

**Comments of The Hong Kong Bar Association (“HKBA”)**  
**on the Outline of The Third Report**  
**of The Hong Kong Special Administrative Region (“HKSAR”)**  
**for the United Nations Human Rights Council (“Council)**  
**Universal Periodic Review (“UPR”)**

**I. Framework and measures for promotion and protection of human rights**

**A. *NPCSC invoking power of interpretation without sufficient restraint***

1. HKBA is of the view that in outlining the constitutional framework for the protection of human rights (viz., BL arts. 11, 26, 27, 32, 34, 39) and the provision for an independent judicial system with power of final adjudication (viz., BL arts. 19, 82), **the Government ought to draw to the attention of the Council specifically BL art. 158 under which the Standing Committee of the National People’s Congress (“NPCSC”) has power to interpret provisions in the Basic Law, which power had been invoked by the NPCSC with the effect of interfering with the constitutional role of the HKSAR courts to adjudicate cases independently, in circumstances where the courts of HKSAR are themselves specifically authorised under BL art. 158 to interpret provisions of the BL “on their own”.** Interpretations issued by a mainland authority acting pursuant to a non-common law system also risk distorting the principles which had long been adopted by the Hong Kong courts under the existing legal system.
2. Of particular concern in that regard was the recent NPCSC interpretation of BL art. 104 in relation oath-taking issued in November 2016 which was issued in the course of **on-going** judicial review proceedings.
3. Briefly, the circumstances of the 2016 Interpretation were that:
  - (a) During the oath-taking ceremony at the Legislative Council (“**LegCo**”) on 12 October 2016, two members newly elected to Legco, Yau Wai

Ching (“Yau”) and Leung Chung Hang Sixtus (“Leung”) sought to take the oath in a theatrical manner using words regarded as insulting and offensive particularly with regard to the People’s Republic of China (“PRC”) and extolling the separateness of the HKSAR from the PRC. The Secretary General of Legco decides that he had no power to administer the oath by these members given the manner and circumstances of their oath-taking. The President of the Legco subsequently decided to allow the legislators in question to re-take the oath.

(b) The Chief Executive (“CE”) and the Secretary for Justice thereafter on 18 October 2016 commenced judicial review proceedings against the Legco President’s decision to permit Yau and Leung to re-take the oath.

(c) The judicial review proceedings were heard by the High Court on 3 November 2016. Before the Court rendered its decision, NPCSC issued an interpretation of BL art. 104 on 7 November 2016 (“2016 Interpretation”), prescribing the requirements of what constitutes a lawful oath, including invalidating any oath which was taken “in a manner which is not sincere or not solemn”. The 2016 Interpretation is expressly stated to have retrospective effect and became binding on the Court preparing to give judgment.

(d) As a result, Leung and Yau could not swear in as Legco members.

4. The NPCSC in so issuing the 2016 Interpretation in effect **decided** the outcome of the proceedings notwithstanding that there are express provisions contained in domestic legislation<sup>1</sup> of Hong Kong dealing with the issue of oath-taking stipulated in BL art. 104, which duly reflects the spirit of the article. HKBA considers that the detailed provisions contained in the 2016 Interpretation are unnecessary and inappropriate and inevitably gave the impression that the NPCSC was effectively legislating for HKSAR, thereby casting doubts on the

---

<sup>1</sup> The Oaths and Declarations Ordinance, Cap. 11

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" guaranteed under the Basic Law.

5. HKBA further considers that the timing of the 2016 Interpretation, which was prior to the Court giving judgment, also created doubts concerning the authority and independence of the judiciary, thereby affecting public confidence in the rule of law in the HKSAR.
6. As a result of the 2016 Interpretation, three other Legco members who had been officially sworn in were disqualified retrospectively because their oath-taking was found not to conform with the requirements set out in the 2016 Interpretation.
7. In these circumstances, HKBA expresses its grave concerns over the apparent lack of self-restraint on the part of NPCSC in invoking its power of interpretation under BL art. 158, which poses a serious threat to the independence of the courts of the HKSAR and could potentially damage the continued operation of the common law system in HKSAR.
8. There is a further underlying concern over the want of appreciation on the part of the Central People's Government ("CPG") as to what an independent Judiciary substantively means and entails. HKBA recalls that the CPG issued a White Paper on the Practice of "One Country, Two Systems" Policy in the HKSAR on 10 June 2014 wherein judges of the HKSAR are regarded as "administrators" of the HKSAR. In particular, it was stated that:

*"Under the policy of 'one country, two systems,' all those who administrate Hong Kong, including the chief executive, principal officials, members of the Executive Council and Legislative Council, judges of the courts at different levels and other judicial personnel, have on their shoulders the responsibility of correctly understanding and implementing the Basic Law, of safeguarding the country's*

*sovereignty, security and development interests, and of ensuring the long-term prosperity and stability of Hong Kong. In a word, loving the country is the basic political requirement for Hong Kong's administrators.” (emphasis added)*

9. Judges and judicial officers of the HKSAR are not and are not to be regarded as “Hong Kong’s administrators” nor are they part of a governance team upon whom a political requirement ought be imposed. HKBA is of the view that the basic tenet of the White Paper belies a fundamental disregard for the importance of judicial independence and raises concerns over the risk of further, future erosions of the exercise of independent judicial power by NPCSC interpretations or otherwise.

***B. “Co-location” arrangement for West Kowloon Station – divesting a part of the HKSAR of rights protection under the laws of HKSAR and the jurisdiction of the HKSAR courts***

10. As part of the framework for constitutional protection of human rights in the HKSAR, HKBA is of the view that **the Government should specifically advise the Council of the pending “co-location” arrangement which (if legislation for its implementation now being scrutinised by Legco is passed) will de-establish a part of the territory of the HKSAR to which HKSAR laws will not apply and over which HKSAR courts will not have jurisdiction.**
11. Briefly, there will be established a “Mainland Port Area” (“MPA”) within the West Kowloon Station wherein the MPA will act as an entry-exit point for immigration controls for the soon-to-be operated Guangzhou-Shenzhen-Hong Kong Express Rail Link (“Co-location Arrangement”). Mainland laws will apply in the MPA even though it is squarely within the territorial boundaries of the HKSAR. HKSAR laws together with all provisions for the protection of fundamental rights will become **inapplicable** and HKSAR courts will have no

jurisdiction in the MPA.<sup>2</sup> The Government has introduced a legislative bill to Legco to implement the Co-Location Arrangement which is being examined by Legco.

12. HKBA is of the firm view that there is **no constitutional foundation** for the Co-Location Arrangement which, if implemented, will contravene various provisions of the Basic Law<sup>3</sup> and seriously undermine the principle of “One Country, Two Systems”.

## II. Achievements and challenges

### *C. Interference with political rights of residents – denial of universal suffrage*

13. The Government in its Second UPR Report to the Council submitted in October 2013 reported that the Basic Law provides that the ultimate aim would be the election of the CE and members of Legco by universal suffrage<sup>4</sup> with provision for universal suffrage for the CE election in 2017 to be followed in like manner in the election of all members of Legco. **The Government should advise the Council that the goal to achieve universal suffrage for the CE election had been thwarted and the retrogression in the enjoyment of political rights by HKSAR residents. HKBA urges the Government to explain how it intends to address the political aspirations of HKSAR residents for universal suffrage and whether it has any measures to redress the widespread public disappointment and frustration in that regard witnessed in the major civil disobedience movement described below.**

---

<sup>2</sup> Except in relation to certain minor excepted matters proposed in the draft legislation

<sup>3</sup> including BL art. 18 which provides that only those mainland laws listed in Annex 3 of the Basic Law (such as mainland laws concerning the national flag) are applicable in Hong Kong

<sup>4</sup> In light of the actual situation in the HKSAR and in accordance with the principle of orderly and gradual progress.

14. The circumstances of the retrogression referred to above are these. Since the Government last reported to the Council, there had been a number of decisions of the NPCSC culminating in the Decision issued by the NPCSC on 31 August 2014 in respect of Issues Relating to the Selection of the Chief Executive of HKSAR by Universal Suffrage and on the Method of Forming the Legislative Council of HKSAR in the Year 2016 (“**8.31 Decision**”).
15. The 8.31 Decision provided that a broadly representative nominating committee shall be formed in accordance with the composition and membership of the Election Committee for the CE election in 2012. The nominating committee will nominate two to three candidates for election by the all eligible voters to the CE office, and each candidate must have the endorsement of more than half of the members of the nominating committee before being eligible to stand for election. The formation of a nominating committee would therefore have the effect of pre-screening candidates and could limit certain candidates from running for the CE.
16. The 8.31 Decision sparked the 79-day “Occupy Central Movement” (or known as “Umbrella Movement”), whereby thousands of citizens, principally young people, occupied and blocked major roads in the Admiralty district of the HKSAR (further referred to below).
17. On 7 January 2015, a public consultation was held for a political reform package based on the 831 Decision. The package was rejected by Legco on 18 June 2015. As a result, the current election arrangements for electing a CE in Hong Kong remains the **same as it was in 2012**, through an Election Committee comprising of 1,200 members.
18. HKBA is of the view that any nomination committee should be limited in its role to nomination only; its function ought not to pre-determine the result of a CE election. The current election arrangement impinges on the right of HKSAR residents to vote and right to stand for elections and other fundamental rights

including right to take part/participate in conduct of public affairs; it prevented a 'free choice of candidates' for the electorate.

***D. Interference with political rights of residents – political screening of candidates to stand in Legco election***

19. **HKBA urges the Government to report to the Council various instances of whereby HKSAR residents had been disqualified from standing in Legco elections and the legal basis for so doing and, in particular, to draw attention to the following cases.**

**(1) Candidates alleged to extol “Hong Kong independence” in alleged breach of the Basic Law**

20. In the 2016 Legco election, the “Return Officers” (“RO”)– who are civil servants appointed for the purpose of vetting the formal qualifications of candidates for elections - invalidated six candidates’ nominations, including (a) Edward Leung Tin-kei who got 66,524 votes or 15.4% of votes in the Legco By-Election held in February 2016 and (b) Chan Ho Tin, the Convenor of the “Hong Kong National Party”. Six candidates had their nominations invalidated because they were held to have failed in the requirement for “upholding the Basic Law” which they had to declare in a written “Confirmation”. The reason why their declaration was decided to be invalid or untruthful was that these candidates were regarded as advocating “independence” of Hong Kong (five out of six) or the “reunification” of Hong Kong with the United Kingdom (one out of six). In one of these cases, a candidate was disqualified even though he expressly recanted, renouncing any further support for “independence” for Hong Kong.
21. Chan Ho Tin launched an election petition against the decision of RO disqualifying his candidacy. The High Court in January 2018 dismissed the election petition and held that the RO has the substantive power to examine the validity of the nomination including whether the declaration was truthful. Chan

Ho Tin has recently lodged an appeal to the Court of Final Appeal against the High Court decision validating the act of the RO in disqualifying him.

(2) Disqualification of Chow Ting, Agnes, for her affiliation with political organisation advocating “democratic self-determination”

22. As a result of the disqualifications referred to in paragraphs 3(d) and 6 above, a by-election was held on 11 March 2018. Agnes Chow was an HKSAR resident seeking candidacy for the by-election in the Hong Kong Island Constituency .
23. On 27 January 2018, Agnes Chow’s nomination was ruled invalid by the RO of her constituency on the ground of Chow’s affiliation with “Demosistō”, a political organisation (formed by students some of whom organised the Umbrella Movement referred to above), which advocates, amongst other things, “democratic self-determination”, notwithstanding that Demosistō had publicly disavowed any support for “independence” of Hong Kong. It was determined by the RO that the principle of “democratic self-determination” is inconsistent with the principle of “one country two systems” and notwithstanding Chow had submitted the written Confirmation declaring that she would uphold the Basic Law, Chow did not in fact “have the intention to uphold the BL and pledge allegiance to the HKSAR”, and therefore not qualified to stand as a candidate. Agnes Chow has brought an election petition in relation to the RO’s decision which is pending hearing.
24. HKBA regrets that the Government had introduced what is in effect a **political screening process** for a prospective candidate, which is not regulated by any fair, open, certain and clear procedure. There is also no timely remedy against an adverse decision of the RO, resulting in an indefinite duration of disqualification of the persons concerned. It is particularly worrying that the requirement of “upholding the Basic Law” is a vague and imprecise political concept, which has now to be interpreted and administered by a civil servant under a closed door inquiry.



*E. Rights to freedom of assembly and procession*

25. **HKBA recalls and urges the Government to advise the Council of the large-scale demonstrations during the “Occupy Central Movement” which saw widespread confrontations between the demonstrators and police leading, in its aftermath, to numerous arrests and prosecutions of both organisers and participants. Many of the organisers had been convicted and jailed in what was the largest scale civil disobedience movement in the history of HKSAR.<sup>5</sup> The police had increasing been deploying more restrictive crowd control measures which had an impact on citizens’ exercising their right to freedom of assembly.**
26. In that regard, HKBA recalls and condemns the excessive and disproportionate use of force – including use of CS gas - by the Hong Kong Police on demonstrators gathering at Harcourt Road in the afternoon of 28 September 2014. Even though on occasions during the stand-in, a minority of demonstrators became confrontational with the police, the overwhelming majority of the demonstrators – many of whom young students - were visibly conducting themselves peacefully. There had also been widespread reports of absence of display of visual signs before the use of CS gas.
27. Whilst there was disagreement as regards the underlying political debate or demands leading to the demonstration and some demonstrators may have committed criminal offences none of these matters justified the use of excessive or disproportionate force - let alone repeated, systematic, indiscriminate and excessive use of CS gas - by the Police against unarmed civilians as a matter of law and common decency. HKBA urges the Government to make open commitment to the Council to eschew such disproportionate and excessive use

---

<sup>5</sup> The most prominent cases being the conviction and jailing of Joshua Wong, Nathan Law and Alex Chow, student leaders of the Occupy Central Movement in 2017 for (inter alia) unlawful assembly.

of force on demonstrators in future which would only aggravate public feelings of resentment and frustration.

28. Further, HKBA noted that in the past few years, the police had increasingly been using hardlined tactics in handling public assemblies and procession. Deployment of crowd control methods appear not to be flexible enough to accommodate greater than expected participants. The police often set up of Designated Public Activity Areas that are far away from the premises belonging to those subject of public protests, especially when those subjects involved agencies of the Central People's Government. Requests to the police by organisers or participants to review deployment of crowd control tactics to accommodate on-the-ground situations had been disregarded.
29. The police's refusal to be flexible in adapting crowd control tactics in respond to on-the-ground situations often end up in heightened tension between the police and those taking part in public assemblies and processions. The police appear to be very ready to deploy force such as CS spray on the crowd when emotions began to run high. The reasonableness and adherence to police internal guidelines governing the use of force are suspect but the police consistently refuse to explain to the public the basis of their deployment of force.
30. Arrests and prosecutions of those taking part in public assemblies and processions are frequent. However, a number of these prosecutions resulted in acquittal with judicial comments critical of the police after having been found to have made false accusations against the defendants. Despite such criticism, those police officers subject to such criticisms continue to serve on the police force with impunity.

***F. Freedom of expression and academic freedom***

31. HKBA notes that there pervades a trend of growing hostility towards certain political speech in the HKSAR. **HKBA urges the Government to clarify and**

**state its views whether HKSAR residents are permitted to engage in certain political speech or discussion, such as discussion on topics of self-determination, in exercise of their fundamental rights.**

32. HKBA draws attention to a recent incident in March 2018 when an Associate Professor of the University of Hong Kong, Benny Tai Yiu-ting – also one of the organisers of the Occupy Central Movement referred to above – made remarks in Taiwan concerning the possible political futures that particular peoples within the PRC might consider in their exercise the right to self-determination in the hypothetical situation of the collapse of the current ruling regime. The Government thereafter issued two statements thereafter condemning Benny Tai for “advocating independence” which, it was said, violated the Chinese Constitution and the Basic Law.<sup>6</sup> Shortly thereafter, a former Chairman of the Law Committee of the NPCSC, Qiao Xiaoyang, made a public speech on 21 April 2018 in which the speaker (amongst other things) denounced any discussion of “Hong Kong independence” as a question of national security and not one of freedom of expression.
33. A related incident is that the Registrar of Companies had earlier this year refused incorporation of Demosistō (referred to in paragraph [23] above) on the ground that the organisation has one of its objectives to advocate “democratic self-determination”. Joshua Wong, a founding member of Demosistō, has lodged judicial review proceedings against such refusal. The case is pending.
34. HKBA is of the view that “self-determination” is a familiar topic in academic discussion and any such discussion whether in the academia or by members of the public constitutes an exercise of the right to freedom of expression which is constitutionally guaranteed.

### ***G. Non-refoulement***

---

<sup>6</sup> Public statement of Government issued on 6 April 2018

35. **HKBA urges the Government to report to the Council that whilst the Unified Screening Mechanism (“USM”) is undoubtedly an improvement on the pre-2014 regime with regard to non-refoulement protection, the mechanism still faces a number of challenges.**
36. The HKBA is concerned with the overall workability and integrity of the mechanism. The USM is not, despite its moniker, ‘unified’ but an amalgamation of three different mechanisms based on the assessment of four applicable grounds for non-refoulement protection. It is both statutory and administrative and involves a number of different standards of proof and thresholds. Particularly problematic is how the stringent procedural requirements and serious consequences for non-compliance are simply assumed to apply to the administrative aspects of the mechanism without any statutory underpinning. Legislating the administrative mechanism to bring it into line with the statutory framework would be a desirable starting point in creating a more cohesive yet delineated approach with the aim of providing increased transparency and clarity as to how each applicable ground should be properly assessed and determined.
37. Further, there is continued concern that decisions of the Torture Claims Appeal Board (“TCAB”) are not published. Published decisions are essential not only in building jurisprudence but to ensure that decisions are fair, transparent and consistent. The HKBA is concerned that poor quality TCAB decisions are not only failing to reach the high standards of fairness required by law but are contributing to a proliferation of judicial reviews.
38. The HKBA is particularly concerned with the low number of substantiated claims, which at less than 1% falls well below the averages for other countries screening asylum claims and are at a level where the fairness of the system can be called into question.
39. Other concerns include the lack of access to legal representation when non-refoulement claimants make their Written Signification (which is necessary to

trigger the mechanism), the inadequate time allowed for filing non-refoulement claim forms, delay in processing claims and the lack of protection under the statute against chain refoulement.

#### ***H. Discrimination on grounds of race***

40. **The Government should report to the Council the various deficiencies of the Race Discrimination Ordinance (Cap. 602) ("RDO").** HKBA remains concerned that the RDO (a) does not cover the Government in the exercise of all its functions and powers, (b) excludes acts done on the ground of a person's immigration status (not being a HKSAR permanent resident), length of residence, nationality, citizenship or resident status, (c) does not outlaw discrimination against newly arrived immigrants from Mainland China, and (d) provides exemptions for immigration legislation (section 55) and for acts done for the purpose of complying with a requirement of an existing statutory provision. As a result, discrimination claims have been rejected in relation to the exercise of certain government powers, such as police powers to arrest: see e.g. *Singh Arjun by his next friend Singh Anita Guruprit v Secretary for Justice* (DCEO 9/2011, 30 May 2016) at paragraphs 445-448.

#### ***I. Discrimination on grounds of sexual orientation***

41. **The HKBA urges the Government to set out in its report to the Council a commitment to and set out a timetable for the consultation on introducing legislation against discrimination on the grounds of sexual orientation, gender identity and intersex status as soon as possible.** The failure to introduce such legislation has been the subject of criticism from multiple UN treaty bodies, such as the Human Rights Committee in 2013 (CCPR/C/CHN-HKG/CO/3 at paragraph 23). In addition, the HKBA urges the HKSAR Government to respond to the recommendations from the Committee Against Torture in 2015 in relation to transgender and intersex persons, including to take

the necessary legislative, administrative and other measures to guarantee respect for the autonomy and physical and psychological integrity of transgender and intersex persons, including by removing abusive preconditions for the legal recognition of the gender identity of transgender persons, such as sterilization (CAT/C/CHN-HKG/CO/5 at paragraph 29(a)), and to expedite the work of the Interdepartmental Working Group on Gender Recognition in addressing this issue.

Dated the 7<sup>th</sup> May 2018.

**Hong Kong Bar Association**