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Submission on the Special Procedures for Appeal against Proscription

Our submission focuses on the special procedures for appeal against proscription.

The basic position of the Asian Human Rights Commission (AHRC) is that, considering the detrimental effects of Section 8 of the bill upon freedom of association and the rule of law in Hong Kong, the whole section should be deleted. The bill allows the proscription of any organisation in the community which is subordinate to a mainland organisation that has been banned on national security grounds by the central government. As a result, the definition of "national security" in Hong Kong will be determined in Beijing, and local organisations will become unlawful, thereby eroding the "one country, two systems" model.

We also uphold the principle that there shall be protections for the right to a fair trial and due process rights even when there are national security considerations. These principles on which Hong Kong's legal system is founded cannot be violated for any reason by anyone.

Regarding the special procedures for appeal against proscription, we offer these comments.

First, the committee stage amendments (CSA) by the government to enable the secretary for security to make regulations concerning appeals creates even a greater danger to people's right to association, for it institutionalises and legalises a conflict of interest in which the person who decides to proscribe an organisation makes the rules on the appeal of that decision.

Second, the bill suggests that during the appeal against proscription the appellant and their lawyer can be excluded from attending the appeal hearing in order to purportedly protect the publication of evidence which might prejudice national security. This arrangement, however, goes against the principles of equality before the courts and the right to a fair and public hearing.

The proscription of an organisation under Section 8A of the bill involves the determination of a criminal charge against the members or anyone who assists that organisation. When an organisation is proscribed, it becomes a criminal offence to act as an office bearer or a member of the organisation. To defend themselves against these charges, the appellant should have the right to legal counsel of their own choosing and access to information relevant to their appeal. The suggestion of appointing a special advocate to represent the appellant during the absence of the appellant and their legal representative in court does not solve the problem of legal representation, for it goes against the right of the appellant to choose their own legal representative. It also produces a series of questions regarding the criteria and process in which the group of special advocates will be selected. Since it has been suggested that these special advocates must be approved by the secretary for justice, the

independence of these special advocates to counsel and represent the appellants in accordance with their established professional standards without any restrictions, influence, pressure or undue interference from any quarter will rightly be questioned.

Furthermore, it is still unclear under Section 8C (1)(e) of the bill whether the provision of legal assistance by lawyers to an organisation after it has been proscribed will be considered an offence of giving “aid” to the proscribed organisation. If this is the case, the right of an appellant to a fair and public hearing will again be seriously violated.

Third, the CSA enables the Court of First Instance (CFI) to admit evidence that would not be admissible in a court of law. This means that the CFI in this case would be free from the constraints of the law of evidence, which is fundamental for safeguarding due process. The suggestion itself indicates that the government will probably make use of this section of the law to submit evidence, in particular hearsay evidence, that would not be admissible in a normal court when the government feels the need to do so. It could quite possibly occur when an appeal concerns the proscription of an organisation by the secretary for security on the grounds that it is subordinate to an organisation proscribed by the central government in which the availability of witnesses from the mainland to appear in court would be questioned.

We have to emphasise again that the proscription of an organisation under the bill involves the determination of a criminal charge. It is not acceptable to lower the established standards of evidence to deprive the right of an appellant to a fair trial.

We have witnessed that in Asian countries where such practices have been adopted the rule of law has suffered severely. If you deny fair trial principles in one area, it will spread into other areas. The disastrous consequences will be much more—indeed, very much more—than even the most enthusiastic person in favour of Article 23 can imagine. If you want to look at examples, look to many other countries in Asia. Why is it necessary for Hong Kong give away what other people in the region so much want to have and for which many Asian people have died trying to attain?