

Simon Henderson, BComm/LLB/GDLP (ANU), LLM (Fletcher)

28 September 2020

Matters relating to two treaties with Hong Kong – Submission

Introduction

I greatly appreciate the opportunity to provide a submission to the inquiry by the Joint Standing Committee on Treaties (**JSCOT**) examining matters relation to two treaties with Hong Kong (the **Inquiry**) and thank JSCOT for inviting me to the roundtable on 21 September 2020 (the **roundtable**) and to make this submission. This submission is made in my personal capacity and draws upon my specialised experience as an international human rights lawyer, particularly with respect to Hong Kong. It includes recent work as a Senior Policy Advisor at Justice Centre Hong Kong, as well as other roles covering Hong Kong, and China more broadly, at the Department of Foreign Affairs and Trade (**DFAT**), the Law Council of Australia and Human Rights in China. This submission will also expand upon comments provided in the roundtable.

I note the 15 September 2020 letter from The Hon Christian Porter MP, Attorney-General, indicating that JSCOT is requested to expedite consideration treaty actions, which involve the 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**) as well as the suspension by mutual consent of the Agreement between the Government of Hong Kong and the Government of Australia concerning Mutual Legal Assistance in Criminal Matters (the **MLA Agreement**). I support the views expressed by the Attorney-General to ensure that any necessary actions are undertaken to formalise these treaty actions by 9 October 2020.

This submission will address the following matters:

- Suspension of the Extradition Agreement
- Suspension of the MLA Agreement
- Misuse of the “non-interference principle” by China in response Australia suspending agreements with Hong Kong
- Fundamental changes in circumstances due to the National Security Law
- Other treaty arrangements with Hong Kong
- Responses by Hong Kong legal professional bodies to the National Security Law

While the proposal in this case is to suspend, rather than terminate the treaty agreements, the effect will essentially be a termination. The People’s Republic of China (**PRC**) and the government of the Hong Kong Special Administrative Region (**HKSAR**) have said they will not back away from the National Security Law (**NSL**), despite widespread international condemnation. The NSL fundamentally changes the circumstances, which warrants the suspension of the Extradition Agreement and the MLA Agreement, as per Article 62 of the Vienna Convention on the Law of Treaties (**VCLT**).¹ Considering

¹ Article 62 of the VCLT provides:

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

...

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

Simon Henderson, BComm/LLB/GDLP (ANU), LLM (Fletcher)
simonjhenderson@gmail.com

28 September 2020

that the NSL breaches 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**), it also calls into question the extent to which Australian policy makers can confidently hold onto views that treaty agreements strengthen and improve Hong Kong's autonomy, as outlined in the recent Inquiry into the Australia-Hong Kong Free Trade Agreement (the **AHKFTA Inquiry**).

Suspension of the Extradition Agreement

I support the decision of the Australian government to suspend the Extradition Agreement as outlined to the HKSAR government via diplomatic note on 9 July 2020. As discussed below in more detail, the decision is consistent with Article 62 of the VCLT in respect of a fundamental change in circumstances due to the introduction of the NSL. While this decision is a suspension, given that the PRC and HKSAR authorities have not indicated any change to the NSL, it will in effect end up being a termination. Unfortunately, there is no sign that the legal or political environment will shift direction any time soon that would otherwise warrant reconsideration of the suspension. It is a disappointing, but necessary outcome of the rapid deterioration of the human rights and rule of law environment in Hong Kong.

It is helpful to briefly analyse the political and legal responses from PRC and HKSAR authorities regarding the suspension. Following the decision to suspend the Extradition Agreement on 9 July 2020, the following exchange took place at press conference with Zhao Lijian, the Chinese Ministry of Foreign Affairs Spokesperson:

"Reuters: Out of concerns over China's national security law for Hong Kong, the Australian Prime Minister today announced the decision to suspend the country's extradition agreement with Hong Kong and extend visas for Hong Kong residents in Australia. Do you have any comment?"

*Zhao Lijian: The Australian side's comments and measures are in serious violation of international law and the basic norms governing international relations. They constitute gross interference in China's internal affairs, and China doesn't accept it. We express strong condemnation and reserve the right to make further reaction, and Australia should bear all the consequences."*²

When a BBC journalist followed up and asked which laws Zhao Lijian was referring to, he could not name any. Such lines were also repeated by the PRC Embassy in Australia, which issued a statement on the same day stating:

*"China strongly deplores and opposes the groundless accusations and measures announced by the Australian government with regard to Hong Kong, which is a serious violation of international law and basic norms governing international relations, and a gross interference in China's internal affairs."*³

² Embassy of the People's Republic of China in the Commonwealth of Australia, 'Chinese Foreign Ministry Spokesperson's Remarks', 9 July 2020. Available at: http://au.china-embassy.org/eng/sghdxwfb_1/t1796668.htm.

³ Embassy of the People's Republic of China in the Commonwealth of Australia, 'Chinese Embassy Spokesperson's Remarks', 9 July 2020. Available at: http://au.china-embassy.org/eng/sghdxwfb_1/t1796361.htm.

Simon Henderson, BComm/LLB/GDLP (ANU), LLM (Fletcher)
simonjhenderson@gmail.com

28 September 2020

Australia was one of several states who shortly after the passage of the NSL decided to suspend their extradition agreement with Hong Kong, including Canada⁴ and the UK.⁵ PRC authorities responded by stating that it had suspended Hong Kong's extradition treaties with Australia, Canada and the United Kingdom in response through action taken on 28 July 2020. In public commentary, Wang Wenbin, a spokesperson for the Ministry of Foreign Affairs, told a press conference that:

*"Taking China's newly enacted national security law for the Hong Kong Special Administrative Region as an excuse, Canada, Australia and the UK unilaterally announced the suspension of their extradition treaties signed with Hong Kong, which has grossly interfered in China's internal affairs and seriously violated international law and basic norms governing international relations."*⁶

These boilerplate lines are common responses from the PRC, and, as argued in my submission to the HKFTA Inquiry, are a now common feature of the Hong Kong government's political rhetoric.⁷ Given such comments on Australia allegedly breaching international law, it is noteworthy that, as outlined in the National Interest Assessment, the Hong Kong government in its diplomatic note of 28 July 2020 did not provide any legal basis for the purported suspension, or otherwise reference the VCLT. No effort appears to have been made to provide an argument in response. In doing so, highlighting that such commentary from the PRC was legal puffery.

Suspension of the MLA Agreement

I support the decision of the Australian government to mutually suspend the MLA Agreement in a manner consistent with Article 57 of the VCLT, which allows for a treaty suspension at any time where there is mutual consent between both parties.⁸ As noted in the National Interest Analysis, following receipt of the diplomatic note of 28 July 2020 from the Hong Kong government that it wished to suspend the MLA Agreement, ongoing cooperation on MLA matters was unlikely to occur. Formalising this situation through suspension and review by JSCOT is the appropriate course to take.

It is notable that, similar to the Extradition Agreement, the 28 July 2020 diplomatic note did not provide any legal basis for the purported suspension of the MLA Agreement. In a press conference on 28 July 2020, Wang Wenbin, indicated that it was a retaliatory action in response to decisions by Australia, among other countries, to suspend their Extradition Agreements:

⁴ Global Affairs Canada, 'Canada takes action following passage of National Security Legislation for Hong Kong', 3 July 2020. Available at: <https://www.canada.ca/en/global-affairs/news/2020/07/canada-takes-action-following-passage-of-national-security-legislation-for-hong-kong.html>.

⁵ The Rt Hon Dominic Raab MP, 'Hong Kong and China: Foreign Secretary's statement in Parliament', 20 July 2020. Available at: <https://www.gov.uk/government/speeches/hong-kong-and-china-foreign-secretarys-statement-in-parliament>.

⁶ As reported in ABC News, 'China suspends Hong Kong extradition treaties with Australia, UK, Canada', 29 July 2020. Available at: <https://www.abc.net.au/news/2020-07-29/china-suspends-hong-kong-extradition-treaty-canada-australia-uk/12501248>.

⁷ Simon Henderson, Submission to the Joint Standing Committee on Treaties: Australia-Hong Kong FTA Inquiry, 6 September 2019. Available at: <https://www.aph.gov.au/DocumentStore.ashx?id=c681b6d3-a745-4afb-afde-42267718d199&subId=669525>.

⁸ Article 57 of the VCLT provides:

The operation of a treaty in regard to all the parties or to a particular party may be suspended:

(a) in conformity with the provisions of the treaty; or
(b) at any time by consent of all the parties after consultation with the other contracting States.

Simon Henderson, BComm/LLB/GDLP (ANU), LLM (Fletcher)
simonjhenderson@gmail.com

28 September 2020

Lately, Canada, Australia and the UK, citing the Law on Safeguarding National Security in the Hong Kong SAR as an excuse, unilaterally suspended extradition agreements with the HKSAR. Such actions constitute gross interference in China's internal affairs and grave violation of international law and basic norms governing international relations. China firmly opposes that.

Under the framework of these agreements, the Hong Kong SAR, with the Central Government's assistance and mandate and in accordance with the Basic Law, has offered assistance to the Canadian, Australian and British sides. By wrongfully politicizing judicial cooperation with Hong Kong, the three countries have seriously damaged the foundation for such cooperation and deviated from its purpose of upholding justice and rule of law. Therefore, China has decided that the Hong Kong SAR will suspend its agreements on surrendering fugitive offenders with Canada, Australia and the UK. At the same time, China has decided that the Hong Kong SAR will suspend its agreements on mutual legal assistance in criminal matters with Canada, Australia and the UK.⁹

Despite these comments, no effort appears to have been made to provide a legal argument in the diplomatic note on 28 July 2020. Again, highlighting that the PRC's commentary with respect to Australia's grave violation of international law was legal puffery in the case of the MLA Agreement.

Misuse of the "non-interference principle" by China in response Australia suspending agreements with Hong Kong

Beyond the international law arguments, or lack thereof, in both the cases suspension was met by comments from the PRC that Australia's actions constituted a "gross interference in China's internal affairs". This statement is not accurate as a matter of international law and is often used by PRC authorities to fend off criticism, especially human rights concerns, whether in China or Hong Kong. A key aim is to ensure that the State no longer speaks out on that particular issue and as much as possible, avoid an international coalescence by States against the PRC's policies or positions. In my submission to the AHKFTA Inquiry, I outlined these concerns in more detail.¹⁰

The decision of a state to suspend a treaty to which it is a party and on the grounds of mutual consent or a fundamental change in circumstances, consistent with Articles 57 or 62 of the VCLT, is not "interference in internal affairs". Article 2 of the Charter of the United Nations, resolutions 25/2625 and 36/103 of the General Assembly, are the international law foundations of the non-interference principle. They are primarily concerned with the threat of force, aggression and military intervention. Suspending a treaty under the terms outlined in the National Interest Assessments for the Extradition Agreement and the MLA Agreement fails to reach the required threshold.

Fundamental changes in circumstances due to the National Security Law

The official talking points from the PRC government, and reflected by the Hong Kong government, is that the NSL will not affect the rights and freedoms enjoyed by Hong Kong residents under the "One

⁹ Wang Wenbin, 'Foreign Ministry Spokesperson Wang Wenbin's Regular Press Conference', 28 July 2020. Available at: https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1801757.shtml.

¹⁰ Simon Henderson, Submission to the Joint Standing Committee on Treaties: Australia-Hong Kong FTA Inquiry, 6 September 2019. Available at: <https://www.aph.gov.au/DocumentStore.ashx?id=c681b6d3-a745-4afb-afde-42267718d199&subId=669525>.

Simon Henderson, BComm/LLB/GDLP (ANU), LLM (Fletcher)
simonjhenderson@gmail.com

28 September 2020

Country, Two Systems" and that the law will only affect a small minority. Such lines are reflected on the Brand Hong Kong website,¹¹ the promotional branding for the HKSAR government, and have been reflected in a strident public diplomacy campaign by the Hong Kong Economic and Trade Offices globally, including in Australia. For example, on 22 September 2020, Raymond Fan, Director, Representative to Australia and New Zealand, wrote a letter to Sky News Editors asserting that rights and freedoms by residents in Hong Kong will not be affected.¹² Furthermore, Carrie Lam, Hong Kong's Chief Executive, has claimed that the NSL has not damaged the reputation of Hong Kong's legal system.¹³ The talking points and assertions from the Hong Kong government are inaccurate and do not reflect the reality of the text of the NSL, which fails to comply with the rule of law and Hong Kong's obligations under the International Covenant on Civil and Political Rights (**ICCPR**) and the International Covenant on Economic, Social and Cultural Rights (**ICESCR**), or reflect the enforcement of the NSL since its introduction.

The NSL has draconian implications and substantially undermines Hong Kong's legal system. For example, Part V of the NSL allows for the establishment of the Office for Safeguarding National Security (**OSNS**) in Hong Kong, which bypasses Hong Kong's law enforcement agencies. The OSNS is not subject to any oversight by the Hong Kong government, has the power to handle certain cases and gives China's courts and procuratorates jurisdiction over such cases. Concerns with the text of the NSL has been expressed by United Nations special mandate holders. Even preceding the imposition of the NSL, over 50 United Nations Special Rapporteurs said that it would "violate China's international legal obligations and impose severe restrictions on civil and political rights in the autonomous region".¹⁴ Such concerns have continued to be expressed following the NSL's introduction, with UN Special Rapporteurs stating in a 1 September 2020 letter stating that the NSL is a serious risk to the territory's political and civic freedoms, urging China to review and reconsider the law:

*"...we are concerned that the law lacks precision in key respects, infringes on certain fundamental rights and may not meet the required thresholds of necessity, proportionality and non-discrimination under international law. We recommend review and reconsideration of this legislation to ensure that the law is in compliance with China's international human rights obligations with respect to the HKSAR."*¹⁵

The UN Special Rapporteurs noted that several sections of the NSL involve breaches of ICCPR obligations, including the possibility for cases to be transferred out of the HKSAR's authority into the

¹¹ Brand Hong Kong, 'National Security Law for the HKSAR', last revision date 22 September 2020. Available at: <https://www.brandhk.gov.hk/html/en/Hong-Kong-Update/National-Security-Law.html>.

¹² Raymond Fan, Director, Representative to Australia and New Zealand, Letter to Sky News Editor, 22 September 2020. Available at: https://www.brandhk.gov.hk/uploads/brandhk/files/HK_Updates_2019/National-Security-Law/2020-09-22-Letter-to-Sky-News.pdf. Further letters have been sent to The Australian, Australian Financial Review, Sydney Morning Herald and other Australian media outlets in recent months.

¹³ News.gov.hk, 'HK legal system robust: CE', 22 September 2020. Available at: https://www.news.gov.hk/eng/2020/09/20200922/20200922_102632_864.html.

¹⁴ Office of the High Commissioner for Human Rights, 'UN experts call for decisive measures to protect fundamental freedoms in China', 26 June 2020. Available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26006&LangID=E>.

¹⁵ United Nations Special Rapporteurs, Comments on The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ("National Security Law"), 1 September 2020, CHN 17/2020. Available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=25487>.

Simon Henderson, BComm/LLB/GDLP (ANU), LLM (Fletcher)
simonjhenderson@gmail.com

28 September 2020

PRC. This fails to comply with a right to a fair trial under Article 14 of the ICCPR, making any cases of transfer a de facto breach of the ICCPR fair trial obligations.¹⁶

Additionally, since the NSL was introduced there have been adverse impacts on separation of powers, judicial independence, and a fundamental erosion of human rights guarantees under the ICCPR and other human rights treaties which apply in Hong Kong. The Hong Kong government has used the NSL already to target activists for making public comments that are protected as freedom of expression under the ICCPR, including four students for “inciting secession” for discussing Hong Kong independence¹⁷ and others for shouting pro-democracy slogans at protests.¹⁸ My assessment is that such heavy handed responses will continue as part of broader efforts to clamp down on any and all opposition.

This NSL highlights the need for continued support to be provided to Hong Kong residents residing in Australia, especially those involved in human rights advocacy.¹⁹ International organisations and foreign nationals are already being targeted under the NSL. For example, Samuel Chu, a United States citizen who works with Hong Kong Democracy Council, an organisation working on human rights advocacy in the United States. He is wanted for allegedly committing crimes of “inciting subversion” and “colluding with foreign powers” under Article 29 of the NSL.²⁰ Another is Simon Cheng, a former staff member at the British Consulate General in Hong Kong who was arbitrarily detained and tortured in China, and has been granted asylum in the United Kingdom. Australian citizens undertaking advocacy on Hong Kong issues in Australia, such as those participating in the Inquiry into whether Australia should examine the use of targeted sanctions to address human rights abuses by the Joint Standing Committee on Foreign Affairs, Defence and Trade, could be targeted using Articles 29(4) and 38 of the NSL. This may be the case even if they remain in Australia. The introduction of the *Migration Amendment (Hong Kong Passport Holders) Regulations 2020* is a welcome response to provide Hong Kongers with more time to stay in Australia and assist with providing a pathway to permanent residency. However, its primary object is to support and encourage skilled workers from Hong Kong and Hong Kong graduates to remain in Australia or relocate to Australia,²¹ rather than protect Hong Kong residents involved in human rights advocacy who may be targeted under the NSL.

Further detail on the implications of the NSL have also been succinctly summarised in other submissions from Australia Hong Kong Link²² and Hong Kong Watch.²³

¹⁶ Ibid.

¹⁷ BBC News, ‘Hong Kong security law: Four students arrested for ‘inciting secession’’, 30 July 2020. Available at: <https://www.bbc.com/news/world-asia-china-53585747>.

¹⁸ The Guardian, ‘“Liberate Hong Kong” slogan banned as protesters lie low’, 3 July 2020. Available at: <https://www.theguardian.com/world/2020/jul/02/hong-kong-protesters-laying-low-following-mass-arrests-china>.

¹⁹ ABC News, ‘Thousands of Hong Kong residents eligible to stay in Australia as safe haven visa extension kicks in’, 24 August 2020. Available at: <https://www.abc.net.au/news/2020-08-24/hong-kong-citizens-thank-australia-as-safe-haven-visa-extension/12586078>.

²⁰ The Guardian, ‘China uses Hong Kong security law against US and UK-based activists’, 1 August 2020. Available at: <https://www.theguardian.com/world/2020/jul/31/china-hong-kong-security-law-american-citizen-exiles>.

²¹ Explanatory Memorandum to the Migration Amendment (Hong Kong Passport Holders) Regulations 2020.

²² Australia Hong Kong Link, ‘Suspension of Extradition and Mutual Legal Assistance Agreements with Hong Kong’, 22 September 2020. Available at: <https://www.aph.gov.au/DocumentStore.ashx?id=01820623-adf8-44f0-8c88-14d8d2391281&subId=691971>.

²³ Hong Kong Watch, ‘Hong Kong Watch submission to Joint Standing Committee on Treaties regarding ‘Matters relating to two treaties with Hong Kong’’, 22 September 2020. Available at: <https://www.aph.gov.au/DocumentStore.ashx?id=83159e3c-32eb-4095-b8b9-b365ce692cb6&subId=691953>.

Simon Henderson, BComm/LLB/GDLP (ANU), LLM (Fletcher)
simonjhenderson@gmail.com

28 September 2020

Other treaty arrangements with Hong Kong

Implications for Australia's positioning on how treaties improve Hong Kong's autonomy

It is one matter to support the 'One Country, Two Systems' framework and Hong Kong enjoying a high degree of autonomy. It is another, the extent to which such features remain and the extent to which consideration has been taken of their future preservation. This has been a constant challenge with respect to Australia's policy making on Hong Kong, which unfortunately has often reflected wishful thinking rather than realistic assessments of the situation on the ground and predictions provided by civil society organisations. The assessments provided by DFAT and the response to the AHKFTA Inquiry are a case in point.

During the AHKFTA Inquiry, Elizabeth Ward, Chief Negotiator, Regional Trade Agreements Division, DFAT, stated:

*"It is because the Australian Government supports a stable, prosperous Hong Kong, with a high degree of autonomy, under the 'one country, two systems' framework, that the government intends to proceed to ratify the agreements which deliver the next milestone in this important relationship."*²⁴

Meanwhile, the Australian Consul-General in Hong Kong said that ratification of the HKFTA would reaffirm and strengthen Hong Kong's autonomous status within 'one country, two systems' and help to buttress Hong Kong's unique constitutional arrangements.²⁵ JSCOT agreed with this assessment, stating that:

*"The Committee acknowledges concerns over the current political situation in Hong Kong but takes the view that ratification of the Agreement will strengthen Hong Kong's unique status under 'one country, two systems' and reaffirm and buttress the high measure of autonomy this provides Hong Kong over its own affairs."*²⁶

Unfortunately, despite the optimistic overtones, there is no sense that the HKFTA has strengthened Hong Kong's autonomous status and the shift towards 'one country, one system' has continued unabated, especially since the introduction of the NSL. This was a trend well before the signing of the HKFTA, having taken place over many years and at an increasingly rapid pace since 2014. It was highlighted by numerous submissions to the HKFTA Inquiry, including from organisations such as Hong

²⁴ Elizabeth Ward, Chief Negotiator, Regional Trade Agreements Division, Department of Foreign Affairs and Trade (DFAT), Committee Hansard, Canberra, 9 September 2019, p. 2.

²⁵ Elizabeth Ward, DFAT, Committee Hansard, Canberra, 9 September 2019, p. 2; and Michaela Browning, Consul-General, Australian Consulate-General, Hong Kong, Committee Hansard, Canberra, 9 September 2019, p. 5.

²⁶ Joint Standing Committee on Treaties, Report 186, October 2019. Available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/A-HKFTA/Report_186.

Simon Henderson, BComm/LLB/GDLP (ANU), LLM (Fletcher)
simonjhenderson@gmail.com

28 September 2020

Kong Watch,²⁷ Australia-Hong Kong Link,²⁸ Canberra Hong Kong Concern Group²⁹ and Hong Kong Higher Institutions International Affairs Delegation,³⁰ as well as in my submission.³¹

This does not mean that Australia should not continue emphasising a desire for ‘one country, two systems’ to be upheld or support a high degree of autonomy.³² Australia should persist in doing so, but from reflecting a realistic portrayal of the current settings, while using all means available to challenge the deteriorating human rights environment. This includes utilising a broader suite of options in the human rights toolkit, continuing to work closely with like-minded partners and strengthening international law and human rights law responses. Two immediate responses should be considered with respect to Australia’s treaties with Hong Kong. Firstly, a thorough review of all Australia’s Hong Kong treaties. Secondly, considering, where such treaties will continue to be maintained, the insertion of enforceable human rights clauses.

JSCOT review of all Australia Hong Kong treaties

As noted above, the NSL represents a fundamental change of circumstances to Hong Kong. This calls into question all of Australia’s Hong Kong treaties, given the far-reaching effects of the NSL. As such, it would be valuable for a comprehensive review to be undertaken by JSCOT, consistent with its resolution of appointment under (I)(b) and I(c) which provide wide scope for inquiry and reporting on treaties, whether or not negotiated to completion, to consider the implications upon all of Australia’s treaties with Hong Kong.

Human rights clauses in treaties

Enforceable human rights clauses, backed by enforceable ‘non-execution’ clause, which refer to support for the protection of fundamental human rights and the rule of law, should be included in all agreements. This was a recommendation from my previous submission to the HKFTA Inquiry, whereby I stated that:

“The Australia-Hong Kong Free Trade Agreement should only be passed subject to the inclusion of a human rights clause, backed by an enforceable ‘non-execution’ clause, which is reflective of Australia’s

²⁷ Hong Kong Watch, Submission to the Joint Standing Committee on Treaties on Inquiry into the Australia-Hong Kong Free Trade Agreement, Submission 16, 23 August 2019. Available at:

<https://www.aph.gov.au/DocumentStore.ashx?id=f9aff9b7-025e-494a-a2e5-6393bafaedf3&subId=668999>.

²⁸ Australia-Hong Kong Link, Submission with regards to the impending inquiry of the Australia-Hong Kong Free Trade Agreement, Submission 17, 23 August 2019. Available at:

<https://www.aph.gov.au/DocumentStore.ashx?id=ae1fb26d-7f00-40bc-a30e-be74a273a208&subId=669022>.

²⁹ Canberra Hong Kong Concern Group, Submission to the Joint Standing Committee on Treaties Inquiry into the Australia-Hong Kong Free Trade Agreement, Submission 4, 23 August 2019. Available at:

<https://www.aph.gov.au/DocumentStore.ashx?id=252a3d2e-72f9-4f0b-9121-00e70a4c5e57&subId=668938>.

³⁰ Hong Kong Higher Institutions International Affairs Delegation, Submission to the Parliament Inquiry on Australia Hong-Kong Free Trade Agreement, Submission 25. Available at:

<https://www.aph.gov.au/DocumentStore.ashx?id=cd4bc3e6-5208-4ced-88b5-5d6b6a6329ff&subId=668996>.

³¹ Simon Henderson, Submission to the Joint Standing Committee on Treaties: Australia-Hong Kong FTA Inquiry, 6 September 2019. Available at: <https://www.aph.gov.au/DocumentStore.ashx?id=c681b6d3-a745-4afb-afde-42267718d199&subId=669525>.

³² Additionally, see for example Australia’s Third Cycle Universal Periodic Review recommendation, which called on China to: “Uphold the rights, freedoms and rule of law embodied in the ‘one country, two systems’ framework for Hong Kong”. See, Department of Foreign Affairs and Trade, ‘Universal Periodic Review Working Group - 31st Session: Universal Periodic Review of China’, National Statement of Australia as delivered on 6 November 2018. Available at: <https://dfat.gov.au/international-relations/international-organisations/un/unhrc-2018-2020/universal-periodicreview/Documents/31st-session-upr-china.pdf>.

Simon Henderson, BComm/LLB/GDLP (ANU), LLM (Fletcher)
simonjhenderson@gmail.com

28 September 2020

fundamental values, including support for the protection of fundamental human rights and the rule of law in Hong Kong.”³³

Human rights clauses are in general based on Article 60 of the 1969 Vienna Convention on the law of treaties, with such clauses being incorporated into the European Union’s free trade agreements for decades and are also used by our like-minded partners, including the US and Canada.³⁴ Additionally, it is noteworthy that the United Kingdom Joint Committee on Human Rights recommended in its Human Rights in International Agreements Inquiry.³⁵ To date, the Australian government has yet to effectively incorporate enforceable human rights clauses into free trade agreements and it remains a significant gap in Australia’s human rights toolkit. The imposition of the NSL in Hong Kong highlights yet again how valuable such clauses would be in providing greater flexibility to Australian policy makers in responding to a sudden change in circumstances in the relevant country.

Acknowledging that the AHKFTA has already passed JSCOT and entered into force, for a human rights clause to subsequently be included the AHKFTA would need to be reopened and discussed with the HKSAR authorities. While acknowledging that such an approach would be challenging and require agreement from both sides, I would recommend that such action is undertaken. This would help to ensure that the Australian government can continue to act in accordance with Australia’s values and interests with respect to the deteriorating human rights environment in Hong Kong, while reflecting widespread concerns held by parliamentarians, civil society organisations and Hong Kong society.

Responses by Hong Kong legal professional bodies to the National Security Law

During the roundtable on 24 September 2020, questions were asked by The Hon David Sharma MP of the Law Council of Australia (**LCA**) regarding the response by the Hong Kong legal profession to the NSL. As the Law Council indicated, there are two legal professional bodies in Hong Kong, the Hong Kong Bar Association (**HKBA**) and the Law Society of Hong Kong (**LSHK**). Another body to note is the Progressive Lawyers Group (**PLG**). PLG was formed in January 2015, shortly after the Umbrella Movement, to provide a stronger voice from the legal profession in response to the decline in democracy, rule of law and freedom in Hong Kong. Although not an accredited granting legal professional body, it was in part formed out of a frustration with the lack of progressive advocacy being undertaken by HKBA and LSHK.

While it is true, as noted by the LCA in their response on the roundtable, that both the HKBA and LSHK have spoken out on the NSL, there has been a notable difference in their response on human rights and rule of law issues in Hong Kong for several years, with the LSHK being more hesitant in speaking out firmly and critically on high profile rule of law issues. This is in part a function of the representatives on the LSHK Council and the LSHK’s leadership. The LSHK Council has generally had more members aligned with the pro-establishment camp, which refers to a political alignment that

³³ Simon Henderson, Submission to the Joint Standing Committee on Treaties: Australia-Hong Kong FTA Inquiry, 6 September 2019. Available at: <https://www.aph.gov.au/DocumentStore.ashx?id=c681b6d3-a745-4afb-afde-42267718d199&subId=669525>.

³⁴ European Parliamentary Research Service, ‘Human Rights in EU trade agreements: The human rights clause and its application’, July 2019. Available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637975/EPRS_BRI\(2019\)637975_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637975/EPRS_BRI(2019)637975_EN.pdf).

³⁵ United Kingdom Joint Committee on Human Rights, ‘Human Rights Protections in International Agreements’, Final Report, 12 March 2019. Available at: <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1833/1833.pdf>.

Simon Henderson, BComm/LLB/GDLP (ANU), LLM (Fletcher)
simonjhenderson@gmail.com

28 September 2020

generally supports the policies of the PRC towards Hong Kong. In some cases, the Liaison Office of the Central People's Government in the HKSAR has interfered in elections, privately advocating for LSHK to elect members who are pro-establishment aligned.³⁶ Additionally, Melissa Pang, President, LSHK, has privately rallied support for certain candidates on the Council during elections earlier this year, whilst at the same time calling for the LSHK to remain "apolitical". This response was at odds with traditional practice.³⁷ The candidates being backed by the President were pro-establishment, rather than progressive. Such an approach by the senior leadership cannot be so easily dismissed as being an individual's members views as C.M. Chan, Vice President, LSHK, said in defence of the President during a press conference in response to criticism.³⁸

As a result of my years working at the LCA, engaging with senior representatives of the LSHK and interacting with the Hong Kong legal community at Justice Centre Hong Kong I have a strong understanding of the operations and processes of legal professional bodies. I am acutely aware of the practices engaged in by international organisations for international legal practitioners, bar associations and law societies, such as the IBA and LAWASIA, and as a result I have paid close attention to how the LSHK has often chosen not to issue a statement. The LSHK Council has on multiple occasions failed to speak out on rule of law issues that otherwise may be expected by a legal professional body. Such decisions, cannot in my view, just be put down to issues regarding process, they reflect an organisational approach. These concerns have also been identified by several members of the LSHK who have attempted to obtain seats on the Council. For example, a candidate in the 2020 LSHK elections, Kenneth Lam, stated in April that the LSHK's response to the extradition bill proposal, that led to large scale protests throughout 2019, was slow and disappointing:

"People have been waiting, I'm sure solicitors and the entire legal profession have been waiting, for the Law Society to come out to say something".³⁹

Likely also reflecting the pro-establishment alignment of the LSHK Council and conservative approach by the LSHK's leadership, the LSHK has long been reticent in speaking out public on the detention and mistreatment of human rights lawyers in the PRC. This has been in contrast to the HKBA. For example, the LSHK did not issue any statement on the conviction of high profile mainland human rights lawyer Wang Quanzhang.⁴⁰ Even when the LSHK has issued statements on the mistreatment of lawyers in the PRC, back in 2015 regarding the '709 lawyers crackdown' they adopted extremely cautious language compared to the HKBA, stressing their respect for "One Country, Two Systems". Instead, it is left to other legal bodies based in Hong Kong to be stronger vocal advocates, whether that is the HKBA, PLG or the China Human Rights Lawyers Concern Group, or legal bodies in other countries, such as the LCA.

³⁶ Hong Kong Free Press, 'Candidates allegedly backed by Beijing win 4 out of 5 seats on Hong Kong's Law Society governing board', 31 May 2019. Available at: <https://hongkongfp.com/2019/05/31/candidates-allegedly-backed-beijing-win-4-5-seats-hong-kongs-law-society-governing-board/>.

³⁷ Standard, 'Liberal voices' stay apolitical in Law Society polls', 21 May 2020. Available at: <https://www.thestandard.com.hk/breaking-news/section/4/147683/'Liberal-voices'-stay-apolitical-in-Law-Society-polls>.

³⁸ RTHK English News, 'Law Society head rejects charges over poll email', 14 May 2020. Available at: <https://news.rthk.hk/rthk/en/component/k2/1526091-20200514.htm?spTabChangeable=0>.

³⁹ Hong Kong Free Press, 'The strong and fearless': Hong Kong's pro bono protest lawyers run for Law Society election', 30 April 2020. Available at: <https://hongkongfp.com/2020/04/30/the-strong-and-fearless-hong-kongs-pro-bono-protest-lawyers-run-for-law-society-election/>.

⁴⁰ The Hong Kong Bar Association issued two statements on Wang Quanzhang, one regarding his release pending trial on 18 December 2018 and another on his conviction on 19 February 2019.

Simon Henderson, BComm/LLB/GDLP (ANU), LLM (Fletcher)
simonjhenderson@gmail.com

28 September 2020

With respect to the NSL, the HKBA has issued five statements to date,⁴¹ while the LSHK has only issued two.⁴² The LSHK has been slow to respond on NSL matters and even where they have responded, provided short statements, deploying overtly deferential language towards authorities. It is noteworthy, that the LSHK has not yet issued any statement on the NSL since it came into force, more than three months ago, unlike the HKBA. The response of the LSHK can also be contrasted with legal professional bodies in other countries, many of whom, including the LCA, have been willing to call out how the NSL contradicts the rule of law. The LCA issued statements on 1 June 2020,⁴³ 30 June 2020⁴⁴ and 30 July 2020.⁴⁵ Meanwhile, the International Bar Association (**IBA**) issued statements on 18 June 2020,⁴⁶ 24 June 2020 (joint letter with 84 organisations)⁴⁷ and 1 July 2020.⁴⁸ The 1 July 2020 statement by the IBA, stated in the title of the statement that “China’s National Security Law for Hong Kong contrary to rule of law”. It is also noteworthy that the International Association of Lawyers (**UIA**), which holds the LSHK and HKBA as members, said in their 14 July 2020 statement they were joining with the HKBA, but made no mention of the LSHK.⁴⁹

Since the passage of the NSL, the LSHK has been silent on several substantial rule of law issues arising from the NSL, especially with regards to legal certainty, accountability to the law and fairness in

⁴¹ Hong Kong Bar Association, ‘Statement of Hong Kong Bar Association on proposal of National People’s Congress to enact National Security Law in Hong Kong’, 25 May 2020. Available at: <https://www.hkba.org/sites/default/files/20200525%20-%20Proposal%20of%20National%20People%27s%20Congress%20to%20enact%20National%20Security%20Law%20in%20Hong%20Kong%20%28E%29.pdf>. Hong Kong Bar Association, ‘Drafting of the National Security Law’, 12 June 2020. Available at: <https://www.hkba.org/sites/default/files/20200612%20-%20HKBA%27s%20Statement%20on%20Drafting%20of%20the%20National%20Security%20Law%20English.pdf>. Hong Kong Bar Association, ‘NPCSC’s deliberation of the proposed national security law and reported details’, 19 June 2020. Available at: <https://www.hkba.org/sites/default/files/20200619%20-%20HKBA%20Statement%20of%20HKBA%20on%20reported%20details%20of%20proposed%20NSL%20%28E%29.pdf>. Hong Kong Bar Association, ‘Proposed Designation of Judges by the Chief Executive in National Security Cases’, 23 June 2020. Available at: <https://www.hkba.org/sites/default/files/20200623%20-%20HKBA%20Statement%20on%20the%20Proposed%20Designation%20of%20Judges%20by%20the%20Chief%20Executive%20in%20National%20Security%20Cases%20%28E%29.pdf>. Hong Kong Bar Association, ‘The Law of the People’s Republic of China (“PRC”) on Safeguarding National Security in the Hong Kong Special Administrative Region (“HKSAR”)’, 1 July 2020. Available at: <https://www.hkba.org/sites/default/files/20200701%20HKBA%20statement%20on%20Safeguarding%20National%20Security%20in%20HKSAR.pdf>.

⁴² Law Society of Hong Kong, ‘National Security Legislation Preliminary Observations’, 11 June 2020. Available at: http://www.hklawsoc.org.hk/pub_e/news/submissions/20200611.pdf. Law Society of Hong Kong, ‘National Security Legislation Further Observations’, 24 June 2020. Available at: http://www.hklawsoc.org.hk/pub_e/news/submissions/20200624.pdf.

⁴³ Law Council of Australia, ‘Law Council concerned for Hong Kong’, 1 June 2020. Available at: <https://www.lawcouncil.asn.au/media/media-releases/law-council-concerned-for-hong-kong>.

⁴⁴ Law Council of Australia, ‘Law Council President, Pauline Wright, statement on China imposing security laws in Hong Kong’, 30 June 2020. Available at: <https://www.lawcouncil.asn.au/media/media-releases/statement-on-china-imposing-security-laws-in-hong-kong>.

⁴⁵ Law Council of Australia, ‘Law Council President providing a statement on Hong Kong’s new national security laws’, 30 July 2020. Available at: <https://www.lawcouncil.asn.au/media/news/statement-on-hong-kong-new-national-security-laws>.

⁴⁶ International Bar Association, ‘China’s move to impose National Security Law on Hong Kong condemned by IBA and IBAHRI’, 18 June 2020. Available at: <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=99cfb8ef-70f9-4867-9c38-66d10aa5aede>.

⁴⁷ International Bar Association Human Rights Institute, ‘IBAHRI signs open letter condemning imposition of national security law in Hong Kong’, 24 June 2020. Available at: <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=59ed4313-3f18-43d2-ad4f-e0f2795f1105>.

⁴⁸ International Bar Association, ‘China’s National Security Law for Hong Kong contrary to rule of law’, 1 July 2020. Available at: <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=c4379ed1-73b9-4394-8a59-f21878676598>.

⁴⁹ International Association of Lawyers, ‘Hong Kong National Security Law Threatens the Rule of Law’, 14 July 2020. Available at: <https://www.uanet.org/en/news/hong-kong-national-security-law-threatens-rule-law>.

Simon Henderson, BComm/LLB/GDLP (ANU), LLM (Fletcher)
simonjhenderson@gmail.com

28 September 2020

application of the law. One of the most notable recent omissions, was that LSHK issued no public statement in response to senior HKSAR government officials, including the Secretary for Justice and the Chief Executive, stating that Hong Kong does not have separation of powers.⁵⁰ It is concerning that the peak legal professional body would not issue any public commentary given the significant implications that such comments have for the rule of law and confidence in the independence of the judiciary. Yet again, it was left to the HKBA and other civil society organisations to speak out. The HKBA issued a strong public statement, where they said that the Chief Executive's views were "unfounded and inconsistent" with the "unambiguous" provisions of the Basic Law, noting the importance of the separation of powers in strengthening the rule of law.⁵¹

While the LSHK has proclaimed that one of its most important roles is to "safeguard the rule of law and uphold the principles on which this core value is found",⁵² its public statements often indicate a selective approach towards those principles. For example, during a speech at the opening of the legal year on 13 January 2020, Melissa Pang, President, LSHK, focused heavily on obedience of the law. After several months of consistent protests against the Extradition Bill proposals and calls for greater democratic representation, not a single sentence was devoted to bad laws, laws which lack clarity, are drafted so broadly and were applied unequally.⁵³ Thousands of protestors had been charged with offences throughout 2019 under the Public Order Ordinance, which provides extensive powers to prosecutors under section 19 to define an act as a "riot". Concerns regarding the misuse of laws by prosecutors in relation to the protests in 2019 have been consistently raised by civil society, such as the Hong Kong Universal Periodic Review Coalition.⁵⁴ However, nothing was mentioned. Yet again, the defence on such rule of law issues came from the HKBA. In the opening of the legal year speech by Philip Dykes, Chairman, HKBA,⁵⁵ such concerns formed a prominent component of his remarks. Statements from the LSHK on rule of law issues, especially in the last two years, have focused predominantly on obedience to the law and judicial independence. In doing so, increasingly echoing HKSAR government talking points.

Taking into account the above considerations, while some parts of the legal profession have been quite vocal in respect of the NSL, including the HKBA, PLG and the international legal community, including in Australia, the LSHK has often chosen instead to remain silent. In assessing commitment to the rule of law and being a strong advocate on behalf of the legal profession, my view is that the LSHK fails to meet the bar.

⁵⁰ Radio Free Asia, 'No Separation of Powers' in Hong Kong: Leader Carrie Lam', 1 September 2020. Available at: <https://www.rfa.org/english/news/china/powers-09012020144755.html>.

⁵¹ Hong Kong Bar Association, 'Separation of Powers Principle', 2 September 2020. Available at: <https://www.hkba.org/sites/default/files/20200902%20-%20HKBA%20statement%20on%20separation%20of%20powers%20%28E%29.pdf>.

⁵² Law Society of Hong Kong, 'Annual Report', 2019. Available at: https://www.hklawsoc.org.hk/pub_e/about/report/AR_2019/report_2019.pdf.

⁵³ Speech of Melissa K. Pang, President of the Law Society of Hong Kong, 'Opening of the Legal Year 2020', 13 January 2020. Available at: http://www.hklawsoc.org.hk/pub_e/news/press/20200113.asp.

⁵⁴ Hong Kong UPR Coalition, 'Joint Civil Society Submission from the Hong Kong UPR Coalition', March 2018. Available at: https://www.justicecentre.org.hk/framework/uploads/2019/09/HKUPRC_Submission_MARCH2018.pdf.

⁵⁵ Speech of Philip J. Dykes SC, Chairman of the Bar Association of Hong Kong, 'Opening of the Legal Year 2020', 13 January 2020. Available at: <https://www.hkba.org/sites/default/files/20200113%20-%20Speech%20of%20Chairman%20at%20Opening%20of%20Legal%20Year%202020%20%28Eng%29.pdf>.