

**Extract from report of the Bills Committee on  
National Security (Legislative Provisions) Bill**

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Appeal against proscription and rules for appeals

*Appeal mechanism*

124. The proposed new section 8D provides a right of appeal for an office-bearer or member of an organization proscribed by S for S to appeal to the Court of First Instance against the proscription within 30 days after the proscription takes effect. Under the proposed new section 8E, the Chief Justice (CJ) may make rules for the appeals against proscription to enable proceedings to take place without the appellant being given full particulars of the reasons for proscription, to enable the Court of First Instance to hold proceedings in the absence of the appellant and his legal representative appointed by him, and to enable the Court to give the appellant a summary of any evidence taken in his absence. Where rules made to exclude the appellant and his legal representative in the proceedings, CJ shall make rules to provide for a power to appoint a legal practitioner (special advocate) to act in the interests of the appellant.

*Concerns and views of members*

125. Some members have expressed grave concern about the proposed provisions. These members have pointed out that although the nature of a proscription order made under proposed new section 8A(1) is regarded as an administrative decision by the Administration, a proscription order will bring about direct criminal consequences. If a person is not allowed to know in full the evidence against him, he cannot conduct the appeal properly. This runs contrary to the principles of natural justice. These members have also pointed out that, Hong Kong residents' rights to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies that are protected under Article 35 of the Basic Law (BL35) will be undermined by such procedural rules which may provide for the exclusion of the appellant and his legal representative from attending the hearing of the appeal. Moreover, the provisions, if enacted, would deprive appellants of the right to a fair hearing as guaranteed by Article 14 of the ICCPR and protected by BL39.

126. Concerning the appointment of a special advocate, these members have queried what such a special advocate could and could not do, how such a special advocate would be selected, and whether an appellant could appoint a special advocate of his choice. These members have also expressed doubt as to whether the provision would violate BL35, which provides for, among other things, the right to choose lawyers.

*Administration's response*

127. The Administration takes the view that the decision of S for S to proscribe a local organization under the proposed new section 8A is an administrative decision. Under the common law, a proscribed organization would have no right to appeal to the court, and could only seek to challenge a proscription by way of judicial review. The proposed right of appeal under the Bill will improve the position of proscribed organizations. It will require the court to conduct an overall review of the decision reached by the executive, in a manner which would not be available in the judicial review process. The court will test the sufficiency of evidence in a way that would not be available by way of judicial review. Both the appellant and S for S would be entitled to adduce evidence. The court is unlikely to be satisfied by evidence merely that national security had been considered and accepted as the basis by S for S for his decision. It is likely that the court would demand the sight of sensitive security documents to assess the sufficiency of the evidence. If such evidence is disclosed to the appellant and his legal representatives, national security might be endangered. In the view of the Administration, the purpose of safeguarding national security might not be achieved without the special procedures proposed in the Bill. The Administration has also pointed out the rule-making power similar to that in the proposed section 8E is found in legislation of Canada and the UK.

128. Regarding the appointment of a special advocate, the Administration has explained that the functions of such a special advocate would be modelled on the Special Immigration Appeals Commission (Procedure) Rules 1998 of the UK. It is proposed that a special advocate could represent the interests of the appellant by -

- (a) making submissions to the court in any proceedings from which the appellant and his legal representative were excluded;
- (b) cross-examining witnesses at any such proceedings; and
- (c) making written submissions to the court.

A special advocate is under a statutory duty to represent the interests of an appellant. However, the special advocate will not be responsible to the person whose interests he is appointed to represent, i.e. there is not the usual client-lawyer relationship between the appellant and the special advocate. It is

intended that an appellant will select a special advocate from a panel of experienced and independent lawyers that have been approved by the Secretary for Justice.

129. The Administration considers that the restrictions imposed by the special procedures are minimum and necessary for the purpose of protecting national security, and would not deprive the appellant of a fair hearing. As regards the choice of lawyers, the Administration has advised that the appellant would continue to be entitled to choose his own legal representative. It is not considered that BL35 confers a right of such an absolute nature that no material information could be withheld from a legal representative. Such a right would be inconsistent with public interest immunity. In addition, if the appellant and his legal representative were excluded from the hearing, his interests would be adequately protected by the appointment of a special advocate. In the view of the Administration, the special procedures to exclude an appellant and its legal representative, and the appointment of a special advocate would comply with ICCPR and BL35.

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