

Hong Kong's National Security Law – Things that businesses should know about

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On 30 June 2020, The Law of the People's Republic of China ("PRC") on Safeguarding National Security in the Hong Kong Special Administrative Region (the "National Security Law") was gazetted for promulgation and came into immediate effect in Hong Kong on the same day. Whilst some may welcome the implementation of the National Security Law, others may be concerned about the likely implications of this legislation on their ways of life and business affairs in Hong Kong. This article summarises a number of areas of the National Security Law which are of particular relevance to those who conduct business in Hong Kong.

What is the National Security Law?

The National Security Law was enacted with the stated objective of preventing, suppressing and imposing punishment for the following four principal types of crimes that endanger national security:

1. **Secession**¹ – separating Hong Kong or any part of the PRC from the PRC.
2. **Subversion**² – undermining or overthrowing the power of the PRC Government or that of the Hong Kong Government, by force, threat of force or other unlawful means.
3. **Terrorist Activities**³ – causing grave harm to society with a view to coercing the PRC Government, the Hong Kong Government or the public to pursue a political agenda.
4. **Collusion with a Foreign Country or with External Elements to Endanger National Security**⁴ – spying or disrupting the national security in Hong Kong, for or with the support of a foreign country/external force.

What are the penalties under the National Security Law?

Individuals who contravene the provisions of the National Security Law may face custodial sentence ranging from a short-term detention to life imprisonment, depending on the perpetrators' degree of participation in the prohibited acts and the seriousness of the offence. The National Security Law also allows for deportation of non-permanent residents of Hong Kong⁵, which may be imposed as a sole or additional punishment, even in circumstances where the perpetrator is not prosecuted for any reason.

Where the perpetrator is a company or an organisation, the consequences of violation include imposition of a criminal fine, suspension of operation, and revocation of business licence or permit⁶. Any proceeds obtained from the commission of an offence, including financial aid, gains and rewards, and funds and tools used or intended to be used in the commission of the offence will be seized and confiscated⁷.

What does the National Security Law mean for businesses in Hong Kong?

1. Compliance with the National Security Law

At the risk of stating the obvious, institutions, organisations and individuals in Hong Kong should be fully aware of and comply with the provisions of the National Security Law, and should not engage in any act or activity which endangers national security.

Those carrying on business in Hong Kong may need to pay particular attention to whether any funds or properties they receive, provide or process will be used to support activities that may be perceived as endangering national security, as the National Security Law makes it unlawful for a person to assist in, abet or provide pecuniary or other financial assistance or property for the commission of crimes of secession⁸ or subversion⁹. It is also an offence for a person to provide support, assistance or facility such as training, weapons, information, funds, supplies, labour, transport, technologies or venues to a terrorist organisation¹⁰ or a terrorist, or for the commission of a terrorist activity¹¹. Businesses should therefore conduct appropriate levels of due diligence and monitoring on their business counterparties with whom they have or will have dealings to ensure that these dealings would not be caught by the prohibitions under the National Security Law. It will also be prudent to develop a contingency plan in anticipation of potential detection of any counterparties' involvement in activities endangering national security.

In addition, Article 2 of the National Security Law stipulates that no institution, organisation or individual in Hong Kong shall, in exercising their rights and freedoms, contravene the principles set out in Articles 1 and 12 of Hong Kong's Basic Law (i.e. that Hong Kong is an inalienable part of the PRC, and that Hong Kong shall be a local administrative region of the PRC, enjoying a high degree of autonomy and coming directly under the Central People's Government). This prohibition may be of particular relevance to the business sector when it comes to communications with the general public, and businesses should exercise caution in this regard.

2. Extra-territorial Scope of Application of the National Security Law

It should be noted that the National Security Law has a global reach. Articles 36 to 38 provide that the National Security Law applies to offences committed on board a vessel or aircraft registered in Hong Kong as well as offences committed outside Hong Kong, whether by Hong Kong permanent residents, companies/organisations incorporated in Hong Kong, or non-Hong Kong permanent residents. Also, an offence will be deemed to have been committed in Hong Kong if an act constituting the offence or the consequence of the offence occurs in Hong Kong.

In light of these articles, companies/organisations in Hong Kong that have operations or establishments in foreign lands should take steps to raise awareness and ensure that their foreign associates are duly informed of and will comply with the requirements under the National Security Law.

3. Assistance to Law Enforcement Agencies

Article 43 of the National Security Law (together with its implementation rules gazetted on 6 July 2020) grants the law enforcement agencies (i.e. the Hong Kong Police Force, the Secretary for Security and the Secretary for Justice) an array of powers when handling cases concerning offences endangering national security. Among other things, they can:

- a. Without a warrant from the Magistrates' Court, enter and search places (including vehicles, vessels, aircraft, tent and structure, and electronic equipment), and inspect, seize and detain anything that is believed to be evidence of an offence;

- b. Freeze, restrain, confiscate and forfeit property relating to the commission of an offence endangering national security (including any properties of a person who participates in or facilitates the commission of an offence endangering national security, or any properties that are intended to be used or were used to finance or otherwise assist the commission of an offence);
- c. Remove messages endangering national security, and require platform service providers, hosting service providers and/or network service providers to provide assistance; and
- d. With permission of the Chief Executive, carry out interception of communications and conduct covert surveillance on a suspect.

Any person who without reasonable excuse fails to cooperate with the law enforcement agencies may attract criminal liability, and could be punished with varying levels of fine and lengths of imprisonment, depending on the requirements that were not complied with. For example, a person who knowingly contravenes a notice issued by the Secretary for Security to freeze offence-related property will be liable on conviction on indictment to a fine and to imprisonment for seven years. Businesses in Hong Kong are advised to take note of the extent of the powers of the law enforcement agencies, and develop an effective reaction plan in response to legitimate requests for assistance in support of enforcement actions.

Notably, the implementation rules impose an obligation on anyone who knows or suspects that any property is property related to an offence endangering national security to make a disclosure to the Hong Kong Police Force as soon as is reasonably practicable, and not to disclose to another person any information which is likely to prejudice any investigation which might be conducted following the disclosure. This duty of confidentiality echoes the requirement under Article 63 of the National Security Law, mandating those who assist with the handling of a case concerning offences endangering national security to keep confidential any information pertaining to the case.

What else should businesses in Hong Kong consider?

Whilst the Hong Kong Government has assured, on various occasions, that the legislation only targets an extremely small minority of criminals, and the basic rights and freedoms enjoyed by the majority of citizens will be protected, the legislation unfortunately has provoked negative reactions from various foreign countries, with concerns having been raised around the ambiguity of several provisions of the legislation. Repeated commentary about the legislation demands greater clarity as to the implications of the new law. That clarity, however, will only come in time once the law has been interpreted and fully implemented. In addition to the implications discussed above, businesses should also have in focus the following matters.

On 14 July 2020, United States President Donald Trump signed into law the *Hong Kong Autonomy Act of 2020* and issued an executive order, declaring it will be the policy of the United States to suspend or eliminate different and preferential treatment for Hong Kong in relation to China. Among other things, the executive order introduced a series of policy changes to Hong Kong's preferential status, such as:

- a. Eliminating the preference for Hong Kong passport holders as compared to PRC passport holders;
- b. Invoking licence exceptions for exports to Hong Kong, re-exports to Hong Kong and transfers within Hong Kong of "dual-use" items (i.e. items which are designed for commercial purposes, but which could have military applications, such as computers, aircraft and pathogens) that provide differential treatment compared to those licence exceptions applicable to China;
- c. Requiring all imported goods from Hong Kong to be marked as goods from the PRC pursuant to section 1304 of title 19, United States Code (a statute governing country-of-origin labelling for imported goods), thereby effectively treating goods from Hong Kong the same as those from the PRC for duty purposes; and

- d. Suspending Hong Kong's special treatment under the Arms Export Control Act (a statute on control of the export of defence articles and services) and the *Export Control Reform Act of 2018* (a statute on control of export, re-export, and transfer of commodities, software, and technology).

Businesses with frequent trade deals with United States entities should now perform a comprehensive review of their business models and develop a business continuity plan in view of the recent shift in the economic and regulatory landscape. For others, it is advisable to monitor the reactions of the United States and other countries to detect any policy changes that may adversely affect their business operations.

As of the date of this article, we have yet to see any other countries similarly imposing economic sanctions or revoking preferential treatments in response to the enactment of the National Security Law, although some, including Canada, Australia and the United Kingdom, have reacted by suspending extradition treaties with Hong Kong (to which the Hong Kong Government has responded by issuing notices to suspend the implementation of those treaties).

If you would like to understand more about the potential implications of the National Security Law on your businesses and practices, you may contact one of the authors of this article. We are happy to address any queries you might have in relation to the legislation.

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1. This offence is defined under Article 20 of the National Security Law to cover organising, planning, committing or participating in any of the following acts:
 1. Separating Hong Kong or any other part of the PRC from the PRC;
 2. Altering by unlawful means the legal status of Hong Kong or any other part of the PRC; or
 3. Surrendering Hong Kong or any other part of the PRC to a foreign country,with a view to committing secession or undermining national unification, whether or not by force or threat of force.↩
 2. This offence is defined under Article 22 of the National Security Law to cover organising, planning, committing or participating in any of the following acts:
 1. Overthrowing or undermining the basic system of the PRC established by the Constitution of the PRC;
 2. Overthrowing the body of central power of the PRC or the body of power of Hong Kong;
 3. Seriously interfering in, disrupting or undermining the performance of duties and functions in accordance with the law by the body of central power of the PRC or the body of power of Hong Kong; or
 4. Attacking or damaging the premises and facilities used by the body of power of Hong Kong to perform its duties and functions, rendering it incapable of performing its normal duties and functions,with a view to subverting the State power, by force or threat of force or other unlawful means.↩
 3. This offence is defined under Article 24 of the National Security Law to cover organising, planning, committing or participating in or threatening to commit any of the following terrorist activities causing or intended to cause grave harm to society:
 1. Serious violence against a person or persons;
 2. Explosion, arson, or dissemination of poisonous or radioactive substances, pathogens of infectious diseases or other substances;
 3. Sabotage of means of transport, transport facilities, electric power or gas facilities, or other combustible or explosible facilities;
 4. Serious interruption or sabotage of electronic control systems for providing and managing public services, such as water, electric power, gas, transport, telecommunications and the internet; or
 5. Other dangerous activities which seriously jeopardise public health, safety or security, causing or intending to cause harm to society,with a view to coercing the Central People's Government, the Hong Kong Government or an international organisation or intimidating the public in order to pursue political agenda.↩
 4. This offence is defined under Article 29 of the National Security Law to cover stealing, spying, obtaining with

payment, or unlawfully providing State secrets or intelligence concerning national security for a foreign country or an institution, organisation or individual outside the mainland, Hong Kong and Macao of the PRC, as well as requesting or conspiring with, or directly or indirectly receiving instructions, control, funding or other kinds of support from a foreign country or an institution, organisation or individual outside the mainland, Hong Kong and Macao of the PRC to commit the acts of:

1. Waging a war against the PRC, or using or threatening to use force to seriously undermine the sovereignty, unification and territorial integrity of the PRC;
 2. Seriously disrupting the formulation and implementation of laws or policies by the Hong Kong Government or the Central People’s Government, which is likely to cause serious consequences;
 3. Rigging or undermining an election in Hong Kong, which is likely to cause serious consequences;
 4. Imposing sanctions or blockade, or engaging in other hostile activities against Hong Kong or the PRC;
 5. Provoking by unlawful means hatred among Hong Kong residents towards the Central People’s Government or the Hong Kong Government, which is likely to cause serious consequences.↵
5. Article 34 of the National Security Law.↵
 6. Article 31 of the National Security Law.↵
 7. Article 32 of the National Security Law.↵
 8. Article 21 of the National Security Law.↵
 9. Article 23 of the National Security Law.↵
 10. “Terrorist organisation” is defined under Article 25 of the National Security Law as an organisation which commits or intends to commit the offence under Article 24 of the National Security Law or participates or assists in the commission of the offence.↵
 11. Article 26 of the National Security Law.↵

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