

The New National Security Law for Hong Kong Takes Effect

July 2, 2020

On June 30, the Standing Committee of the National People's Congress (the "**Standing Committee**") in the People's Republic of China ("**China**") unanimously passed *The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region* (the "**Law**").

Later that day, the Law was inserted into Annex III of the Basic Law, the mini constitution of the Hong Kong Special Administrative Region ("**Hong Kong**"), gazetted for promulgation in Hong Kong and took effect at 11:00 p.m. Hong Kong time. At that point, the Law, comprising six chapters and 66 articles, was published for the first time.

While the broad contours of the Law had been described in an earlier statement released by the Standing Committee on June 20 (covered in our [last alert](#) on this topic), the publication of the Law puts to an end speculation about several key matters. The summary below covers or reflects these and other provisions of the Law.

Preserving National Security

- In addition to safeguarding national security and preventing, suppressing and punishing the offences covered in the Law, the multi-pronged objectives of the Law also include ensuring the implementation of the One Country, Two Systems policy, maintaining the prosperity of Hong Kong and protecting the rights of Hong Kong people.
- The Central People's Government ("**CPG**") in China has overarching responsibility for national security affairs relating to Hong Kong. The executive authorities, legislature and judiciary in Hong Kong are all required to prevent, suppress and impose punishment for any act or activity endangering national security in accordance with the Law and other relevant laws. It is also stipulated to be the "*common responsibility of all the people of China, including the people of Hong Kong, to safeguard the sovereignty, unification and territorial integrity of [China].*"
- Hong Kong must "*strengthen its work on safeguarding national security and prevention of terrorist activities*" and use necessary measures "*to strength public communication, guidance, supervision and regulation...including those relating to schools, universities, social organizations, the media and the internet.*" The Law

Contact Information

If you have any questions concerning this alert, please contact:

Daniel L. Cohen

Consultant

Daniel.cohen@akingump.com

Hong Kong

+852 3694.3032

Tatman R. Savio

Registered Foreign Lawyer

Tatman.savio@akingump.com

Hong Kong

+852 3694.3015

Anne-Marie Godfrey

Partner

Anne-marie.godfrey@akingump.com

Hong Kong

+852 3694.3040

Stephen S. Kho

Partner

skho@akingump.com

Washington, D.C.

+1 202.887.4459

Clete R. Willems

Partner

cwillems@akingump.com

Washington, D.C.

+1 202.887.4125

also refers to the promotion of national security education in schools and universities.

Constitutional protections

- Human rights are required to be respected and protected in the safeguarding of national security. Specifically, this involves the protection of the freedoms of speech, the press and publication, association, assembly and demonstration, which, the Law records, are enjoyed by Hong Kong people under the Basic Law and the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, as applied to Hong Kong.
- Adherence to the principle of the rule of law, the presumption of innocence and protection from “double jeopardy” are also explicitly covered.

Hong Kong Enforcement Bodies and Governance Arrangements

- The Hong Kong government is required to establish a new body, the Committee for Safeguarding National Security (the “**Committee**”), which is to have responsibility for safeguarding, and affairs relating to, national security in Hong Kong.
- While it is a Hong Kong establishment, the Committee will work under the supervision of, and be accountable to, the CPG.
- The Committee will be chaired by the Chief Executive, Hong Kong’s head of government (the “**Chief Executive**”). Other members are individuals occupying various Hong Kong public offices. The Committee will function through a secretariat led by a Secretary-General who is nominated by the Chief Executive but appointed by the CPG. The Committee will also have a national security adviser designated by the CPG.
- The Committee is required by the Law to do a number of things to safeguard national security in Hong Kong, including formulating policies, advancing the development of legal and enforcement mechanisms, and “*coordinating major work and significant operations*”.
- It appears that the Committee will operate largely or entirely in a confidential manner. The Law states that the Committee will not publicly disclose information about its work and that its decisions cannot be challenged through “judicial review” (a procedure that enables a person to challenge the legality of a decision made by a public body or authority in Hong Kong).
- The Law also requires the Hong Kong Police Force to establish a department for safeguarding national security, headed by an individual nominated by the Chief Executive after seeking an opinion from the CPG Office in Hong Kong. This department may recruit qualified professionals and technical personnel from outside of Hong Kong. Among its many functions, the department will be involved in “*collecting and analysing intelligence and information concerning national security*” and “*conducting counter-interference investigations and national security review*”. However, the department’s remit potentially extends beyond these and other specific acts mentioned in the Law in terms of “performing other duties and functions necessary for the enforcement of this Law.”
- When investigating offences, the Hong Kong Police Force can take measures that are permitted to be taken by the police in Hong Kong and measures specified in the Law, which include (among other things) searches of electronic devices, “*requiring*

a person who published information or the relevant service provider to delete the information or provide assistance” and, “upon approval of the Chief Executive, carrying out interception of communications and conducting covert surveillance on a person who is suspected, on reasonable grounds, of being involved in the commission of an offence endangering national security.”

- In addition, the police can order any person suspected of having committed an offence endangering national security to surrender travel documents, or prohibit the person from leaving Hong Kong.
- The Hong Kong Department of Justice is likewise required to establish a specialized division, in this case to handle prosecutions of national security offences. The head of the division is to be appointed by the Chief Executive after seeking an opinion from the CPG Office, and prosecutors working within the division will also be appointed by the Chief Executive after obtaining consent from the Committee.
- Overall, the Law stipulates that the Chief Executive is to be accountable to the CPG for all affairs relating to national security and that he or she must submit an annual report on the performance of national security duties in Hong Kong.

The CPG Office

- The Law requires a new office of the CPG to be established in Hong Kong for safeguarding national security (the “**CPG Office**”).
- The staffing of the CPG Office will be handled by national security authorities working under the CPG. The Law requires the staff to abide by Hong Kong as well as national laws, but they will be under the supervision of national supervisory authorities and their actions in the course of undertaking their duties will not be subject to the jurisdiction of Hong Kong. A holder of an identification card issued by the CPG Office cannot be subject to inspection, search or detention by law enforcement in Hong Kong.
- The CPG Office remit includes *“providing opinions and making proposals on major strategies and important policies for safeguarding national security; overseeing, guiding, coordinating with and providing support to [Hong Kong] in the performance of its duties for safeguarding national security; collecting and analysing intelligence and information concerning national security; and handling cases concerning offences of endangering national security in accordance with the law.”* The CPG Office is also required to strengthen working relations and cooperation between various mainland organs in Hong Kong, including the Liaison Office, the Office of the Commissioner of the Ministry of Foreign Affairs and the Hong Kong Garrison of the Chinese People’s Liberation Army.
- In collaboration with the Commissioner of the Ministry of Foreign Affairs in Hong Kong and the Hong Kong government, the CPG Office shall *“take necessary measures to strengthen the management of and services for organs of foreign countries and international organizations in [Hong Kong], as well as non-governmental organizations and news agencies of foreign countries...”*

National Security Crimes

- Four series of offences are established by the Law. They relate to the crimes of secession, subversion of state power, terrorist activities and collusion with a foreign country or with external elements to endanger national security. The offences are

broadly defined and generally capture individuals directly involved in planning, committing or participating in the relevant conduct, as well as those who incite, assist, abet or provide pecuniary or other financial assistance or property for the commission of an offence relating to secession or subversion.

- It appears that most, but not all, of the offences may require an element of intention on the part of the perpetrator to achieve a particular outcome.
- Penalties for the offences vary in some respects, but are typically dependent on the level of an individual's involvement and the gravity of an offence. This ranges from life imprisonment or a fixed-term of imprisonment of not less than 10 years to a fixed-term of not more than three years, or short-term detention or "restriction" (which could include a range of penalties, such as community service).
- The Law confirms that corporations (and unincorporated bodies) which commit an offence may be criminally fined and that their operations shall be suspended or their licenses or business permits revoked.
- The following is a high level summary of the key features of the offences (not a complete or exhaustive description):

Secession

Acts undertaken, whether or not by the use or threat of force, "*with a view to committing secession or undermining national unification*". The acts include separating Hong Kong or any other part of China from the rest of China; altering by unlawful means the legal status of Hong Kong or of any other part of China or surrendering Hong Kong or any other part of China to a foreign country.

Subversion

Acts by force or threat of force or other unlawful means, "*with a view to subverting state power.*" The acts include overthrowing or undermining the basic system of China established under the Chinese Constitution and overthrowing the body of central power of China or of Hong Kong.

The acts also include the following, potentially wider matters: "*seriously interfering in, disrupting, or undermining the performance of duties and functions in accordance with the law by the body of central power of [China] or the body of power of [Hong Kong]; or 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*".

Terrorist activities

A range of specified violent, dangerous and/or disruptive actions which have the effect of "*causing or intending to cause grave harm to society*" and are undertaken, "*with a view to coercing the [CPG], the [Hong Kong government] or an international organisation or intimidating the public in order to pursue a political agenda.*"

The offences also cover organizing or taking charge of a terrorist organization, as well as providing support to a terrorist organization, a terrorist or the commission of terrorist activity.

Further, it is also an offence to advocate terrorism or incite the commission of terrorist activity.

Collusion with a foreign country or with external elements to endanger national security

This refers to a person who steals, spies, obtains with payment or unlawfully provides state secrets (not defined by the Law) or intelligence concerning national security for a foreign country or an institution, organization or individual outside China.

It is also an offence to request a foreign country, institution, organization or individual outside China, or to conspire with or receive any kind of support from any of the foregoing, to commit various acts. These acts include (among others), “*using or threatening to use force to seriously undermine the sovereignty, unification and territorial integrity of [China]*”, “*seriously disrupting the formulation and implementation of laws and policies by the [Hong Kong government] or the [CPG] which is likely to cause serious consequences*”, “*rigging or undermining an election in [Hong Kong], which is likely to cause serious consequences*” and, “*imposing sanctions or a blockade or engaging in other hostile activities against [Hong Kong] or [China]*.”

Another prohibited act is described as, “*provoking by unlawful means hatred among Hong Kong residents towards the CPG or [Hong Kong government], which is likely to cause serious consequences.*”

- The Law includes a significant element of extraterritorial application. More particularly, it is stated to apply to offences under the Law which are committed in Hong Kong, meaning the act constituting the offence or the consequence of the offence occurs in Hong Kong. Further, the Law states that it applies to permanent residents of Hong Kong, and corporations and unincorporated bodies that are set up in Hong Kong, who commit an offence under the Law outside of Hong Kong. In addition, it applies to offences under the Law committed against Hong Kong by non-permanent residents of Hong Kong.

Enforcement and Jurisdiction

- Except in cases where the CPG Office exercises jurisdiction (see below), Hong Kong is to have jurisdiction over national security cases.
- For cases within Hong Kong’s jurisdiction, both the Law and Hong Kong local law shall apply to procedural matters related to criminal investigations, prosecutions, trials, and penalties.
- The judges who hear national security cases in Hong Kong will be designated by the Chief Executive from among individuals who currently serve as, or are former, magistrates and judges in Hong Kong. The Chief Executive may consult with the Committee (among others) before making a designation and appointees will have a one-year term of office. An individual who has “*made any statement or behaved in any manner endangering national security*” is not eligible to serve as a national security judge.
- Trials are to be conducted in open court, but “*when circumstances arise such as a trial involving State secrets or public order, all or part of the trial shall be closed to the media and the public but the judgment shall be delivered in an open court.*” Further, for national security criminal proceedings before the Hong Kong High Court, the Hong Kong Secretary for Justice may direct a case to be tried without a jury on the grounds of, among others, the protection of state secrets or involvement

of foreign factors. In such a case, the trial will be conducted without a jury by a panel of three judges.

- In certain circumstances, the CPG Office will exercise jurisdiction over a case. This will happen upon approval of the CPG of a request made by the Hong Kong government or the CPG Office itself. The circumstances must be that “*the case is complex due to the involvement of a foreign country or external elements, thus making it difficult for [Hong Kong] to exercise jurisdiction over the case; a serious situation occurs where the [Hong Kong government] is unable to effectively enforce this Law; or a major and imminent threat to national security has occurred*”.
- Where the CPG Office exercises jurisdiction, mainland Chinese law will apply to procedural matters related to the investigation, examination and prosecution, trial and penalty. Further, mainland Chinese authorities shall designate a prosecuting body and court to adjudicate the charges.

Implementation

Many provisions of the Law are open to interpretation in some respects and could possibly invite a flexible application. We will need to see how the Law is implemented and applied in practice, including the manner in which enforcement bodies conduct their operations, before we know what many aspects of the Law mean in everyday terms.

The Law states that, in the case of any inconsistency, the Law shall prevail over Hong Kong (local) law. The Law is also subject to interpretation by the Standing Committee. We can therefore expect oversight by the CPG and the Standing Committee in the resolution of interpretational matters going forward.

At the time the Law entered force in Hong Kong, we know that the work of implementing it was already underway. A statement released on June 30 by the Hong Kong government stated that, “*the Police and the Department of Justice have earlier made preparations for the establishment of dedicated units. As the National Security Law has come into effect, the Police will establish a dedicated National Security Department on July 1 to handle the relevant work.*” The statement also referred to the setting up of the Committee “as soon as possible”. On July 1, the first arrests reportedly were made in Hong Kong in respect of alleged conduct prohibited under the Law.

International Reaction

The Law has triggered a variety of responses internationally.

On July 1, coalitions of countries spoke out both in favor and against the Law at the United Nations. Cuba read a statement in support of the Law on behalf of 53 countries, including Pakistan, Myanmar and Cameroon, among others. The United Kingdom (“**U.K.**”) read a statement opposing the Law on behalf of 27 countries, including the majority of EU Member States, Japan, Australia, and Canada, among others.

For its part, the United States (“**U.S.**”) has already begun the process of enacting measures in response. In anticipation of the promulgation of the Law, on June 29, the Trump Administration announced certain changes to the U.S. government’s treatment of Hong Kong as a customs territory separate from mainland China. Specifically, the Secretary of Commerce issued a statement indicating the suspension of preferential

treatment for exports to Hong Kong over mainland China ([see here](#)), while the Secretary of State announced that the U.S. would “end” controlled defense exports to Hong Kong ([see here](#)). In subsequent guidance issued June 30, the Department of Commerce suspended Hong Kong’s eligibility to receive exports, re-exports, and transfers of items subject to the Export Administration Regulations pursuant to license exceptions that provide differential treatment from those available for mainland China. It is not yet clear when or if the Trump Administration will take further action to remove other aspects of Hong Kong’s special status under U.S. international trade laws. In addition, both the U.S. House of Representatives and the U.S. Senate have passed by unanimous consent similar, but not identical, versions of the Hong Kong Autonomy Act, which would impose certain sanctions measures on foreign persons, including foreign financial institutions, in relation to the perceived infringement of Hong Kong’s autonomy resulting from the passage of the Law. The Senate will need to vote on and pass the House version of the legislation before it goes to the President for signature.

Another notable response has been that of the U.K.. On June 2, the Foreign Secretary announced a bespoke immigration route for Hong Kong holders of British National (Overseas) status who are to be given limited leave to remain and work in the U.K., following which they may apply for settled status and citizenship in the UK. Certain Members of Congress are also pushing for the United States to adopt a similar policy.

akingump.com