

The Law of the PRC on Safeguarding National Security in the HKSAR: Business Impact in Hong Kong

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On the evening of 30 June 2020, the Hong Kong Government gazetted the [Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region](#) (NSL) with the new law taking immediate effect that day. In addition, on 6 July 2020, the Chief Executive, in conjunction with the National Security Committee, exercised her powers under Article 43 of the National Security Law to make implementation rules for law enforcement agencies. As such, the [Operating Principles and Guidelines for Application for Authorization to Conduct Interception and Covert Surveillance](#) (Operating Principles and Guidelines), and the [Implementation Rules for Article 43 of NSL](#) (Implementation Rules) have both been adopted and now have the force of law.

The NSL raises important legal and compliance questions for businesses with operations in Hong Kong and for offshore operations serving Hong Kong. It is important for all companies with a nexus to Hong Kong to be mindful of the implications of the new legislation and keep informed to stay in compliance with its legal obligations.

This note provides a high-level overview of the NSL, with a focus on how companies can manage compliance risks under the law.

Establishment of the National Security Committee and the Office for Safeguarding National Security

The NSL creates a new national security apparatus in Hong Kong, mandating the Hong Kong Government to establish a National Security Committee (NSC) which has responsibility for safeguarding national security. The NSC is chaired by Hong Kong's Chief Executive. The NSL separately provides that the Central People's Government (the mainland China Government, or CPG) shall designate a national security advisor who will sit in on NSC meetings and advise the NSC on matters relating to the NSC's duties and functions.

The NSL also mandates the CPG set up the Office for Safeguarding National Security (OSNS) in Hong Kong, a bureau of the Chinese central Government located in Hong Kong that is responsible for analysing and assessing developments in relation to safeguarding national

security, collecting and analysing intelligence and handling cases concerning national security offences. Critically, as further explained below, the OSNS may, with the CPG's approval, exercise jurisdiction over national security cases in certain circumstances.

Scope

The NSL has wide potential scope, applying to persons and organizations within Hong Kong and outside of Hong Kong where the consequences of the offence occur in Hong Kong. Therefore, persons and organizations may violate the NSL even when they are not physically located in Hong Kong.

Offences

There are four crimes punishable under the NSL: secession, subversion, terrorist activities and collusion with a foreign country or with external elements to endanger national security.

1. Secession

A person can be found guilty of secession if he or she organises, plans, commits, or participates in any of the following acts, whether or not by force or threat of force, with a view to committing secession or undermining national unification:

- (a) separating HKSAR or any part of PRC from the PRC;
- (b) altering by unlawful means the legal status of HKSAR or of any part of the PRC; or
- (c) surrendering the HKSAR or any part of the PRC to a foreign country.

A person who incites, assists in, abets or provides pecuniary or other financial assistance or property for the commission by another of the crime of secession shall also be guilty of an offence.

Those convicted of active participation in the commission of a secession offence may receive a minimum sentence of three years and a maximum of ten years. Principal offenders can be sentenced to a minimum of ten years and a maximum of life imprisonment.

The offence also covers those who incite, assist in, abet or provide financial assistance for the commission of secession, with penalties of up to ten years' imprisonment in serious cases, with maximum term of imprisonment of five years in cases of a minor nature.

2. Subversion

A person can be found guilty of subversion if he or she organises, plans, commits, or participates in any of the following acts by force or other unlawful means with a view to subverting the state power:

- (a) overthrowing or undermining the basic system of the PRC established by the constitution of the PRC;
- (b) overthrowing the central PRC Government or the Hong Kong Government;
- (c) seriously interfering in, disrupting, or undermining the performance of duties and functions of central PRC Government or the Hong Kong Government; or

- (d) attacking or damaging the premises and facilities used by the Hong Kong Government to perform its duties and functions, rendering it incapable of performing its normal duties and functions.

There is a minimum sentence of three years and a maximum of ten years' imprisonment for "active participation" in subversion. Principal offenders can expect a minimum sentence of ten years with a maximum of life imprisonment.

A person who incites, assists in, abets, or provides pecuniary or other financial assistance or property for the commission by the other person of subversion, shall also be guilty of an offence. The maximum sentence is ten years' imprisonment.

3. Terrorist acts

A person who organizes, plans, commits, participates in or threatens to commit any of the following terrorist activities causing or intending to cause grave harm to society, with a view to coercing the central PRC Government, the Hong Kong Government or an international organization or intimidating the public in order to pursue a political agenda shall be guilty of an offence:

- (a) serious violence against a person or persons;
- (b) arson, causing explosion, or dissemination of poisonous or radioactive substances;
- (c) sabotage means of transport, electricity power, or gas facilities;
- (d) serious interruption or sabotage of electronic control systems for providing and managing public services such as water, electricity, gasoline, telecommunication and the internet; or
- (e) other dangerous activities that seriously jeopardise public health, safety or security.

Penalties range from ten years' imprisonment up to life imprisonment for offences causing serious bodily injury, death or significant loss of public or private property.

A person who organises or takes charge of a terrorist organisation is liable to a minimum term of ten years and a maximum term of life imprisonment.

A person who incites the commission of terrorist activity may be liable to a term of between five and ten years' imprisonment, criminal fines or property confiscation.

A person who provides support, assistance or facilitates such as training, weapons, information, funds, supplies, labour, transport, technologies, or venues to a terrorist organisation or a terrorist, or for the commission of terrorist activities, shall also be guilty of an offence. The maximum sentence for such activities is ten years' imprisonment.

4. Collusion with foreign forces

A person who:

- (a) steals, spies, obtains with payment or unlawfully provides state secrets or intelligence concerning national security, in each case, for a foreign country or institution, organization or individual outside the PRC;
- (b) requests a foreign country or an institution, organization or individual outside the PRC; or

- (c) directly or indirectly receives instructions, control, funding or other kinds of support from a foreign country or an institution, organization or individual outside of the PRC,

to commit any of the following acts shall be guilty of an offence:

- (i) 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;
- (ii) Seriously disrupting the formulation and implementation of laws or policies by the HKSAR or by the Central People's Government, which is likely to cause serious consequences;
- (iii) Rigging or undermining an election in the HKSAR, which is likely to cause serious consequences;
- (iv) Imposing sanctions or blockades, or engaging in hostile activities against the HKSAR or the PRC; or
- (v) Provoking by unlawful means hatred among Hong Kong residents towards the Central People's Government or the HKSAR Government, which is likely to cause serious consequences.

Penalties range from ten years' imprisonment up to life imprisonment for offences of a grave nature or a fixed-term imprisonment of not less than ten years.

Aggravating Measure for Foreign Involvement in Secession or Subversion

The NSL also includes an aggravating measure for foreign involvement in secession or subversion, providing that any person who conspires with or directly or indirectly receives instructions, control, funding or other kinds of support from a foreign country or an institution, organization, or individual outside the PRC to commit the offences of secession or subversion shall be liable to a more severe penalty under those offences.

Powers of Investigation

Article 43 of the NSL creates a set of additional investigatory powers in relation to national security offences being investigated by the Hong Kong authorities, including search powers, and obligations to delete information, provide information or provide assistance.

On 6 July 2020, the Hong Kong Government gazetted the Operating Principles and Guidelines for Application for Authorization to Conduct Interception and Covert Surveillance as well as the Implementation Rules for Article 43 of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, which provide some specifics as to how the authorities may exercise these new investigatory powers.

Enforcement and Potential Diversion to Chinese Criminal Process and Adjudication

The NSL requires the Hong Kong Police Force to establish a specific department responsible for safeguarding national security and investigating national security offences. The Hong Kong Department of Justice is required to establish a specialized prosecution division in relation to national security offences. Prosecutions may not be instituted under the NSL without the written consent of the Secretary for Justice.

However, following a request to the CPG made by either the Hong Kong Government or the OSNS, under Article 55 of the NSL the CPG may direct that the OSNS exercise jurisdiction over a case concerning national security if:

- (i) the case is complex due to the involvement of a foreign country or external elements;
- (ii) a serious situation occurs where the Hong Kong Government is unable to effectively enforce the NSL; or
- (iii) a major and imminent threat to national security has occurred.

A case falling under the ambit of Article 55 will be handled in accordance with PRC criminal law and its relevant criminal procedures.

Common Law Interpretation Questions

The NSL has been implemented as part of the Basic Law. Pursuant to Article 65 of the NSL, ultimate interpretative authority rests with the Standing Committee of the National Peoples' Congress. It follows that there is uncertainty as to the extent to which in practice interpretation of the NSL will be a matter of common law interpretation by the Hong Kong judiciary (supported by, for example, the implementing rules under Article 43) as opposed to interpretations by the CPG's NPCSC.

Greater understanding of the scope and impact of the NSL will no doubt increase over time, but given the severity of the penalties for non-compliance, it is important for organizations to have a clear understanding of the offences and the investigatory powers available to law enforcement under the new law and manage risk accordingly.

Assisting and Abetting Clauses

International businesses should pay particular attention to the "assisting and abetting" clauses prohibiting the provision of pecuniary or other financial assistance or property in the assistance of crimes under the NSL.

Articles 21 and Article 23 of the NSL state that whoever incites, assists in, abets, or provides pecuniary or other financial assistance or property for the commission by other persons of the offences of secession and subversion shall be guilty of an offence. Similarly, under Article 26, whoever provides support, assistance or facility such as training, weapons, information, funds, supplies, labour, transport, technologies or venues to a terrorist organisation or a terrorist, or for the commission of a terrorist activity; or manufactures or illegally possesses hazardous substances or uses other means to prepare for the commission of a terrorist activity shall also be guilty of an offence. As noted, the NSL has extra-territorial effect in relation to the acts of an offence committed outside of Hong Kong, where the consequences of the offence occur in Hong Kong.

The potential scope of "financial assistance", "technologies" and "venues" should be carefully assessed. Financial institutions, network service providers, and other technology companies should pay particular attention and seek advice on how to comply with the NSL's requirements.

Conclusion

The NSL is a critically important legal development for Hong Kong that raises jurisdictional, investigatory, procedural and interpretation questions for companies doing business in and with Hong Kong. In order to effectively mitigate the risk of violating the law, companies should stay apprised of all legal and regulatory developments under the NSL, take a full review of current operations, clients, and public statements to ensure current compliance, and ensure any future actions are consistent with the law.

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