



Law Council
OF AUSTRALIA

Office of the President

22 September 2020

Mr Dave Sharma MP
Chair
Joint Standing Committee on Treaties
PO Box 6021
Parliament House
CANBERRA ACT 2600

By email: jsct@aph.gov.au

Dear Chair

Matters relating to two treaties with Hong Kong

The Law Council of Australia (**Law Council**) welcomes the opportunity to contribute to the Joint Standing Committee on Treaties' (**Committee**) inquiry into matters relating to two treaties with Hong Kong. Due to the short timeframe in which to provide submissions, the Law Council's written contribution to the inquiry remains high level, however we would be pleased to elaborate further should the opportunity present itself.

Context for the proposed suspensions

On 3 September 2020, the Minister for Foreign Affairs tabled in Parliament the National Interest Analysis (**NIA**) for the suspension of the *Agreement for the Surrender of Accused and Convicted Persons between the Government of Australia and the Government of Hong Kong* (**Extradition Agreement**) and the *Agreement between the Government of Hong Kong and the Government of Australia concerning Mutual Legal Assistance in Criminal Matters* (**MLA Agreement**).

The dominant focus of the NIAs are the technical legal basis for suspension under the *Vienna Convention on the Law of Treaties* (**VCLT**). In the case of the Extradition Agreement, reference is made to a fundamental change of circumstances that has occurred, while for the MLA Agreement, reliance is placed on the mutual consent between the parties (noting that on 28 July 2020 Hong Kong provided Australia with a diplomatic note purporting to unilaterally suspend the MLA Agreement).

The NIAs refrain from commenting in detail on the underlying reasons as to why Australia is seeking to suspend the arrangements, which primarily relates to the potentially adverse implications for Australia's human rights obligations should the Extradition Agreement and MLA Agreement continue in the current climate.

Specifically, the *Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region* – also known as the National Security Law (**NSL**) – which entered into force on 30 June 2020 substantially undermines the independence of Hong Kong's judiciary, as well as the region's autonomy under the 'One Country, Two Systems' policy. The NSL also permits security and intelligence agencies of

the People's Republic of China (PRC) to operate in Hong Kong and act outside local laws in carrying out their duties.

The Law Council considers that the broadly defined offences of sedition, secession, terrorism and collusion with foreign forces undermine rights protected by the *International Covenant on Civil and Political Rights (ICCPR)*¹, the application of which is preserved in Hong Kong under the Basic Law and the Sino-British Joint Declaration.² Due to the extraterritoriality of the NSL, these laws may impact not only residents and citizens of Hong Kong, but also Australians whose extradition may be sought from offshore.

For these reasons, and for those outlined below, the Law Council is supportive of the steps taken by the Australian Government to suspend both the Extradition Agreement and the MLA Agreement.

Extradition Agreement

On 9 July 2020, Australia notified Hong Kong of its intention to suspend the Extradition Agreement on the basis of a fundamental change of circumstances, namely the implantation of the NSL.

The Law Council agrees with the NIA that the Extradition Agreement was premised on Hong Kong's highly regarded legal system grounded in the rule of law and judicial independence, as well as the understanding that Hong Kong exercised a high degree of autonomy and would continue to guarantee the rights contained in the ICCPR. Although it is not yet clear how the NSL will be implemented, the Law Council agrees that on its face, the NSL casts sufficient doubt over the application of the criminal law in Hong Kong and Australia's confidence in its legal processes to justify the suspension of the Extradition Agreement.

With appropriate human rights safeguards, international extradition serves an important function to facilitate cooperation between States, demonstrate respect for each other's sovereignty, and prevent criminals from evading justice. However, there is also an important national interest in ensuring that the administration of justice accords with fundamental rule of law principles and human rights obligations under international law. Mutual respect for, and adherence to, these norms by States promotes peace and security both domestically and internationally. It is also the basis upon which many of Australia's bilateral relationships and instruments of international cooperation are founded.

The Law Council has previously identified major shortcomings regarding the quality of criminal justice in the PRC, specifically the PRC's violation of international standards regarding procedural fairness and lack of adherence to the rule of law.³ The PRC's unwillingness to adhere to these standards is particularly evident for persons accused of political crimes or crimes relating to national security, however, concerns also extend to other matters not considered political offences. These concerns were detailed in the Law Council's submission to the Committee's 2016 inquiry into the then proposed *Treaty on*

¹ Opened for signature 19 December 1966, 993 UNTS 3 (entered into force in 3 January 1976).

² See, Law Council of Australia, 'Statement on Hong Kong National Security Laws' (8 July 2020) <www.lawcouncil.asn.au/media/news/statement-on-hong-kong-new-national-security-laws>, Law Council of Australia, 'Statement on China imposing security laws in Hong Kong' (30 June 2020) <www.lawcouncil.asn.au/media/media-releases/statement-on-china-imposing-security-laws-in-hong-kong>.

³ Law Council of Australia, 'Law Council of Australia statement regarding the arrest of Dr Yang Hengjun' (28 August 2019) <<https://www.lawcouncil.asn.au/media/media-releases/law-council-of-australia-statement-regarding-the-arrest-of-dr-yang-hengjun>>. See also Human Rights Council Working Group on Arbitrary Detention, 'Opinion No. 62/2018 concerning Wang Quanzhang, Jiang Tianyong and Li Yuhan (China)' UN Doc A/HRC/WGAD/2018/62 (12 October 2018) para 66-68.

*Extradition Between Australia and The People's Republic of China.*⁴ The provisions and scope of the NSL (i.e. its extraterritorial application and the mechanism enabling the PRC to exercise jurisdiction over cases in certain circumstances) render these concerns directly relevant to consideration of the Extradition Agreement.

MLA Agreement

As noted above, on 28 July 2020 Hong Kong provided Australia with a diplomatic note purporting to unilaterally suspend the MLA Agreement.

The MLA Agreement has provided an important mechanism by which mutual legal assistance can take place between Australia and Hong Kong. Indeed, the NIA points out that there are currently 11 active requests between the two states under the MLA Agreement.

The Law Council considers it appropriate to formalise the suspension of the MLA Agreement for reasons of:

- ensuring that the application of the NSL will not compromise the intent or integrity of the mutual legal assistance process (as outlined above); and
- providing certainty to the suspension, which requires mutual consent of parties under Article 57 of the VCLT.

The Law Council thanks the Committee for the opportunity to comment on these matters. Please contact Dr Natasha Molt, Director of Policy on (02) 6246 3754 or at natasha.molt@lawcouncil.asn.au in the first instance, if you require further information or clarification.

Yours sincerely



Pauline Wright
President

⁴ Law Council of Australia, '*Treaty on Extradition Between Australia and the People's Republic of China*', submission to the Joint Standing Committee on Treaties (24 March 2016).