



Suspension of Extradition and Mutual Legal Assistance Agreements with Hong Kong – Supplementary Materials

About us

Australia-Hong Kong Link is a network of Australia-based volunteers across different states in Australia 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.

Introduction

We make this submission to provide further evidence 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), and the Agreement between the Government of Hong Kong and the Government of Australia concerning Mutual Legal Assistance in Criminal Matters (the MLA Agreement) (together, referred to as "the Treaties"), following the roundtable public hearing session on 24 September 2020.

Further evidence

Views from the international community

On 2nd June 2020, Senator the Hon David Fawcett, chair of the Joint Standing Committee on Foreign Affairs Defence and Trade, jointed with fellow chairs of Foreign Affairs Committees of New Zealand, the United Kingdom and Canada, wrote a letter to the United Nations Secretary General, clearly stating there is "erosion of the rule of law and the increasingly serious and urgent human rights situation in Hong Kong". Mentioned in the letter was that "Beijing imposed the Security Law on Hong Kong without direct participation of Hongkongers, legislature or judiciary, which was a breach of the legally binding agreement between the UK and China which provides that rights and freedoms". The United Nations was also requested to approve a mandate for the establishment of a special envoy for Hong Kong.

The open letter echoes consensus within many liberal democratic countries, that the rule of law in Hong Kong has been corroded. This heighten the need to reconsider whether Australia (ranking 11th at the WJP Rule of Law Index 2020)¹ should maintain the mutual legal assistance and extradition treaties with Hong Kong, a city extensively considered to have its rule of law eroded.

¹ <https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2020>



UK Parliamentary Report on Hong Kong

We would like to refer to the two reports published by Foreign Affairs Select Committee of the British House of Commons published in April and November 2019 respectively as part of our supporting evidence.²

In April 2019, the Committee's report noted "the dangerous erosion of the One Country, Two Systems principle of governance in Hong Kong". While in November the same year, the Committee reported "the situation has markedly deteriorated". Point 39 of the report emphasized on the negative effects of recognising Hong Kong's judicial system. "As one of the judiciaries represented in the Hong Kong Court of Final Appeal (CFA), we believe that there could be a reputational risk to the UK if the Government inadvertently appears complicit in supporting and participating in a system that is undermining the rule of law."

It was also mentioned in the letter that The Foreign Affairs Select Committee of the British House of Commons had written to the Australian Parliament, urging to "assess the impact of continued participation in the (CFA) if current trends continue".

The continuation of the two treaties may be interpreted as endorsing the Hong Kong's judicial system, thus bringing negative impacts to Australia's reputation. This risk is highlighted by the resignation of Justice Spiegelman, former Chief Justice of the New South Wales Supreme Court as mentioned in point 15 on our first submission.

Views of Hong Kong legal profession

Alan Leong, former Chairperson of Hong Kong Civic Party and former chairman of Hong Kong Bar Association (2001-2003) visited UK parliament in 2019. He revealed a number UK senators have concerns on whether British judges should continue to work in Hong Kong's Court of Final Appeal due to reputational risks, and the encroaching political pressure the Chinese Communist Party is willing to impose on Hong Kong's courts. Leong responded that the rule of law in Hong Kong had been deteriorating.³

Philip John Dykes, Hong Kong barrister and current Chairman of the Hong Kong Bar Association wrote to members on the 16th October 2019, stating that whenever the rule of law in Hong Kong is threatened, the SBA will respond with a statement, and "There is nothing more corrosive to the Rule of Law than violence inflicted on members of the public by apparently unaccountable state agents".

Benny Tai, legal scholar and Associate Professor of Law at the University of Hong Kong, observed that there is a serious conflict between the National Security Law and the principles of rule of law.

² <https://publications.parliament.uk/pa/cm201919/cmselect/cmfaaff/109/109.pdf>

<https://hk.appledaily.com/local/20191106/RTU34AXGIQCEIJT3Z5BW2CSZYQ/>

³ <https://m.mingpao.com/ins/%E6%96%87%E6%91%98/article/20200709/s00022/1594207740779/>



Supplementary Submission to the Joint Committee on Treaties

Although the Hong Kong National Security Law has provisions to adhere to the principle of rule of law, its formulation, status, content, implementation and jurisdiction have serious conflicts with the principle of rule of law. The National Security Law seems to be a specific law for regulating national security. However, its offences are vaguely defined and have wide-ranging implications. The law enforcement powers within the National Security Law are not properly restricted and takes precedence over Hong Kong's body of laws.⁴

With the National Security Law's extraterritorial jurisdiction, Australian citizens and residents may be at risk with vaguely defined offences and law enforcing standards, as well as Chinese Government's involvement in Hong Kong's judicial system.

Recent cases showing declination of rule of law in Hong Kong

- a. The Hon Ted Hui Chi-fung, Legislative Councillor filed two private prosecutions against a police chief who fired live rounds on protesters at the demonstrators on November 11 last year and against a driver who drove a taxi into a group of crowded demonstrators, injuring many with some demonstrators received permanent injuries. While the incidents were caught on camera by multiple media outlets, police refused to investigate both cases. Although the Court agreed to hear the case, Teresa Cheng, the Secretary for Justice later intervened and cancelled the two private prosecutions. According to Lord Wilberforce, a British judge in the 1970s, private prosecution is the best protection against the government's obsession and prejudice. Councillor Hui observed "the situation in Hong Kong is falling into the obsession and prejudice, which is why we Hong Kong people want to initiate private prosecutions." These cases are strong indications that the rule of law in Hong Kong is being undermined by the Hong Kong Government.⁵

- b. Samuel Chu, an American citizen who lives in the US was charged and issued a warrant after the implement of the National Security Law. He manages the Hong Kong Democracy Council, a Washington DC-based advocacy organization dedicated to furthering Hong Kong's freedom and democracy, and became the first person targeted under this aspect of the law, even though his advocacy work is based in Washington. This demonstrates that the National Security Law can be used to target citizens of other countries outside of Hong Kong and

⁴ <https://www.epochtimes.com/gb/19/10/17/n11593375.htm>

⁵ <https://www.thestandnews.com/politics/%E9%84%AD%E8%8B%A5%E9%A9%8A%E7%A8%B1%E5%8F%AF%E6%92%A4%E5%9B%9E%E7%A7%81%E4%BA%BA%E6%AA%A2%E6%8E%A7-%E8%A8%B1%E6%99%BA%E5%B3%AF-%E9%8B%AA%E8%B7%AF%E4%BB%8B%E5%85%A5%E8%AD%A6%E6%9A%B4%E6%A1%88/>



highlights the serious threat to Australian citizens and residents, reflecting the importance to suspend the treaties.⁶

- c. On 10 August 2020, outspoken pro-democracy media mogul Jimmy Lai was arrested, together with nine individuals, under the National Security Law. 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.⁷
- d. 12 activists, including a 16-year-old were intercepted and arrested at sea by China as international concern grows over the status of the detainees. They were caught on 23rd August after setting off from Hong Kong in a boat for Taiwan. It has been more than a month but the 12 were not released according to China's immigration law. John Lee, a former police officer, who is the current Secretary for Security claimed the 12 had appointed 2 lawyers from the Chinese official list as their legal representatives but was found to be inconsistent with the facts. Families of the activists reported that the individuals were denied access to the lawyers of their choice and the families were not allowed to get in touch with them to date.⁸

Our position

Australia-Hong Kong Link is of the view that Australia needs to formally suspend the mutual legal assistance treaty and the extradition treaty.

A major benefit to suspend the treaties is to protect the safety and interests of Australian citizens and residents. There is a risk that the National Security Law would be used against Australian citizens and academics, as the case of Samuel Chu demonstrated. We recommend that the Australian

⁶ <https://www.theguardian.com/world/2020/jul/31/china-hong-kong-security-law-american-citizen-exiles>

⁷ <https://www.bbc.com/news/world-asia-china-53748285>

⁸ <https://www.aljazeera.com/news/2020/9/25/hong-kong-legislators-protest-arrest-of-activists-by-china>

<https://www.thestandnews.com/politics/12-%E6%B8%AF%E4%BA%BA%E9%80%81%E4%B8%AD-%E5%AE%B6%E5%B1%AC%E5%BE%8B%E5%B8%AB%E6%8F%AD%E7%95%B6%E4%BA%8B%E4%BA%BA%E6%9C%AA%E5%8F%A6%E8%81%98%E5%85%A9%E5%BE%8B%E5%B8%AB-%E6%9D%8E%E5%AE%B6%E8%B6%85%E7%96%91-%E8%AC%9B%E5%A4%A7%E8%A9%B1-%E4%BF%9D%E5%AE%89%E5%B1%80%E6%8B%92%E5%9B%9E%E6%87%89/>



Supplementary Submission to the Joint Committee on Treaties

Government to suspend the treaties, and then carefully consider the impacts on citizens and Australia's national interest before making any decision to reactivate the treaties.

We also submit that suspending the treaties would help Australia to avoid reputational risks. Suspending the two treaties avoids endorsement of the Chinese Communist Party's crackdown, thus demonstrating Australia's commitment to human rights and a rule-based international order.

At the time of writing, the UK, New Zealand, Finland and the Netherlands, have already suspended the mutual legal assistance treaties due to Hong Kong National Security Law. There are only 16 countries currently having effective mutual legal assistance treaties with Hong Kong. As more like-minded democracies adopt similar actions, it is in Australia's national security interests to join its western allies.