

**For discussion on
22 December 2014**

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

**Proposed Creation of one Permanent Post of
Deputy Principal Government Counsel
in the Civil Division of the Department of Justice**

PURPOSE

This paper invites Members' views on the proposed creation of one permanent post of Deputy Principal Government Counsel (DPGC)(DL2) in the Civil Division (CD) of the Department of Justice (DoJ) with effect from 1 April 2015, in place of an existing supernumerary DPGC post which is due to lapse on 1 April 2015. The creation is proposed for taking forward the work required in sustaining the promotion and development of the wider use of mediation as a means of dispute resolution in Hong Kong and to undertake duties relating to mediation and other forms of dispute resolution.

JUSTIFICATION

Development of mediation in Hong Kong

2. The DoJ has been closely and directly involved in the promotion and development of the wider use of mediation to resolve disputes in Hong Kong since the Administration's first official commitment to promote mediation in 2007. Considerable efforts have been made in this direction since then, including the setting up in 2008 of a Working Group on Mediation (chaired by the Secretary for Justice (SJ)) which published a Report in February 2010 with 48 recommendations for public consultation; and the setting up of a Task Force on Mediation (also chaired by the SJ in December 2010) to implement the major recommendations in the Report, notably the introduction of the Mediation Ordinance (Cap. 620) (the Ordinance) and the formation of the Hong

Kong Mediation Accreditation Association Limited¹ (HKMAAL). The Task Force completed its tasks in around mid-2012.

3. In November 2012, a Steering Committee on Mediation (the Steering Committee) was established as Government's long term commitment to promote and develop the wider use of mediation to resolve disputes in Hong Kong. It was chaired by SJ and the terms of reference are set out in **Annex A**. Underpinning its work are three Sub-committees, namely, (a) the Regulatory Framework Sub-committee, (b) the Accreditation Sub-committee, and (c) the Public Education and Publicity Sub-committee.

4. The firm commitment to the further promotion and development of mediation services in Hong Kong was explicitly made in the Policy Address and the Budget Speech of 2014².

The Mediation Team in DoJ

5. The Mediation Team of CD has been providing support to SJ and DoJ in implementing the long term policy to promote and develop mediation in Hong Kong. It mainly provides secretariat support to the Steering Committee and the three Sub-committees, including preparing agenda, papers, notes and minutes for the meetings, as well as implementing major initiatives in the promotion and development of mediation services in Hong Kong. It also provides advice to counsel of CD on matters relating to mediation and organises mediation training for DoJ counsel and other civil servants.

¹ HKMAAL was established in August 2012 with a view to becoming the premier accreditation body for mediators in Hong Kong, discharging accreditation and disciplinary functions and setting standards for training.

² In paragraph 31 of the Policy Address delivered by the Chief Executive on 15 January 2014, it is stated as follows –

“Hong Kong has a fine tradition of the rule of law and a well-developed legal system. The Government will continue to actively promote Hong Kong's legal and dispute resolution services to enhance our status as a centre for international legal and dispute resolution services in the Asia-Pacific region. The Government will strengthen its promotion efforts overseas, continue to co-ordinate the development of mediation services through the Steering Committee on Mediation...”

In paragraph 97 of the Budget Speech delivered by the Financial Secretary on 26 February 2014, it is stated as follows –

“In recent years, arbitration and mediation have become the mainstream modes of resolving international commercial disputes. Building on our robust legal system and tradition, Government has all along been actively promoting Hong Kong's legal and arbitration services, and making its best efforts to advocate and develop mediation services, with a view to enhancing Hong Kong's position as an international legal and dispute resolution services centre in the Asia-Pacific region.”

6. Since the establishment of the Steering Committee in late 2012, the Mediation Team has successfully implemented various major initiatives in support of the work of the Steering Committee. These initiatives include the holding of a “Mediation Week” in March 2014 with a two-day mediation conference themed “Mediate First for a Win-Win Solution” plus 24 mediation talks; the production of a new Announcement in the Public Interest with both video and audio clips broadcast in March 2014 to enhance the public’s awareness and understanding of mediation as a means of dispute resolution; and the provision of 10 sessions of mediation training and seminars for DoJ counsel and other civil servants to promote mediation within and develop the wider use of mediation by the Government.

7. The Mediation Team has also commenced various initiatives including the drafting of Exemption Guidelines to assist stakeholders in using mediation communications for research, evaluation or educational purposes without breaching restriction against disclosure of mediation communication; conducting a study on the need for an Apology Legislation for the purpose of facilitating settlements having regard to experience of other jurisdictions; and the holding of a “Mediate First” event to promote mediation to Small and Medium Enterprises (SMEs).

8. To take forward the commitment to promote and develop mediation, the Mediation Team will continue to support the Steering Committee by implementing further initiatives and measures to enhance the legal infrastructure conducive to mediation, strengthen efforts in the training of mediators, and improve public understanding of and interest in the use of mediation. From information and experience gained over the years, the Mediation Team will focus on the promotion and development of the use of mediation in the business, community (essentially building management), and medical sectors, with particular attention to SMEs as the use of mediation to resolve disputes would be in line with their way of conducting business; and also continue to facilitate the development of mediation in other sectors including but not limited to construction, education, family, financial, insurance, and legal.

9. The Mediation Team’s specific work portfolio in relation to the three Sub-committees of the Steering Committee in the short to medium term is set out below.

Regulatory Framework Sub-committee

10. The Regulatory Framework Sub-committee assists the Steering Committee in monitoring the implementation of the Ordinance and advise on the promulgation and promotion of a set of guidelines on the exemption for disclosure of mediation communication under section 8(2) of the Ordinance, and the finalisation of the study on the need for an Apology Legislation in Hong Kong, and subject to the advice of the Steering Committee, the publication of a consultation report and the implementation of the recommendations.

Accreditation Sub-committee

11. The Accreditation Sub-committee assists the Steering Committee in monitoring matters concerning the accreditation and regulation of mediators in Hong Kong and the monitoring of the operation of HKMAAL and keeping in view its future development, including whether the power to appoint mediators in default may be given to HKMAAL and whether and when a statutory accreditation body may be set up. The Sub-committee will consider HKMAAL's review of the Mediation Code, a code of conduct which has been adopted by HKMAAL and a number of mediation service providers.

Public Education and Publicity Sub-committee

12. The Public Education and Publicity Sub-committee continues to implement, in collaboration with stakeholders, on-going and new publicity initiatives, including the following –

- (a) SMEs : to facilitate and provide support to the promotion and development of the use of mediation by SMEs as a means of dispute resolution;
- (b) Education : to further promote mediation in schools, covering students, teachers, principals and parents groups, and to explore opportunities to take part in events organised by the stakeholders on a regular basis;
- (c) Medical : to further promote mediation in the medical sector, including exploration of the launching and implementation of a medical mediation scheme; and
- (d) Community : to organise seminars and role-plays at community level to enhance public education on the use of

mediation and to explore opportunities to participate in mediation promotional events organised by other stakeholders, such as taking part in mediation events organised by the Home Affairs Department in resolving building management disputes, and mediation exhibitions, road shows etc. to be organised by individual service providers.

The Sub-committee will review the Pilot Project for Community Venues for Mediation with the relevant stakeholders and monitor its effectiveness.

13. Other work of the Mediation Team includes maintaining and updating the mediation webpage of DoJ; providing support to the regular reporting of the Department to the Legislative Council Panel on Administration of Justice and Legal Services on the subject “Development of Mediation in Hong Kong”; responding to media and public enquiries about mediation and matters concerning the work of the Steering Committee and its three Sub-committees; preparing mediation statistics and returns; and preparing manual, promotional leaflet and materials as appropriate.

Looking further ahead

14. To facilitate the long term development of mediation in Hong Kong, the Mediation Team will consolidate its efforts in various areas including the provision of an environment and legal infrastructure conducive to mediation, to strengthen efforts in the context of capacity building, to enhance public understanding and interest in the use of mediation, as well as to enhance Hong Kong’s competitiveness and international image as a mediation services centre in the Asia-Pacific region.

15. In the context of legislative framework, apart from looking into the question of whether it is necessary to introduce an Apology Legislation in Hong Kong as mentioned in paragraph 10 above, the Steering Committee also needs to monitor the operation and effectiveness of the implementation of the Ordinance, to review the adequacy of the Ordinance and consider the need to propose amendments to the Ordinance.

16. The quality, professional ethics and professionalism of mediators are crucial in inspiring public confidence in the use of mediation as a means of dispute resolution. While much has already

been done by HKMAAL in setting accreditation and training standards as well as developing an effective disciplinary mechanism, judging from the experience of other jurisdictions and the features of the local circumstances, much remains to be done to ensure that this industry-led body would fulfil its mission and win the confidence of both the mediation sector and the general public.

17. Infrastructure and hardware aside, it is equally important to build up a mediation culture in Hong Kong. In this regard, continuous efforts are required to promote, among other things: (a) a proper understanding of mediation and its relationship with other modes of dispute resolution such as arbitration; (b) how mediation can assist parties to resolve disputes; and (c) when mediation may not be appropriate and when other modes of dispute resolution should be considered.

18. While mediation is taking root in Hong Kong, its future healthy development rests on the joint efforts of all the stakeholders and the community. The Mediation Team is required to continue to support the Steering Committee in taking forward the work required to sustain the cultivation of mediation culture for further healthy development of mediation in Hong Kong. This will complement the efforts of DoJ in promoting Hong Kong as an international legal and dispute resolution services hub in the Asia-Pacific region.

19. With a view to developing a culture to use mediation and other forms of dispute resolution in appropriate cases, the Mediation Team will continue to support Government departments in the wider use of mediation by advising on the suitability of mediation for legal actions brought by or against the Government, on the documentation required for mediation, in the setting up of a dedicated team in preparation for mediation and in the conduct of the mediation including the drafting of mediation agreements. The Mediation Team will also provide advice and support to DoJ counsel in all stages of the mediation process such as the choice of mediators and the terms of the agreement to mediate.

Need for a permanent DPGC post to continue to support the work on the promotion and development of mediation

20. To provide the necessary support in promoting and developing mediation in Hong Kong, a three-year non-civil service (NCS) DPGC position was created in September 2010 with the approval of the Finance Committee in June 2010 vide EC(2010-11)6, which was subsequently replaced by a two-year civil service DPGC post created in April 2013 with the approval of the Finance Committee in March 2013

vide EC(2012-13)18.³

21. As the promotion and development of mediation (as well as other forms of dispute resolution) are a long term and firm commitment of the Administration, the proposed DPGC post is required to be made permanent to provide the necessary support to the Steering Committee and its three Sub-committees. The DPGC, who is supported by three existing non-directorate staff (including one SGC, one Law Clerk and one Personal Secretary I), is responsible for supervising the overall work of the Mediation Team, as well as undertaking duties and responsibilities for implementing the commitment / new initiatives to sustain the promotion and development of mediation (as well as other related forms of alternative dispute resolution, as appropriate) and to enhance the capacity and status of Hong Kong as a dispute resolution centre. The job description of the DPGC post is at **Annex B**. The organisation chart of CD showing the proposed post is at **Annex C**.

22. The proposed DPGC will be responsible for developing policy agenda for the implementation of the policy objectives, supervising the overall work of the Mediation Team and attending to management duties. The work in relation to the three Sub-committees requires substantial planning, organisational and liaison skills, and the proposed DPGC will oversee the effective implementation of all the ongoing and new initiatives of the Sub-committees. Moreover, the proposed DPGC will need to keep abreast of the latest developments in mediation internationally and locally and provide timely updates on mediation information, together with advice and support in the use of mediation in specific cases. The DPGC will also devise and provide appropriate training programmes for officers in DoJ and law-related officers of other Government departments.

³ To provide the necessary support to the then Task Force for Mediation, a three-year NCS DPGC position was created in September 2010 with the approval of the Finance Committee. The officer filling the position (who was recruited through an open recruitment exercise) subsequently left the Department in early 2012 and no suitable candidate was identified through another open recruitment exercise. In order not to delay the outstanding tasks that need to be followed up, as an interim staffing arrangement, a six-month supernumerary DPGC post was created under delegated authority for the period from 18 June to 17 December 2012 to provide the required staffing support for handling the mediation-related work and the post was filled by a Senior Government Counsel (SGC) on an acting basis, working under the supervision of a Principal Government Counsel (PGC). Apart from the six-month DPGC post mentioned above, a Government Counsel on NCS contract terms was also engaged in the same period to provide support in this regard. After the lapse of the supernumerary DPGC post, as an interim arrangement, the mediation-related work was handled by a counsel at SGC level under the supervision of the PGC until the creation of a supernumerary civil service DPGC post in April 2013 for two years.

23. Taking into account the duties of the DPGC as mentioned above, the subject officer will have to work closely with stakeholders and other people and bodies from different sectors, including the Judiciary, other Government departments, the mediation community and the academia, often at professional and senior levels. Some of the issues arising from the committee work are also complex and sensitive. Given the heavy and extensive duties to be taken forward, the nature of work, as well as the long term work required for the promotion and development of mediation, it is appropriate for this permanent post to be pitched at DPGC level.

ALTERNATIVES CONSIDERED

24. We have considered alternative staff redeployment other than the creation of the DPGC post but found that not feasible.

25. At present, Law Officer (Civil Law) (DL6) is supported by four PGC (DL3). The four PGC oversee the operation of their respective units which, in turn, comprise 13 teams (including the Mediation Team) each of which is headed by a DPGC and one team headed by an Assistant Principal Government Counsel (DL1).

26. CD represents the Government in the conduct of all legal claims and disputes involving Government and provides legal advice on civil matters to all Government bureaux and departments. Each DPGC is responsible for supervising a team of counsel in the conduct of cases or advisory matters under the purview of his/her team in specific areas of work. All DPGC in CD are tasked with, and fully tied up with, their respective directorate supervision, management functions and professional work. The workload of the proposed DPGC is expected to be very heavy. We have critically examined whether the workload of the proposed DPGC can be handled through internal redistribution of work and redeployment of resources. However, it would not be feasible to deploy another DPGC to take up the work on top of his/her current duties without adversely affecting the discharge of their duties and compromising the quality of work. Details of the duties of the DPGC in the various Units of CD are set out at **Annex D**. Separately, noting that a PGC is currently supervising the work on mediation in addition to his current duties, we have also considered the viability for the PGC to take up the duties of the proposed DPGC post. This however is not practicable, given that the PGC is already heavily occupied with other aspects of his work. It is thus essential to create the DPGC post for handling the work concerned.

27. If the proposed DPGC post is not created, the work of the Mediation Team will be seriously undermined, resulting in the dissipation of the experience gained and the loss of the working network established with stakeholders. Stakeholders will question Government's commitment to promote and develop mediation as a means of dispute resolution.

FINANCIAL IMPLICATIONS

28. The proposed creation of one permanent DPGC post will bring about an additional notional annual salary cost at mid-point of \$1,739,400. The full annual average staff cost, including salaries and staff on-cost, is \$2,462,000.

29. The proposed DPGC will continue to be supported by three non-directorate staff as mentioned in paragraph 21 above, at a total notional annual salary cost at mid-point of \$1,850,220 and the full annual average staff cost, including salaries and staff on-cost, is \$2,762,000. We will include the necessary provision in the draft Estimates of 2015-16 and subsequent years to meet the cost of the proposal.

ADVICE SOUGHT

30. Members are invited to comment on the proposal. Subject to Members' views, we will seek the recommendation of the Establishment Subcommittee in January 2015 and approval from the Finance Committee in February 2015.

Department of Justice
December 2014

Steering Committee on Mediation

Terms of Reference

The terms of reference of the Steering Committee on Mediation are as follows -

To advise on and assist in the further promotion and development of mediation in Hong Kong, including but not limited to –

- (a) monitoring the implementation of the Mediation Ordinance (Cap. 620), and advising on issues arising therefrom;
- (b) monitoring matters concerning the accreditation and regulation of mediators in Hong Kong, including such matters as may arise from the organisation and operation of the Hong Kong Mediation Accreditation Association Limited, and advising on issues arising therefrom;
- (c) considering and advising on ongoing and new initiatives for the promotion and development of mediation;
- (d) conducting such studies, reviews or researches relating to mediation (whether by its own members or through others) as may be required; and
- (e) such matters as may be incidental to the matters stated in (a)-(d) above.

Job Description
Deputy Principal Government Counsel (Mediation)

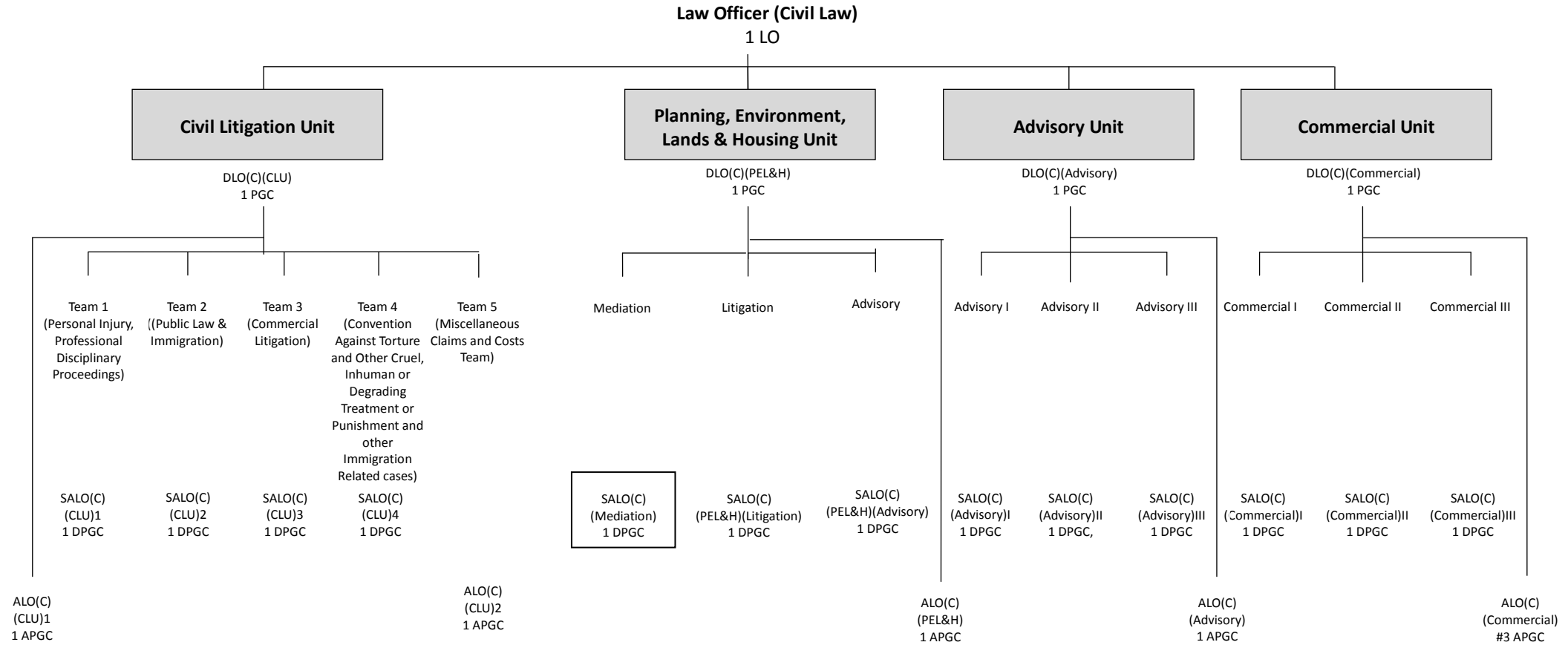
Rank : Deputy Principal Government Counsel (DL2)

Responsible to : Deputy Law Officer (Civil Law)

Main duties and responsibilities

1. To provide secretariat and research support to the Steering Committee on Mediation and its three Sub-committees, including but not limited to the following –
 - (a) working with relevant stakeholders to monitor the implementation of the Mediation Ordinance (Cap. 620) and advising on issues arising therefrom, as well as considering the need for an Apology Legislation;
 - (b) working with stakeholders to keep in view and monitor the development of the system of accrediting mediators;
 - (c) working with relevant parties to consider and advise on ongoing and new initiatives for the promotion and development of mediation in Hong Kong; and
 - (d) working with relevant parties for initiating pilot mediation schemes in different sectors.
2. To advise on and assist in the promotion of the more extensive use of mediation in Hong Kong as appropriate.
3. To provide support and advice as appropriate to counsel of the Department of Justice and to other departments on the application of mediation and other forms of dispute resolution in relation to civil disputes involving the Government.
4. To liaise with other Government bureaux/departments for the provision of appropriate briefings and training for their officers for the promotion of more extensive use of mediation to resolve disputes involving the Government.
5. To undertake such other duties as may be assigned from time to time, in particular relating to alternative dispute resolution including mediation.

Existing and Proposed Organisation Chart of the Civil Division



- Legend:
- LO = Law Officer (DL6)
 - PGC = Principal Government Counsel (DL3)
 - DPGC = Deputy Principal Government Counsel (DL2)
 - APGC = Assistant Principal Government Counsel (DL1)
 - DLO(C) = Deputy Law Officer (Civil Law)
 - SALO(C) = Senior Assistant Law Officer (Civil Law)
 - ALO(C) = Assistant Law Officer (Civil Law)
 - CLU = Civil Litigation Unit
 - PEL&H = Planning, Environment, Lands and Housing
 - = Existing supernumerary DPGC post proposed to be made permanent
 - # Include one supernumerary APGC post for two years up to 9 February 2016

**Major Responsibilities and Current Workload of the Deputy
Principal Government Counsel (DPGC) in the various Units of the
Civil Division (CD) of the Department of Justice**

Civil Litigation Unit (CLU)

The four DPGC in this Unit are each responsible for the supervision of a team of counsel in advising and representing Government bureaux and departments and other related public bodies before courts and tribunals in all forms of civil litigation and dispute resolution. The Unit handles a wide range of litigation cases involving the Government, particularly those involving Basic Law issues, civil service matters, immigration matters, revenue matters, charity and trusts, commercial matters, intellectual property matters, personal injuries and other damages claims, etc. The workload of the Unit has ever been increasing especially over the past few years in terms of the number of litigation cases, their urgency, complexity and significance, and the DPGC cannot be spared for taking up other additional duties.

Planning, Environment, Lands & Housing Unit (PEL&H)

The Advisory Team and the Litigation Team of the Unit are headed by two DPGC and each supported by a team of counsel. The Advisory Team and the Litigation Team of the Unit are responsible for providing legal advice to and acting in litigation cases for Government bureaux and departments in relation to town planning, lands, building, heritage issues, road schemes, Government rates and rent, housing, and environmental protection issues, etc. The number and complexity of requests for advice and the litigation cases handled by the Unit have been on the rise and are consistently at a high level. The work capacities of the DPGC are fully stretched.

Advisory Unit

The three DPGC in this Unit are responsible for advising Government bureaux and departments on general civil law issues relating to their functions, duties and powers. Each DPGC is responsible for handling

high profile and complex matters involving difficult and sensitive issues, and for supervising a team of counsel in providing legal advice relating to interpretation of legislation, statutory powers and duties, legislative proposals and amendments, Government's civil liability, etc. to Government bureaux and departments. With the increase in the number and urgency of requests for legal advice, and the increasing level of complexity and sensitivity of cases which often require the Unit to consult other Division/Units in the Department to provide consolidated advice, the DPGC are not able to take up other additional duties.

Commercial Unit (CU)

Each of the three DPGC in this Unit is supervising a team of counsel and they advise Government bureaux and departments on all aspects of commercial law including broadcasting, telecommunications, theme parks, competition law, company law, pensions, transportation, securities and futures, insurance, banking, finance, schemes of control for power companies, tax and public finance, etc. The Unit also drafts/comments on commercial contracts, licences and franchises, etc. The CU has experienced a consistently high level of workload with considerable and increasing complexity, in particular with some major projects such as the grant of domestic free television programme service licences, frequency re-assignment arrangements for 3G mobile services, resolution regime for financial institutions, the scheme of control for power companies and post-2018 review of the future regulatory framework for the local electricity market. The work capacities of the DPGC are fully stretched.