

**For discussion
on 12 February 1998**

EC(97-98)70

ITEM FOR ESTABLISHMENT SUBCOMMITTEE OF FINANCE COMMITTEE

**HEAD 56 - GOVERNMENT SECRETARIAT : PLANNING,
ENVIRONMENT AND LANDS BUREAU AND WORKS
BUREAU**

**HEAD 92 - DEPARTMENT OF JUSTICE
Subhead 001 Salaries**

Members are invited to recommend to Finance Committee the creation of the following three permanent posts in the Works Bureau to head a Legal Adviser's Division -

1 Principal Government Counsel
(DL3) (\$127,900 - \$135,550)

2 Deputy Principal Government Counsel
(DL2) (\$110,000 - \$116,800)

offset by the deletion of the following permanent post
in the Department of Justice -

1 Deputy Principal Government Counsel
(DL2) (\$110,000 - \$116,800)

PROBLEM

Noting the cost-effectiveness in dispute resolution of the Airport Core Programme (ACP), the Secretary for Works (S for W) wishes to adopt

/similar

similar proceedings for non-ACP contracts and to improve legal advisory, litigation and alternative dispute resolution services to the Works Bureau (WB) and the Works Group of Departments¹. However, the wide spread of existing resources across the Lands and Works (L&W) Unit and the Civil Litigation Unit (CLU) of the Department of Justice and the New Airport Projects Co-ordination Office (NAPCO) of WB and the lack of a central unit to co-ordinate efforts do not lend support to this.

PROPOSAL

2. We propose to set up a dedicated Legal Adviser's Division (LAD) in WB by subsuming the Legal Advisory Division of NAPCO and part of the CLU and the L&W Unit in the Department of Justice, and to create three posts of one Principal Government Counsel (PGC) (DL3) and two Deputy Principal Government Counsel (DPGC) (DL2), offset by the deletion of one DPGC in the Department of Justice, to head the new Division.

JUSTIFICATION

Present arrangement

3. We now have three teams of lawyers in Government handling construction work: one PGC, one DPGC, three Senior Government Counsel (SGC) and one Government Counsel (GC) in NAPCO handling contract drafting, advice on contracts and dispute resolution; the equivalent of half of a DPGC and two SGC in the L&W Unit of the Department of Justice handling contract drafting and pre-letting contract advice; and the equivalent of half of a DPGC, two SGC and two GC in the CLU handling post-letting advice and dispute resolution.

4. When we established the L&W Unit in the former Legal Department in 1982, we anticipated that we would resolve construction disputes by arbitration because it was a speedier and less costly means to resolve disputes than litigation. By 1990, it had become apparent that arbitration could be just as cumbersome and expensive as litigation. In the light of experience, we adopted alternative forms of dispute resolution for ACP projects. The standard ACP contract provides for

/compulsory

¹ The Works Group of Departments comprises Architectural Services Department, Civil Engineering Department, Drainage Services Department, Electrical and Mechanical Services Department, Highways Department, Territory Development Department and Water Supplies Department.

compulsory notification of claims as they arise, for mediation and adjudication during the course of the contract and defers arbitration until completion of the contract. We set up a new unit (i.e. the Legal Advisory Division) in 1991 in NAPCO to deal with all ACP related matters.

5. Present arrangements are unsatisfactory because of the following reasons -

- (a) the contract drafting and dispute resolution functions are carried out in separate units, which are inefficient and hinder the interchange of ideas and experience between the counsel concerned; and
- (b) the number of counsel engaged on non-ACP work is insufficient. They have other responsibilities which frequently take precedence.

6. As a result of these inadequacies, the non-ACP part of the Public Works Programme (PWP) has not received the input of resources at a desirable level.

Proposed future arrangement

7. Experience with ACP projects suggests that early identification and assessment of claims is essential to avoid unnecessary disputes. Even if a dispute arises, it can be resolved more expeditiously and cost effectively. Both in the initial assessment and in the subsequent mediation and adjudication proceedings, there is a need for timely and authoritative legal advice. Disputes can be handled at inception: mediation and adjudication give an opportunity to resolve problems before they develop into arbitrations. If we lose early opportunities then there is less incentive for a contractor to settle the claim short of full arbitration. The setting up of the new central unit in WB will provide the following advantages -

- (a) with the centralisation of all legal resources, we can provide timely advice during the execution of the works for good contract management and early identification of problems. This will be a major step to achieve completion of works on time and to minimise the number of disputes; and
- (b) there is a general shortage of local lawyers with construction experience in Hong Kong. The results of recent recruitment exercises indicate that recruiting local lawyers with construction

/experience

experience is not a realistic option. Provision of in-house training to counsel with little or no prior construction experience appears to be the only viable solution to manpower supply. By concentrating experienced counsel in one unit under WB, inexperienced counsel will have a better training opportunity and have their own work adequately supervised.

Future work of the new unit

ACP contract disputes

8. Although we have arranged to complete all ACP contracts before 1998 and to resolve any possible claims and disputes before their completion, it is probable that some disputes will remain unresolved upon the opening of the new airport at Chek Lap Kok. If any of them goes to arbitration, these proceedings could, based on past experience, continue for anything up to five to six years. It may also take some considerable time before we can serve the notice of arbitration as there is no limit for bringing forward claims.

9. Even on the most optimistic assumptions, we estimate that, with the level of legal resources available in the NAPCO's Legal Advisory Division, we are unlikely to resolve all disputes in relation to ACP contracts before 2001-02. At present, we have briefed out a significant proportion of such work. If the level of work is lower than anticipated, we will be able to handle a greater proportion of the work in-house and can save the related briefing out expenses (around \$10.4 million in 1996-97).

The rest of the Public Works Programme

10. Although ACP expenditure is now declining, non-ACP expenditure has increased in real terms by about 50% in the past four years. We forecast that the total PWP expenditure (including ACP) will grow at 6% per year in real terms for at least the next six years. The projects are increasing in complexity and there is then a commensurate risk of an increase in the number of construction disputes.

11. The Works Group of Departments face a number of major projects in the years ahead e.g. Route 10 - North Lantau to Yuen Long Highway, the Central Kowloon Route, the Eastern and Western Highways, the railway

/development

development programme, the development of the Kai Tak airport site, new water supply projects and the new container terminals etc. The ACP experience indicates that it is advantageous to have timely legal advice during the contract execution stage in order to safeguard Government's interests in these projects, both in terms of time and costs. This approach will inevitably involve a lot more legal input throughout the construction phase. Potentially enormous amounts of money are at stake as far as construction claims are concerned and it is important that Government should put in adequate legal resources to meet the demands of the construction contracts. With these major projects in the pipeline, the anticipated amount of work to be handled by the new unit in 2001-02 and beyond will be more than enough to offset the decline in the ACP work.

12. The cost of arbitrating a claim often bears very little relationship to the value of the claim and even less to the value of the final award. On the basis of a draft indicative model developed by WB, the cost of a \$1 million arbitration with a \$1 million counter claim is likely to reach \$6 million, including costs of non-legal resources employed. Once proceedings have started and each side has incurred substantial costs, the proceedings take on a life of their own, where the costs often become a more significant factor in inhibiting settlement than the real difference between the parties on the claim itself. It is essential for advice to be given before significant costs are incurred and positions become entrenched.

13. At present, expertise is spread too thinly and counsel in L&W Unit and CLU are overstretched and have to undertake non-construction related work. They do not have sufficient time to spend on improving contract terms and dispute resolution procedures and to develop new contract forms in line with development in the construction industry both locally and overseas. The Government is not therefore playing as great a role as it should in the development of Regional (Asia-Pacific Region) expertise in this area. This means that proposals for the amendment of the Arbitration Ordinance were put forward by a private working party in which the Department of Justice played little part. A dedicated LAD in WB would be in a better position to play an active part in the development of construction law in Hong Kong and in establishing contacts with construction professionals world-wide and in promoting Hong Kong as a centre for construction and dispute resolution services in the Region.

Proposed Legal Adviser's Division

14. The proposed LAD will be responsible for legal services to the whole of the Government's construction programme including construction

/contracts

contracts undertaken on behalf of departments outside the Works Group of Departments such as the Environmental Protection Department. This unit will also advise the WB and the Works Group of Departments on all legal matters in the course of their administration.

15. The LAD will be headed by the Legal Adviser (Works), ranked at the PGC (DL3) level, who will advise S for W and heads of works departments on all legal matters related to PWP and ACP projects. The Legal Adviser will be assisted by two DPGC, to be designated as Deputy Legal Adviser (Works)1 and Deputy Legal Adviser (Works)2.

16. The Deputy Legal Adviser (Works)1 will head Unit 1 of the LAD which will continue to look after ACP projects and take over responsibility for new projects and other contract work when ACP works diminishes. Unit 1 will aim eventually to share equally with Unit 2 the task of providing all legal advice relating to the work of WB and the Works Group of Departments.

17. The Deputy Legal Adviser (Works)2 will head Unit 2 of the LAD which will provide legal advisory services and other services for non-ACP PWP projects and develop standing procedures for contract drafting and dispute resolution.

18. In addition, we will create 21 non-directorate posts to support the above three directorate posts. These posts will be offset in full by the deletion of 11 posts in the Department of Justice and ten posts in NAPCO as outlined at Enclosure 1.

Encl. 1

19. Upon the establishment of the LAD in WB, the L&W Unit of the Department of Justice will be renamed as the Planning, Environment, Lands and Housing Unit and will deal with all legal matters other than issues relating to construction contracts; and the Legal Advisory Division of NAPCO will lapse.

20. The existing and proposed organisation charts of WB and the Civil Division of the Department of Justice are at Enclosures 2 to 5, respectively. The existing job descriptions for the Legal Adviser (NAPCO), the Deputy Legal

Encls. 2-5

/Adviser

Encls. 6-9 Adviser (NAPCO), the Senior Assistant Law Officer (Civil Law) (Lands & Works) and the Senior Assistant Law Officer (Civil Law) (Litigation) are at Enclosures 6 to 9 respectively. The proposed job descriptions for the Legal Adviser (Works) and the two Deputy Legal Advisers (Works) and the revised job description for the Senior Assistant Law Officer (Civil Law) (Planning, Environment, Lands and Housing) are at Enclosures 10 to 13 respectively.

FINANCIAL IMPLICATIONS

21. The additional notional annual salary cost of this proposal at mid-point is \$2,941,200, calculated as follows -

	\$	No. of Posts
New permanent posts	4,302,000	3
<i>Less</i> Permanent post deleted	1,360,800	1
	<hr/> 2,941,200 <hr/>	<hr/> 2 <hr/>

The full annual average staff cost of this proposal, including salaries and staff on-cost, is \$5,253,216. We have included sufficient provision in the 1998-99 draft Estimates to meet the cost of this proposal. Subject to Members' endorsement of this proposal, we will create and delete the 21 non-directorate posts through the normal Departmental Establishment Committee machinery in 1998-99.

BACKGROUND INFORMATION

22. We established the L&W Unit of the then Legal Department in 1982 to undertake both contract advice and dispute resolution in respect of the PWP and land matters. It rapidly became apparent that the Unit was not capable of handling the larger disputes. By the end of 1987, we briefed out work relating to Tin Shui Wai and Shun Fung Ironworks at fees of \$100 million and \$50 million, respectively.

23. With the departure or transfer from the Unit of experienced construction lawyers and the expansion of its advisory work in relation to town

/planning

planning and environmental protection, we decided at the end of the 1980s to conduct contentious construction work in the CLU of the then Legal Department, while retaining the advisory work in the L&W Unit.

24. In 1991, we established a separate Legal Advisory Division in NAPCO of WB to advise on both contract drafting and dispute resolution in relation to the Government's ACP. The two posts of one PGC and one DPGC posts in the Legal Advisory Division are supernumerary and would lapse on 1 October 1998. The original plan was to seek Members' endorsement to retain the posts for a further period up to March 2002.

CIVIL SERVICE BUREAU COMMENTS

25. Civil Service Bureau accepts the need to set up a dedicated LAD in the WB to improve legal advisory, litigation and alternative dispute resolution services to the WB and the Works Group of Departments. It considers the ranking and grading of the proposed posts to be appropriate, having regard to the scope and level of responsibilities and professional input required.

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

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

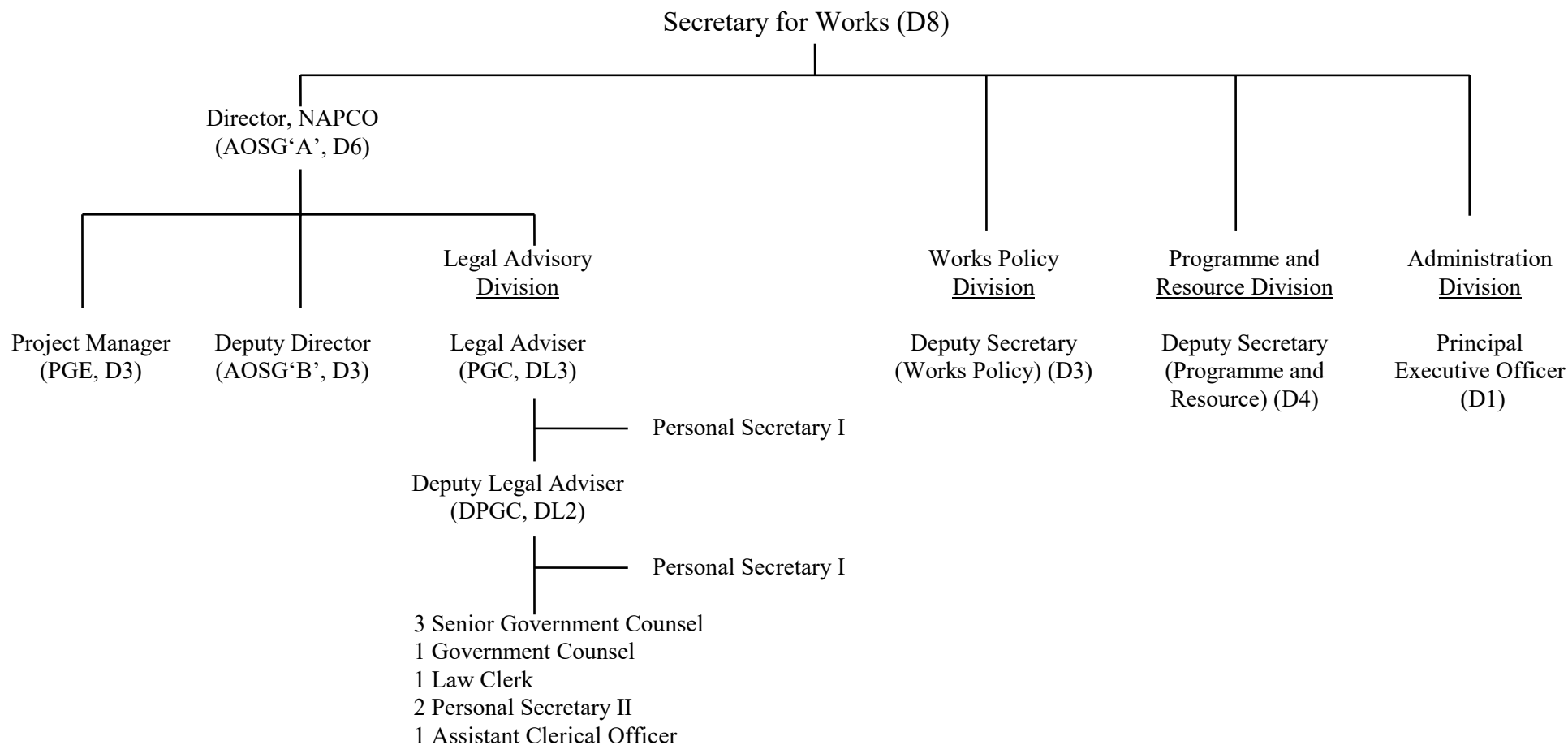
Works Bureau
January 1998

Staffing Requirement for the Proposed Legal Adviser's Division, Works Bureau

Rank	Number of posts to be created	Number of posts to be deleted in	
		Department of Justice	NAPCO
<u>Directorate post</u>			
Principal Government Counsel (DL3)	1	0	1*
Deputy Principal Government Counsel (DL2)	2	1	1*
Sub-total (a)	3	1	2
<u>Non-directorate post</u>			
Senior Government Counsel	6	3	3
Government Counsel	4	3	1
Personal Secretary I	3	1	2
Personal Secretary II	5	3	2
Law Clerk	1	0	1
Assistant Clerical Officer	1	0	1
Clerical Assistant	1	1	0
Sub-total (b)	21	11	10
Total ((a) + (b))	24	12	12

* Supernumerary post

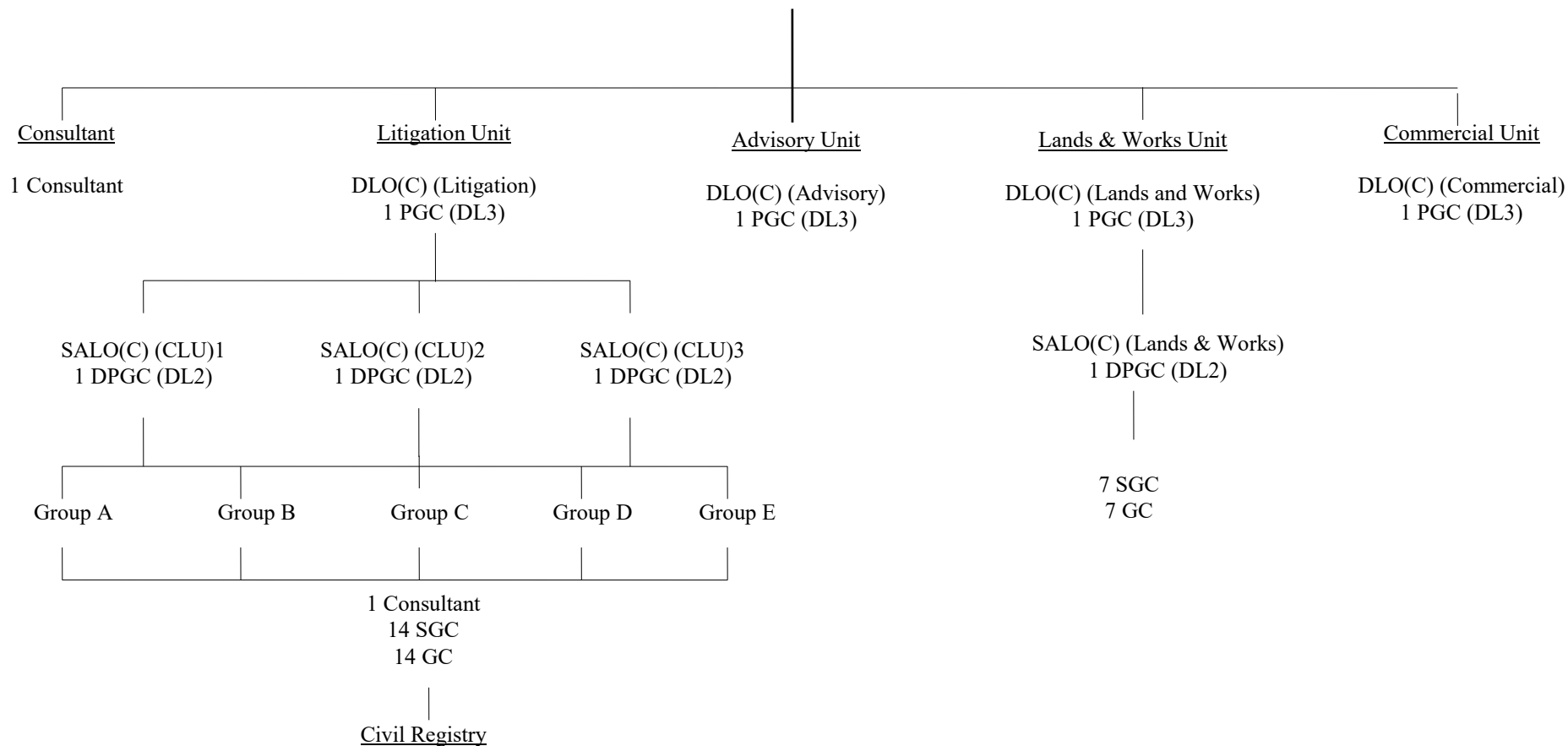
**Existing Organisation Chart of the Works Bureau
(including the New Airport Projects Co-ordination Office)**



Existing Organisation Chart of the Civil Division

Department of Justice

Law Officer (Civil Law)
1 LO (DL6)

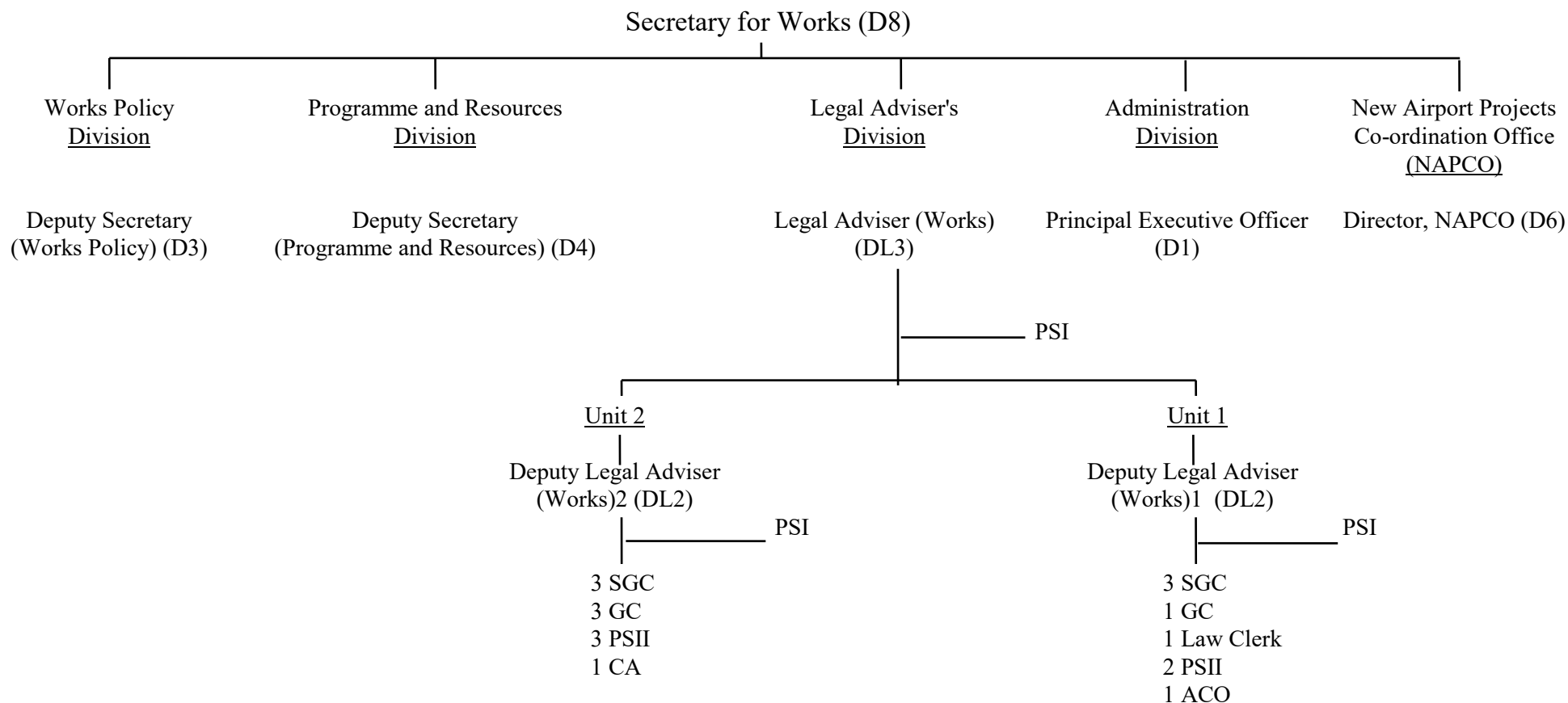


Legend

PGC	Principal Government Counsel
DPGC	Deputy Principal Government Counsel
SGC	Senior Government Counsel

GC Government Counsel
DLO Deputy Law Officer
SALO Senior Assistant Law Officer

Proposed Organisation Chart of the Legal Adviser's Division Works Bureau

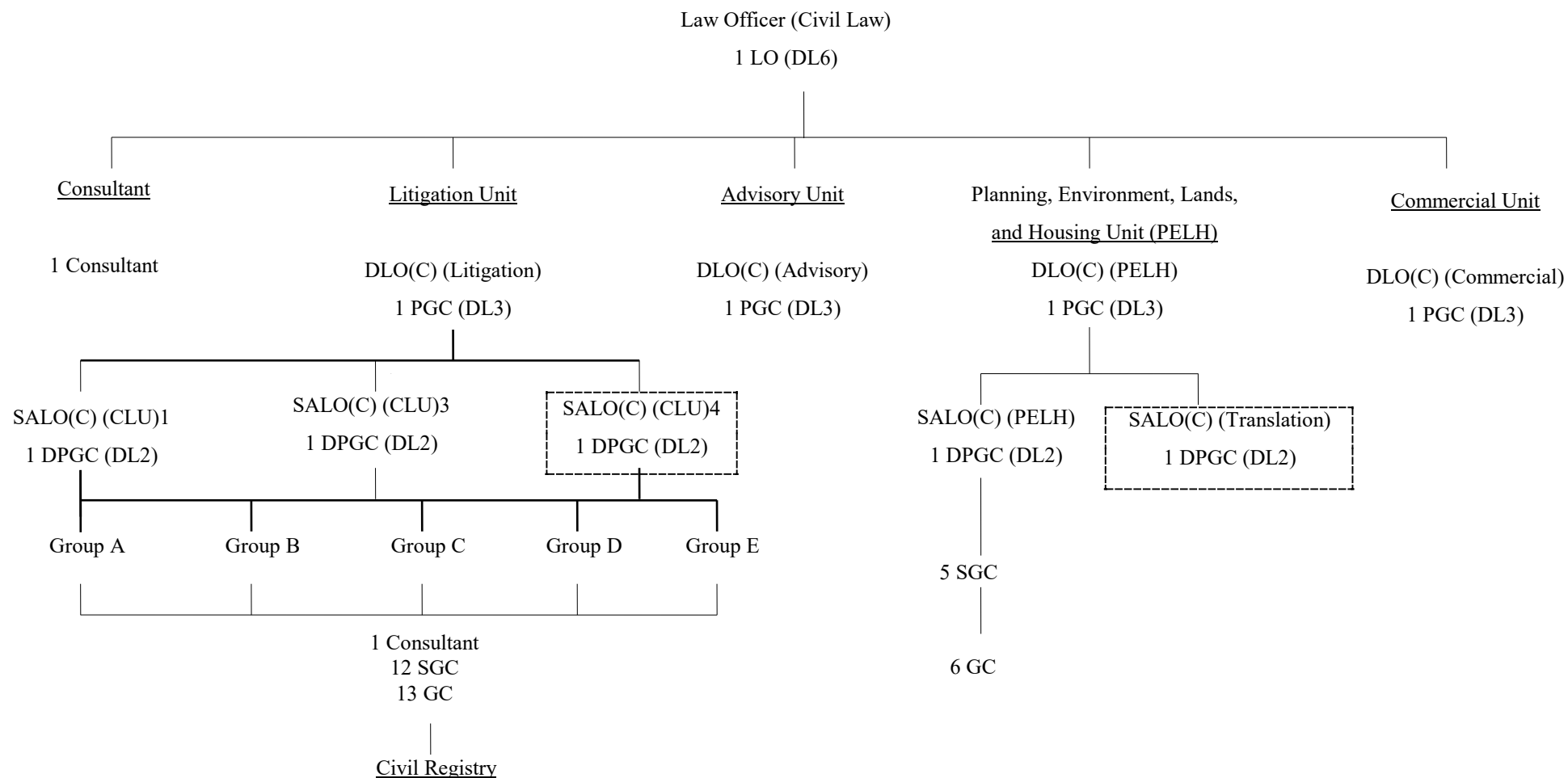


Legend

SGC Senior Government Counsel
GC Government Counsel
PSI Personal Secretary I

PSII Personal Secretary II
ACO Assistant Clerical Officer
CA Clerical Assistant

Proposed Organisation Chart of the Civil Division Department of Justice



Legend

PGC	Principal Government Counsel	SGC	Senior Government Counsel
DPGC	Deputy Principal Government Counsel	GC	Government Counsel

Notes: - Proposal for the creation of two new posts of SALO(C) is the subject of a separate Establishment Subcommittee paper.

**Existing Job Description for
Legal Adviser
New Airport Projects Co-ordination Office**

Rank : Principal Government Counsel (DL3)

Main Duties and Responsibilities

Responsible to the Director, New Airport Projects Co-ordination Office (NAPCO) for -

1. administering and supervising the Legal Advisory Division;
2. advising on all matters relating to the preparation of contracts, the tendering process, resolution of disputes and other legal matters arising in the course of the work of NAPCO and that of the departments responsible for Airport Core Programme (ACP) projects;
3. settling with appropriate policy bureaux and departments drafting instruction for legislation for ACP related matters prior to submission to the Law Draftsman;
4. keeping an overview on ACP related legal matters which are undertaken on behalf of the Government by private firms of solicitors and liaising with their Senior Partners;
5. co-ordinating all ACP legal advice in order that each separate project proceeds in pace with overall development;
6. reporting to the Director, NAPCO and the Law Officer (Civil Law) regularly on the progress and integration of the legal aspects of the ACP;
7. overseeing the financial control, work allocation and supervision of briefing out ACP legal matters;
8. advising on legal matters related to the Memorandum of Understanding;
9. directing and providing legal advice on dispute resolution procedures and mediation for ACP contracts;

10. liaising with the Director of Legal Services of the Airport Authority and the Mass Transit Railway Corporation on common legal issues and where otherwise necessary; and
11. organizing the training of officers within the Legal Advisory Division.

**Existing Job Description for
Deputy Legal Adviser
New Airport Projects Co-ordination Office**

Rank : Deputy Principal Government Counsel (DL2)

Main Duties and Responsibilities

Responsible to the Legal Adviser, New Airport Projects Co-ordinator Office (NAPCO) for -

1. assisting in administering and supervising the Legal Advisory Division;
2. identifying problems of the Airport Core Programme (ACP) projects which have claims potential and which are capable of resolution, and putting together settlement proposals and the justifications for such which are required by government procedures;
3. liaising with resident site staff, engineers and works agents in connection with procedures to take to avoid contractual claims and actively promoting and facilitating the settlement of claims and the resolution of disputes;
4. advising and assisting in the streamlining and improvement of the Government's ACP related claim settlement and dispute resolution procedures;
5. supervising the work of counsels in-house and briefed-out lawyers in the resolution of claims under the ACP claims and dispute resolution process;
6. co-ordinating all legal advice on disputes concerning Government ACP contracts in order to assure consistent policies are followed and consistency of interpretation and approach between Government Departments in their approaches to claims avoidance and dispute resolution;
7. personally advising and representing Government in the more difficult and important claims;
8. advising on all matters relating to the preparation of contracts, the tendering process, resolution of contractors claims and contractual disputes and other legal issues and related matters for each of NAPCO and the Government Departments responsible for the execution of the Government's ACP projects;

9. in consultation with the Legal Adviser, NAPCO, deciding upon criteria for briefing out of claims and disputes to the Government's outside legal advisers and the legal supervision and budget management of matters which are briefed out; and
10. assisting Works Agents in formulating appropriate responses to the more difficult claims to enable resolution of contractual issues without resort to formal contractual dispute resolution mechanisms.

**Existing Job Description for
Senior Assistant Law Officer (Civil Law) (Lands & Works)**

Rank : Deputy Principal Government Counsel (DL2)

Main Duties and Responsibilities

Responsible to the Deputy Law Officer (Civil Law) (Lands & Works) for -

1. the general administration of the Unit including supervision and training of all counsel in the Unit, allocation of work and staff performance appraisal;
2. the preparation of financial estimates and forecasts for the Unit including assisting in the compilation of Controlling Officer's report in relation to Civil Division;
3. the provision of legal advice to the Government on all matters relating to rating, town planning, environmental protection, land, buildings, building management, resumption, reclamation and road schemes and claims for compensation including interpretation of land leases;
4. the provision of legal advice to the Government in relation to construction related tender documents and contracts (including drafting of related documents, interpretation of contracts and vetting of contracts estimated to be worth more than \$100 million);
5. advising the Government in relation to formulation of policies and legislative proposals including legislation for major works projects and drafting instructions;
6. serving as a member of various working groups and committees;
7. commenting on draft Executive Council Memoranda relating to lands and works matters; and
8. carrying out such other tasks as may be assigned from time to time by the Law Officer (Civil Law) and the Deputy Law Officer (Civil Law) (Lands and Works).

**Existing Job Description for
Senior Assistant Law Officer (Civil Law) (Litigation)**

Rank : Deputy Principal Government Counsel (DL2)

Main Duties and Responsibilities

Responsible to the Deputy Law Officer (Civil Law) (Litigation) for -

1. preparing and conducting the more important civil litigation for the Government (particularly in those areas relating to construction and tax cases) in the Court of Final Appeal, Court of Appeal, Court of First Instance and Tribunals;
2. directing and supervising the work of a team within Civil Litigation Unit;
3. preparing instructions and briefs for outside counsel representing the Government in complicated civil litigation cases;
4. advising the Unit on matters of civil litigation, practice and procedure; and
5. carrying out such other tasks as may be assigned from time to time by the Law Officer (Civil Law) and the Deputy Law Officer (Civil Law) (Litigation).

**Proposed Job Description for
Legal Adviser (Works), Works Bureau**

Rank: Principal Government Counsel (DL3)

Main Duties and Responsibilities

Responsible to the Secretary for Works for -

1. administering and supervising the Legal Adviser's Division;
2. advising on all matters relating to the preparation of contracts, the tendering process, resolution of disputes and other legal matters related to Public Works Programme and Airport Core Programme projects;
3. advising Works Bureau on policies relating to all aspects of works contracts;
4. settling with appropriate policy bureaux and works departments drafting instructions for legislation prior to submission to the Law Draftsman and vetting of Executive Council Memoranda;
5. keeping an overview on all legal matters which are undertaken on behalf of the Government by private firms of solicitors' and liaising with their Senior Partners;
6. overseeing the financial control, work allocation and supervision of briefing out legal matters;
7. directing and providing legal advice on dispute resolution procedures and mediation for works contracts; and
8. organising the training of counsel within the Legal Adviser's Division.

**Proposed Job Description for
Deputy Legal Adviser (Works)1, Works Bureau**

Rank: Deputy Principal Government Counsel (DL2)

Main Duties and Responsibilities

Responsible to the Legal Adviser (Works) for -

1. assisting in administering the Legal Adviser's Division including supervision and training of counsel;
2. identifying problems of the Airport Core Programme (ACP) projects which have claims potential and which are capable of resolution, and putting together settlement proposals and the justifications for such which are required by government procedures and facilitating the settlement of claims and the resolution of disputes;
3. advising on all ACP project matters relating to the resolution of contractors claims and contractual disputes and assisting Works Agents in formulating appropriate responses to the more difficult claims to enable resolution of contractual issues without resort to formal contractual dispute resolution mechanisms;
4. advising and assisting in the dispute resolution process;
5. drafting of supplementary agreements, contracts, bonds and other legal documents relating to Public Works Programme (PWP) (including ACP) projects;
6. advising Government Bureaux and departments on legal issues relating to PWP (including ACP) matters;
7. supervising the work of briefed-out lawyers in the resolution of claims under PWP (including ACP) claims and dispute resolution process;
8. assuming the future increase in workload generated by PWP projects relating to contract drafting and advisory work, dispute resolution and other work when ACP work declines; and
9. carrying out such other tasks as may be assigned from time to time by the Legal Adviser (Works).

**Proposed Job Description for
Deputy Legal Adviser (Works)2, Works Bureau**

Rank: Deputy Principal Government Counsel (DL2)

Main Duties and Responsibilities

Responsible to the Legal Adviser (Works) for -

1. drafting and reviewing construction contracts and all legal documents relating to those contracts (e.g. conditions of tender, bonds, undertakings, guarantees, warrantees, supplemental agreements, circulars, project procedures and notices);
2. providing legal advice to the Works Bureau, other bureaux, the Works Group of Departments as well as the Environmental Protection Department on construction and infrastructure matters;
3. advising on all legal matters arising in the course of the administration of the Works Bureau and the Works Group of Departments;
4. providing construction-related litigation and alternative dispute resolution (including mediations, adjudications and arbitration) services, and promoting and assisting in the early resolution of disputes by extra-contractual negotiation;
5. constant reviewing of the Government's General Conditions of Contract for Civil Engineering Works, Electrical and Mechanical Works, Building Works and the Design and Build and other forms of Contract;
6. advising on formulating policies and draft drafting instructions for legislation relating to the work of the Works Bureau and the Works Groups of Departments, vetting of Executive Council Memoranda;
7. assisting in the supervision and training of counsel; and
8. carrying out such other tasks as may be assigned from time to time by the Legal Adviser (Works).

**Revised Job Description for
Senior Assistant Law Officer (Civil Law)
(Planning, Environment, Lands and Housing)**

Rank : Deputy Principal Government Counsel (DL2)

Main Duties and Responsibilities

Responsible to the Deputy Law Officer (Civil Law) (Planning, Environment, Lands and Housing) for -

1. the general administration of the Unit including supervision and training of all counsel in the Unit, allocation of work and staff performance appraisal;
2. the preparation of financial estimates and forecasts for the Unit including assisting in the compilation of Controlling Officer's report in relation to Civil Division;
3. the provision of legal advice to the Government on all matters relating to rating, town planning, environmental protection, land, buildings, building management, resumption, reclamation and road schemes and claims for compensation including interpretation of land leases;
4. advising the Government in relation to formulation of policies and legislative proposals and drafting instructions;
5. serving as a member of various working groups and committees;
6. commenting on draft Executive Council Memoranda relating to planning, environment, lands and housing matters; and
7. carrying out such other tasks as may be assigned from time to time by the Law Officer (Civil Law) and the Deputy Law Officer (Civil Law) (Planning, Environment, Lands and Housing).