

Chairman's Report for 2017

1. The year 2017 marks the 20th anniversary of the return of Hong Kong's sovereignty to China. It has been a momentous year for the Bar. The independence of Judiciary and public trust and confidence in the Hong Kong legal system were under threat both locally and internationally.
2. I took up office when new developments of a number of pronounced political events emerged. There were unjustified comments against the Judiciary and personal attacks against the trial Judge following the conviction of seven policemen, which had caused much public attention. On 20 February 2017, the Bar issued a statement to defend the judgment of His Honour Judge Dufton. Whilst we welcome informed and measured criticisms, we reject any abuse and personal attacks against the trial Judge. This led to subsequent and unjustified attacks on the Bar as being "pro-Occupy".
3. Six months later, attacks came from individuals from the other end of the political spectrum, following the sentencing review by the Court of Appeal of Joshua Wong and others in cases of unlawful assembly. The Bar issued a statement in August 2017 to refute the editorial comments in some international and local media that the court in sentencing the defendants was motivated by '*political considerations originating outside Hong Kong*'. These comments were damaging to the legal system and to Hong Kong as a whole. This led to unjustified comments on the Bar as "pro-Government".
4. As a professional body, it is the duty of the Hong Kong Bar Association to uphold the Rule of Law and the independence of our legal system without taking sides. The above two incidents illustrate the Bar's determination to defend the Rule of Law and independence of the Judiciary.
5. In July 2017, the HKSAR Government published a "Discussion Paper" outlining the Co-location Arrangement. The paper set out the proposals it intended to seek with the Mainland authorities for immigration, customs and quarantine clearance of passengers of the Guangdong-Shenzhen-Hong Kong Express Rail Link at the Hong Kong West Kowloon Station. The "Three-step Process" proposed by the HKSAR Government and its possible implications on the systems of the HKSAR have been the subject of considered study by

our Committee on Constitutional Affairs & Human Rights (“CCAHR”) and active monitoring by the Bar Council.

6. In September 2017, the Bar Council decided not to issue a substantive position paper on the Co-location Arrangement as it would be relatively close to the hearing of a number of applications for leave to apply for judicial review against the HKSAR Government’s proposal to enter into the Co-location Arrangement, and, in line with past practices, the Bar would refrain from commenting on issues that are *sub judice*. This is because when a matter is *sub judice*, any premature commentary and conjecture might be perceived to add unnecessary pressure to those concerned, and are best avoided. This led to subsequent reporting in the press about purported discussions within the Bar Council concerning the Co-location Arrangement, including reference to an internal paper prepared for the Bar Council’s consideration by the CCAHR. A statement was issued by the Bar on 16 September 2017 clarifying that the news reports of what transpired at the Bar Council discussions were incorrect and misleading, and denouncing the breach of confidentiality.
7. On 19 October 2017, the Bar issued a statement indicating that it has been closely monitoring the development of the “Three-step Process” and will publish its views if and when appropriate, and urged the HKSAR Government to release full details of the “Three-step Process” to facilitate a constructive and rational discussion on the legal and constitutional issues involved. Such position was consistent with the observations of the Honourable Mr Justice Chow, in refusing leave for judicial review in HCAL 453, 455, 458 & 460 of 2017 as being premature (27 September 2017), as follows:-

“[39] Second, the factual and legal events relevant for determining the constitutionality or legality of the Proposed Co-location Arrangement have not yet occurred. **Unless and until the “Three-step Process” has been completed, the details of the Co-operation Arrangement, the NPCSC decision and the local legislation will not be known. Such details are plainly relevant to any discussion or determination of the constitutionality or legality of the Proposed Co-location Arrangement ...**

[41] ... At this stage, it is simply not known whether the NPCSC decision which may be made to endorse and approve any

Co-operation Arrangement put forward by the SAR Government and the relevant Mainland authorities will include, or be accompanied by, an interpretation of the relevant provisions of the Basic Law (including BL 18 strongly relied upon by Mr Lee and BL 20 referred to in the Legco Paper). Assuming that no such interpretation will be included or accompany the NPCSC decision, it would still be a moot question as to whether the decision itself can be treated as an interpretation of the Basic Law by necessary implication, and what would be the effect of a decision of the NPCSC short of a formal interpretation ... **In all, I do not consider that it is possible, at this stage, to come to any conclusion that the Proposed Co-location Arrangement would necessarily be contrary to the Basic Law whatever may be the final form and contents of the Co-operation Arrangement, the NPCSC decision and the local legislation.**” (emphasis added)

8. It was after the Bar had access to the full details (including, in particular, the purported legal underpinning) of the first two steps of the “Three-step Process” on 27 December 2017 when the NPCSC announced its Decision (“NPCSC Co-location Decision”) approving the Co-operation Agreement between the Mainland and the HKSAR and the Government releasing the Co-operation Agreement on the same day that the Bar Council considered it to be the opportune moment to state our views on the legal and constitutional issues involved in the Co-location Arrangement.
9. On 28 December 2017, the Bar issued a statement that the NPCSC Co-location Decision purporting to “confirm” the legitimacy of the Co-operation Agreement without stating how this is so, is tantamount to the NPCSC saying the Co-operation Agreement complies with the Chinese Constitution and the Basic Law **“just because the NPCSC says so”**. The Council took the view that such an unprecedented move severely undermines public confidence in “one country, two systems” and the Rule of Law in the HKSAR. The Council further took the view that none of the Basic Law provisions cited in the State Council’s explanatory memorandum to the draft NPCSC Co-location Decision is capable of providing the legal basis for the local legislation being the last of the “Three-step Process”.

10. At this juncture I should explain how and when the Bar Council issues a statement. The Bar has to choose the topic and timing of speaking out very carefully. This is because when the Bar speaks out on a topic, its views and the consequences of expressing those views may have lasting effect. If the Bar speaks too often (and on too many topics), it runs the risk of “diluting” its views and becomes or is perceived as a mere current affairs commentator. If it speaks too rashly or before mature and detailed consideration it runs the risk of inadequate research or basing itself on the wrong facts or wrong law. For every occasion of applause, there will be hawks circling in the sky looking for mistakes and flaws in what the Bar said and to discredit the Bar as being partisan. The Bar Council also has to take extra care in providing official translated versions for the press, since the Bar should engage closely with the media in a user-friendly way. Preparation of Bar statements therefore often took more time because it was not just a matter of preparing it in one language and translating it to the other, but is often an interactive process of deciding what to say in the English or Chinese version first and then working out the version in another language. The point is – there is often much more than meets the eye superficially. The Bar Council needs to take time to reflect and plan carefully before speaking out every time.
11. In the case of the Co-location Arrangement, as you may read from the report of the CCAHR, the CCAHR considered it a “blessing in disguise” that the Bar Council did not issue a substantive position paper before the commencement of the “Three-step Process”, given the shape of the Co-location Arrangement announced on 27 December 2017 was different from what the Government postulated back in July 2017 – in particular its non-reliance on Article 20 of the Basic Law, which formed a substantial part of the discussion back then.
12. These were some of the challenges that the Bar Council faced in 2017. The Bar Council, and its officers, represents the profession as a whole, irrespective of members’ political beliefs, status or practice areas. I am grateful for the collective wisdom of members of the Council, who have always provided me with thoughtful and wise guidance.
13. In paragraphs that follow I shall highlight a number of aspects of the work of the Council during the past year. Elaboration on some of the topics can be found in the reports of the committees.

Practice Area Committees

14. As a profession, we cannot stand still. We have to move with times, as the rest of the society does. I continued to implement the idea of having our own members share their knowledge with other members of the Bar. The objective is to ensure that the Hong Kong Bar maintains a high standard commensurate with the standards of similar professionals around the world.
15. The respective Practice Area Committees have been organizing seminars for members of the Bar throughout the year which received a good attendance rate. For example:-
 - (a) Companies Law (2 seminars for the newly qualified or junior members of the Bar as part of their practice development);
 - (b) Family Law (1 seminar covering family law practice and proceedings);
 - (c) Land, Trust and Probate (the conference is set out below);
 - (d) Financial and Securities Law (a series of 8 seminars covering both the substance and the practice of financial and securities law).

Continuing Professional Development

16. In the past year, the question of whether, and if so, what kind of continuous professional development measures should be implemented within the Bar have been considered in detail by the Council. As the Honourable Macrae JA observed in CACV 174/2014 (30 June 2015):-

“[49] Not surprisingly, this greater awareness of rights and expectations by the general public has been accompanied by a greater vigilance by professional bodies in upholding the professional standards of their members. In England and Wales, for example, all barristers of both the inner and outer Bars have been required to fulfil the requirements of continuing professional development (known as CPD) since 2001. In New South Wales, in which jurisdiction *Birks* [*note - referring to *R v Birks* (1990) 48 A Crim R 385] was decided, barristers have been required by law to undergo continuing legal education since 2005.

[50] **Remarkably, in Hong Kong, there is no such mandatory requirement for the Bar**, notwithstanding that the Law Society of Hong Kong has had a compulsory system of continuing professional development applicable to all solicitors since 2003; the scheme having been introduced in phases since 1998. **Given the greater education and perception of the public as to their rights and expectations in litigation, it would be unfortunate if the Bar were to continue to ignore the tide of these events.** The Court in *Birks* was not intending to endorse some form of *de facto* immunity for the Bar.” (emphasis added)

17. I am grateful to the Standing Committee on Professional Development headed by Victor Dawes SC for producing a comprehensive consultation paper on whether and how the Bar should commence a regulated system of continuous professional development. The Standing Committee on Legal Education, headed by Edward Chan SC, commented that if such a scheme is to be implemented, it should be an outcome-based scheme as recommended by the Bar Standards Board of the English Bar in its consultation paper published in May 2015. The Bar Council is presently devising a finalized scheme that takes into account the divergent views which it has received from members on the format of continuing professional development insofar as possible, but without undermining the purpose and utility of the scheme.

Work of the Committees

18. The Standing Committees and Practice Areas Committees play an important role in representing the interests of the profession. To highlight a few matters:-
 - (a) A significant amount of time had been devoted to the reforms to the legal aid by the Standing Committee on Legal Aid Reform, headed by Ruy Barretto SC. The Committee made extensive submissions to the Home Affairs Bureau (“HAB”) and the Legislative Council Panel on Administration of Justice and Legal Services (“AJLS”) on a number of issues, including financial eligibility levels, emergency certificates, and the recent reform barring counsel who have given a Section 9 Opinion from being assigned the case save in exceptional circumstances.

Members of the Committee had meetings with the HAB and the Bar Council members, discussing the ramifications of the above issues.

The Committee assisted the Council in drafting a letter to the relevant authorities on 25 October 2017 seeking their reconsideration of the revised policies on assignment limits and revocation of the ban. By letter dated 27 December 2017, the HAB maintained the revised limits of assignment and the ban on Section 9 Opinions. A reply was sent to the relevant authorities on 8 January 2018 reiterating our concerns raised in our letter dated 25 October 2017 and seeking suspension of the implementation of the revised policies. The Committee had also prepared a draft report on reforms of the legal aid system including criminal legal aid representation, improved civil legal aid at District Court level, and appeals against refusal of legal aid.

- (b) The Standing Committee on China Practice Development, headed by Winnie Tam SC, co-hosted the 9th Lujiazui Law Forum in Shanghai under the theme '*Belt and Road and Internationalization of Legal Services*'. The Committee also participated in various events relating to China practice development including (i) lectures at the National Judges College in Beijing; (ii) courses on international arbitration at the Peking University; (iii) the '*Belt & Road Summit – Using Hong Kong as a Platform for Infrastructure Dispute Resolution*' organised by the Government and the Hong Kong Trade Development Council; and (iv) the '*Belt and Road Legal Services Forum*'.
- (c) The Committee on Land, Trust and Probate, headed by Bernard Man SC, took part in the preparation and organization of the Chancery Bar Association Hong Kong Conference in May 2017 which spanned over a weekend and was very well-attended. A number of eminent London silks specializing in Chancery and company work came to Hong Kong and shared their valuable experiences with our members in a series of lectures and seminars. It enabled members to be updated on the latest developments on various aspects of Chancery and company practice.
- (d) The Committee on Family Law, headed by Corinne Remedios, continued to play an active and important role on matters relating to Family Law and Practice. It had a meeting with the Young Barristers'

Committee (“YBC”) and discussed various means to facilitate the members of the young bar in sharing knowledge and experience, and getting practical advice. It also compiled a paper dated 16 October 2017 in response to the Consultation Paper on Gender Recognition. The Council provided funding to bring trainers to Hong Kong to train members in presiding over and/or appearing in private adjudications.

- (e) The Committee on Mediation, headed by Elaine Liu, organised with the Shanghai Commercial Mediation Centre and its course provider (Kai Sheng Mediator Academy) a training and qualifying course on Mainland China mediation.
- (f) The Committee on Convention Against Torture Training Course, headed by Selina Kung, organised an extensive 4-day CAT Training and Accreditation Programme in June 2017 at the University of Hong Kong, completion of which entitles the participant to register with the Duty Lawyer Service to be included in the panel of the Convention Against Torture and Non-refoulement Claims Scheme.
- (g) One of the most active committees is undoubtedly the Committee on Constitutional Affairs & Human Rights, headed by PY Lo. The Committee had considered various topical issues including:-
 - (i) the Co-location Arrangement;
 - (ii) preparation of two statements in February and August 2017;
 - (iii) non-refoulement protection law and screening arrangements;
 - (iv) preparing a response of the Inter-departmental Working Group on Gender Recognition’s Consultation (Part I) on whether Hong Kong should establish a gender recognition system and if so, with what parameters.
 - (v) advising the Bar Council to call on the Government in May 2017 to start public consultation on introducing legislation to prohibit discrimination on the grounds of sexual orientation, gender identity and intersex status.
 - (vi) advising the Bar Council to issue a statement in March 2017 citing the entitlements of 4 Chinese citizens and lawyers/legal activists to certain rights under Mainland Chinese laws and international human rights and obligations subscribed to by the

PRC in the then upcoming trials for the alleged offences of “subverting state power”, “inciting subversion of state power” and “disruption of court order”.

- (h) The Committee on Companies Law, headed by Linda Chan SC, provided detailed comments on the Judiciary’s proposed ‘*Practice Directions on Shareholders Disputes - Stages 1 to 3*’ and the draft Companies (Amendment Bill) 2017 with the proposed Guideline on the Keeping of Significant Controllers Register.
- (i) The Committee on Arbitration, headed by William Wong SC, co-hosted a seminar with the International Chambers of Commerce to promote barristers’ interest in international commercial arbitration. The seminar was well-attended by over 100 participants. Another joint seminar with the Hong Kong International Arbitration Centre will be organized in January 2018. The Committee also offered its comments on Third Party Funding legislation and amendments to the Arbitration Ordinance, and offered a teaching course on international commercial arbitration to LLM students of Peking University.
- (j) The Standing Committee on Welfare and Sports Activities, headed by Osmond Lam, currently has 8 teams participating in various activities, namely Badminton, Band, Basketball, Bridge, Table-tennis, Snooker, Soccer and Tennis. Regular meetings are also maintained to promote sporting activities amongst professional bodies, including the Hong Kong Institute of Certified Public Accountants, the Hong Kong Institute of Architects, the Hong Kong Dental Association, the Law Society of Hong Kong and the Hong Kong Medical Association.

Discipline

19. One of the busiest committees is the disciplinary arm of the Bar Council. I would refer to the report submitted by the Standing Committee on Discipline, headed by Anson Wong SC, on its work in the previous year.

Young Barristers

20. I would also like to mention the achievements and contribution of the Young Barristers Committee (YBC), headed by Hugh Kam, in the previous year. There are presently 555 young barristers (YBs) (453 barristers within 7 years of call and 102 pupils) constituting 36.4% of the Bar (including pupils). It is important that the Bar Council should provide constant support and assistance to the YBs. For numerous events over the years, including the Bar Mess and overseas visits, the Bar Council has resolved to provide subsidy to a number of YBs to encourage active participation.
21. One key event on YB affairs include undertaking a Survey on the YBs. This is the first time a wide-ranging study on diverse areas concerning the YBs has taken place. It aims to provide data on the YBs to assist the Council and its Committees in the formulation of their policies and activities for the YBs.
22. Another new development is the Pupil Mentorship Programme which provides a useful platform for the Council to gauge the pulse of pupils. As of now, 31 incumbent pupils have signed up for the programme and almost all of them have had at least one meeting with their assigned mentors. A new round of recruitment will take place in March 2018.
23. The YBC has also reached out to the society by partnering with the Hong Kong Salvation Army to offer members of the Bar an opportunity to visit low-income and/or invalid elderly living alone in the Yau Ma Tei area on 23 September, 9 December and 21 December 2017 to celebrate festive events.

Practice Development – In Hong Kong and Beyond

24. The Bar is a forward-thinking profession. The Council has been working over the years to advance the Bar's scope of practice in terms of source of work.

Prosecution Fiat Scheme

25. On 22 May 2017, the LegCo AJLS Panel discussed the future development of the Fiat Scheme. Prior to the meeting, Graham Harris SC as Chairman of the Committee on Criminal Law & Procedure met with members of the YBC on 9 July 2017 where he explained the position of the Department of Justice

(“DOJ”) as regards the scheme and further views were exchanged.

26. A meeting was arranged for the YBC to meet with the then Director of Public Prosecutions, as well as members of the DOJ in charge of the Fiat Scheme, to discuss future changes to the scheme. The YBC also raised concerns over various difficulties faced by YBs when undertaking prosecution work in the scheme, such as late delivery of papers, the last-minute briefing of counsel, the relative lack of opportunities for counsel who are only English-speaking and the procedures governing various matters such as arrest warrants. These issues will continue to be monitored and followed up by the Council.

Exploring legal services outside Hong Kong

27. The Bar, as a professional body, must look beyond Hong Kong and market its services to those who have always been in a position to instruct us directly for certain types of work, but did not previously know it was possible to do so.
28. On 19 March 2017, the Bar attended and spoke at the seminar “*Developing Legal Services to Support Free Trade*” in Shanghai.
29. On 11 April 2017, I attended a meeting with the Sustainable Hong Kong Research Hub, driven by the research team of the City University of Hong Kong, regarding ‘*The Belt and Road Initiative: The Participation and Sustainability of Professional Services*’.
30. I led a delegation of young barristers to visit Beijing between 4 and 7 June 2017. This was the first time that a trip to Mainland China focused on YBs had been organised by the Bar. There was a meeting with the Young Lawyers Committee of the Beijing Lawyers Association. During these meetings, the YBC introduced the skills and work of YBs to their Beijing counterpart, and discussed the different ways in which our YBs could assist Mainland lawyers professionally. The YBC joined meetings with the General Counsel of the Asian Infrastructure Investment Bank, the Dean of the Peking University Law School and law students of the University.
31. I also led a 13-person delegation to visit the Kaohsiung Bar Association, Taichung Bar Association, Taipei Bar Association, Taiwan Bar Association, Taiwan Ciaotou District Court, and Judicial Yuan Constitutional Court. This

provided a valuable opportunity for the Hong Kong Bar to exchange views and experience with their Taiwan counterparts, and led to the signing of memoranda of understanding with these lawyers' associations.

32. On the international front, as part of a young lawyers' exchange, the Bar Council received 5 French young lawyers in Hong Kong from 1 to 10 June 2017 in a programme jointly organised with the French National Bar Council.
33. The Bar has continued to take part in international events and conferences relating to the law such as the 30th LAWASIA Annual Meeting and Conference, Opening of the Legal Year in London, 20th Commonwealth Law Conference, Conference of the Presidents of Law Associations in Asia, International Bar Association Annual Conference, World City Bar Leaders Conference and American Bar Association Annual Meeting.
34. Further, a number of international conferences were attended by members of the YBC this year, including the 55th International Young Lawyers' Congress, International Weekend 2017 organised by the Junior Lawyers Division of the Law Society of England and Wales and other associations, the 2017 Fall Conference of the American Bar Association's Young Lawyers Division, and the International Bar Association's 2017 Annual Conference.
35. YBs attending conferences were required to separately arrange a formal meeting with the YBC's counterpart in the jurisdiction of the conference, through which the YBC have engaged in meaningful exchanges with:-
 - (a) the Chair of the English Bar Council's Young Barristers' Committee;
 - (b) the immediate past Chair, the present Chair and the Chair-Elect of the American Bar Association's Young Lawyers Division;
 - (c) the Chair of the New South Wales Bar Association's New Barristers Committee;
 - (d) Council Member of the Northern Ireland Bar;
 - (e) a Co-Chair of the Young Lawyers' Committee of the International Bar Association;
 - (f) the Vice Chair of the International Committee of the Tokyo Bar Association, and
 - (g) the Vice Chair of the Standing Committee on Young Lawyers of the Law Society of Singapore.

Conclusion

36. It is an honour and privilege to serve as the Chairman of the Bar Council for the past year. These are testing times. I would not have been able to discharge my duties as Chairman without the support of all members on the Council and the cooperation of all Committees. They have all selflessly devoted their time to the well-being of the Bar, and if I may say, often wholly unappreciated.
37. I would like to thank, in particular, the other members of the inner cabinet, namely the two Vice Chairmen, the Hon. Secretary and Deputy Hon. Secretary for their invaluable counsel and support, and their work done in the past year. I am grateful to all members of the Council who are behind me in good times, difficult times and bad times. Last but not least, I have to thank the staff of the Bar Secretariat – the Bar and the Bar Council could not function without the tireless work undertaken by our loyal and dedicated staff.

Paul Lam SC
Chairman
Hong Kong Bar Association
8 January 2018