

Re: The Security Arrangements of the Hong Kong Police Force During
the Visit of Vice-Premier Li Keqiang

Statement of the Hong Kong Bar Association

1. The Hong Kong Bar Association (“HKBA”) makes this statement regarding the controversy and public debate over the security arrangements adopted and implemented by the Hong Kong Police Force during the recent visit of Vice-Premier Li Keqiang to Hong Kong.

2. The HKBA would like to draw attention firstly to the following legal principles:
 - (a) In the 2005 case of *Leung Kwok Hung & Ors v HKSAR* (2005) 8 HKCFAR 229, the Court of Final Appeal stated at paragraph 22: “the right to peaceful assembly involves a positive duty on the part of the Government, that is the executive authorities, to take reasonable and appropriate measures to enable lawful assemblies to take place peacefully.” At paragraph 23 of the judgment, the Court referred specifically to the HKSAR Government’s second report to the United Nations Human Rights Committee (January 2005), in which the HKSAR Government acknowledged as follows, namely: “The HKSAR has an obligation to assist and provide for the right of peaceful public assembly and demonstration”. While the Court recognized, as other regional and overseas courts did, that this positive duty is not an absolute obligation, and that the authorities have a wide discretion in the choice of the means to be used, they have emphasized that “the obligation ... is an obligation as the measures to be taken and not as to results to be achieved”. Such measures include: (1) helping demonstrators minimize inconvenience to the public; (2) providing demonstrators with access to public space of significance; and (3) protecting members participating in public assemblies from hostile audiences.

- (b) While the freedoms of speech, assembly and to demonstrate may be restricted by police measures, such measures must be proportionate to the aims sought to be achieved thereby, striking a proper balance between the interests of society on the one hand and the individual's right of freedom of speech, assembly or to demonstrate on the other. In Hong Kong, the legitimate purposes to which a restriction must be rationally connected are only the following: national security, public safety, public order (*ordre public*), the protection of public health or morals, and the protection of the rights and freedoms of others. The means used to impair the right of freedom of speech, assembly or to demonstrate must be no more than is necessary to accomplish an identified legitimate purpose; see *Leung Kwok Hung* (above), paragraphs 17, 36. Where the police exercise a statutory discretion to restrict a fundamental right such as the freedom of expression, assembly or to demonstrate in the interest of "public order (*ordre public*)", the discretion may only be exercised for the maintenance of public order and prevention of public disorder; see *Leung Kwok Hung* (above), paragraphs 76, 82, 85. The Court of Final Appeal further cautioned against giving a wide scope to "the protection of the rights and freedom of others" in the context of the police exercising a statutory discretion to restrict fundamental rights; see *Leung Kwok Hung* (above) paragraph 88.
- (c) Earlier in the same year, the Court of Final Appeal underlined the freedom to demonstrate in the opening paragraph of *Yeung May Wan v HKSAR* (2005) 8 HKCFAR 537 with these words: "The freedom to demonstrate is a constitutional right. It is closely associated with the freedom of speech. These freedoms of course involve the freedom to express views which may be found to be disagreeable or even offensive to others or which may be critical of persons in authority. These freedoms are at the heart of Hong Kong's system and it is well established that the courts should give a generous interpretation to the

constitutional guarantees for these freedoms in order to give to Hong Kong residents their full measure.”

- (d) The vital public watchdog role of a free press in Hong Kong has also been recognized by the HKSAR courts. In *So Wing Keung v Sing Tao Ltd & Anor* (unreported, 10 August 2004, HCMP 1833/2004), Hartmann J (as he then was) stated at paragraph 47 that: ‘In short, in Hong Kong a free press is a constitutional guarantee. It is a guarantee of the greatest importance for it is the function of the press to act as the eyes and ears of all concerned citizens. It was Thomas Jefferson, the third president of the United States of America, who said: "No government ought to be without censors, and where the press is free none ever will".’ The judge then added that: “It follows that a free press must be an effective press, not moribund or compliant.”
3. The HKBA is not aware of any legal basis for the designation of an area as a “core security zone” or “core security area” (which are terms utilized by the Hong Kong Police Force in connection with the Vice Premier’s visit). These terms are not used in any legislation in Hong Kong. While there are powers in sections 10 and 36 of the Public Order Ordinance (Cap 245) providing for “designated public areas” and “closed areas” respectively, both require a formal act of declaration. In the former case the designated public area must be gazetted; in the latter there must be a declaration by the Chief Executive (for example, the Closed Area (Hong Kong Ministerial Conference of World Trade Organization) Order dated 2 December 2005).
4. In the view of the HKBA, the requirement of a formal and public declaration of special zones, in accordance with law, where the activities of members of the public may be monitored and regulated by the police intensely engages the most fundamental aspects of the Rule of Law, namely (i) that the freedom and liberty of the citizen can only be limited or restricted with a proper legal basis, and not based on mere expediency; and (ii) that the public are entitled to and must be in a position to know their rights and obligations in advance

(including the circumstances when they may be subject to arrest and detention) in order that they may regulate their own conduct accordingly.

5. Even if there is a power, whether statutory or common law based constabulary power, to designate a “core security zone”, the implementation of such a zone, which affects the rights and freedoms of ordinary citizens, must, the HKBA says, be not only in accordance with the legal principles set out above, but also necessary and proportionate, both generally and in the specific circumstances.
6. There must be a genuine need for the use of the measure. The shielding of high political figures from public embarrassment at being confronted by others holding different views in the exercise of the right of free expression is, in the HKBA’s view, a manifestly inadequate basis. Moreover, where any “security zone” (assuming there is some legal basis to do so) is implemented, it should be in a manner which causes minimal inconvenience to the public. This is another reason why there should be sufficient notice to the public.
7. The HKBA thus urges the Security Bureau and the Hong Kong Police Force to explain publicly the following matters:
 - (i) The legal authority (in terms of specific statutory authorization or common law power) for introducing the security measures at different parts of Hong Kong (including at Laguna City and the campus of the University of Hong Kong) during the visit of Vice-Premier Li in Hong Kong;
 - (ii) The legal authority (in terms of specific statutory authorization or common law power) for imposing restrictions to freedoms of expression, assembly and to demonstrate at places associated with the visit of Vice-Premier Li in Hong Kong (including at Laguna City and the campus of the University of Hong Kong).
 - (iii) The legal authority (in terms of specific statutory authorization or common law power) for imposing access restrictions to members of

the press at places associated with the visit of Vice-Premier Li in Hong Kong.

- (iv) How the above restrictions to freedoms of expression, assembly and to demonstrate imposed during the visit of Vice-Premier Li in Hong Kong are compatible with the legal principles set out above?
- (v) What legitimate purpose(s) were relied on, what means were chosen in relation to such legitimate purposes(s) and whether the means actually used were in the prevailing circumstances necessary to achieve such legitimate purpose(s)?

Dated 24 August 2011

HONG KONG BAR ASSOCIATION