Issues arising from the Remarks reported to have been made by Ms Elsie Leung Oi-sze at a public forum on 6 October 2012

Paper of the Hong Kong Bar Association
to the Legislative Council Panel on Administration of Justice and Legal Services

1. The Hong Kong Bar Association (**"HKBA"**) issued two Statements in the last two months. The first statement was issued on 10 October 2012 in response to recent remarks which, according to various press reports in Hong Kong, were attributed to Ms. Elsie Leung (**"Ms Leung"**), the first Secretary for Justice of the Government of the HKSAR and currently a Deputy Chairperson of the Committee for the Basic Law of the HKSAR of the Standing Committee of the National People's Congress (**"NPCSC"**). The second statement was issued on 9 November 2012 in response to statements, comments or suggestions, again according to various press reports in Hong Kong, on the composition of the Judiciary of the HKSAR, including the Court of Final Appeal.

2. According to various press reports, Ms. Leung gave a talk entitled "The Legal Challenges since the Handover" on 6 October 2012 under the auspices of the Institute of Social Science of the Hong Kong College of Technology and made certain points during this event. First, she was reported to have made express references to the *Ng Ka Ling* judgment of the Court of Final Appeal in 1999 and said that the legal profession in Hong Kong, including judges, had a poor understanding of and misunderstood the Central-SAR relationship. She was also reported to have said that if the judges had the correct and necessary understanding, mistakes would not have been made. Second, she was reported to have observedat in relation to the problem of "Doubly Non-permanent Mainland Women" giving birth in Hong Kong, her preferred solution (which she had stated earlier in March 2012) was for the Chief Executive of the HKSAR to report to the State Council for the purpose of seeking an interpretation of the Basic Law by the NPCSC.

3. In the light of Ms Leung's previous and current held official positions and the controversy and concern sparked by comments attributed to her, the HKBA considered it

necessary to reiterate in the Statement of 10 October 2012 certain obvious and fundamental principles underlying Hong Kong's legal and judicial systems for the benefit of public information and discussion.

4. For the benefit of this Panel , these fundamental principles are:

- Under the Basic Law of the HKSAR, the NPCSC has the power to interpret provisions of the Basic Law. The Courts of the HKSAR have consistently, clearly and correctly acknowledged this power of the NPCSC to interpret provisions of the Basic Law in accordance with the Basic Law.
- The legal and judicial systems of Hong Kong are based on the common law. It is a cardinal principle of the common law that the interpretation of all enacted laws is a matter solely for the judges when deciding cases that are litigated before them.
- The Basic Law of the HKSAR has expressly recognised the above matters and has
  - vested the HKSAR with "independent judicial power, including final adjudication";
  - provided for the continuation of the common law based legal system;
  - authorized the courts of the HKSAR when adjudicating cases to interpret on their own the provisions of the Basic Law within the limits of the autonomy of the HKSAR as well as to interpret other provisions of the Basic Law, but subject to the requirement to refer, before final adjudication, to the NPCSC for it to interpret the provisions of the Basic Law concerning affairs which are the responsibility of the Central People's Government and that concernthe relationship between the Central Authorities and the SAR.
- It is well-established that the interpretation of the Basic Law of the HKSAR is a task entrusted by the Basic Law to the Courts of the HKSAR and to be exercised independently.
- Judicial independence is an indispensable and most important facet of the application and adherence of the Rule of Law in Hong Kong.
- The Judiciary of the HKSAR is locally and internationally renowned, recognized

and respected for its independence, integrity, ability, credibility and transparency.

- Any act which interferes, or which may be perceived as interfering, with the independence of the Judiciary in Hong Kong must be viewed with great circumspection, even if otherwise within the letter of the law.

5. In the light of views that have been expressed from various quarters consequential to the HKBA's Statement, the HKBA would like to supplement the above points as follows:-

- The concept of the Rule of Law does not simply mean taking steps that are permitted by (or not prohibited by) the law.
- The public in Hong Kong are accustomed to, and are justifiably confident in a system whereby legal disputes and questions of legal interpretation are

    - resolved in Courts that are independent from political influence;
    - which hear cases openly and fairly;
    - upon receiving evidence presented by all sides to a dispute;
    - and by reference to well established legal principles as well as legal materials placed before them by the parties and which are freely and openly accessible.

- The importance of maintaining the Rule of Law in Hong Kong is such that (amongst other things) the powers of the Executive are checked and kept within the strict limits of the law, and also that every person can have a reasonable opportunity of predicting and assessing their legal position in advance by reference to well established legal principles that are readily and easily ascertainable.
- Any public act should fully respect the Hong Kong public's reasonable expectation as to how legal disputes (including disputes as to meaning of an enactment) are to be resolved.
- Any public act which undermines the authority of the Hong Kong judiciary is likely to be perceived to be a threat to the Rule of Law and the independence of the Judiciary, even if the public act is otherwise permitted by the law.

6. As to the reported suggestion that all judges in the Judiciary of the HKSAR, including all judges of the Court of Final Appeal, should be Chinese nationals and/or persons who are permanent residents of the HKSAR, the HKBA made the following points in its Statement of 9 November 2012:

- The said suggestion is inconsistent with provisions of policy in Section III, Annex I to the Sino-British Joint Declaration 1984.
- Those provisions of policy in the Sino-British Joint Declaration 1984 have been given effect in Articles 82, 88, 90, 92 of the Basic Law of the HKSAR. By Article 82, it is stipulated that the power of final adjudication of the HKSAR shall be vested in the Court of Final Appeal, which may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal. By Article 92, it is stipulated that members of the judiciary of the HKSAR shall be chosen by reference to their judicial qualities and may be recruited from other common law jurisdictions.
- The question of nationality and right of abode of judges in Hong Kong has received specific consideration and treatment in the Basic Law. Article 90(1) stipulates that only the Chief Justice of the Court of Final Appeal and the Chief Judge of the High Court of the HKSAR have to be Chinese citizens who are permanent residents of the HKSAR with no right of abode in any foreign country.
- The Hong Kong Court of Final Appeal Ordinance (Cap 484) was enacted in 1995 by the Legislative Council of Hong Kong on the basis of a composition of the Court of Final Appeal agreed upon by the Chinese and British sides of the Joint Liaison Group. This composition, as stipulated in section 16 of the Hong Kong Court of Final Appeal Ordinance, provides for the hearing and determination of appeals by a court consisting of the Chief Justice, three permanent judges and one non-permanent judge, who can be either a non-permanent Hong Kong judge or a non-permanent judge from another common law jurisdiction selected by the Chief Justice and invited by the Court. Thus it is clear that a non-permanent judge from another common law jurisdiction sits as only one member of a court of five judges if and when he or she is invited to sit in the hearing and determination of an appeal and where the other four judges are invariably Hong Kong judges.

- Further, it has been observed by Lord Cooke of Thorndon, a non-permanent judge of the Court of Final Appeal, in 2000 that "[having regard to Articles 2, 8, 11, 19, 82 and 159 of the Basic Law] and to the purposes of the Basic Law as a whole, I think that it may be intended that, in appropriate cases, a function of a judge from other common law jurisdictions is to give particular consideration to whether a proposed decision of this Court is in accord with generally accepted principles of the common law" (*Chen Li Hung & Anor v Ting Lei Miao & Ors* (2000) 3 HKCFAR 9).
- It is the HKBA's view that, in order to maintain the link and continuity with the common law in Hong Kong, it was and remains important to invite judges of international repute from other common law jurisdictions to be non-permanent judges of the Court of Final Appeal, whilst at the same time appointing suitably qualified persons from both the ranks of the Judiciary and the profession to be judges of the HKSAR based on their ability and not on the basis of nationality.
- The historical circumstances and considerations surrounding Hong Kong's reunification with China, involving two systems with different social, ideological and legal traditions as well as a different outlook towards the Rule of Law, are unique. Arrangements and legal provisions concerning the nationality and right of abode of judges, and the composition of the Court of Final Appeal, reflect the understanding and acceptance of these unique circumstances. They were deliberately devised in an open-minded manner through careful and detailed consultation.
- The HKBA sees no justification or need to change the basis upon which judges are and have been selected for appointment to the Judiciary of the HKSAR. The Hong Kong Judiciary enjoys a well earned reputation of ability, credibility, integrity and independence not only within the Greater China region but most importantly also internationally. The HKBA believes that this reputation is due in a substantial part to the current basis and arrangements as to the approach and manner of selection for appointment of judges to the Hong Kong Judiciary.

The HKBA is confident that the Courts of the HKSAR, composed under the current basis and arrangements for appointment, will continue to interpret laws and the constitutional instruments of the HKSAR by reference to established principles of interpretation on the

basis of arguments, evidence and materials which, in accordance with the adversarial system of litigation practiced in Hong Kong, are properly placed before the Courts by litigants and their legal advisors.

7. The question has nothing to do with the right of and/or interference with freedom of expression. The HKBA does not in any way seek to limit or restrict the freedom of expression of any person. Equally, the HKBA does not see that any freedom of expression has been infringed. Nevertheless, the freedom to express one's view and opinion (especially where the speaker is, or is perceived to be, a person carrying special status, influence or authority) carries with it the corollary that they may be the subject of contrary views and comments. The HKBA believes that it is of fundamental importance to the maintenance of freedom of expression that all views, be they supportive or to the contrary, be generously and magnanimously received and acknowledged.

Dated 23rd November 2012.

THE HONG KONG BAR ASSOCIATION

香港大律師公會

就據報梁愛詩女士於十月六日發表的言論所引發的討論

提交立法會司法及法律事務委員會之意見書

1. 在過去兩個月，香港大律師公會兩度發表聲明。第一次聲明於 10 月 10 日發表，回應根據香港傳媒報導有關梁愛詩女士 (梁女士) (首任香港特別行政區律政司司長、現任全國人大常委會香港特別行政區區基本法委員會副主任)的言論。第二次聲明於 11 月 9 日發表，回應根據香港傳媒報導某些有關香港特別行政區司法機構（包括終審法院）的組成的言論或提議。

2. 據報導，梁女士於10月6日出席港專社會科學研究中心舉辦的活動時，以「回歸以來的法律挑戰」爲題演講。首先，報導引述梁女士以1999年終審法院「吳嘉玲案」的判決爲例，指「香港法律界，包括法官都對中央與香港特區的關係缺乏認識」，又指「如果(法官)是明白中央與特區的關係，就不會犯下這錯誤」。此外，傳媒又引述梁女士認爲要解決「雙非孕婦問題」，應由香港特區行政長官報告國務院，由國務院提請人大常委會，對《基本法》作出法律解釋。梁女士於本年3月亦曾表達類似的意見。

3. 鑑於梁女士過去及現時的公職，她的公開言論引起了社會的關注和討論，香港大律師公會認爲有需要於10月10日的聲明中重申，一些香港的法律和司法制度的基本和顯而易見的原則，爲公眾提供資訊，讓社會各界可深入討論。

4. 爲了讓法律事務委員會的權益容易查閱，香港大律師公會現引述該等基本原則，包括:

- 全國人大常委會對《基本法》作出解釋的權力是源自《基本法》。香港法院一貫承認人大常委會擁有按照《基本法》，詮釋《基本法》條文的權力。

- 然而，香港的法律及司法體系沿用普通法，按照普通法系的基本原則，法官在處理案件時專享詮釋法律條文的權力。

- 香港特區《基本法》明文表明:
  - 香港特別行政區享有「獨立的裁判權，包括終審權」;
  - 法律體系繼續沿用普通法;
  - 授權香港特別行政區法院在審理案件時對《基本法》關於香港特別行政區自治範圍內的條款自行解釋及對《基本法》的其他條款也可解釋。 但如香港特別行政區法院在審理案件時，需要對《基本法》關於中央人民政府管理的事務、或中央和香港特別行政區關係的條款進行解釋，在對該案件作出不可上訴的終局判決前，應由香港特別行政區終審法院請全國人民代表大會常務委員會對有關條款作出解釋。

- 衆所周知，《基本法》賦予香港法院權力解釋《基本法》，並由法院獨立行使。獨立的司法系統，是在香港維護及施行法治不可或缺的重要一環。

- 香港的司法機構的獨立性、專業操守、能力、信譽及透明度均獲得本地及世界各國尊崇。

- 任何干擾司法獨立或可能被視爲干擾司法獨立的舉措，即使是不違法，均須嚴加防範並慎重處理。

5. 社會人士對大律師公會的聲明，反映了一些意見。公會希望補充以下各點:

- 法治精神並不是單純地探取一些法律容許(或不被法律禁止)的手段;

- 香港的普羅大眾已慣於和接受香港的司法制度，並對其充滿信心，認爲每當遇到法律爭議或需要詮釋法律時:
    - 由獨立、不受政治影響的法庭;
    - 公開、公正的審訊;
    - 經審視各方當事人的提出相關的証據;
    - 及沿用恆之有效的法律原則，以及由各方當事人提供（可自由、公開地供查看）的法律資料來判斷解決。

- 維護法治的其一重點的便是行政權力在法律之下受到制約，限於法律的嚴格規範之內，而人人都可有合理的機會，憑藉易於取得和理解的法律原則，預先評估自己的法律地位。

- 任何公共的舉措，必須完全尊重香港公眾對於如何解決法律上的爭議(包括對立法的含意的爭議)的合理期望。

- 任何削弱香港司法機構權力的公共舉措，即使該舉措本身是法律容許的，都有可能被視爲對法治精神和司法獨立造成威脅。

6. 至於有報導指有建議香港司法體系內的所有法官(包括終審法院法官)均應擁有中國國藉，或應爲香港的永久性居民，甚至有說兩者俱全方可勝任。香港大律師公會於 11 月 9 日的聲明提出下列各點:

- 此等建議不符合 1984 年簽訂的《中英聯合聲明》(附件一，第三條)。

- 香港特別行政區《基本法》第 82，88，90 及 92 條是按照《1984 年中英聯合聲明》制定。《基本法》第 82 條明確規定香港特別行政區的終審權屬於香港特別行政區終審法院。終審法院可根據需要邀請其他普通法適用地區的法官參加審判。根據《基本法》第 92 條，香港特別行政區的法官和其他司法人員，應根據其本人的司法和專業才能選用，並可從其他沿用普通法的地區委聘。

- 《基本法》已充份和具體地考慮法官的國藉及在港的居留權問題，並已作出特別的處理。第 90 條(1) 規定只有香港特別行政區終審法院和高等法院的首席法官，才須在外國無居留權並且爲香港特別行政區永久性居民和中國公民。

- 《香港終審法院條例》（第 484 章）於 1995 年由立法會制定，根據聯合聯絡小組中英雙方協議議定終審法院法官的人數的組成，《香港終審法院條例》第 16 條明文規定，上訴須由終審法院審判庭聆訊及裁決，而終審法院審判庭須由首席法官、三名常任法官、及一名非常任法官組成。該名非常任法官，可以是香港法官，或是一名由終審法院首席法官挑選並由終審法院邀請、來自其他普通法適用地區的法官。法例已明確表明，如有來自其他普通

法適用地區法官的非常任法官應邀參予終審法院的聆訊及裁決，該名法官不過是五名法官的其中一名，其餘四名均必定是香港的法官。

- 再者，已故終審法院非常任法官顧安國勳爵(Lord Cooke of Thorndon)在 2000 年《 Chen Li Hung & Anor v Ting Lei Miao & Ors》(2000) 3 HKCFAR 9 一案的判決書中指出：- "考慮到《基本法》第 2， 8， 11， 19， 82 及 159 條和《基本法》的整體立法原意，我認爲來自其他普通法管轄區法官的其中一項職能是在審理個案時，考慮判決是否符合廣泛爲人接受的普通法原則。" (譯文)

- 香港大律師公會認爲終審法院能委聘其他普通法管轄區傑出的法官爲非常任法官，對維持和延續普通法法制在香港的施行，尤其重要。與此同時，法院能夠從司法機構及法律業界中，只依據專業才能和不分國藉地委任符合資格的人士當法官，對普通法在香港的承傳也起着相輔相承的作用，不可或缺。

- 香港回歸祖國涉及種種獨特的歷史背景和因素，包括兩地在社會制度、意識形態及司法傳統的分別，以至對〝法治精神〞理解的差異。有關特區法院法官的國藉、居留權及終審法院法官組成的安排，是當年在理解和接受上述各樣獨特因素的前提下，以開明的方式作出謹慎及詳盡的諮詢，在深思熟慮後所制訂的方案。

- 香港大律師公會認爲沒有任何理據、亦無需要改變香港特別行政區司法機構行之有效的法官委任機制。香港大律師公會相信，香港司法機構的能力、公信力、獨立性和專業操守之所以獲得大中華區內及(更爲重要的是)世界各國

尊崇，正是基於現時就挑選及委任香港司法機構法官的方式所採用的準則及安排。

香港大律師公會有信心以現行挑選及委任法官的方式及安排組成的香港特別行政區法院、會繼續以既定的準則詮釋法律和香港特別行政區的憲制文件的條文，按抗辯式訴訟下，各方當事人及其代表律師，在法官席前提出的論據、証據和材料，作出判決。

7. 這次討論的問題並不關乎言論自由或對言論自由的干預。香港大律師公會不曾有任何意圖要限制任何人的言論自由。同樣的，香港大律師公會不以爲有任何人的言論自由已受到干預。無論如何，發表想法、言論的自由是同時伴隨言論受到與之相反的意見和評論的後果，特別是當言者是或被視爲一個有特殊身分、影響力或權責的人。香港大律師公會相信，應以寬宏的態度聽取所有意見，不論是支持還是反對的意見。這對維護言論自由至爲重要。

香港大律師公會

2012年11月23日