THE LAW SOCIETY OF HONG KONG
香港律師會

Practitioners Affairs 110th ANNIVERSARY

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CAHRC/18/3942322

9 May 2018

Mr. Patrick Nip
Secretary for Constitutional and Mainland Affairs
Constitutional and Mainland Affairs Bureau
12/F East Wing
Central Government Offices
2 Tim Mei Avenue
Tamar, Hong Kong

BY EMAIL & BY POST
(patricknip@cmab.gov.hk)

Dear Patrick,

Implementation of the National Anthem Law

I refer to the captioned, and attach the Law Society's submissions on the subject matter for your consideration.

Thank you.

Kind Regards,

Kenneth Fok
Director of Practitioners Affairs
The Law Society of Hong Kong

Encl.

c.c. Panel on Constitutional Affairs, LegCo

THE LAW SOCIETY OF HONG KONG 香港律師會

IMPLEMENTATION OF THE NATIONAL ANTHEM LAW

PRELIMINARY OBSERVATIONS

1. In accordance with the Basic Law, Hong Kong's legal system is firmly embedded in the common law tradition; see Articles 8, 18, 19, 81, 87 and 160 thereof.

2. One of distinctive features of the common law system is the evolving case law, which allows for some flexibility while providing for certainty and predictability, when judges apply the common law principles to interpret laws.

3. This principle of legal certainty is fundamental to not only the regulation of daily activities of Hong Kong residents, but also the protection of their rights and freedoms guaranteed by the laws of Hong Kong, including the Basic Law (e.g. Article 39).

4. We note the Government recently produced an outline of the proposed content of the National Anthem Bill which seeks to implement the National Anthem Law passed by the Mainland. That law has been incorporated in Annex III of the Basic Law, and is to be implemented by way of local legislation.

5. The outline do not provide any definition for terms such as "derogatory", "insult" or "respect" (e.g. could standing in silence for non-Mandarin speaking persons amount to showing respect to the national anthem?). On the other hand, concept such as "harmful to the dignity of the national anthem" (article 6 of the Government's outline) is proposed to be included. These concepts are not defined.

6. We also note, with concern, the proposal to suitably incorporate into the preamble of the bill wordings " to cultivate and practise the core values of socialism" (article 1, ibid), which, prima facie, is inconsistent with Basic Law Article 5.

7. The Government has explained its intention to introduce a simple national anthem legislation, leaving it to the courts to decide on the cogency and weight of evidence presented by the prosecutor.

8. Failing to provide clear definitions in the national anthem legislation would leave the courts to develop the law based on common law principles on a legislation derived from a civil law jurisdiction. This is undesirable, because it would result in the Judiciary being responsible for interpreting issues of constitutional importance in a politically charged social environment.

9. Judges in Hong Kong have recently been exposed to unwarranted and misguided criticism over decisions involving contentious political issues. The proposed legislation without clear definitions could potentially expose the Judiciary to unfair criticism. That would not be beneficial to the rule of law in Hong Kong.

The Law Society of Hong Kong
8 May 2018