

**Statement of the Hong Kong Bar Association
on the Drafting of the National Security Law**

1. The Hong Kong Bar Association refers to its earlier statement dated 25 May 2020 on the Proposal of the National People’s Congress to enact National Security Law in Hong Kong. We expressed our concerns there on the constitutional propriety of enacting the national security law. Nothing has happened since then to remove those concerns.

2. Subject to this reservation, if the national security law is to be made and to apply here, it should fully reflect the unique circumstances and the constitutional context of its promulgation. These include:
 - (1) In line with the common law tradition, criminal offences should be clearly defined. This is so such that both the public and law enforcement agencies would know what is conduct covered by the new law and what is not. The offences covered by the national security law should have clearly defined elements concerning what acts are prohibited and the required state of mind. The law should not have retrospective effect.

 - (2) The national security law is to be tailor-made by the Standing Committee of the National People’s Congress (“NPCSC”) for the HKSAR, which is a common law system. It is to be applied to the HKSAR only. It follows that the national security law should be applied and interpreted in accordance with the usual common law principles and subject to all the usual guarantees in our criminal procedures, including meeting standard due process requirements.

 - (3) This is the first time that the NPCSC has made a specific law imposing criminal responsibility in the HKSAR applying to everyone in Hong Kong. The justification for the NPCSC enacting a national

security law for the HKSAR notwithstanding the delegation of power to the HKSAR to enact such laws under Article 23 of the Basic Law, is the alleged failure of the HKSAR to do this in the last two decades. Thus, the purpose of the national security law is to fill a gap and take the place of a law that is supposed to have been enacted by the HKSAR. As such, and notwithstanding its origin, the national security law should not be treated differently from any other piece of domestic legislation in the HKSAR. The need to harmonize is reinforced by the new law's limited territorial application, its close relationship with ordinary criminal law in the HKSAR, the protection of fundamental rights, freedoms and liberties in the Basic Law, and Article 31 of the PRC Constitution which provides that the legal systems of the HKSAR shall be governed by the Basic Law.

3. In light of the unique circumstances and the constitutional context and in order to protect the integrity of the constitutional design of One Country, Two Systems, a national security law should include the following:

- (1) The national security law is a law specifically made for the HKSAR. It needs to be construed and applied in accordance with the common law principles.
- (2) Notwithstanding anything to the contrary in the national law, including the PRC Legislative Act, the national security law should be construed consistently with, and be subject to, the Basic Law, and in particular, the International Covenant on Civil and Political Rights as applied to Hong Kong through Article 39 of the Basic Law, and the Hong Kong Bill of Rights.

- (3) For the avoidance of doubt:
- (a) HKSAR courts should have full jurisdiction over the interpretation and application of the national security law and this should be so stated in the promulgated law.
 - (b) There should be no requirement that only Chinese nationals with no right of abode in a foreign country can adjudicate national security law cases. Such a requirement may contravene Articles 82 and 90 of the Basic Law and Article III Annex I of the Joint Declaration.
- (4) Given the seriousness of the offences under the national security law, a defendant should be afforded a right to a trial by jury in the Court of First Instance of the High Court.
- (5) For the same reason and in line with the practice of some other serious offences in the HKSAR, no prosecution should be commenced without the written consent of the Secretary for Justice.
- (6) Any person who is arrested and detained under the national security law should be released as soon as practicable, and in any event within 48 hours. If a longer period of detention is contemplated, the arrested person should be brought promptly before a judge of the High Court to consider whether further detention should be allowed or whether the person should be released on bail. Anyone who is arrested needs to be informed, at the time of arrest, of the reasons for his arrest and should be promptly informed of any charges against him. The arrested person should have the right to access to lawyers of his own choosing before being required to undergo interrogation.

- (7) Prosecution of offences under the national security law should be in strict accordance with the normal criminal procedures applying in Hong Kong courts. The Chief Justice or Chief Judge of the High Court should be able to issue practice directions on the conduct of proceedings under the national security law.
- (8) The rights of the parties to the proceedings under the national security law should be protected in full. These rights include:
- (a) the right to fair and public hearing before a competent, independent and impartial tribunal;
 - (b) the right to be presumed innocent;
 - (c) the right to be informed of the charges against oneself;
 - (d) the right to have adequate time and facilities for the preparation of his defence and to communicate with legal representatives of his own choosing;
 - (e) the right to be tried without undue delay;
 - (f) the right to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing;
 - (g) the right to have free legal assistance;
 - (h) the right to examine the witnesses who give evidence against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (i) the right not to be compelled to testify against himself or to confess guilt;
 - (j) the right to appeal;
 - (k) the right not to be tried or punished against for an offence for which he has already been finally convicted or acquitted; and
 - (l) the right not to be subject to retrospective criminal offences and the retrospective imposition of a heavier penalty.

- (9) While the NPCSC enjoys a power of interpretation of the national security law under the PRC Constitution and the PRC Legislative Act, the NPCSC should refrain from exercising the power of interpretation in the absence of a request from the Court of Final Appeal.
- (10) The national security law should not come into effect before its gazettal in Hong Kong and should by no means have any retrospective effect.
- (11) As the national security law is meant to fill a gap in the existing laws of the HKSAR, the national security law, or any part thereof, should end upon the enactment and coming into force of the equivalent law in the HKSAR.
4. The Hong Kong Bar Association repeats its concern about the suggestion that the national security organs of the Central People's Government may, if necessary, set up an office in the HKSAR. The national security organs of the Central People's Government are clearly departments of the Central People's Government. If an office is to be set up in the HKSAR, it should only be done pursuant to Article 22 of the Basic Law. The office and its personnel need to abide by the laws of the HKSAR. They should not have any law enforcement powers, including the power to conduct surveillance, save in accordance with the laws of the HKSAR. They should not be entitled to any civil and criminal immunity under the laws of the HKSAR.

Hong Kong Bar Association

Dated: 12 June 2020