

Hong Kong security law less draconian than Australia's

China's new national security law for Hong Kong has aspects that jar against ideal notions of civil liberties, as all such laws inevitably do. Attempts by Beijing's detractors to paint the law as a uniquely authoritarian assault on the territory's "democratic freedoms", however, are both exaggerated and hypocritical. Not only does the new law not breach Hong Kong's Basic Law or the "One Country, Two Systems" approach to Hong Kong self-government, as some have alleged; but it is in no way more draconian, and in some respects far less so, than comparable laws in Australia, Britain or the United States. Canberra's hypocrisy is especially rank given that its pious lecturing of China on "democracy", "transparency" and the like come as it prosecutes whistleblowers and their lawyers in secret on "national security" grounds, and is pushing to give its own intelligence agencies yet greater powers in areas where their existing ones already exceed those just put in place in Hong Kong.



The sickening moment in 2019 when young protestors set alight an older resident who stood up to their violence and vandalism. The relentless, US/UK-backed violence forced China's hand to enact its national security law. Photo: Screenshot

The Hong Kong National Security Law (NSL)—formally "The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region"—was promulgated by the National People's Congress Standing Committee, China's top legislative body, on 30 June. According to the 4 July *South China Morning Post* it was approved unanimously by the Standing Committee, endorsed by the Hong Kong Legislative Council (LegCo) the same day, and took effect at 11:00 PM that night. One immediate problem is that whilst Hong Kong has both English and

Chinese ^[1] as official languages, many lawyers and even judges are fluent only in English; but thus far, there is only a "reference" English-language version, and the official text is only available in Chinese. As Hong Kong Bar Association Chairman Philip Dykes told *SCMP*, "Without an English version, you're going to have problems in court, because some judges may not be able to read it" and would be forced to rely on an expert advisor. *SCMP* reported that according to a government source, Hong Kong authorities "were discussing with Beijing how an official English version could be published as soon as possible".

But in the meantime, as Nathan Rich, an American author and political commentator who lives in China, pointed out in an 8 July [YouTube](#) video, Hong Kong authorities have only themselves to blame. "The interesting thing that nobody ever brings up", he said, "no matter how many times they discuss this ... [is that] Hong Kong has not followed its own Basic Law!" Sometimes referred to as Hong Kong's "mini-Constitution", the Basic Law was adopted by the National People's Congress in 1990 in preparation for, and took effect upon, the return of Hong Kong from British colonial rule on 1 July 1997. Article 23 of the Basic Law stipulates that "The Hong Kong Special Administrative region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organisations and bodies from conducting political activities in the Region, and to prohibit political organisations or bodies of the Region from establishing ties with foreign political organisations or bodies." (Emphasis added.) Because the LegCo has failed to do so, so-called pro-democracy "protestors" and political groups have been free to do everything on that list right out in the open for over a year, ^[2] forcing the central government's hand. Said Rich, "You should really think about, when you're watching, or listening to, or reading this news: Why do they never, ever mention that Hong Kong has been *directly and specifically avoiding* following its own Basic Law? ... And then when some citizens, or some protestors, or some rioters want something, they suddenly think Basic Law is super-important; 'But only this one [part]; this is the Basic Law we really like. These ones, we don't like.' Well that's not following the law, ... that's chaos."

Comparing the pair

According to the 11 July Australian newspaper, the head of the Australian Security Intelligence Organisation (ASIO), Director-General of Security (DGS) Michael Burgess, took umbrage after Law Council of Australia spokesman Dr David Neal told Parliament on 10 July that the new "counter-

terrorism” powers ASIO is currently pursuing ^[3] compare unfavourably with the Hong Kong NSL: “When asked whether the [proposed Australian] legislation was broader than China’s controversial national security law imposed on Hong Kong, Dr Neal responded: ‘The answer to that is yes. ... It doesn’t go to the extent of saying anything that is detrimental to the interests of China falls within this framework. It’s addressed to different things’, he said. ‘However, we are very concerned that ... agents of ASIO would be entitled to detain people for 40 hours to question them about things which are detrimental to the interests of Australia because they’ve been talking to someone who’s classified as a foreign power.’” DGS Burgess responded that he was “actually offended by that statement”, the *Australian* reported. It continued: “Mr Burgess said the new Hong Kong law made it a terrorism offence to damage public transport, granted life immunity from prosecution to Chinese security agents and could subject peaceful protesters to a term of life imprisonment if they had foreign links. ‘To suggest that these bills are comparable—in fact, that our bill is worse—is just beyond the pale. It’s completely, completely wrong.’”

Burgess’s claim regarding immunity is a lie. Immunity for ASIO officers and agents is indeed not included in the proposed bill—but only because they have already had it since the passage of the *National Security Legislation Amendment Act 2014*, for any crime besides torture; sexual offences; and actions causing death or serious injury, or “significant loss of, or serious damage to, property”. And since the same law *criminalises the disclosure of such actions* on pain of 10 years’ jail, they are immune in practice, if not strictly according to the letter of the law. And the Hong Kong NSL does not confer immunity upon Chinese security agents anyway; rather, whilst staff of the new Office for Safeguarding National Security (OSNS) in Hong Kong are required by Article 50 of the NSL to “abide by the laws of the Hong Kong Special Administrative Region as well as national laws”, Article 60 puts them outside the jurisdiction of local authorities and stipulates that “In the course of performing duty, a holder of an identification document or a document of certification issued by the Office and the articles including vehicles used by the holder shall not be subject to inspection, search or detention by law enforcement officers of the Region.” *ASIO officers enjoy the same privilege*, as do their counterparts in Britain’s Security Service (MI5). As for the NSL making it “a terrorism offence to damage public transport”, yes it does, along with other crimes—if they are done with the aim of “causing ... grave harm to the society with a view to coercing the Central People’s Government, the Government of the Hong Kong Special Administrative Region or an international organisation or intimidating the public in order to pursue political agenda”. Australia defines terrorism in [nearly identical terms](#).

‘Remove the beam from thine own eye’

Other aspects of the NSL singled out by Australian politicians and media are likewise no worse, and usually an improvement upon, our own laws and those of our allies. China, we are told, has claimed “extraterritorial jurisdiction”, the right to enforce its laws beyond its borders. What the NSL actually says is that where a Hong Kong resident or Chinese citizen conspires with an outside “institution, organisation and individual” to damage Chinese national security, said outside entity “shall be convicted and punished for the same offence” (Article 29); and that Hong Kong permanent residents and organisations based in the region are subject to the law wherever they are (Article 37). The other passage touching upon extraterritoriality is Article 36, which states: “This Law shall apply to offences under this Law which are committed in the Hong Kong Special Administrative Region by *any person*. An offence shall be deemed to have been committed in the Region if an act constituting the offence or *the consequence of the offence* occurs in the Region.” (Emphasis added.) Admittedly this author is not a lawyer, but it is difficult to read any claim of “universal jurisdiction” into the criminalisation *in China* of external agitators who work against its national security, nor is there any indication that China intends to pursue them through anything other than legitimate international legal means. After all, China has not invaded nations and overthrown governments in pursuit of those it deems terrorists, as Australia and its allies the USA and Britain have done; China has conducted no “extraordinary rendition” abduction-and-torture program, nor sent drones to assassinate its own and other nations’ citizens without any legal process. And meanwhile, Canberra sits idly by while the USA’s Trump Administration justifies its and Britain’s persecution of Australian journalist Julian Assange for his exposure of US war crimes, with the claim that US legal jurisdiction extends to every human being on Earth, while constitutional protections apply only to US citizens.

In terms of transparency, the Hong Kong NSL is superior to Australian law. Public trial by jury is the default option, as it is here. It does however provide that “When circumstances arise such as the trial involving State secrets or public order, all or part of the trial shall be closed to the media and the public *but the judgment shall be delivered in an open court*.” (Emphasis added.) In Australia, suspects tried under certain national security provisions may be indicted, convicted and imprisoned entirely in secret, with the promise of further lengthy jail terms should they reveal any of the details to a single living soul; for example, former military intelligence officer “Witness J” spent 455 days in jail in 2018-19, for we know not what crime—“and no-one would have been any the wiser”, *Australian Financial Review* legal editor Michael Pelly reported 7 March, “but for a dispute with the ACT [Australian Capital Territory] prison system that found its way into the courts”. Canberra lawyer and former ACT Attorney-General Bernard Collaery is also to be tried largely in secret to cover up the details of then-Foreign Minister Alexander Downer’s corrupt misuse of Australian Secret Intelligence Service (ASIS) resources during maritime boundary negotiations with Timor-Leste in 2003; Collaery’s client, former

ASIS officer “Witness K”, is being prosecuted entirely in secret. ^[4] Another way in which the Hong Kong NSL is superior to equivalent Australian law is that it stipulates maximum sentences for every crime, whereas here (as in Britain) people convicted of terrorism can have their sentences extended indefinitely on the say-so of the government and a compliant federal judge. It also bears mention that under the NSL even collusion with a foreign power to make war upon China carries a maximum sentence of life in jail and a minimum of just 10 years, whereas in the “humanitarian” USA the penalty for such treason is death. In a perfect world, both civil liberties and national sovereignty would be universally respected, and national security legislation—like militaries, police forces and intelligence agencies—would not be needed. In this, the real world, China’s appear no worse than anyone’s and better than some, Australia’s included; and where adherence to international law is concerned, its government has infinitely more credibility than ours. Canberra ought not lecture China until it has mended its own ways.

Footnotes

[1]. Cantonese (the native tongue of Hong Kong) and Mandarin (China’s majority and administrative language) are not mutually intelligible; however documents in Standard Written Chinese, whose characters (by and large) represent a fixed meaning independent of pronunciation, can be read by speakers of either language.

[2]. “Project Democracy coup machine drives Hong Kong ‘protests’”, AAS, 28 Aug. 2019. 3. “Dutton moves to expand police state under cover of COVID-19”, AAS, 27 May 2020.

[3]. “Dutton moves to expand police state under cover of COVID-19”, AAS, 27 May 2020.

[4]. “Collaery tried in secret to protect Downer’s Timor bastardry”, AAS, 1 July 2020.

By Richard Bardon, Australian Alert Service, 15 July 2020