporary GC), compared with the original establishment of two SGC in March 1997. The Unit provides advice on new policies and legislative proposals initiated by the Administration, as well as amendments to existing laws and regulations, so as to ensure that they are consistent with the Basic Law. With the growing volume and complexity of bills and subsidiary legislation in the last few years, clearance of such bills, etc from the Basic Law angle (in conjunction with the Human Rights Unit) demands continuous specialist input at the DPGC level. DPGC/BL is also required to handle the more sensitive and complicated legal issues arising under the Basic Law.

Increase in Workload

4. Since the coming into effect of the Basic Law in the Hong Kong Special Administrative Region (HKSAR) on 1 July 1997, there has been a growing demand for specialised advice on the Basic Law. The number of pieces of written advice provided by the Basic Law Unit has increased sharply by 130% from 212 in 1997 to 487 in 1998, and by another 82% to 887 in 1999. In the light of these statistics, we expect that the demand for Basic Law advice will continue to be substantial in the coming years.

5. Volume aside, the number of complicated legal issues dealt with by the Basic Law Unit has also increased significantly. These include the right of abode issues under Article 24; the provisions relating to public servants under Articles 99 to 103; the economic provisions under Chapter V; the external affairs power of the HKSAR under Chapter VII; and the mechanism for amending the Basic Law under Article 159. Consideration of these issues requires detailed research from a comparative law angle into the law and practice of other jurisdictions.

6. In addition to advice, DPGC/BL also assists policy bureaux in attending Legislative Council (LegCo) panel meetings to explain to Members the views and research results of the Administration on those complicated issues, such as conflicts of jurisdiction between the HKSAR and the Mainland, and amendment of the Basic Law under Article 159. Moreover, as a member of the Basic Law Litigation Committee of the Department, DPGC/BL regularly advises on issues arising out of litigation involving the Basic Law, which has been on the increase. These litigation include those on the right of abode issues under Article 24, and in relation to the national flag law under Article 18 and its relationship with the human rights guarantees under Article 39 of the Basic Law.

7. Apart from providing Basic Law advice and support in litigation, DPGC/BL also renders significant assistance to the Administration in promoting greater understanding of the Basic Law both within the civil service and in the community. In this regard, DPGC/BL is responsible for overseeing the compilation and revision of Basic Law materials (including self-learning booklets, the Basic Law Information Note and other training materials) in conjunction with the Civil Service Training and Development Institute (CSTDI). He is also responsible for conducting Basic Law seminars primarily for civil servants and relevant departments jointly with the CSTDI. Twenty-five seminars were conducted in 1998 and 17 were organised in 1999. The themes of these seminars range from a general introduction to the Basic Law to specialist topics such as fundamental rights, economic provisions and external affairs power of the HKSAR under the Basic Law. We anticipate that the demand for Basic Law seminars will continue in future, particularly on topical issues and regular updates of the Basic Law principles laid down by the HKSAR courts.

8. Besides, DPGC/BL also has the overall responsibility to oversee the establishment of a comprehensive database on legal opinions and background materials relating to the Basic Law for reference of counsel in the Department. This involves not only a systematic compilation of legal opinions on specific matters already given to government bureaux and departments, but also the gradual preparation of research papers on topics under various Basic Law provisions, the interpretation and application of which the HKSAR courts have not yet had an opportunity to give guidance on. This requires detailed research into international and comparative jurisprudence by a dedicated team under the close supervision and guidance of DPGC/BL.

/Need

Need for a Permanent DPGC Post

9. The Basic Law is the yardstick for measuring the constitutionality of the HKSAR laws passed by the HKSAR legislature and of the policies and practices adopted by the HKSAR Government. Being the supreme law of the HKSAR passed in accordance with Article 31 of the People's Republic of China Constitution, the Basic Law forms the basis upon which the constitutional principle of "one country two systems" is implemented. It is therefore essential that the Basic Law is correctly applied by the HKSAR Government and the courts.

10. The constitutional obligation to comply with the Basic Law will last so long as it is in place in the HKSAR i.e. for at least 50 years. Every new legislative proposal, every amendment to HKSAR laws and regulations, and every new policies or change of existing policies must comply with the Basic law. We therefore expect that demand for Basic Law advice on these issues will continue on a permanent basis.

11. Moreover, experience from other jurisdictions (e.g. Canada, USA, Australia and South Africa) shows that constitutional issues will arise on a regular basis, given the ongoing constitutional duties of the government and the legislature. An additional dimension in the context of the Basic Law is the mutual co-operation between the HKSAR and the Mainland where different legal systems operate. The Basic Law will provide important guidance to the two jurisdictions in their mutual co-operation. We therefore expect that legal advice on the implications of the Basic Law in Mainland-HKSAR relationship will be required on a regular basis.

12. Given the importance of the Basic Law and the legal complexities associated with this constitutional instrument, it is important that the Basic Law Unit must be headed by a directorate officer who should possess a solid background in the common law tradition, as well as knowledge in international law and comparative constitutional law. The officer should also be conversant with the underlying values of the Hong Kong legal system (including the rule of law, independence of the Judiciary, and respect for fundamental rights and freedoms) as well as the constitutional history leading to the transformation of Hong Kong to a special administrative region of the People's Republic of China and the new constitutional order established under the Joint Declaration and the Basic Law.

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13. DPGC/BL, like any other lawyer, should be bound by his professional duty to provide his client bureau/department with a competent legal opinion based on sufficient knowledge of the relevant facts and adequate consideration of the applicable law. He should ensure that the client bureau/department is fully apprised of the implication of a proposed policy or action and any related legislative proposals. Where a certain matter is particularly important and sensitive, DPGC/BL would refer it to more senior officers within the Department, and ultimately SJ, for consideration. The professional advice of DPGC/BL and the background research conducted by him and his Unit will assist senior officers and, where warranted, SJ to form a departmental view on the matter.

14. Under Article 63 of the Basic Law, the Department headed by SJ "shall control criminal prosecutions, free from any interference". For Basic Law cases in the criminal context, it is for SJ and officers under her supervision to independently conduct the prosecution and to argue on Basic Law issues free from any interference, including that of policy bureaux. If a case involves issues of broad policy or constitutional implications, the Department will take the initiative to consult the relevant policy bureaux but the decision as to whether to prosecute and the conduct of the criminal proceedings (including the Basic Law arguments) will ultimately remain that of SJ.

15. In respect of all Basic Law advice, the Department will impress upon the client bureau/department the constitutional importance of adhering to the Department's advice on the Basic Law. This will help to ensure that all proposals of the client bureau/department are fully compatible with the constitutional provisions of the Basic Law. In the final analysis, SJ will advise the Chief Executive in Council whether a bureau's proposal is or is not consistent with the Basic Law.

16. Having regard to the above and in light of the experience of the supernumerary DPGC/BL post over the past two years, SJ considers that there is a functional need for a DPGC post on a permanent basis to -

- (a) head a dedicated team of lawyers providing specialist advice on the Basic Law on a regular basis to meet the huge and rising demand for such advice in the coming years;
- (b) provide legal advice on sensitive and complex issues or projects on Basic Law issues which require input at the directorate level;

/(c)

- (c) assist the Administration in handling Basic Law issues, in responding to enquiries raised by LegCo Members and in attending meetings of LegCo panels and committees;
- (d) provide directorate support to the SJ on important Basic Law issues arising from Basic Law litigation and mutual legal assistance with the Mainland and overseas;
- (e) promote greater understanding of the Basic Law within the civil service and to the community; and
- (f) oversee the maintenance and expansion of the legal databases initiated by the Basic Law Unit.

17. Given the high volume and level of complexity of work of the other dedicated units in the Legal Policy Division, SJ considers it not possible to redeploy resources from within the Division, or indeed the Department, to meet the increasing demand for Basic Law advice and assistance. SJ therefore proposes the creation of a permanent DPGC post with effect from 1 March 2000 when the existing supernumerary DPGC/BL post will lapse. We set out the main duties and responsibilities of the proposed permanent DPGC post and the proposed organisation chart of the Legal Policy Division at Enclosures 1 and 2 respectively.

Encls. 1&2

FINANCIAL IMPLICATIONS

18. The additional notional annual salary cost of this proposal at MID-POINT is \$1,443,000. The full annual average staff cost of the proposal, including salaries and staff on-costs, is \$2,583,000.

19. We have included the necessary provision in the 1999-2000 Estimates to meet the cost of this proposal.

20. This proposal has no direct consequence on the non-directorate establishment of the Department of Justice.

/BACKGROUND

BACKGROUND INFORMATION

21. We first put forward the proposal to create a permanent DPGC post in the Basic Law Unit to the Establishment Subcommittee in June 1996 *vide* paper EC(96-97)22. However, Members expressed reservations about the permanent need for the post. Having considered Members' views, we considered it prudent to create a DPGC post on a supernumerary basis first, and to review the continued need for the post at a later stage. On 14 February 1997, the Finance Committee approved Members' recommendation (*vide* EC(96-97)50) for the creation of a supernumerary post of DPGC in the Legal Policy Division to head the Basic Law Unit for a period of three years with effect from 1 March 1997. The Department has recently reviewed the work of the Basic Law Unit and considers that there is a continued need for the post. Far from reducing after re-unification, the volume of Basic Law advice has been increasing and, given the nature and complexity of constitutional issues, will require the dedicated attention of a directorate officer on a permanent basis.

CIVIL SERVICE BUREAU COMMENTS

22. Having regard to the increasing volume and complexity of work in relation to provision of advice on Basic Law, the Civil Service Bureau supports the creation of the proposed permanent directorate post in the Basic Law Unit of the Legal Policy Division. The grading and ranking of the proposed post are considered appropriate.

ADVICE OF THE STANDING COMMITTEE ON DIRECTORATE SALARIES AND CONDITIONS OF SERVICE

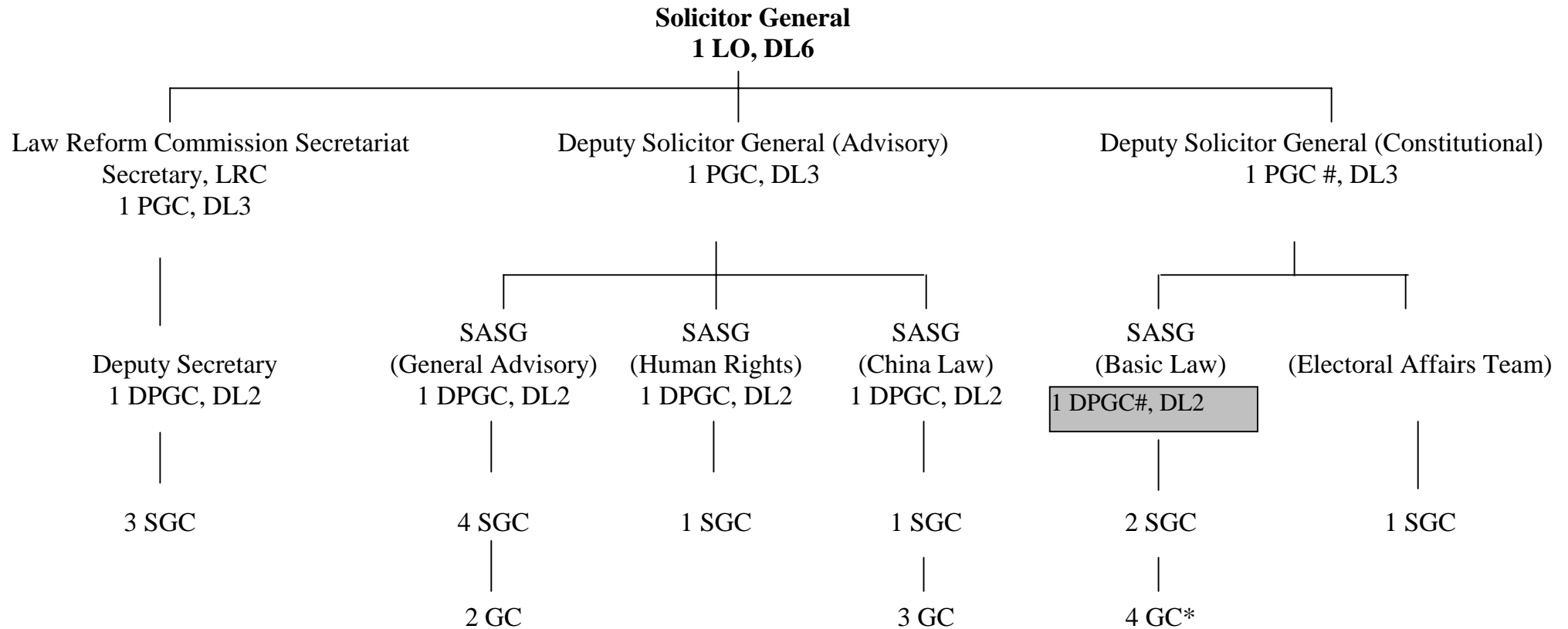
23. The Standing Committee on Directorate Salaries and Conditions of Service has advised that the grading proposed for the post would be appropriate if the post were to be created.

**Main duties and responsibilities of the
Deputy Principal Government Counsel (DL2)
(Senior Assistant Solicitor General (Basic Law))**

Responsible to the Deputy Solicitor General (Constitutional) for -

- (1) advising policy bureaux and Government departments on matters relating to the Basic Law;
- (2) providing support, at the directorate level, to the Secretary for Justice and the Administration on sensitive and complex issues or projects on the Basic Law, in responding to enquiries raised by LegCo Members and in attending meetings of LegCo panels and committees ;
- (3) advising on Basic Law litigation and acting as a member of the Basic Law Litigation Committee;
- (4) establishing a comprehensive database on legal opinions and other materials relating to the Basic Law;
- (5) conducting seminars and compiling training materials on the Basic Law for civil servants of different ranks;
- (6) establishing and maintaining contact with counterparts in the Mainland;
- (7) directing and supervising the day-to-day work of the Basic Law Unit; and
- (8) performing such other duties as may be assigned from time to time by the Deputy Solicitor General (Constitutional).

Existing and Proposed Organisation Chart of the Legal Policy Division



- Legend:
- LO = Law Officer
 - PGC = Principal Government Counsel
 - DPGC = Deputy Principal Government Counsel
 - SGC = Senior Government Counsel
 - GC = Government Counsel
 - SASG = Senior Assistant Solicitor General
 - # = Supernumerary post
 - = Proposed creation of DPGC post on a permanent basis
 - * = Including 1 temporary GC and 3 GC on loan from other divisions