

Hong Kong's National Security Law ("NSL")



The NSL became law at 11 pm on 30 June 2020 on the Chief Executive signing the law's promulgation. The NSL is both a PRC national and Hong Kong regional law.

By virtue of its insertion into Annex III of the Basic Law ("**BL**"), Article 18 of the BL¹ was satisfied allowing the national parts of the law to apply within the HKSAR.

Some comments on the NSL are made at the end of this note, in summary: it is early days and there is a lot of uncertainty about what is going to happen.

Article 1 of the NSL states that the law's purposes include to:

- Deter, end and punish the criminal offences of secession, subversion, terrorist activities and collusion with a foreign country or external elements to endanger national security (the "**Offences**");
- Maintain the HKSAR's prosperity and stability; and
- Protect the lawful rights and interests of HKSAR residents.

The NSL is divided into six chapters with 66 Articles with extensive implementation rules².

The above purposes are to be achieved with: (i) a substantive law which provides for the Offences and their penalties; (ii) a procedural law in relation to enforcement, prosecution and trial of the Offences; and (iii) an organisation law which establishes responsible bodies for the NSL.

1. General Principles of the NSL

Articles 1 and 12 of the BL provide that the HKSAR is an inalienable part of the PRC and shall have a high degree of autonomy under the Central People's Government.

It is stated in **Article 2** of the NSL that as a matter of general principle Articles 1 and 12 of the BL are its fundamental provisions.

Therefore under the NSL when exercising rights and freedoms in the HKSAR any institution, organisation and individual shall not contravene Articles 1 and 12 of the BL.

2. Offences

Secession (Article 20) is the act of: (i) separating the HKSAR or any other part of the country from the PRC; (ii) altering by unlawful means the legal status of the HKSAR or any other part of the PRC; or (iii) surrendering the HKSAR or any other part of the PRC to a foreign country.

A person who organises, plans, commits or participates in these acts or who contrary to **Article 21** of the NSL incites, assists in, abets or provides pecuniary or other financial assistance or property for their commission commits a criminal offence.

¹ PRC law cannot apply to Hong Kong unless the law is listed in Annex III.

² Law with effect from 7 July 2020.

Subversion (Article 22) is the act of: (i) overthrowing or undermining the basic system of the PRC established by its Constitution; (ii) overthrowing the body of central power of the PRC or the body of power of the HKSAR; (iii) seriously interfering in, disrupting or undermining the performance of the duties and functions by the body of central power of the PRC or body of power of the HKSAR; or (iv) attacking or damaging the premises and facilities used by the body of power of the HKSAR to perform its duties and functions, rendering it incapable of performing its normal duties and functions.

A person who organises, plans, commits or participates in any of these acts by force or threats of force or other unlawful means or who contrary to **Article 23** of the NSL incites, assists in, abets or provides pecuniary or other financial assistance or property for their commission commits a criminal offence.

Terrorist Activities (Article 24) are the acts of: (i) serious violence; (ii) explosion or dissemination of radiation, poison or pathogens; (iii) sabotage of means of transport, transport facilities, electric or gas facilities; (iv) serious interruption or sabotage of electronic control systems for public services, transport, telecommunications or the internet; and (v) other dangerous activity.

Any person who organises, plans, commits, participates in or threatens the above activities to pursue a political agenda commits an offence.

Advocating or inciting terrorism is also an offence under **Article 27** of the NSL.

Collusion with a foreign country or external elements to endanger national security (Article 29) comprises the acts of: (i) stealing; (ii) spying; (iii) obtaining by payment; or (iv) unlawfully providing State secrets or intelligence concerning national security to a foreign country or institution.

Furthermore when outside of the PRC, HKSAR and Macau it is also a criminal offence to: (i) wage war against the PRC, threaten or use force to undermine the territorial integrity of the PRC; (ii) disrupt the formulation of law or policy of the PRC or HKSAR which is likely to have serious consequences; (iii) rig an election of the HKSAR; (iv) impose sanctions or blockade or engage in hostile activities against the HKSAR; and (v) provoke by unlawful means hatred among residents of Hong Kong to the Central People's or HKSAR Governments.

3. Scope of Application & Penalties

The law has extremely wide application.

Companies and businesses need to note that not only individuals but according to **Article 31** of the NSL incorporated and unincorporated bodies can also be criminally liable for the Offences and furthermore they shall if guilty be punished with: (i) a criminal fine; (ii) the suspension of its operations or revocation of its business permits; and (iii) the confiscation of the proceeds obtained from the Offences.

The NSL applies to anyone who commits an Offence within the HKSAR. Any act or consequence of an Offence occurring in the HKSAR is sufficient for jurisdiction to be exercised.

HKSAR permanent residents, bodies incorporated or established here (**Article 37**) and people who are not permanent residents (**Article 38**) can commit Offences with all relevant acts happening outside the HKSAR, so in certain circumstances the NSL has extra-territorial reach.

Penalties for the Offences are tiered depending on the level of involvement and seriousness. For example, principal offenders committing offences of a grave nature or terrorism causing serious bodily injury, death or loss of property shall be sentenced to life imprisonment or imprisonment of a term not less than 10 years.

Incitement, assisting, advocating, abetting the Offences is punishable with between no less than 5 and no more than 10 years' imprisonment. The least serious Offences may attract a Community Service Order (**Article 64**).

Non-permanent residents of the HKSAR may be punished with deportation on contravening the NSL even if not prosecuted (**Article 34**).

Mitigation (Article 33) on conviction a lower penalty may be imposed if: (i) in the midst of committing the Offence it is voluntarily discontinued or its consequences avoided; (ii) the suspect surrenders themselves and gives a truthful account of the offence; or (iii) reports of other Offences are made by them or material information is given which helps solve other cases.

4. **Jurisdiction**

According to **Article 40**, the HKSAR has jurisdiction over cases concerning the NSL unless any of the three specified circumstances set out in **Article 55** arise, namely:

- The case is complex due to the involvement of a foreign country or external elements, making it difficult for the HKSAR to exercise jurisdiction;
- A serious situation occurs where the Government of the HKSAR is unable to effectively enforce the NSL; or
- A major and imminent threat to national security has occurred.

The trigger for 'Mainland' jurisdiction to be exercised is a request to and then the approval of the Central People's Government in the above circumstances from either the Office for Safeguarding National Security ("**Office**" see below) or the HKSAR Government.

Mainland Jurisdiction

When such jurisdiction exists, the Office (not the Police) exercise investigatory powers in Hong Kong applying National laws when doing so and all institutions, organisations and individuals affected must comply with those National laws. The Office shall not be subject to the jurisdiction of the HKSAR and the NSL states their officers shall not be subject to inspection, search or detention by Hong Kong law enforcement.

The Supreme People's Procuratorate and Supreme People's Court shall designate the prosecuting authority and the PRC Court where the criminal trial shall take place.

Article 58 provides that when Mainland jurisdiction is exercised suspects have the right to retain a lawyer (but it isn't clear if it's a lawyer of their choice) and to a fair trial in the PRC which is to take place without undue delay.

Hong Kong Jurisdiction

When cases are subject to Hong Kong's jurisdiction then the investigation, procedural matters³ and the trial will be governed by HKSAR law.

When conducting their **investigations**, according to **Article 43**, the Hong Kong Police may: (i) conduct searches, including of electronic devices without a warrant; (ii) order a suspect to surrender their passport; (iii) freeze and forfeit property used or intended to be used in committing an Offence; (iv) upon approval of the Chief Executive intercept communications and carry out surveillance; and (v) require suspects suspected of possessing information to answer questions, furnish information or provide material.

Implementation Rules

³ The same Prosecutions Code which applies to all other crimes will apply to the Offences.

Article 43 also gives the Chief Executive the power to make relevant implementation rules (the “**Rules**”) to give effect to the NSL’s Articles. The Rules came into operation on 7 July 2020 and contain many powerful provisions which are described in the **Schedule** hereto. Most of these provisions are not new to Hong Kong legislation, however nowhere before have they been found in one single piece of legislation.

Bail applications are made pursuant to the NSL which it seems ousters the principles of the Criminal Procedure Ordinance where bail is a suspect’s right⁴. Under the NSL (**Article 42**) no bail is to be granted unless the Judge has sufficient grounds to believe the suspect won’t continue to commit acts endangering national security.

Trials shall be conducted in open court in the Court of First Instance before a Jury unless State secrets, foreign factors and/or the safety of the Jury is an issue whereupon the trial shall be before a panel of three Judges⁵. If a trial is not in open court, nonetheless all verdicts will be given in open Court.

5. Responsible bodies

A **Committee** for Safeguarding National Security (“**Committee**”) has been established with the Chief Executive as its chairperson, several high ranking ‘local’ government officials as its members. The Committee is accountable to the Central People’s Government, under its supervision and responsible for NSL policy: its decisions are not be subject to judicial review (**Article 14**). Furthermore, no-one in the HKSAR shall interfere with the work of the Committee.

A **National Security Adviser**⁶ designated by the Central People’s Government will sit in the meetings of the Committee and advise it (**Article 15**).

A **new Police department** (the “**Department**”) to safe guard national security has been created. It may recruit qualified professionals and technical personnel from outside the HKSAR (**Article 16**) to assist it with its duties.

A **specialized prosecution division in the Department of Justice** will be established. Its prosecutors are all to be approved by the Committee.

The heads of the Department and specialized prosecution division are both appointed by the Chief Executive after seeking the opinion of the Office.

Judges handling national security cases are to be designated onto a list drawn up by the Chief Executive from magistrates, District Court, High Court and Appellate Judges.

The Chief Executive may consult the Committee about such Judge’s appointment to the list. Their term of office is one year and pursuant to **Article 44**, a designated Judge can be removed from the list if he/she makes any statement or behaves in any manner endangering national security during their term of office.

The **Office** is established by the PRC Government and as mentioned above can investigate cases when Mainland jurisdiction is exercised. At all other times, the Office has the following role and mandate: (i) to assess developments about national security in the HKSAR and make proposals on major strategy; (ii) to provide support to safeguard national security; and (iii) to collect and analyse intelligence on national security.

The staff of the Office shall abide by the local laws of the HKSAR as well as National laws. However staff of the Office, when performing duties here shall not be subject to the jurisdiction of the HKSAR (so no inspection, search or detention by Hong Kong law enforcement officers).

6. Comments

⁴ To be denied **only** if the suspect is likely to abscond, re-offend or interfere with the witnesses.

⁵ It is not yet known if these Judges need to give a unanimous or majority verdict and if/when a Judge dissents they give their reasons for doing so.

⁶ Mr Luo Huining.

Aside of the circumstances as to how the NSL became law, a few encouraging points can be made at this time:

- **Article 4** of the NSL states human rights shall be respected and protected in safeguarding national security. Freedoms of speech, press, assembly and demonstration enjoyed under the BL shall be protected. **Article 5** states a person is presumed innocent until convicted.

It is the first time in the PRC's history as far as we are aware that its legislation has made these statements;

- Under Article 23 of the BL, Hong Kong has a constitutional obligation to legislate for a range of national security offences but has not yet done so. The NSL could easily have legislated for all Article 23 offences but only legislated for the Offences, four crimes, leaving the HKSAR Government to legislate for the remainder. Looked at through this perspective, the NSL has adopted a minimalist approach with respect to its scope;
- The NSL is not retrospective; and
- Local laws of the HKSAR, so the common law, remain applicable unless inconsistent with the NSL (**Article 62**).

Businesses

In order to operate a business in Hong Kong the general principles of the NSL, as stated in Part 1 above, need to be accepted there is now no debate about this.

Given the serious ramifications for a business breaching the NSL which includes closure, they need to be very careful about **Articles 21 and 23** in particular and not to provide pecuniary or other financial assistance or property to those committing the offences of Secession or Subversion.

SCHEDULE

Implementation Rules

The first paragraph of **Article 43** of the NSL provides the Department may take various measures including the following with respect to: (i) searches; (ii) surrender of travel documents; (iii) freezing of and restraining of property; (iv) control of published information; (v) intercepting communications; and (vi) requiring a person to answer questions.

Schedule 1 - Searches⁷

The Rules permit a Police Officer investigating offences under the NSL to obtain a search warrant from a Magistrate allowing entry to any place (vehicle, vessel, aircraft, tent or structure or any electronic equipment) to search, inspect and seize evidence.

Comment: unusually for recent legislation, for example the Securities and Futures Ordinance (“SFO”) and Competition Ordinance, the length of time for which a search warrant issued under the NSL is valid for is not expressly stated. Nonetheless, it is expected recent Court of Appeal authority on search warrants having a limited life span will apply.⁸

If there is insufficient time to obtain a search warrant and when necessary to preserve evidence or the safety of any people, an Assistant Commissioner of Police may authorise a search without a warrant.

Schedule 2 - Surrender of travel documents⁹

A Magistrate may on a Police Officer’s ex parte application order a person who is the subject of an investigation of an offence contrary to the NSL to surrender their travel document. Such order would be valid for 6 months. Failing to comply with the order renders the suspect liable to be arrested and committed to prison (for up to 28 days or until they comply and surrender their travel document).

Whoever has surrendered their travel document may apply for its return and also for permission to leave Hong Kong by writing to the Commissioner of Police or a Magistrate explaining the unreasonable hardship which would be caused to them otherwise.

Before granting such a request, the applicant may need to deposit a reasonable sum of money or even property title deeds into Court or provide recognizance with their sureties.

Schedule 3 - Restraint and confiscation of property¹⁰

These provisions apply to ‘*offence related property*’ in Hong Kong or elsewhere which is: (i) the property of a person who attempts, facilitates, participates in or commits an offence; or (ii) property used or intended to be used in an Offence.

Where the Secretary for Security has reasonable grounds to suspect a person’s property is offence related property they can direct by written notice served on whoever is holding the property that the person shall not to deal with it. Such a notice will remain valid for 2 years.

⁷ Similar powers to those stated in the Schedule 1 of the NSL exist in sections 50(3) and 50(7) of the Police Force Ordinance.

⁸ Keen Lloyd Holdings Ltd. v Commission of Customs & Excise [2016] 2 HKLRD 1372 paragraph 121.

⁹ Very similar powers to those in Schedule 2 are found (and used by the Independent Commission Against Corruption) in section 17A of the Prevention of Bribery Ordinance.

¹⁰ Very similar powers to those in Schedule 3 are found in the Organized and Serious Crimes Ordinance.

Anyone knowingly breaching a notice commits an offence triable on indictment and punishable for 7 years. Anyone who without reasonable excuse breaches the notice is liable on conviction to a fine of HK\$100,000 and 3 months' imprisonment¹¹.

There are rights to apply to the Court of First Instance for a release of the property restrained or for the said terms to be varied. If there is a suspicion of the likely removal of the property from Hong Kong, the Police may seize it.

Reporting offence

Where a person suspects any property is offence related property this must be disclosed to a Police Officer as soon as reasonably practicable. Failing to do so may render you liable to a fine of HK\$50,000 and to 3 months' imprisonment.

Those in employment can discharge their reporting obligations by making reports about offence related property to their employer's reporting officer, if one.

Once disclosure is made to the Police, should any dealing with the offence related property occur such as an act of financing or assisting the commission of an offence, the acts won't be an offence if done with a Police Officer's consent. A report after the act will also be a defence when the report was made on your own volition and as soon as practicable.

Information reported can be used by the Hong Kong Police or other investigatory bodies such as the Office.

Tipping off offence

Tipping off liability exists if you are aware a report has been made to a Police Officer or your employer's reporting officer and you thereafter disclose information to another person which may prejudice the investigation of the national security offences related to the disclosure. This offence is punishable with a fine and 3 years' imprisonment.

Comment: it is expected that the reporting regime will operate in a similar way to Hong Kong's anti-money laundering legislation where suspicious transaction reports are made to the Joint Financial Intelligence Unit and permission to proceed being sought from them.

The remainder of the Schedule then provides for restraint, charging and confiscation orders for property related to the Offences.

If the Court determines that a defendant has benefitted from offences of endangering national security for which a defendant has been, or could have been convicted, the Court must determine the amount to be recovered for confiscation and will fix a period of no more than 6 months within which the sums be paid. Failing to do so results in a term of imprisonment ranging from 1 year for failing to pay an amount (representing the sum benefitted) of up to HK\$200,000 to a maximum of 10 years' imprisonment for failing to pay an amount exceeding HK\$10,000,000.

Schedule 4 – Removal of messages

A duly authorized Police Officer may require by way of written notice that a person who published an offending message to remove it and whoever fails to comply is liable to be fined HK\$100,000 and imprisoned for 1 year.

A network services provider, platform services provider or hosting services provider can be ordered to remove or restrict access to text, sound, voice or video messages within a specified period of time. Those failing to comply (without a specified excuse¹²) are liable to be fined HK\$100,000 and imprisoned for 6.

¹¹ The punishments stated in the Rules (in-line with other Hong Kong Ordinances) appear to be the maximum punishments permissible.

¹² For example the necessary technology to remove the message was not reasonably available.

On the authorization of a Magistrate, if a message is not removed as instructed, the Police may seize the relevant electronic device and take whatever action is necessary to remove it. These provisions have extra territorial application according to **section 14 of Schedule 4**.

A Magistrate may also issue a warrant allowing the Police to be provided with: (i) identification records of whoever published a message; or (ii) decryption assistance. Offences can be committed for failing to comply.

Schedule 5

This Schedule provides rules for foreign and Taiwan political organizations or agents (in essence anything or one who is not a diplomat) upon notice from the Police to provide information of all their Hong Kong staff and members, their assets, income, expenditure and activities in Hong Kong.

Schedule 6 - surveillance¹³

In order to prevent or detect the Offences or protect national security and when there is a reasonable suspicion a person has been, is or is likely to be involved in the foregoing, covert surveillance comprising the interception of their mail or telecommunications and/or use of surveillance devices in or at the places specified in the relevant authorization. Third parties referred to in the relevant authorizations must render reasonable assistance.

Permission to conduct surveillance would be given to the Hong Kong Police by the Chief Executive to carry out Type 1 surveillance or to a director grade officer of the HKSAR Government for permission to carry out Type 2¹⁴ surveillance. Such activity if permitted can be performed for up to 6 months and may be renewed more than once. In emergency situations exist, such as when death or serious injury, substantial damage, serious threats or loss of vital evidence are imminent, the Commissioner of Police may authorize surveillance to take place.

Unless there are reasonable grounds to believe a lawyer themselves, others practicing with the lawyer or working with them or persons residing with the lawyer is/are parties to Offences or the furtherance of a criminal purpose, no surveillance of the home, office, post or telecommunications of a lawyer should be authorized to protect legal professional privilege.

Schedule 7 – furnishing of information and materials

By way of an ex parte application to the Court of First Instance by the Secretary for Justice and for the purposes of an investigation into offences endangering national security, the Court may order when it is in the public interest¹⁵: (i) a person to answer questions relevant to the investigation; and/or (ii) furnish information relevant to an investigation or allow access to the material (which may then be copied).

Information or material subject to legal professional privilege cannot be disclosed save that lawyers may need to provide their client's name and address.

¹³ The most comprehensive Schedule in the Rules.

¹⁴ Covert surveillance using listening, optical monitoring and/or tracking devices. Type 1 surveillance is all other types of surveillance.

¹⁵ Factors include the seriousness of the matters being investigated, the effectiveness of the investigation without the compelled information, the benefit of the information, how the information has been acquired including obligations of confidentiality that are owed.

If the information to be disclosed might incriminate the person or is subject to secrecy obligations or similar such restrictions, it still needs to be provided but may not be used in any criminal proceedings against the person who provides it.¹⁶

Failing to comply without reasonable excuse to a request to answer questions will be punished with a fine of HK\$100,000 and 1 year's imprisonment.

The provision of false or the reckless provision of information is to be punished with a fine of HK\$500,000 and 3 years' imprisonment.

When ordered to furnish information the minimum period for compliance must be 7 days unless the Court has ordered a longer or shorter period depending on the circumstances. Failing to furnish the information, without a reasonable excuse, is an offence which will be punished with a fine of HK\$100,000 and 1 year's imprisonment.

Get in touch



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¹⁶ This investigatory regime is similar to that deployed by the Securities and Futures Commission under sections 182 and 183 of Securities and Futures Ordinance.