



立法會秘書處 法律事務部
LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

來函檔號 YOUR REF : CMAB E4/1/1
本函檔號 OUR REF : LS/B/9/18-19
電話 TELEPHONE : 3919 3503
圖文傳真 FACSIMILE : 2901 1297
電郵 EMAIL : kylee@legco.gov.hk

By Fax (2179 5589)

13 February 2019

Ms LAM Wai-ki, Cordelia
Principal Assistant Secretary
(Constitutional & Mainland Affairs)⁷
Constitutional and Mainland Affairs Bureau
13/F, East Wing
Central Government Offices
2 Tim Mei Avenue, Tamar
Hong Kong

Dear Ms LAM,

Re: National Anthem Bill

We are scrutinizing the captioned Bill with a view to advising Members.

Please find attached an appendix listing our observations in relation to the Bill. We should be grateful if you could let us have your response in both English and Chinese as soon as possible.

Yours sincerely,

(Kelvin Ka-yun LEE)
Senior Assistant Legal Adviser

c.c. Department of Justice
(Attn: Mr Lawrence PENG, SALD and
Mr Jonathan LUK, SGC) (By Fax: 3918 4613)
Legal Adviser
Assistant Legal Adviser 2
Clerk to Bills Committee

Legal Service Division's observations on the National Anthem Bill

General observations

1. At the meeting of the Panel of Constitutional Affairs on 23 March 2018, Members expressed concern about the impact of the Bill on freedom of speech, of expression and of creation. To allay these concerns, would the Administration clarify how the proposed offence provisions are justified restrictions on the right to freedom of speech and expression guaranteed by Article 27 of the Basic Law and Article 16 of the Hong Kong Bill of Rights.
2. Section 3 of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) provides that there shall be freedom of speech and debate in the Council or proceedings before a committee, and such freedom of speech and debate shall not be liable to be questioned in any court or place outside the Council. Please clarify whether such freedom would be affected as a result of the enactment of the Bill, and if the answer is affirmative, how.

Preamble

3. A preamble may be used as a means to ascertain the meaning of the provisions in an ordinance under certain circumstances.¹ Please clarify whether this is the nature and effect of the Preamble to the Bill. It is noted that the National Flag and National Emblem Ordinance, which was enacted to implement the Law of the People's Republic of China on National Flag and the Law of the People's Republic of China on the National Emblem in Hong Kong by local legislation, does not contain a preamble. Please explain why the inclusion of a preamble in the Bill is necessary.
4. It is noted that the Chinese text of "broadcast" in the Preamble is "播放". However, "廣播" is proposed as the Chinese text for the same word in clause 10(1), (2) and (3). On the other hand, "播放" is used as the Chinese text for "playing" in clause 2(3)(c). If it is considered that the use of "broadcast" is appropriate in the Preamble, please consider using "廣播" as its Chinese text to achieve consistency with clause 10(1), (2) and (3).

¹ See, for example, *LEE Yiu-kee v The Chinese University of Hong Kong* (CACV 93/2009, 23 July 2010).

Clause 2(3)

5. Clause 2(3) provides that, except in section 5, a reference to playing and singing the national anthem includes-
- (a) singing the national anthem;
 - (b) playing the national anthem on musical instruments; and
 - (c) playing a recording of the national anthem.

It is noted that the word "includes" is used. Please provide examples of other scenarios that are contemplated to be covered by clause 2(3). Please explain the difference between the reference to playing and singing the national anthem under clause 2(3) and under clause 5(3).

Clause 4

6. Under clause 4, the etiquette for playing and singing the national anthem would apply in relation to an occasion on which the national anthem is played and sung. Under clause 5, the occasions on which the national anthem must be played and sung are set out in Schedule 3. Please clarify whether clause 4 would only apply to the occasions set out in Schedule 3. If not, what other occasions are intended to be covered by clause 4? For example, would clause 4 apply to an occasion on which a person watching a programme broadcast in a public place (for example, via a big screen on the wall of a building) and a recording of the national anthem was being played and sung in the programme?
7. Is there any legal consequence for not complying with the etiquette provision in clause 4? For example, if a person behaves in a way disrespectful to the national anthem referred to in clause 4(2)(b), could this be used as evidence in a prosecution of the offence of intentionally insulting the national anthem for the purpose of clause 7?

Clause 5(1)

8. Please clarify whether clause 5(1) imposes a requirement that each person present at the occasion set out in Schedule 3 must sing the national anthem when the national anthem is played. If a person

concerned does not sing on the occasion, would the person be regarded as behaving in a way disrespectful to the national anthem, thereby constituting non-compliance with the etiquette proposed in clause 4(2) or constituting an offence under clause 7(2)?

Clause 5(2)

9. Please explain the criteria used for selecting the occasions to be included in the proposed Schedule 3 and the factors that the Chief Executive ("CE") in Council would take into account in deciding what other occasions should be included in Schedule 3.

Clauses 6(1) and 6(2)

10. It is noted that clauses 6(1) and 6(2) are framed in passive voice without specifying who is intended to be subject to the provisions. Please clarify whether the offence of misuse of national anthem under clause 6(3) would apply only to natural persons or both natural persons and legal persons. For example, where the national anthem, or the lyrics or score of the national anthem, is used by a company in a trade mark or commercial advertisement in contravention of clause 6(1), would the company be prosecuted for the offence under clause 6(3)? If not, who would be prosecuted for the offence?
11. Please explain who would be prosecuted for an offence under clause 6(3) in the following circumstances:
 - (a) in the case where an owner and/or a manager of a public place (such as a restaurant) allows or fails to prevent or stop a person from using the national anthem as background music in the public place in contravention of clause 6(2);
 - (b) in the case where an employee working in the public place in paragraph (a) above under the instruction of his employer or a patron of the public place (such as a customer of a restaurant) plays the national anthem as background music in the public place in contravention of clause 6(2).

Clause 6(3)

12. In the light of the circumstances set out in paragraph 11, please clarify, for example, whether the lack of knowledge that the national anthem would be played as background music in a public place, or

lack of control would be regarded as reasonable excuse under clause 6(3).

Clause 6(5)

13. Under clause 6(5), CE in Council may, by notice published in the Gazette, prescribe an occasion, place or purpose, for the purposes of clause 6(1)(c). Please clarify what occasion(s), place(s) or purpose(s) would be prescribed under clause 6(5) and explain the factors that CE in Council would take into account in prescribing the occasion(s), place(s) or purpose(s).

Clause 7(2)

14. Under clause 7(2), a person commits an offence if the person publicly and intentionally insults the national anthem in any way. It appears that clause 7(2) is wide enough to cover the acts specified in clause 7(1)(a) and (b). If that is the case, please explain why it is necessary to provide for the offence under clause 7(1).

Clause 7(4)

15. Under clause 7(4), 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. It appears that clause 7(4) is wide enough to cover the circumstances specified in clause 7(3)(a) and (b). If that is the case, please explain why it is necessary to provide for the offence under clause 7(3).
16. In the case where a person A, with intent to insult the national anthem, intentionally played and sang the national anthem in a distorted and disrespectful way at home in the presence of his friend B and B recorded it and later shared a video of A's insulting act on a website, would A and B be prosecuted under clause 7?

Clause 7(7)

17. Clause 7(7) proposes to extend the limitation period for prosecuting offences under clause 7 whereas for the offences in clause 6, section 26 of the Magistrates Ordinance (Cap. 227) would apply and therefore the time limit is six months from the time of offence. Please explain the reason(s) for proposing different time limits for prosecuting offences under clauses 6 and 7.

Clause 9

18. It is proposed in clause 9 that the Secretary for Education must give directions for the inclusion of the national anthem in primary education and in secondary education. Please provide examples of the directions that the Secretary for Education may give under the Bill. If there are any existing guidelines or directions given by the Secretary for Education on teaching the national anthem, please provide a copy of the existing guidelines or directions.
19. Please explain who are intended to be subject to the directions. Would they be students, teachers and/or principals? Would other employees of a school be covered as well? Please also explain whether there would be any consequences for non-compliance with the directions.

Clause 10

20. Under clause 10 of the Bill, the licensee of a broadcasting licence may be required by a determination or direction of the Communications Authority ("CA") to broadcast the national anthem by an announcement in the public interest, or material in the public interest, in the licensed service. Please clarify whether there would be any consequences for non-compliance with CA's determination or direction.
21. What factors would CE take into account in stipulating a date under clause 10(4) on which the licensee is required to broadcast the national anthem?