



# Civil Division



Law Officer (Civil Law), Mr Benedict Lai (third left), with his deputies (from left): Deputy Law Officer (Civil Litigation), Mr Herbert Li; Deputy Law Officer (Advisory), Ms Christina Cheung; Deputy Law Officer (Planning, Environment, Lands & Housing), Mr Simon Lee; Legal Adviser (Works), Mr Tony Tang; and Deputy Law Officer (Commercial), Mr L Y Yung

## Civil Division

The Civil Division has an important role in providing legal advice on a wide range of legal issues on civil matters to all government bureaux and departments. The Division also represents the Government in the conduct of all civil claims and disputes involving the Government.

The Civil Division comprises four major units (not including staff seconded to the Legal Advisory Division (Works) under the Development Bureau):

- Civil Advisory
- Civil Litigation
- Commercial
- Planning, Environment, Lands & Housing

### Civil Advisory Unit

The Civil Advisory Unit advises all government bureaux and departments on civil law issues of a general nature, including statutory interpretation, administrative law issues and legislative proposals.

It is imperative that a public body exercises all its powers and functions in a lawful manner. The Civil Advisory Unit advises government bureaux and departments on the scope of their powers and functions, the legality of their decisions in the exercise of any discretion conferred on them (e.g. in licensing) and other areas which may be subject to legal challenge. By way of examples, the unit has



advised on legal issues arising from the Government's "Scheme \$6,000", financial assistance for elderly persons who choose to retire on the Mainland (the Guangdong Scheme) and the one-off assistance package to owners of trawler vessels, local deckhands and owners of fish collector vessels affected by the trawl ban.

It is important that the law should evolve over time to meet the changing needs of our society. When a need arises for new legislation or amendment to existing legislation, the unit provides advice to the bureaux or departments on the draft drafting instructions before proceeding to legislative drafting. Major legislative proposals which have been advised by the unit include those on the protection of personal data, the control of trade descriptions, the trawl ban, the electronic health record sharing system, and private columbaria.

Counsel of the unit act as legal advisers to statutory boards or committees, e.g. Supplementary Medical Professions Council, Pharmacy and Poisons Board, and Liquor Licensing Board. Counsel of the unit also serve

as members of working parties and from time to time attend meetings (together with representatives from the relevant government bureaux or departments) before the Executive Council and panels or committees of the Legislative Council.

Not every dispute involving the Government will end up in Court. The unit advises on liability and merits of civil disputes referred by the relevant government bureaux or departments and recommends the appropriate ways of resolving disputes (including arbitration and mediation) in appropriate cases.

In addition to the above, other major work handled by the unit includes advising on the review of the law concerning transsexuals, the review of social security system, the review of the Chinese Temples Ordinance (Cap 153) and the operating arrangement of the Guangzhou-Shenzhen-Hong Kong Express Rail Link.

### Civil Litigation Unit

Counsel of the Civil Litigation Unit act as instructing solicitors or advocates, as the case may be, representing the Government in the conduct of civil claims and disputes involving the Government. Some of the work has been briefed out to private practitioners as and when the circumstances required. As in previous years, public law cases (especially applications for judicial review), including claims under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and other claims for non-refoulement protection, have formed a major part of the unit's work. Some of the more important cases among these are mentioned in the chapter on "Notable Cases".

Apart from public law litigation, the unit handles a wide spectrum of other civil litigation on behalf of the Government, including personal injury cases, civil service matters, immigration matters, charities and



The Civil Advisory Unit has advised government bureaux and departments on many legal issues, including the Guangdong Scheme

trusts matters, revenue appeals, general recovery and enforcement of government debts, and monetary claims against the Government.

Another significant area of development is the use of mediation for resolving civil disputes. Following the Civil Justice Reform, the Practice Direction on Mediation issued by the Judiciary (Practice Direction 31) came into effect on 1 January 2010, which places a duty on parties to litigation and their legal representatives to assist the Court in furthering the underlying objectives of the Civil Justice Reform by using mediation.

### Commercial Unit

Work on commercial law is generated by the Government's own commercial requirements, by the Government's regulation of utilities, franchisees and licensees, as well as by certain commercial services provided to the community. During 2012, 2013 and 2014, counsel of the unit advised on such matters as:

- the rewrite of the Companies Ordinance (Cap 32)

- reform of banking and securities and futures legislation
- telecommunications, broadcasting and electronic transactions
- general competition policy
- review of the Trustee Ordinance (Cap 29)
- establishment of an independent Insurance Authority

### Planning, Environment, Lands & Housing Unit

The Planning, Environment, Lands & Housing (PEL&H) Unit has two teams, namely, the Advisory Team and the Litigation Team.

#### PEL&H (Advisory) Team

Counsel of PEL&H (Advisory) Team advise the Government on a wide range of matters relating to town planning, environment, lands, building, building management, housing, road scheme,





railway projects, reclamation works, heritage, government rent and rates. In 2012, 2013 and 2014, significant matters and projects on which the team advised include:

### *Town planning*

- Proposed amendments to the Central District (Extension) Outline Zoning Plan relating to the Central Military Dock

### *Environment*

- Waste Management Strategy
- Introduction of new Air Quality Objectives
- Control on emission of pollutants

### *Land and buildings*

- Post-enactment review and proposed amendments to the Land Titles Ordinance (Cap 585)
- Development of the North East New Territories New Development Areas
- Proposal to establish a statutory regime for the property management industry
- Pilot Scheme for Arbitration on Land Premium

## **PEL&H (Litigation) Team**

Counsel of the team act as instructing solicitors or advocates, as the case may be, in representing the Government in the conduct of civil litigation cases concerning land, town planning, buildings, environment and housing in all levels of courts, boards and tribunals in the HKSAR, and some of the work has been briefed out to private practitioners as may be required.

In 2012, 2013 and 2014, the team handled a wide variety of litigation cases, including:

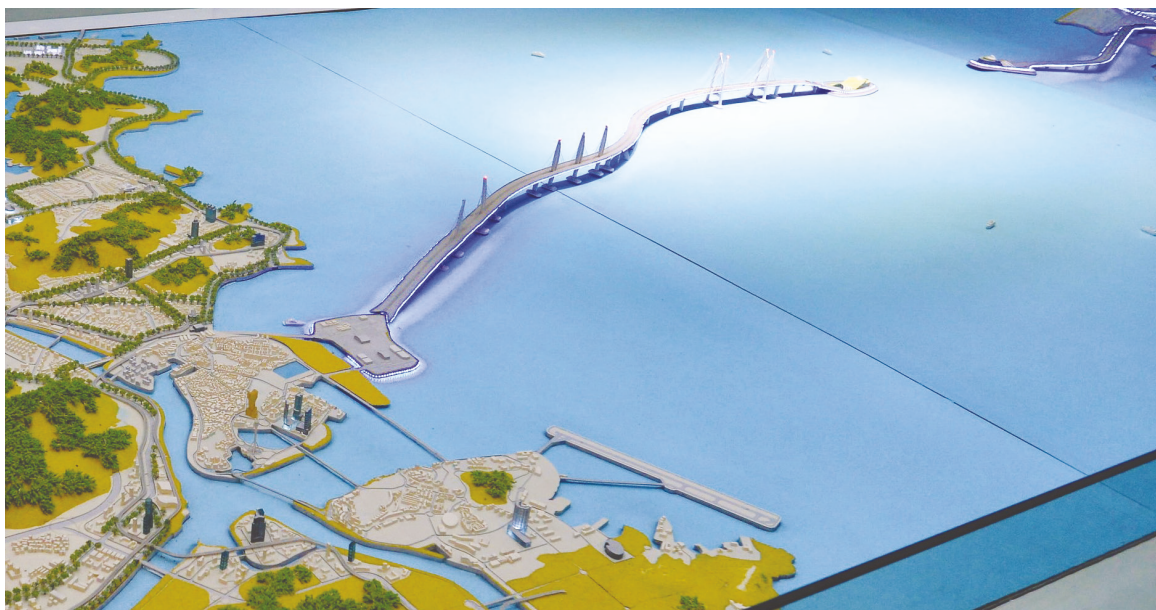
- town planning appeals
- building appeals
- land disputes
- environmental protection appeals
- rating and government rent appeals
- land compensation claims under various statutory scheme

The team also handled public law litigation arising from matters under its purview, e.g. judicial review applications challenging decisions of the Town Planning Board or determinations of the Appeal Tribunal (Buildings) and the relevant authority's approval for environmental impact assessments and permits, as well as arbitration cases (other than those related to construction works).

## **Legal Advisory Division (Works)**

The Legal Advisory Division (Works) (LAD(W)) was set up in the then Works Bureau on 1 October 1998 by subsuming the former Legal Advisory Division in the New Airport Projects Co-ordination Office, part of the Civil Litigation Unit and the then Lands and Works Unit. Although it is part of the Development Bureau, counsel and the para-legal staff of the Department of Justice are seconded to the Development Bureau to provide the legal services which are within the ambit of the LAD(W).

The LAD(W) is responsible for providing legal services (both contentious and non-contentious) to the whole of the Government's construction programme including construction contracts undertaken by the Works Group of Departments and departments outside the Works Group of Departments such as the Environmental Protection Department. The LAD(W) also advises the Works Branch of the Development Bureau and the Works Group of Departments on all legal matters that fall within the Works Branch's



Model of Hong Kong-Zhuhai-Macao Bridge

policy purview in the course of their administration. Significant matters and projects handled by LAD(W) in 2012, 2013 and 2014 are highlighted below.

The LAD(W) was heavily involved in the drafting and tendering of the contracts for major infrastructure projects, including the local infrastructure projects in the HKSAR of the Hong Kong-Zhuhai-Macao Bridge, Central-Wan Chai Bypass and Island Eastern Corridor Link, Kai Tak Development, Harbour Area Treatment Scheme Stage 2, Wan Chai Development Phase II and Liantang/Heung Yuen Wai Boundary Control Point and Integrated Waste Management Facilities Phase I. All these contracts are high-valued contracts involving complex contractual provisions to deal with the specific requirements of the projects.

The LAD(W) advised the Works Branch on measures to enhance the control of fresh water cooling towers to minimise the potential risk of Legionnaires' disease related to these cooling towers. The LAD(W) also advised the Civil Engineering and Development Department on the handling of the tender exercise for the Lung Mei Beach project when faced with the petitions and the

subsequent application for judicial review regarding the environmental permit for that project.

The LAD(W) was closely involved in legislative proposals which are highly important to the construction industry, such as the legislative proposal for the security of payment legislation.

The LAD(W) also provided legal advice to the Transport and Housing Bureau and the Highways Department on issues arising from the delay in the construction of the Hong Kong section of the Guangzhou-Shenzhen-Hong Kong Express Rail Link project.

On contentious matters, the LAD(W) provided legal services to the Government in relation to construction disputes arising out of public works contracts. The LAD(W) assisted the Government, particularly the Works Group of Departments, in resolving the disputes through negotiation, mediation, adjudication, arbitration or litigation.



## Highlights of the Division's work in 2012, 2013 and 2014

### *Judicial review*

Judicial review is a process whereby the courts exercise a supervisory jurisdiction over the exercise of decision-making powers by government officials, public bodies, inferior courts or tribunals, and provides redress against unlawful or invalid administrative actions. It concerns the decision-making process, rather than the merits of the decision itself. The subject of challenge can be a decision, an action or a failure to act, a policy or a piece of legislation.

There are three main grounds for judicial review, namely, illegality, irrationality and procedural impropriety. Leave of court is required for commencing an application for judicial review and such leave will only be granted to an applicant upon demonstration of a reasonably arguable case. Reliefs which the court may grant following a successful application for judicial review include, among others, an order quashing the decision or one requiring the decision-maker to perform its public law duty.

The scope of judicial review covers a wide spectrum of matters involving public law elements in different contexts, ranging from disciplinary cases, elections, education, social welfare, immigration, land, buildings, town planning, environment, to rating and government rent, etc.

The Department provides one-stop legal support to government bureaux and departments throughout the course of any judicial review, including taking instructions, advising on legal issues (substantive and procedural), conducting research, formulating arguments in response, advising on alternative solutions and contingency planning. The Department also provides follow-up advice after judgments are given. Due to increasing complexity of and

implications arising from judicial review challenges, more cross-divisional and interdepartmental consultations are required in handling judicial review cases.

In the case of *W* concerning the registration of a transsexual marriage, the Department conducted extensive comparative studies of the relevant legal position in different jurisdictions. In the foreign domestic helpers' right of abode litigation, consolidated inputs from different divisions within the Department and various bureaux and departments were essential in defending the constitutional challenge (In the feature article "Advising on Right of Abode Issues" at page 53, the Basic Law Unit of the Legal Policy Division describes its role in advising on this case.) In the cases of *Ubamaka* and *C & Ors* concerning non-refoulement protection of persons claiming risks of ill-treatment upon removal, the Department provided legal support on the unified screening mechanism to be implemented by the Government in response to those judgments. An outline of the above cases and judgments can be found in the chapter on "Notable Cases".

### *Companies Ordinance rewrite exercise*

The former Companies Ordinance (Cap 32) dated from 1932. Six years after the Standing Committee on Company Law Reform recommended a full review, restructuring and rewriting of the Ordinance, the Companies Ordinance Rewrite Exercise (the Rewrite) started in mid-2006. The Commercial Unit of the Division set up a dedicated team to assist the Financial Services and the Treasury Bureau and the Companies Registry with the Rewrite. A new Companies Ordinance (Cap 622) was subsequently passed by the Legislative Council (LegCo) on 12 July 2012, after a 15-month scrutiny by a Bills Committee of LegCo, and came into operation on 3 March 2014.

The new Ordinance covers the core areas of company law, e.g. the Companies Registrar and Registry, incorporation, administration, members' remedies and dissolution. The corporate insolvency winding-up provisions remain in Cap 32. When the new Ordinance came into operation, Cap 32 was re-titled the Companies (Winding Up and Miscellaneous Provisions) Ordinance. The Government, in April 2013, launched the improvement of corporate insolvency law exercise, under which there will be amendments to a number of the winding-up provisions in Cap 32. The Government will also seek to introduce provisional supervision – the corporate rescue procedure – and insolvent trading which it had previously sought to legislate.

### **Competition law**

As recommended in 2006 by the Competition Policy Review Committee and after public consultation, the Government prepared a cross-sector Competition Bill (the Bill) to promote competition. The Bill was introduced into LegCo in July 2010.

The Bill completed its passage through LegCo and became an Ordinance in June 2012 with phased commencement.

The Competition Ordinance (Cap 619) (the Ordinance) contains the following prohibitions (Conduct Rules):

- an undertaking must not make or give effect to an agreement, engage in a concerted practice, or as a member of an association of undertakings, make or give effect to a decision of the association, if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in the HKSAR; and
- an undertaking that has a substantial degree of market power in a market must not abuse that power by engaging in conduct that has as its object or effect the prevention, restriction or distortion of competition in the HKSAR.

The Ordinance also contains a Merger Rule which prohibits an undertaking from, directly or indirectly, carrying out a merger involving a carrier licensee under the Telecommunications Ordinance (Cap 106) that has, or is likely to have, the effect of substantially lessening competition in the HKSAR.

The Ordinance provides that the Conduct Rules and the Merger Rule (together "Competition Rules") do not apply to statutory bodies except those statutory bodies or their activities specified in regulations to be made by the Chief Executive (CE) in Council in accordance with statutory criteria.

The CE in Council may also make orders to exempt agreements or conduct if he is satisfied that there are exceptional and compelling reasons of public policy for doing so.

Under the Ordinance, the Competition Commission (the Commission) was established in January 2013. A chairperson and 13 members were appointed by the CE in May 2013.

One of the most important functions of the Commission is to investigate conduct that may contravene the Competition Rules and to bring proceedings before the Competition Tribunal (the Tribunal) in respect of anti-competitive conduct. The Commission must also prepare guidelines including as to the manner in which it expects to interpret and give effect to the Competition Rules and the procedures it will follow in deciding whether or not to conduct an investigation. Before issuing the guidelines, the Commission must consult LegCo and any persons it considers appropriate.

In August 2013, the Tribunal was established within the Judiciary as a superior court of record and consists of the judges of the Court of First Instance. The Tribunal has jurisdiction to hear and determine competition cases.



Under the Ordinance, the Tribunal will be empowered to apply a full range of remedies. These remedies include, among others, pecuniary penalties not exceeding 10 per cent of the turnover of the undertaking in the HKSAR for each year of contravention of a Competition Rule up to the three years in which the contravention occurred with the highest turnover.

The Competition Rules are not expected to commence until late 2015/early 2016.

### ***Town planning matters***

Counsel of the PEL&H Unit are responsible for advising the Planning Department on planning matters, and represent the Town Planning Board (TPB) in town planning appeals before the Town Planning Appeal Board (TPAB) and in judicial review applications against the decisions of the TPB.

In 2012, 2013 and 2014, there were a total of 41 appeals to the TPAB and a total of 18 decisions of the TPAB which arose out of the decisions of the TPB to refuse to grant planning permissions for land uses (e.g. temporary open storage and vehicular repairing workshop) or approve the proposed developments (e.g. comprehensive residential, golf course and residential, columbarium and small house developments) under the relevant Outline Zoning Plans (OZPs). The appeals have wide implications on planning applications of a similar nature.

Counsel of the unit are involved in all stages of the town planning appeals, from advising on legal issues relevant to the appeals, taking instructions and collating relevant evidence for opposing the appeals, advising on factual and expert evidence, preparing for hearings and submissions, to acting as advocates in the hearings before the TPAB.

There has been a notable increase in the number of

judicial review applications made against decisions of the TPB. In 2012, 2013 and 2014, there were 26 applications for judicial review made against the TPB's decisions, a substantial number of which challenged decisions arising from the imposition of site-specific restrictions affecting developments under draft OZPs. Such restrictions, e.g. building height, non-building areas, building gaps and set back requirements were implemented with a view to minimising the adverse effects (e.g. wall effect) of developments and improving the living environment (e.g. air ventilation). Grounds of challenge included (i) TPB acting *ultra vires* its powers in imposing the relevant restrictions, (ii) TPB's failure to make inquiries on important factual information, (iii) discriminatory, unequal or inconsistent treatment of materials before the TPB, (iv) arbitrary, illogical and irrational nature of the decisions, and (v) disproportionate interference with property rights contrary to Articles 6 and 105 of the Basic Law.

Through working in the town planning appeals and judicial reviews applications over the years, counsel of the unit have accumulated a good understanding of the planning law and of the TPB's decision-making process. The knowledge so acquired will enable the unit to effectively respond to the increasingly difficult planning challenges which have important ramifications not only for the town planning regime in the HKSAR, but also the wider public interest at stake.

### ***Commission of Inquiry into the Collision of Vessels near Lamma Island on 1 October 2012***

A Commission of Inquiry under the Commissions of Inquiry Ordinance (Cap 86) was set up on 22 October 2012 whereby the Chief Executive in Council appointed the Honourable Mr Justice Michael Victor Lunn, Justice of Appeal of the Court of Appeal of the High Court, as Chairman and Commissioner, and Mr Benjamin Tang Kwok-bun, as Commissioner, to inquire into the collision of two vessels that



took place near Lamma Island on 1 October 2012. The terms of reference of the Commission were to inquire into the facts and circumstances leading to and surrounding the said collision:

- ascertain the causes of the incident and make appropriate findings thereof;
- consider and evaluate the general conditions of maritime safety concerning passenger vessels in the HKSAR and the adequacy or otherwise of the present system of control; and
- make recommendations on measures, if any, required for the prevention of the recurrence of similar incidents in future.

On 22 November 2012, a “Salmon Letter” was issued by the Commission to the Director of Marine informing him that part of the Terms of Reference of the Commission may have implications for the conduct, management and operation of the Marine Department. The substantive hearing for the inquiry started on 12 December 2012 and concluded on 12 March 2013. The Department of Justice represented the Director of Marine, the Director of Fire Services and the Commissioner of Police.

On 30 April 2013, the Commission published its report. In the report, the Commission made certain findings concerning, *inter alia*, the work of the Marine Department and its officers. It also made recommendations on measures required for the prevention of the recurrence of similar incidents in future. This Department provided advice to the Marine Department on matters relating to the implementation of the recommendations set out in the report and any legal issues arising from the incident.

### **Construction mediations/arbitrations**

Since 2009/10, there has been a significant increase in public works expenditure (from actual expenditure of \$25.3 billion in 2009/10 to \$58.6 billion in 2013/14). Capital works expenditure is expected to maintain at relatively high levels in the next few years. The Works Group of Departments have been involved in the letting and management of an increasing number of public works contracts and related consultancy agreements and in claims and disputes arising therefrom.

The standard terms of the public works contracts



provide for a two-tier dispute resolution process involving mediation and then arbitration. If either party does not wish the disputes arising out of a public works contract to be referred to mediation or if the disputes cannot be resolved by the mediation process, the disputes will then be referred to arbitration. The LAD(W) provides legal advice and assistance to the Works Group of Departments whether they are pursuing or defending the claims in the arbitration proceedings.

In 2012, 2013 and 2014, the LAD(W) dealt with a number of construction arbitration cases on behalf of the Works Group of Departments. The disputes in these arbitrations include claims in respect of delay and disruption to works, extensions of time, valuation of variations to the contract works, omitted items, sums due under the final account for the contract and the contractor's entitlement to payment under a complex Scheme of Arrangement. The sums claimed in these cases ranged from tens of millions to billions of dollars.

Even after arbitration proceedings have been commenced, the LAD(W) will continue to take appropriate steps to advise clients to explore the possibility of achieving a quick and cost-effective settlement by direct negotiation, further request for mediation or making a Calderbank offer.

Construction arbitrations may also lead to judicial proceedings, as applications may be made to the courts for certain orders (e.g. consolidation of arbitration proceedings) or appeals may be made against the arbitrator's award or his/her decision on interlocutory matters. In 2012, 2013 and 2014, the LAD(W) handled a consolidation application in the Court of First Instance and a few applications for leave to appeal before the Court of First Instance, the Court of Appeal, and the Appeal Committee of the Court of Final Appeal.

## **Mediation**

### **Promotion and development of mediation**

The Department has taken the lead in the promotion of mediation in the HKSAR. The Mediation Team provides support to the Steering Committee on Mediation chaired by the Secretary for Justice in promoting and developing the use of mediation to resolve disputes. Through the concerted efforts of the Government, the Judiciary and relevant stakeholders, mediation has taken root in and has become part of the dispute resolution landscape of the HKSAR.

Major tasks implemented included (i) the enactment of the Mediation Ordinance (Cap 620) in June 2012 (which came into operation on 1 January 2013); (ii) the formation of an industry-led accreditation body, i.e. the Hong Kong Mediation Accreditation Association Limited (HKMAAL), in August 2012 (which came into operation in April 2013) for setting training and accreditation standards and handling disciplinary matters; and (iii) organising promotion activities.

### **Steering Committee on Mediation**

As a long-term commitment of the Department, the Secretary for Justice established the Steering Committee on Mediation (Steering Committee) in November 2012 to continue with the efforts to promote and develop the more extensive use of mediation to resolve disputes in the HKSAR.

The main objective of the Steering Committee is to advise on and assist in the further promotion and development of mediation in the HKSAR, including but not limited to:

- monitoring the implementation of the Mediation Ordinance;
- monitoring the development of accreditation and regulation of mediators in the HKSAR;



Organisations and associations signing the “Mediate First” Pledge in July 2013

- considering and advising on initiatives for the promotion and development of mediation; and
- conducting such studies and researches relating to mediation as may be required.

The Steering Committee is assisted by three Sub-committees, namely the Regulatory Framework Sub-committee, the Accreditation Sub-committee, and the Public Education and Publicity Sub-

committee. In July 2013, a “Mediate First” Pledge reception was organised to promote the use of mediation by commercial and other organisations and associations.

In March 2014, the first Mediation Week was held. The Mediation Week included a two-day mediation conference themed “Mediate First for a Win-Win Solution” and 24 mediation talks, seminars and activities for specific sectors. The purpose of the



The Secretary for Justice, Mr Rimsky Yuen, SC, speaking at the opening of the “Mediate First for a Win-Win Solution” Conference in March 2014



The Right Honourable The Lord Woolf of Barnes, former Lord Chief Justice of England and Wales, speaking at the “Mediate First for a Win-Win Solution” Conference in March 2014



Mediation advocacy seminar

Mediation Week was to arouse public awareness of mediation and provide an opportunity for overseas and local mediation experts to share their experiences. The feedback from participants was very encouraging, and it is hoped that similar events can be held in the future so as to further promote the mediation services available in the HKSAR.

The Mediation Team will continue to promote and develop the more extensive use of mediation to resolve disputes by supporting the Steering Committee and its Sub-committees and working closely with stakeholders. Specific tasks will include the public consultation regarding the enactment of apology legislation for facilitating settlement, the drafting of guidelines on the exemption for the disclosure of mediation communication for research, evaluation or educational purposes and a data collection mechanism to monitor the operation of the Mediation Ordinance. The operation of HKMAAL in

undertaking its accreditation and disciplinary functions will be monitored through the Accreditation Sub-committee of the Steering Committee with the view to maintaining the quality and standard of accredited mediators in Hong Kong. Promotional activities will be focused on the use of mediation in the community (particularly building management) and business sectors with special attention on small and medium enterprises as prospective users of mediation. Continuous efforts will also be made to facilitate the development of mediation in specific sectors including construction, family, medical and intellectual property.

### Looking Forward

The Civil Division will continue to uphold the rule of law. As can be seen from the Highlights of the Division's work from 2012 to 2014, the Division continues to play an important role in a wide spectrum of judicial review cases which involve public interest. As well as providing legal representation in court proceedings in defending government decisions, the Division will continue to discharge its role in maintaining and promoting the rule of law through providing legal advice to government bureaux and departments in their day-to-day work. The Division will also continue to promote the use of mediation in resolving disputes and follow up on the public consultation regarding the proposed apology legislation in Hong Kong.



Experience sharing session on mediation