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[English Translation]

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Dear Mr LEE,

Supplementary Information on the National Anthem Bill

Regarding the questions raised in your letter of 13 February 2019 on the National Anthem Bill (the Bill), our reply is as follows.

Legislative principle of the Bill

2. The National Anthem Law has been added to Annex III to the Basic Law. According to Article 18(2) of the Basic Law, the national laws listed in Annex III to the Basic Law shall be applied locally by way of promulgation or legislation by the Hong Kong Special Administrative Region (“HKSAR”). It is thus the constitutional duty of the HKSAR Government to implement the National Anthem Law locally. Implementing the National Anthem Law in HKSAR by local legislation is consistent with the “one country, two systems” principle and the requirements of the Basic Law.

3. Our legislative principle is to fully reflect the purpose and intent of the National Anthem Law, which is to preserve the dignity of the national anthem and for the public to respect the national anthem; and at the same time to give due regard to the common law system practised in Hong Kong, as well as the actual circumstances in Hong Kong.

The Bill is in conformity with the Basic Law and the Hong Kong Bill of Rights Ordinance (Cap. 383)

4. The focus of the Bill is two-pronged: firstly, to state that the national anthem is the symbol and sign of the People's Republic of China, and to promote respect for the national anthem by means of directional provisions; secondly, to impose penalties on people who publicly and intentionally insult or misuse the national anthem.

5. On the act of insulting the national flag and the regional flag, the Court of Final Appeal stated the following in the judgment of *HKSAR v. Ng Kung Siu and another* (1999) –

- The Basic Law contains constitutional guarantees for the freedoms that are of the essence of Hong Kong's civil society. ...The question in this appeal is whether the statutory provisions which criminalise desecration of the national flag and the regional flag are inconsistent with the guarantee of the freedom of expression.
- A national flag is the symbol of a nation. It is a unique symbol. ... The national flag is the symbol of the People's Republic of China. It is the symbol of the State and the sovereignty of the State. It represents the People's Republic of China, with her dignity, unity and territorial integrity.
- The society in the People's Republic of China, the country as a whole, including the Hong Kong Special Administrative Region, has a legitimate interest in protecting their national flag, the unique symbol of the Nation.
- Flag desecration is a form of non-verbal speech or expression. ...The prohibition of desecration of the national and regional flags by the statutory provisions in question is **not a wide restriction of the freedom of expression**. It is a limited one. It bans **one mode of expressing** whatever the message the person concerned may wish to express, that is the mode of desecrating the flags. It **does not interfere with the person's freedom to express the same message by other modes**. ...[A] law seeking to protect the dignity of the flag

in question as a symbol, **in order to be effective, must protect it against desecration generally.**

- As to the time, place and circumstances with which we are concerned, Hong Kong has a new constitutional order. On 1 July 1997, the People's Republic of China resumed the exercise of sovereignty over Hong Kong being an inalienable part of the People's Republic of China and established the Hong Kong Special Administrative Region under the principle of "one country, two systems". ...[T]here are **strong grounds for concluding** that the criminalisation of flag desecration is a justifiable restriction on the guaranteed right to the freedom of expression.

Similarly, the Bill protects the dignity of the national anthem as a symbol and sign of the People's Republic of China by restricting one mode of expression only, that is the mode of insulting the national anthem. It does not restrict the content of the message which the public wish to express. Therefore, the restriction on freedom of speech and of expression imposed by the Bill is a limited and reasonable one and is not inconsistent with the guarantee of freedom of speech and of expression in the Basic Law and the Hong Kong Bill of Rights Ordinance (Cap. 383).

Powers and privileges of Legislative Council Members

6. Whether a particular act by a member of the Legislative Council (LegCo) would be protected by immunity depends on the actual circumstance of each individual case. According to the court judgments in past cases, the protection provided by Article 77 of the Basic Law and sections 3 and 4 of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) attaches only to statements made by a LegCo member in the course of official debates on the floor of the LegCo when exercising his powers and discharging his functions as a LegCo member.

Preamble

7. Preambles mainly serve to provide a context in which to understand the provisions of the legislation concerned. Articles 1, 3 and 5 of the National Anthem Law set out the purpose and spirit of the law, stating clearly that the national anthem is the symbol and sign of the People's Republic of China and thus should be respected and its dignity be preserved. By suitably adopting such articles into the Preamble, the public can be given a better understanding of the legislative purpose of the Bill and the provisions in the National Anthem Law can be reflected more accurately.

8. In the Preamble of the Bill, “broadcast of ... national anthem” is used as the corresponding English expression for “國歌的…播放”. That expression is chosen by making reference to the Chinese provision of Article 1 of the National Anthem Law and its English translation. On the other hand, in clause 10(1), (2) and (3) (provisions on sound broadcasting and domestic television programme services), “廣播牌照” and “廣播國歌” are chosen as the corresponding Chinese expressions for “broadcasting licence” and “broadcast the national anthem”. The choice of those expressions is made by making reference to the expressions relating to “broadcast” in the Telecommunications Ordinance (Cap. 106) and the Broadcasting Ordinance (Cap. 562). Given the different places in the Bill in which those expressions are located, and the different purposes they are intended to serve, there is no need to standardize the expressions.

Clause 2(3)

9. References to playing and singing the national anthem can be found in clauses 3, 4(1), 4(2), 5(1), 7(1)(b), 7(3)(b), 7(5)(b) and 9(1)(b)(ii) of the Bill. The interpretation provision in clause 2(3) is added to provide that a reference to playing and singing the national anthem in those provisions (except in clause 5(1)) is to include the following three types of situations – (a) singing the national anthem; (b) playing the national anthem on musical instruments; and (c) playing a recording of the national anthem.

10. Clause 5(3) of the Bill provides that a reference to the national anthem being played and sung in clause 5 is a reference to the national anthem being played on musical instruments in accordance with the standard score, or an official recording of the national anthem being played, for the singing of the national anthem. The main differences between the interpretation under this clause and the interpretation under clause 2(3) are as follows: (i) a reference to playing and singing the national anthem under clause 2(3) includes singing without instrumental or recorded accompaniment (i.e. singing without accompaniment), while a reference to playing and singing the national anthem under clause 5(3) does not apply to singing without accompaniment; (ii) clause 2(3) does not provide for the score to be used for playing the national anthem on musical instruments or the recording used for playing the national anthem, while clause 5(3) provides that on each occasion set out in Schedule 3, the national anthem should be played on musical instruments in accordance with the standard score, or an official recording of the national anthem should be played, for the singing of the national anthem.

Clause 4

11. Clause 4(1) of the Bill provides that clause 4 applies in relation to an occasion on which the national anthem is played and sung, which includes the occasions on which the national anthem must be played and sung as set out in Schedule 3 of the Bill, as well as other occasions on which the national anthem is played and sung. Clause 4(2) provides for the etiquette to be followed by the persons who take part in or attend the relevant occasions when the national anthem is played and sung. Since clause 4 only applies to those who “take part in or attend” the occasions on which the national anthem is played and sung, there is no question of a person watching a TV programme during which the national anthem is featured has to stand solemnly as mentioned in paragraph 6 of your incoming letter.

12. Clause 4 of the Bill is a directional provision which carries no penalty. The penal provisions, contained in Part 3 of the Bill, are designed to deal with behaviour that amounts to an insult to the national anthem or a misuse of the national anthem. For the offence of insulting the national anthem, the law enforcement agencies will only enforce the law in accordance with clause 7 of the Bill.

Clause 5

13. Schedule 3 of the Bill is worked out based on Article 4 of the National Anthem Law with adjustments made in the light of the actual circumstances of Hong Kong. Clause 5 of the Bill provide that on each occasion set out in Schedule 3, the national anthem must be played on musical instruments in accordance with the standard score, or an official recording of the national anthem must be played, for the singing of the national anthem. When the national anthem is played and sung, those who take part in or attend the occasion should follow the etiquette set out in clause 4, i.e. to stand solemnly and deport themselves with dignity, and to not behave in a way disrespectful to the national anthem. Not singing the national anthem on the occasions listed in Schedule 3 does not of itself necessarily amount to insulting the national anthem.

Clause 6

14. The offences set out in Part 3 of the Bill (including clause 6) apply to legal persons. Whether a legal person will be held criminally liable depends on the evidence and if the behaviour concerned constitutes the relevant offence. “Reasonable excuse” in clause 6(3) is a defence. If the prosecution has proven all the elements of the offence, the court will then

consider whether the defendant has any “reasonable excuse” as defence. The circumstances in each case are different and every piece of critical information, including alleged defence, has to be assessed based on the facts and details of each individual case.

15. Clause 6 of the Bill is drafted with reference to the occasions, places and purposes prohibited for the use of the national anthem in Article 8 of the National Anthem Law. Making reference to the approach of the National Flag and National Emblem Ordinance, clause 6(5) of the Bill allows the Chief Executive in Council to prescribe the occasions, places or purposes prohibited for the use of the national anthem in future when necessary. The HKSAR Government has not considered any occasions, places or purposes prohibited for the use of the national anthem other than those specified in clause 6(1) and (2) at the moment.

Clause 7

16. Clause 7 of the Bill is drafted with reference to Article 15 of the National Anthem Law. In order to reflect the legislative purpose of the National Anthem Law as much as possible in the Bill, the use of words in clause 7(1) is similar to “deliberately alters the lyrics or music of the national anthem, or plays or sings the national anthem in a deliberately distorted or disrespectful manner” in Article 15 of the National Anthem Law; the use of words in clause 7(2) is similar to “insults the national anthem in any other manner” in Article 15 of the National Anthem Law. Clause 7(2) does not adopt the use of “in any other manner” in Article 15 of the National Anthem Law because according to the general principles for interpreting legislative provisions and the context of clause 7, “in any other manner” may be interpreted as behaviour “in any other manner” which are of the same kind as those provided in clause 7(1). This cannot fully reflect the legislative purpose of Article 15 of the National Anthem Law. Clause 7(3) and 7(4) prohibit the act of publishing in relation to insulting the national anthem, and their construction is similar to that of clause 7(1) and 7(2).

17. On whether a specific case will contravene clause 7 of the Bill, the enforcement agencies would, according to the actual circumstances and the evidence collected in each case, make an assessment in accordance with the law. All cases will be tried in accordance to the usual standard of handling criminal cases in Hong Kong (i.e. beyond reasonable doubt). Our legislative intent is to prohibit public and intentional behaviour with an intent to insult the national anthem. We will use the above principles as the basis of assessing whether a case contravenes the law.

18. The enforcement agencies consider that contraventions of clause 7 may likely involve large crowds or the use of the Internet, which requires longer investigation time. To strike a balance between effective law enforcement and reasonable prosecution time bar, clause 7(7) of the Bill sets the prosecution time bar to one year after the date on which the offence is discovered by, or comes to the notice of, the Commissioner of Police, or two years after the date on which the offence is committed, whichever is the earlier.

Clause 9

19. The provisions of the Bill require the Secretary for Education to provide all primary and secondary schools with directions for the inclusion of the national anthem in primary and secondary education. At present, the learning contents of the national anthem are covered in the subject curricula and Moral, Civic and National Education in primary and secondary schools. To support the implementation of the National Anthem Law by local legislation, the Education Bureau (EDB) is reviewing the curriculum and administrative arrangements, and updating learning and teaching resources to see that students could learn to respect the national anthem and understand its background. Upon passage of the local legislation, the Secretary for Education will issue, through the prevailing mechanism, circulars and related guidelines to schools for them to take forward the relevant work. The EDB will also support schools in educating students to respect the national anthem.

20. The legislative spirit of clause 9 of the Bill is to educate students to respect the national anthem. The EDB will issue circulars and guidelines to all primary and secondary schools in due course. In general, the circulars and guidelines will apply to all who are responsible for decision-making and implementation of educational measures in every school, i.e. School Management Committees/Incorporated Management Committees, principals and teachers. Other clauses of the Bill also regulate disrespect or insulting behaviour in relation to the national anthem on the part of other school staff and stakeholders.

21. Clause 9 of the Bill does not include penalties. If a school does not follow the directions given by the Secretary for Education in connection with the National Anthem Ordinance, the EDB will require, through the prevailing mechanism, the school to make rectification. Schools have all along been complying with the Education Ordinance, relevant legislation and the EDB's guidelines. We trust that they will do the same in the enforcement of the National Anthem Ordinance.

Clause 10

22. Clause 10 of the Bill will be implemented through the existing mechanism for announcements or material in the public interest (APIs), and the Communications Authority (CA) and the Information Services Department will follow up in accordance with this mechanism. According to the relevant licence conditions and the determinations or directions made by the CA, domestic free television and radio broadcasters are currently required to broadcast on each channel not more than one minute of APIs in every clock hour without charge. Domestic pay television broadcasters are required to broadcast on specific channels not more than one minute of APIs in every two clock hours without charge. If a licensee fails to broadcast the national anthem by an API as required, the CA will handle such case in accordance with established procedures. This includes providing reasonable opportunities for the licensee to make representations, followed by a determination on whether the licensee concerned is in contravention of a licence condition or a direction made by the CA. If the licensee is found to have contravened the relevant requirement, the CA may impose sanction as appropriate. As at present, the mechanism for broadcasting APIs by domestic television and sound broadcasting licensees has worked well and there has been no deliberate contravention of the relevant requirements in recent years.

23. Article 13 of the National Anthem Law requires the Mainland broadcasters to broadcast the national anthem on important national statutory holidays and anniversaries. Clause 10 of the Bill also gives the Chief Executive power to stipulate a date for the licensees to broadcast the national anthem by APIs. The HKSAR Government will make reference to the holidays and anniversaries mentioned in Article 13 of the National Anthem Law and make adjustments in the light of the actual circumstances of Hong Kong when stipulating the dates for broadcasting the national anthem.

Yours sincerely,



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for Secretary for Constitutional and Mainland Affairs

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