



Suspension of Extradition and Mutual Legal Assistance Agreements with Hong Kong

About us

1. Australia-Hong Kong Link is a network of Australia-based volunteers with strong ties to Hong Kong. Our organisation upholds the Australian core values and supports Hong Kong's democracy, freedom, rule of law and human rights. Our main purpose is to connect Hong Kong and Australia through the provision of support services to Hongkongers residing in Australia and acting as a bridge of communication between members of our communities.

Executive Summary

2. As representatives of our community, we make this submission in support of the formal suspension of the *Agreement for the Surrender of Accused and Convicted Persons between the Government of Australia and the Government of Hong Kong (the Extradition Agreement)*,¹ and the *Agreement between the Government of Hong Kong and the Government of Australia concerning Mutual Legal Assistance in Criminal Matters (the MLA Agreement)*² (together, referred to as "**the Treaties**").
3. We refer to the relevant National Interests Analyses completed in relation to the Treaties, and submit that Australia ought to:
 - a. suspend the MLA Agreement by mutual consent under Article 57 of the *Vienna Convention on the Law of Treaties (VCLT)*, following Hong Kong's diplomatic note dated 28 July 2020 seeking unilateral suspension; and
 - b. provide an instrument to Hong Kong to bring the suspension of the Extradition Agreement into immediate effect on 9 October 2020, following the provision of a diplomatic note dated 9 July 2020 evincing Australia's intention to suspend the Extradition Agreement.
4. We make these submissions for the following reasons:
 - a. that a fundamental change of circumstances has occurred as a result of the imposition of the National Security Law (**NSL**) in Hong Kong within the meaning of article 62 of the VCLT; and

¹ *Agreement for the Surrender of Accused and Convicted Persons between the Government of Australia and the Government of Hong Kong*, [1997] ATS 11 (entered into force 29 June 1997).

² *Agreement between the Government of Australia and Government of Hong Kong concerning Mutual Legal Assistance in Criminal Matters*, [1999] ATS 20 (entered into force 6 November 1999).



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- b. that formal suspensions of the Treaties are necessary to protect Australian citizens and those who reside in and enjoy the rights and freedom offered by Australia.

Fundamental change of circumstances

5. Article 62 of the VCLT provides that a treaty may be suspended when a fundamental change of circumstances has occurred regarding those existing at the time of the conclusion of a treaty which was not foreseen by the parties. A treaty can only be suspended on this ground if the existence of those circumstances formed an essential basis of the consent of the state parties to be bound by the treaty and the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.³
6. Australia recognised Hong Kong's special legal status based on the Special Administrative Region's high degree of autonomy guaranteed under the *Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (the Joint Declaration)*. Based on this important distinction and the trust that was given to Hong Kong's legal system that was independent from China, Australia entered into a number of treaties with the Hong Kong government. We agree with the Australian Government's position that the Treaties were entered into on the essential basis that Hong Kong having a high degree of autonomy, judicial independence and fundamental human rights.⁴
7. We submit that the impact of the NSL implemented by China in Hong Kong constitutes a fundamental change of circumstances, as the law radically erodes the independence of the Hong Kong judiciary, the legislature, and the rights and freedoms enjoyed by the Hong Kong people. The way the NSL was implemented also disregards the high degree of autonomy guaranteed under the Joint Declaration. Our submission is supported by the evidence below:

Threats to Hong Kong's Autonomy

8. The substance of and process by which the NSL was imposed indicates that Hong Kong no longer enjoys a high degree of autonomy. It was unilaterally passed by the Standing Committee of National People's Congress (**NPC**) of the People's Republic of China without any involvement of the people of Hong Kong or the Hong Kong Legislature.

³ VCLT, Article 62(1).

⁴ *National Interest Analysis* [2020] ATNIA 15, at [9].



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9. The leading up to the passage of the legislation demonstrated that China has decided to disregard due process and the autonomy of Hong Kong. The decision to implement the law was adopted by the NPC on 22 May 2020, which gave authorisation to the Standing Committee of the NPC to draft the law. Throughout the drafting process, the provisions of the Bill remained secretive and the Chief Executive of the Hong Kong government commented that the Hong Kong government had limited involvement in the process and was not privy to the draft.⁵
10. No consultation was carried out by the Hong Kong government or the Chinese government after the announcement, and the general public in Hong Kong had no knowledge of the details of the law until it came into effect on 1 July 2020. The full text of the law only became available to the public after it came into effect. Further, the NPC unilaterally enacted the law and inserted it into the Basic Law, Hong Kong's mini constitution, bypassing Hong Kong's legislature.
11. The NSL is draconian and undermines Hong Kong's law enforcement system. The law covers four crimes, namely secession, subversion, terrorism activities and collusion with foreign country or with external elements to endanger national security, which are all punishable by life imprisonment.⁶ Part V of the NSL sets out China's Central People's Government's role in Hong Kong, allowing for the establishment of the Office for Safeguarding National Security (**OSNS**) in Hong Kong which bypasses Hong Kong's law enforcement agencies.⁷ The OSNS is directly controlled by the Chinese government and is not subject to any oversight of the Hong Kong Government. The OSNS is given powers to oversee and coordinate Hong Kong's performance and has the power to handle certain cases under the NSL.⁸ China's courts and procuratorates have jurisdiction over cases handled by the OSNS.⁹
12. Article 62 of the NSL provides that the NSL prevails where inconsistencies exist between the NSL and local laws of Hong Kong, while Article 65 stipulates that the power of interpretation of the NSL is vested in the Standing Committee of the National People's Congress. This means, essentially, that the NSL exists outside of and takes precedence over Hong Kong's body of laws.

⁵ Mary Hui, *The leader of Hong Kong is in the dark about the law that will change Hong Kong forever*, Quartz (23 June 2020) <<https://qz.com/1871988/carrie-lam-knows-little-about-hong-kongs-national-security-law/>>.

⁶ *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, Annex III, Instrument 9, arts 20, 22, 24, 29.

⁷ *Ibid*, art 48.

⁸ *Ibid*, arts 49, 55.

⁹ *Ibid*, art 56.



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Threats to separation of powers and judicial independence

13. The substance and implementation of the NSL harbours threats to the independence of Hong Kong's judiciary. Within the context of Hong Kong and Beijing's interpretation of separation of powers within the Basic Law, this is particularly problematic.
14. Article 44 of the NSL provides the Chief Executive with the power to designate judges to handle cases under the NSL without consulting Judicial Officers Recommendation Committee.¹⁰ Instead, the Chief Executive is to consult the Committee for Safeguarding National Security of the Hong Kong Special Administrative Region, a committee established by the NSL whose membership consists predominantly of other members of Hong Kong's Executive Council and the Commissioner of Police.
15. On 2 September 2020, Justice Spiegelman, former Chief Justice of the New South Wales Supreme Court, resigned from his position as a non-permanent judge of Hong Kong's Court of Final Appeal, citing concerns over the content of the NSL.¹¹
16. On 18 September 2020, Hong Kong's Chief Executive Carrie Lam told reporters that the city did not have any meaningful separation of powers between the legislature, the executive and the judiciary, overturning long held Hong Kong government stance that the separation of powers formed an important element of the one county, two systems arrangement. Ms Lam also stressed that the Chinese government has ultimate authority over Hong Kong.¹²
17. Respect for the very concept of Rule of Law is fundamentally undermined by the NSL. Article 60 of the NSL provides that the Office for Safeguarding National Security of the Central People's Government in the Hong Kong Special Administrative Region, established by the NSL to carry out intelligence activities in Hong Kong is not subject to the laws of Hong Kong, despite being able to enjoy rights and immunities provided under Hong Kong Law. This means that the central body established by and tasked with implementing the NSL exists outside and is not answerable to Hong Kong's executive or judiciary.

¹⁰ Ibid, art 44.

¹¹ Stephen Dziedzic, *Australian James Spigelman Resigns as judge of Hong Kong appeals court over new national security law* (18 September 2020) Australian Broadcasting Corporation <<https://www.abc.net.au/news/2020-09-18/judge-quits-over-hong-kong-national-security-law/12679318>>.

¹² Ibid.



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Erosion of commitments to human rights protection and guarantees

18. The substance of the NSL indicates a dangerous departure from human rights protection that Hong Kong has upheld and committed to for a number of years. In the brief months since the NSL has begun operation, the Hong Kong and Chinese Governments have already carried out a number of actions under the NSL that undermine fundamental principles of human rights despite assurances given under Article 4 of the NSL that human rights shall continue to be respected and protected under the NSL.
19. The NSL is inconsistent with Hong Kong's Bill of Rights in many aspects, but the Bill of Rights offers very limited safeguards against the NSL. Being a local legislation, the Bill of Rights is subordinate to the NSL, which is a national legislation embedded in the Basic Law. With the Standing Committee of the NPC being the superior authority to interpret Basic Law, Beijing is likely to adopt an interpretation that the NSL cannot be restrained by the Bill of Rights. As explained previously, Article 62 further empowers the NSL to take precedence over local Hong Kong law.
20. The dangers implicit within the implementation of the NSL have already been evidenced by the interception and detention of 12 activists fleeing Hong Kong for Taiwan (**Hong Kong 12**).¹³ Since their detention on 23 August 2020, the Hong Kong 12 have been removed to China and have not been heard from. Chinese lawyers engaged by their family members to assist them have been refused access by Chinese authorities. The conditions of the Hong Kong 12 remain unclear to date, and it is not known when, where or how the prosecution of their alleged crimes will proceed.
21. Under Article 56 of the NSL, certain "complex" cases relating to national security may be heard in China instead of Hong Kong. In such situations, it is highly likely that the accused within such matters be removed to China and be subject to the same treatment as the Hong Kong 12, and countless human rights defenders before them. Given the ambiguous elements of the crimes as outlined by the NSL, we submit that Hong Kong is no longer able to make assurances that its systems can discharge its guarantees of fair trial, due process and freedom from arbitrary detention.

¹³ Associated Press, *Hong Kong 12 who fled by boat for Taiwan held in 'criminal detention' by China* (15 September 2020) The Guardian <[5 | Page](https://www.theguardian.com/world/2020/sep/15/hong-kong-12-who-fled-by-boat-to-taiwan-held-in-criminal-detention-by-china#:~:text=Hong%20Kong-,Hong%20Kong%2012%20who%20fled%20by%20boat%20for,in%20%27criminal%20detention%27%20by%20China&text=Chinese%20authorities%20have%20confirmed%20the,in%20Beijing%20has%20labelled%20separatists.>></p></div><div data-bbox=)



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Freedom of press and expression of political opinion

22. The NSL has given the Hong Kong Government the means with which to persecute and prosecute civil society and the press on the basis of political opinion. As a result of the NSL, freedom of political opinion is no longer guaranteed and is actively oppressed.
23. Recent cases have shown that the Hong Kong government intends to and has used the law to target student groups and pro-democracy organisations for matters as trivial as making comments on social media.¹⁴ Activists have also been arrested under the NSL for participating in hearings or raising awareness for Hong Kong's pro-democracy movement in other democratic countries.¹⁵
24. On 10 August 2020, outspoken pro-democracy media mogul Jimmy Lai was arrested, together with nine others, under the NSL. The offices of his media company, Next Digital Daily, were subsequently raided by more than 200 police officers without warrants identifying the reasons for and ambit of their search.¹⁶
25. The NSL has also been used to target elected legislators and candidates to interfere with the city's elections and to undermine the legislature.
26. On 30 July 2020, the Hong Kong government barred 12 opposition candidates from election, including four incumbent lawmakers. Citing the NSL, the government stated that the candidates cannot be considered to be abiding the law if they:
 - a. expressed an intention to exercise the functions of a legislator by voting down legislative proposals introduced by the Hong Kong government so as to force the government to accede to political demands; or
 - b. expressed an objection in principle to the imposition of the NSL; or
 - c. advocated for, or promoted, Hong Kong independence; or
 - d. solicited intervention by foreign governments in Hong Kong's affairs.¹⁷
27. We submit that the restrictions above, in particular the restrictions on voting down legislative proposals and expressing an opinion on a legislation, are within the

¹⁴ *Teenagers among first arrested under new Hong Kong National security law* (30 July 2020) Australian Broadcasting Corporation <<https://www.abc.net.au/news/2020-07-30/hong-kong-teenagers-first-arrested-china-national-security-law/12505574>>.

¹⁵ Nikkei staff writers, *Agnes Chow questioned by Hong Kong Police*, Nikkei Asian Review (2 September 2020 <<https://asia.nikkei.com/Spotlight/Hong-Kong-protests/Agnes-Chow-questioned-by-Hong-Kong-police>>.

¹⁶ BBC, *Jimmy Lai: Arrested Hong Kong tycoon tells protesters to be 'careful'*, BBC News (12 August 2020) <<https://www.bbc.com/news/world-asia-china-53748285>>

¹⁷ *Hong Kong bars 12 opposition candidates from election*, British Broadcasting Corporation (30 July 2020) <<https://www.bbc.com/news/world-asia-china-53593187>>.



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ordinary functions of a legislature and are unreasonable restrictions that fundamentally undermine the functions of Hong Kong's legislature.

28. The ease with which the Hong Kong government and police have been able to carry out the actions described above under the NSL indicate the high level of threat which imposition of the NSL presents to political and press freedom in Hong Kong.

The NSL indicates a lack of respect of other countries' sovereignty

29. Article 38 of the NSL seeks to assert extraterritorial jurisdiction over conduct occurring outside of its borders as well as over citizens of other countries.¹⁸ In effect, this article seeks to assert jurisdiction over all peoples everywhere in the world regardless of their citizenship and the location of where the alleged crime took place. This is problematic at both the domestic level for Australia and at the International law level. Therefore, if we were to give recognition to the NSL by allowing extradition, we would be passively endorsing an illiberal draconian law that is contrary to both our Australian values, rule of law and international legal norms.
30. At the international level, extraterritorial criminal jurisdiction can be recognised in international law (such as joint efforts against terrorism) however there are limits on extraterritorial jurisdiction such as comity and reasonableness. However, it is arguable whether the charges under the NSL have thus far been reasonable according to international standards. People in Hong Kong have been arrested for NSL violations allegedly inciting secession by virtue of having flags with protest slogans, the US and UK flags, for wearing a shirt with "free Hong Kong". It is clear that these are political persecutions to erode people's right to free speech. It is unlikely that from an objective standard, the NSL's extraterritorial application could justifiably be deemed reasonable.
31. Furthermore, Article 38's extraterritorial application is inconsistent with established norms of international law. Under customary international law, there are generally five bases upon which a state may assert extraterritorial jurisdiction:
- territorial principle¹⁹, where the crime happened within the state's territory;
 - (active) nationality protective principle²⁰, based on the perpetrator's nationality;
 - passive personality principle²¹, based on the victim's nationality;
 - protective principle²², controversial but increasingly popular as the act abroad must injure national interest or be prejudicial to the security of the particular States concerned;

¹⁸ Above n 6, art 38.

¹⁹ SS Lotus Case (France v Turkey) PCIJ 1927.

²⁰ Nottebohm (Liechtenstein v Guatemala) ICJ 1955; XYZ v Cth (2006) HCA 25.

²¹ US v Yunis No 2 (1988) US Fed District Court.

²² Attorney General of Israel v Eichmann (1961) District Ct Jerusalem; Joyce v DPP [1946]AC 347.



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- and universality principle, where every state has jurisdiction in jus cogens offences such as genocide, war crimes or torture, crimes against humanity and piracy.
32. While the Hong Kong and Chinese government would seek to rely on the protective principle to justify the extraterritorial application of the NSL, the justification of a state's extraterritorial power only exists where it is seeking to protect the collective interests of individuals in that State. Based on the precedents set by the arrests which have occurred under the NSL, it is clear that the arrests have been of a political nature rather than based on a genuine need to protect. Even in the exceptional cases where the protective principle has been invoked, the cases have been largely controversial
33. For Australia, the assertion of extraterritoriality under section 38 of the NSL challenges the traditional notions of state sovereignty. To recognise the extraterritorial nature of the NSL would undermine Australia's commitment to human rights, the rule of law and procedural fairness. Domestic human rights and constitutional guarantees must apply equally to extraterritorial assertions of jurisdiction as to territorial assertions. However, due to the secretive operation and enforcement of the NSL, there is no guarantee of procedural fairness as the right to an open court can be limited and there is political screening for presiding judges as they are handpicked by the Chief Executive of Hong Kong and not based on experience. The issuance of an arrest warrant under the NSL by the Hong Kong police for American citizen, Samuel Chu²³ who is a democracy activist in the US sets a dangerous precedent and demonstrates the long arm of the draconian laws of an illiberal regime.

Conclusion

34. In light of our submissions above, we submit that the Treaties be formally suspended to give certainty to Australia's commitment to human rights and rule of law.
35. Through the examples given above, we have severe concerns in relation to the effect of the imposition of the NSL on Hong Kong's autonomy, respect for judicial independence, and commitments towards human rights guarantees.
36. In the interests of Australians and those residing within Australia, it must be recognised that the NSL has resulted in a fundamental change of circumstances in Hong Kong to the extent that Australia can no longer rely on the city as a viable treaty partner.

²³*China uses Hong Kong security law against US and UK based activists*
<https://www.theguardian.com/world/2020/jul/31/china-hong-kong-security-law-american-citizen-exiles>



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37. Australian citizens and other nationals that reside in Australia are confident in and rely heavily on this nation's commitment to freedom, fairness and rule of law. Continuing to pursue treaties with Hong Kong, in circumstances where these same principles are no longer guaranteed there, would undermine the trust that people residing in Australia have placed in the freedom that this society affords.