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Hong Kong – Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region

The Law Society of England and Wales (the “Law Society”) and the Bar Council of England and Wales (the “Bar Council”) have been following recent developments in Hong Kong with significant concern. We are gravely alarmed by the adoption - on 30 June 2020 - of the Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (the “national security law” or “law”) by the Standing Committee of the Chinese National People’s Congress. The law was promulgated that same day by your office.

Following its adoption, the law was not adequately published thereby undermining the principle of legal certainty. This means that the people to whom this law applies did not know which conduct would violate its provisions and expose them to possible arrest and criminal prosecution. This is especially concerning since some Hong Kong citizens had already been arrested under the law.

There are many aspects of the national security law that are particularly worrying to the Law Society and the Bar Council, but we mainly note some provisions relating to fair trial rights and judicial independence. The national security law carries maximum sentences of life imprisonment for the crimes of secession, subversion, terrorism, and collusion with foreign powers. These crimes are vaguely defined, especially the crime of terrorism, which has an overly broad definition.

The sentencing provisions do not include clear definitions of what constitutes a grave or minor offence and include minimum sentences that may be disproportionate in some cases. The law has broadly worded extra-territorial application, applying to actions not committed within Hong Kong by persons who are not permanent residents of Hong Kong. The law contains restrictions on defence counsel regarding secrecy that may not be compatible with a defendant’s right to prepare an adequate defence. To the extent that the law allows for undue restriction of other procedural guarantees, this would violate the internationally recognised right of a fair trial.

It is also noteworthy that the Office for Safeguarding National Security of the Central People's Government in Hong Kong has wide discretion to assume jurisdiction over certain cases under the law. Its decisions are not subject to review by the Hong Kong courts. Such cases are then adjudicated under mainland Chinese laws by a court designated by the Supreme People's Court of China and without an extradition process. We have significant concerns about the respect of fair trial guarantees in such cases.

The Law Society and the Bar Council are especially concerned that the national security law threatens judicial independence in Hong Kong through a number of provisions. Cases under the law may only be heard by judges who are on a list designated by the chief executive of Hong Kong. Judges can be removed from that list if their actions or statements are deemed to endanger national security. Judges are also only appointed for one year. This not only allows for undue political interference with the judiciary in Hong Kong, but also violates the principle that judges should have tenure as a means to guarantee their independence. Moreover, the Secretary of Justice can issue a certificate determining that a trial shall be held without a jury, making this a decision by the executive rather than the judiciary itself.

In addition, in certain cases, courts are under an obligation to obtain a certificate from the chief executive of Hong Kong— which shall be binding upon the courts - to determine whether an act involves national security. The width of this provision and the absence of safeguards also undermines the principle of separation of powers. The principal body with jurisdiction to interpret the national security law is the Standing Committee of the National People's Congress, which is a political rather than a judicial body.

Although the law expressly refers to fundamental rights and the rule of law, the provisions of the national security law evidently allow for an implementation of that law in which there would be significant restrictions of several human rights, including the right to freedom of assembly, right to freedom of association, right to freedom of expression, right to liberty and security of the person, as well as the right to a fair trial.

Your office has referred to national security as one of the main justifications for the adoption of this law. However, the abovementioned rights may not be restricted on grounds of national security unless certain specific requirements have been met. The national security law itself, as well as its application, may result in violations of these rights if those requirements are not respected. Such violation occurs in any case to the extent that definitions of offences in the law are vaguely defined and give room to arbitrariness in its application.

The provisions of the national security law give rise to grave concerns that this law may be used to stem dissent, arrest and criminally prosecute members of the legal profession and others who legally exercise their internationally recognised human rights. We believe that the national



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security law undermines the rule of law and separation of powers in Hong Kong and allows for violations of human rights of its citizens and others.

The Law Society and the Bar Council will monitor the application of this law in practice, especially to members of the legal profession and human rights defenders, as well as threats to judicial independence in Hong Kong. We stand in solidarity with legal professionals in Hong Kong and others in their efforts to uphold the rule of law and fundamental rights in their jurisdiction.

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