THE LAW SOCIETY OF HONG KONG
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The Law Society of Hong Kong's comments on the draft Committee Stage Amendments to the United Nations (Anti-Terrorism Measures) Bill

The Law Society has reviewed the draft Committee Stage Amendments ("CSAs") and has the following comments:

Clauses 4 and 4A

1. At this stage, there is no evidence of terrorist activities in HK which cannot be dealt with under the existing law. There is no urgency or justification to enact additional legislation beyond the requirements under the United Nations Security Council Resolutions. The "minimalist approach" should be adopted. The Administration has failed to justify the need for the Clause 4A and related procedures. The procedures in Clause 4 covering terrorist and terrorist property specified by the UN Committee are sufficient for our purpose to meet Hong Kong's obligations.

2. The proposal that the Administration will seek Court approval before gazettal of the terrorist's name is no more than an attempt to provide legitimacy to the procedure, without providing real safeguards to individual rights. In particular, the test of "reasonable grounds to believe" proposed by the Administration provides an unacceptably low threshold given the dire consequences of being specified a terrorist or terrorist property under the proposed legislation. An analogy can be drawn from the criminal procedure law: a low threshold of "reasonable grounds to believe/suspect [a person having committed a crime]" is adopted for exercising the power of arrest; a higher threshold of a "prima facie" case is adopted for committing a person for trial; and an onerous burden of "beyond reasonable doubt" is required for convicting the accused at the substantive trial. Even for the determination of civil rights, the Administration should prove its case on the "balance of probabilities', which is much higher than the threshold of "reasonable grounds to believe".

3. Hence, without prejudice to our primary submission that the Clause 4A and related procedures are unnecessary, we submit that the test of "reasonable grounds to believe" proposed by the Administration should be changed to one of "beyond reasonable doubt" or at the very least a "balance of probabilities" or "prima facie" case.

4. We believe it is envisaged that the rules to be promulgated under Clause 17(1) may provide for *ex parte* applications by the Secretary for Justice in certain circumstances. In cases of interim orders made *ex parte*, it may be acceptable to adopt a lower

threshold of "reasonable grounds to believe". We however submit that an *inter partes* hearing before a Court of First Instance ("CFI") judge should follow to determine the continuation of the order and at that hearing, a higher threshold as suggested above should be adopted.

Clause 10(1)

5. This clause should be deleted.

Clause 11

6. The Law Society welcomes the CSA in relation to the proposed Clause 2(5).

Clause 13

7. In Clause 13, the CFI may make an order to forfeit property of the "terrorist". These provisions are similar to the freezing orders in civil proceedings, namely Mareva Injunctions. The Bill fails to make any provisions for subsistence or maintenance from the frozen assets to enable the "named terrorist" to meet normal living expenses or to allocate reasonable sums in relation to legitimate legal expenses. The Administration should review these provisions to enable such "named terrorists" to have access to sufficient funds should they challenge the order. The practice in Mareva proceedings could be adapted as a model.

Clause 16A

8. It is inappropriate for the Court of Appeal to perform a fact-finding role which should be exercised by the CFI.

Constitutional Affairs Committee
The Law Society of Hong Kong
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