

**For discussion on
19 December 2016**

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

**Proposed Creation of a Permanent 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 one permanent post of Deputy Principal Government Counsel (“**DPGC**”) (DL2) in the Legal Policy Division (“**LPD**”) of the Department of Justice (“**DoJ**”) with effect from 13 April 2017, or with immediate effect upon approval of the Finance Committee (“**FC**”) of the Legislative Council (“**LegCo**”), whichever is the later, to undertake essential duties in respect of constitutional and electoral matters.

JUSTIFICATION

Current situation

2. One important responsibility of LPD is to provide advice to Government bureaux and departments on whether proposed legislation, or a particular policy, is consistent with the Basic Law including provisions on human rights, and other relevant legal principles. LPD also provides advice and information on the laws of the Mainland, organises visits, training programmes and other promotional activities in order to develop and enhance mutual understanding of the legal systems and professional practices in the Hong Kong Special Administrative Region (“**HKSAR**”) and the Mainland. If the Secretary for Justice is responsible for a particular piece of new legislation, the Division takes an active role in preparing the bill and presenting it to the Executive and the Legislative Councils. It also falls on the portfolio of LPD, jointly with the Civil Division (“**CD**”), to promote Hong Kong as a leading centre for international legal and dispute resolution services in the Asia-Pacific region. Separately, dedicated counsel from LPD carry out necessary

research and provide secretariat services to the Law Reform Commission and its sub-committees.

3. LPD is headed by the Solicitor General who is supported by three Principal Government Counsel (“**PGC**”). One of the PGC heads the Constitutional Affairs Sub-division which comprises three units, namely the Human Rights Unit (“**HRU**”), the Basic Law Unit (“**BLU**”), and the Constitutional Development and Elections Unit (“**CD&EU**”).

4. Before the establishment of CD&EU in April 2012, the Constitutional Affairs Sub-division (then known as the Constitutional Section) comprised two units, namely BLU and HRU, each headed by a DPGC. The work in respect of constitutional and electoral affairs was undertaken jointly by LPD and CD. The advisory work in relation to the application of existing election legislation was generally dealt with by counsel in the Civil Advisory Unit of CD while the work in respect of the development of constitutional and election laws was shared between BLU and HRU. The work carried out by BLU and HRU included 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 (Cap. 569) and the Legislative Council Ordinance (Cap. 542). The work capacities of BLU and HRU were fully stretched as the two units had also been heavily involved in other responsibilities including providing legal input in the preparation and enactment of many pieces of legislation such as the Race Discrimination Ordinance (Cap. 602) and Minimum Wage Ordinance (Cap. 608), as well as the preparation of reports to the United Nations related to human rights. In view of the increased demand for advisory service in relation to the application of election legislation and the preparation for the Chief Executive Election (“**CEE**”) and LegCo Election (“**LCE**”) in 2012, a supernumerary DPGC post was created on 1 October 2011 for six months to provide the necessary directorate support for such work. Thereafter, given the anticipated rising demand for advisory service in relation to constitutional and electoral affairs, the creation of a supernumerary DPGC post for five years from April 2012 was approved by the FC.

5. CD&EU was set up in April 2012 following the creation of the above-mentioned supernumerary DPGC post, with the support of two Senior Government Counsel (“**SGC**”) (one SGC re-deployed from CD and one SGC created on 1 April 2014) and one Personal Secretary (“**PS**”) I. It was then envisaged that a review on the continued need for

the post would be conducted in 2016, having regard to the workload as well as the need (if any) to adjust the composition of the legal team advising on this important subject area.

Workload of CD&EU since 2012

Electoral Affairs

6. The work taken up by the Unit in the past four years in respect of electoral affairs centered around the provision of legal advice and services to CMAB, the Electoral Affairs Commission (“EAC”), Registration and Electoral Office (“REO”), Home Affairs Department (“HAD”) and the Independent Commission Against Corruption (“ICAC”)¹ in relation to the five sets of major public elections in Hong Kong (namely LCE, District Council Election (“DCE”), Rural Representatives Election (“RRE”), Election Committee Subsectors Election and CEE) and by-elections, plus Heung Yee Kuk Election (“HYKE”) and Rural Committee Elections (“RCE”)², as well as residual election-related issues (in particular voter registration exercises).

7. Generally speaking, the work that comes up during a typical election cycle includes pre-election preparation, provision of advice on polling day, post-election litigation, post-election review of electoral arrangement and legislative amendments. Coupled with the annual voter registration exercise (including preparation for objection cases) and possible by-elections, there is a constant demand for legal advice from CD&EU throughout the election cycle. The exact involvement of the

¹ This does not include the prosecution of election-related offences which is handled by the Prosecutions Division.

² RCE involves the election of Rural Committee (“RC”) chairmen and vice-chairmen from amongst the elected rural representatives returned from RRE, and the RC chairmen and vice-chairmen returned from RCE will participate in HYKE. Although HYKE and RCE are relatively limited in terms of scope and coverage when compared to the major public elections, the Heung Yee Kuk (“HYK”) and RC play an important part of our electoral system for the following reasons –

- (i) the 27 RC Chairmen are ex officio members of the nine District Councils in the New Territories;
- (ii) HYK members (including rural representatives, RC chairmen and vice-chairmen, as well as other relevant persons) are electorates of the HYK functional constituency and HYK subsector in our electoral system; and
- (iii) the elected candidate for the HYK functional constituency will be a LegCo Member of the HKSAR whereas the elected candidates for the HYK subsector will be Election Committee members who will elect the Chief Executive of the HKSAR.

Hence, there is a practical need for CD&EU to assist in advising on RCE and HYKE.

Unit in the various elections since 2012 are set out below, which demonstrated the fact that work relating to electoral affairs took up the resources of the Unit on a continuous basis.

8. Around the time of the establishment of the Unit, the first half of 2012 witnessed the annual voter registration cycle. While legal advice had always been sought from DoJ on the eligibility of and vetting procedures of applicants for voter registration, since 2012 was an election year, the 2012 voter registration cycle was particularly important, as the eligibility of a person to vote in the 2012 LCE would depend on whether his/her name was included in the final registers published in July 2012. With the introduction of the new District Council (second) functional constituency, most of the electors would have for the first time one vote for a geographical constituency and one other vote for a functional constituency to cast in the 2012 LCE. Moreover, in view of the public concern over the accuracy of registered addresses in the geographical constituency register following the 2011 DCE, REO had implemented a series of measures since January 2012 to widen the scope of checking to verify the accuracy of registered addresses. CD&EU provided its advice on the eligibility of and vetting procedures of individual and corporate applicants, as well as handled necessary advice and appearance before the Revising Officers on the claims and objections received during the claims and objections period.

9. The nomination period of the LCE started on the same day when the final voter registers were published on 18 July 2012. Prior to the nomination period, counsel in the Unit had to vet the draft Guidelines prepared by EAC for the 2012 LCE and the various specified forms, ICAC booklet on clean election and Gazette Notices. During the two-week nomination period from 18 to 31 July 2012, legal advice had to be rendered promptly. Apart from attending the Candidates Briefing at the close of nominations, numerous requests for legal advice were sought from CD&EU on complaints received and preparation for polling day on 9 September 2012. A total of 80 counsel from within and outside DoJ had been recruited to act as Assistant Returning Officers (Legal) (“**ARO(L)**”) to render legal advice to the Returning Officers during the counting of votes. CD&EU had to prepare briefing materials for all ARO(L) to assist them in providing legal advice on the determination of questionable ballot papers. The overall time span of the 2012 LCE exercise was short and back-to-back. The handling of advisory work of such urgency and volume was only made possible with the dedicated CD&EU.

10. Although 2013 and 2014 were non-election years, there were three and four DC by-elections in 2013 and 2014 respectively. As for the Rural Representative by-elections, it is an established practice that two by-elections are held every year to fill vacancies of rural representatives. Apart from giving legal support for by-elections, the Unit had the usual workload including the legislative amendment exercises and annual voter registration matters, etc. It is also noteworthy that the constitutional development reform had its public consultation begun in December 2013 which formed the main focus of the Unit's work since mid-2013.

11. The last round of RRE, RCE and HYKE was held in the first half of 2015. Like DCE and LCE, RRE is held every four years. The voter registration exercise and the claims and objections hearings in the second half of 2014 were of particular importance because only when a person's name was registered on the registers that he/she could cast his/her vote on the polling day. Counsel from CD&EU had appeared before the Revising Officers on behalf of HAD in some cases. Similar to the timing of previous exercises, shortly after RRE was held in January 2015, the newly elected rural representatives took part in the respective 27 RCEs held in March 2015, with the RC chairmen and vice-chairmen commencing their term of office on 1 April 2015. The RC chairmen and vice-chairmen then participated in the HYKE held on 1 June 2015. In these elections, CD&EU assisted in vetting all the relevant forms, EAC Guidelines for RRE, ICAC booklet and Gazette Notices in the normal manner. Counsel in the Unit were also required to act as ARO(L) on polling days.

12. Overlapping with the timing of RRE, RCE and HYKE, the voter registration for the current cycle of major public elections began in the first half of 2015, and CD&EU was involved in the exercise starting from its commencement by providing prompt legal advice to various parties. Prior to the November 2015 DCE, there was a record high of over 1 500 cases of claims and objections arising from voter registration entitlement which generated very heavy workload for CD&EU. Counsel of the entire CD&EU had to attend court hearings for two consecutive weeks because as many as three magistrates acting as Revising Officers had been appointed to handle all these cases at the same time in order to conclude the proceedings before the statutory deadline. As a result, in early November 2015, CMAB issued a public consultation paper on "*Enhancement of Voter Registration System*" inviting views from the public on the existing voter registration system. The five main issues raised in this consultation were (i) voter registration and checking arrangements, (ii) penalties on voter registration offences, (iii) review

of the objection mechanism, (iv) time limit for processing objection cases, and (v) the need for address proofs. The consultation report was released in January 2016. Legal advice on various issues was sought from CD&EU in preparing both the public consultation paper and the report. Meanwhile, a large number of requests for legal advice three to four months prior to and during the DCE was received from CMAB, EAC, REO, HAD and ICAC, and the time allowed to render legal advice was usually fairly short. On this occasion, 24 counsel were recruited to act as ARO(L) so as to assist in the determination of questionable ballot papers during the counting of votes. Moreover, there were six election petitions after the 2015 DCE whereby three respective Returning Officers and the Secretary for Justice were named as respondents, and CD&EU counsel had provided strong support to the handling of these cases.

13. In the first half of 2016, there has been a steady increase in requests for legal advice arising from the 2016 LegCo New Territories East Geographical Constituency By-election (held on 28 February 2016). There was also the LegCo General Election held in early September 2016 while the Election Committee Subsectors Election was just held in mid-December 2016. On these two occasions, 80 and 32 counsel had been recruited respectively to act as ARO(L) to assist the Returning Officers in the determination of questionable ballot papers during the counting of votes. Apart from these elections, CD&EU also had to provide legal advice on the handling of a number of election petitions and judicial reviews arising therefrom. Although the next CEE is to be held in late March 2017, CD&EU has already been consulted on incidental issues by CMAB, REO and ICAC on a regular basis.

14. Looking ahead, taking into account the current overall atmosphere, we anticipate that election matters will be increasingly complex, sensitive and controversial while election-related disputes would have to be handled in between elections. As demonstrated by the work pattern since the establishment of CD&EU in April 2012 as explained above, election-related matters are a steady (and heavy) source of work of CD&EU. The cycle of elections, plus the likelihood of occasional LegCo, DC and Rural Representative By-elections in between the major elections, actually takes up the resources of CD&EU on a continuous basis. Moreover, the electoral registers are updated annually, and apart from usual requests for advice from REO concerning applicant's eligibility, vetting procedures, checking REO's various standard letters to different kinds of electors, Gazette Notices and so on, there are also claims and objections for all the geographical constituencies, functional constituencies, subsectors and rural areas. Although the number of

cases varies every year (usually very high during an election year), it imposes a constant demand for legal advice from CD&EU.

Constitutional Matters

15. 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 last effort to implement universal suffrage for the CE began with a consultation in December 2013, and ended in June 2015 when the Government's motion to amend Annex I of the Basic Law did not obtain the required support from LegCo. If and when any constitutional reform package is to be introduced in future to this end, it is projected that there will be an enormous amount of preparatory, research and other incidental work on the part of the HKSAR Government touching on sensitive and complex legal issues in respect of which input from the Unit is required. Indeed, during the public consultation period in respect of the last constitutional reform package, the DPGC of the Unit had to deal with highly controversial and complex legal issues from time to time and conducted in-depth research on the highly specialised legal issues.

16. Moreover, if and when a motion relating to universal suffrage is passed by the LegCo, there will be substantial changes to our electoral system in the HKSAR with a view to reaching a full universal suffrage model for the CEE first and then for the LCE at a later stage. The majority of the existing electoral legislation will then have to be amended and a dedicated legal team headed at the appropriate level will be all the more inevitable.

17. Actual work in taking forward any constitutional reform proposals aside, past experience suggests that in the course of such work, it is likely that a fair amount of litigation may be brought to challenge the legality of such reform. This will place further burden on the substantial workload of CD&EU.

18. Apart from the above, CD&EU's advice is always sought on amendments or changes proposed to be made to our electoral system and law. Such legal advice has to be rendered promptly notwithstanding that the conduct of extensive research (e.g. comparison with the framework in other overseas jurisdictions) is often required.

The need for a permanent DPGC post

19. As illustrated from the situation of CD&EU explained in paragraphs 6 to 18 above, the work of the Unit (in particular that on the election front) runs on a continuous basis, despite various election cycles which only represent “peaks” in the on-going heavy workload. Besides, legal issues that may arise are becoming increasingly complex, technical and sensitive, and very often, counsel in CD&EU would need to carry out extensive research and detailed analysis on the subject matters (and possibly related issues as well) before advice could be provided thereon. As an election is to be conducted and its results declared within a relatively short period of time from the commencement of nomination (say, within two months), counsel have to render advice to relevant bureaux/departments very promptly and the entire Unit is thus put under substantial manpower stress. As for the post-election litigation including both election petitions and election-related judicial reviews, input from the election perspective is often required and in many of these cases, the relevant law and the underlying legal principles have to be applied in a highly fact-sensitive manner, making the advisory work an original, rather than a routine, exercise as references may not always be drawn from precedent cases. The satisfactory handling of work of such nature requires the dedicated attention and steer of a directorate officer.

20. In this regard, the unit head of CD&EU is primarily responsible for the provision of legal advice to the Government relating to constitutional and electoral affairs. He/She has to provide dedicated legal support and services to the said important and sensitive tasks, as well as supervise the SGC who render advice to the relevant bureaux and departments, including CMAB, EAC and REO on the existing electoral laws and legislative amendment proposals. Expert advice is also given to HAD in the course of RRE, HYKE and RCE. The Unit also deals with legal issues relating to post-election reviews, complaints and appeals.

21. Since the legal work relating to the constitutional and electoral affairs is highly specialised, complex and technical, requiring expertise and in-depth knowledge in a wide range of legislation on electoral law and related constitutional law and human rights law, it is essential that the responsibilities continue to be taken up by a directorate counsel at DPGC level who possesses the necessary knowledge and experience. There is a genuine need to provide for a permanent DPGC post in DoJ to address –

- (a) the anticipated demand for advisory services relating to electoral and constitutional matters;
- (b) the increasing complexity and sensitivity of the legal issues that are likely to be involved;
- (c) the heightened expectation to apply, in a fact-sensitive manner in respect of an elector or candidate alike, the prevailing law as from time to time revised and updated to each individual election or by-election to be held; and
- (d) the need to build, accordingly, the required in-house capability to give prompt legal support by developing and accumulating the necessary level of expertise in this specialised area of the law to meet the challenges ahead.

The proposed permanent DPGC post, if created, will continue to lead the CD&EU in rendering specialised and complex advice to CMAB, EAC, REO, HAD and ICAC. The existing and proposed organisation chart of the LPD and the detailed job description of the proposed DPGC post are at **Annex 1** and **Annex 2** respectively.

Non-directorate support

22. As mentioned in paragraph 5 above, the existing supernumerary DPGC post is currently supported by two SGC and one PS I, who will continue to provide support to the proposed permanent post of DPGC if this proposal is approved. Of the three supporting posts, the PS I post is time-limited and will lapse on 16 April 2017. A permanent PS I post will be created under delegated authority along with the creation of the permanent DPGC post.

ALTERNATIVE

23. There is no viable alternative. The existing heads of other Units in LPD at DPGC and APGC level are already fully occupied in providing legal advice and assistance under the relevant Unit's own purview to Government bureaux and departments. In recent years, we have seen a marked increase in the workload and the complexity of the issues involved. A dedicated directorate officer heading the CD&EU would be the only viable option to ensure that proper and sufficient steer can be provided on the aforementioned potentially complicated legal issues which have become a constant and inherent part of the job portfolio of the CD&EU in recent years. The possibility of redeploying existing staffing resources to undertake the above tasks and the increased workload has

been explored but is considered not feasible as resources in LPD are already fully stretched, and there is a need to develop sustainable expertise in electoral law to meet the demands of perennial public elections. If a permanent DPGC post is not created after the lapse of the existing supernumerary DPGC post, there will not be a directorate officer to head and lead CD&EU to deal with constitutional and election matters.

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 \$2,056,200. The additional full annual average staff cost, including salaries and staff on-cost, is \$2,874,000.

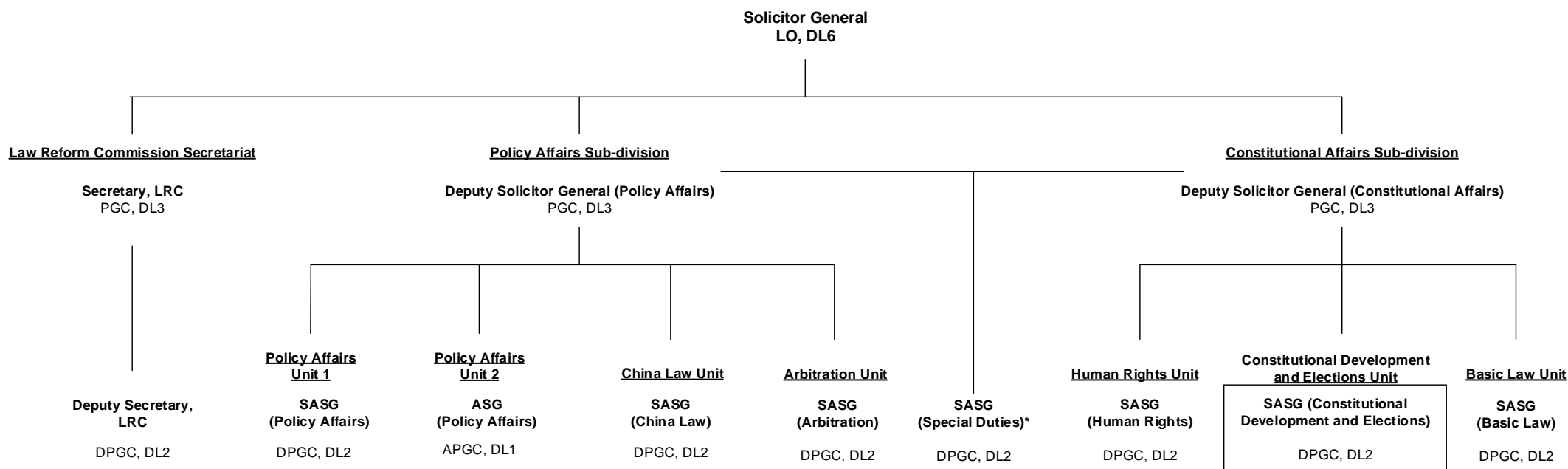
25. The proposed DPGC will be supported by three non-directorate staff as mentioned in paragraph 22 above, at a notional annual salary cost at mid-point of \$3,136,860 and the full annual average staff cost, including salaries and staff on-cost, is \$4,630,000. We will include sufficient provision in the draft Estimates of 2017-18 to meet the cost of this proposal.

ADVICE SOUGHT

26. Members are invited to comment on the proposal. Subject to Members' views, we will seek the recommendation of the Establishment Subcommittee and approval from the FC.

Department of Justice
December 2016

Existing and Proposed Organisation Chart of the Legal Policy Division



Legend :

- DL – Directorate Legal Pay Scale
- LO – Law Officer
- PGC – Principal Government Counsel
- DPGC – Deputy Principal Government Counsel
- APGC – Assistant Principal Government Counsel
- SASG – Senior Assistant Solicitor General
- ASG – Assistant Solicitor General

– Proposed permanent retention of one DPGC post

* – Supernumerary post for six months from 21 October 2016 to 20 April 2017

Job Description
Senior Assistant Solicitor General (Constitutional Development and Elections)

Rank : Deputy Principal Government Counsel (DL2)

Responsible to : Deputy Solicitor General (Constitutional Affairs)

Main Duties and Responsibilities

1. To provide legal advice and services to relevant Government bureaux and departments on issues relating to constitutional and electoral matters;
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 and electoral matters;
3. To supervise and provide guidance to counsel of the Constitutional Development and Elections Unit (“**CD&EU**”) 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 CD&EU; and
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.