香港中區立法會道一號
立法會綜合大樓
《廣深港高鐵(一地兩檢)條例草案》委員會主席
葉劉淑儀議員, GBS, JP

主席：

對《廣深港高鐵(一地兩檢)條例草案》委員會報告的意見

《廣深港高鐵(一地兩檢)條例草案》委員會於 5 月 25 日的內務委員會會議上提交報告(CB(4)1117/17-18)，公民黨認為條例草案涉及重大憲制及法律問題，報告必須全面及準確反映條例草案委員會的討論內容。現時報告即使包含政府和議員雙方面的意見，但大篇幅陳述政府的立場，只簡短描述議員意見，尤其忽略議員就反對條例草案、對條例草案是否合憲及內容有質疑的陳述和理據。報告整體並無確切反應議員提出的意見和理據，亦未有全面及準確地反映委員會的討論內容，包括公民黨議員就政府答覆的追問及相關理據。此外，由於會議議期過度緊密，以及主席限制發言時間，委員無法有足夠時間在會議上跟進各項問題，部分問題因此需書面跟進，但報告內並沒有引述議員在信件中的論點，做法粗疏。我們要求修改報告，以準確反映議員質疑草案的理據。

公民黨對報告的意見如下：

1. ***大律師公會的意見書及當中的法律理據***

報告第 21 段特別引述大律師公會的意見，但並沒有引述任何大律師公會的意見書內容及法律理據。大律師公會分別於 3 月 12 日及 3 月 29 日所發表的兩份意見書均有針對政府就《基本法》第 18 條、第 19 條，及第 22 條的立場作出回應，委員在會上亦有多次引用大律師公會的意見作為質疑政府立場的基礎，而且政府亦曾經對大律師公會的意見提交書面回覆[1]。大律師公會的意見對香港憲法和法律問題有權威性，公民黨認為應報告應包括大律師公會的論述。公民黨已將上述兩份意見書的英文文本載入本信件的附件。

此外，政府當局就 2018 年 3 月 16 日會議席上所提出事項作出的回應承認，「我們未

[1] CB(4)710/17-18(02)：2018 年 2 月 23 日會議席上所作討論 而須採取的跟進行動一覽表

有留意到香港大律師公會以往曾向任何法案委員會提供意見書，述明審議中的法案，若獲制定為法例，會違反《基本法》。[2]」我等認為報告必須記錄此史無前例的表述。

2. ***《基本法》第 18 條***

報告第 29 – 33 段記載理解《基本法》第 18 條的討論，當中第 29 段引述法律顧問要求政府澄清，政府在作出對《基本法》第 18 條原意的解釋時，即「限制全國性法律在香港特區範圍內對所有人一般性適用 」，有否考慮任何外來資料(extrinsic materials)。

政府一直未有回答相關問題，報告第 30 段中引述《基本法》第二章屬內在資料(internal aids)，以非外來資料(extrinsic materials)。 就上述問題，張超雄議員於 3 月 13 日質疑，政府沒有提供實質條文和字句支持對第 18 條的理解，只是指出《基本法》第二章容許政府作出對第 18 條的演譯[3,4]。公民黨曾兩次，分別於 3 月 13 日及 4 月 6 日去信追問相關問題[5]，但並沒有獲政府正面回覆，政府根本無法提供任何外來資料(extrinsic materials)支持當局對《基本法》第十八條原意的解讀。公民黨重申，單靠《基本法》第二章的背景並不能支持政府對《基本法》第 18 條原意的解釋，認為委員會報告必須包含政府無法向議員提供任何外來資料(extrinsic materials)以支持政府對《基本法》第 18 條及其他條文的解釋的情況。

另外，報告第 25 段指出郭榮鏗議員不同意政府認為草案並不牽涉《基本法》第 18 條，但未有提及議員的重要反駁。郭榮鏗議員於 3 月 16 日會議指出草案顯然是讓內地法律在香港境內實施，第 18 條的字面清晰明顯訂明內地法律在什麼情況下可以實施，草案無可能不牽涉《基本法》第 18 條。報告必須包含及釐清議員提出其觀點的理據。

3. ***《基本法》第 19 條***

報告第 38 – 42 段記載相稱驗證準則應用於《基本法》第 19 條的討論，當中第 41 段引述政府指，有關《基本法》第 18 條的事宜和相稱驗證準則的應用，應分開考慮，但其實政府在法案委員會內並沒有處理就《基本法》第 19 條，包括就的相稱驗證準則是否適用的問題。大律師公會於 3 月 29 日的意見書中第 7 段指，條例草案並非屬於《基本法》第 19(2)條所指的限制，意見書中第 8 段指，相稱驗證準則並不適用於

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[2] CB(4)850/17-18(01)：2018 年 3 月 16 日會議席上所作討論而須採取的跟進行動一覽表
[3] 《廣深港高鐵(一地兩檢)條例草案》委員會會議 (第一部分)(2018/03/13)
https://www.youtube.com/watch?v=EUw1kjY4RAo#t=55m30s
[4] 《廣深港高鐵(一地兩檢)條例草案》委員會會議 (第二部分)(2018/03/13)
https://www.youtube.com/watch?v=dsmSsEXmchM#t=50m00s
[5] 文件編號：CB(4)803/17-18(01)、CB(4)885/17-18(03)

「移除 (remove / oust)」香港法院對內地口按區的司法管轄權，我等認為報告應包含大律師公會就此重大問題所表述的意見。公民黨五位議員於 4 月 6 日亦曾以信件追問上述問題，惟政府未有作進一步回覆[6]。

此外，報告中第 37 段指，《國際組織及外交特權條例》(第 190 章) 屬透過成文法規限制香港法院的司法管轄權的例子，但公民黨應為該例子並不可與本條例草案相提並論。公民黨五位議員於 4 月 6 日的信件中亦有指出，《國際組織及外交特權條例》明顯屬外交範疇，外交特權亦是根據國際公約及國際法確立。公民黨在信中要求政府提供《國際組織及外交特權條例》以外，限制香港法院的司法管轄權的法例，惟政府回應指，「兩者均以成文法則的方式對法院審判權施加限制」，亦未能提供其他例子。公民黨認為報告須包含有關分析。

報告第 40 段亦提及 「郭榮鏗議員提到，政府當局提出只要在內地口岸區實施內地法律的建議能符合相稱驗證準則，內地法律便可在內地口岸區實施，他認為此說法並不正確。」但有關部分沒有反映郭榮鏗議員支持其觀點的理據，郭榮鏗於 3 月 16 日會議表示相稱驗證準則 (proportionality test) 並不適用於《基本法》的某些條文，某些條文的內容和保障是絕對 (absolute) 的，亦表示政府從來未能提供任何過去先例或其他司法管轄區的有關案例以支持其觀點。

4. ***<u>實地視察</u>***

報告第 169 段記述委員會兩次實地考察，但當中並沒有全面反映考察情況及想關要求。民主派議員在兩次考察中均有要求視察內地口岸區與香港口岸區的界線，包括在後勤範圍連接相方口岸區的逃生及防火門，但遭到拒絕。朱凱廸議員亦曾於 4 月 23 日會議上，表示視察範圍應該是根據本條例定立的整個內地口岸區，而非單純視察乘客將會經過的路線[7]。莫乃光議員亦於該會議上要求視察石崗列車停放處[8]，陳帆局長只表示會考慮，但最終並沒有安排。

本條例旨在定立內地口岸區，委員理應有權全面視察該範圍。譚文豪議員在會上亦多次指出，因列車車箱在條例定立後將會是一條移動邊界，一些走私行為有可能於石崗列車停放處發生，因此委員要求視察亦合理。公民黨認為報告應如實反映政府無理拒絕委員的就視察西九龍站及石崗列車停放處的要求。

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[6] 文件編號：CB(4)885/17-18(03)、CB(4)914/17-18(02)

[7] 《廣深港高鐵(一地兩檢)條例草案》委員會會 (第一部分)(2018/04/23)
https://www.youtube.com/watch?v=rsVeO0ww60w#t=1m30s

[8] 《廣深港高鐵(一地兩檢)條例草案》委員會會 (第一部分)(2018/04/23)
https://www.youtube.com/watch?v=rsVeO0ww60w#t=18m15s

5. ***委員要求的其他資料***

報告第 170 - 171 段記述委員要求的其他資料，但並沒有記錄政府拒絕公開的資料。因現時公開的圖則缺乏站內各設施及區域的詳情，陳淑莊議員曾於 3 月 1 日去信要求政府提供西九龍站的建築圖則[9]，以便委員了解相方口岸區界線的情況，但遭政府拒絕。

6. ***修訂委員會報告***

委員會報告作為立法會議員審議草案的重要文件，就以上情況，公民黨認為《廣深港高鐵(一地兩檢)條例草案》委員會必須更正向內務委員會會議提交的報告的內容，以充分及準確地反映委員在法案委員會審議草案的過程和討論。

《廣深港高鐵（一地兩檢）條例草案》委員會委員

陳淑莊　　楊岳橋　　郭榮鏗　　郭家麒　　譚文豪

二零一八年五月三十日

[9]文件編號：CB(4)685/17-18(01)

附件

Further Submission of the Hong Kong Bar Association

In respect of the

Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-location) Bill

("the Bill")

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1. Shortly after the Hong Kong Bar Association ("the HKBA") made its submission to the Legislative Council on 12 March 2018, the HKBA became aware of the letter of the Transport and Housing Bureau of the HKSAR Government ("the HKSAR Government") to the Legislative Council dated 9 March 2018, in which the HKSAR Government put forward legal arguments in support of the Bill.

2. The arguments put forward by the HKSAR Government are largely reiteration of the Explanations given by Director Zhang Xiaoming of the Hong Kong and Macao Affairs Office of the State Council to the NPCSC on 22 December 2017 ("the Explanations"), to which the HKBA has already responded. The HKBA refers to its previous Statement dated 28 December 2017 and its submission dated 12 March 2018.

3. More specifically, the HKSAR Government argued that the Bill is consistent with Article 18 of the Basic Law because Article 18 is intended to restrict the general application of national laws to all persons within the HKSAR, whereas the Bill only allows national laws to apply for a specific purpose, at a specific location, and to a specific class of persons, namely, high-speed rail passengers.

4. The HKBA has addressed this argument in its previous statement dated 28 December 2017: see para 6. The suggestion that, if the Bill were implemented, Mainland laws would not apply to all persons is flawed. The fact that a law may not have immediate practical consequences for a person unless they step into a particular arena does not mean that the law does not apply to all persons. The University of Hong Kong Ordinance applies to the university and its students, but that does not mean that the Ordinance does not apply to all persons in Hong Kong. Likewise, the mere fact that one does not choose to enter into or to deal with a trust does not mean that the Trusts Ordinance does not apply to all persons. The Bill applies to all

persons in Hong Kong as every person is a potential passenger of the high-speed rail. In fact, the assertion of the HKSAR Government that citizens could make their own choices whether or not to use the high-speed rail and enter the Mainland Port Area is already an admission that it affects all persons in Hong Kong each of whom has the right to make the above choice, as they cannot choose to enter a part of Hong Kong without being subject to the jurisdiction of the Mainland.

5. The HKSAR Government equated the situation of passengers entering the Mainland Port Area as they have chosen to enter another jurisdiction. This is a bad point which fails to properly address the central issue which is that Article 18 clearly states that Mainland laws shall not be applied in Hong Kong except for those listed in Annex III, which must, logically and as a matter of common sense, mean anywhere in the entirety of Hong Kong.

6. The HKSAR Government then argued that the restriction of the jurisdiction of the Hong Kong court is consistent with the proportionality test. This argument is misconceived.

7. Article 19 expressly states that the courts of the HKSAR shall have jurisdiction over all cases in the HKSAR, except the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained. While it is possible to restrict the jurisdiction of the court, any such restriction has to be subject to the strictest scrutiny as the jurisdiction of the court goes to the fundamental principle of the rule of law in the common law system. The question here is not whether the Bill can restrict the jurisdiction of the court, but whether in so doing the Bill is consistent with the express provision of Art 19 of the Basic Law in circumstances where what the Bill seeks to achieve is not "restriction" of the Hong Kong court's jurisdiction but removal of the same through the eradication of the legal system of Hong Kong from the Mainland Port Area.

8. The effect of the Bill is to oust the jurisdiction of Hong Kong courts completely from the Mainland Port Area. The proportionality test has no place when the issue is ouster of the jurisdiction of the court.

9. Even assuming that the proportionality test could apply, it would require the strongest justifications to oust the jurisdiction of the court. Mere convenience or political expediency could hardly justify ouster of the jurisdiction of the court. Nor is there anything to suggest that

the economic benefits of the high-speed rail could not be achieved by alternative means that do not contravene the Basic Law, such as an amendment to the Basic Law or an amendment to the boundary of the HKSAR. In the absence of the above justifications the argument of the Government does not amount to an attempt to pass the minimum impairment test.

10. The HKSAR Government then argued that the CFA agrees that its power of final adjudication could be subject to reasonable restrictions. This argument is premised on the same arguments for the restriction of the jurisdiction of the court, and the same replies apply with equal cogency.

11. The HKSAR Government further argued that allowing Mainland personnel to perform their duties at the Mainland Port Area is not inconsistent with Article 22(3) of the Basic Law because they could only perform their duties in the Mainland Port Area after the Bill is enacted and forms part of the laws of Hong Kong. This is a curious and circular argument which assumes enactment of the Bill whilst ignoring the unconstitutional legal basis for the Bill. Article 22(3) provides that Mainland personnel in Hong Kong shall abide by the laws of the HKSAR. It is difficult to understand how they are to abide by the laws of the HKSAR when the effect of the Bill is to make the laws of the HKSAR inapplicable to them.

12. Finally, the HKSAR Government prayed in aid the definition of "persons" in s 3 of the Interpretation and General Clauses Ordinance in construing Article 7 of the Basic Law. This is another curious argument. The issue regarding Article 7 of the Basic Law has nothing to do with the meaning of "persons", but simply that the power to grant land leases does not include a power to surrender the jurisdiction of the HKSAR.

13. In summary, there is nothing in the arguments of the HKSAR Government that could provide even an arguable constitutional and legal basis for the Bill. The arguments are both wholly unconvincing and unsatisfactory.

29 March 2018

Submission of the Hong Kong Bar Association

In respect of the

Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-location) Bill

("the Bill")

1. Under Article 11 of the Basic Law, "no law enacted by the legislature of the Hong Kong Administrative Region shall contravene the Basic Law." When the Legislative Council ("Legco") enacts a piece of legislation, it has a constitutional duty to ensure and be satisfied that the legislation under deliberation does not contravene the Basic Law. Legco has **no authority** to enact, and it cannot and may not pass an Ordinance that contravenes the Basic Law.

2. The Hong Kong Bar Association ("HKBA") is of the firm view that the Bill, premised upon and made pursuant to the Co-operation Arrangement between the Mainland and the Hong Kong Special Administrative Region on the Establishment of the Port at the West Kowloon Station of the Guangzhou-Shenzhen-Hong Kong Express Rail Link for Implementing Co-Location Arrangement ("Co-location Arrangement"), has **no constitutional foundation** and cannot be enacted **save** in contravention of the Basic Law.

3. The Bill seeks to establish a "Mainland Port Area" ("MPA") in West Kowloon Station ("WKS") – which comprises the "designated area" within the WKS as delineated in Annex 1 of the Bill as well as a "train compartment" – pursuant to Clauses 4 and 5. Under Clause 6, the MPA will be regarded as "an area lying outside Hong Kong but lying within the Mainland" for the purpose of "the application of the laws of the Mainland" and "the delineation of jurisdiction (including the jurisdiction of the courts)" over the MPA (save for the reserved matters provided under Clauses 7 and 8).

4. In effect, the Bill seeks to "**de-establish**" a part of the HKSAR that is squarely **within** the territorial and jurisdictional boundary of HKSAR as defined by a decision of the NPCSC dated 4 April 1990, which provides that "the area of the Hong Kong Special Administrative Region covers the Hong Kong Island, the Kowloon Peninsula, and the islands and adjacent waters under its jurisdiction". Pursuant to this decision, the precise boundary of the HKSAR was promulgated by the Order of the State Council of the People's Republic of China No. 221 dated 1 July 1997 (and published as SS No. 5 to Gazette No. 6/1997 of the Gazette). Clause 6 renders the MPA Mainland territory.

5. None of the provisions in the Basic Law provides the basis or foundation for HKSAR to undertake such "de-establishment", which entails **divesting** the area in question (the MPA) of the application of Hong Kong law and the jurisdiction of the Hong Kong courts provided for under respectively articles 18(1), 19(1) and (2) and 82 of the Basic Law.

6. In the HKBA's Statement dated 28 December 2017 ("HKBA Statement")[1] on the Decision of the Standing Committee on the National People's Congress ("NPCSC") adopted on 27 December 2017 on the Co-operation Arrangement (the "Decision") and the Explanations given by Director Zhang Xiaoming of the State Council Hong Kong and Macao Affairs Office to the NPCSC session on 22 December 2017 ("Explanations"), it has been pointed out that none of the provisions of the Basic Law referred in the Explanations, viz, articles 7[2], 118 and 119[3] and 154(2)[4] provides legal justification of the Co-location Arrangement. We note that, in seeking to respond to the HKBA Statement,[5] the Administration has still failed to take the discussion beyond the Explanations and provide a sound legal basis for the Bill.

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[1] Annexed to this Submission for easy reference.
[2] Which authorises the HKSAR Government to enter into an agreement with another person in respect of the granting of and the use of a piece of land.
[3] which authorises the HKSAR Government to formulate policies to promote and co-ordinate the development, inter alia, of trade and investment.
[4] Which authorizes the HKSAR Government to maintain immigration control.
[5] See Annex 1 of the Administration's response to the List of follow-up actions arising from the discussion of the Bills Committee meeting on 23 February 2018 issued on 7 March 2018.

7. On the contrary, as stated in the HKBA Statement, the Co-location Arrangement, now sought to be enacted in the Bill, contravenes article 18(3) of the Basic Law which provides that only the Mainland laws listed in Annex III of the Basic Law apply to HKSAR. Clause 6 of the Bill seeks precisely the application of the **entire body** of Mainland laws (save the reserved matters) in the MPA, being a part of the territory of the HKSAR, regardless of Annex III of the Basic Law.

8. HKBA does not accept that the Decision has the effect of conferring constitutional foundation for the Co-location Arrangement and the Bill. The Decision does not constitute any part of the Basic Law. The NPCSC, whose functions and powers are provided in article 67 of the Constitution of the People's Republic of China, must itself abide by the provisions of the Basic Law. HKBA notes that it is not purported by the Administration that the Decision constitutes or amounts to an "interpretation" of any provision of the Basic Law (let alone those referred to in the Decision or Explanations) pursuant to article 158 or otherwise. Clearly, no such interpretation has taken place in accordance with article 158.

9. The Administration seeks to draw parallels between the Bill and provisions under the Shenzhen Bay Port Hong Kong Port Area Ordinance (Cap 591).[6] There is a fundamental distinction between establishing an MPA at WKS, which is part of the HKSAR at all times, and establishing a "Hong Kong Port Area" at the Shenzhen Bay Port, which is not part of the HKSAR at any time. Cap. 591 provides, against the background of the authorization by the NPCSC, that the Hong Kong Port Area at the Shenzhen Bay Port, which is outside the HKSAR and is not part of the HKSAR, shall be regarded as an area inside the HKSAR with the laws of the HKSAR implemented there. This involves an **augmentation** of the jurisdictional scope and authority of the HKSAR and not vice versa. The Basic Law provides that no Mainland law shall apply to Hong Kong save under Annex III. The extension of Mainland law and jurisdiction to Hong Kong is a matter of compliance with the Basic Law, and not just a matter of agreement. In contrast, there is no similar legal or constitutional provision in Shenzhen to the effect that no Hong Kong law shall apply in Shenzhen. Hence, the

[6] See p.13 of the Administration's letter to Legco dated 22 February 2018 and reference to schedules 3 and 4 of Cap. 591 and of the Bill.

establishment of the Hong Kong Port Area in Shenzhen is a matter of agreement between Shenzhen authority and the HKSAR.

10. The mere fact that clause 6 takes the form of a deeming provision does not change the position. There is no power to deem an area in the HKSAR to be part of the Mainland and subject to Mainland law and jurisdiction when this is in contradiction of the clear provisions of the Basic Law. Indeed, clause 6(2), which states that the boundary of the HKSAR remains unaffected, makes no sense and is in contradiction with clause 6(1).

11. In conclusion, the HKBA is of the firm view that the Bill is **not** Basic Law-compliant. It would be wrong for Legco to disregard such non-compliance and take the attitude that it should first pass and enact the Bill and wait for a court's ruling on its validity and constitutionality if and when a party seeks to challenge it. This would not be a responsible approach to take in the legislative process.

12. The HKBA reserves its right to make further submissions on specific clauses of the Bill in due course without prejudice to its position as stated above. For the avoidance of doubt, the HKBA takes no position on the desirability, the economic advantages and viability of the High Speed Rail, save that any arrangement of co-location has to be constitutional and in compliance with the Basic Law and the laws of the HKSAR.

12th March 2018

Annex

STATEMENT OF THE HONG KONG BAR ASSOCIATION ON THE DECISION OF THE NPCSC OF 27 DECEMBER 2017 ON THE CO-OPERATION AGREEMENT BETWEEN THE MAINLAND AND THE HKSAR ON THE ESTABLISHMENT OF THE PORT AT THE WEST KOWLOON STATION OF THE GUANGZHOU-SHENZHEN-HONG KONG EXPRESS RAIL LINK FOR IMPLEMENTING CO-LOCATION ARRANGEMENT

1. The Hong Kong Bar Association (**HKBA**) refers to –

   (a) The Decision of the Standing Committee of 12th National People's Congress adopted on 27 December 2017 at its 31st Session on Approving the Co-operation Agreement between the Mainland and the HKSAR on the Establishment of the Port at the West Kowloon Station of the Guangzhou-Shenzhen-Hong Kong Express Rail Link for Implementing Co-location Arrangement (**the NPCSC Co-location Decision**);

   (b) The Explanations given by Director Zhang Xiaoming of the State Council Hong Kong and Macao Affairs Office to the NPCSC Session on 22 December 2017 in respect of the Draft NPCSC Co-location Decision (**the Explanations**); and

   (c) The Co-operation Agreement between the Mainland and the HKSAR on the Establishment of the Port at the West Kowloon Station of the Guangzhou-Shenzhen-Hong Kong Express Rail Link for Implementing Co-location Arrangement (**the Co-operation Agreement**) that the HKSAR Government published on 27 December 2017.

2. The HKBA notes that the Co-operation Agreement provides in –

   (a) Paragraph 2 that the HKSAR provides to the Mainland the Mainland Port Area of the Port at the Hong Kong West Kowloon Station (**WKS**) of the Guangzhou-Shenzhen-Hong Kong Express Rail Link (**XRL**) for use and

exercise of jurisdiction by the Mainland in accordance with the Co-operation Agreement; and that the acquisition, duration and fees for the use of the site of the Mainland Port Area shall be provided by a contract between the said parties.

(b) Paragraph 4 that the Mainland Port Area shall, from the date of its commencement of operation, be subject to Mainland jurisdiction in accordance with the Co-operation Agreement and Mainland laws (including judicial jurisdiction), with the Mainland Port Area being regarded as within the Mainland for such purpose.

(c) Paragraphs 5 and 6 that Mainland authorities shall be stationed at the Mainland Port Area to carry out duties under Mainland laws in respect of entry/exit border check, customs supervision and examination and quarantine.

(d) Paragraph 9 that passengers bound for the HKSAR shall be treated as within the Mainland before they leave the Mainland Port Area and if any one of them contravenes a Mainland law, the Mainland authorities stationed there shall take appropriate legal measures according to the law and the specific circumstances.

(e) Paragraph 10 that passengers bound for the Mainland shall be treated as within the Mainland after they have entered the Mainland Port Area and if any one of them contravenes a Mainland law, the Mainland authorities stationed there shall take appropriate legal measures according to the law and the specific circumstances.

(f) Paragraph 12 that HKSAR officers may enter the Mainland Port Area to assist in respect of sudden and emergency incidents only at the request and authorization of the Mainland authorities stationing there.

3. On 19 October 2017, the HKBA issued a statement indicating that it has been monitoring the development in respect of the "Three-step Process" closely and will publish its views if and when appropriate. Now that the HKBA has access to the details of the first two steps of the "Three-step Process" following yesterday's events, we consider it necessary to state our views on the legal and constitutional issues involved.

4. The HKBA refers to the Explanations and considers that its claim at page 5 that the high degree of autonomy enjoyed by the HKSAR **is** the source of authority for the HKSAR to enter into the Co-location Arrangement with the Mainland is erroneous in material respects. The HKBA makes the following observations on the provisions of the Basic Law used to support this claim:

(a) The HKSAR's authority to maintain its own immigration control system pursuant to Article 154(2) of the Basic Law is the reason for the HKSAR, **not** the Mainland authority, to maintain exit control check for Mainland-bound passengers using the XRL and entry control check for Hong Kong-bound passengers using the XRL.

(b) Although the directions in Articles 118 and 119 of the Basic Law for the HKSAR to formulate appropriate policies to promote and co-ordinate the development of various trades and to provide an economic and legal environment for encouraging investments, technological progress and the development of new industries may suggest or make it desirable for the adoption of certain policies by the HKSAR Government to promote, co-ordinate or facilitate economic development, they do not authorize the HKSAR Government to act inconsistently with the systems provided for under the Basic Law.

(c) While Article 7 of the Basic Law may enable the HKSAR Government to enter into an agreement with another person in respect of the granting of

the use of a piece of land within the HKSAR, it does not authorize the HKSAR Government to divest **all** institutions of the HKSAR (including the HKSAR courts) from having the jurisdiction they have pursuant to the various provisions of the Basic Law over that piece of land.

5. Accordingly, the HKBA is of the firm view that **none** of the Basic Law provisions referred to the Explanations provide the source of authority for the Co-location Arrangement in the Co-operation Agreement, the implementation of which will clearly mean the disapplication of the systems of the HKSAR provided for by and under the provisions of the Basic Law, pursuant to Article 31 of the Constitution of the People's Republic of China and Article 11 of the Basic Law, in respect of the land within the HKSAR at the Mainland Port Area at WKS. Given that Article 11(2) of the Basic Law provides that not even legislation of the HKSAR can contravene Article 11 of the Basic Law, the Co-operation Agreement (being an agreement entered into between the HKSAR Government and the Guangdong Provincial Government), by itself, has no authority to override Article 11.

6. In this regard, the HKBA considers that the suggestion in the Explanations that the Co-location Arrangement does not contravene Article 18 of the Basic Law because Mainland laws only apply to **a part of** the HKSAR (i.e. the Mainland Port Area) – which will be regarded under the Co-location Arrangement as being situated in the Mainland – and not the entire HKSAR, goes against any plain reading of the Article. Such logic, if extended, is capable of authorizing the application of Mainland laws to ***any part*** of the HKSAR designated by the HKSAR Government (e.g. the High Court Building) as long as it does not cover the whole of the HKSAR, and completely by-passes and emasculates the requirement under Article 18(3) of the Basic Law that only national laws listed in Annex III of the Basic Law shall be applied to the HKSAR.

7. The HKBA is appalled by the NPCSC Co-location Decision, which merely states that the NPCSC approves the Co-operation Agreement and "confirms" that the

Co-operation Agreement is consistent with the Constitution of the People's Republic of China and the Basic Law without stating how this is so. This is followed by a provision phrased in terms of an "obligation" of the HKSAR to legislate to ensure the implementation of the Co-operation Agreement. This plainly amounts to an announcement by the NPCSC that the Co-operation Agreement complies with the Constitution and the Basic Law **"just because the NPCSC says so"**. Such an unprecedented move is the most retrograde step to date in the implementation of the Basic Law, and severely undermines public confidence in "one country, two systems" and the rule of law in the HKSAR.

8. The NPCSC does not exercise power out of a vacuum. Its functions and powers are provided in Article 67 of the Constitution of the People's Republic of China, and its functions and powers are prescribed (and circumscribed) in Articles 17, 18, 20, 90, 158, 159 and 160, and Annexes I and II to the Basic Law. The NPCSC must abide by these provisions of the Constitution of the People's Republic of China and the Basic Law when it makes a decision in respect of the HKSAR.

9. The HKBA considers that the assertion in the NPCSC Co-location Decision that the stationing of Mainland authorities at the Mainland Port Area at WKS to exercise their duties under Mainland laws there is different from the situation under Article 18 of the Basic Law of national laws being implemented in the whole of the HKSAR begs the question of how this is different. The assertion that it is appropriate to make provision under the Co-operation Agreement to provide for the division of jurisdiction and the application of laws in the WKS Port and to confirm that the Mainland Port Area (a part of the HKSAR) shall be regarded as "being in the Mainland" again begs the question of why this is appropriate. The assertion that the establishment of the Mainland Port Area in the Port at WKS does not alter the extent of the HKSAR, does not affect the high degree of autonomy of the HKSAR enjoyed according to law, and does not limit the rights and freedoms the Hong Kong residents enjoy according to law, plainly begs the question of how and why they are so.

10. The NPCSC Co-location Decision is both wholly unconvincing and unsatisfactory in achieving its purported purpose, namely to provide a **firm legal basis** for the Step 3 local legislation being the last of the "Three-step Process". The Co-location Arrangement's disapplication of the systems of the HKSAR provided for by and under the provisions of the Basic Law means that the Step 3 local legislation will, by reason of Article 11(2) of the Basic Law, appear to be inconsistent with specific provisions of the Basic Law, including Articles 4, 11, 19, 22(3), 31, 35, 38, 39, 41, 80, 87. The HKBA does not regard as a satisfactory explanation any reliance by the HKSAR Government of the NPCSC Co-location Decision in answer to any of the above questions of inconsistency.

11. The HKBA considers that the NPCSC has, by reason of the NPCSC Co-location Decision and the way the NPCSC has adopted it, generated a strong perception among the legal community in Hong Kong and in the wider legal and political communities outside Hong Kong that the NPCSC is prepared to make decisions at the request of the Chief Executive of the HKSAR and the HKSAR Government under her leadership just because the subject matter concerned "is a good thing", without due regard and respect for the provisions of (and restrictions in) the Constitution of the People's Republic of China and the Basic Law. The HKBA notes, with utmost concern and regret, that such a strong perception will surely impair and undermine the confidence of the local and international communities on the maintenance of the rule of law and the "one country, two systems" policy in Hong Kong, both of which are provided for by the Basic Law, which was enacted pursuant to Article 31 of the Constitution of the People's Republic of China. Through the combined efforts of the HKSAR Government, the State Council and the NPCSC in producing NPCSC Co-location Decision, the integrity of the Basic Law has now been irreparably breached.

Dated 28th December 2017

HONG KONG BAR ASSOCIATION