

## Business navigates Hong Kong's new national security law

**Hong Kong's national security law caused considerable concern when it was enacted in June. *Global Insight* assesses the implications for businesses operating in the territory.**

Over the summer, media reports indicated that some banks were examining clients for links to Hong Kong's pro-democracy movement to avoid being caught out by the territory's new national security law (NSL) – which was passed and came into effect in June. Some tech companies, meanwhile, have moved their data centres out of Hong Kong as a result of the law.

Business' concerns include that they will inadvertently be hit by sanctions under the NSL and that the law is written in broad terms, leaving considerable room for interpretation.

But while everybody seems to hold a strong opinion on Hong Kong's new law, not everybody is willing to share that opinion.

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**Stefan Schmierer**

*Managing Partner, Ravenscroft & Schmierer*

Tony Williams, Principal of Jomati Consultants and former Managing Partner of Clifford Chance, said in July that international law firms based in Hong Kong have been deafening in their silence in response to the NSL, but that this was ‘understandable and inevitable’.

‘The law is so uncertain that everybody is afraid of speaking up and that is clearly the intention of the law,’ says Stefan Schmierer, Managing Partner of Ravenscroft & Schmierer, Hong Kong.

Schmierer says the German Chamber of Commerce in Hong Kong wanted to host a seminar on the NSL but couldn't find any law firms willing to participate. Many Hong Kong-based law firms are known to have given their lawyers directives not to speak on the issue. This practice has been likened to the LGBTQI+ issue in Singapore, where financial institutions and law firms are encouraged not to publicly support the cause, despite having internal policies in place.

Nicholas Turner, of counsel at United States firm Steptoe & Johnson, says any decision to stay quiet has less to do with not wanting to make a statement and more to do with not wanting to draw attention to yourself. ‘What obligations do law firms have to make a political statement? I think most companies have been keeping their heads down. If they are

not able to control what their employees are going to say, they may decide it's best to instruct them not to say anything.'

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With one of the offences under the NSL being 'collusion with foreign entities', many organisations don't want to be seen to be doing something that might suggest that sanctions are appropriate.

'Companies will have to be very careful about with whom they speak; they will not want to stand out and make their position known about the law,' says Philip J Dykes SC, a barrister with Bernacchi Chambers and Chairman of the Hong Kong Bar Association.

'As the local bar association, we have an obligation under our constitution to speak up on matters affecting basic law and the protection of human rights,' he adds. 'So, if we see something in the national security law that's problematic, we'll say so. But private firms don't have that mandate so they will keep their heads down.'

## Rational response or overreaction?

The NSL provides for four distinct categories of offence, namely secession, subversion, terrorist activities and collusion with foreign forces, which are all punishable with a minimum sentence of three years and a maximum of life imprisonment.

Detractors of the NSL say the new law has undermined Hong Kong's legal system which, along with its world-class regulators and tradition of freedom of speech, has until now underpinned the territory's status as a thriving bridge between China and the rest of the world.

'It's too early to say,' says Dykes. 'There has only been **one court case (/Article/NewDetail.aspx?ArticleUid=47204504-A705-4E67-9ACF-BFD6943CFB3F)** concerning the national security law and the Court made clear that what seemed to be an obstacle to defendants getting bail actually isn't. So, the first significant ruling on the law seemed to confirm the status quo.'

The NSL covers a small part of the criminal law in Hong Kong but does not cover the territory's civil law nor its administrative law, which remain unchanged. 'Any undermining of Hong Kong's legal system is not done by the law but by the often-biased media reporting,' believes Winnie Tam SC, Diversity and Inclusion Officer of the IBA Asia Pacific Regional Forum and Head of Chambers at Des Voeux Chambers.

'There are important differences between what has been written about the new law in the liberal media and what the law really is,' she adds. 'We lose no liberties as a result of this new law. It is not the case that if you criticise China in the media you will fall foul of this new law, despite what these outspoken media people say. I cannot think of a country without a similar national security law.'

"People want to find a way that the new law impacts them. But I would argue it doesn't impact some businesses very much at all

**Nicholas Turner**

*Of Counsel at Steptoe & Johnson*

Concerns have been raised by many Hong Kong-based foreign businesses about the ambiguity of several provisions of the NSL, with calls for greater clarity. However, Turner agrees that it is people's reaction to the NSL, rather than the law itself, that is having an impact on businesses. 'I don't think the NSL was intended to have an effect on business, and it doesn't so long as you don't get caught up in the discussion that people are having about it.'

Turner adds that people have responded strongly in an emotional way but, purely from a commercial perspective, he believes there has been 'a bit of an overreaction from some quarters'.

Some of Turner's clients have sought advice about retaining their compliance function in Hong Kong in light of greatly expanded enforcement powers under the NSL. 'People want to find a way that the new law impacts them. But I would argue it doesn't impact some businesses very much at all,' he says.

Rangam Sharma, an associate at J Sagar Associates, says that a concern for businesses may now be legal and compliance expenditure. 'The overheads may increase in order to decode and work in an environment that has such penetrative laws,' he says.

Turner explains that now the NSL has been in effect for a few months, the level of excitement has declined significantly. 'I feel that people are now taking a more rational perspective having lived under the NSL for some time. They realise that life goes on and that they're not going to be the centre of attention when it comes to the NSL, as they were never intended to be.'

Turner says the reaction to the NSL is similar to that caused by the implementation of US sanctions. In August, the US Bureau of Industry and Security placed several subsidiaries of state-owned China Communications Construction Company (CCCC) on its Entity List for their construction work in militarising artificial islands in the South China Sea.

The Entity List is a US exports control list that prohibits the provision of US origin items and technology to companies. 'But the next thing you know you see headlines saying companies like CCCC are being sanctioned and the US is opening up a new front in its sanctions war', says Turner. 'The fact is that the Entity List doesn't really impact these companies unless they're dealing with US origin goods or technology.'

'If you understand the rules, as lawyers should, and you assess the empirical risk that companies face, most people realise that this is limited. The principle applies also to the NSL and other actions,' says Turner.

## Complaints

Under Hong Kong's Basic Law, the local government had responsibility to legislate for national security in the territory (under Article 23). The nearest that Hong Kong came to achieving this was in 2002, when former Secretary for Security Regina Ip sought to implement a much harsher law that addressed six types of conduct. The furore at the time, and the level of resistance since then, ensured the law remained off the political agenda until this year.

One of the key arguments put forward by the NSL's proponents for the haste with which the new law was implemented this year, was the need to address the increasingly violent protests that were, at least at the outset, synonymous with the territory's pro-democracy movement.

'Events have developed in such a way since last year which, when added to the stance that the US seemed to be taking against China over Hong Kong, meant that there simply could not be any further delay,' says Tam.

She believes that 'it's very obvious that Hong Kong is being used as a base for subversive activities – not to subvert Hong Kong but to subvert China. Hong Kong is really just a pawn in all of this.'

Other than the three years and eight months of Japanese occupation of Hong Kong during the Second World War, the territory has never seen such a hugely damaging period of unrest.

Tam says that even during the 1967 riots, when people were trying to rise up against the colonial government, the damage was very quickly contained by an emergency law passed by the Governor himself without going through any consultation. 'That law, passed in 1967, gave the police much more power than the new national security law gives them,' she says. 'That's what the international media is forgetting about or not wanting to report on.'

Dykes argues that a proper consultation process would have resulted in a more accessible law, and that existing laws were in place, such as various public order offences, to address the violence on the streets. 'There is an article within the national security law that purports to say that all of these concepts are meant to merge with our procedures in Hong Kong,' he says. 'But the difficulty will be working that out.'

National laws made in China can be made to apply to Hong Kong either by promulgation (ie, introduced directly into Hong Kong, as with the NSL) or by legislation (ie, through the Legislative Council of Hong Kong, or LegCo). No details of the NSL were provided in advance because the law was enacted in China and therefore scrutiny was carried out by China's National People's Congress (NPC) (which consists of, among others, some 200 Hong Kong representatives).

Tam says there was a consultation exercise, but it wasn't the type that would be conducted for any regular piece of legislation in Hong Kong. 'Scores of consultation sessions were held over several days and a wide spectrum of people were asked to attend these meetings and give their opinion on the new law, including me,' she says.

“Although the NPC has enacted this law, this is not the Mainland law. It will be construed by Hong Kong's judges according to common law

**Winnie Tam SC**

*Diversity and Inclusion Officer, IBA Asia Pacific Regional Forum*

Tam adds that although these consultations have been dismissed as a box-ticking exercise, some of the points raised were ultimately implemented in the law that came into effect. 'So, they wanted to get it right and have an effective law that put a stop to all of this nonsense that was destroying Hong Kong,' she says.

The perceived lack of an adequate consultation process prior to implementation is just one of a number of complaints made about the NSL. Given that the law is written in broad terms, leaving substantial room for interpretation, many businesses have struggled to understand what it means in concrete terms.

Tam says that offences such as subversion have common law meaning and that many other jurisdictions have similar laws against such offences. 'If you compare this law with the equivalent law in the US for national security, you will find that this law is much milder,' she says.

'Although the NPC has enacted this law, this is not the Mainland law,' she adds. 'It will be construed by Hong Kong's judges according to common law. So, I don't see why anybody should be overly worried. It's the flexibility of the law that leaves room for the judges to apply their common sense honestly and carefully in order to let go those people that the law is not designed to catch and to convict others to whom the law was designed for.'

Turner adds that there is similar ambiguity in US law. 'You get a little bit of ambiguous language, you get nothing from the government, and then people just run with it,' he says. 'In terms of the speculation, I'm waiting to hear it from the government. Until then we have to wait rather than reach our own conclusions.'

Another area of concern results from the fact that national security cases will be heard by judges appointed by the Chief Executive as opposed to the usual process of selection by the Judicial Officers Recommendation Commission. 'There was concern that this was an intrusion into judicial autonomy,' says Dykes.

In August, two High Court judges acknowledged the point in their judgment in a case concerning the first person charged under the NSL. 'The judgment says, yes, it looks like it but it's not really the case,' says Dykes, who represented the applicant in the case. 'It explains that the judges are impartial, but my point is that the appointment of judges by the Chief Executive gives the appearance of lack of impartiality.'

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**Philip J Dykes SC**

*Chairman of the Hong Kong Bar Association*

Another complaint covered in this judgment is that the NSL is drafted in Chinese only. In Hong Kong, all laws enacted by the legislature are enacted in both English and Chinese. For example, the Basic Law, published in 1990, has an authentic English version so that non-Chinese speaking practitioners can read and interpret the law, and make submissions in court in English.

At the moment, English speakers are relying on, and responding to, an unofficial translation of the NSL by state-run news agency Xinhua. When representing the applicant in the aforementioned case, Dykes refused to make any submissions based on this unofficial translation.

'Without an authentic English text, it would be irresponsible for me to make submissions on the unofficial English version and hope that it corresponds to the Chinese text. So, my junior made all of the submissions in Chinese,' says Dykes. 'This is the first time that's happened and it represents an obstacle to accessing the meaning of the law. We'll

wait to see whether an authentic text is produced, but at the moment a non-Chinese practitioner cannot advise on the law with confidence.'

## Compliance

Given that the NSL is implemented under the framework of 'One Country, Two Systems', it is difficult to directly compare it with the national security laws of other common law jurisdictions. However, the NSL does appear to criminalise activities that other common law jurisdictions also criminalise in their laws.

For most businesses in Hong Kong, the risk of being directly implicated in activities constituting offences under the NSL's Articles 20-21 (Secession), 22-23 (Subversion) and 24-28 (Terrorist Activities) is likely to be low. The final category of offences, relating to collusion with foreign or external parties in a manner that endangers national security, is where the concern lies.

The NSL has greatly expanded the powers of Hong Kong's law enforcement agencies, who can now enter and search any premises and seize and detain anything believed to be evidence without a warrant from the Magistrates' Court. They can also intercept communications and conduct covert surveillance on a suspect with permission from the Chief Executive. 'One area of great concern from a commercial point of view is that there may now be an obligation to report the assets of individuals suspected of breaching the NSL,' says Turner.

As a result, technology companies such as Facebook, Google, Twitter and Zoom suspended their compliance with data requests from the Hong Kong authorities in early July, while South Korean online platform Naver moved its data centres and servers out of Hong Kong. 'They worry about the risk to user data and the ability of law enforcement – without very much judicial oversight – to demand that information,' adds Turner.

'In theory, those legal powers are expansively worded and potentially impactful, so there's always the potential for abuse of those powers. However, those powers really aren't very different to what the US has,' he says.

'The ability for the US government to subpoena information of not only US companies, but of foreign companies, the well-known pervasiveness of US surveillance of collection of data, wiretapping, access to financial records and so forth – again with restricted judicial oversight. All of that is a feature of US law and none of it is unique to China. That tends to get lost in the discussion,' believes Turner.

## The whole picture

Professor Albert Chen, a law professor at the University of Hong Kong, who also sits on the NPC's Basic Law Committee, came to the conclusion, after interpreting the law in Chinese, that a key tenet of the NSL is to uphold the 'One Country, Two Systems' governing paradigm.

In a recently published blog post, Chen added that the Basic Law Committee, NPC delegates and the Hong Kong government will all have a role in hashing out the parameters of the NSL and reconciling the differences in various legislation introduced over the years.

'It's a very complicated situation with uncertain expectations, a highly politicised environment, and obvious tensions and conflicts between major powers and stakeholders, so it's very difficult to understand precisely what the impact will be,' says Turner.

He adds that from a rational, commercial perspective, everybody's interest lies in maintaining Hong Kong as a business centre, a reasonably open city and one where commerce is allowed to flourish as it always has.

'From China's perspective, the protests have, for the most part, ended, and Hong Kong is a relatively stable and quiet place again,' explains Turner. 'In pure commercial terms, why wouldn't that be a more attractive environment than the one that was happening a year ago?'

Some political commentators have argued that Hong Kong's institutions face gradual decay as a result of the NSL and that the city will drift away from being a globalised financial centre towards one that is more mainland Chinese. Others believe it depends on how heavy-handed China is going forward.

'We need a couple of years to pass before we can really find out what Mainland China wants to do with this law,' says Schmierer. 'Whether they really want to crack down on society here in Hong Kong or whether they really want to use it in a limited way to crack down on those advocating independence for Hong Kong.'

Dykes says that the NSL has shocked people and made them scared, but that this should be the objective of the law. 'But I'm interested to see what will happen when people have got over the shock and when the virus abates,' he says. 'Last year's demonstrations were very largely peaceful, but will they be allowed now?'

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*Header pic: A junk ship sails in Victoria Harbour, Hong Kong Island, Hong Kong, August 2017. Shutterstock.com/Patrick Foto*