HONG KONG BAR ASSOCIATION

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19 October 2017

The Honourable Mr Dennis Kwok Wing Hang
Room 813, Legislative Council Complex
1 Legislative Council Road, Central, Hong Kong

By mail and email (dennis@denniskwok.hk)

Dear Dennis,

Re: Facebook entry dated 17 September 2017 titled **"Fact Check 好緊要"** ("Facebook Post") and article published in Hong Kong Economic Journal on 21 September 2017 ("Article")

A Purpose of this letter

1. On 16 September 2017, the Hong Kong Bar Association ("**HKBA**") issued a statement in response to news reports regarding the HKBA's stance on the Co-Location Arrangement ("**Statement**"). Paragraph 2 of the Statement (**Attachment 1**) reads as follows:

> "*The HKBA is aware that a Court hearing has been fixed towards the end of this month for argument to be heard on legal issues arising from the Co-location Arrangement. In these circumstances, the Bar Council has resolved that it is inappropriate to comment on the relevant legal matters at this stage. Further, in light of the fact that discussions of the Bar Council are confidential, the HKBA will not be making any substantive response to the News Reports. HKBA wishes to emphasise that all decisions of the Bar Council (including the decision to issue this Statement) are the result of the collective deliberations of the Bar Council with the benefit of full and candid discussions.*" (emphasis added)

2. In gist, paragraph 2 of the Statement encapsulates, *inter alia*, the HKBA's practice to refrain from commenting on issues which are *sub judice* ("**Sub Judice Practice**").

3. In response to the Statement:

   (1) on the following day, namely 17 September 2017 at 2:30 pm, the Facebook Post appeared in your official Facebook page;[1]

   (2) thereafter the Article (**Attachment 2**) was published on 21 September 2017 and we note that the Article was contributed by you in your capacities as a Legco Member, an Executive Committee Member of the Civic Party and the Convenor of the Professionals Guild.

4. The Facebook Post and the Article make reference to five specific incidents and cite them as examples where the HKBA had allegedly departed from the Sub Judice Practice (namely, press releases issued by the HKBA on 18 December 2012, 28 October 2014, 3 March 2015, 2 and 7 November 2016) (collectively "**Five Press Releases**").

5. The following comments are made in the Facebook Post and the Article:

   (1) in the Facebook Post: "*大律師公會過去都有在一些案件正在審理時發表意見，其中一次更是譚允芝仍為大律師公會主席時發生。*"

   (2) in the Article: "*由此可見，公會並無一旦有案件在法庭就不會發表意見的傳統慣例和自我限制。... 然而，請勿假借專業，隱藏那些有道理但忤逆當權者的意見。否則，公會的聲譽必然掃地，這是沒有人希望見到的，除了當權者之外。*"

6. The above comments connote an aspersion, and it is a serious one, that the HKBA is or has been hiding behind the Sub Judice Practice to suppress a view which is inimical to the position taken by the Government.

7. However, such connotation is untrue, unjustified and premised on (1) factual inaccuracies and (2) an unfairly skewed reading of the Five Press Releases.

8. In the light of the seriousness of the aspersion, the Bar Council has resolved that it is necessary to correct the factual inaccuracies by this open letter. You will no doubt appreciate that the Facebook Post and the Article have generated concerns amongst members of the Bar. As a result, the Bar Council has also resolved to publish this open letter on the HKBA website to address the concerns expressed by its members.

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[1] The address of the Facebook page "@cpdenniskwok" is provided as a link in your Members' Biographics of the Legislative Council website.

B The Five Press Releases

18 December 2012 (Attachment 3)

9. This press release is titled "The Secretary for Justice's Request under Article 158(3) of the Basic Law of the HKSAR in the Foreign Domestic Helpers Final Appeals".

10. Attachment 3 confirms the Sub Judice Practice. At paragraph 3, it is stated:

> *"HKBA has not substantially commented on the Department of Justice's request because the final appeals are still to be heard by the Court of Final Appeal. The HKBA does not regard that it should comment on the merits of the rival arguments when the matter is sub judice."*

11. At paragraph 7, it is stated:

> *"HKSAR has a Judiciary that has been rightly recognised both locally and internationally as being truly impartial, independent and free from corruption, manipulation and political influence. Such recognition demands and deserves the trust and support of the community and media of the HKSAR. When a matter is sub judice, high-profiled commentary and conjecture might be perceived to add unnecessary pressure to those concerned, and are best avoided."* (emphasis added)

12. It is noted in passing that the above underlined text is precisely the stance expressed by Ms Winnie Tam SC which the Article criticizes at the second paragraph.

13. The rest of Attachment 3 sets out HKBA's concerns which are not related to the issues to be decided by the CFA and therefore does not detract from the Sub Judice Practice.

28 October 2014 (Attachment 4)

14. This press release is titled "Statement of Hong Kong Bar Association in respect of "Mass Defiance of Court Orders"".

15. Paragraph 2 of Attachment 4 specifically does not deal with the underlying merits of the injunction. It states:

> *"If any party believes that an order made by the Court ought not to have been made at all, he can challenge the court order either by applying to set it aside (if made ex parte) or appealing against it. Judgment is now pending as to whether the injunctions should be further continued or discharged, and no doubt the court will make a ruling on the basis of the evidence and arguments placed before it. However, before or until an order is set aside it should be obeyed. Independence of the Judiciary and respect for the*

dignity and authority of the Court are fundamental tenets of the concept of the Rule of Law. When deliberate defiance of a court order is committed en masse as a combined effort, a direct affront to the Rule of Law will inevitably result. For the same reason, open calls to the public to disobey a court order applicable to them would undoubtedly constitute an erosion of the Rule of Law." (emphasis added)

16. In a speech delivered on 15 October 2015 by the then Chairperson Ms Winne Tam SC, she explained Attachment 4 as follows:

"The third statement was issued near the end of October 2014 (on 28 October 2014) in the light of some politicians (several of whom had legal qualifications) openly calling for defiance of injunction orders granted by the Court of First Instance restraining the further occupation of areas in Admiralty and Mongkok. Supporters of the occupiers openly vilified the judges involved while politicians, even those who are members of the legal profession, joined in the criticism or stood by. The Bar Association explained that if a person believes that an order made by the Court was wrong and ought not to have been made at all, she can challenge it in Court. But, before or until an order is set aside it should be obeyed. In the statement, we said: "Independence of the Judiciary and respect for the dignity and authority of the Court are fundamental tenets of the concept of the Rule of Law. When deliberate defiance of a court order is committed en masse as a combined effort, a direct affront to the Rule of Law will inevitably result. For the same reason, open calls to the public to disobey a court order applicable to them would undoubtedly constitute an erosion of the Rule of Law." Quoting Sir Isaiah Berlin, the Bar Association expressed the view that the Rule of Law is "definitely Hong Kong's all-too-precious egg now much at risk of being broken by recent events.

I believe that this third statement shows that the Bar Association has sought to be above politics and stands ready to criticize both the Government and opposition politicians. More importantly, it indicates the Bar Association's natural role to uphold and defend the independence of the judiciary and the dignity and authority of the Courts of the Hong Kong Special Administrative Region." (emphasis added)

17. Attachment 4 was issued to defend the independence of the judiciary and the authority of the Hong Kong Courts, in a similar vein to the HKBA's recent statements to defend the independence of the judiciary. It does not represent a departure from the Sub Judice Practice.

6 March 2015 (Attachment 5)

18. Attachment 5 is a press summary of the HKBA's submission on the Second Round Consultation Document on the Method for Selecting the Chief Executive by Universal Suffrage. Again, it confirms rather than detracts from the Sub Judice Practice. Paragraph 5 states:

"This round of consultation proceeds on the basis that the relevant amendments to local legislation must comply with the NPCSC's Decision of 31 August 2014 ("the Decision"). There has been much debate on the validity of the Decision. This is the subject matter of an application for leave to apply for judicial review, recently made on 3 March 2015. At this time, we do not believe it is appropriate for us to express our view or position on this issue. This is not a question posed in the Government's consultation anyway." (emphasis added)

2 and 7 November 2016 (respectively ***Attachments 6 and 7)***

19. Attachments 6 and 7 are concerned with the undesirability of NPCSC interpretation and do not comment on the merits of the case. Neither in Attachment 6 nor Attachment 7 did the HKBA comment on the legal issues which were *sub judice.*

20. Specifically, paragraph 2 of Attachment 6 states:

"As to the incident concerning the oath taking by Leung and Yau, the Secretary for Justice, inter alia, has already applied for judicial review and commenced legal proceedings. The Court has already granted leave to apply for judicial review, and the substantive hearing of both sets of legal proceedings will take place tomorrow (with the day after tomorrow reserved). We take the view that the Hong Kong judiciary is well capable of arriving at a fair adjudication on the issues of the legality of the oath and the scope of the related powers of the President of the LegCo within the judicial system of Hong Kong."

21. Paragraph 3 of Attachment 7 states:

"... The issue as to the legal consequence of an invalid oath has already entered into the judicial process, and the relevant cases have been argued before the Court and are awaiting determination. The Bar considers the timing of the making of the Interpretation at this highly sensitive moment by the NPCSC is most unfortunate, in that the perception of the international community in the authority and independence of the judiciary is liable to be undermined, as would public confidence in the rule of law in Hong Kong."

C Conclusion

22. As may be seen from the foregoing, the Five Press Releases plainly do not justify the aspersion connoted in the Facebook Post and the Article, as none of them represents a departure from the Sub Judice Practice. To the contrary, each of them confirms the existence of and the hitherto adherence by the HKBA to such a practice.

23. Similar to the HKBA's press release dated 11 December 2015 (the subject matter of which was an incorrect reference on your part in your question to the Secretary for

Justice on 9 December 2015) (**Attachment 8**), the sole purpose of this open letter is to set out what the HKBA believes to be factual inaccuracies. We note that the Facebook Post and the Article only make very brief references to the Five Press Releases. We trust that the recitation of the relevant passages set out above has clarified the position of the HKBA.

Yours sincerely

Paul Lam SC
Chairman
Hong Kong Bar Association

Statement of the Hong Kong Bar Association ("HKBA") in Response to News Reports Regarding HKBA's Stance on the Co-location Arrangement

1. The HKBA is deeply concerned about certain news reports on the alleged disclosure of the discussion within the Bar Council concerning the Co-location Arrangement ("**News Reports**"). These news reports, which appeared in the past 2 days, include references to an internal paper prepared for the Bar Council's consideration by the Bar Council's sub-committee on Constitutional Affairs & Human Rights ("**Paper**").

2. The HKBA is aware that a Court hearing has been fixed towards the end of this month for argument to be heard on legal issues arising from the Co-location Arrangement. In these circumstances, the Bar Council has resolved that it is inappropriate to comment on the relevant legal matters at this stage. Further, in light of the fact that discussions of the Bar Council are confidential, the HKBA will not be making any substantive response to the News Reports. HKBA wishes to emphasise that all decisions of the Bar Council (including the decision to issue this Statement) are the result of the collective deliberations of the Bar Council with the benefit of full and candid discussions.

3. However, in order to dispel any misunderstanding in relation to the HKBA's position on the Co-location Arrangement and for the avoidance of doubt, we must emphasize that the Bar Council is still considering and discussing the various complicated and multi-

faceted legal issues arising from the Co-location Arrangement, and the Paper forms part of this continuing process. The HKBA emphasizes that it has **not yet** made a decision or adopted a position on whether the Co-location Arrangement is or is not permissible under the Basic Law.

4. News Reports of what transpired in the Bar Council's discussion are incorrect and misleading. The HKBA strongly denounces the misrepresentations made to the media and the disclosure of HKBA's internal material in breach of confidentiality. It is deeply regrettable that this may have caused the public to misunderstand the HKBA's position on the Co-location Arrangement.

Dated 16 September 2017

Hong Kong Bar Association

Attachment 2

【文章】社會期望的大律師公會

Posted on September 21, 2017

2017-09-21 | 信報財經新聞
A19 |時事評論 |專業議政

「一地兩檢」可說是香港回歸後，比人大釋法更影響《基本法》和香港法治的重大事件，因此方案有出台，即引起法律界激烈討論。然而，可能是最有「份量」、往往是社會和傳媒焦點的大律師公會（下稱「公會」），第一份就「一地兩檢」發表的聲明不是它對「一地兩檢」的看法，而是解釋為何尚未就「一地兩檢」發表意見。

公會在9月16日聲明的第二段，指由於知悉法庭於本月底審理有關「一地兩檢」的案件，故認為不適宜對有關法律問題作任何評論；大律師公會前主席譚允芝更聲稱公會絕不會用自己的公信力於案件審訊前發表意見，以免造成向某一方面施壓，影響案件審訊的看法。

公會是否絕對不會於案件審訊期間發表意見呢？肯定不是。2012年底，政府就外傭居港權案上訴至終審法院，律政司司長要求終院向人大尋求釋法，公會於12月18日發表「香港大律師公會對日前律政司司長根據《基本法》第158（3）條在外傭居港權案尋求人大釋法之聲明」；2014年10月，有連輔業團體就旺角及金鐘佔領區申請禁制令，公會於10月28日發表「香港大律師公會就集體違抗法庭命令的聲明」；2015年3月3日，學聯前常委梁麗幗就人大「八三一決定」及特區政府的政改諮詢申請司法覆核，公會於3月6日發表「香港大律師公會就行政長官普選辦法第二輪諮詢的意見書」；2016年，時任行政長官梁振英及律政司司長袁國強就梁頌恒及游蕙禎的宣誓提出司法覆核，案件正在審訊期間，公會先後於11月2日及7日發表「香港大律師公會就全國人大常委會可能針對立法會議員宣誓事件釋法之聲明」及「香港大律師公會就全國人大常委會針對香港《基本法》第104條作出解釋的聲明」。值得一提的是，2016年11月，時任大律師公會主席的正是譚允芝資深大律師。

勿借專業作擋箭牌

由此可見，公會並無一旦有案件在法庭就不會發表意見的傳統慣例和自我限制。從公會的聲明可見，它其實正在就「一地兩檢」草擬意見書。近日有傳公會內部就該意見書的內容有不同意見，這其實正常不過，就如人們常說的「10個律師有10個法律意見」。

因此公會發表意見，最重要的考慮點，不應是對案件會否構成任何壓力，而是事件對香港法治有無構成重大影響。公會一向備受尊重的原因，是它會發表未必迎合當權者但有道理的意見。

就「一地兩檢」這個富爭議的法律問題，公會內部有不同意見，很正常，不妨效法終審法院的判詞，把不同意見公開讓公眾知悉。然而，請勿假借專業，隱藏那些有道理但忤逆當權者的意見。否則，公會的聲譽必然掃地，這是沒有人希望見到的，除了當權者之外。

社會期望的大律師公會

郭家望 專業議政

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勿借專業作擋箭牌

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立法會（法律界）議員，公民黨執委及專業議政召集人

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PRESS RELEASE

TO : All Press
DATE : 18th December 2012
NO. OF PAGES : 6 (including cover page)

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The Secretary for Justice's Request under Article 158(3) of the Basic Law of the HKSAR in the Foreign Domestic Helpers Final Appeals

香港大律師公會對日前律政司司長根據基本法第 158(3)條在外傭居港權案尋求人大釋法之聲明

The Secretary for Justice's Request under Article 158(3) of the Basic Law of the HKSAR in the Foreign Domestic Helpers Final Appeals

Statement of the Hong Kong Bar Association

1. The Hong Kong Bar Association ("HKBA") notes the public discussion and debate following the news report that the Department of Justice has made a request to the Court of Final Appeal in the final appeals by foreign domestic helpers pending before the Court of Final Appeal (FACV 19, 20/2012). The request by the Department of Justice is for a reference under Article 158(3) of the Basic Law of the HKSAR to the Standing Committee of the National People's Congress ("NPCSC") seeking an interpretation to clarify certain issues concerning the binding effect of the NPCSC's 1999 interpretation of Articles 22(4) and 24(2)(3) of the Basic Law.

2. The HKBA also notes the statement of the Secretary for Justice on 13 December 2012 that the clarification of those issues by the NPCSC "can facilitate a proper interpretation of the right of abode for *all categories of persons* under BL 24(2) including FDHs".

3. The HKBA has not substantially commented on the Department of Justice's request because the final appeals are still to be heard by the Court of Final Appeal. The HKBA does not regard that it should comment on the merits of the rival arguments when the matter is *sub judice*.

4. However, the HKBA expresses its concern that as the public discussion and debate develops, commentators and interviewees have, in a high-profiled manner:

(1) raised in the public domain arguments and counter-arguments on the legal merits of the request;

(2) made conjectures on the outcome(s) of the request;

(3) expressed in strong terms the social and political consequences if the Court of Final Appeal were to rule one way or another; and

(4) levelled criticisms on the Secretary for Justice for making the request.

5. Freedom of expression is a cherished value of the society and the mass media in Hong Kong. However, exercise of freedom of expression has to be informed, and against the following background:-

(1) The Secretary for Justice has a professional and constitutional responsibility to advance on behalf of the Government all arguments that he, his department and external Counsel (leading and junior, local and overseas) consider to be reasonably arguable, just as counsel for any other party is obliged and expected to do.

(2) Whether the Court of Final Appeal should make a reference under Article 158(3) of the Basic Law on the request is patently a legal issue. The Court of Final Appeal, upon receiving the written arguments and hearing the oral arguments of *all* the parties, will come to a view on all the arguments before it independently and impartially, according to law. The Court of Final Appeal, and they alone, will decide whether the request ought to be acceded to on the basis of the law, and of the law alone.

6. The HKBA believes that the Court of Final Appeal will not accept an otherwise legally unmeritorious argument because of political expediency or pressure emanating from one end of the political spectrum. In a similar vein, the Court will not reject an otherwise legally meritorious argument

because of alleged concerns about the perceived demise of the Rule of Law emanating from another end of the political spectrum.

7. The HKSAR has a Judiciary that has been rightly recognised both locally and internationally as being truly impartial, independent and free from corruption, manipulation and political influence. Such recognition demands and deserves the trust and support of the community and media of the HKSAR. When a matter is *sub judice*, high-profiled commentary and conjecture might be perceived to add unnecessary pressure to those concerned, and are best avoided.

8. The HKBA finds it necessary in the present context for it to repeat what it had stated earlier on 10 October 2012 in another context: Any act which interferes, or which may be perceived as interfering, with the independence of the judiciary in Hong Kong, regardless of political affiliation, must be viewed with great circumspection even if otherwise within the letter of the law.

Dated 18th December 2012.

HONG KONG BAR ASSOCIATION

香港大律師公會對日前律政司司長根據基本法第 158(3)條在外傭居港權案尋求人大釋法之聲明

1. 近日媒體報導，律政司司長將在外傭居港權終審上訴(案件編號 FACV 19, 20/2012)聆訊中，建議終審法院根據基本法第 158(3)條提請全國人大常委會(以下簡稱〝人大常委會〞)解釋《基本法》，以澄清某些關於人大常委會在 1999 年就《基本法》第 22(4)條及第 24(2)(3)條所作的解釋對香港法院的約束力，香港大律師公會留意到公眾對此議論紛紜，各自表述。

2. 香港大律師公會亦留意到律政司司長於 12 月 13 日發出的聲明，指人大常委會對問題的澄清，將有助解決所有《基本法》第 24(2)條下不同類別人士(包括外傭) 的居港權問題。

3. 香港大律師公會未有對律政司司長的建議作出實質的評論, 皆因有關案件仍有待終審法院裁決，公會不宜對法律理據的是非曲直置評。

4. 然而，隨著公眾討論日益熾熱，有評論員和受訪者高調地提出有關請求提請釋法在法理上正、反兩面的論據，又揣測建議會否被接納，並以強烈的字眼表述提請釋法與否對社會及政治所帶來的後果，更批評律政司司長向終審法院所作的建議。香港大律師公會對此表示關注。

5. 言論自由是社會大眾和傳媒所珍重的價值。可是，行使言論自由的同時，亦須了解事件的情況和背景。 首先，代表政府提出所有合理的論據，是律政司司長在專業上和憲法上的責任。終審法院是否按《基本法》第 158(3)條提請人大釋法純屬法律問題。正如代表任何案件當事人的法律顧問一樣，律政司司長本人與其部門、以及所延聘之法律專家(包括本地和海外的資深大律師及大律師)有責任共同磋商，提出一切有合理可辯性的論據，而其他當事人的法律代表團隊亦必會對此提交論據作出抗辯。終審法院在詳細考慮各方法律代表的書面及口述論據後, 自會獨立地、公正無私地，以法律作唯一的基礎，對律政司司長的請求依法判決。

6. 大律師公會深信終審法院既不會因爲政治上的權宜、或受某一方政權或政客施壓而接受一些於法不合的論據，但也不會因懼怕其判決或會被另一方政客或其所引起的輿論指控爲削弱法治，而拒絕接納一些合符法理的論據。

7. 大律師公會重申香港特別行政區的司法機構，一向不偏不倚、廉潔獨立、不受任何政治或其他勢力操控或影響，廣爲本地及海外推崇。 正因如此，社會各界和傳媒更應對司法機構及其獨立性表示信任和支持，避免在案件待決期間，對案件作高調評論或無謂揣測，以免制造任何不必要的壓力和干擾。

8. 就本次事件，大律師公會必須重申在 2012 年 10 月 10 日回應另一事件所發出的聲明：任何干擾司法獨立或可能被視爲干擾司法獨立的舉措，不論政治立場，即使是不違法，仍須嚴加防範並慎重處理。

香港大律師公會

2012年12月18日

Statement of Hong Kong Bar Association

in respect of "Mass Defiance of Court Orders"

1. The Hong Kong Bar Association ("HKBA") views with dismay recent calls for open defiance of injunctions granted by the Court in relation to the occupation of certain areas in Mongkok and Admiralty.

2. If any party believes that an order made by the Court ought not to have been made at all, he can challenge the court order either by applying to set it aside (if made *ex parte*) or appealing against it. Judgment is now pending as to whether the injunctions should be further continued or discharged, and no doubt the court will make a ruling on the basis of the evidence and arguments placed before it. However, before or until an order is set aside it should be obeyed. Independence of the Judiciary and respect for the dignity and authority of the Court are fundamental tenets of the concept of the Rule of Law. When deliberate defiance of a court order is committed *en masse* as a combined effort, a direct affront to the Rule of Law will inevitably result. For the same reason, open calls to the public to disobey a court order applicable to them would undoubtedly constitute an erosion of the Rule of Law.

3. The HKBA rejects any suggestion by an academic that there is no challenge to the Rule of Law from merely disobeying a civil court order, or that the Rule of Law is only threatened when there is disobedience of an actual order of committal for contempt of court. Such suggestions tend to mislead the public. The eroding effect of an act of deliberate disobedience of a court order cannot depend upon whether or not anyone had followed up a breach of that court order by an application to commit for contempt.

4. The concept of Rule of Law does not recognize or countenance any "tit for tat" strategy. Many people would share the view, as we do, that the decision of the NPCSC dated 31st August 2014 imposed unreasonable restrictions on civil and political rights. However, it does not mean that civilians, whether acting individually or *en masse*, are therefore entitled to move to the other extreme by breaching a subsisting order made by an independent judiciary. This would be to take the law into one's own hands, thereby going down a slippery slope towards a state of lawlessness. In particular, at this juncture we are concerned with violation of laws and court orders not just by ordinary civilians in the course of expressing their views, but by citizens *en masse* acting in wilful defiance of the law and court orders as a political bargaining tool.

5. Some prominent politicians – several of whom are legally qualified - have contemptuously dismissed criticisms of prolonged occupation in breach of court orders. By such dismissal, they implicitly encouraged continued flouting of court orders. Their views may well be strongly and genuinely held, but they do not sit well with a detached, impartial, well-based, balanced and objective analysis of the concept of the Rule of Law for the benefit of the public as a whole. The HKBA must strongly disagree with them with the greatest moral courage. While exclusive or over-emphasis on "compliance with the law" could, in some circumstances, be symptomatic of an oppressive "Rule By Law" regime (something which the HKBA unequivocally detests), ***on this occasion and on the facts before us***, publicly advocating or endorsing mass disobedience of court orders ***unquestionably*** erodes the Rule of Law and sets a bad precedent.

6. In this connection it is worth quoting from the judgment of the Honourable Mr. Justice Hartmann, currently a Non-Permanent Judge of the Court of Final Appeal, in the case of *Secretary for Justice v Ocean Technology Ltd (t/a Citizens' Radio)* [2010] 1 HKC 456 24 November 2009:

"7. In court this morning, each of the respondents has explained why he felt compelled to act in the way he did. Each has said that, in seeking the lawful operation of a community radio service and having that desire frustrated, his conflict was not with the court but with the Government. However as a result of the Government's oppressive conduct (as each saw it) which resulted in the granting of the injunction, each felt that they had no choice other than to pursue a limited course of civil disobedience. Accordingly, insofar as their actions may have amounted to a breach of the injunction, the respondents have accepted that they have been in contempt but have stressed that they had no intention to directly disobey the court and were not motivated by any malice towards it.

.....

9. ***Hong Kong adheres to the rule of law. In the present context, this means that every resident – from those filled with the most noble ideals to those seeking only the most menial advantage – are governed by and bound to the operation of the law. Whatever their motives, the respondents understood that, in accordance with the rule of law, they had an obligation to obey the injunction.*** Their decision not to do so has constituted a contempt of court.

10. By way of a postscript it should be said that the injunction issued by Fung J did come back before the court for consideration a week after its issue. On this occasion, I heard the matter and refused to extend the injunction. However, at the end of the judgment, I said the following which must still hold good:

> "... while I have declined to extend the injunction, the fact remains that on 10 January of this year Fung J saw fit for a limited period of time to grant that injunction. If it is shown that any of the defendants have acted in contempt of that injunction they will be held accountable. I say that because, ***unless the integrity of our judicial system is honoured, this court will be unable to afford the very protection that the defendants themselves have sought from it.***"

...

23. The respondents are committed social activists. I have no doubt that at the time they were acting as their beliefs and consciences dictated. I can also understand their frustration at the turn of events. But, as Hoffmann LJ observed in *Department of Transport v Lush* (unreported: 29 July 1993 Court of Appeal, Civil Division):
"... the law cannot allow obedience to its orders to be a matter of individual choice even on grounds of conscience." " (emphasis added)

7. The HKBA had always been a strong advocate of the need for everyone involved in the law (the legislature, the executive and the judiciary) to protect and respect fundamental civil and political rights within their respective constitutional roles. This is well borne out by our successive statements on the meaning of the Rule of Law. Recognizing the scope for legitimate theoretical disagreement on the subject of civil disobedience and Lord Hoffmann's remark in the case of *R v Jones* that "It is the mark of a civilized community that it can accommodate protests and demonstrations of this kind" (quoted in the HKBA's Statement dated 8 October 2014), the HKBA had ***not*** sought to ***generally*** condemn the occupation movement merely on the ***simplistic*** basis that it might involve breach of some law or regulations. However, it is wrong to think that just because civil disobedience is a philosophical concept and people pursue it for a political cause, it is thereby wholly immunized from objective comments from a "Rule of Law" perspective under the excuse "political matters are to be resolved politically". That would be to create a "Rule of Law no man's land" entirely self-defined by the participants.

8. On the facts of this occasion, where:

(a) there had been massive disobedience of court orders and open calls for such mass disobedience; and

(b) the law underlying such orders – namely a law concerning the use of public space – is NOT a law which can be described as inherently "evil" (which distinguishes the present situation from examples concerning laws promoting genocide or racial discrimination);

the HKBA believes that such mass disobedience and calls for disobedience have ***overstepped the mark*** which can be reasonably tolerated even by relatively liberal understandings of the concepts of the Rule of Law and civil disobedience.

9. As Sir Isaiah Berlin, one of the greatest liberal thinkers of the 20th century, said in an address delivered in 1994, when commenting on the way some had sought to fight for their ideals:-

> *"eggs are broken, but the omelette is not in sight, there is only an infinite number of eggs ... ready for the breaking. And in the end the passionate idealists forget the omelette, and just go on breaking eggs."*

The target of his comment is different, but the message equally applies here. Whatever other eggs there may be and whether those other eggs are worth breaking, the "Rule of Law" is definitely Hong Kong's all-too-precious egg, now very much at risk of being broken by recent events.

Dated the 28th day of October 2014.

HONG KONG BAR ASSOCIATION

Hong Kong Bar Association

Submission on the 2nd Round Consultation Document on the Method for Selecting the Chief Executive by Universal Suffrage

Press Summary

1. The Hong Kong Bar Association has prepared a Submission published on its website in response to the Consultation Document of the HKSAR Government regarding the method for selecting the Chief Executive by universal suffrage. This is a summary of the contents of the Submission.

2. We refer to our previous Submission of 28 April 2014 on the HKSAR Government's 2014 Consultation Document.

3. Both submissions can be accessed at http://www.hkba.org/whatsnew/index.html.

4. We are a professional and apolitical body. We strive to limit our public comments to legal issues affecting public interest, particularly on the rule of law and civil liberties. The same approach is adopted in this Submission. In particular, we do not intend to propose any particular method of selecting the Chief Executive in 2017 but would comment on the related procedures by reference to principles.

5. This round of consultation proceeds on the basis that the relevant amendments to local legislation must comply with the NPCSC's Decision of 31 August 2014 ("**the Decision**"). There has been much debate on the validity of the Decision. This is the subject matter of an application for leave to apply for judicial review, recently made on 3 March 2015. At this time, we do not believe it is appropriate for us to express our view or position on this issue. This is not a question posed in the Government's consultation anyway.

6. The Submission focuses therefore on the matters the HKSAR Government has asked for the public's view in Chapters 3 to 6 of the Consultation Document.

7. We believe, as has been made clear in our previous Submission of 28 April 2015, that the method of selecting the Chief Executive should not contain discriminatory distinctions or unreasonable restrictions. The permanent residents of Hong Kong should enjoy the right and opportunity to vote, and be elected, in genuine periodic elections. Such elections should ensure that the will of electors are freely expressed.

8. We have examined whether the conditions imposed under the Decision would be discriminatory measure(s) or would result in any restrictions of the above fundamental rights, and if so whether any such restriction is proportionate for achieving any legitimate purpose.

9. Any conclusion that there is a disproportionate restriction of fundamental rights would be significant, because:

   9.1 It would call into question whether there is a violation of the ICCPR;

   9.2 Any local legislation should strive to mitigate such unreasonable restriction; and

   9.3 There should be improvements and changes in respect of future Chief Executive elections.

Chapter 3

10. Article II(1) of the Decision provides that the nomination committee should (i) follow the current composition of the Election Committee for the Fourth Chief Executive; (ii) have 1,200 members; (iii) have members selected from four major

sectors in equal propositions; (iv) be selected by the existing method provided for in Annex I to the Basic Law.

11. We have stated in our Submission of 28 April 2014 that the formation of the nominating committee should ensure (i) the maximum extent of participation of the electorate; and (ii) parity in such participation by individual members of the electorate. It is questionable whether the conditions laid down under Article II(1) of the Decision are consistent with these principles.

12. We believe it is important to make the nomination committee as "broadly representative" as possible. To achieve that, there could be more sub-sectors in the nominating committee. The existing number of sub-sectors is 38, and that is not sufficiently representative. Also, a sub-sector which covers a large number of people should proportionately have more members on the nominating committee. Corporate voting should be abolished across the board.

Chapter 4

13. Article II(2) of the Decision limits the maximum number of candidates the nominating committee can nominate. It also requires each nominated candidate to have the endorsement of more than half of the members of the nominating committee.

14. The restrictions on nominations now formulated under Article II(2) of the Decision are open to criticisms precisely for failing to meet the following requirements set out in our Submission of 28 April 2014:

    14.1 The process of nomination must ensure plurality. Not only should there be plurality by number, there should be candidates of different political inclinations. The electorate should have a genuine "free choice".

14.2 The nomination committee is to nominate candidates to be voted upon by the entirety of the electorate in Hong Kong. It is not to pre-determine the result of that election. Collective decision by "majority rule" in the nomination committee runs a serious risk of that.

14.3 The concern about the "overcrowding" of candidates can be dealt with by other means. The rules of nomination in the nomination committee would, in any event, in practice return a finite number of candidates without an explicit numerical limitation by law.

15. We believe that the nominating committee should adopt a "two stage" procedure: (i) members recommendation; and (ii) committee nomination.

15.1 At the first stage, the aspiring candidate would be required to secure the endorsement by the requisite number of members of the nomination committee.

15.2 At the second stage, the nominating committee votes on the candidates who have secured the requisite number of endorsements.

We also believe that there should be measures in the procedure of nomination to increase the possibility of plurality and free choice of candidates.

16. As regards the first stage ("members recommendation"):

16.1 The number of endorsements required should be 100 or lower to ensure plurality and genuine free choice by the electorate of Hong Kong.

16.2 To ensure plurality and free choice, we do not agree with the Government's proposal that each member of the nomination committee should be limited to giving one endorsement.

16.3 Likewise, we suggest that there be a cap on the number of recommendations each candidate can obtain.

17. As regard the second stage ("committee nomination"), we believe that the method which would have the greatest chance of ensuring plurality and free choice should be preferred.

18. Regarding the proceedings of the nominating committee:

18.1 The proceedings of the nominating committee should be open. It is a body which represents the people of Hong Kong generally. Each of its members participates as a "representative" only. Its members should accordingly be accountable to the people they represent. Transparency, therefore, is key.

18.2 There should be at least three plenary meetings of the nominating committee.

18.2(a) First, there should be a plenary meeting at the members recommendation stage. The aspiring candidates should be given equal and adequate opportunities to present themselves.

18.2(b) Second, there should be another plenary meeting after the members recommendation stage, for the candidates recommended to have a further opportunity to present themselves and answer questions.

18.2(c) Third, there should be a plenary meeting where the nomination committee votes on the recommended candidates. The voting should be open. There should not be secret balloting in the nomination committee. It is a body accountable to the Hong Kong people as a whole.

Chapter 5

19. Turning to the procedures for the electorate to vote on the candidates nominated by the nomination committee:

19.1 As we have said in our Submission of 28 April 2014, the method of voting should ensure that the winning candidate should have a majority mandate. The voting by the electorate at large must be by secret ballot.

19.2 We do not believe that the "first past the post" voting system achieves the objective of a majority mandate. Of the three other systems the Government asks the public to consider, both the two-round voting system and the instant runoff system merit further consideration.

19.3 We suggest that further consideration be given to the possibility that if more than 50% of the votes cast were "NOTA" (none of the above), then the election be deemed to have failed. This rule gives the electorate the option of rejecting all the candidates nominated by the nomination committee. It may also increase the degree of participation in the election, and ensure that the voting results would more accurately reflect the precise sentiment of the electorate.

Chapter 6

20. We believe the nomination committee should cease to have any function upon the swearing in of the Chief Executive returned by the electorate. If another election is required mid-term, another nomination committee should be constituted *then* for that purpose. The nomination committee should be reflective of public opinion as at the time of the relevant election.

21. We agree that the Chief Executive Election Ordinance (Cap 569) should provide for the situation where the Chief Executive-elect returned by the electorate is not

appointed by the Central People's Government. In such an event, the election process should re-commence within a reasonable time or a specified time frame.

22. We believe there are respectable arguments for removing the restriction that the Chief Executive should not have any political affiliation. This restriction is a restriction of an individual's right to stand for election, freedom of association and right to political expression.

Other matters

23. In the event that a bill of amendments to Annex I to the Basic Law is not endorsed by a two-third majority of the Legislative Council, we do not believe that the Government is under a constitutional or legal duty to restart the five-step process under the NPCSC Interpretation of 6 April 2004. In such a scenario, the existing method of selection of the Chief Executive will continue to be used.

24. Lastly, if local legislation is passed to implement an election process in compliance with the Decision for 2017, further amendment or improvement is permissible under the Basic Law.

Hong Kong Bar Association

6 March 2015

THE HONG KONG BAR ASSOCIATION'S STATEMENT CONCERNING THE POSSIBILITY OF THE NPCSC TO INTERPRET THE BASIC LAW CONCERNING THE INCIDENT OF OATH TAKING BY LEGISLATIVE COUNCILLORS

1. The Bar is deeply concerned about reports that the Standing Committee of the National People's Congress ("NPCSC") may interpret the Basic Law in relation to the taking of oath by certain Legislative Councillors. The Bar takes the view that if the NPCSC insists on interpreting the Basic Law in response to the incident at this stage, it will deal a severe blow to the independence of the judiciary and the power of final adjudication of the Hong Kong court. It will also seriously undermine the confidence of the Hong Kong people and the international community in the high degree of autonomy of the HKSAR under the principle of One Country, Two Systems. The irreparable harm it will do to Hong Kong far outweighs any purpose it could possibly achieve.

2. As to the incident concerning the oath taking by Leung and Yau, the Secretary for Justice, inter alia, has already applied for judicial review and commenced legal proceedings. The Court has already granted leave to apply for judicial review, and the substantive hearing of both sets of legal proceedings will take place tomorrow (with the day after

tomorrow reserved). We take the view that the Hong Kong judiciary is well capable of arriving at a fair adjudication on the issues of the legality of the oath and the scope of the related powers of the President of the LegCo within the judicial system of Hong Kong.

3. The Bar implores the NPCSC to exercise the highest degree of restraint in handling this highly sensitive incident as its gesture will have critical implications on One Country, Two Systems.

Hong Kong Bar Association

2 November 2016

THE HONG KONG BAR ASSOCIATION'S STATEMENT CONCERNING THE INTERPRETATION MADE BY NATIONAL PEOPLE'S CONGRESS STANDING COMMITTEE OF ARTICLE 104 OF THE BASIC LAW

1. The Bar expresses deep regrets for the interpretation issued by the Standing Committee of the National People's Congress ("NPCSC") concerning Article 104 of the Basic Law ("the Interpretation"). The Bar reiterates that it is unnecessary, and indeed would do more harm than good, for the NPCSC to issue the Interpretation in haste at this juncture.

2. There are express provisions contained in the Hong Kong Oaths and Declarations Ordinance dealing with the issue of oath-taking stipulated in Article 104 of the Basic Law, which duly reflects the spirit of the article. The Bar considers that the detailed provisions contained in the Interpretation are unnecessary and inappropriate. The way in which the matter has been handled would inevitably give the impression that the NPCSC is effectively legislating for Hong Kong, thereby casting doubts on the commitment of the Central People's Government to abide by the principles of "One Country Two Systems, Hong Kong People Ruling Hong Kong, and High Degree of Autonomy".

3. The Interpretation provides that if any relevant individual gives what would be held to be an invalid oath, such individual will not be

granted another opportunity to retake the oath. The issue as to the legal consequence of an invalid oath has already entered into the judicial process, and the relevant cases have been argued before the Court and are awaiting determination. The Bar considers the timing of the making of the Interpretation at this highly sensitive moment by the NPCSC is most unfortunate, in that the perception of the international community in the authority and independence of the judiciary is liable to be undermined, as would public confidence in the rule of law in Hong Kong.

7 November 2016

Hong Kong Bar Association

Hong Kong Bar Association's Statement on Reference Made by the Hon. Dennis Kwok to its "Views on Legislation under Article 23 of the Basic Law" (22 July 2002)

1. The Hong Kong Bar Association ("HKBA") notes that the Honourable Mr. Dennis Kwok, Member of the Legislative Council, made reference to a statement of the HKBA in 2002 in his question to the Secretary for Justice on 9 December 2015 to suggest that it was "inappropriate" for the HKSAR Government to "borrow or adopt" national laws. The question was asked in the context of the HKSAR Government's hinted "co-location/juxtaposition/preclearance" of immigration, customs and quarantine ("ICQ") checkpoint facilities at the West Kowloon terminus of the Guangzhou-Shenzhen-Hong Kong Express Rail Link ("the Proposed Co-location Arrangement"). The HKBA wishes to make clarification in respect of the way in which the view of the HKBA was quoted.

2. The sentence referred to by Mr Kwok came from a paragraph of the "Hong Kong Bar Association's Views on Legislation under Article 23 of the Basic Law" dated 22 July 2002 ("2002 Statement"), which is now quoted in full with its context included:

> "4. Article 23 of the Basic Law emphasizes that the HKSAR **shall enact laws on its own**. Furthermore, there is a restriction on applying national laws under Article 18 of the Basic Law. If any national law is to be applied in the HKSAR, it has to be included in Annex III of the Basic Law by the Standing Committee of the National People's Congress after consulting the Committee on the Basic Law and the HKSAR Government. Borrowing or adopting Mainland Laws by the HKSAR Government is therefore inappropriate.

> 5. Accordingly, the Bar is of the view that the Basic Law does not require the HKSAR Government to enact Article 23 legislation in terms identical to the relevant provisions of the Criminal Law of the PRC."

What was pointed out as being "inappropriate" in the 2002 Statement was to adopt the identical terms of the Criminal Law of the PRC as the Hong Kong legislation to be enacted under Article 23 of the Basic Law. The sentence quoted by Mr. Kwok therefore was NOT directed towards the appropriateness or otherwise of applying national law through Annex III of the Basic Law in general.

3. The HKBA considers it essential that the sentence be read in the proper context of the paragraph and the document to which it belongs, concerning the specific question of legislation under Article 23 of the Basic Law.

4. The HKBA is actively monitoring developments in respect of the Proposed Co-location Arrangement and is also studying the constitutional and legal issues arising out of such a suggestion. The HKBA will publish its views on the matter when and where appropriate.

Dated: 11 December 2015.

HONG KONG BAR ASSOCIATION