

**Information Note on the
Creation of a Permanent Deputy Principal Government Counsel Post
for Basic Law Unit, Legal Policy Division**

This Note provides additional information on the Department of Justice's proposal to create a permanent post of Deputy Principal Government Counsel/Basic Law (DPGC/BL) in the Legal Policy Division of the Department, in response to the request of the LegCo Panel on Administration of Justice and Legal Services (AJLS) raised at its meeting of 16 November 1999.

2. Before responding to the first three issues raised by the AJLS Panel, it will be helpful to put the role of DPGC/BL within the wider context of the operational structure of the Department of Justice. It will also be helpful to set out in greater detail the need for a permanent DPGC/BL post in the Department of Justice.

Role of DPGC/BL within the Operational Structure of the Department of Justice

3. DPGC/BL is the head of a team of Basic Law and constitutional law specialists responsible for advising the Administration on various Basic Law issues. The post is pitched at DL 2 in line with the arrangement of the Department of Justice. Professional officers of the Department operate primarily on unit basis, each unit headed by a professional officer at the rank of DPGC. For example, there are 16 units within the Prosecutions Division each headed by a DPGC. The same operational structure is found in the Legal Policy Division and the Civil Division.

4. Each of these units is in turn supervised by a Deputy Law Officer (at DL 3) who may, depending on his duties and the workload of each individual unit, be responsible for the supervision of one or more of such units. For example, Deputy Law Officer (Civil Law)/Advisory (at DL 3) supervises two units (Civil Advisory I and Civil Advisory II) each headed by a DPGC. Deputy Solicitor General (Advisory) (at DL 3) supervises three units (General Advisory Unit, Human Rights Unit and China Law Unit) each headed by a DPGC. In the case of the Basic Law Unit, it is under the supervision of Deputy Solicitor General (Constitutional) (DL3) who is also responsible for

advising on electoral matters. The Law Officer (at DL 6) of individual divisions of the Department will also supervise the individual units where the nature of the matter concerned so warrants. Because of the importance of the implementation of the Basic Law in the Hong Kong Special Administrative Region (HKSAR), the Solicitor General of the Legal Policy Division closely supervises the Basic Law Unit in respect of important and sensitive issues and personally handles important Basic Law matters from time to time with close support by DPGC/BL via Deputy Solicitor General (Constitutional).

5. In addition to the supervisory relationship between senior officers of the Legal Policy Division and DPGC/BL, DPGC/BL also provides Basic Law support to other units of the Department. Thus, while the Prosecution Division and the Civil Division each have their own specialist units dealing with Basic Law-related prosecution and litigation, on important cases (e.g. flag case and right of abode cases), research and advisory input will be given by the Basic Law Unit (e.g. commenting on draft submissions of counsel) either directly or through the inter-divisional Basic Law Litigation Committee chaired by the Solicitor General which includes the Law Officer (Civil Law) and the Director of Public Prosecutions as its Committee members.

6. The present proposal is to convert the supernumerary post of DPGC/BL into a permanent post in line with the Department's operational structure so that the Basic Law Unit as headed by DPGC/BL could continue to provide advisory support, through its supervising officers Deputy Solicitor General (Constitutional) and Solicitor General, to the Administration on the implementation of the Basic Law.

Need for a permanent DPGC/BL post

7. 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 Administration. As the supreme law of the HKSAR passed in accordance with Article 31 of the People's Republic of China (PRC) Constitution, it forms the basis upon which the constitutional principle of "one country two systems" is implemented. Indeed, "the systems and policies practised in the HKSAR, including the social and economic systems, the system for safeguarding the fundamental rights and freedoms of its residents, the executive, legislative and judicial systems, and the relevant policies, shall be

based on the provisions of [the Basic] Law” (Article 11 of the Basic Law). It is therefore highly important that the Basic Law is correctly applied by the Administration.

8. The constitutional obligation to comply with the Basic Law will last for 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. Demand for Basic Law advice on these issues is therefore expected to continue on a permanent basis.

9. Experience from other jurisdictions shows that constitutional issues will arise on a regular basis (e.g. Canada, USA, Australia, South Africa), 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. It could therefore be expected that legal advice on the implications of the Basic Law in Mainland-HKSAR relationship will be regularly required.

10. Given the importance of the Basic Law and the legal complexities associated with this constitutional instrument, it is important that the Basic Law Unit operating within the above-mentioned structure of the Department of Justice could continue to provide advice to client bureaux/departments and provide litigation support to the Prosecutions Division and Civil Division. The continuation of the post of DPGC/BL on a permanent basis will help to ensure that the Basic Law is effectively implemented in the HKSAR.

The qualities and qualifications required of the right candidate to match the importance of the post of DPGC/BL

11. As observed by Chan CJHC in the Court of Appeal’s decision in *HKSAR v David Ma* [1997] HKLRD 761, at 772I – 773B,

“The Basic Law is not only a brainchild of an international treaty, the Joint Declaration. It is also a national law of the PRC and the constitution of the HKSAR. It translates the basic policies enshrined

in the Joint Declaration into more practical terms. The essence of these policies is that the current social, economic and legal systems in Hong Kong will remain unchanged for 50 years. The purpose of the Basic Law is to ensure that these basic policies are implemented and that there can be continued stability and prosperity for the HKSAR. Continuity after the change of sovereignty is therefore of vital importance.

...

The Basic Law is a unique document. It reflects a treaty made between two nations. It deals with the relationship between the sovereign and an autonomous region which practises a different system. It stipulates the organisations and functions of the different branches of government. It sets out the rights and obligations of the citizens. Hence, it has at least three dimensions: international, domestic and constitutional. It must also be borne in mind that it was not drafted by common law lawyers. It was drafted in the Chinese language with an official English version but the Chinese version takes precedence in case of discrepancies. That being the background and features of the Basic Law, it will be obvious that there will be difficulties in the interpretation of its various provisions.”

12. Given the international, domestic, and constitutional dimensions of the Basic Law, the underlying purpose of the Basic Law to maintain the pre-97 Hong Kong legal system, as well as the complexities associated with its interpretation, it is important that the candidate for the post of DPGC/BL possesses a solid background in the common law tradition, as well as knowledge in international law (particularly international treaty law) and comparative constitutional law (including the mainland constitutional system). The candidate must 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 from a British colony to a special administrative region of the PRC and the new constitutional order established under the Joint Declaration and the Basic Law.

As the duty of DPGC/BL involves advising the Government on sensitive Basic Law litigation and related constitutional issues, what safeguards are in place to ensure the independence of DPGC/BL in performing his duty, particularly in cases where there may be a potential conflict between adherence to policy and upholding of a high degree of autonomy in the HKSAR.

13. Like every other lawyer in Hong Kong, DPGC/BL is under a professional duty to provide his client (in this case the client bureaux and departments) with a competent opinion to the best of his ability based on sufficient knowledge of the relevant facts and adequate consideration of the applicable law. The advice must be honest and candid, clearly stating what the officer honestly thinks about the merits of the case.

14. In respect of advice on the Basic Law (including support on Basic Law litigation), the officer must comply with this professional duty and ensure that the client bureau/department is fully apprised of the implications of a proposed policy or action and any related legislative proposals.

15. When a request for advice comes before him, DPGC/BL with the assistance of his team will conduct detailed research and form an independent view on the merits of a particular draft proposal of his client bureau/department. In the normal course of event, such draft proposal will be revised to take into account the Basic Law implications so as to ensure that they will not be rendered unconstitutional by the court.

16. On difficult, less clear-cut issues, eg where there is no local judicial guidance on the full implications of a particular Basic Law provision, the client bureau/department, will be fully advised of the Basic Law Unit's view on the matter, risk of legal challenges, and whether such challenges could be defended in the light of comparative constitutional research. The comprehensive legal advice prepared by DPGC/BL and his team will provide the basis for the Administration to decide whether to proceed with the proposal. The above approach is fully in line with that adopted by lawyers in private practice.

17. Given the various dimensions of the Basic Law as highlighted by Chan CJHC in *the David Ma case's* above, Basic Law advice will need to take into account the underlying purpose of the Basic Law, the context of the particular

provision concerned as well as other aids to interpretation (including the Joint Declaration). While a high degree of autonomy as an important theme of the Basic Law is clearly enshrined in Articles 2 and 12 of the Basic Law, this is not the sole criterion in the interpretation of the Basic Law. Other factors, such as the international legal background (eg agreement of the Sino-British Joint Liaison Group), the constitutional status of Hong Kong as a special administrative region of the PRC and the underlying Mainland constitutional framework, as well as the theme of continuity of the Basic Law should also be taken into account.

18. DPGC/BL, like any other lawyer, will need to apply his legal knowledge and skills to form a professional view on the interpretation of a particular provision and its implication on the proposal of the client bureau/department concerned. Where a certain matter is particularly important and sensitive, it may be referred to more senior officers within the Department of Justice, and ultimately the Secretary for Justice, 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, the Secretary for Justice, to form a departmental view on the matter.

19. The above brief explanation of the process leading to the issue of a professional opinion shows that there is no question of policy dictating what the legal advice is. The advice of DPGC/BL and other senior officers of the Department is formulated on an independent basis in line with their duties as professional legal advisers to the Administration.

The DPGC/BL is ultimately answerable to the Secretary for Justice who assumes the overall responsibility for advising the Chief Executive and the policy bureaux on legal matters. In this connection, how does the Secretary for Justice herself envisage her unique and independent role in safeguarding the rule of law and a high degree of autonomy in the HKSAR, in a situation where there may be a difference in opinion between the policy bureaux and the Department of Justice in relation to certain matters.

20. The Secretary for Justice is entrusted with a special constitutional role in the HKSAR. Under Article 63 of the Basic Law, the Department of Justice headed by the Secretary for Justice “shall control criminal prosecutions, free from any interference”. Therefore, for Basic Law cases in the criminal context,

it is for the Secretary for Justice 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 the Secretary for Justice.

21. In civil matters with a Basic Law dimension, the Department of Justice offers independent professional advice on civil litigation and non-contentious matters (e.g. legislative proposals). Where particular civil proceedings relating to the Basic Law have serious implications going beyond the responsibility of the individual policy bureau, and also where the Department of Justice has a strong view on an issue relating to the Basic Law in a non-contentious context, the matter may be referred to a policy group of the Chief Secretary or, where the policy group concerned sees fit, to the Executive Council for decision.

22. In respect of all Basic Law advice, the Department of Justice will impress upon the client bureau/department the constitutional importance of adhering to the Department of Justice'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, the Secretary for Justice will advise the Chief Executive in Council whether a bureau's proposal is or is not consistent with the Basic Law.

Comparative Perspectives and Exchange of Views

23. Because of the need to prepare comprehensive Basic Law advice and the absence of local judicial guidance on many of the provisions of the Basic Law, DPGC/BL and his team have in their advice made extensive reference to comparative constitutional materials from various jurisdictions (e.g. USA, Canada, Australia, South Africa, the Mainland and some civil law countries), as well as international legal principles. This approach has taken into full account Article 84 of the Basic Law which authorises the courts of the HKSAR to "refer to precedents of other common law jurisdictions".

24. Counsel of the Basic Law Unit have participated in constitutional and comparative law seminars organised both in and outside Hong Kong. Some have gained experience in overseas jurisdictions (e.g. South African Constitutional Court).

25. The Department of Justice will also organise jointly with the Faculty of Law, University of Hong Kong, a one and a half day Constitutional Law seminar in April 2000 to commemorate the 10th anniversary of the promulgation of the Basic Law, primarily for members of the legal profession and those with an interest in comparative constitutional law. Overseas, mainland and local speakers with expertise in constitutional law will be invited to present a paper in the seminar. They will include a judge of the Supreme Court of Canada and a judge of the South African Constitutional Court.

26. The comparative constitutional research, participation in seminars and exchanges with members of the legal profession and others have all helped DPGC/BL and his team to give competent professional advice to the Administration in realising its commitment to implement the Basic Law in the HKSAR.

Department of Justice
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