

Issues arising from the Remarks reported to have been made by
Ms Elsie Leung Oi-size 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 observed at 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 concern the 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