



Department of Justice

2015



# Contents

- 2 ■ Foreword by the Secretary for Justice
- 5 ■ Introduction
- 9 ■ Civil Division
- 22 ■ International Law Division
- 32 ■ Law Drafting Division
- 41 ■ Legal Policy Division
- 55 ■ Prosecutions Division
- 66 ■ Administration & Development Division
- 72 ■ Notable Cases
- 89 ■ The Department's links with other jurisdictions
- 93 ■ Appendix



## Foreword by the Secretary for Justice

It is with great pleasure that I present to you this ninth periodical review of the work of the Department of Justice (the Department), which covers the three-year period from 1 January 2012 to 31 December 2014. As I took over as the Secretary for Justice of the Hong Kong Special Administrative Region (HKSAR) Government on 1 July 2012, the Department was under the helmsmanship of my predecessor, Mr Wong Yan Lung, SC, during the first half of 2012. Mr Wong's professionalism and dedication set a shining example for the entire Department to follow.

During the three-year period covered by this review, the legal landscape and the environment within which the Department operated kept transforming, presenting new challenges as well as fresh opportunities. The Department's work has continued to increase significantly both in breadth and depth, which is being shouldered by colleagues with admirable dedication.

Capitalising on our well-developed legal system and legal infrastructure, it is the steadfast policy of the HKSAR Government, as well as one of the top priorities of the Department, to consolidate and enhance the HKSAR's status as a centre for international legal and dispute resolution services in the Asia-Pacific region. To meet this end, the Department frequently made efforts to promote the HKSAR as a hub for international legal and dispute resolution services (including, among others, arbitration and mediation) in the Asia-Pacific region at forums, seminars and other similar events held within or outside the HKSAR from 2012 to 2014.

In September 2012, the China International Economic and Trade Arbitration Commission (CIETAC) established in the HKSAR the CIETAC Hong Kong Arbitration Center, which is its first such centre ever established outside the Mainland. In January 2013, we concluded

an Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards with the Macao Special Administrative Region, and enacted the Arbitration (Amendment) Ordinance in July 2013 to implement the Arrangement as well as to enhance the arbitration regime of the HKSAR in some other aspects. In November 2014, the China Maritime Arbitration Commission (CMAC), a leading maritime arbitration institution in the Mainland, set up an arbitration centre in Hong Kong, which is also its first centre outside the Mainland. Further, in December 2014, the Advisory Committee on Promotion of Arbitration was established to co-ordinate efforts and strategic plans for promoting the HKSAR as a leading centre for international arbitration services in Asia-Pacific region.

As I have previously said on other occasions, law reform plays an important role in any society which aspires to uphold the rule of law. The HKSAR is no exception. Over the last three years, the Department played an important part in the context of law reform including, among others, the implementation of recommendations made by the independent Law Reform Commission (LRC) on subjects including class actions; criteria for service as jurors; double jeopardy; hearsay in criminal proceedings and privity of contract. Some topics, for example, privity of contract, are more straightforward and a bill giving third parties the right to sue under agreements has been enacted as law. On the other hand, other topics, like class actions, are more complex and controversial, which called for the setting up of a cross-sector working group to study the LRC's proposals and to make recommendations to the HKSAR Government on how to take the matter forward.

During the three-year period in question, there have been important decisions by the courts in both criminal



and civil matters in respect of which counsel of the Department have played a significant role. In July 2013, the Court of Final Appeal (CFA) granted declarations that the relevant sections of the Marriage Ordinance and Matrimonial Causes Ordinance must be read and given effect so as to include within the meaning of the words “women” and “female” a post-operative male-to-female transsexual whose gender has been certified by an appropriate medical authority to have changed as a result of sex reassignment surgery. I am chairing an inter-departmental working group, with members comprising representatives of relevant policy bureaux and legal experts, to study issues that may benefit from legislative changes so as to address the problems facing transsexuals and make such recommendations to the HKSAR Government as may be appropriate.

On the criminal side, the CFA set out the applicable principles on interpreting strict or absolute liability offences in the landmark decision of *HKSAR v Kulemesin Yuriy & Another* (FACC 6 & 7/2012), and more details can be found in the chapter below on “Notable Cases”. The Prosecutions Division is also to be congratulated for successfully organising the Prosecution Weeks 2012, 2013 and 2014, an initiative to reach out to the public in promoting the work of the Division and enhancing the general public’s awareness of the rule of law in the HKSAR. In September 2013, the Division released the new *Prosecution Code* which replaces the previous *Statement of Prosecution Policy and Practice - Code for Prosecutors* published in 2009. These new guidelines for prosecutors, which took into account the international trend of prosecutions and latest development of criminal jurisprudence, are accessible to the public through the Department’s homepage.

In view of the importance of the HKSAR’s connections with the rest of the world, the Department’s activities have continued to extend beyond domestic issues. Indeed, to better promote the HKSAR as a centre for international legal and dispute resolution services in the Asia-Pacific region and in the overall interests of



the HKSAR, I always stress the importance of making the HKSAR as visible as possible in the international arena. In this regard, the work done by the Department included that relating to the setting up of the Asia Pacific Regional Office in the HKSAR by the Hague Conference on Private International Law in December 2012, which represented a vote of confidence in the HKSAR as a regional centre for legal services.

On another front, the Department continued to handle numerous cases of mutual legal assistance and related matters including requests for surrender of fugitives. The one that attracted much publicity is the case concerning Mr Edward Snowden. In June 2013, the Department processed a request

from the Government of the United States for the provisional arrest of Mr Snowden, who was wanted for prosecution in respect of alleged offences of unauthorised disclosure of national defence information, classified communication intelligence and theft of state property. Notwithstanding the sensitivity and media attention surrounding this case, the Department handled the request strictly in accordance with the laws of the HKSAR.

In September 2014, what turned out to be a 79-day “Occupy Movement” began, during which time traffic in some main roads of the HKSAR was blocked, and the rule of law faced significant challenges. Apart from handling the related prosecutions strictly in accordance with the *Prosecution Code* as well as in a fair and just manner, the Department has been working and will continue to work closely with other government departments and bureaux to enhance the general public’s understanding of the concept of the rule of law through different channels.

Apart from expressing my gratitude to my predecessor, Mr Wong Yan Lung, SC, as I did at the outset, I would also like to take this opportunity to acknowledge the significant contribution of Mr Eamonn Moran, QC, and Mr Kevin Zervos, SC, who were respectively our former Law Draftsman and Director of Public Prosecutions during the period covered by this review. Mr Paul Wan and Mr Keith Yeung, SC, have since joined the

Department and have taken up the offices leading the Law Drafting Division and the Prosecutions Division respectively. I also wish to express my gratitude to Mr Stuart Stoker who retired in 2012 after serving as the Secretary of the LRC for over 20 years. During the relevant period, we have also seen the addition of two “silks” (Senior Counsel) amongst our colleagues – Mr Wesley Wong, SC, and Mr Simon Tam, SC. Needless to say, this is one of the highest professional recognition a barrister could get in the course of his legal career! For the benefit of the Department and the HKSAR as a whole, I hope more counsel of the Department can in future attain the rank of Senior Counsel. Last but certainly not least, I would also like to take this opportunity to pay tribute again to the dedication and skill of those who serve in the Department, whether lawyer or otherwise. Their high calibre and dedicated attitude ensure that the Department is in a position to fulfil its important role.



(Rimsky Yuen, SC)  
Secretary for Justice

# Introduction







## Introduction

### The role of the Secretary for Justice



The Department of Justice is headed by the Secretary for Justice, whose paramount duty is to maintain the rule of law. As one of the Principal Officials of the HKSAR Government, the Secretary for Justice discharges a wide range of duties. Chief among these is to act as the principal legal adviser to the Chief Executive, to the HKSAR Government and to government bureaux, departments and agencies. The Secretary for Justice is also a member of the Executive Council.

Under Article 63 of the Basic Law, the Department of Justice shall control criminal prosecutions free from any interference. As head of the Department, this constitutional duty to control criminal prosecutions, including the decision to prosecute criminal offences, is discharged by the Secretary for Justice independently. The Secretary for Justice is also named as the defendant in all civil actions brought against the Government and represents both the Government

and the public interest in legal proceedings.

As guardian of the public interest in a wider sense, the Secretary for Justice may in appropriate case make application for judicial review to enforce public legal rights. The Secretary may also intervene in any case involving a matter of great public interest. The Secretary represents the public interest as counsel to tribunals of inquiry. The Secretary is the Protector of Charities and must be joined as a party in all actions to enforce charitable or public trusts. The Secretary also has a more general public interest role as *amicus curiae* (friend of the court), the most important example of which is bringing alleged contempts of court to the notice of the courts.

Amongst many other functions, the Secretary for Justice is the ex-officio Chairman of the Law Reform Commission, Vice-Chairman of the Fight Crime Committee, and serves on the Chief Secretary for Administration's Policy Committee, the Judicial Officers Recommendation Commission and the Independent Commission Against Corruption's Operations Review Committee.



The Secretary for Justice with staff members of the Secretary for Justice's Office (from left): Administrative Assistant to Secretary for Justice, Mr Howard Lee; Senior Personal Assistant to Secretary for Justice, Miss Polly To; Secretary for Justice, Mr Rimsy Yuen, SC; and Press Secretary to Secretary for Justice, Mr Terence Yu

### The Secretary for Justice's Office

The Secretary for Justice's Office provides public relations and administrative support in respect of the Secretary for Justice's many functions. This includes assisting the Secretary in all matters relating to the Executive and Legislative Councils, be it the promotion of legislation or providing answers to legislators' questions. Members of the office ensure that the Secretary is fully briefed on the issues which arise, assist in the analysis of those issues, and help prepare speeches and responses.

### Information and public relations

Promoting public understanding of the HKSAR's legal system and the rule of law is an important commitment of the Department of Justice. To this end, the Public Relations and Information Unit of the Secretary for Justice's Office provides information to the public and the media about the work of the Department through press releases, press conferences, answers to media enquiries, and other media and publicity channels. The unit also co-ordinates the preparation of educational materials and publications to introduce different aspects of the Department's works.



Media session arranged by the Public Relations and Information Unit



The Secretary for Justice, Mr Rimsky Yuen, SC (centre), with division heads (from left): Solicitor General, Mr Frank Poon; Law Officer (International Law), Ms Amelia Luk; Director of Administration and Development, Mr Cheuk Wing Hing; Law Officer (Civil Law), Mr Benedict Lai; Director of Public Prosecutions, Mr Keith Yeung, SC; and Law Draftsman, Mr Paul Wan

## The divisions

The lawyers (often referred to as Government Counsel) in the Department work in one of five legal divisions, namely Civil, Prosecutions, International Law, Law Drafting and Legal Policy. The legal divisions are provided with general support by the Administration and Development Division, which is headed by the Director of Administration and Development.

Each of the legal divisions is headed by a Law Officer who, as well as directing the work of their respective divisions, assists the Secretary for Justice in the overall management of the Department. The Law Officers are the Solicitor General, the Director of Public Prosecutions, the Law Officer (Civil Law), the Law Officer (International Law) and the Law Draftsman.

While each of the legal divisions has distinct areas of responsibility, many matters or cases handled by the Department require input from more than one division or specialist unit within a division. In such cases, lawyers from each of the relevant units or divisions will work closely together to ensure that the relevant government department or bureau is provided with comprehensive assistance.





# 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

# International Law Division







Law Officer (International Law), Ms Amelia Luk (centre), with Deputy Law Officer (Mutual Legal Assistance), Mr Wayne Walsh, SC (left); and Deputy Law Officer (Treaties & Law), Mr Paul Tsang (right)

## International Law Division

The International Law Division comprises two units, namely, the Treaties and Law Unit and the Mutual Legal Assistance Unit. The Division provides legal advice on public international law to the Government, negotiates international agreements or provides legal advice for such negotiations, and handles requests for legal co-operation between the HKSAR and other jurisdictions.

### Review of work in 2012, 2013 and 2014

#### *Advisory work*

- Rendering advice on international trade law, privileges and immunities, civil aviation and maritime matters, international labour conventions, human rights, environment and health, visa abolition and outer space;
- Rendering advice on drafting and interpretation of customs, police, cultural and education co-operative agreements and arrangements; and

- Advising on the enactment of legislation to implement international instruments and agreements in the HKSAR including United Nations Security Council Resolutions, and agreements on maritime matters, conservation, surrender of fugitive offenders (SFO) and mutual legal assistance (MLA) in criminal matters.

#### *Negotiations*

- Negotiating agreements on behalf of the HKSAR on SFO, MLA, transfer of sentenced persons (TSP) matters; and



Heads of delegations initialling agreement



Negotiation in progress



Exchanging initialled texts



Happy faces at the conclusion of the negotiation

- Providing legal support in other bilateral negotiations such as agreements on air services, avoidance of double taxation, customs co-operation, investment promotion and protection, free trade and visa abolition.

#### *Multilateral agreements and international conferences*

- Participating in international meetings and diplomatic conferences held by international organisations.

#### *Legal co-operation with other jurisdictions*

- Acting as the Central Authority of the HKSAR on SFO and MLA matters, advising on and processing SFO and MLA requests;
- Advising on and processing letters of requests from overseas courts or tribunals pursuant to the Evidence Ordinance (Cap 8);
- Acting as the Central Authority of the HKSAR under the Hague Convention of the Civil Aspects of International Child Abduction, advising on and processing requests made under the Convention; and
- Advising the Security Bureau on TSP applications.

#### *Other work*

- Providing legal support to the Financial Secretary and the Secretary for Security in relation to the HKSAR's participation in the Financial Action Task Force Against Money Laundering (FATF), attending international meetings of FATF, participating in expert working groups and acting as expert legal assessors in mutual evaluations of fellow members' implementation of FATF recommendations on measures to combat money laundering and terrorist financing; and

- Serving as speakers and participating in regional and international seminars organised by other governments and international organisations such as the Hague Conference on Private International Law; conducting briefings for local and overseas law enforcement agencies on international legal co-operation matters; delivering papers in the field of international co-operation in criminal matters such as asset recovery and other forms of MLA.

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

#### *Hearing of an appeal to the Court of Appeal and the Court of Final Appeal*

Counsel in the Division was engaged in appeals to the Court of Appeal and the Court of Final Appeal (CFA) which arose from surrender of fugitive offenders proceedings involving a person who was wanted by the Government of Australia for prosecution on charges relating to drug trafficking.

It was the Australian Government's case that the person in question was involved in trafficking over 50 kilograms of crystal methamphetamine in Australia by giving directions to his accomplices through telephones while he remained in the HKSAR at the material time. The Australian Government sought his surrender from the HKSAR.

In March 2011, the person in question was committed into custody to await a decision by the Chief Executive on his surrender. He applied for *habeas corpus* on the ground that telecommunication intercepts evidence, though obtained lawfully in Australia, was inadmissible as evidence in surrender proceedings in HKSAR courts. The application was dismissed in July 2011.

He further appealed against the dismissal of his *habeas corpus* application and the Court of Appeal dismissed his appeal in July 2012. His application for leave to appeal to the CFA was dismissed by the Court of Appeal in January 2013.

In July 2013, the Appeal Committee of the CFA certified that the appeal ground raised a point of law of great and general importance, and granted leave to the person to appeal to the CFA. The final appeal was heard in February 2014 and the CFA dismissed the appeal, holding that Article 30 of the Basic Law did not render telecommunication intercepts obtained lawfully in a foreign jurisdiction inadmissible as evidence in surrender proceedings in the HKSAR.

#### *Request for provisional arrest of a person who is wanted for prosecution of offences of unauthorised disclosure of national defence information, classified communication intelligence and theft of state property*

In June 2013, the Division processed a request from the United States (US) Government for the provisional arrest of a person who is wanted for prosecution on alleged offences of unauthorised disclosure of national defence information, classified communication intelligence and theft of state property. The request was made under the Agreement between the Government of Hong Kong and the Government of the US of America for the Surrender of Fugitive Offenders.

The Division, which handled the matter strictly in accordance with the laws of the HKSAR, sought clarifications from the US Government in relation to the information provided in the request in order to ensure that the relevant requirements under the Fugitive Offenders Ordinance (Cap 503) for the issuance of a warrant for provisional arrest were met.

The person in question, however, left the HKSAR on his own volition before the requested clarifications were provided by the US Government. As the person did not commit any crime in the HKSAR, there was no legal basis to restrain him from leaving the jurisdiction.

***Taking of evidence by live television link for use in overseas criminal proceedings***

Counsel in the Division processed a MLA request issued by the Government of the United Kingdom which sought assistance in obtaining evidence from two witnesses in the HKSAR, by way of live television link.

The evidence was sought for the prosecution of two defendants in the United Kingdom for conspiracy to defraud involving documents purportedly issued and signed by two directors of a listed company in the HKSAR.

The evidence was taken in end October/early November 2012 from the two witnesses in the HKSAR before a Magistrate in the Technology Court, High Court. The evidence-taking proceedings were linked up to the trial in the United Kingdom with jury sitting, for the United Kingdom judicial team (the trial judge, prosecuting counsel and defence counsel) to take part in the evidence-taking proceedings.

***Restraining assets and registering an external confiscation order in the HKSAR at foreign request***

The Division processed a MLA request from Indonesia which arose from the collapse of a bank. Assistance was sought to restrain the properties of four defendants who were connected with the Indonesian investigation and criminal proceedings and of the related companies.

The Division obtained a restraint order from the Court of First Instance (CFI). The properties under restraint consisted of bank accounts with cash and a large bulk of complex securities and debt instruments.

The defendants and intervening third parties filed applications to discharge the restraint order. At the same time, the Division made an application to appoint receivers to manage the restrained properties pending registration of a final confiscation order from Indonesia. CFI dismissed the applications for discharge of the restraint order and granted the appointment of receivers. The defendants and parties sought leave to appeal and to stay the appointment of the receivers. CFI granted leave to appeal but refused to stay the appointment of receivers. The defendants and parties then filed notices of appeal and sought a fresh stay of the appointment of receivers. The Court of Appeal dismissed their stay applications but granted them leave to appeal.

Meanwhile, Indonesia made a supplementary MLA request seeking assistance to register and enforce the confiscation order made by the Indonesian Court. Pursuant to the supplementary MLA request, the Division lodged an application to CFI which was again challenged by the defendants. At the end of the hearing which lasted for five days in November 2013, CFI allowed registration and enforcement of the Indonesia confiscation order over the majority of the restrained properties. Defendants subsequently filed notices of appeal against CFI's order while the Division filed notice of cross-appeal. The hearing of the consolidated appeals and the cross-appeal remained pending.

***Obtaining of legal assistance from overseas for prosecution in the HKSAR***

The Division issued a MLA request to the Philippines in October 2012 seeking assistance in inviting nine witnesses to travel to the HKSAR to testify in criminal proceedings. The proceedings were a re-trial of a defendant for offering to traffic in a substance believed to be a dangerous drug. The defendant was arrested in the HKSAR in an anti-dangerous drugs operation jointly run by the Hong Kong Police and



the Philippines Drug Enforcement Agency (PDEA) when he was receiving drugs (cocaine) from an undercover action agent of the PDEA. The witnesses included the undercover PDEA agent and other PDEA agents participating in the joint operation. All nine witnesses accepted the invitation to travel from the Philippines and testified at the re-trial in the HKSAR in January 2013.

***Processing a request for return of the child in a child abduction case***

As the Central Authority under the Hague Convention of the Civil Aspects of International Child Abduction (the Convention), the Division received an application from a father concerning the return of his five-year-old child to Slovakia in August 2011.

Both parents were from Slovakia. They were not married. Their son was born in Slovakia in 2007 and the relationship ended in 2009. The mother removed the child to the HKSAR in September 2010. Formal application for the child's return was taken out by the father 11 months after the removal. Upon receipt of the application, the Division commenced proceedings before CFI under the Convention to preserve the

status quo pending resolution of the matter.

In January 2013, issues involving the father's right of custody, whether the father consented or acquiesced to the removal/retention of the child in the HKSAR and whether returning of the child to Slovakia would expose him to physical or psychological harm or otherwise place him in an intolerable situation were argued before the court. Both the father and the mother were legally represented. Counsel of the Division participated in the hearing to observe and to assist the court where necessary.

The evidence was carefully deliberated before the court which, in the end, found that the father had come to accept the status quo and had made a choice not to assert his rights to seek the child's prompt return. Further, the court held that there was a grave risk that the child would be placed in an intolerable situation if a return order was made.

***Asia Pacific Regional Office of the Hague Conference on Private International Law***

Counsel in the Division assisted the Hague



Official opening of the Asia Pacific Regional Office of the Hague Conference on Private International Law

Conference on Private International Law to open its Asia Pacific Regional Office (Regional Office) in the HKSAR on 13 December 2012, which represented a vote of confidence in the HKSAR as a regional centre for legal services.



Signing of the Memorandum of Administrative Arrangements concerning the establishment of the Asia Pacific Regional Office of the Hague Conference on Private International Law in the HKSAR by the Secretary for Justice, Mr Rimsky Yuen, SC (front row, second right), and the then Secretary General of the Hague Conference, Mr Hans van Loon (front row, second left)

Since its establishment, counsel in the Division continued to support the Regional Office in various ways. For instance, the Division organised jointly with the Regional Office a workshop on the Hague Intercountry Adoption Convention held in Macao in March 2013.



Co-organising the Workshop on the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption in Macao

In addition to organising events, counsel in the Division assisted the Regional Office to establish relationship with institutions in the region. For example, through the introduction and liaison work by counsel in the Division, the Regional Office entered into a Memorandum of Understanding on Academic Co-operation with Kyushu University, Japan in February 2013. Further, with the assistance of the Division, the Regional Office supported the organisation of a conference on transnational litigation in Wuhan University in September 2013.

The Regional Office also worked with the Division in promoting legal co-operation in the region through the use of the Hague Conventions. In particular, counsel in the Division organised, in collaboration with the Regional Office, an APEC Workshop on the Apostille Convention in Medan, Indonesia, in June 2013 under the auspices of the APEC Economic Committee with a view to promoting circulation of public documents through the use of the Apostille Convention. The workshop was so successful that it brought the Apostille Convention to the attention of APEC Ministers who encouraged wider participation in the Apostille Convention in their Joint Ministerial Statement in October 2013.



Colleague speaking at the Economic Committee Workshop during the Third APEC Senior Officials' Meeting in Medan, Indonesia

In August 2014, counsel in the Division organised, in collaboration with the Regional Office, another APEC Workshop on Ease of Doing Business through



Participants of the 9th International Forum on the electronic Apostille Programme jointly organised by the International Law Division with the Asia Pacific Regional Office of the Hague Conference on Private International Law

Hague Conventions in Beijing, China under the auspices of the APEC Economic Committee. The positive outcome of the workshop was expressly acknowledged and endorsed in the APEC Joint Ministerial Statement and Economic Leaders' Declaration in November 2014.

In October 2014, the Division organised jointly with the Regional Office the "HCCH Asia Pacific Week" (a series of international events held in the HKSAR), including the 9th International Forum on the electronic Apostille Program which was held for the first time in the Asian region.

#### ***Tax information exchange agreements; free trade agreement with Chile***

The Global Forum on Transparency and Exchange of Information for Tax Purposes of the Organisation for Economic Co-operation and Development, of which the HKSAR is a member, recommended that the HKSAR should put in place a legal framework for entering into tax information exchange agreements (TIEAs) as instruments for exchanging information with other jurisdictions. Counsel in the Division

assisted the relevant policy bureau in preparing the Inland Revenue (Amendment) (No. 2) Ordinance 2013 (which was passed in July 2013) to provide the legal framework for entering into TIEAs with other jurisdictions. Counsel in the Division also assisted the policy bureau in preparing for TIEA negotiations.

In 2012, counsel in the Division actively participated in the negotiation and conclusion of the Free Trade Agreement with Chile (the Agreement). On 7 September 2012, the HKSAR and Chile signed the Agreement in the margins of the APEC Economic Leaders' Meeting in Russia. The Agreement covers a wide range of areas of mutual interest to the HKSAR and Chile, encompassing trade in goods and services, investment, and other related areas. It strengthens the bilateral relationship and economic partnership between the two sides. The Agreement entered into force on 9 October 2014. Alongside with the Agreement, the HKSAR and Chile also negotiated and signed two side instruments, namely, the Exchange of Notes on the negotiation of an agreement on investment and the Memorandum of Understanding on Labour Co-operation between Hong Kong, China and Chile, which entered into force on the same date



as that of the Agreement. Counsel in the Division also actively participated in these negotiations.

### ***Permanent Court of Arbitration***

Counsel in the Division have assisted in the preparation and negotiation of a Host Country Agreement and a related Memorandum of Administrative Arrangements with the Permanent Court of Arbitration (PCA), under which dispute resolution proceedings administered by PCA can be conducted in Hong Kong with the provision of facilities and support services required. The signing of the above instruments will further enhance the HKSAR's status as an international arbitration centre in the Asia-Pacific region.

### ***Serving as speakers and participating in regional and international seminars***

Counsel in the Division spoke and/or participated in a number of regional and international conferences and seminars, including:

- Third Asian Asset Forfeiture Regional Conference in Jakarta;
- Conference of the United Nations Convention Against Corruption in Vienna;
- 30th Cambridge International Symposium on Economic Crime;
- 75th Biennial Conference of the International Law Association in Sofia;
- Workshop for East and Southeast Asian State on the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption in the Macao SAR;
- The Hague Conference at 120: Today and the Future in The Hague;
- Conference on Recovery of Maintenance in the European Union and Worldwide in Heidelberg;

- Conference on International Judicial Co-operation, run by the 2nd EU-Macao Co-operation Programme in the Legal Field, in the Macao SAR;
- APEC Workshop on Simplified Authentication Process for Production of Public Documents Abroad through the Use of the Hague Apostille Convention in Medan;
- 16th Annual Meeting of the Asia-Pacific Group on Money Laundering in Shanghai;
- Conference on International Litigation in the Asia-Pacific Region in Wuhan;
- 8th and 9th International Forum on the e-APP (electronic Apostille Program) in Montevideo and in the HKSAR respectively;
- 2nd and 3rd Arab Fora on Asset Recovery in Marrakech and Geneva respectively;
- Seminar on Matters of Co-operation in the Sphere of Extradition and Legal Assistance in Criminal Matters in Vladivostok;
- 76th Biennial Conference of the International Law Association in Washington, DC;
- Conference on Cross-Border Family Matters and the Well-Being of the Child: Asia-Pacific Perspectives in Beijing; and
- APEC Workshop on Ease of Doing Business through Hague Conventions in Beijing.



The Deputy Law Officer (Mutual Legal Assistance), Mr Wayne Walsh, SC, speaks at the Conference on International Judicial Co-operation in Macao



## Looking forward

### *Future work in collaboration with international organisations*

Counsel in the Division will continue to support the Asia Pacific Regional Office of the Hague Conference on Private International Law (Regional Office) in promoting legal co-operation in the region. For example, the Division is planning to organise jointly with the Regional Office more regional or international events including a symposium in Macao SAR in June 2015 and an international conference in HKSAR in November 2015.

The Regional Office will also continue to support the Division in organising events under the auspices of APEC, with a view to promoting international co-operation through the use of Hague Conventions among APEC member economies, including a workshop on Effective Enforcement of Business Contracts and Efficient Resolution of Business Disputes Through the Hague Choice of Court Agreements Convention to be held in Cebu, the Philippines around early September 2015.

Moreover, co-operation with APEC and other APEC member economies will be further strengthened through the Group on Strengthening Economic and Legal Infrastructure (established by the APEC Economic Committee) of which counsel of this Division will assume the role of Convenor.

Counsel in the Division will continue to liaise with PCA to explore further co-operation opportunities, including organisation of a PCA seminar in the HKSAR in March 2015, in collaboration with the Legal Policy Division.

Counsel in the Division will also foster co-operation with the United Nations Commission on International

Trade Law (UNCITRAL) through participation in the international seminars organised by the UNCITRAL Regional Centre for Asia and the Pacific and jointly organising international conferences as well as possible secondment to the Centre.



# Law Drafting Division



Law Draftsman, Mr Paul Wan (centre), with Deputy Law Draftsman (Legislation), Ms Fanny Ip (left); and Deputy Law Draftsman (Bilingual Drafting & Administration), Mr Gilbert Mo (right)

## Law Drafting Division

### Work of the Division

The Law Drafting Division is responsible for drafting all legislation proposed by the Government. Its objective is to draft legislation that accurately reflects the intended policy and is both legally sound and easy to understand. This chapter sets out the progress the Division has made in providing legislative drafting services in the HKSAR and highlights the Division's most significant work in the busy and dynamic years of 2012 to 2014.

The HKSAR is the only jurisdiction in the world that enacts legislation in both the English and Chinese languages. Both language texts of legislation are equally authentic, and the law operates on the principle that one text is not treated as merely a translation of the other. To achieve this, the Division is dedicated to refining its drafting skills and developing best practices to ensure that the two texts have no ambiguities and clearly convey the same meaning.

As well as drafting legislation for new government policies, the Division carries out other important duties. First, the Division vets the bills and subsidiary legislation put forward by non-government bodies to ensure that they comply with current drafting styles and practices. Secondly, it provides the drafting work necessary for applying the relevant national laws of the People's Republic of China to the HKSAR (i.e. those listed in Annex III to the Basic Law).

Finally, the Division plays a key role in compiling and publishing the Laws of Hong Kong by ensuring that the published laws are up to date and accessible. As at 31 December 2014, the hard copy loose-leaf edition of the laws comprised 56 volumes (excluding the Editorial Records and Index volumes), containing 696 Ordinances and 1466 items of subsidiary legislation. In addition, the online legislation database, known as the Bilingual Laws Information System (BLIS), is available free to the public on the internet.

## New legislation

From 2012 to 2014, the Division delivered a substantial legislative programme on a range of important public issues, comprising a total of 69 Ordinances and 561 pieces of subsidiary legislation which were enacted and published in the Gazette. The new Ordinances enacted during the period are set out below:

- **Adaptation of Laws (Military References) Ordinance** (Ordinance No. 2 of 2012)

The Ordinance adapts military-related references in legislation to conform with the Basic Law and the HKSAR's status as a Special Administrative Region of the People's Republic of China.

- **Lifts and Escalators Ordinance** (Ordinance No. 8 of 2012)

The Ordinance provides for the safety of lifts and escalators by establishing a registration scheme for contractors, engineers and workers engaged in lift or escalator works.

- **Competition Ordinance** (Ordinance No. 14 of 2012)

The Ordinance prohibits any conduct that prevents, restricts or distorts competition in the HKSAR, and prohibits mergers that substantially lessen competition in the HKSAR.

- **Mediation Ordinance** (Ordinance No. 15 of 2012)

The Ordinance provides for a regulatory framework for various aspects of mediation.

- **Residential Properties (First-hand Sales) Ordinance** (Ordinance No. 19 of 2012)

The Ordinance regulates the provision of sales brochures and price lists, and the use of show flats for the sale of first-hand residential properties. It also regulates the viewing of units before sale, the publication of sale arrangements and the execution of agreements concerning first-hand residential properties.



- **Companies Ordinance** (Ordinance No. 28 of 2012)

The Ordinance reforms and modernises the HKSAR's company law. It restates part of the existing enactments and makes new provisions relating to companies.

- **Contracts (Rights of Third Parties) Ordinance** (Ordinance No. 17 of 2014)

The Ordinance enables a person who is not a party to a contract to enforce a term of the contract under certain circumstances. It brings about a variation in the common law rule of privity of contract insofar as third party rights under a contract are concerned.

## Role of the Division

The Division plays a significant role in making all the statutory laws of the HKSAR, from Ordinances to subsidiary legislation. When the Government proposes new legislation, drafting counsel of the Division will liaise with those making the proposal to gain a thorough understanding of its background and intended effect. Drafting counsel, who are specialists professionally trained in the principles and techniques of drafting legislation, must first carefully analyse the drafting instructions to ensure that the proposal is



conceptually sound and legally effective. They will then conceive a legislative scheme to give effect to the proposal and choose the most appropriate forms and words. This process exemplifies the dual aspects of legislative drafting: the conceptual aspect, in which drafting counsel ascertain and perfect the concepts to be employed in the draft; and the literary aspect, in which drafting counsel select the best means of expressing those concepts.

After drafting the proposed legislation, drafting counsel provide legal support to the relevant policy bureaux during the legislative process. When government bills and subsidiary legislation are submitted to the Executive Council for consideration, drafting counsel attend the Executive Council meetings to advise on general legal issues and questions relating to drafting.

Usually, after a bill has been introduced into the Legislative Council, a Bills Committee will be formed to consider it. For example, 44 Bills Committee meetings were held to scrutinise the Companies Bill. Drafting counsel attended those meetings to advise on drafting and other general legal issues and then drafted all the committee stage amendments proposed or agreed to by the Government. These amendments were considered and decided on before the bill was put to the vote for its final reading in the Legislative Council meeting. Likewise, if an item of subsidiary legislation made by the Government is referred to a sub-committee after being tabled at the Legislative Council, drafting counsel will attend the sub-committee meetings and draft any amendments which the Government proposes.

In the complex process of drafting legislation, drafting counsel are assisted by a dedicated team that includes law translation officers, law clerks, an English legislative editor, personal secretaries, proofreaders, typists and calligraphists. Their hard work contributes to the making of statutory laws in the HKSAR.

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

### *Bilingual guide to styles and practices of drafting legislation in the HKSAR*

As part of the Division's ongoing drive to improve the readability and accessibility of the laws of the HKSAR, it has made publicly available a comprehensive guide to the styles and practices used in drafting legislation in the HKSAR. The guide, known as *Drafting Legislation in Hong Kong: A Guide to Styles and Practices*, was published in January 2012 and consists of 15 chapters canvassing most of the important aspects of drafting legislation in the HKSAR. The Guide makes transparent the form and presentation of legislation and explains the drafting approaches and techniques adopted by the Division. It also shares advice on useful tools to adopt, as well as pitfalls to avoid, in the drafting process.

Furthermore, the Guide discusses the major parameters in the HKSAR context within which laws are drafted, including the Basic Law, specific Ordinances and common law principles. The publication of this work represents the culmination of years of meticulous internal examination of the Division's drafting practices to improve the quality and comprehensibility of the English and Chinese texts

A Chinese version of the Guide was published in June 2012. In addition to carrying the same content as the English-language Guide, it includes

passages and examples dealing with drafting legislation in Chinese and a chapter on issues specific to the Chinese text. In the same month, the Division published a bilingual version of *How Legislation Is Made in Hong Kong*, which provides



updated information and statistics relating to making legislation in the HKSAR. Intended as a companion text to the Guide, it gives readers an overview of the legislation-making process in the HKSAR and elaborates on the roles played by stakeholders involved in that process. With these publications, the Division hopes to enable all statute users to better understand the law.

### *The database: a mammoth project in progress*

In recent years, the Division embarked on a major e-legislation initiative to transform access to statutory laws by undertaking a project to establish a verified, authenticated and searchable electronic database of all legislation in the HKSAR. The enactment of the Legislation Publication Ordinance (Cap 614) in 2011 paved the way for the implementation of the database project by providing the necessary legislative backing for it. Although the existing Bilingual Laws Information System already provides a consolidated version of the laws of the HKSAR through the internet, it has no legal status and is for reference purposes only. Once completed, the database project will facilitate free and convenient online access to accurate and up-to-date legislation in the HKSAR with legal status by the public anywhere, anytime.

The major benefits of the database are:

- timely dissemination of and free access to legislation in the HKSAR with legal status;
- improved accuracy and efficiency in compiling legislation in the HKSAR; and
- enhanced searching and printing functions.

The Division plans to implement the database in two phases. Phase 1 will cover the core functions for use by the Department internally (i.e. the new laws compilation and publication system). Phase 2 will cover the functions for public use and, on its

completion, the public will be able to access the database. Legislative materials will then be migrated gradually from the current loose-leaf edition of the laws to the database.

In late 2012, the contract for the project was awarded and, for the most part of 2013, the project was at the system analysis and design stage. In August 2013, a Hong Kong Legislation Database User Liaison Group was formed. The group, which held its first meeting in September 2013, provides a channel through which the Division could benefit from suggestions by frequent users of legislation. By the end of 2014, the Division had carried out a series of tests for the functions covered in phase 1.

The verification process (i.e. the process of checking and confirming the relevant data as being an accurate version of legislation) is targeted to start in 2015/2016 at the earliest. That promises to be a formidable task which will take several years to complete. The existing loose-leaf edition of legislation will be phased out progressively as the verification process makes its way to completion.

### *Customised drafting course taught locally*

In the summer of 2013, the Division launched an intensive legislative drafting course for new recruits and less experienced counsel, which was the first in-house drafting course entirely designed and conducted by counsel of the Division. The course aimed to equip junior drafters with the necessary knowledge to deal with their drafting assignments and to give them a solid foundation for developing and sharpening their drafting skills.

Held from 9 July to 6 August 2013, the course comprised 10 sessions and was attended by six participants. The Hong Kong-centric and practical nature of the course ensured that what the participants had learnt from the course could

be directly applied in drafting legislation in the local context. Course topics included not only the fundamentals of legislative drafting such as the structure and interpretation of legislation, but also specialised subjects such as the handling of drafting instructions and approaches to bilingual drafting.

A noteworthy component of the course was a drafting class held in Macao and attended by the counsel of the Division and participants from the Legal Affairs Bureau and the Law Reform and International Law Bureau of the Macao SAR. The drafting class provided a welcome opportunity for legislative drafters from two different bilingual jurisdictions to exchange views and knowledge whilst collaborating on a drafting assignment. The kind assistance of officials of the two authorities in Macao contributed greatly to the success of the project.



Members of a joint drafting class consisting of Macao and Hong Kong legislative drafters held in 2013

A second legislative drafting course was organised for junior drafters of the Division in the summer of 2014. This five-day course, which was conducted by Canadian law drafting expert Mr Paul Salembier, focused on the more fundamental techniques and principles of legislative drafting. To encourage the exchange and sharing of experience, lawyers from other Divisions of this Department and the Legislative Council Secretariat were also invited to attend the course. Another significant feature of the course was that ample opportunities were provided

to the participants to engage in open discussions of their drafting assignments with guidance from the course tutor.



Tutor of the legislative drafting course held in 2014, Mr Paul Salembier (front row, third right), and the participants

### *Division's links with other jurisdictions*

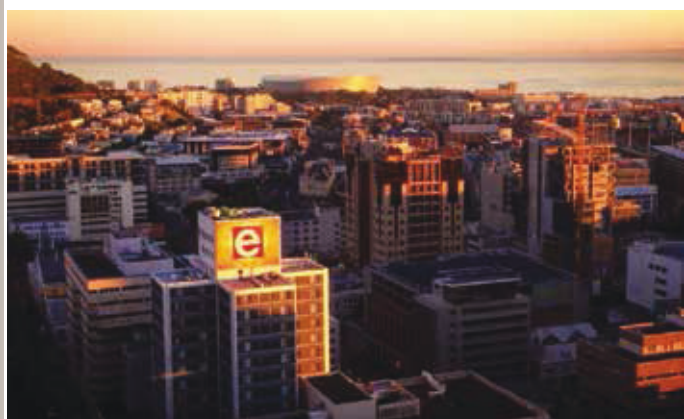
Maintaining connections with drafting offices in other jurisdictions is important to the Division in different ways. First, despite their diverse cultural backgrounds and legal systems, drafting offices have the common goal of drafting effective legislation. Thus it is always valuable to see how other drafting offices seek to attain that goal. Secondly, the ease of communications in our technologically connected world has enabled drafting offices to benefit greatly through collaborative endeavours. Assistance can be provided in various aspects of drafting work including computer-assisted drafting and gaining access to research or reference materials. Thirdly, a competent legislative drafter who needs to deal with a variety of subject matters and understand them in some depth can gain important insights by broadening his or her horizons as far as possible.

From 2012 to 2014, the Division continued to strengthen its links with drafters in other jurisdictions. In 2012 and 2014, colleagues of the Division attended the Conferences of Clarity (an international plain language organisation) held in

Washington, DC, and Antwerp respectively. Those conferences brought together a diverse network of lawyers and communication experts who shared their knowledge of and experience in plain language techniques and projects.

In November 2012, a delegation led by the Law Draftsman, Mr Paul Wan, visited the Legal Affairs Bureau and the Law Reform and International Law Bureau of the Macao SAR. The delegation from the HKSAR had a very useful exchange of ideas and experiences on bilingual drafting with their counterparts in Macao.

The Conference of the Commonwealth Association of Legislative Counsel held in Cape Town, South Africa, in April 2013 offered a unique setting for drafting counsel at every level of experience to exchange views and to network with legislative drafters from many jurisdictions. Three members of the Division including the Law Draftsman attended the Conference and subsequently shared their observations and reflections with other colleagues of the Division at an all-counsel meeting.



Cape Town by the Atlantic Ocean, where the CALC (Commonwealth Association of Legislative Counsel) Conference 2013 was held

As information technology is now an integral part of the work of any drafting office, participation in legislative drafting IT forums is a highly beneficial

experience for the staff of the Division. Counsel of the Division participated in the PCC IT Forums held by the Australasian Parliamentary Counsel's Committee in 2012, 2013 and 2014.

In addition to overseas visits and participation in international conferences, the Division sent a senior drafter on a 10-week secondment to the Office of the Queensland Parliamentary Counsel in Brisbane, Australia, in the summer of 2014. The secondment was considered extremely valuable in that it gave the drafter an immersive experience of the professional and management practices of an overseas drafting office, and set a solid foundation for further exchanges and co-operation with law drafters of that office.

## Looking forward

### *More user-friendly legislation*

One of the long-term objectives of the Division is to make legislation more accessible as well as easier to read and understand. Indeed the Division holds the view that the rule of law, which is treasured so much by the people of the HKSAR, requires that the law be accessible.

With this in mind, the Division has adopted drafting principles and techniques that ensure the statutory laws of the HKSAR are as clear and simple as possible. Its drafting techniques include those that aim at facilitating comprehension of legislation to all statute users, from legal professionals to members of the public, in the understanding that legislation regulates the conduct of citizens in many aspects of their lives.

Looking forward, the Division will remain strongly committed to plain language drafting as a means to creating user-friendly laws. The Division's Drafting



Techniques and Legislative Styles Committee, established in 2008, will continue to meet regularly to examine legislative drafting styles and practices, with an emphasis on techniques that can produce simple and clear legislation. Apart from the changes already implemented (e.g. updated document designs, avoiding archaic words, using plainer terms and simplifying sentence structures), the Division has begun using overviews, signposting, notes and examples in legislation as aids to the reader.

As part of this commitment, the Division has made an initiative to consider how legislative drafting in Chinese can be further advanced—the Chinese Drafting Sub-committee, formed under the Drafting Techniques and Legislative Style Committee, held its first meeting in December 2012. The Sub-committee has been assigned with the tasks of compiling a comprehensive manual for legislative drafting in Chinese; recommending drafting styles for the Chinese text; and disseminating good practices for drafting the law in Chinese. In addition, it will make recommendations on matters relating to co-ordinating the drafting of the two official language texts of HKSAR legislation.

### *Professional development of drafting counsel*

The Division strives to enhance the continuing professional development of drafting counsel to meet the challenges posed by the ever-evolving law and the technological advances of the digital age. Consequently, it gives a very high priority to providing drafting counsel with training and other opportunities to upgrade and update their knowledge, skills and competencies.

### *In-house workshops and seminars*

To this end, a structured programme of in-house talks and workshops on a wide range of topics is being implemented. The programme is conducted



Young drafting counsel attending the in-house Practical Drafting Course 2013

by experienced drafting counsel, as well as outside experts, and covers the theory and practice of law drafting and other relevant legal and non-legal topics. The Division realises that it is a challenging task to make both the Chinese and English texts of legislation equally readable. The programme has therefore been designed to give a balanced emphasis on the theory and practice of drafting in both official languages. For example, on 2 October 2013, former Chief Legislative Counsel of Canada, Mr Lionel Levert, shared his extensive experience in bilingual drafting with counsel in an engaging seminar organised by the Division. In 2014, out of the 10 workshops conducted for members of the Division, five of them covered topics related to bilingual drafting or the use of Chinese in legislative drafting.



The Law Draftsman, Mr Paul Wan (left), presents a souvenir to former Chief Legislative Counsel of Canada, Mr Lionel Levert, at a seminar on bilingual drafting

### *Knowledge sharing*

The Division has been implementing measures to ensure that its professional staff has ample opportunities to share knowledge and experience in a friendly and supportive environment. These include monthly all-counsel meetings during which drafters discuss their current work items, and an e-forum on which counsel post questions and share information in an informal way.

The Division has also developed an elaborate system of public folders in its internal computer network to facilitate knowledge sharing. The system provides a convenient means of central access for members of the Division to training materials and other related information that may be helpful to them.

# Legal Policy Division





Solicitor General, Mr Frank Poon (second right), with his deputies (from left): Deputy Solicitor General (General), Mr Peter Wong; Deputy Solicitor General (Constitutional), Ms Roxana Cheng; and Secretary of the Law Reform Commission, Ms Michelle Ainsworth

## Legal Policy Division

The Legal Policy Division comprises three sections: the Legal Policy (General) Section, the Legal Policy (Constitutional) Section and the Law Reform Commission Secretariat. The Division provides legal advice and support on matters of constitutional and legal importance and has policy purview over subject matters relating to the legal system, legal and arbitration services as well as the legal profession. The Law Reform Commission Secretariat serves the Law Reform Commission of Hong Kong which is an independent body chaired by the Secretary for Justice.

### Legal Policy (General) Section

The Legal Policy (General) Section consists of two General Legal Policy Units and the China Law Unit. The General Legal Policy Units advise government

bureaux and departments on compliance of existing and proposed legislation and policies with established principles underlying the legal system, and provide advice on legal issues arising out of various types of petitions and statutory appeals to the Chief Executive and other authorities, as well as on procedures and practice of the Legislative Council. They also assist in formulating and promoting policies and bills on subject matters for which the Secretary for Justice has carriage, particularly in relation to the legal system, legal and arbitration services and the legal profession. The China Law Unit provides advice on Mainland law as well as the implementation of national laws applicable to the HKSAR. It helps foster closer co-operation and exchanges amongst the HKSAR, the Macao SAR, Taiwan and the Mainland on the legal front, and operates programmes, including the Common Law Training Scheme, to facilitate



Mainland officials' better understanding of the legal system of the HKSAR and vice versa. The section also assists in promoting the HKSAR as an international legal and dispute resolution services centre in the Asia-Pacific region.

### Legal Policy (Constitutional) Section

The Legal Policy (Constitutional) Section consists of the Basic Law Unit, Human Rights Unit and Constitutional Development and Elections Unit. Together, the section provides legal advice to the Government on the Basic Law, human rights law (including anti-discrimination legislation) and electoral law issues in the context of legislation, policies or government litigation. The section is responsible for ensuring that new legislative and major policy proposals are in conformity with the Basic Law and human rights. The section works closely with government bureaux and departments

on constitutional reforms and electoral operations. Counsel of the Human Rights Unit assist the Government in preparing periodic reports to the United Nations (UN) treaty monitoring bodies under the applicable human rights treaties and play an active part at the relevant UN hearings.

### Law Reform Commission Secretariat

Counsel in the Law Reform Commission (LRC) Secretariat, together with a team of law translation officers and other supporting staff, serve as secretaries of the independent LRC of Hong Kong and its sub-committees, providing all necessary professional and administrative support to them in their law reform work. After the LRC has published a final report, counsel may be directly involved in assisting the relevant government bureaux or departments in implementing the LRC's proposals through enacting or amending legislation.



The Solicitor General, Mr Frank Poon (centre), addressing the UN Human Rights Committee at the hearing on the HKSAR Third Periodic Report under the International Covenant on Civil and Political Rights in March 2013



The Secretary for Justice, Mr Rimsky Yuen, SC (front row, seventh left), and representatives of the participating organisations of the Hong Kong Legal Services Forum held in Guangzhou in September 2012

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

- The coming into full force of the Legal Practitioners (Amendment) Ordinance 2010 in June 2012, which enables eligible solicitors to apply for higher rights of audience in the higher courts thereby widening the pool of able advocates.
- The enactment of the Legal Practitioners (Amendment) Ordinance 2012 in July 2012, which introduces limited liability partnership as an additional business model for law firms in the HKSAR.
- The enactment of the Statute Law (Miscellaneous Provisions) Ordinance 2012 in July 2012 and the Statute Law (Miscellaneous Provisions) Ordinance 2014 in November 2014, both of which introduce miscellaneous legislative amendments to various ordinances and subsidiary legislation to keep our body of legislation tidy.
- The opening by the China International Economic and Trade Arbitration Commission (CIETAC) of its CIETAC Hong Kong Arbitration Center

in September 2012, its first office outside the Mainland.

- The establishment of a Working Group on Class Actions in December 2012, chaired by the Solicitor General, to follow up on the LRC's *Report on Class Actions* published in May 2012.
- The conclusion of the Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards with the Macao SAR in January 2013.
- The enactment of the Arbitration (Amendment) Ordinance 2013 in July 2013, which implements the above arrangement with the Macao SAR and introduces miscellaneous amendments to enhance the arbitration regime in the HKSAR.
- Promoting the HKSAR as an international legal and dispute resolution services centre in the Asia-Pacific region at forums and events outside the HKSAR, including Beijing, Guangdong, Fujian, Shandong, India, Seoul, London, Vietnam, Cambodia and Myanmar.
- Co-hosting the second Hong Kong Legal Services Forum in Guangzhou in September 2012.



The Secretary for Justice, Mr Rimsky Yuen, SC (centre), and the then Fujian Provincial Department of Justice's Director-General, Mr Chen Yixing (third right), together with representatives of the participating organisations of the Seminar on Hong Kong Legal and Arbitration Services held in Xiamen in April 2013

- Co-organising a seminar on Hong Kong Legal and Arbitration Services in Xiamen in April 2013.
- Counsel of the Department, as members of the Chinese delegation, attended the United Nations Commission on International Trade Law (UNCITRAL) Working Group III on Online Dispute Resolution at its 25th to 30th sessions from 2012 to 2014.
- Counsel of the Department, as members of the Chinese delegation, attended the UN hearings on the periodic reports of China (including the HKSAR) under the Convention on the Rights of Persons with Disabilities, the Convention on the Rights of the Child, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, and the periodic report of the HKSAR prepared in the light of the International Covenant on Civil and Political Rights, and attended the Universal Periodic Review of China (including the HKSAR) conducted by a Working Group of the UN Human Rights Council from 2012 to 2014.
- The establishment of the Inter-departmental Working Group on Gender Recognition, under the chairmanship of the Secretary for Justice, in January 2014 to follow up on the judgment of the

Court of Final Appeal in the case of *W v Registrar of Marriages* (2013) 16 HKCFAR 112.

- Co-hosting the third Hong Kong Legal Services Forum in Qingdao in September 2014.



Mock arbitration demonstrated to the participants of the Hong Kong Legal Services Forum held in Qingdao in September 2014

- The opening by the China Maritime Arbitration Commission (CMAC) of its CMAC Hong Kong Arbitration Center in November 2014, its first office outside the Mainland.
- The enactment of the Contracts (Rights of Third Parties) Ordinance (Cap 623) in November 2014, which reforms one of the aspects of the common law doctrine of privity of contract.
- The establishment of the Advisory Committee on Promotion of Arbitration, under the chairmanship of the Secretary for Justice, in December 2014.



HKSAR members of the Chinese delegation addressing questions raised by the UN Committee on the Rights of the Child during the hearing on the HKSAR's Second Periodic Report under the Convention on the Rights of the Child in September 2013

### **Looking forward: ongoing and new initiatives**

- Working towards the introduction of a bill into the Legislative Council for implementation of the LRC's reports on (1) Enduring Powers of Attorney: Personal Care, (2) Criteria for Service as Jurors, and (3) Hearsay in Criminal Proceedings.
- Providing assistance to the cross-sector Working Group on Class Actions, and the sub-committee formed under it in their deliberations of the recommendations made by the LRC.
- Participating in various seminars in the Mainland to promote Hong Kong's legal and dispute resolution services.
- Introduction of the Arbitration (Amendment) Bill 2015 into the Legislative Council in 2015.
- Ensuring Basic Law compliance of constitutional reforms relating to the Chief Executive and Legislative Council elections.



# FEATURE ARTICLE 1

## Promotion of the HKSAR's Legal and Arbitration Services

In his address at the ceremonial opening of the Legal Year 2013, the Secretary for Justice said, *"A combination of factors including... our efficient legal system have placed Hong Kong in a good position to be a leading centre for legal services and dispute resolution in the Asia-Pacific region. Much effort has previously been made in this regard, and I have no doubt that this is a direction that we should continue to pursue."* On the same event in 2014, the Secretary for Justice further stated, *"Last year, I said Hong Kong is well placed to be a leading centre for legal and dispute resolution services in the Asia-Pacific region. This remains the case, and the Department of Justice would continue with its efforts to enhance Hong Kong's strength in this regard."*

Since taking office in July 2012, the Secretary for Justice has helped promote our international legal and dispute resolution services to the international community on numerous occasions, including on 27 September 2013 when he purposely chose the topic "The Crucial Role of Hong Kong's Legal and Dispute Resolution Services in making it a Global Centre for Finance and Commerce" as the theme of his address at the Hong Kong Association forum in London. As he pointed out, *"Capitalising on our well-developed legal system and legal infrastructure, it is the steadfast policy of Hong Kong's current Administration, as well as one of the priorities of my department (the Department of Justice), to consolidate, maintain, enhance and promote Hong Kong as a centre for international legal and dispute resolution services in the Asia-Pacific region."*

The Legal Policy Division helps formulate policies concerning our legal system and legal profession and promote the HKSAR's legal and arbitration services, and as such, the addresses by the Secretary for Justice are of special significance, conveying a clear direction and a strong sense of purpose to our work. They also remind us that the endeavour is a work in progress

and that we must continue to work towards perfecting our legal system and services and to keep pace with international trends for the HKSAR to stay competitive in the region. In the ensuing paragraphs, we highlight some of the policy initiatives pursued by the Division in the period from 2012 to 2014.

### Legal services

#### *Higher rights of audience*

We brought the Legal Practitioners (Amendment) Ordinance 2010 into operation in June 2012. The Ordinance removed the long-time restriction against solicitors acting as their clients' advocates in our higher courts. Today, a solicitor who is able to meet the relevant qualification requirements can apply for higher rights of audience, and a solicitor's right to act as an advocate in our higher courts is no longer restricted by his being solicitor, so long as he has the necessary ability and experience to do so. The reform is also welcomed by members of the public who now have a wider choice of suitable advocates to represent them in the higher courts. Thanks to the efforts of the Higher Rights Assessment Board which is empowered by the Ordinance to approve applications for higher rights of audience, 24 applicants were granted the rights from 2012 to 2014, and we expect more successful applications in future.

#### *Limited Liability Partnership (LLP)*

The Legal Practitioners (Amendment) Ordinance 2012 was enacted in July 2012. The Ordinance, upon coming into operation, would allow law firms in the HKSAR to practise in the form of an LLP. Unlike the case of a general partnership, the personal assets of



The Secretary for Justice, Mr Rimsky Yuen, SC (fourth left), with the then Secretary for Administration and Justice of the Macao Special Administrative Region, Ms Florinda Chan, after the signing of the Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards Between the Hong Kong Special Administrative Region and the Macao Special Administrative Region in January 2013

innocent partners of an LLP would be shielded from liability caused by their fellow partners' professional default. Amongst others, LLP is expected to encourage small local firms to merge into bigger practices, enabling them to offer a wider range of legal services to their clients and become more competitive. Since its enactment in 2012, we have been working closely with the Law Society on draft subsidiary legislation of the Ordinance. Significant progress on this front has been made, and we aim to finalise this matter and bring the Ordinance into operation soon.

#### ***The Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA) Supplements IX and X***

We promoted co-operation between the legal professions of the Mainland and the HKSAR, and worked closely with the legal and dispute resolution services sectors to seek better access to the Mainland market under CEPA and other platforms. Following

the signing of CEPA Supplement IX in June 2012, the maximum number of Mainland law firms with which a HKSAR law firm is allowed to operate in association has been relaxed to three. After the signing of CEPA Supplement X in August 2013, as a pilot measure, a HKSAR law firm and a Guangdong law firm are now able to enter into an agreement to enable the Guangdong law firm to second Mainland lawyers to work as consultants on Mainland law in representative offices of the HKSAR law firm in Guangdong. This is an improvement on the current restriction in the Mainland against representative offices of the HKSAR law firms employing Mainland practising lawyers. The new commitment took effect on 1 January 2014. The Agreement between the Mainland and Hong Kong on Achieving Basic Liberalization of Trade in Services in Guangdong was signed in December 2014. Liberalisation measures on legal services covered by this Agreement include allowing Hong Kong and Guangdong law firms to enter into association in the form of partnership in three pilot areas in Qianhai, Nansha and Hengqin.

## Arbitration services

Following the new Arbitration Ordinance (Cap 609) which we promoted in the Legislative Council in 2010 (the new Ordinance established a unified arbitration regime in the HKSAR based on the UNCITRAL Model Law), the Division further promoted the Arbitration (Amendment) Ordinance 2013. The Amendment Ordinance amended the new Arbitration Ordinance in response to latest developments in the field of arbitration. In particular, it introduced a statutory mechanism for the enforcement of arbitral awards made in the Macao SAR by HKSAR courts to implement the Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards concluded with Macao in January 2013. To meet the need of the arbitration community, the Amendment Ordinance also made clear that emergency relief granted by an emergency arbitrator is enforceable in accordance with the new provisions of the Amendment Ordinance.

In March 2014, the Solicitor General signed an agreement for and on behalf of the Government with the Hong Kong Trade Development Council for conducting a study on the development of arbitration in Hong Kong and the challenges and opportunities that Hong Kong faces as a regional centre for international arbitration in the Asia-Pacific region. The Hong Kong Trade Development Council has engaged a consultant to carry out the study, with a view to completing the study and delivering the final report in 2015.

In December 2014, the Department of Justice established the Advisory Committee on Promotion of Arbitration to promote Hong Kong as a leading centre for international arbitration services in the Asia-Pacific region. The Advisory Committee, comprising representatives of key stakeholders and eminent members of the arbitration community, is responsible for overall co-ordination and strategic planning for

the promotion of arbitration services. We hope that with the co-ordination of the Advisory Committee, concerted efforts made by various institutions and stakeholders of our dispute resolution services will take the promotion of Hong Kong's arbitration services to another level.

Apart from assisting in policy initiatives, counsel of the Division also organised and participated in many conferences and events to promote the HKSAR's legal and arbitration services, and to build up networks with legal professionals from other places. We feel privileged to have been given the opportunity to take part in and contribute to this purposeful cause.

We have also continued our efforts in facilitating the establishment and growth of world-class arbitration institutions in Hong Kong. In September 2012, the China International Economic and Trade Arbitration Commission set up its first arbitration centre outside the Mainland in Hong Kong. In November 2014 the China Maritime Arbitration Commission, the sole professional maritime arbitration institution in the Mainland, also set up its Hong Kong Arbitration Center. The presence in Hong Kong of reputable arbitration institutions would further enhance Hong Kong's position as a leading international arbitration centre in the Asia-Pacific region.



The Secretary for Justice, Mr Rimsky Yuen, SC (fifth left), at the inauguration ceremony of the China Maritime Arbitration Commission Hong Kong Arbitration Center in November 2014

## FEATURE ARTICLE 2

### Implementation of the Reports published by the Law Reform Commission for Subjects within the Department of Justice's Policy Portfolio

Law reform plays an important role in any society which aspires to uphold the rule of law. As our society evolves, so too must our laws to keep pace with changing social needs. The Law Reform Commission (LRC) of Hong Kong was established in 1980 as an independent body to keep our laws under review. The primary objective of any LRC project is to present well-considered proposals for improving our law. LRC reports generally the result of a highly detailed study by a sub-committee of experts in the field and involve extensive public consultation.

Within the Department of Justice, the Legal Policy Division has the role of considering and, if appropriate, implementing the recommendations made in the reports published by the LRC on subjects falling within the policy portfolio of the Department. This includes subjects concerning general legal principles and policies, legal services and the legal profession. Considering and implementing reports of the LRC (including preparing and introducing relevant draft legislation into the legislature) form an important part of the Division's work. Set out below are the various LRC topics on which we have been working in 2012, 2013 and 2014.

#### *Class actions*

In recent years, the subject of an aggregate litigation mechanism has been under the spotlight around the world and there have been extensive debates on

whether it should be introduced. The need for such a mechanism most typically arises where a large number of persons have been adversely affected by another's conduct, but each individual's loss is too small to make it economically viable to undertake individual litigation. Typical examples include consumer cases (involving product liability and consumer fraud), insurance cases, personal injury

cases (such as food poisoning). Under the current law in the HKSAR, the procedure for dealing with multi-party proceedings is a rule on representative proceedings under the Rules of the High Court. However, this was criticised as restrictive and inadequate by the Chief Justice's Working Party on Civil Justice Reform in its Final Report in 2004.

In May 2012, the LRC published its *Report on Class Actions*, recommending the introduction of a class action regime in the HKSAR. In November 2012, the Legal Policy Division had established a cross-sector working group (Working Group) to study the LRC's proposals and to make recommendations to the Government on how to take the matter forward. The Working Group is chaired by the Solicitor General with members from the private sector, relevant government bureaux and departments, the two legal professional bodies and the Consumer Council. Also on the Working Group is a representative from the Judiciary to provide input to the deliberations from the perspective of interface with court operations. The Working Group has held several meetings to study the LRC's proposals closely.





### ***Criteria for service as jurors***

Some of the HKSAR's current eligibility criteria and exemptions for jury service date back to 1845, when the original legislation created exemptions for government employees, lawyers, doctors, clergyman, service personnel and employees of the "East India Company." The extremely strict eligibility requirements which long prevailed in the HKSAR led to criticisms that the HKSAR's jury list consisted of "a cultural, social and political elite". For example, previously, "any person 'ignorant' of the English language" was a notable ground for disqualification from jury service dating back to 1851. (English language proficiency continued to be a requirement for jury service in the HKSAR until 1997, when proficiency in the Chinese language was added.)

In June 2010, the LRC published *a Report on Criteria for Service as Jurors*, aimed at ensuring that the eligibility criteria and exemptions for jury service are as appropriate as possible to current circumstances and that the relevant legislative provisions are clear and precise. The Department is currently working towards a draft bill for the purpose of consultation.

### ***Double jeopardy***

The rule against double jeopardy, which prevents a person who has been acquitted of an offence from being tried again for the same offence, is grounded on the notion that a person who has undergone the ordeal of a criminal trial and been acquitted should be left undisturbed to lead a normal life following the final verdict. However, if new compelling evidence then emerges pointing to his guilt, the question arises whether he should be allowed to escape justice. These concerns have been highlighted in recent years by

rapid developments in forensic science and DNA testing, and changes to the law have been proposed or adopted in a number of jurisdictions. In February 2012, the LRC published *a Report on Double Jeopardy* proposing that the rule against double jeopardy should be relaxed in the HKSAR in exceptional circumstances.

The Department has decided to take forward all the recommendations in the LRC report. It will work out details of the legislative amendments required in consultation with stakeholders.

### ***Enduring powers of attorney: personal care***

At present, an enduring power of attorney (EPA) applies only to decisions about a donor's property and financial affairs and cannot be used to delegate decisions about the donor's personal care (including, for example, where and with whom the donor is to live and his everyday health care matters). In July 2011, the LRC published *a Report on Enduring Powers of Attorney: Personal Care* recommending the extension of the scope of EPAs to include personal care decisions.

The Department has established an inter-departmental working group to examine the recommendations in the LRC report and is also making preparation for a working draft bill, with a view to consulting the legal professional bodies, the Judiciary and other stakeholders in 2015.

### ***Hearsay in criminal proceedings***

In November 2009, the LRC published *a Report on Hearsay in Criminal Proceedings*. The report proposes that the existing rule which prohibits the admission of hearsay evidence in criminal proceedings should be reformed and that the court should be given

discretion to admit hearsay evidence during a trial where it is satisfied that the admission of that evidence is “necessary”, and that the evidence is “reliable”.

In April 2012, the Department consulted the Panel on Administration of Justice and Legal Services of the Legislative Council, and in May 2012, it organised a small-scale forum to consult representatives of the Hong Kong Bar Association, the Law Society of Hong Kong and the Judiciary on the way forward. The Department is now preparing a working draft bill, with a view to consulting the legal professional bodies, the Judiciary and other stakeholders in 2015.

### ***Privity of contract***

Under the doctrine of privity of contract, only the parties who enter into an agreement can enforce rights under it. The LRC published a *Report on Privity of Contract* in 2005 which recommended that a clear and straightforward legislative scheme should be enacted to allow parties to an agreement to confer on a third party legally enforceable rights or benefits under that agreement. After careful consideration of the views and recommendations of the LRC, the Department proposed to implement the recommendations of the LRC in full with certain necessary modifications.

The Contracts (Rights of Third Parties) Ordinance (Cap 623) was enacted on 26 November 2014 and published in the Gazette on 5 December 2014. The Ordinance does not completely abolish the doctrine of privity. While it includes statutory provisions to give third parties the right to sue under agreements, it also provides that contracting parties should have the freedom to contract out of these provisions if they wish the doctrine of privity to apply. The Ordinance will come into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette.

## FEATURE ARTICLE 3

### Advising on Right of Abode Issues

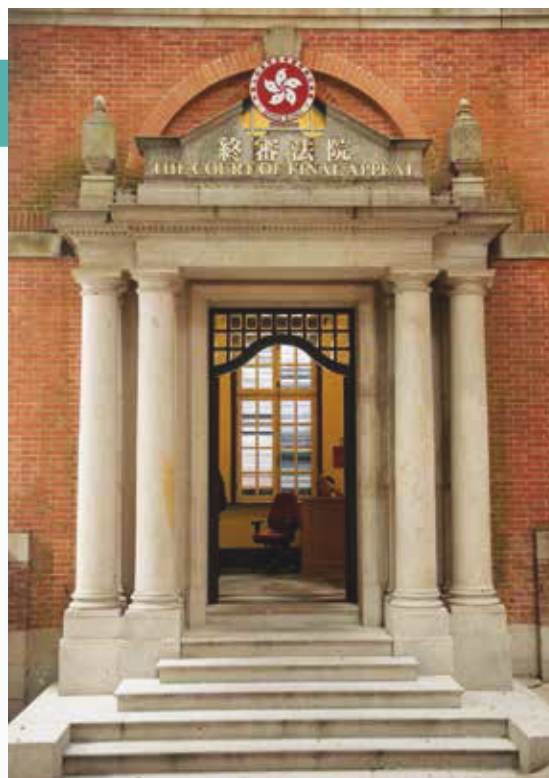
Article 24 of the Basic Law defines residents of the HKSAR to include permanent residents and non-permanent residents. There are six categories of persons who are entitled to permanent residence under Article 24. Apart from enjoying other rights and freedoms guaranteed to all HKSAR residents in Chapter III of the Basic Law, permanent residents enjoy the right of abode in the HKSAR; have the right to vote and the right to stand for election, and may serve in government departments as public servants.

From time to time, the Basic Law Unit (BLU) of the Legal Policy Division is called upon to provide advice on whether a person is a permanent resident and is entitled to the right of abode. Examples of such advice include issues arising from the cases of children born of Mainland mothers whilst in the HKSAR whose husbands are not HKSAR residents (Type II children), and foreign domestic helpers in the HKSAR.

#### *Type II children*

Article 24(2)(1) of the Basic Law stipulates that Chinese citizens born in the HKSAR before or after the establishment of the HKSAR shall be HKSAR permanent residents. In July 2001, the Court of Final Appeal (CFA) held in *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211 that Chinese citizens born in the HKSAR are permanent residents regardless of the residential status of their parents. The Immigration Ordinance (Cap 115) was accordingly amended in 2002 to bring the law in line with the CFA decision.

The number of Type II children has risen sharply in the past decade (from 629 in 2001 to 35 736 in 2011), giving rise to unintended and unforeseen consequences especially in the social and economic contexts. There is public concern about the impact



of birth tourism on the HKSAR's infrastructure and resources and the long-term sustainability of the situation. Since 2012, administrative measures have been rigorously deployed by the Government to deal with the problem, including announcement by the Chief Executive of a zero delivery quota policy for Mainland pregnant women in 2013. On the whole, these administrative measures are working effectively. The Department of Justice and the Security Bureau will continue to carefully examine appropriate and legally viable options to resolve the Type II children issue. However, it is pertinent to note that each option would have pros and cons and it is necessary to assess possible impacts inherent in each option. In this regard, BLU counsel provide advice to ensure that the options under consideration are consistent with the Basic Law.

#### *Foreign domestic helpers*

Article 24(2)(4) of the Basic Law provides that persons not of Chinese nationality who have entered the HKSAR with valid travel documents, have ordinarily resided in the HKSAR for a continuous period of not

less than seven years and have taken the HKSAR as their place of permanent residence before or after the establishment of the HKSAR shall be permanent residents of the HKSAR.

In *Vallejos v Commissioner of Registration* (2013) 16 HKCFAR 45, the two appellants were Philippine nationals who entered the HKSAR for employment as foreign domestic helpers (FDHs) and have resided in the HKSAR for more than seven years as FDHs. They challenged the constitutionality of section 2(4)(a)(vi) of the Immigration Ordinance which provides that a person employed as a FDH who is from outside the HKSAR is not to be treated as “ordinarily resident” in the HKSAR and so cannot become a permanent resident of the HKSAR.

The appellants contended that they were covered by the natural and ordinary meaning of the words “ordinarily resided” in Article 24(2)(4) and the restriction in section 2(4)(a)(vi) of the Immigration Ordinance was in breach of Article 24(2)(4) and unconstitutional. Their argument was accepted by the Court of First Instance but rejected by the Court of Appeal. The CFA dismissed their appeals. The judgment which each member of the bench had contributed was handed down on 25 March 2013. The CFA decided by a majority that the residence of FDHs, as a class, in the HKSAR did not come within the meaning of “ordinarily resided” in Article 24(2)(4). FDHs were not admitted for settlement, and accordingly, FDHs were not eligible for right of abode in the HKSAR under the Basic Law.

The HKSAR has a legal system different from the rest of the Mainland, and it enjoys independent judicial power, including that of final adjudication. Our courts

apply the common law in the interpretation of laws, including the Basic Law, in the adjudication of cases. Counsel of the BLU apply the same approach when advising the Government on legal questions involving the Basic Law. However, in order to understand and interpret the Basic Law properly, the role of Article 158 in the constitutional framework of the HKSAR must be correctly understood. The Hon Sir Anthony Mason AC KBE, NPJ describes it as follows:

“The conjunction of a common law system under a national law within the larger framework of Chinese constitutional law is a fundamental aspect of the Principle ‘one country, two systems’. Article 158 is the link between the two systems.”  
*(“The Rule of Law in the Shadow of the Giant: The Hong Kong Experience”, [Vol 33:623 2011] Sydney Law Review 623)*

In the FDH case, apart from raising some common law arguments, a fall-back submission was made during the hearing before the CFA on behalf of the respondents that the Court should seek an interpretation of Article 158 of the Basic Law from the Standing Committee of the National People’s Congress pursuant to Article 158(3) of the Basic Law in the event their primary arguments are not accepted. The Court ultimately did not find it necessary to seek such an interpretation, since the respondents’ primary argument was upheld. Despite criticisms from the appellants’ legal representatives, the CFA (when dealing with the issue of costs) pointed out that raising the point of Article 158 interpretation did not constitute any abuse as it was contingently relevant in the event the Court was unable to dispose of the appeal on the common law arguments put forward by the respondents.





# Prosecutions Division



The Director of Public Prosecutions, Mr Keith Yeung, SC (centre), with Deputy Directors of Public Prosecutions (from left): Mr Wesley Wong, SC; Mr William Tam, SC; Dr Alain Sham; and Mr David Leung, SC

## Prosecutions Division

Article 63 of the Basic Law of the HKSAR stipulates that the Department of Justice “*shall control criminal prosecutions, free from any interference*”. Within the Department, the Prosecutions Division is responsible for handling all matters concerning criminal prosecutions. In short, it is responsible for prosecuting trials and appeals at all levels of the criminal court, as well as assisting coroners with death inquests, providing legal advice to law enforcement agencies on their investigation and exercising on behalf of the Secretary for Justice the discretion whether or not to institute criminal proceedings. In addition, counsel in the Division, known as Public Prosecutors, provide advice and assistance to government bureaux and departments in relation to all aspects of the criminal law as well as existing and proposed legislation.

### Work of the Division

The work of the Division is mainly conducted by Public Prosecutors in the following four sub-divisions, each headed by a Deputy Director of Public Prosecutions:

- Sub-division I (Advisory): Counsel in this sub-division are responsible for advising law enforcement agencies on the important question of whether or not to prosecute and preparing cases for trial;
- Sub-division II (Advocacy): Counsel in this sub-division are experienced advocates who prosecute sensitive and high-profile criminal trials at all levels of court, to assist coroners in the holding of death

inquests and occasionally to conduct criminal appeals. Sometimes, new Public Prosecutors who first join the Division are temporarily posted to this sub-division to receive training in advocacy;

- Sub-division III (Appeals): Counsel in this sub-division are responsible for advising on and conducting appellate matters in court, including applications for judicial review and cases involving Basic Law and human rights issues in the criminal context; and
- Sub-division IV (Commercial Crime): Counsel in this sub-division are responsible for advising on, and the prosecution of, complex commercial fraud, corruption, money laundering, securities offences, revenue fraud and cases investigated by the Independent Commission Against Corruption and the Customs and Excise Department.

The Deputy Director who takes up the role of the Chief of Staff also oversees the work of:

- the Office of the Director of Public Prosecutions, which is responsible for all administrative, management, training, media relations, complaints and feedback matters and policy development of the Division; and
- the Proceeds of Crime Section, which handles applications for restraint orders and confiscation orders.

### Prosecution of offences

Depending on its nature and seriousness, a criminal case will be heard before the Magistrates' Courts, the District Court or the Court of First Instance, as the case may be. Public Prosecutors in the Division handle most appeals and the majority of prosecutions in the Court of First Instance. Public Prosecutors will sometimes prosecute in the Magistrates' Courts, particularly in cases of significance or where complex issues are expected to arise in the proceedings. Counsel from

the private bar and solicitors in private practice are from time to time briefed to prosecute on behalf of the Division (referred to as prosecutors "on fiat") at all levels of courts.

The majority of prosecutions in the Magistrates' Courts are conducted by Court Prosecutors, who are appointed as official prosecutors under section 13 of the Magistrates Ordinance (Cap 227) and have rights of audience at the magistracy level. Every Court Prosecutor attends an initial nine-month training course run by counsel in the Department before starting work. He or she also participates in programmes of continuing legal education. Although Court Prosecutors do not have the same legal qualifications as Public Prosecutors, they are valuable assets in the administration of criminal justice and have proved to be effective in discharging their duties.

### The new Director of Public Prosecutions

On 9 September 2013, Mr Keith Yeung Kar-hung, SC, took up the office of the Director of Public Prosecutions (DPP). Mr Yeung was called to the Hong Kong Bar in 1987 and was appointed Senior Counsel in 2009. Before his appointment as the DPP, Mr Yeung practised in a wide spectrum of areas of law covering criminal, civil and regulatory matters and also prosecuted cases on behalf of the Department of Justice. He succeeded Mr Kevin Zervos, SC, who has, upon his departure from the office after having served the Division as a prosecutor for 21 years, joined the Judiciary as a judge of the Court of First Instance.

### Major events and new initiatives in 2012, 2013 and 2014

#### *Prosecution Weeks 2012, 2013 and 2014*

The Prosecution Week was first introduced on



The Secretary for Justice, Mr Rimsky Yuen, SC (second right), with other officiating guests of the Prosecution Week 2012 (from left): The then Vice President of Law Society of Hong Kong, Mr Stephen Hung; the then Director of Public Prosecutions, Mr Kevin Zervos, SC; and the then Chairman of Hong Kong Bar Association, Mr Kumar Ramanathan, SC



A Public Prosecutor briefing students on criminal justice system in Prosecution Week 2013

7 July 2012 as an initiative to reach out to the public in promoting the transparency of the work of the Division and increasing the public's awareness of the rule of law in the HKSAR. A variety of activities were held which included seminars, guided visits to the Department and the Hong Kong Jockey Club Drug InfoCentre, school talks, meetings with community groups such as the Boy Scouts and the Junior Police Call, court visits, mock trials and quiz competitions. Riding on the success of this initiative, Prosecution Weeks 2013 and 2014 with the respective themes of "ROLE - Rule of Law Enforced" and "Prosecutions: Fearless, Accountable, Impartial and Robust (FAIR)" were held from 21 to 28 June 2013 and from 24 to 30 June 2014 respectively. As in the first year, during the week of the event, participants were guided by Public Prosecutors to visit the Hong Kong Jockey Club Drug InfoCentre, the High Court and the District Court and were briefed on the criminal justice

system of the HKSAR to enhance their knowledge and understanding of the rule of law. In 2014, a keen response was received from a total of 30 secondary schools which enrolled for this activity. This is the largest number of responses in the three years since Prosecutions Week was first launched.



The Secretary for Justice (first left) with the Director of Public Prosecutions, Mr Keith Yeung, SC (first right), and the winners of the slogan competition of the Prosecution Week 2014

### *Criminal Law Conference 2012*

The Criminal Law Conference, held on 17 November 2012, was the first of its kind organised by the Division. The conference theme was "Reforming the Criminal Justice System of Hong Kong". It aimed at bringing together experienced and dedicated



The then Director of Public Prosecutions, Mr Kevin Zervos, SC, addressing the participants in Criminal Law Conference 2012



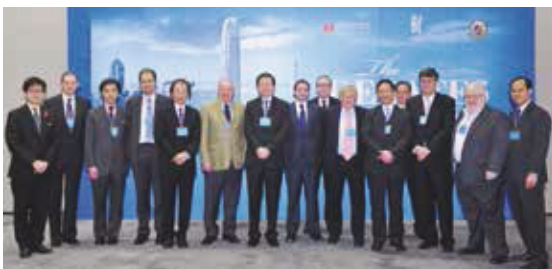
Public Prosecutors attending Criminal Law Conference 2012



legal practitioners to reflect on the existing criminal justice system in the HKSAR and to study current developments in the realm of the criminal law in other common law jurisdictions. Over 200 participants attended the conference and they actively exchanged views and shared thoughts to explore possible reforms in all aspects of our criminal justice system. The Right Honourable Sir Anthony Hooper, formerly a Lord Justice of Appeal of the Court of Appeal of England and Wales and currently an editor of Blackstone's Criminal Practice; Professor David Ormerod, the English Law Commissioner for Criminal Law and Evidence; and Justice Susan Glazebrook of the Supreme Court of New Zealand, were amongst a group of distinguished speakers, all of whom were drawn from the Judiciary, private practitioners and academics in the HKSAR and overseas.

### *The Debates: Criminal Justice Reform 2013*

A conference entitled "The Debates: Criminal Justice Reform", held on 2 November 2013, was jointly organised by the Division, the Hong Kong Bar Association and the Law Society of Hong Kong. It was a sequel to the Criminal Law Conference



Speakers, panelists and adjudicators of "The Debates: Criminal Justice Reform"



The Director of Public Prosecutions, Mr Keith Yeung, SC (right), debates in the conference

2012. Taking further on the insightful and thought-provoking exchanges in the preceding conference, potential areas for reform were identified for indepth discussion. At the conference, these topics were revisited by experienced criminal advocates in the form of debates covering four motions, namely the offence of money laundering, disclosure by the defence in criminal proceedings, legal professional privilege and guidelines and tariffs in sentencing. The debates were adjudicated by the Honourable Justice Mark Weinberg of the Court of Appeal, Supreme Court of Victoria, Australia; and the Right Honourable Sir Anthony Hooper. Over 200 participants attended the conference.

### *HOPAC 2013*

The Division hosted the 12th Heads of Prosecuting Agencies Conference (HOPAC) which was held from 29 to 31 May 2013. HOPAC is a biennial conference aimed at giving the heads of prosecuting agencies of selected common law and related jurisdictions an opportunity to meet and discuss matters of general principle, contemporary significance and practical importance. The theme of HOPAC 2013 was "Challenges to a modern prosecution service: moving with the times". Over 40 heads of prosecution or their representatives attended the conference to discuss current trends and issues as well as challenges faced by modern prosecution services in both the international and domestic context.



The then Director of Public Prosecutions, Mr Kevin Zervos, SC (centre), and deputy directors attending HOPAC 2013

### ***Meet the Community 2014***

In April 2014, the Division launched the Meet the Community programme. It is a programme which runs through the year. The idea is to send prosecutors out to interested schools and community organisations in all areas of Hong Kong. They give talks to students and members of the public on important legal topics relevant to the criminal justice system. The topics include the rule of law, the role of prosecutors, drug abuse, cyber bullying, juvenile crimes, sexual offences, white collar crimes and triad activities, etc. All participating students and other audiences find these topics interesting and useful. The discussions also help them identify and steer away from crimes. In this way, the public benefit from the programme by having a better understanding of the criminal justice system, upon which the continuous maintenance of the rule of law hinges.

### ***Prosecution Code – new guidelines for prosecutors***

In September 2013, the Division released the *Prosecution Code* which replaces the *Statement of Prosecution Policy and Practice – Code for Prosecutors* published in 2009. The *Prosecution Code* substantially revises the previous statement, modernising it in terms of substance, presentation as well as language. It contains a set of statements and instructions to guide prosecutors in conducting prosecutions. It is made available to Public Prosecutors, Court Prosecutors, Departmental Prosecutors and lawyers who prosecute on fiat. The public can also have access to the *Prosecution Code* through the Department's homepage.

### ***Attachment programme***

To foster links and enhance co-operation with prosecution offices in other jurisdictions, an attachment programme has been put in place. Since the implementation of the programme in November 2012, prosecutors from the Attorney-General's

Chambers of Singapore; the Justice Department of Brunei; the Office of the Director of Public Prosecutions, Republic of Mauritius; and the Office of the Attorney General of Mongolia were on attachment to the Division. During the stay of these visiting prosecutors, they were exposed to a wide range of work and duties undertaken by Public Prosecutors and were invited to attend various levels of court to observe criminal proceedings in the HKSAR.

### ***Combating cybercrime***

In response to the significant increase in cybercrimes in recent years, the Division formed a Cybercrime Section in August 2012. The section is responsible for providing expert legal advice on cybercrime, preventing technology crime and conducting related prosecutions. It also carries out research and training to prosecutors to deal with cases involving cybercrime. Counsel in the section co-ordinate legal actions within the HKSAR and promote co-operation on an international level.

### ***Training initiatives***

- Since 2012, Dr Simon Alderson, a highly experienced and respected English teacher, was engaged to provide a training programme on plain English for counsel of the Division. The training programme comprised lectures with interactive discussions and drafting workshops. During the training sessions, counsel were given opportunities to review their work and attempt to make their sentences shorter, words simpler and meaning clearer.
- The Criminal Advocacy Course is a training course organised by the Division for newly recruited legal trainees and Public Prosecutors. In 2012, an experienced criminal practitioner was engaged to update and expand the training materials with updated authorities, practical examples and tips. Every Public Prosecutor and Court Prosecutor has

been provided with a copy of the new Manual. The revamped “Criminal Advocacy Course Manual” now serves as a user-friendly, yet comprehensive, handbook for prosecutors’ ease of reference.

- The understudy programme is a new initiative introduced in 2012 to provide a learning opportunity to junior counsel in the private bar to equip them with the skills and experience in prosecuting complex or sensitive cases. Under this arrangement, Senior Counsel or experienced junior counsel who are briefed to prosecute cases of some complexity or sensitivity can nominate a counsel with less than 10 years’ experience to act as an understudy and to take part in the criminal proceedings as his or her junior at a fixed daily rate.
- To better equip prosecutors with the knowledge and expertise in handling cases of animal cruelty, in January 2013, Ms Amanda Whitfort, Associate Professor, Faculty of Law, the University of Hong Kong, and Mr Tony Ho, Chief Officer Inspectorate of the Society for the Prevention of Cruelty to Animals, talked to Public Prosecutors and Court Prosecutors on the law and practice on this subject. Participants actively discussed and exchanged views in relation to legal issues concerning animal protection and welfare.

## Looking forward

Prosecutors in the Division are committed to performing their roles as ministers of justice in providing a modern prosecution service to the community efficiently and professionally. Looking ahead, the Division will continue to pursue a policy of transparency in ensuring that prosecution decisions are made fairly and properly in accordance with established prosecution policy and practice. To face the global challenge of cross-border crime, the Division will also foster close association with prosecuting agencies from other jurisdictions in enhancing co-operation in the fight against transnational crime.



Ms Amanda Whitfort and Mr Tony Ho talk to prosecutors on animal law

# FEATURE ARTICLE 1

## Prosecution Guidelines and Prosecutorial Decisions

The prosecution service plays a pivotal role in the criminal justice system. It is very important that the public has confidence in the prosecuting authority knowing that it serves the community at all times in upholding the rule of law. The prosecuting authority should not aim at achieving a high conviction rate but instead be committed to ensuring that the guilty are convicted and the innocent acquitted. Prosecutors are, therefore, entrusted to take on these responsibilities in a fair manner and in accordance with the law.

Article 63 of the Basic Law of the HKSAR provides that the Department of Justice “shall control criminal prosecution, free from any interference”. This serves as an important constitutional guarantee to prosecutors within the Department that they make decisions to prosecute or not to prosecute in a wholly independent manner without any political, improper or other undue influence.

To facilitate the promotion of fair, efficient and effective administration of justice, the Prosecutions Division has formulated policies and practices to guide and direct prosecutors in conducting prosecutions and to ensure that decisions to prosecute are made consistently and justly. The first set of guidelines called *Prosecution Policy – Guidance for Crown Counsel* was issued in 1993. Moving on with the time and keeping in line with the development and changes in the law and criminal jurisprudence, there have been subsequent revisions and updates. In September 2013, the Division released its latest edition of the prosecution guidelines bearing the title *Prosecution Code*.

Apart from serving as a guide for prosecutors, as stated in the introduction of the *Prosecution Code*, it “also aims to give others a clearer understanding of the

approach prosecutors take, and the considerations they employ, in handling prosecutions”. The *Prosecution Code* is not intended to be an internal set of rules out of reach by the public. Instead, as a modern, transparent and accountable authority, the Department uploaded the *Prosecution Code* on its website for free public access, enabling the public to know the principles and guidelines that prosecutors should follow in the discharge of their duties.

The decision to prosecute or not is a very crucial one and has wide implications to an individual, an entity, a victim of crime and the community as a whole. Prosecutors in the Department are guided by a two-stage test as set out in the *Prosecution Code* in deciding whether prosecution should be brought in each case, namely that the evidence available demonstrates a reasonable prospect of conviction and if so, a prosecution is required in the public interest. The same or similar test is applied in other common law jurisdictions. In each case a prosecutor must consider the situation and examine all the relevant factors. Generally, the more serious the case, the more likely it is that a prosecution will be required in the public interest. What constitutes public interest may vary from case to case and often such a decision is not easy to make. The prosecution test is applicable at all stages of the prosecution process and a prosecutor is under a





duty to continually review a prosecution that has been commenced.

Prosecutors may, in appropriate cases, agree to deal with offenders who have committed minor criminal offences for the first time by way of a bind over. This will require an offender to admit his or her wrongdoing. A conviction will not be recorded against him or her but he or she will be bound over to keep the peace and/or of good behaviour in reference to specific conditions. The practice has proved to be effective in keeping him or her on the straight and narrow and to steer away from crime. The bind over procedure may be viewed as a rehabilitative measure in its own right and should not be treated as a “let-off”. An offender subjected to a bind over order is liable to criminal sanction for non-compliance with the terms of the order. The *Prosecution Code* requires a prosecutor to consider the following factors carefully before taking a decision to agree to a bind over:

- whether the public interest requires the prosecution to proceed;
- whether the consequences to the offender would be out of all proportion to the gravity of the offence;
- the likely penalty in the event of conviction;
- the age of the offender, his or her record, character, mental state (at the time of offending and presently);
- the views of a victim; and
- the attitude of the offender to the offence.

At the same time, it is, no doubt, in the public interest that criminals committing serious crime are prosecuted. Throughout the past few years, the

Division has successfully prosecuted a number of high-profile cases without fear or favour. Whether or not high-ranking public officials and well-known members of the community are involved, prosecution actions are initiated in accordance with the principled criteria as set out in the established prosecution guidelines and practices.

The people of the HKSAR enjoy the freedom of peaceful assembly, procession and demonstration. There are, however, occasions when the law enforcement agencies have to step in to maintain law and order or to protect the rights and interests of others. In making prosecutorial decisions in relation to offences alleged to have been committed where people are exercising these constitutionally guaranteed freedoms, prosecutors also get guidance from the *Prosecution Code*. It helpfully reminds prosecutors of the fundamental principles in accordance with which cases related to public order events should be dealt with through highlighting the useful references to the Basic Law, the Hong Kong Bill of Rights and the relevant court decisions.

As a concluding note, it cannot be emphasised more that to maintain public trust in the administration of the criminal justice system, prosecutorial decisions must be fair, objective and independent. To this end, Public Prosecutors in the Department will continue to strive to serve the community as ministers of justice in assisting the court and to do justice.

## FEATURE ARTICLE 2

### New Silks in the Prosecutions Division:

Mr Wesley Wong, SC, and Mr Simon Tam, SC

On 26 March 2013, the Judiciary announced the appointment of eight Senior Counsel of the HKSAR. Two of the eight Senior Counsel appointed, namely, Mr Wesley Wong Wai-chung and Mr Simon Tam Man-fai were from the Prosecutions Division. The official ceremony was held at Court No. 1 of the High Court on 11 May 2013.

Both Mr Wong and Mr Tam are serving directorate officers at the Division, having spent their entire legal careers so far in the public service. Save for the fact that they studied at different times in the same local secondary school and joined the Government at different years (Mr Tam in 1981 initially as Court Prosecutor and Mr Wong in 1993 as legal trainee), the two gentlemen crossed paths with each other in more ways than one.

They both read law together at the University of Hong Kong and were conferred with a Bachelor of Laws degree (with honours) in 1992 and obtained the Postgraduate Certificate in Laws in 1993, at which year they started their pupillage together at the then Legal Department (more affectionately known as the "Attorney General's Chambers") and were called to the Hong Kong Bar.

Since his appointment as a legal officer, Mr Wong has served at 13 different posts during his 20 years with the Department of Justice. He is said to be a very versatile counsel and has involved himself mostly in civil litigation and criminal prosecution work. He prosecutes trials and appeals at various levels of court on an everyday basis, gives legal advice on civil and criminal issues to various law enforcement agencies, bureaux and departments and actively participates in the management of the Department. Apart from appearing in court,



Mr Wesley Wong, SC (right), and Mr Simon Tam, SC (left)

he had sat on the rules committees of the higher courts and also promoted government bills, including those bringing legislative changes, among other new initiatives facilitating long term development on legal services, to localise and adapt the appointment of Queen's Counsel in anticipation of the resumption of sovereignty in 1997 and leading to the implementation of the Civil Justice Reform in 2009. Mr Wong is one of the four Deputy Directors of Public Prosecutions and heads Sub-division II (Advocacy) whilst at the same time being the Chief of Staff responsible for all management and policy development of the Division.

Mr Tam, a very experienced advocate, has over the years, prosecuted a number of sensitive and high-

profile cases. These include the brutal murder of “Ha Je”, a female newspaper vendor who met her unfortunate death in an armed group attack by machetes; the Revenue Tower murder in which the body of a female Thai tourist was discovered on top of an overhanging air-duct some tens of feet above the ground inside an engine room in the Revenue Tower; the case concerning the strangling of a young female member of an airline ground crew whilst she was alone on her way home at night; and the case of a serial killer who had within 21 days strangled two sex workers to death after drugging them with chloroform in their “one-woman brothels”. Mr Tam also conducted the appeal of a murderer who had killed a young girl, dismembering her body in his home into small pieces and flushing them down the toilet. He also assisted the coroner in conducting the death inquest in respect of the nine people who lost their lives in the fire which broke out in Fa Yuen Street, Mong Kok, in 2011. Mr Tam is currently a Senior Assistant Director of Public Prosecutions at Sub-division II (Advocacy) of the Division.

Mr Tam recalled an incident which happened in the 1980s when he was then a Court Prosecutor prosecuting at the Causeway Bay Magistracy. On that particular occasion, whilst walking to court, he got caught in heavy rain. Upon arrival he was totally drenched, and so were the defence lawyer and the Magistrate. On that occasion, the court ordered Mr Tam and the defence lawyer to take off their clothes, with which Mr Tam duly complied. He took off almost everything – his clothes, shoes and socks – except for his undervest and trousers. He even placed his pair of leather shoes on the Bar table. Until now, he is still intrigued by the charisma of the Magistrate

who insisted that “The show must go on!” whatever happens.

Upon “taking silk” (so-called because of the silk gown Senior Counsel wear), both Mr Wong and Mr Tam felt deeply honoured but would regard the appointments as a form of recognition to the important work performed at a high standard by and an encouragement to all staff of the Department as a whole for the benefit of the HKSAR community. They valued the opportunities afforded to them by the Department and the support they received from their colleagues.

A blurred office background featuring computer monitors and desks. In the foreground, a black computer keyboard is in sharp focus, resting on a light-colored desk. A semi-transparent gold banner is positioned across the middle of the image, containing the text 'Administration & Development Division' in a white serif font.

# Administration & Development Division



## Administration & Development Division

The Administration & Development Division provides essential support for the effective functioning of the Department. The support covers areas including human resources, financial management, training, library services and information technology (IT). This is provided by a team of administrative staff including managers, accounting and translation officers, library staff, IT personnel, secretaries, clerical officers and other support staff.

### Human resources

The people who work for the Department are its most valuable asset. An important aspect of the Division's human resources function is to attract and retain talents. This objective is achieved through:

- effective recruitment of new staff
- continuous training
- proper career planning
- effective performance assessment and management
- long-term succession planning for the senior posts
- minimal wastage or loss of experienced staff
- good staff relations

A key part of this function is the running of the Department's Legal Trainee Scheme. The Scheme enables Postgraduate Certificate in Laws graduates from local universities or serving civil servants in the legal/judicial group of departments who hold recognised qualifications to complete in the Department the practical training required before qualifying as barristers or solicitors. Trainees of the Scheme have unique opportunities to work with other government bureaux/departments, law enforcement agencies and outside counsel. Ten law graduates joined the Scheme each in 2012 and 2013, and 12 in

2014. The number of applications on each occasion greatly exceeded the number of places.

In addition, the Department conducted open recruitment exercises annually to recruit Government Counsel on civil service terms to bring in fresh blood. A total of 28, 29 and 27 candidates were offered appointment in 2012, 2013 and 2014 respectively. The Department also recruits summer interns under a Post-Secondary Student Summer Internship Programme. In 2012, 2013 and 2014, 23, 24 and 38 summer interns were accepted respectively.

### Financial management

Effective financial management is important for ensuring that the available financial resources are put to the best use. Annual estimates are prepared taking into account the different needs of the various divisions and financial performance is closely monitored. The exercise of prudent financial principles ensures that the Department's services are delivered within budget.

### Training

The Department places emphasis on continuous learning, so as to maintain the quality of work performed by its colleagues. The Division plays an important part in organising a wide range of training activities to help colleagues acquire the necessary knowledge and skills to perform more effectively and for career development. From 2012 to 2014, a total of 7 159 places on various kinds of training and development programmes were taken up by colleagues. Legal, management and communication training was organised in-house, as well as provided by the Civil Service Training and Development Institute and outside experts. Counsel and para-legal



Counsel from the Department attended the Mainland Legal Studies Course for Government Lawyers of the HKSAR at Peking University in October 2013

officers were also sponsored to attend law-related courses run outside office hours.

To keep abreast of the latest legal developments, counsel and para-legal officers participated in a wide range of law seminars, conferences and law-related training programmes. Continuous efforts were also made to strengthen understanding of the law and the legal environment in the Mainland. Counsel were nominated to attend national studies courses held at Tsinghua University, Peking University and the Chinese Academy of Governance, as well as foreign affairs study programmes and thematic study programmes in the Mainland. In 2013, 12 counsel attended the Mainland Legal Studies Course for Government Lawyers of the HKSAR at Peking University. In 2014, 18 para-legal staff attended the China Law Course at the Sun Yat-sen University in Guangzhou. In addition, eight counsel undertook training attachments to justice bureaux in the Mainland from 2012 to 2014.

### Library services

The Department of Justice library was set up in 1953 and currently houses more than 90 000 publications. The collection is renowned for its strength in HKSAR legal materials and Commonwealth legislation. To facilitate legal research, online library catalogue and subscribed electronic databases are accessible at the library's intranet site.



## Information technology

The Information Technology Management Unit is responsible for managing the Department's IT systems and information resources. This includes the maintenance and periodic upgrade of existing IT systems, implementation of new projects and planning for future IT needs.

The unit also provides helpdesk services to provide various IT related services and handle requests from users. It provides training to colleagues on the proficient use of the Department's IT systems.

### *The Department's information technology facilities*

The Department's network links around 1 200 users across 26 different floors and separate locations. All permanent staff in the Department have access to either dedicated or shared personal computers equipped with modern office automation functions for word-processing, document management, printing, fax, electronic mail and internet access. Remote access to the Department's network and facilities is available.

**Bilingual Laws Information System (BLIS):** This system enables users to view and search HKSAR's legislation in both Chinese and English. BLIS is available free to the public on the internet in three versions, including English, traditional Chinese and simplified Chinese. BLIS has proved to be very popular since its introduction and has now an average of around 6 300 "hits" per day. The contents of BLIS can also be displayed in a user-friendly way on popular mobile devices.

**Department of Justice website:** This website provides a wealth of information on our legal system and the work of the Department. The public can find information regarding the latest news of the Department. To tie in with the government-wide Web Accessibility Campaign, the Department's

homepage, BLIS and its related websites were revamped in 2013 to adopt the latest version (Version 2.0) of World Wide Web Consortium Web Content Accessibility Guidelines Level AA standard with a view to enhancing user-friendliness.



## Relocation to the former Central Government Offices

Since 1986, the offices of the Department have mainly been accommodated in the Queensway Government Offices (QGO). Over the years, the Department has demand for more office space due to operational and development needs. Given the limited floor area in the QGO, the Department has to accommodate some of its offices in different commercial buildings and government-owned premises in the vicinity of Admiralty. The offices of the Department, therefore, are currently scattered among the QGO and other different buildings.

It was announced in the 2009-10 Policy Address that the Main and East Wings of the former Central Government Offices (CGO) would be preserved for use by the Department after the relocation of the bureaux to the new CGO at Tamar. In December 2012, the Government announced the decision to reuse the West Wing of the former CGO and allocate it for use by the Department and law-related organisations. This arrangement will enable all divisions of the Department to be accommodated



in the three Wings of the former CGO, which will help enhance the Department's overall operational and service efficiency. The provision of some space to law-related organisations for setting up their offices will also support the Government's policy to enhance the HKSAR's position as an international legal and dispute resolution services centre in the Asia-Pacific region.

The Division is charged with managing this large-scale relocation project and oversees the planning and implementation work. Phase 1 relocation to CGO Main and East Wings is scheduled for the second quarter of 2015 while Phase 2 relocation to CGO West Wing is scheduled for early 2018. At the same time, the Division also commenced planning work for the renovation of the former French Mission Building, which will be taken over by the Department to provide space for use by law-related organisations after the Court of Final Appeal has moved out from there and completion of necessary procedures. Together, the French Mission Building and the former CGO buildings will form a "legal hub" in the heart of Hong Kong's central business district.

## Social activities

Two organisations within the Department, the Staff Club and the Mess, provide staff with a range of social activities to help enhance team spirit and interaction among colleagues.

### *Department of Justice Staff Club*

The Staff Club aims to promote friendship and a sense of belonging among serving and former staff of the Department.

The Staff Club is run by an Executive Committee composed of representatives from different levels



Staff taking part in the Dragon Boat races



Former Central Government Offices



of officers in the Department. It organises various activities every year, including interest classes on tai-chi, yoga, dancing, flower arrangements, etc, annual events such as Christmas lunch party and spring dinner, as well as outdoor visits and volunteer services.

In 2012 and 2014, the Staff Club took part in the Corporate Games. Participants enjoyed the support and companionship of fellow colleagues in the various events enrolled, and competed in the Games with admirable endeavours, and getting gratifying results including numerous championships and medals in swimming (2012 & 2014), snooker (2012) and tennis (2014).



Staff taking part in swimming events of the Corporate Games in September 2012



Staff participating in the "Lifeline Express Kung Fu for Brightness 2013" charity performance in July 2013

### *The Department of Justice Mess*

The Mess provides a place for counsel to discuss cases and other matters which concern them during the working day, and to relax in friendly surroundings after office hours.

There is a Mess Committee which organises various functions and activities to foster an environment of collegiate support.

A tradition has been maintained whereby departing members entertain colleagues to drinks and light refreshments in the Mess and are presented with a memento such as a personally engraved mug or plaque. From time to time, the Prosecutions Division also hosts Mess Nights, to which judges and lawyers in private practice are invited. Members also "ring the bell" when there are occasions providing sufficient cause for celebration, such as promotions and important appointments.



# Notable Cases

## Notable Cases



### Criminal

In *HKSAR v WONG Tak-keung* (FACC 8/2014), the appellant was convicted of conspiracy to traffic in 650 grammes of methamphetamine (commonly called “ice”) from Hong Kong to Australia. A 15-year-old courier was involved in the plan. The appellant was sentenced to 19 years’ imprisonment and he appealed against conviction. As jurisdiction of the offence was called into question, the Court of Final Appeal identified four categories of cases where the issue of jurisdiction might be raised. It is only in relation to the fourth category that controversy has arisen and the law has developed. This category involves cases where some of the constituent

elements of the offence occur within the jurisdiction while other essential elements occur outside. The traditional view was that offences in this category were deemed to have been committed only in the place where the offence was completed. However, in recent English cases, a wider approach has been adopted whereby the substantive offence is held to be committed within the jurisdiction and thus justiciable by the English courts if “substantial activities constituting the crime” occurred within the jurisdiction but other essential elements of the offence occurred abroad. In the Canadian Supreme Court case of *Libman v R* (1985) 21 DLR (4th) 174, La Forest J in his dictum indicated that he preferred this wider approach to the earlier “terminatory” theory. The Court of Final Appeal found that the *Libman* decision had no application in the present case as the appellant’s acts, even if properly regarded as something agreed upon by the conspirators in Hong Kong, were to take place only in Australia. The appellant’s appeal was allowed and his conviction was accordingly quashed.

In *HKSAR v LEUNG Shing-chi & 2 Ors* (FACC 4/2014), the three appellants were Correctional Services Department officers. They were convicted of inflicting grievous bodily harm on a 33-year-old Taiwanese inmate who subsequently died. Each of them was sentenced to 16 months’ imprisonment. They appealed on the sole ground on which leave was granted that their counsel was flagrantly incompetent because he had failed to give adequate or correct advice on whether or not they should testify and that he had given wrong advice on the basis of his misunderstanding of the law on joint enterprise. The Court of Final Appeal acknowledged that one of the most difficult tactical decisions encountered in the conduct of a defence is whether or not the defendants should testify. After reviewing

the evidence and the procedure at trial, the Court held that it could not reasonably be said that counsel was incompetent. There was no question of flagrant incompetence in this case. Nor could it be said that the appellants did not have a fair trial. The appeals were dismissed.

In *HKSAR v Koo Sze-yiu & Ma Wan-ki* (FAMC 40/2014), Koo and Ma were convicted of attempting to desecrate the regional flag contrary to section 7 of the Regional Flag and Regional Emblem Ordinance (RFREO) for trying to set fire to the regional flag of the HKSAR. Koo received four months' imprisonment (suspended for two years) whereas Ma was ordered to serve 230 hours' community service. On appeal, their convictions were upheld but their sentences were reduced to two months' imprisonment (suspended for one year) and 110 hours' community service respectively. They sought leave to appeal to the Court of Final Appeal against their conviction. The Appeal Committee held that there was no basis for revisiting or reversing the conclusion drawn by the Court of Final Appeal in *HKSAR v NG Kung-siu & another* (1999) 2 HKCFAR 442, namely, that section 7 of the RFREO was not unconstitutional. Their application was dismissed with costs awarded against them.

In *Secretary for Justice v Ip Hon-ming & Yeong Yun Hong Gary* (CAAR 3/2014), the Secretary for Justice applied for review of the sentences imposed upon Ip (a recovery agent) and Yeong (a solicitor) following their conviction of a total of 26 charges of champerty. Each charge concerned a different complainant in a personal injuries civil action. The trial judge sentenced Ip and Yeong to 12 months' and 15 months' imprisonment respectively and ordered those sentences to be suspended for 18 and 24 months respectively. The Secretary for Justice sought to review such sentences on the ground that they were manifestly inadequate and/or wrong in principle. The Court of Appeal found that the

trial judge fell into error in the approach which she adopted in determining whether or not to impose a suspended sentence. Moreover, the sentences imposed on the respondents were both wrong in principle and unduly lenient. The Court of Appeal granted the Secretary for Justice's application and substituted a sentence of two years and two months' imprisonment for Ip and three years and two months' imprisonment for Yeong, both sentences to be served immediately.

In *HKSAR v Hui Rafael Junior & 4 others* (HCCC 98/2013), the former Chief Secretary for Administration, the vice-chairmen and managing directors of Sun Hung Kai Properties Limited (SHKP), an executive director of SHKP and the former chief operating officer (COO) of the Hong Kong Futures Exchange (HKFE) were charged with various offences including misconduct in public office (MIPO) and conspiracy to offer an advantage to a public servant.

After trial, Rafael Hui, the former Chief Secretary, was found guilty of one count of conspiracy to commit MIPO, three counts of MIPO and one count of bribery offence under the Prevention of Bribery Ordinance (Cap 201) (POBO). The vice chairman of SHKP, Kwok Ping-kwong, Thomas, was found guilty of one count of conspiracy to commit MIPO. Kwok's aide Chan Kui-yuen, Thomas, and the former COO of HKFE Kwan Hung-sang, Francis, were both convicted of one count of conspiracy to commit MIPO and a POBO offence.

Hui was sentenced to a total term of seven years and six months' imprisonment and ordered to pay the Government \$11.182 million as restitution. Kwok was sentenced to five years' imprisonment and a fine of \$500,000. Chan was sentenced to a total term of six years' imprisonment with a fine of \$500,000. Both Kwok and Chan were disqualified from being company directors for five years and six years respectively. Each of them also had to pay \$12.5 million



of the prosecution's costs. Kwan was sentenced to five years' imprisonment. All defendants have filed applications for leave to appeal.

In *HKSAR v Chow Chi-wai & Another* (HCCC 458/2013) - Chow and Lai, respectively the coxswains of two vessels Lamma IV (a passenger launch) and Sea Smooth (a high speed catamaran), were each charged with 39 counts of manslaughter and two counts (alternative to each other) of endangering the safety of others at sea. At the time of the offence, Sea Smooth was engaged in a scheduled service from Central to Yung Shue Wan, whilst Lamma IV was then carrying staff and family members of the Hong Kong Electric to the Victoria Harbour for viewing the National Day fireworks. Despite the fact that the weather was clear and that both vessels were equipped with a radar, they collided with each other, resulting in the rapid sinking of Lamma IV and the death of 39 passengers on board. After a 64-day trial in the Court of First Instance, Chow was found not guilty of the manslaughter charges but guilty of the endangering offence. He was sentenced to imprisonment for nine months. Lai was found guilty of all 39 counts of manslaughter and also of endangering. He was sentenced to imprisonment for a total of eight years' imprisonment. Lai has lodged an appeal against conviction and sentence.

In *HKSAR v Lin Kei-tat* (CACC 11/ 2013), the appellant, a self-confessed bookmaker, pleaded guilty to two counts of money laundering offences, for which he was sentenced to three years and six months' imprisonment. The value of the proceeds of crime was about \$39 million. A confiscation order was made against the appellant pursuant to section 8 of the Organized and Serious Crimes Ordinance (Cap 455) (OSCO) in the sum of \$10.3 million, which was the value of his realisable property. The appellant was ordered to serve a default term of imprisonment of five years, to be activated upon his failure to comply with the confiscation order before the deadline.

The appellant appealed against the confiscation order, contending that according to *HKSAR v Li Kwok Cheung George* (2014) 17 HKCFAR 319, when the Court of Final Appeal held that proceeds of crime must be in the nature of reward, the recoverable amount should be the net profits gained from the relevant criminal conduct. The Court of Appeal held that the legislative intent of OSCO was to effectively combat organised and serious crimes by having draconian provisions to confiscate the proceeds of crime. The proceeds of an offence, as defined in OSCO, refer to any payments or other pecuniary advantage obtained in connection with commission of that offence, but not just to "profit". Confiscation is not restricted to "profit" after deduction of expenses. Also, in determining the imprisonment in default under section 13(1) of OSCO, the Court of Appeal held that the matter should not be approached on a simple arithmetical basis. The periods set out in the table under section 13(2) of OSCO are maximum periods and the court has the discretion to impose a period below the maximum. The normal procedure is for the court to impose a default sentence that falls between the maximum for the band immediately below and that for the band itself. The Court should not encourage a defendant in any way in his non-compliance with the order, and it should be made clear to the defendant that he has nothing to gain by non-compliance. In fixing such default imprisonment, it is not required to have regard to the totality principle in relation to the sentence imposed for the substantive offence. The appellant's appeal was dismissed.

In *HKSAR v Minney John Edwin* [2013] 6 HKC 10, the Court of Final Appeal confirmed that in sentencing a defendant charged with possession of dangerous drugs, the court is entitled to apply the latent risk principle which allows it to adopt a higher sentencing starting point than usual if the court considers that there is a real risk that some of those drugs might be redistributed to others. In this case, the appellant



pleaded guilty to two counts of possession of cocaine in small quantities. In sentencing, the trial judge applied the latent risk principle and increased the starting point by three months. The appellant challenged the constitutional validity of the principle but the Court of Final Appeal, in dismissing the appeal, confirmed that it did not contravene the presumption of innocence under the Basic Law and the Hong Kong Bill of Rights Ordinance (Cap 383).

In *HKSAR v Kulemesin Yuriy & Another* (FACC 6 & 7/2012), the appellants were the master (A1) and senior pilot (A2) of an oil rig supply vessel and a bulk carrier respectively. The two ships collided with each other in the North Coast of Lantau Island, resulting in 18 deaths. A1 and A2 were convicted of the offence of endangering the safety of others in the sea, contrary to section 72 of the Shipping and Port Control Ordinance (Cap 313). The Court of Final Appeal held that the lower courts had fallen into an error in treating section 72 to be an offence of absolute liability. After considering the legislative background of section 72, the seriousness of the offence and the wide range of situations covered by the section, the court determined that section 72 is a strict liability offence. However, if there is evidence capable of raising a reasonable doubt that a defendant may have acted or omitted to act in the honest belief on reasonable grounds that his conduct was not such as to cause danger to the safety of others, he should

be acquitted unless the prosecution established beyond reasonable doubt that the defendant either did not have such belief or that his belief though honestly held was not based on reasonable grounds. In the end, A1's appeal was dismissed while A2 was acquitted. This is a landmark decision setting out the applicable principles on interpreting strict or absolute liability offences.

In *HKSAR v Francis Lee Kwok-wah* [2013] 2 HKLRD 1009, the Applicant appealed against his conviction and sentence for three counts of unlawful sexual intercourse with a girl under 16, one count of indecent assault, and one count of indecent conduct towards a child. He was sentenced to a total term of eight years' imprisonment. The victims were underage female orphans from an orphanage in Yunnan province operated by the Applicant, a HKSAR permanent resident. The Applicant contended, *inter alia*, that the extra-territorial effect of section 153P(1) of the Crimes Ordinance (Cap 200), in respect of a specified offence committed by a HKSAR permanent resident outside the HKSAR was incompatible with the principle of "equality before the law" under Article 22 of the Hong Kong Bill of Rights and Article 25 of the Basic Law, as non-HKSAR residents would not be so liable under section 153P(1). The Court of Appeal held that under the United Nations Convention on the Rights of the Child, it is necessary for the HKSAR to legislate provisions such as section 153P to protect children from crimes committed on them both within and outside the jurisdiction of the HKSAR. Section 153P is found to have complied with the rationality and proportionality test, and it therefore does not contravene the relevant articles of equality. The court also applied the Court of Final Appeal's ruling in *HKSAR v Lee Ming-tee & Another* (2001) 4 HKCFAR 133 on the impact of pre-trial publicity on the jury's ability to reach a fair verdict.

In *HKSAR v Tse Man-lai* [2013] 3 HKLRD 691, the Applicant was convicted of two counts of obtaining

access to a computer with a view to dishonest gain for himself or another, contrary to section 161(c) of the Crimes Ordinance (Cap 200). It was alleged that he had sent a large number of attacking packets (known as a Denial of Services Attack) from his computer to the website of HKExnews, a website set up by the Hong Kong Exchanges and Clearing Limited for disseminating information to the public in respect of stock transactions. As a result of the attacks, seven listed companies were forced to suspend from trading. The Applicant conducted the attacks in order to promote his computer software business. The Court of Appeal held that a person is to be regarded as obtaining access to a computer in respect of each separate discrete use of the computer and the law operates to catch a person who obtains access to a computer with a view to a dishonest gain, even in circumstances where the earlier access by that person to the computer had been entirely innocent.

In *HKSAR v Pang Hung-fai* (FACC 8/2013), the Court of Final Appeal revisited the established test in deciding the mens rea element of the offence of dealing with property known or believed to be proceeds of an indictable offence, contrary to section 25(1) of the Organized and Serious Crimes Ordinance (Cap 455) (commonly known as the money laundering offence). In approaching this element, the court considered that for the phrase of “knowing or having reasonable grounds to believe” - the two mental elements should be understood as if they read “knew or ought to have known”. References (as employed in the test in the past) to “objective” and “subjective” elements, to “reasonable person” (as opposed to focusing attention on the accused), to “first step” and “second step”, and to “facts” known (as opposed to “grounds”), divert attention away from the proper test. On most occasions when an alternative formulation may assist a jury in its deliberations, the *Seng Yuet Fong* formulation will be all that is required:

*“To convict, the jury had to find that the accused had grounds for believing; and there was the additional requirement that the grounds must be reasonable: That is, that anyone looking at those grounds objectively would so believe.”*

When assessing the whole of the evidence, the judge or jury can give such weight to an accused’s belief, perception or prejudice as he/she believes is warranted. No doubt, in many cases, that decision maker will entirely discount such evidence of the accused. Nevertheless, they are “grounds” which stand or fall by the test of reasonableness.

In the HKSAR’s first marked oil case, *HKSAR v Sze Meimun and 4 others* (2014) 3 HKLRD 452, the Hong Kong Customs and Excise Department restrained \$240 million of crime proceeds under the Organized and Serious Crimes Ordinance (Cap 455). The proceeds came from a cross-boundary syndicate smuggling marked oil from the HKSAR to the Mainland. The case originated from a joint investigation between the Hong Kong Customs and Excise Department and the Customs of the People’s Republic of China that had begun in late 2009. At trial, the prosecution called 47 witnesses among whom four were serving sentences in the Mainland. By way of Letters of Request made to the Mainland authorities, evidence-taking hearings had been carried out at the Shenzhen Municipal Intermediate People’s Court. The evidence was subsequently received and accepted by the District Court. All five defendants were convicted of one count of conspiracy to export unmanifested cargo. In addition, they were also convicted either jointly or individually of charges of money laundering. They were sentenced to imprisonment terms ranging from four to six years. Most of their convictions were upheld by the Court of Appeal. Their sentences were also confirmed. Leave to appeal to the Court of Final Appeal was dismissed by the Appeal Committee. The confiscation application against the defendants

will be heard in due course.

In *HKSAR v Mui Kwok-keung* (DCCC 890/2012), the defendant, a practising barrister, was convicted of five counts of champerty. He agreed with five clients to make personal injuries claims and would charge them legal fees by taking sums between 25 per cent and 30 per cent from the damages to be recovered in successful claims. He took over \$1.6 million from four of his victims. Upon conviction, the defendant was sentenced to a total term of three and a half years' imprisonment. The defendant's subsequent appeal against conviction and sentence was dismissed by the Court of Appeal (CACC 133/2013).

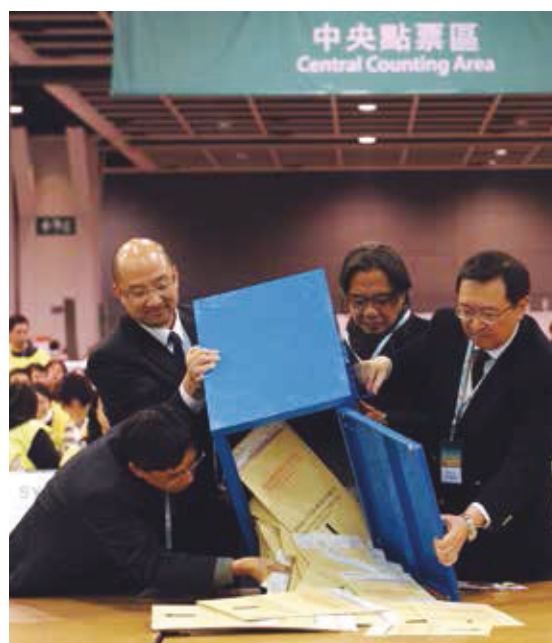
In *HKSAR v Mak Chai-kwong & Tsang King-man* (DCCC 956/2012), Mak Chai-kwong, the former Secretary for Development; and Tsang King-man, an Assistant Director of the Highways Department, were jointly charged for having conspired to defraud the Government of the HKSAR in claiming and receiving Private Tenancy Allowance. It was alleged that they had made false representation by claiming that they had no financial interest in the flats that they respectively leased and that the leases were genuine ones. Both faced a further count of corruption offence, contrary to section 9(3) of the Prevention of Bribery Ordinance (Cap 201). Both defendants were convicted as charged and were sentenced to eight months' imprisonment suspended for two years. Their appeals against conviction were dismissed by the Court of Appeal (CACC 309/2013). An application for leave to appeal to the Court of Final Appeal was made but a hearing has not yet been fixed (FAMC 75/2014).

## Civil

### Elections

In *Charles Peter Mok v Tam Wai-ho, Vincent Fung*

*Hao-yin and Secretary for Justice (for and on behalf of the Secretary for Constitutional and Mainland Affairs)* (FACV 8/2010), the petitioner, who was a candidate for the Legislative Council election for the information technology functional constituency held on 7 September 2008, challenged the result of the election on the ground that material irregularities had occurred in the election and that the first respondent had engaged in illegal and corrupt conduct. The petition was dismissed by the Court of First Instance on 9 April 2009. On 3 December 2009, the Court of Appeal dismissed the appeal. On 13 December 2010, the Court of Final Appeal allowed the appeal, holding that the finality provision failed to satisfy the proportionality test and thus was unconstitutional and invalid as being inconsistent with Article 82 of the Basic Law. The substantive appeal from the Court of First Instance's determination was remitted to the Court of Appeal for a re-hearing and was dismissed on 9 June 2011. On 6 January 2012, the petitioner obtained leave from the Appeal Committee to appeal to the Court of Final Appeal. On 24 May 2012, the Court of Final Appeal (FACV 2/2012) dismissed the appeal, holding that expenses are likely to qualify as "election expenses" if they have been incurred by or on behalf of a candidate for the purpose of promoting





the election of the relevant candidate or prejudicing the election of another candidate; the activities or matters to which the relevant expenses are incurred are referable to a specific election and go to the conduct or management of the election, in particular to the machinery of the election; and have taken place or occurred either during the election period or during the period when the relevant person was a candidate. Applying the aforesaid criteria, it was held that the expenses in the sum of \$220,000 incurred on behalf of the first respondent in relation to the airtime given for the broadcast of videos on Cable Television between 30 May and 30 June 2008 before the public announcement made on 13 July 2008 of his intention to stand as a candidate for the 2008 Legislative Council Election were not election expenses.

In *Secretary for Justice v Ho Chun-yan, Albert and Others* (HCAL 83-85/2012, FAMV 21-22, 24-26, 32-34/2012, FACV 24-25 & 27/2012, FACV 1/2013), Albert Ho and K H Leung each applied for leave to apply for judicial review, seeking to declare that C Y Leung was not duly elected as the Chief Executive by reasons of matters relating to the unauthorised building works in his property. On 30 July 2012, the Court of First Instance handed down its judgment dismissing their applications with costs. Separately, Albert Ho lodged an election petition out of time to challenge the result of the 2012 Chief Executive election. In particular he challenged section 34(1) of the Chief Executive Election Ordinance (Cap 569) (CEEEO), which requires an election petition to be lodged within seven working days after the result of the election is declared and without any provision for time extension as being inconsistent with Article 35 of the Basic Law which guarantees right to access to the courts. The Chief Executive applied to strike out the election petition which application was partially allowed by the Court of First Instance in its judgment dated 12 September 2012. On 5 October 2012, the Court of First Instance handed down a further judgment holding the seven-day time limit in section

34(1) of the CEEEO to be unconstitutional but applying a remedial interpretation to save this provision by reading in a judicial power to extend the time for lodging an election petition. Albert Ho, K H Leung, the Chief Executive and the Secretary for Justice (as Intervener) each applied for leave to appeal to the Court of Final Appeal from the judgments of the Court of First Instance. On 13 November 2012, the Appeal Committee of the Court of Final Appeal granted leave for the parties to appeal. The substantive hearing was held before the Court of Final Appeal on 11 June 2013. On 11 July 2013, the Court of Final Appeal handed down its judgment, giving guidance on the relationship between judicial review and election petition in challenging the Chief Executive election; holding that the unextendable seven-day time limit is not unconstitutional; and substituting the Court of First Instance's costs order in respect of Albert Ho's application for leave to apply for judicial review with no order as to costs.

In *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* (HCAL 72/2012), the Applicant challenged the constitutionality of section 39(2A) of the Legislative Council Ordinance (Cap 542) which was passed into law on 1 June 2012. In gist, section 39(2A) disqualifies a person from being nominated as a candidate at a by-election within six months of his resignation as a Legislative Council (LegCo) member. The Applicant argued that section 39(2A) is inconsistent with Article 26 of the Basic Law, Article 21 of the Hong Kong Bill of Rights and/or Article 25 of the International Covenant on Civil and Political Rights on the basis that it restricts the right to stand for election, and as such, fails to satisfy the proportionality test in particular when this right is a fundamental human right which the court should protect at all costs. The Respondent argued that section 39(2A) is constitutional as the restriction on the right to stand for election is a reasonable, necessary and proportionate measure in serving a legitimate purpose, namely to deter the practice of a LegCo member resigning in



order to trigger a by-election in which he intends to stand and seek to be re-elected. The substantive judicial review hearing took place on 10-11 December 2013. The Court of First Instance on 5 March 2014 dismissed the application for judicial review and held that (i) section 39(2A) is constitutional, (ii) the court should not interfere unless the restriction on the right to stand for election is “manifestly without reasonable foundation” and that (iii) section 39(2A) serves a legitimate aim and satisfies the proportionality test. The Applicant’s appeal to the Court of Appeal is scheduled to be heard on 9 September 2015.

### **Health and social welfare**

In *Kong Yunming v The Director of Social Welfare* (CACV 185/2009) and *Yao Man Fai v The Director of Social Welfare* (CACV 153/2010) (heard together), the applicants challenged the policy that a person aged 18 years or over was eligible for Comprehensive Social Security Assistance (CSSA) only if he/she had been a HKSAR resident for at least seven years and, further, had resided in the HKSAR continuously for at least one year immediately before the date of application.

In *Kong Yunming*, the applicant, being a HKSAR resident settled in the HKSAR in 2005 on strength of

her one-way permit from the Mainland, challenged the constitutionality of the seven-year residence requirement for an applicant to receive assistance under the CSSA. In its judgment dated 17 February 2012, the Court of Appeal, upholding the judgment of the court below, held that such a policy was constitutional.

In *Yao Man Fai*, in its judgment of 17 February 2012, the Court of Appeal held that the requirement that, subject to a grace period of 56 days, an applicant for CSSA must have resided in the HKSAR continuously for at least one year immediately before the date of application constituted an unconstitutional and unlawful discrimination against those permanent residents who had been absent from the HKSAR for a total period of more than 56 days in the year immediately prior to their applications for CSSA and infringed their rights to travel. The Director of Social Welfare did not further appeal against this judgment.

The *Kong Yunming* case went on appeal to the Court of Final Appeal (FACV 2/2013). In its judgment dated 17 December 2013, the Court of Final Appeal, while dismissing the arguments that the CSSA scheme was not “in accordance with law” (i.e. it had been effected without the backing of legislation), held that the seven-year residence requirement restricted rights to social welfare protected by

Article 36 of the Basic Law and was not rationally connected to the claimed legitimate aim of curbing expenditure so as to ensure the sustainability of the social security system. Alternatively, even if there was any rational connection, the restriction was wholly disproportionate and manifestly without reasonable foundation given its contradictory policy consequences and socially insubstantial benefits. The requirement was thereby held to be unconstitutional.

In *Suen Mo v Director of Social Welfare* (HCAL 117/2012), the applicant challenged by way of judicial review the policy of the Social Welfare Department in adjusting the level of maximum rent allowance (MRA) payable to CSSA recipients in accordance with the movement of the relevant consumer price index for private housing rentals. The applicant argued that such adjustment policy was unlawful as the Government had misinterpreted the applicable policy which was to adjust the MRA according to the actual rent paid by 90th percentile of the rent paying CSSA recipients (policy based on the 90th percentile objective). By its judgment of 11 June 2014, the Court of First Instance dismissed the judicial review and held, on the evidence, that the Government has never adopted any policy based on the 90th percentile objective. The applicant's appeal was dismissed on 17 December 2014 by consent.

### Charities

In *The Secretary for Justice v Joseph Lo Kin Ching and Derek Lai Kar Yan, the Joint and Several Administrators of the Estate of Kung, Nina also known as Nina Kung and Nina T H Wang and Others* (HCMP 853/2012), the Secretary for Justice commenced proceedings (the Construction Proceedings) to seek guidance from the court on the construction of the will executed on 28 July 2002 (the Will) of the late Madam Nina Wang (Madam Wang), which had been declared as the only valid and authentic will of the late Madam Wang after

contested probate proceedings. The Construction Proceedings were commenced by the Secretary for Justice in his capacity as *parens patriae* (the Protector of Charities) in discharge of his public duty to protect the charitable interest in the Estate of Madam Wang. The core question for the Court of First Instance's determination was whether, upon a true and proper construction of the Will, Chinachem Charitable Foundation Limited (the Foundation) held Madam Wang's Estate on trust for the charitable purposes specified in the Will or absolutely as beneficial owner. The Court of First Instance held on 22 February 2013 that the clear and imperative language used by Madam Wang in the Will evinced an intention to create a trust, and the trust was a charitable one. The Foundation's appeal (CACV 44/2013) was dismissed by the Court of Appeal on 11 April 2014. On 15 September 2014, the Court of Appeal granted leave to the Foundation to appeal to the Court of Final Appeal. The Foundation's appeal (FACV 9/2014) was heard on 21-23 April 2015 and by its judgment of 18 May 2015, the Court of Final Appeal unanimously dismissed the appeal.

### Basic Law litigation

In *Vallejos Evangeline Banao v Commissioner of Registration and Another* (FACV 19/2012) and *Domingo Daniel L. v Commissioner of Registration and Another* (FACV 20/2012), the appellants challenged the constitutionality of section 2(4)(a)(vi) of the Immigration Ordinance (Cap 115), which deems a person's presence in the HKSAR when employed as a foreign domestic helper not to be ordinary residence, and hence prevented the appellants from acquiring the right of abode in the HKSAR. The Court of Final Appeal handed down its unanimous judgment on 25 March 2013, upholding the decision of the Court of Appeal and the constitutionality of the impugned provision (but for different reasons). (This case is also discussed at page 53 in a feature article "Advising on Right of Abode Issues".)

In *Gutierrez Joseph James v Commissioner of Registration and Another* (FACV 2/2014), the appellant (a minor born in Hong Kong to a foreign domestic helper) challenged the refusal of his application for Hong Kong permanent resident status under para. 2(d) of Schedule 1 to the Immigration Ordinance (Cap 115), arguing, *inter alia*, that the permanence requirement could be satisfied if one can show the maintenance of an ordinary or regular pattern of life in Hong Kong and there is a reasonable prospect of maintaining the same in Hong Kong. The Court of Final Appeal handed down its unanimous judgment on 18 September 2014, upholding the decision of the Court of Appeal and confirmed that the test for the permanence requirement previously laid down by the Court in *Prem Singh* applies to adults and children alike and is an additional element to the ordinary residence requirement, requiring objective evidence of “concrete steps” having been taken by or on behalf of the appellant at the time of the application to establish a permanent home in Hong Kong. The Court also held that on proper construction of the proviso to regulation 25 of the Registration of Persons Regulations (Cap 177A), the appellant cannot be treated as “persons qualified to obtain” a Hong Kong identity card under Article 24(4) of the Basic Law. Accordingly, the appellant is not a non-permanent resident and his absences during the seven-year period immediately before his application had also failed the ordinary residence requirement. The Court, however, left open the question of whether a foreign national child born in Hong Kong and permitted to remain on prolonged visitor status would necessarily be unable to build up ordinary residence here in order to invoke section 2(6) of the Immigration Ordinance to provide a basis for preventing interruption of continuity of ordinary residence.

In *W v The Registrar of Marriages* (FACV 4/2012), a post-operative male-to-female transsexual challenged the Registrar of Marriages’ refusal to allow her to register a marriage with her male partner. Insofar

as she was prohibited from marrying a man (as opposed to a woman), the applicant argued that the Registrar had misinterpreted the words “man” and “woman” and “male” and “female” in section 20(1)(d) of the Matrimonial Causes Ordinance (Cap 179) (MCO) and section 40 of the Marriage Ordinance (Cap 181) (MO), or, alternatively, that those provisions were inconsistent with Article 37 of the Basic Law and Article 19(2) of the Hong Kong Bill of Rights guaranteeing the right to marry. The Court of First Instance and the Court of Appeal ruled in favour of the Registrar of Marriages, holding that on a proper interpretation of the relevant provisions, “man” and “woman” and “male” and “female” did not cover post-operative transsexuals. Rather, their sex was to be determined for the purposes of those provisions according to their biological sex at birth. The courts further concluded that the relevant provisions did not infringe the right to marry guaranteed under Article 37 of the Basic Law and Article 19(2) of the Hong Kong Bill of Rights. Upon further appeal by the applicant, the Court of Final Appeal by its judgment dated 13 May 2013 unanimously upheld the lower courts’ ruling on the construction ground, but by a majority allowed the appeal on the constitutional ground. By order dated 16 July 2013, the Court of Final Appeal granted declarations that (i) section 20(1)(d) of the MCO and section 40 of the MO must be read and given effect so as to include within the meaning of the words “woman” and “female” a post-operative male-to-female transsexual whose gender has been certified by an appropriate medical authority to have changed as a result of sex reassignment surgery; (ii) the applicant is in law entitled to be included as “a woman” within the aforesaid provisions and is accordingly eligible to marry a man; and (iii) the said declarations be suspended for 12 months from the date of the said order in order to allow time for the Government and the legislature to put in place a constitutionally compliant scheme which is capable of addressing the position of the broader classes of persons potentially affected by the judgment.



In *Ubamaka Edward Wilson v Secretary for Security and Another* (FACV 15/2011), the appellant, a Nigerian national convicted of drug trafficking and having served his sentence in the HKSAR, appealed to the Court of Final Appeal challenging the deportation order issued against him. The appellant alleged that the intended deportation would result in his suffering from “double jeopardy” upon his return to Nigeria because of possible prosecution of offences arising from the same conduct resulting in his conviction in the HKSAR, thereby amounting to inhuman treatment. The Court of Final Appeal dismissed the appeal on the facts (i.e. the potential prosecution and conviction in Nigeria would not amount to inhuman treatment) but held that notwithstanding section 11 of the Hong Kong Bill of Rights Ordinance (Cap 383) (HKBORO) is constitutional and consistent with Article 39 of the Basic Law, it should be construed in its context, adopting a “generous and purposive approach”. Accordingly, construed purposively, section 11 must be read as qualified by section 5 of the HKBORO and understood to exclude the application of the HKBORO and the Hong Kong Bill of Rights (BOR) in relation to the exercise of powers and enforcement of duties under immigration legislation regarding persons not having the right to enter and remain in the HKSAR except insofar as non-derogable and absolute rights protected by Article 3 of the BOR are engaged. In other words, refoulement of a deportee to another country where that person faces a genuine and substantial risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment would be prohibited.

In *GA and Others v Director of Immigration* (FACV 7-10/2013), the appellants (mandated refugees and screened-in torture claimant) appealed to the Court of Final Appeal challenging the Director of Immigration’s policy not to permit mandated refugees and screened-in torture claimants to take up paid employment in Hong Kong pending their resettlement save in exceptional circumstances. The Court of Final Appeal dismissed the appeal and

unanimously held that mandated refugees and screened-in torture claimants do not have any right to work under Articles 3 and 14 of the BOR, Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 33 of the Basic Law and common law while remaining in Hong Kong. In the light of the Court of Final Appeal’s decision in *Ubamaka Edward Wilson* (FACV 15/2011), the Court held that if inhuman or degrading treatment (IDT) or a substantial and imminent risk of IDT can be shown, the Director must exercise his discretion to give permission to work.

In *Ghulam Rbani v Secretary for Justice for and on behalf of Director of Immigration* (FACV 15/2013), the appellant appealed to the Court of Final Appeal challenging the dismissal of his damages claim against the Director of Immigration on the ground that his 46-day detention under section 32(2A) of the Immigration Ordinance (Cap 115) was unlawful and arbitrary. The Court of Final Appeal allowed the appeal on the narrow factual basis that, given the application of the *Hardial Singh* principles to time-limited detention under section 32(2A) of the Immigration Ordinance, the entire removal process (consideration of issuing a removal order against the appellant) ought to have been completed some 10 days sooner and the appellant was awarded damages (HK\$10,000) for false imprisonment for 10 days. The Court accepted that there is no public law duty requiring the Director to publish the policies setting out the criteria for exercising statutory discretionary powers and held that whether such duty to publish policies arises depends on the nature of the discretion in question and how it is to be exercised. The Court also considered *A (Torture Claimant) v Director of Immigration* [2008] 4 HKLRD 752 and remarked that the Court of Appeal in *A* did not lay down any obligation to make and publish policies. In the context of section 32(2A) detention, the Court held that a public law duty to publish policy could arise; but on the fact of this case, the appellant could not

have been in any doubt as to why and on what basis he was detained and so there was no breach of any duty to publish policies by the Director. By reason of section 11 of the HKBORO, the Court held that the appellant could not rely on Article 5 of BOR and Article 28 of the Basic Law.

In *T v Commissioner of Police* (FACV 3/2014), the applicant took part in an event which was held in a public pedestrian precinct and included a performance on a temporary stage involving music, chanting of slogans and dance. The performance was stopped after the organisers were informed by the Police that a licence under the Places of Public Entertainment Ordinance (Cap 172) (PPEO) was required. The applicant argued that the PPEO did not apply to the event or, alternatively, if it applied, sections 2 and 4 thereof were unconstitutional for infringing the freedoms of expression and assembly guaranteed under Articles 27 and 39 of the Basic Law and/or Articles 16(2) and 17 of the Hong Kong Bill of Rights. The Court of First Instance ruled in favour of the Police, but the Court of Appeal agreed with the applicant. By a judgment dated 10 September 2014, the Court of Final Appeal, by a majority of 3:2, dismissed the Police's appeal and held that the organisers were not required to obtain a licence under the PPEO. On the basis that "public entertainment" was defined as one "to which the general public is admitted", the requirement was that the public be admitted to the place of entertainment, and not merely to the entertainment. The majority held that the word "admitted" should be construed in an active sense and as requiring some form of control over the admission to the place. On the facts, it was held that the organisers of the event did not have the power to exclude other persons from the pedestrian precinct where the performance was presented or carried on. The public was therefore not admitted to the pedestrian precinct. Accordingly, the pedestrian precinct was not a place of public entertainment under the PPEO, and the organisers were not required to obtain a licence under the PPEO.

As the majority found in favour of the applicant on the construction issue, it was not necessary to address the constitutional issue.

In *Leung Kwok Hung v The President of the Legislative Council of the Hong Kong Special Administrative Region* (FACV 1/2014), the applicant, a member of the Legislative Council (LegCo), sought leave to apply for judicial review to challenge the ruling of the President of LegCo made pursuant to rule 92 of the Rules of Procedure of LegCo to close the debate of the Legislative Council (Amendment) Bill 2012, being proposed legislation prohibiting members of LegCo who resigned from office from being nominated as a candidate at a by-election if held within the six months ending on the date of the by-election. The Court of Final Appeal held that the purpose of Article 73(1) of the Basic Law is to confer certain powers and functions on the LegCo as a law-making body and is not directed to the powers or rights of individual members. The LegCo is to have exclusive authority in determining its procedure and the President of LegCo is to exercise his power to preside over meetings so as to ensure the orderly, efficient and fair disposition of LegCo's business. Article 73(1) of the Basic Law should be interpreted in the light of the relevant common law principles and policy considerations. The relevant common law principles include the doctrine of separation of powers and, within it, the established relationship between the legislature and the Courts. This relationship includes the principles that the Courts will recognise the exclusive authority of the legislature in managing its own internal process in conduct of its business, in particular its legislative process. The Courts will not intervene to rule on the regularity or irregularity of the internal process of the legislature but will leave it to determine exclusively for itself matters of this kind. While "legal procedures" in Article 73(1) of the Basic Law plainly include the Rules, it makes no attempt to address the question whether non-compliance with the Rules will result in invalidity of a law which

is subsequently enacted. In the opinion of the Court of Final Appeal, the provision of Article 73(1) are ambiguous on this point and it does not make compliance with the Rules essential to the validity of the enactment of a law by the LegCo. It is for the LegCo itself to determine its own rules of procedure and how they will be applied. In the present case, it is clear that the President has the power to set limits to terminate a debate, such power is inherent in, or incidental to, the power to preside over meetings under Article 72(1) of the Basic Law. As long as the President has this power, it is not for the Courts to consider whether or not the power was properly exercised and whether the President's decision to end the debate constituted an unauthorised making of a new rule of procedure.

In *Chee Fei Ming v Director of Food and Environmental Hygiene and Another* (HCAL 73/2013), and *Hung Shui Fung v Director of Food and Environmental Hygiene and Another* (HCAL 110/2013), the Applicants (who are Falun Gong practitioners) sought leave to apply for judicial review against the decision of the Director of Food and Environmental Hygiene (the Director) made in April and May 2013 to remove banners and placards placed by Falun Gong practitioners at various locations in Hong Kong pursuant to sections 104A and 104C of the Public Health and Municipal Services Ordinance (Cap 132) which prohibit the display of bills or posters on government land without permission. In its judgment of 15 October 2014, the Court of First Instance ruled that the challenges raised by the Applicants were not reasonably arguable, and therefore refused to grant leave for judicial review to the Applicants. The Court of First Instance held that restrictions under sections 104A and 104C are lawful and constitutional as they are prescribed by law, rationally connected to and no more than is necessary in serving a number of legitimate purposes including the protection and preservation of the cityscape of Hong Kong and the enjoyment of public places free of under interference.

### **Public international law**

In *C and Others v Director of Immigration and Another* (FACV 18-20/2011), the appellants, being asylum seekers whose refugee claims were rejected by the United Nations High Commissioner for Refugees (UNHCR), appealed against the judgment of the Court of Appeal handed down on 21 July 2011. The Court of Final Appeal allowed the appeals on 25 March 2013 ruling that given the Director of Immigration's practice of (i) taking into account humanitarian considerations in deciding whether to exercise his power under the Immigration Ordinance (Cap 115) to remove or deport a person to a place of putative persecution; and (ii) taking a well-founded fear of persecution as a relevant humanitarian consideration, the Director is required to screen claims of persecution risks independently of the UNHCR in the context of considering whether to exercise his power of removal. Having reached such a conclusion, the Court of Final Appeal did not consider it necessary to make any ruling on the customary international law issues.

### **Commercial/Tax**

In *Re Chang Hyun Chi* (HCB 5227/2006), the Bankrupt sought a declaration that section 30A(10)(a) of the Bankruptcy Ordinance (Cap 6) (the said section) was unconstitutional based on the Court of Final Appeal decision in *Chan Wing Hing* which struck down a similar provision (section 30A(10)(b)(i)). Under the said section, if a bankrupt has, before the commencement of bankruptcy, left the HKSAR and has not returned to the HKSAR, the relevant period of the bankruptcy shall not commence to run until such time as he returns to the HKSAR and notifies the trustee of his return. The Bankrupt argued that the said section infringed his right of freedom to travel under Article 8 of the Hong Kong Bill of Rights. On appeal to the Court of Appeal lodged by the Bankrupt, the appeal was allowed on 11 December 2014. The Court of Appeal held that the distinction



between the said section and section 30A(10)(b)(i), on analysis, could not provide a proper basis for upholding the proportionality requirement and that the reasoning of the Court of Final Appeal in *Chan Wing Hing* was applicable. The Court of Appeal therefore declared that the said section was unconstitutional but granted a stay of execution of the judgment upon an undertaking by the Official Receiver to apply for leave to appeal to the Court of Final Appeal. Such leave application has been made to the Court of Appeal and the decision is pending.

In *Aviation Fuel Supply Company v Commissioner of Inland Revenue* (FACV 14/13), the Commissioner of Inland Revenue appealed against the judgment of the Court of Appeal (CACV 150/11) which refused to vary the tax assessment to take into account balancing charges and/or deemed trading receipts and upheld the Court of First Instance's decision that the lump sum received by the taxpayer from the Airport Authority, which had the effect of expediting the transfer of an aviation facility provided by the taxpayer under a build-operate-transfer agreement

back to the Airport Authority, was not chargeable to profits tax. By a judgment handed down on 15 December 2014, the Court of Final Appeal dismissed the Commissioner's appeal.

### *Town planning*

In *Hysan Development Company Limited and Others v Town Planning Board* (HCAL 38/2011 & HCAL 57/2011, CACV 232/2012 & CACV 233/2012), the Applicants challenged the Town Planning Board's decisions not to propose or fully propose amendments to the Draft Outline Zoning Plans (DOZPs) for the Causeway Bay and Wan Chai areas in accordance with their representations seeking to relax planning restrictions such as building height, non-building areas, set back requirements and building gaps imposed on the Applicants' sites. The Applicants also challenged the procedures which the Town Planning Board adopted in reaching the said decisions. By the Court of Appeal's judgment of 13 November 2014, the Applicants' appeals against dismissal of their judicial review applications were allowed principally on grounds of breach of *Tameside Duty* by the Town Planning Board and procedural unfairness in its decision making process. As a result, the relevant decisions were quashed and the Town Planning Board was directed to reconsider the matters. Nonetheless, the Court of Appeal affirmed the power of the Town Planning Board to impose site specific restrictions. Both parties intend to seek leave to appeal to the Court of Final Appeal.

In *Oriental Generation Limited v Town Planning Board* (HCAL 62/2011, HCAL 109/2011 & HCAL 34/2012, CACV 127/2012 & CACV 129/2012), the Applicant challenged the Town Planning Board's decisions not to propose amendments to the Draft Ngau Tau Kok and Kowloon Bay Outline Zoning Plan in accordance with its representations/further representations seeking to relax the restrictions on building height, non-building area and building gap (the Restrictions)



imposed on the Applicant's "Kai Tak Mansion" site. By its judgment dated 11 May 2012, the Court of First Instance held that the Restrictions were imposed by the Town Planning Board arbitrarily. Specifically, there was, in the Court's view, insufficient evidence to demonstrate that the Applicant could fully utilise its permissible gross floor area given the building height restrictions imposed, or to justify the imposition of a building gap and a non-building area of specific dimensions. The Restrictions were therefore quashed by the Court of First Instance and the relevant matters were remitted to the Town Planning Board for reconsideration. The Town Planning Board's appeal was dismissed by the Court of Appeal on 13 November 2014. It is now seeking leave to appeal to the Court of Final Appeal.

### **Buildings**

In *Building Authority v Appeal Tribunal (Buildings) (Interested Party: China Field Limited)* (HCAL 60/2011, CACV 277/2012, FACV 7/2014) arose out of the building appeal by the Interested Party in

respect of its proposed development at Wang Fung Terrace, the Building Authority applied for judicial review against the decision of the Appeal Tribunal (Buildings) (Tribunal) to proceed with the rehearing on the basis that the question of section 16(1)(g) of the Buildings Ordinance (Cap 123) has not been remitted to it by the Court of Final Appeal in FACV 2/2009 for hearing and contended, *inter alia*, that the Tribunal misinterpreted section 16(1)(g) and failed to take into account relevant considerations. The Court of First Instance allowed the application on 19 November 2012. The Interested Party's appeal was dismissed by the Court of Appeal on 3 January 2014 and the matter was ordered to be remitted to the Tribunal for rehearing. The Interested Party obtained leave to appeal to the Court of Final Appeal on the question of "*in the exercise of the Building Authority's discretion under section 16(1)(g), whether consideration could be given to health, and safety issues, or town planning aspects, and the extent to which such considerations have any spatial or causal limitations*". The appeal was heard on 23 February 2015 and by its judgment of 13 March 2015, the



Court of Final Appeal unanimously dismissed the appeal.

### Environment

In *Leung Hon-wai v Director of Environmental Protection and Another* (HCAL 49/2012, CACV 176/2013), the Applicant challenged the decisions of the Director of Environmental Protection in approving an Environmental Impact Assessment Report and granting an environmental permit in relation to the proposed Integrated Waste Management Facilities to be constructed near Shek Kwu Chau as well as the Town Planning Board's decision in approving the Draft Shek Kwu Chau Outline Zoning Plan. The Applicant sought to challenge the decisions on the grounds that they were unlawful, Wednesbury unreasonable and/or made in breach of natural justice. The Court of First Instance handed down its judgment on 26 July 2013 rejecting all the grounds of challenge and dismissing the judicial review application. The Applicant's appeal was heard on 4 and 5 June 2014 and by its judgment of 2 September 2014, the Court of Appeal (by majority) dismissed his appeal. The Applicant has applied to the Court of Appeal for leave to appeal to the Court of Final Appeal on the questions regarding the Direction of Environmental Protection's dual role under the Environmental Impact Assessment Ordinance (Cap 499) and off-site mitigation measures.

In *Ho Loy v Director of Environmental Protection and Chief Executive in Council* (HCAL 100/2013, CACV 216/2014), the Applicant challenged the decisions of the Director of Environmental Protection and Chief Executive in Council not to exercise their respective powers under section 14(1) and 14(3) of the Environmental Impact Assessment Ordinance (Cap 499) to suspend or cancel the Environmental Permit issued for the project to develop to a bathing beach at Lung Mei, Tai Po. The Applicant's fundamental

contention was that a specific ecological impact assessment in relation to spotted seahorses in the study area to assess the conservation value was mandatory, and failure to carry out such assessment rendered the Environmental Impact Assessment Report misleading, wrong, incomplete or false, thus justifying the Director's exercise of her power under section 14(1). The Applicant also contended that in view of the increase in the number of sighting of spotted seahorses, the continuation of the project is or is likely to be more prejudicial to the health and well-being of the fauna or ecosystem that expected at the time of issuance of the Environmental Permit, thus justifying the Chief Executive in Council's exercise of his power under section 14(3). In its judgment handed down on 12 August 2014, the Court of First Instance rejected all the Applicant's grounds of challenge and dismissed the judicial review application. The hearing of the Applicant's appeal is fixed for 23 and 24 February 2016.

### Inquiry

On 22 October 2012, a Commission of Inquiry under the Commissions of Inquiry Ordinance (Cap 86) was set up to inquire into the collision of two vessels near Lamma Island on 1 October 2012. This Department represented the Director of Marine, the Director of Fire Services and the Commissioner of Police. The inquiry lasted 50 days and involved about 100 witnesses. On 30 April 2013, the Commission published its report consisting of 186 pages (only the redacted version was made available to the public). 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.

# The Department's links

with other jurisdictions





## The Department's links with other jurisdictions

The HKSAR's legal system has the same roots and applies many of the same principles as other common law jurisdictions around the world. Just as lawyers in the HKSAR refer to case law from diverse common law jurisdictions such as England, Australia, New Zealand, Canada and South Africa, so decisions of HKSAR courts can assist lawyers researching overseas. Besides, in cases concerning human rights, references were often made by lawyers and courts of the HKSAR to European jurisprudence on similar issues.

Since 1997, the HKSAR's status as a Special Administrative Region of the People's Republic of China has meant that, in addition to continuing to foster strong links with the common law world, mutual understanding with the Mainland of our two legal systems is also important.

The sharing of experience with lawyers in other jurisdictions plays an important role in legal life, a fact reflected in the composition of the HKSAR's Court of Final Appeal, which at every full hearing has included one judge from another common law jurisdiction. In short, given the HKSAR's status as an international financial and commercial centre and as the pace of globalisation continues, it becomes more and more important to maintain close ties with other jurisdictions.

### Visits

The Secretary for Justice and the Law Officers regularly meet visitors from the Mainland and overseas, both lawyers and non-lawyers. The Secretary for Justice personally met numerous visitors or delegations from overseas and the Mainland between 2012 and 2014. Those from overseas included the Minister of Justice of New Zealand, Attorney General of Singapore, Minister of Justice of Mongolia, and Chairman of the



The Secretary for Justice, Mr Rimsky Yuen, SC (first left), delivering a keynote speech at the 120th anniversary of the Hague Conference on Private International Law held in the Hague in April 2013



The Secretary for Justice (second left) meeting with the Korea Bar Association during an official visit in Seoul in November 2013

Bar Council of England and Wales. Visitors from the Mainland included senior judges from the Supreme People's Court and senior officials from the Supreme People's Procuratorate, the National Development and Reform Commission, the Ministry of Justice, the Department of Treaty and Law of the Ministry of Foreign Affairs, and Departments of Justice at the provincial and municipal levels. Other members of the Department met a wide range of visitors to the Department from 2012 to 2014. Members of



the Department also gave briefings on the HKSAR's legal system to many distinguished visitors from the Mainland and overseas, including lawyers, legislators, journalists and consular officials.

The Secretary for Justice and the Law Officers themselves from time to time visit their counterparts or undertake duties in other jurisdictions. For instance, in 2012 and 2013, the Secretary for Justice met officials of the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Foreign Affairs, the National Development and Reform Commission, the Ministry of Justice and other law departments in Beijing, and visited Shenzhen, Guangzhou, Xiamen, Tianjin and Qingdao, to discuss measures to further enhance legal co-operation between the HKSAR and the Mainland. The Secretary for Justice also visited The Hague, London, Seoul, Singapore, Vietnam and Cambodia, meeting senior government officials, legal practitioners and important contacts in each jurisdiction.

In September 2013, the Law Officer (International Law) led a delegation of counsel on a legal study visit to Beijing and Harbin. Organisations which the delegation visited included the Ministry of Justice,



The Secretary for Justice (right) with the President of the Supreme Court, Lord Neuberger, during an official visit in London in September 2013

the Legislative Affairs Commission of the National People's Congress and the Legislative Affairs Office of the State Council.

In 2012 and 2013, two State Counsel of the Civil Division of the Attorney General's Chambers of Singapore (Singapore AGC) were attached to the Civil Division of the Department each for five weeks. The State Counsel were interested in areas of law relating to land resumption and judicial review in



The Secretary for Justice (second left) holds discussions with officials of the Tianjin Municipal Bureau of Justice and the Tianjin Bar Association in October 2013. Also attending the session is the Law Officer (International Law), Ms Amelia Luk (first left)



The Secretary for Justice (left) meets with the Minister of Justice, Mr Ang Vong Vathana, in Phnom Penh, Cambodia, in February 2014



Counsel of the Department visit the Singapore International Arbitration Centre



Counsel of the Department attend the 18th Commonwealth Law Conference in Cape Town, South Africa

particular. Attachment programmes were therefore tailored for the State Counsel with focus on exposure to these areas of law.

A Deputy Principal Government Counsel and a

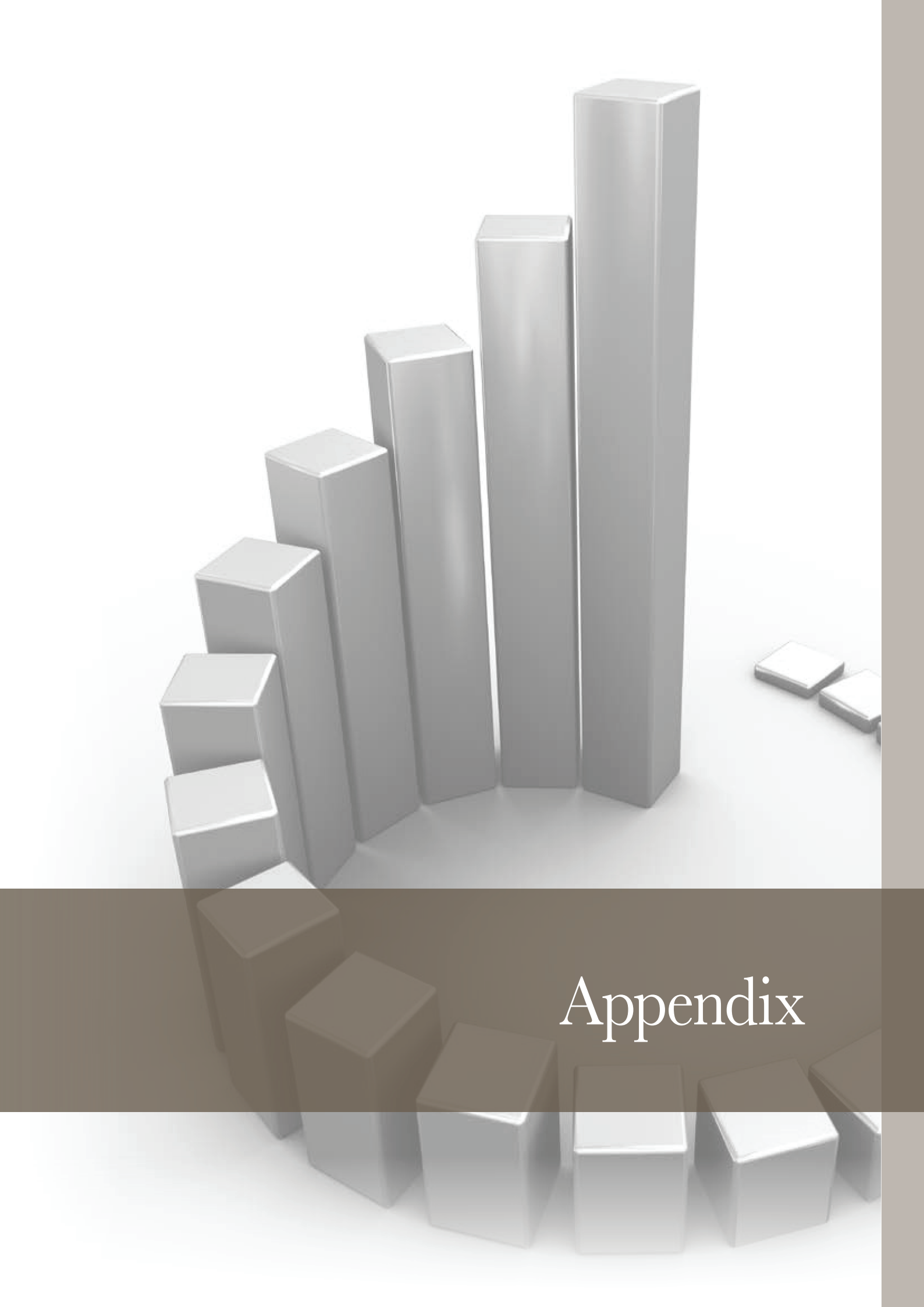
Government Counsel were attached to the Civil Division of the Singapore AGC for one week in January 2013, with the primary objective of gaining some insight in its work management system and the development of alternative dispute resolution and their application to the different types of civil litigation work handled by the Singapore AGC.

In September 2014, the Law Officer (International Law) received a delegation from Thailand, which was on a legal study visit to Hong Kong, and exchanged views on the operation of a number of international conventions.

### Conferences and seminars in the Mainland and overseas

Counsel of the Department regularly attend conferences and seminars in the Mainland or overseas to keep abreast of legal developments and law reform in other jurisdictions and to learn from the experience of others. From 2012 to 2014, major conferences attended by the Department's counsel included:

- 75th Biennial Conference of the International Law Association in Sofia, Bulgaria (August 2012)
- Conference on International Recovery of Maintenance in the EU and Worldwide in Heidelberg, Germany (March 2013)
- 18th Commonwealth Law Conference in Cape Town, South Africa (April 2013)
- Asia-Pacific Regional Arbitration Group Conference in Beijing (June 2013) and Melbourne (March 2014)
- 8th International Forum on the e-APP (electronic Apostille Program) in Montevideo, Uruguay (October 2013)
- 76th Biennial Conference of the International Law Association in Washington, DC, the United States (April 2014)



# Appendix

# Appendix

## Rank and post title of senior legal staff

Post title Rank	Civil Division	International Law Division	Law Drafting Division	Legal Policy Division	Prosecutions Division
Law Officer	Law Officer (Civil Law)	Law Officer (International Law)	Law Draftsman	Solicitor General	Director of Public Prosecutions
Principal Government Counsel	Deputy Law Officer	Deputy Law Officer	Deputy Law Draftsman	Deputy Solicitor General	Deputy Director of Public Prosecutions
Deputy Principal Government Counsel	Senior Assistant Law Officer	Deputy Principal Government Counsel	Senior Assistant Law Draftsman	Senior Assistant Solicitor General	Senior Assistant Director of Public Prosecutions
Assistant Principal Government Counsel	Assistant Law Officer	—	—	Assistant Solicitor General	Assistant Director of Public Prosecutions

## Staff establishment (as at 31 December 2014)

Division	Directorate counsel	Non-directorate counsel	Para-legal staff #	Other staff	Total
Secretary for Justice's Office	-	1	-	14	15
Civil	23+2*	140	45	128	336+2*
International Law	7	16	2	12	37
Law Drafting	15+1*	26	23	58	122+1*
Legal Policy	10+1*	34	7	30	81+1*
Prosecutions	27+1*	107	135	215	484+1*
Administration & Development	-	1	-	198	199
<b>Total number of posts</b>	<b>82+5*</b>	<b>325</b>	<b>212</b>	<b>655</b>	<b>1 274+5*</b>

# Court Prosecutors, Law Translation Officers and Law Clerks

\* Supernumerary posts



## Total expenditure on departmental activities

	2012 (HK\$ million)	2013 (HK\$ million)	2014 (HK\$ million)
Personal emoluments and personnel related expenses	675.1	711.8	742.3
Departmental expenses	94.4	95.5	104.0
Court costs	218.0	179.1	258.3
Hire of legal services and related professional fees	286.7	277.8	321.3
General non-recurrent account	0.1	0.5	6.9
<b>Total</b>	<b>1 274.3</b>	<b>1 264.7</b>	<b>1 432.8</b>

## Indicators of major areas of work

	2012	2013	2014
Number of pieces of legal advice given by the Department of Justice, with breakdown by Divisions as follows –	48 215	48 946	52 208
• Civil Division	14 735	15 204	15 284
• International Law Division	10 333	11 428	12 062
• Law Drafting Division	7 931	6 326	6 816
• Legal Policy Division	4 662	4 681	5 150
• Prosecutions Division	10 554	11 307	12 896
Number of commercial tenders, consultancy briefs, contracts, licences and franchises drafted/vetted by Civil Division	645	590	699
Number of cases in which arbitration or mediation was attempted	17	30	32
Number of pages of bills and subsidiary legislation gazetted	8 762	6 042	7 740
Number of bills and subsidiary legislation introduced into LegCo, for which the Department of Justice has policy responsibility	1	1	2
Number of criminal cases prosecuted (including cases* and appeals at all levels of court)	174 619	174 824	174 132
Number of death inquests	45	69	20
Number of current civil litigation cases (including number of judicial reviews)	30 325 (557)	32 901 (618)	34 590 (673)
Number of international agreements initialled	2	4	1
Number of new requests dealt with in various categories of mutual legal assistance	364	397	434
Number of legal training seminars arranged by the Department of Justice for other government departments	3 419	4 029	4 649

\* Cases include Court of First Instance indictments, District Court charge sheets, applications for review under section 104 of the Magistrates Ordinance, Cap 227, caseload of Court Prosecutors and High Court bail applications.

## Training courses attended by staff

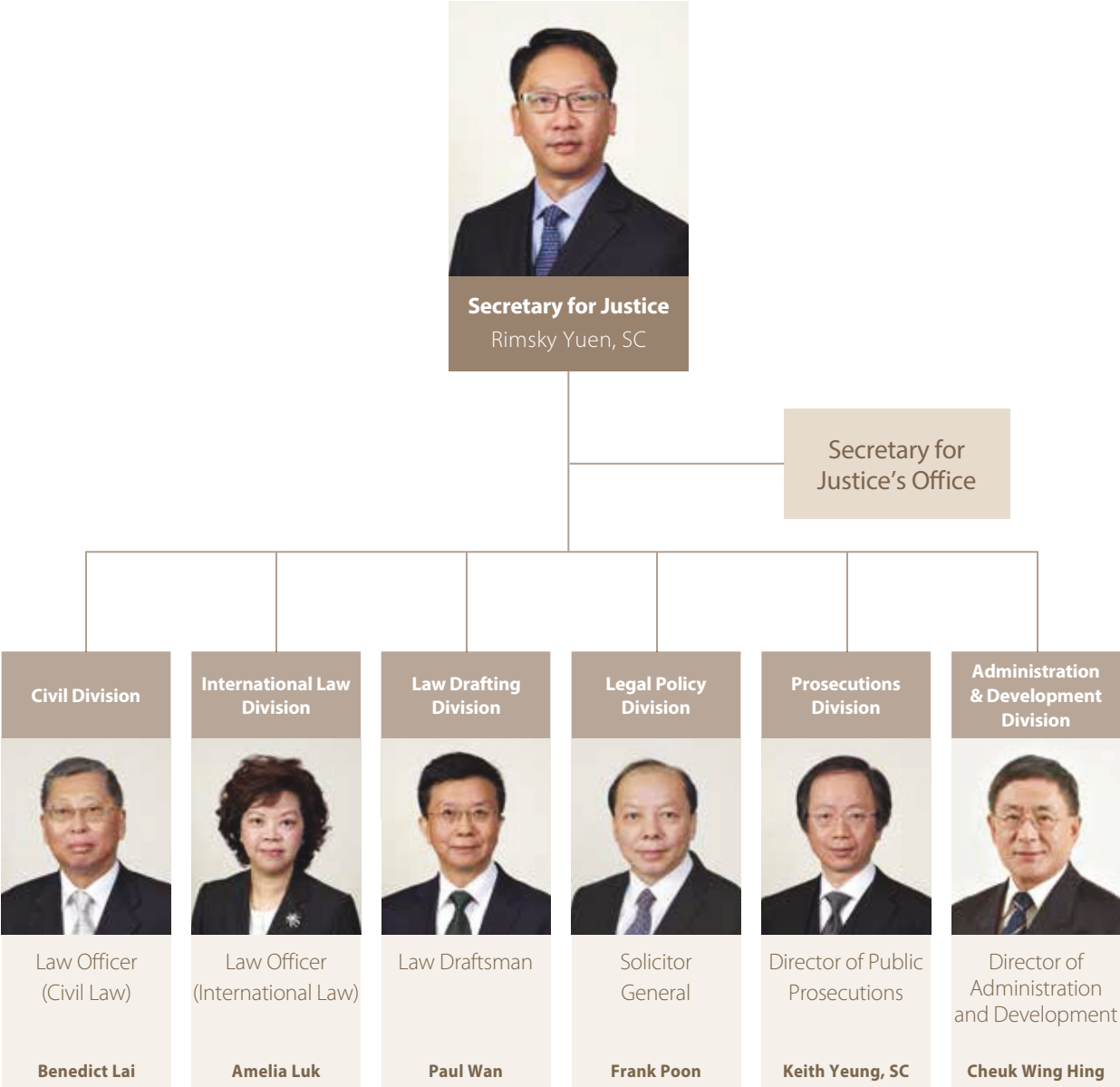
### (a) Distribution of participants by nature of training

	2012		2013		2014	
Law-related training and conferences	2 175	79.5%	1 464	64.7%	1 578	73%
National Studies, Foreign Affairs Studies and China Law	85	3.1%	68	3.0%	94	4.4%
Management training (including courses outside the HKSAR)	136	5.0%	64	2.8%	173	8.0%
Communication and language training	69	2.5%	54	2.4%	117	5.4%
Others	272	9.9%	612	27.1%	198	9.2%
<b>Total</b>	<b>2 737</b>	<b>100%</b>	<b>2 262</b>	<b>100%</b>	<b>2 160</b>	<b>100%</b>

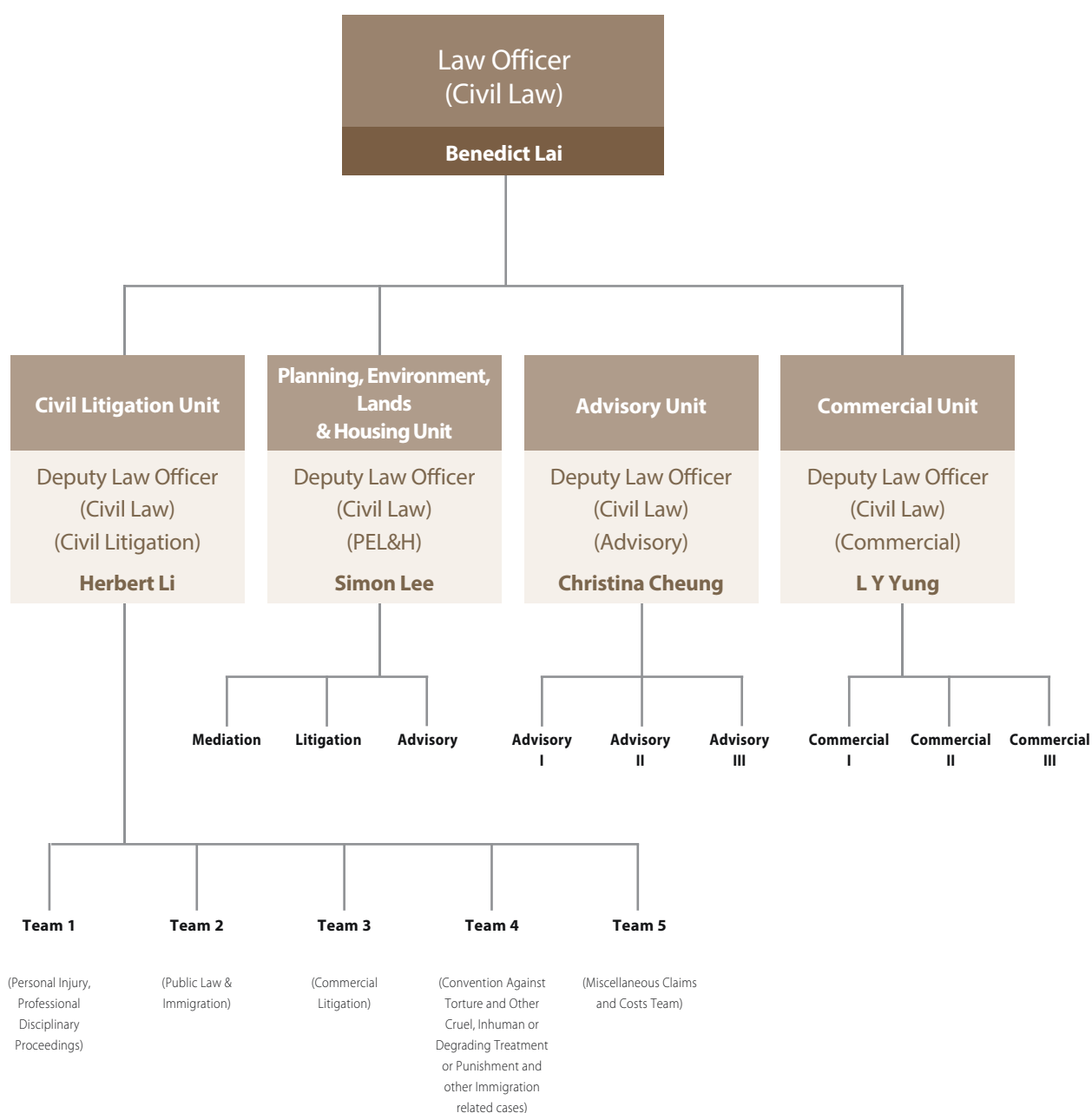
### (b) Distribution of participants by place of training

	2012		2013		2014	
In-house training	2 000	73.1%	1 639	72.5%	1 324	61.3%
Training in local institutes	628	22.9%	510	22.5%	700	32.4%
Training outside the HKSAR (in Mainland of China)	40	1.5%	42	1.9%	51	2.4%
Training outside the HKSAR (other than Mainland of China)	69	2.5%	71	3.1%	85	3.9%
<b>Total</b>	<b>2 737</b>	<b>100%</b>	<b>2 262</b>	<b>100%</b>	<b>2 160</b>	<b>100%</b>

Organisation chart (as at 31 December 2014)

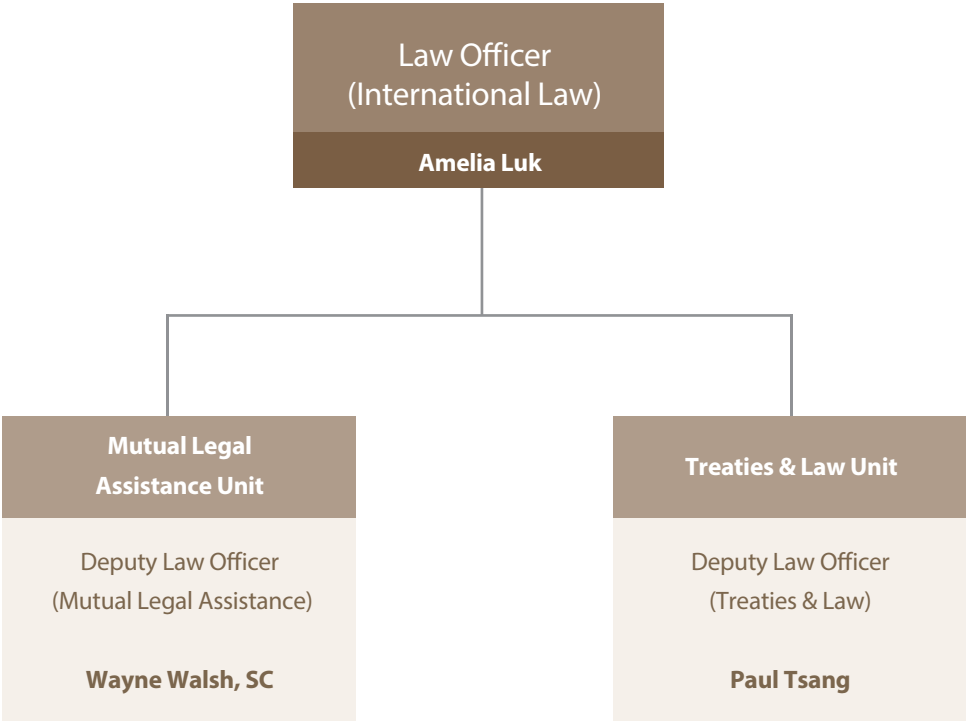


## Organisation chart of the Civil Division (as at 31 December 2014)

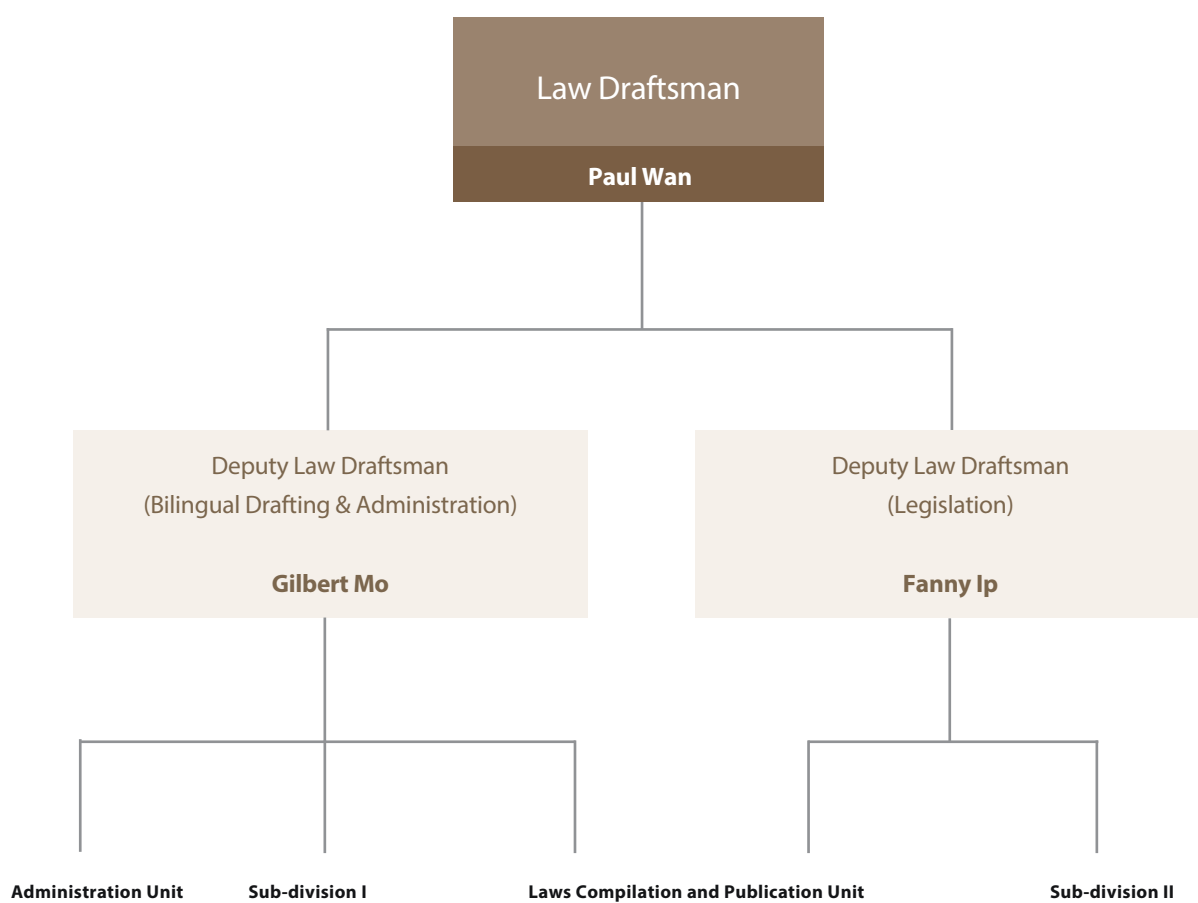




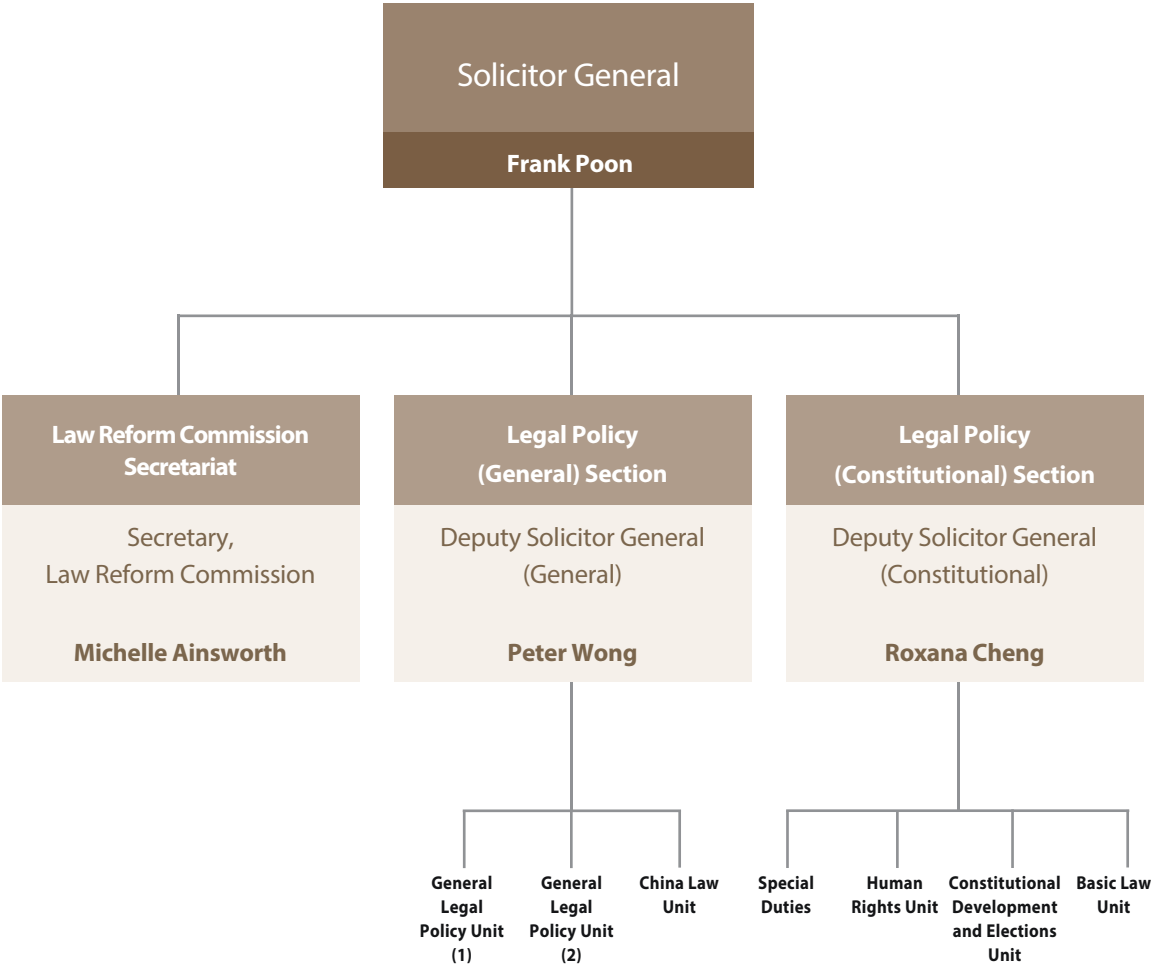
Organisation chart of the International Law Division  
(as at 31 December 2014)



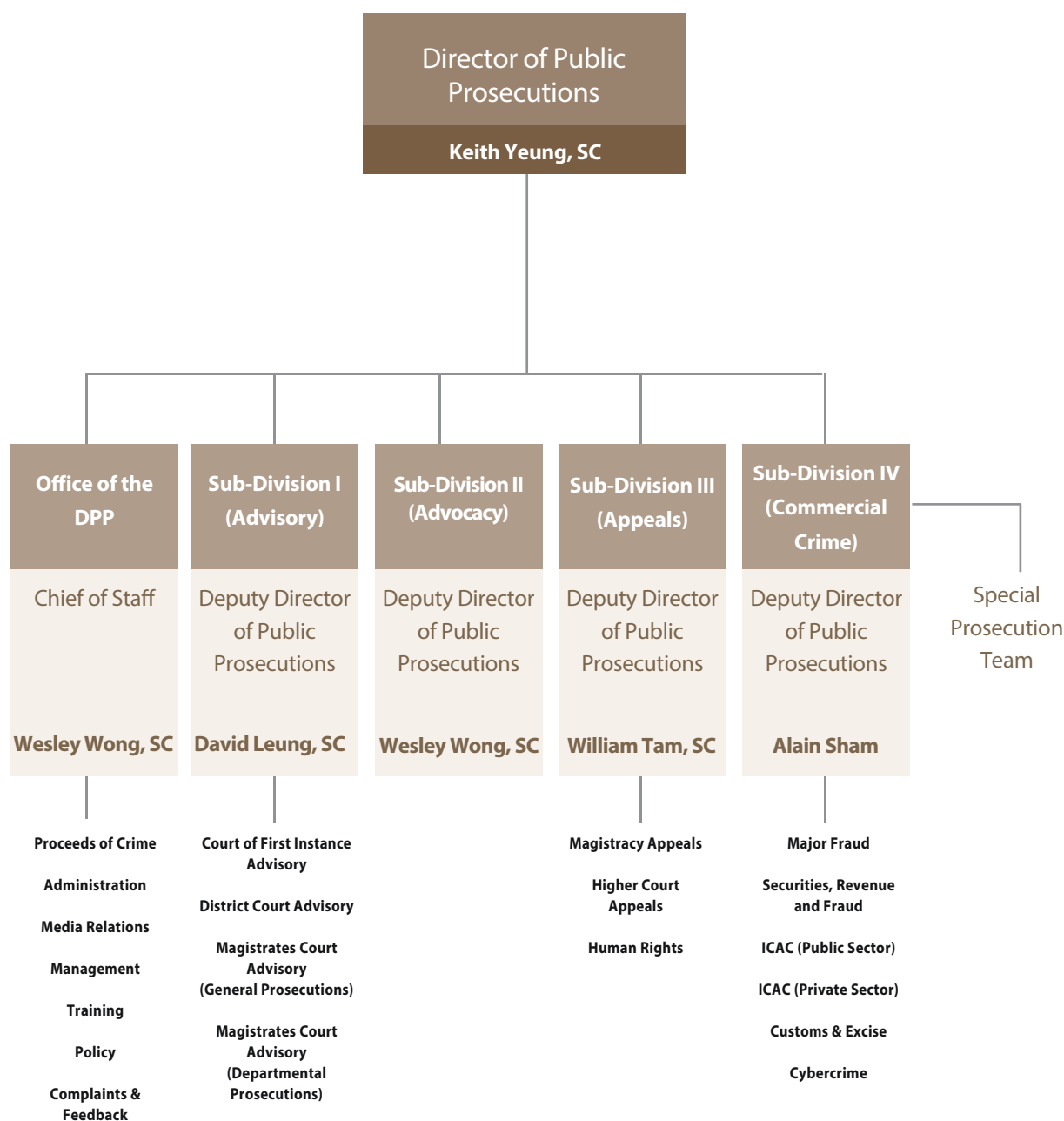
## Organisation chart of the Law Drafting Division (as at 31 December 2014)



Organisation chart of the Legal Policy Division  
(as at 31 December 2014)

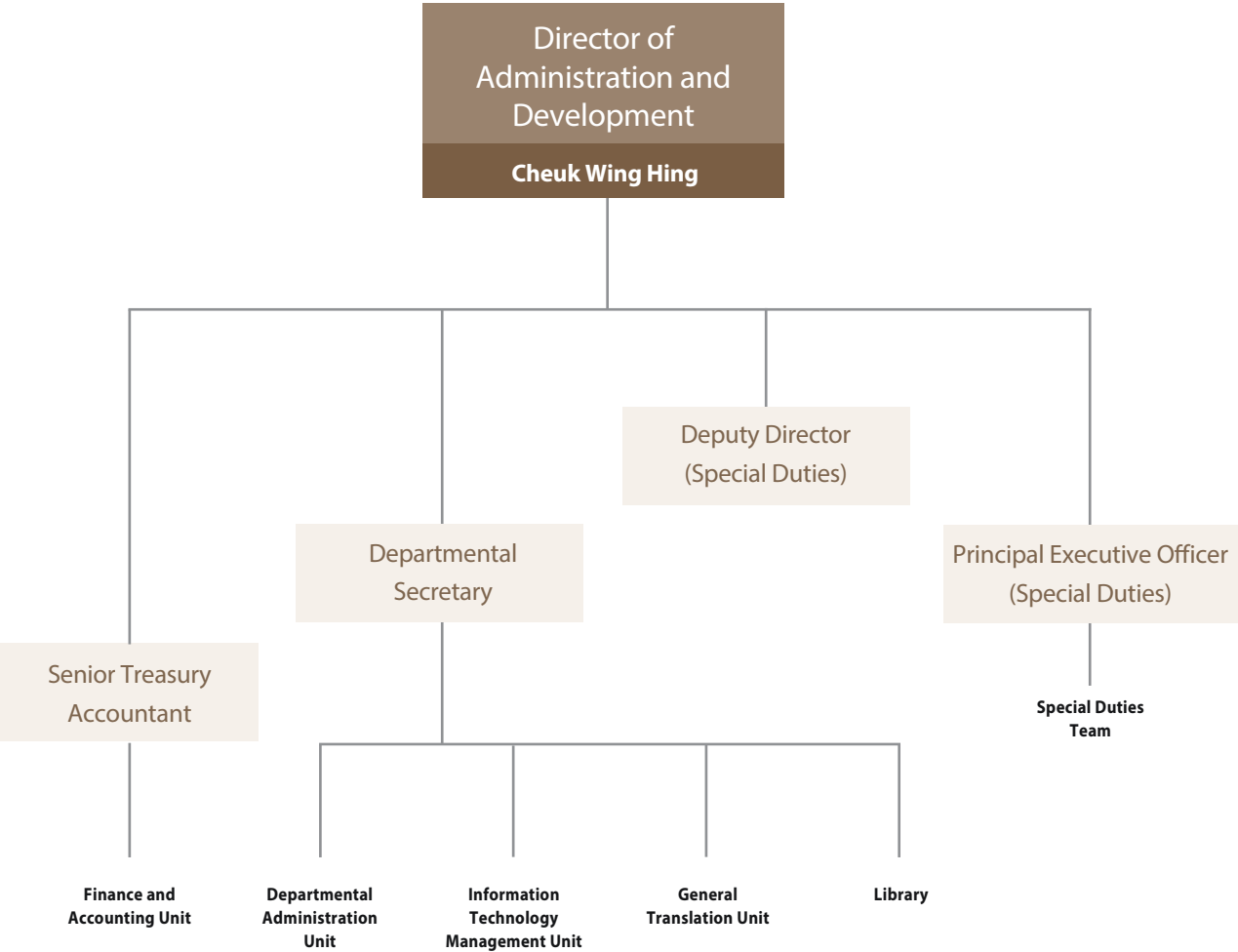


## Organisation chart of the Prosecutions Division (as at 31 December 2014)





Organisation chart of the Administration and Development Division  
(as at 31 December 2014)





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