

Further Submission of the Hong Kong Bar Association
In respect of the
Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-location) Bill
(“the Bill”)

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