

1 October 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

Responses to questions on notice: Matters relating to two treaties with Hong Kong

On 24 September 2020, the Law Council of Australia (**Law Council**) appeared before the Joint Standing Committee on Treaties (**Committee**) following an invitation to provide evidence to the Committee's inquiry into matters relating to Australia's Extradition Agreement and Mutual Legal Assistance Agreement with Hong Kong.

This supplementary submission addresses three matters that were raised by the Committee during the Law Council's appearance, which the Law Council took on notice. These matters relate to:

1. the presence of Australian jurists currently serving on courts or tribunals in Hong Kong;
2. other legal arrangements between Australian and Hong Kong that may be affected by the implementation of 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**); and
3. knowledge of arrests of dual citizens (or foreigners) residing in Hong Kong, under the NSL.

These matters are dealt with separately below.

Australian jurists in Hong Kong

At the hearing of 24 September 2020, the Chair of the Committee, Mr Dave Sharma MP, noted the resignation of Justice Spigelman from his position as a non-permanent judge on Hong Kong's Court of Final Appeal. The Chair then asked whether the Law Council was aware of other Australian jurists who are currently serving on Hong Kong courts or tribunals.¹

Based on publicly available information, the Law Council is aware that the following Australians are appointed as judges and judicial officers in Hong Kong:

¹ Joint Standing Committee on Treaties, '*Proof Committee Hansard*' (24 September 2020) 9.

- The Honorable Justice Murray Gleeson – Court of Final Appeal of Hong Kong (appointed 2009);
- The Honorable Justice William Gummow – Court of Final Appeal of Hong Kong (appointed 2013);
- The Honorable Justice Robert French – Court of Final Appeal of Hong Kong (appointed 2017);
- The Honorable Justice Ian McWalters – Justice of Appeal of the Court of Appeal of the High Court of Hong Kong (appointed 2014); and
- The Honorable Justice Kevin Zervos – Justice of Appeal of the Court of Appeal of Hong Kong (appointed 2018).

Justices Gleeson, Gummow and French are the only Australians appointed to the Hong Kong Court of Final Appeal as non-permanent foreign judges.²

The Law Council notes that Australia’s Consulate-General in Hong Kong does not keep a comprehensive list of Australian judicial officers in Hong Kong, and there may be other Australians other than Justices McWalters and Zervos appointed to courts and tribunals below the Court of Final Appeal.

Regarding the futures of the other non-permanent judges on the Court of Final Appeal, the Hong Kong Court of Final Appeal Ordinance states that there is no mandatory retirement age for a non-permanent judge, and judges hold office for three-year terms – which may continue to be extended by the Chief Executive acting in accordance with the recommendation of the Chief Justice.³ There is no limit on the number of extensions which may be granted to a non-permanent judge.

The Law Council therefore expects that foreign non-permanent judges may either elect not to request for their term to be renewed or, if the Government of Hong Kong takes the view that judges from other common law jurisdictions are no longer desirable to hold appointments on the Court of Final Appeal, the Chief Executive may decline to renew their term.

Other legal arrangements with Hong Kong that may be affected by the NSL

At the hearing of 24 September 2020, the Deputy Chair of the Committee, Mr Peter Khalil MP asked whether the Law Council had considered whether the implementation of the NSL may have an impact on legal arrangements between Australia and Hong, beyond those agreements relating to extradition and mutual legal assistance.⁴

The Law Council notes that Australia is not among the list of countries that have concluded, or are in the process of negotiating, Double Taxation Agreements with Hong Kong.⁵

To the knowledge of the Law Council, Australia’s other legal agreements with Hong Kong include the:

- Free Trade Agreement between Australia and Hong Kong, China* (entered into force on 17 January 2020).

² Non-permanent Hong Kong judges from other common law jurisdictions are appointed by the Chief Executive acting in accordance with the recommendation of the Judicial Officers Recommendation Commission. See Hong Kong Court of Final Appeal Ordinance (Cap. 484) section 8, <https://www.elegislation.gov.hk/hk/cap484!en?xid=ID_1438403251521_002>.

³ Hong Kong Court of Final Appeal Ordinance (Cap. 483) section 14(3)-(4).

⁴ Joint Standing Committee on Treaties, ‘*Proof Committee Hansard*’ (24 September 2020), 10-11.

⁵ See Inland Revenue Department Government of the Hong Kong Special Administrative Region of the People’s Republic of China <https://www.ird.gov.hk/eng/tax/dta_inc.htm>.

- b. *Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China* (entered into force on 17 January 2020).

The Law Council suggests that the Government consider a review of the above agreements which were concluded prior to the passage of the NSL.

The Law Council notes that these agreements were negotiated in recognition of Hong Kong's separate legal and economic system to that of China, and the Australian Government may wish to consider whether a 'fundamental change in circumstances' has occurred for the purposes of article 62 of the Vienna Convention on the Law of Treaties – as has been invoked with respect to the Extradition and Mutual Legal Assistance Agreements.

Other arrests of dual citizens or foreigners

Finally, at the hearing of 24 September 2020, the Deputy Chair of the Committee, Mr Peter Khalil MP noted the arrest of Mr Jimmy Lai under the NSL and asked whether the Law Council was aware of other dual citizens or foreigners residing in Hong Kong that have been arrested under these measures.⁶

The Law Council understands that as of Friday 25 September, about 16 individuals have had warrants issued for their arrest, or have been arrested and/or charged under the NSL. It is not clear precisely how many of this number reside in Hong Kong.

The Law Council is not aware of any Australian citizens (resident in Hong Kong or otherwise) within that group, and notes that the Australian Consulate-General in Hong Kong would be aware of particular cases relating to Australian citizens where they seek consular assistance.

It is worth noting that arrest warrants have been reportedly issued under the NSL for at least six prominent Hong Kong pro-democracy activists exiled or living abroad. These include Samuel Chu, Simon Cheng, Nathan Law, Wayne Chan, Ray Wong, and Lau Hong.⁷

Samuel Chu is the first non-Chinese citizen to be targeted by the NSL. Originally from Hong Kong, he is a US citizen who has lived in the US for 30 years, and runs the Hong Kong Democracy Council. His father Reverend Chu Yiu Ming was one of the founders of the 2014 Umbrella Movement.

Simon Cheng is a former British Consulate staffer who was detained and tortured in China, and has been granted asylum in the United Kingdom (UK).

Nathan Law and Lau Hong (also known as Honcques Laus) fled to Britain immediately prior to the passage of the NSL, while Wayne Chan is believed to have fled to the Netherlands. Ray Wong was granted asylum in Germany in May 2017 and now lives in the UK.

The Law Council notes that Chinese state-owned media outlets continually highlight the extraterritorial power of the NSL, and indicate that it will be used against Hong Kong citizens and non-citizens both within and outside of Hong Kong. For example, the Global Times reported '[The arrest warrant for Samuel Chu] actually highlights the law's power and scope, as anyone, of any nationalities, is destined to receive the punishment if they violate national security legislation for Hong Kong', and suggested that Hong Kong authorities will exert pressure on safe-haven countries through the Interpol framework.⁸ The article also notes

⁶ Joint Standing Committee on Treaties, 'Proof Committee Hansard' (24 September 2020), 11.

⁷ BBC News, 'Hong Kong 'seeking arrest' of fleeing activists' (31 July 2020) <<https://www.bbc.com/news/world-asia-china-53616583>>.

⁸ Global Times, 'Hong Kong police seeking 6 fugitives, to uphold national security' (1 August 2020) <<https://www.globaltimes.cn/content/1196337.shtml>>.

that while the UK has suspended its extradition treaty with Hong Kong, China seeks those activists in the UK “under the current framework of domestic and international laws and agreements”.⁹

The Law Council therefore suggests that even if the Government elects to suspend the Extradition and Mutual Legal Assistance agreements – a course of action endorsed by the Law Council – it should anticipate receiving pressure through Interpol and other international mechanisms should an Australian citizen (or Hong Kong citizen granted a visa or asylum to Australia) be sought under the NSL.

The Law Council thanks the Committee for the opportunity to comment on these matters. Please contact Ms Charlotte Stubbs, Policy Lawyer (International) on (02) 6246 3753 or at charlotte.stubbs@lawcouncil.asn.au in the first instance, if you require further information or clarification.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Pauline Wright', written in a cursive style.

Pauline Wright
President

⁹ Ibid.