



Submission on National Anthem Bill
Progressive Lawyers Group

A. Introduction and Executive Summary

1. These are the Progressive Lawyers Group's submissions on the National Anthem Bill (the "**Bill**") gazetted by the Government on 11 January 2019.
2. There are a range of issues with the Bill, among which the following features are the most concerning:
 - (1) The lack of clarity in particular in the offence creating sections (Clauses 6 and 7), which regrettably falls foul of the "prescribed by law" requirement.
 - (2) Specifically in relation to Clause 6 which prohibits the use of the national anthem, its lyrics or score on certain occasions, there are concerns regarding the ambiguity of the phrase "*lyrics or score of the national anthem*", the lack of any *mens rea* requirement, the width of the Chief Executive's power to restrict usage of the national anthem, its lyrics or score, and the lack of definition of a "*private funeral event*".
 - (3) In relation to Clause 7 which prohibits insulting the national anthem publicly:
 - (a) there is an alarming lack of clarity in inter alia the definition and scope of "*insult*" and "*public*". We strongly recommend the Government provide clearer definitions for such terms. Whilst the PLG acknowledges that it is not possible to provide a complete definition of these terms, it is certainly possible to for example provide a list of factors that should or should not be considered in determining what constitutes insult and what constitutes

public. As indicated below, similar pieces of legislation such as the National Flag ordinance and the Public Order Ordinance make corresponding terms at least marginally clearer. It is trite law that clarity and certainty are required for criminal offenses given the grave rate consequences they entail.

(b) We urge the Government to include a reasonable excuse defence to the criminal offences contained in Clause 7.

(4) More generally, there is disproportionate and far reaching encroachment on the freedom of expression, which is extremely concerning especially in contrast with the National Flag and National Emblem Ordinance (the “**National Flag Ordinance**”)

3. Secretary for Constitutional Affairs Patrick Nip has repeatedly said¹ in the press that members of the public do not have to be concerned and that there will be no abusive use of this piece of legislation.

4. With respect, this misses the point entirely. Whether someone is prosecutor is not up to him or indeed any Secretary for Constitutional and Mainland Affairs in the future. In any event, the real issue is whether people can be prosecuted for certain conduct or non-conduct and in this regards his reassurances which have no binding effect are wholly meaningless. We are deeply concerned that the Bill in its present form is susceptible to abuse by those in power to oppress and persecute dissidents.

B. The Preamble

5. The Preamble of a piece of legislation can be significant in that the Courts have regularly taken such into account in construing the legislation.²

¹ See for example: <https://news.rthk.hk/rthk/en/component/k2/1437390-20190110.htm>

² See for example: the Preamble of the Land Registration Ordinance, Cap. 128, considered in *Wide Power Corp Ltd v Incorporated Owners of Manhattan Court* [2015] 4 HKLRD 480 and the Pre-able in Foreign Judgments (Reciprocal Enforcement) Order (Cap.319A, Sub.Leg.), considered in *Lim Yi Shenn v Wong Yuen Yee* [2012] 3 HKLRD 505.

6. Our concerns with the Preamble in the Bill are two-fold.
7. **First**, it purports to impose an obligation on all individuals and organizations to respect the national anthem, preserve the dignity of the national anthem, and play and sing the national anthem on appropriate occasions.
8. This is extraordinary, as most preambles do no more than stating the context and aim of the legislations in question. It is also unclear what legal implications it has.
9. **Second**, it states that one of the aims of the Bill is “*to enhance citizen awareness of the People’s Republic of China, and to promote patriotism*”. It is questionable whether these are “legitimate purposes” in the context of considering whether the restrictions on civil liberties and individual rights in the Bill are justified. This gives no comfort to those who are concerned that the Bill, once enacted, becomes susceptible to abuse by those in power to oppress and persecute dissidents.

C. Clauses 3 and 4

10. Clauses 3 and 4 provide for the standard and etiquette for playing and singing the national anthem.
11. Our concerns with these two clauses are as follows:
 - (1) These clauses are objectionable in principle as they appear to be part of an alarming tendency to regulate and restrict individual rights including the freedom of expression. This is far more intrusive than the National Flag Ordinance, which does not contain similar provisions regulating the conduct of the public while the national flag is being raised or lowered. It merely prevents the national flag from being desecrated.
 - (2) From a practical point of view, even assuming it is necessary or desirable to regulate the etiquette for playing and singing the national anthem, the requirement under Clause 4(2)(b), i.e. “*to not behave in a way disrespectful to the national anthem*” is sufficient to protect the dignity of the national anthem. The requirement under Clause 4(2)(a) “*to stand solemnly and deport*

themselves with dignity” is unnecessary and indeed impractical in particular in circumstances where individuals may be unable to do so physically.

D. Clause 5 and Schedule 3

12. Clause 5 and Schedule 3 together provide for occasions on which the national anthem must be “*played and sung*”.

13. A number of issues arising out of these require clarifications:

(1) It is unclear what “*played and sung*” in Clause 5 means: sung by whom? This is concerning in particular when read together with Schedule 3 which provides that the national anthem must be “*played and sung*” at oath-taking ceremonies of *inter alia* judicial officers. Judges who do not speak the Chinese language (including those from Hong Kong and other common law jurisdictions) will not be able to sing the national anthem. Does that mean they are precluded from taking the judicial oath and assuming judicial positions in Hong Kong?

(2) If a person does not sing the national anthem on those occasions specified in Schedule 3, does that constitute “insulting” the national anthem and therefore an offence under Clause 7(2) which provides “*a person commits an offence if the person publicly and intentionally insults the national anthem in any way*”?

(3) For the purpose of protecting the dignity of national anthem (and even promoting the national anthem), why is it not sufficient to provide that national anthem must be “*played*” (rather than “*played and sung*”) on specified occasions?

(4) There is a further concern that Clauses 4-5 and Schedule 3 (in particular the part concerning oath-taking ceremonies) read together may provide a further ground for disqualification of members of Legislative Council duly elected by the people. An elected member who is accused of not compliant with the etiquette under Clause 4 when the national anthem is “*played and sung*” at the oath taking ceremony may be considered failing to take the oath “solemnly” or

“sincerely” as required under the Interpretation issued by the Standing Committee of the National People’s Congress on 7 November 2016.

- (5) What events are considered “*a major sports event held by the Government*” in Schedule 3?

E. Clauses 6 and 8

14. Clause 6 prohibits misuse of the national anthem, its lyrics or score, including its use in a trade mark or commercial advertisement, in private funeral event, as background music in a public place, or on occasions prescribed by the Chief Executive. Offenders are liable to be fined.

15. There are several problems with this clause, which tend to make this clause an unconstitutional restriction on freedom of expression:

- (1) The ambiguity of the phrase “lyrics or score of the national anthem”;
- (2) The lack of any *mens rea* requirement;
- (3) The width of the Chief Executive’s power to restrict usage of the national anthem, its lyrics or score;
- (4) The lack of definition of a “private funeral event”.

E1. “Lyrics or score of the national anthem”

16. When read together with Clause 8, for the purpose of Clause 6, so long as the words and score can **reasonably** be regarded as **part of** the lyrics or score, the prohibition under Clause 6 applies.

17. It is unclear how big or small such “parts” may be. This is concerning in particular given that the lyrics of the national anthem contains common, everyday words and phrases.

18. A blanket ban on the mere use of its lyrics would present undue restriction on the creative work of writers, and create traps for the unwary.

19. Take for example the phrase “起來，不願做奴隸的工友”. It certainly contains words that not only resemble, but are the same as part of the lyrics of the national anthem. Is the use of this phrase now prohibited in advertisement or in tribute to a departed friend? How about “不願做奴隸的人”? Or simply “奴隸”? Do writers now have to avoid such common terms in order not to fall foul of the law? With such a wide sweeping protection of the lyrics of the national anthem, Clause 6 would in effect create a blacklist of words and phrases, severely hampering creative activities and the use of common Chinese words and phrases.
20. It is submitted that for the purpose of preventing misuse of the national anthem, it is sufficient to prohibit the misuse of the national anthem *itself* as a whole, i.e. only where taking into account all the circumstances, a usage of words and/or music makes one reasonable believe that it *is* the national anthem, rather than just parts of the lyrics or score.
21. Clause 6 involves a restriction on freedom of expression, and the boundary of such restriction should be narrowly drawn.

E2. *Mens rea requirement*

22. A closely related issue is the lack of express *mens rea* requirement in Clause 6. Clause 6 appears to create a strict or absolute liability offence.
23. Given the broad definition of lyrics and score, it is not difficult to envisage the possibility that a person might have used such words or score without subjectively believing or intending it to be regarded as part of the lyrics or score of the national anthem. Should such persons nevertheless be subjected to criminal sanction?
24. In *Gammon (Hong Kong) Ltd v Attorney- General of Hong Kong* [1985] AC 1, PC, Lord Scarman stated the following principles on *mens rea* requirements in criminal offences (at 14B):

“(1) there is a presumption of law that mens rea is required before a person can be convicted of a criminal offence; (2) the presumption is particularly strong where the offence is ‘truly criminal’ in character; (3) the presumption applies to statutory

offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute; (4) **the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, eg public safety;** (5) **even where a statute is concerned with such an issue, the presumption of mens rea stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.”** (emphasis added)

25. There is no clear evidence that misuse of the national anthem is rampant or of such social concern that it should be criminalised by the imposition of a strict liability offence. Further, nor could an imposition of a strict liability offence prevent misuse of words or music similar to the national anthem, if the person concerned genuinely did not believe that he or she was using the national anthem.

26. A strict liability offence that criminalises use of the national anthem, or even just part of its lyrics and music, would create a chilling effect far greater than the need to protect the dignity of the national anthem. It would in effect create a tool for literary inquisition, subjecting the artistic creation of writers and producers to post-production scrutiny notwithstanding their original intention.

27. It is submitted that the *mens rea* of this offence should be precisely laid out to avoid criminalising the unwary and the innocent. Only if a person uses the national anthem, its lyrics and or its score, or part of it, *intending it to be regarded as the national anthem*, should he or she be caught by Clause 6.

E3. The Chief Executive's unfettered power to expand Clause 6

28. Under Clause 6(5), the Chief Executive may prescribe any occasion, place or purpose, for which the national anthem cannot be used. Such power is not limited to the use of national anthem for commercial purpose.

29. Clause 6 is *prima facie* a restriction of freedom of expression, and as such its scope should be strictly confined within constitutional parameters. It is trite that for any

restriction on freedom of expression to be constitutional, it must pass both the test of legality and proportionality.

30. The test of legality in particular requires law restricting right to be sufficiently certain and accessible. In *Leung Kwok Hung* (2005) 8 HKCFAR 229 the CFA has explained in details the meaning of this requirement:

*“27. To satisfy this principle, certain requirements must be met. It must be **adequately accessible** to the citizen and must be formulated with **sufficient precision** to enable the citizen to regulate his conduct...*

*29. A law which confers discretionary powers on public officials, the exercise of which may interfere with fundamental rights, **must give an adequate indication of the scope of the discretion**. The degree of precision required of the law in this connection will depend upon the particular subject matter of the discretion. *Malone v. United Kingdom* (1984) 7 EHRR 14 at para.68. See also *Silver v United Kingdom* (1983) 5 EHRR 347 at para.88 and *Sunday Times v. United Kingdom* at para.49. In *Malone v. United Kingdom*, the police had tapped the applicant’s telephone conversation in the course of a criminal investigation. The European Court of Human Rights held that this was an interference with his right to respect for his “private life” and “correspondence” under art. 8 of the European Convention (para.64). The issue was whether the interference was “in accordance with law” as required by art. 8(2), which mandates the principle of legal certainty. The Court held that English law **did not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion** conferred on the public authorities in the field of interception of communications. Accordingly, the interferences with his right under art. 8 were not “in accordance with law” (paras.79 and 80).”*

31. If the provision in question is an offence that limits the exercise of a fundamental freedom, for example freedom of speech, an exceptionally high degree of certainty of definition is required: *Shum Kwok Sher* (2002) 5 HKCFAR 381 at §3.

32. The European Court of Human Rights in *Glas Nadezhda Eood v Bulgaria* (2009) 48 E.H.R.R. 35, §46 stressed that the discretion granted to the executive to restrict fundamental right must not be unfettered:

*“In matters affecting fundamental rights it would be **contrary to the rule of law**, one of the basic principles of a democratic society enshrined in the convention, **for a legal discretion granted to the executive to be expressed in terms of an unfettered power**. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise...”*

33. It is for the legislature to prescribe the limit of such restriction of right, and not to leave it to the discretion of the executive. As discussed by the South African Constitutional Court in the case of *Dawood, Shalabi and Thomas v. Minister of Home Affairs* 2000 (3) SA 936 at §54:

*“It is **for the Legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable**. It is therefore not ordinarily sufficient for the Legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution.”*

34. At present there is no guidance of what kind of “occasion, place or purpose” could the Chief Executive prohibit the use of the national anthem, its lyrics or score. With such broad power he could have prohibited the use of such in any place and for any purpose, whether for profit or not for profit. There is simply nothing in the National Anthem Bill that could prevent the abuse of such power.

35. Imagine for instance that the Bill contains a clause that prohibits the use of the national anthem, its lyrics or score in the Civic Square. Such a provision would certainly be subjected to the most anxious scrutiny; it could cover the use of the national anthem during demonstration, and could even catch those who have set the national anthem as their ringtone, and has his or her phone rang at the wrong place or time. Such sweeping impact is likely to be controversial and be regarded as unconstitutional. However under Clause 6(5), the Chief Executive is given

precisely the power to impose such a broad restriction, without any need to go through the legislative process.

36. There is no justification why such a wide and unfettered power is needed, or why such power should be granted to the Chief Executive. If any situation should arise in the future that genuinely requires a further restriction in the “occasion, place or purpose” where the national anthem may be used, there is no reason why such a situation cannot be dealt by appropriate legislative amendments, preceded by sufficient public debate.

37. It is suggested that Clause 6(1)(c) and 6(5) be deleted in their entirety.

E4. Private funeral event

38. There is no definition in the Bill as to what constitutes a “*private funeral event*”. Is it to be determined by whether the invitation to the funeral is published publicly or only sent only to named invitees? Or is it to be determined by whether the deceased have done great service to Hong Kong? Would funeral of civil servants who died in the course of duty be automatically classified as “public funeral”, notwithstanding that only family members are invited? Without a clear definition of what constitutes a “private funeral event”, it is impossible to comply with Clause 6(1)(b).

E5. Possibility of a Permission scheme?

39. Lastly, it is not entirely clear why should the national anthem, its lyrics and score be prohibited for all advertisement or private funeral. Certainly there may be legitimate reasons for the use of the national anthem, its lyrics or score in those occasions, for example to honour a deceased for his service of the country. An advertisement may for instance contain a story about a proud soldier of the country and be entirely respectful in its use of the national anthem. Is it really necessary to impose a blanket prior restriction on all such usage?

40. Other countries which restrict the use of the national anthem have adopted a permission scheme, which protects the dignity of their national anthem without

unduly restricting the creative activities of its people. Australia for example, requires one to obtain permission from the government to use its national anthem for commercial purpose, while no restriction is imposed for non-commercial use³. Ireland is now considering a similar scheme⁴.

41. It is suggested that instead of imposing a blanket prohibition on the use of the national anthem on pain of criminal sanction, a permission scheme may instead be put in place to regulate its use for certain purposes, primarily commercial ones, which gives more flexibility for citizens to use the national anthem while retaining control on misuse.

F. Clause 7

42. Clause 7 of the Bill is one of two provisions in the Bill that seeks to criminalise conduct in relation to the national anthem.

43. Insofar as this is the first time in the entire history of Hong Kong that conduct relating to any national anthem is criminalised, this constitutes a regression to individual liberties in Hong Kong and is deeply regrettable.

44. One of the principal problems with Clause 7 is its patent lack of clarity and precision and failure to comply with the test of legality, leading to its possible application as regards conduct that the Government has simply not indicated it does not agree with and seeks to punish i.e. in circumstances the Government has not envisaged.

F1. Definition and Scope of Insult

45. The definition of an insult raises a myriad of problems.

³ <https://www.pmc.gov.au/government/australian-national-anthem/use-australian-national-anthem>

⁴ https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/seanad_public_consultation_committee/reports/2018/2018-07-17_status-treatment-and-use-of-the-national-anthem_en.pdf

46. **First**, Clause 7(8) defines as insult as meaning “*to undermine the dignity of the national anthem as a symbol and sign of the People’s Republic of China*”. This is self-evidently nebulous.
47. **Second**, Clause 7(1) then provides that one could be insulting the national anthem if one “*alters the lyrics or score*” thereof or “*plays and sings*” it “*in a distorted or disrespectful way*”. This would therefore seem to indicate that merely playing the national anthem or singing it in a distorted or disrespectful way may not constitute an insult.
48. Yet Clause 7(2) provides more generally that a person commits an offence if he insults the national anthem “in any way” and this would prima facie seem to catch a mere playing or a mere singing (as opposed to “*plays and sings*” the national anthem) that is distorted or disrespectful.
49. **Third**, there are many provisions governing how one should act or not act in relation to the national anthem. It is wholly unclear whether such actions or inactions constitute an insult, particularly as these provisions do not contain offences for the breaches thereof.
50. Thus, for example, Clause 4(2) provides that whilst the National Anthem is being played and sung, “*persons who take part in or attend the occasion*” are expected “*to stand solemnly and deport themselves with dignity*” and “*to not behave in a way disrespectful to*” the national anthem. No offence is created in relation to this provision.
51. However, by construing Clause 4(2) with Clause 7(2) together, a failure to stand during a playing of the national anthem, for example, would seem to constitute an insult. This would then have many practical implications.
52. For example, if an ordinary citizen plays the national anthem in a public plaza and two other citizens are sitting nearby and chatting, their failure to stand immediately and stop chatting could render them in breach of Clause 7(2). It is immediately obvious that this is unnecessarily harsh.

53. One response would be that since they had no intention to insult, they would not be in breach of Clause 7(2). However, it is unclear whether this is the case – is their intention to continue to sit and chat sufficient to show an intention to not to stand solemnly and respectfully which manifests an intention to insult? There is no obvious answer.
54. Ironically, if an insult to the National Anthem includes failing “*to stand solemnly and deport*” oneself “*with dignity*” (as required under Clause 4(2)), then much conduct which cannot normally reasonably be seen as insulting then automatically becomes insulting. Thus, for instance, it is not uncommon for people to sing or play out a national anthem on the streets in celebration in a big international football match or in the competition to host the Olympics. It is not uncommon for people to chant or holler or dance or honk their horns in response. According to the Bill, this conduct would potentially be seen as insulting conduct, even if, self-evidently, this is a marked departure from what ordinarily constitutes insulting conduct.
55. **Fourth**, the lack of greater guidance or limitation as to the definition of insult and/or the requisite *mens rea* of insult within the Bill means that a vast array of conduct could be caught. Indeed, Clause 7(2) specifically makes it clear that insulting the national anthem “*in any way*” is an offence.
56. Whilst the Government's intention with this provision may have been geared towards preventing the booing of the national anthem at football matches, read literally, it is in fact no longer open to criticise, even if with basis, the national anthem in any public arena, whether physical or virtual and whether in speech or in print. Thus, for example, a university lecturer writing an article in an academic journal, three friends chatting in a café, or a politician commenting on Facebook, that includes criticism of any sort of the national anthem, even if objectively justifiable, would be liable to conviction. This is particularly so as there is no “*reasonable defence*” to Clause 7(2) i.e. that one will not commit the offence if one has a reasonable excuse which may include academic or artistic expression. It is noteworthy that the only other criminalising provision in the Bill, Clause 6(3), does indeed have a “*reasonable excuse*” exception and no explanation has been provided to date by the Government as to why this (unjustifiable) difference exists.

57. The problem extends beyond direct criticism. The lack of clarity and precision means a whole swathe of conduct is now put into question and the limitations on individual liberty far more extensive than one might imagine.
58. For example, is it possible to wear a T-shirt reading 'Hong Kong is NOT China' to a football match any longer? It might be argued that that phrase, even if not taken literally but taken figuratively to mean support for Hong Kong independence, is at most targeted towards dislike of the PRC rather than the national anthem *per se*. However, the chilling effect on freedom of expression that this Clause has is precisely that one cannot say for certain that wearing that T-shirt would not be taken as an insult and therefore criminal conduct (when ordinarily wearing that T-shirt would have absolutely no legal implications).
59. How about a T-shirt that reads 'I hate the Chinese Communist Party'? The national anthem, after all, certainly has deep historical roots and present connections with the Chinese Communist Party and again it is hard to categorically rule out that insulting the umbrella organisation to which the national anthem 'belongs' would not be seen as insulting a constituent part thereof.
60. Further still, would wearing a face mask even if one does not have the flu for example constitute an insult or wearing a cap? Again, it is commonly accepted that good manners require people to take off their headgear in solemn occasions.
61. And yet further still, if one intentionally wears suit but a black coloured tie to an oath taking ceremony where the National Anthem is played, could that constitute an insult? After all, black coloured ties are associated with deaths and funerals and the Bill expressly makes it clear that the national anthem is not to be associated with funereal matters. See Clause 6(1)(b).
62. The matter extends beyond clothing. If one intentionally refuses to switch off one's mobile telephone and it rings during the course of a playing of the national anthem, would that constitute an insult? An objective bystander could not unreasonably consider it rude, especially in the context of a national anthem no less and when a law no less has made it clear that the national anthem is meant to be respected.

63. One response to these concerns about potential insults that do not take the form of direct criticism is that the individuals will be protected if they do not have an intent to insult since Clause 7(2) only criminalises conduct done with such an intent.
64. This is scant relief. If the conduct is deemed to be insulting, the reality is it will fall to the individual to provide a decently credible explanation for why that conduct was done without an intent to insult and that may not necessarily be easy. After all, it is difficult to explain why one simply had to wear that particular piece of clothing or keep one's cap on or not switch one's telephone to silent mode. Presumably, explanations such as 'I just couldn't be bothered' or 'I like that T-shirt' or 'I didn't know the anthem was going to be broadcast' are not going to be particularly convincing.
65. This lack of clarity as to what constitutes an insult and the width of conduct correspondingly proscribed is particularly egregious when Clause 7 is compared with the National Flag Ordinance. The commensurate offence, as contained in Section 7 thereof, reads as follows.

"A person who desecrates the national flag or national emblem by publicly and wilfully burning, mutilating, scrawling on, defiling or trampling on it commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 3 years."

66. It is immediately obvious that the criminal conduct and the requisite *mens rea* under this provision is much more clearly, specifically and clearly defined. There is limited scope for arguing what does constitute or does not constitute the trampling on or the scrawling on of an object. Thus, for example, it is clear that simply criticising the PRC national flag (such as for being ugly or being representative of an evil dictatorship) is unimpeachable or wearing a T-shirt stating 'Hong Kong is NOT China' whilst clutching the flag at the same time as a flag of a skeleton's head would equally not be.
67. The contrast with the Section 7 of the National Flag Ordinance makes clear the laziness and the carelessness of the Government in attempting to describe the conduct to be proscribed. That is certainly unacceptable.

F2. Definition and Scope of Public

68. Another element of the offences created by Clauses 7(1) and 7(2) is that the insult has to be committed publicly.

69. The lack of clarity as to what is meant by “public” could lead to absurdity: a man in a park without anyone else nearby who boos quietly when he hears the national anthem being broadcasted over the park’s speakers may then be potentially liable, but when he invites 50 people to his home to watch a game of football and they all boo loudly when the national anthem is played, he (and all of them) should be free from liability.

70. A further odd result that comes about in association with the public nature of the offence is as regards Clause 7(4). Clause 7(4) provides as follows:

“A person commits an offence if, with intent to insult the national anthem, the person intentionally publishes the insulting in any way of the national anthem.”

71. An application of a provision so drafted means that in the aforementioned example, the 50 people are not liable to conviction but a person present who records the occasion and then shares it with one friend on WhatsApp thereafter commits an offence. In other words, it is odd that the private committing of an insult is itself not punishable but the publication of such is punishable. This certainly seems to make no logical sense.

72. More generally, the complete lack of definition of what constitutes an insult committed publicly is unhelpful. Thus, for example, can a private home become a public place if any member of the public is allowed access (and what if, only a segment of the public is allowed access)? Is an insult committed in a public place but which is not witnessed by anyone constitute a public insult? What if the insult is committed in private (such as someone’s home) but is overheard in public (such as on the street)? And what constitutes a public space in the virtual world? Whilst there is no doubt that case law can provide some guidance, specific instruction

(drafted as it would be particularly for this context) would help limit the space for confusion.

73. This lack of guidance is particularly egregious when the Public Order Ordinance (Cap. 245) is considered in comparison since there is at least some guidance therein. Thus, for example, section 7(2) thereof makes it clear that a public meeting does not include a meeting of not more than 50 persons, a meeting of not more than 500 persons in private premises (whether or not the public or any section thereof are permitted to attend) and a meeting held in a school or a college or educational establishment if consent thereof is obtained (whether or not the public or any section thereof are permitted to attend). Again, the lack of proposed guidance points to laziness and carelessness in the drafting (of such an important and human rights limiting piece of legislation).

F3.

74. Another area for concern is the time limit under which offences may be prosecuted pursuant to Clause 7(7), being the earlier of (a) the end of the period of 1 year after the date on which the offence is discovered by, or comes to the notice of, the Commissioner of Police, and (b) the end of the period of 2 years after the date on which the offence is committed.

75. The offences under Clause 7 are *prima facie* summary offences⁵. However, the time limit for prosecution under Clause 7 is significantly longer than the 6 months applicable to most summary offences (see Section 26 of the Magistrates Ordinance (Cap.277)).

76. In *Interush Ltd v The Commissioner of Police* [2019] HKCA 70, the Court of Appeal noted that extension of the usual time limit of 6 months can be made “*where the underlying investigatory issues can be more complicated or involve international or Mainland elements.*”

⁵ Pursuant to section 14A of the Criminal Procedure Ordinance (Cap.221), where any provision in any Ordinance creates, or results in the creation of, an offence, the offence shall be triable summarily only, unless—(a)the offence is declared to be treason;(b)the words “upon [indictment](#)” or “on [indictment](#)” appear; or (d)the offence is transferred to the District [Court](#) in accordance with Part IV of the Magistrates Ordinance ([Cap. 227](#)).

77. The Government gave two reasons in the Legislative Council Brief to justify the extension of time limit, i.e, that : contraventions under Clause 7 may involve a large crowd of unidentified culprits, or the use of the Internet and social media.

78. However, we note that there are a number of summary offences which may involve a large crowd of unidentified culprits, or the use of the Internet and social media, but to which the usual 6 months limit remains applicable⁶. We see no credible reasons why the underlying issues are materially more complicated than such other summary offences which justify a departure from the usual rule.

G. Clauses 6-7: Disproportionate restriction of fundamental rights

79. The freedom of expression is a fundamental right protected by virtue of Article 16(2) of the Hong Kong Bill of Rights (“**HKBOR**”) and Article 39 of the Basic Law.

80. It is trite that any restriction of fundamental rights must satisfy the test set out in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372 at §§134-137 per Ribeiro PJ:

- (1) Whether the intrusive measure pursues a legitimate aim;
- (2) If so, whether it is rationally connected with advancing that aim;
- (3) Whether the measure is no more than necessary for that purpose (the standard of necessity being variable with the circumstances of the case); and
- (4) Whether a reasonable balance has been struck between the societal benefits of the encroachment and the inroads made into the constitutionally protected rights of the individual, asking in particular whether pursuit of the societal interest results in an unacceptably harsh burden on the individual.

81. A number of questions arise out of the restriction on freedom of expression in Clauses 6 and 7 as detailed in **Sections E-F** above.

⁶ As to offences which may involve a large crowd of unidentified culprits: Sections 4, 23, 28, 29 of the Summary Offences Ordinance (Cap.228) (“**SOO**”); as to offences which may involve the use of the Internet and social media: Sections 20, 21, 22 SOO.

82. **First**, the stated purpose of the Bill is to preserve the dignity of the national anthem and promote respect for the national anthem, to regulate the playing and singing, the broadcast and the use of the national anthem, to enhance citizen awareness of the People's Republic of China and to promote patriotism.
83. While in *HKSAR v Ng Kung Siu & Another* (1999) 2 HKCFAR 442, the Court of Final Appeal accepted that the protection of the national flag and the regional flag *per se* were interests within the concept of public order (*ordre public*), to say the very least, it is highly questionable whether to enhance citizen awareness of the People's Republic of China and to promote patriotism constitute legitimate aims.
84. **Second**, the restriction on the freedom of expression goes much further than necessary and is manifestly excessive, particularly in contrast with the National Flag Ordinance.
85. In *Ng Kung Siu*, which concerned Section 7, the offence creating section of the National Flag Ordinance which prohibits desecration of the national/regional flag or emblem by publicly and wilfully burning, mutilating, scrawling on, defiling or trampling on the same, the Court of Final Appeal came to the conclusion that the provision on the basis that the provision bans "*one mode of expression*" but "*does not interfere with the person's freedom to express the same message by other modes*" (per Li CJ, at §44).
86. Notably, in *Ng Kung Siu*, Bokhary PJ (as he then was) considered those restrictions placed on freedom of expression lay "*just within the outer limits of constitutionality*".
87. As detailed in **Sections E-F** above, the modes of expression banned under Clauses 6 and 7 are much wider than Section 7 of the National Flag Ordinance. The definitions of the *actus rea* and *mens rea* are so imprecisely defined that there are clearly dangers of such having the effect of interference with the substance of the message the individuals wish to express.
88. The restrictions under Clauses 6 and 7 go much further than the National Flag Ordinance and are clearly disproportionate.

H. Clause 9

89. Clause 9 of the Bill obliges the Secretary for Education to give directions for the inclusion of the national anthem in primary and secondary education.

90. However, it is not clear what the consequences are if a school does not comply with such directions.

91. The Education Ordinance (Cap. 279) provides – on specified grounds – that the Permanent Secretary has power to give directions, and to close schools.

92. Would a school's refusal to comply with a direction to include the national anthem in education be a ground which renders it liable to be closed under section 83(1)(b) of the Education Ordinance, where "*the conduct of the managers, teachers or pupils of a school is or has been unsatisfactory*"? If it is, it certainly raises concerns of unjustified interference of education and academic freedom.

I. Conclusion and Recommendations

93. For the reasons set out above, we find the Bill is lacking in clarity in a number of aspects not least in the offence creating sections, and imposes disproportionate restrictions on the freedom of expression (whether in contrast with the National Flag Ordinance or otherwise).

94. We urge the Government to overhaul the Bill and address these concerns by improving the clarity and precision of the relevant provisions and deleting or tuning down provisions which unjustifiably encroach on civil liberties.

Progressive Lawyers Group

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