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[English Translation]

Ms Joanne MAK
Clerk to Bills Committee on National Anthem Bill
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

15 March 2019

Dear Ms MAK,

Supplementary Information on the National Anthem Bill

Regarding the questions raised by members at the meeting of the Bills Committee on 1 March this year, our reply is set out below.

Legislative principle

2. Some members indicated that the National Flag and National Emblem Ordinance does not include provisions on respect for the national flag and national emblem and the requirement of facing the flag and standing solemnly to salute the flag, which are provided for under the Law of the People's Republic of China on the National Flag (National Flag Law) and the Law of the People's Republic of China on the National Emblem (National Emblem Law). Such approach varies from the handling of similar provisions in the local legislation of the Law of the People's Republic of China on the National Anthem (National Anthem Law).

3. The National Flag and National Emblem Bill was submitted to the Provisional Legislative Council for First Reading by the then Chief Executive-elect's Office on 3 May 1997, and passed by the Provisional Legislative Council on 14 June, and came into effect on 1 July. We do not have records showing the consideration behind the adoption or otherwise of specific provisions of the national laws by the Government in 1997 during the drafting of the National Flag and National Emblem Bill.

4. We must emphasise that the legislative principle of the National Anthem Bill (the Bill) is to fully reflect the purpose and intent of the National Anthem Law, which is to preserve the dignity of the national anthem and to promote respect to 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 has struck a balance between these two principles, implementing the national law in ways that are consistent with Hong Kong law system.

Powers and privileges of Legislative Council Members

5. Article 77 of the Basic Law states that members of the Legislative Council (LegCo) of the Hong Kong Special Administrative Region (HKSAR) shall be immune from legal action in respect of their statements at meetings of the Council. Section 3 of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) (LCPPO) 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. Section 4 of that ordinance also provides that no civil or criminal proceedings shall be instituted against any member for words spoken before, or written in a report to, the Council or a committee, or by reason of any matter brought by him therein by petition, Bill, resolution, motion or otherwise.

6. In *Chief Executive of the HKSAR & Another v. The President of the LegCo* (HCAL 185/2016), the court ruled that the protection provided by Article 77 of the Basic Law and sections 3 and 4 of the LCPPO (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 member¹.

¹ See paragraphs 86-88 of the CFI judgment.

7. The Court of Final Appeal, in *Leung Kwok Hung v The President of the LegCo (No 1)* (2014) 17 HKCFAR 689, has laid down the scope and limit of the non-intervention principle as applied in Hong Kong: (1) the principle of non-intervention as applied in Hong Kong is necessarily subject to the constitutional requirements of the Basic Law; (2) where the Basic Law confers law-making powers and functions on the legislature, the court has powers to determine whether the legislature has a particular power, privilege or immunity. In relation to (2), the CFA also flag up the “necessity” test i.e. it is for the courts to determine whether necessity sufficient to support a privilege is made out².

8. The court has pointed out in verdict of *HKSAR v Leung Kwok Hung* (DCCC 546/2016) that LegCo and the court have different and overlapping jurisdictions; for criminal conducts happening inside LegCo, LegCo may take disciplinary proceedings and the court may try the offender for the crime³. The court also points out that a proper balance needs to be struck between the protection of freedom of speech and debate in the legislature on the one hand and the equality before the law on the other⁴.

9. The aforementioned court judgments indicate that the protection provided to LegCo members by the LCPPO (Cap. 382) is not absolute. Whether a particular act by a member of the Legislative Council (LegCo) will be protected by immunity depends on the actual circumstances of each individual case. One must possess the requisite mens rea before the offence of insulting the national anthem is committed. If a LegCo member publicly and intentionally carries out acts with intent to insult the national anthem during LegCo meetings, he or she may contravene clause 7 of the Bill. There is no conflict between the Bill and the LCPPO (Cap. 382).

Enforcement actions taken by the Mainland in relation to the National Anthem Law

10. According to information provided by the Liaison Office of the Central People's Government in the HKSAR, since the National Anthem Law came into force in the Mainland on 1 October 2017, the Mainland security authorities have imposed administrative detention on two Mainlanders who contravened Article 15 of the National Anthem Law. Details are as follows –

² See paragraphs 39-31 of the CFA judgment.

³ See paragraphs 36, 45-47 of the reasons for verdict.

⁴ See paragraph 54 of the reasons for verdict.

- In November 2017, the security authorities of Ningcheng County of Inner Mongolia imposed an administrative detention of 15 days on a person who contravened Article 15 of the National Anthem Law on online live-streaming platform.
- In October 2018, a mainlander contravened Article 15 of the National Anthem Law when conducting online live-streaming at home. The security authorities of Shanghai imposed an administrative detention of five days on the mainlander concerned.

11. Administrative detention is a kind of penalties for administration of public security in the Mainland. It is an administrative penalty of restriction of personal liberty of a short period imposed by statutory administrative bodies in accordance with law on those who violated administrative provisions. According to section 2 of the Law on Penalties for Administration of Public Security in the Mainland, “[a] person who disturbs public order, endangers public safety, infringes on the rights of person and property or hampers social administration, which is harmful to the society and which, according to the provisions of the Criminal Law of the People’s Republic of China, constitutes a crime, shall be investigated for criminal responsibility according to law; and if such an act is not serious enough for criminal punishment, the public security organ shall impose on him a penalty for administration of public security according to this Law.” Since the decisions on administrative detention are made by security authorities of the county level or above but not by the court, there is no written judgment.

12. The legal system in the Mainland and that in Hong Kong are different, and thus the HKSAR Government implements the National Anthem Law in Hong Kong by local legislation. Section 11(1) of the Bill already provides that offences in relation to the national anthem in Hong Kong are investigated, and offenders are prosecuted, according to the laws of Hong Kong. Part 3 of the Bill contains provisions relating to offences of misuse of the national anthem and of insulting the national anthem. The enforcement agencies would, according to the actual circumstances and the evidence collected in each case, make an assessment in accordance with the laws of Hong Kong. All cases will be tried in accordance to the common law principles and usual standard for criminal cases in Hong Kong.

Legislation related to national anthem in other countries

13. Different countries and places adopt different ways to protect their national anthems. Some countries have laws for national anthems and provide penalties for protecting them (e.g. France, Germany, Austria,

Portugal, and Singapore). Some countries do not have laws regarding the national anthem (e.g. The United Kingdom and Australia). Some countries have laws for national anthems but do not provide penalties for contravening the relevant laws (e.g. Canada and Japan). The summary of the relevant legislations for the aforementioned countries with laws for national anthems is at Annex.

14. We must emphasise that the National Anthem Law has come into force nationwide since 1 October 2017, and the Bill is to implement the National Anthem Law in the HKSAR by local legislation. Therefore, the Bill must be in line with the legislative purpose and spirit of the National Anthem Law.

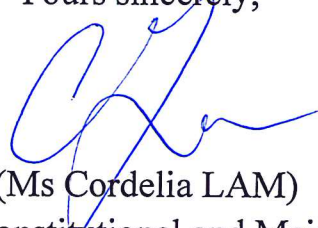
Clause 9 and 10 of the Bill

15. Clause 9 and other clauses of the Bill do not make contravention of the directions given by the Secretary of Education (SED) regarding Clause 9 a criminal offence and thus there are no sanctions. The Education Bureau (EDB) has all along had administrative measures in place to follow up irregularities identified in school operation (including not complying with the directions given by the SED), for example giving verbal/written advice and warnings. If individual schools still do not comply with the requirements and make rectifications, authority is conferred by relevant sections of the Education Ordinance to handle malpractices. Nurturing students' sense of national identity is the responsibility of school education. All along students have been taught the national anthem in primary and secondary schools and the relevant learning content of the national anthem has been embedded in the primary and secondary curricula. The society in general has no objection to teaching students to show respect to the national anthem. In this regard, we see little likelihood violations of the directions given by the SED regarding clause 9 of the Bill by schools.

16. 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.

Yours sincerely,



(Ms Cordelia LAM)

for Secretary for Constitutional and Mainland Affairs

c.c. Secretary for Commerce and Economic Development
(Attn: Mr Keith GIANG, Fax no.: 2511 1458)

Secretary for Education
(Attn: Mrs HONG CHAN Tsui-wah, Fax no.: 3428 6034)

Secretary for Justice
(Attn: Mr Lawrence PENG, Fax no.: 3918 4613
Mr Jonathan LUK, Fax no.: 3918 4613
Ms Heidi LEE, Fax no.: 3918 4799
Ms Cecilia SIU, Fax no.: 3918 4521
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Legislation related to national anthem in other countries¹

<u>Country</u>	<u>Legislations related to national anthem</u>
France	Article 433-5-1 of the Penal Code of France provides that the act of publicly insulting the national anthem or the national flag at an event organised or regulated by the public authorities is punished by a fine of €7,500. Where it is committed as a group action, the act is punished by six months' imprisonment and a fine of €7,500.
Germany	Section 1 under article 90A "Defamation of the state and its symbols" of the German Criminal Code provides that whoever publicly, in a meeting or through the dissemination of written materials, carries out the following behaviour, shall be liable to imprisonment not exceeding three years or a fine: (2) insults the symbols, flag, coat of arms or the anthem of the Federal Republic of Germany or one of its states
Austria	Article 248 "Disparagement of the state and its symbols" of the Austrian Criminal Code provides that: (1) Any person who publicly reviles or scorns the Republic of Austria or one of its federal states shall be liable to imprisonment not exceeding one year or a fine up to 720 daily rates. (2) Any person who, in the manner specified in paragraph (1), reviles, scorns or disparages in other ways a flag of the Republic of Austria or of one of its federal states displayed publicly, a national emblem affixed by a national authority of Austria, or the national anthem of the Republic of Austria or anthem of one of its federal states, shall be liable to imprisonment not exceeding six months or a fine up to 360 daily rates.

¹ Translated versions are for reference only, except that official version of the relevant legislations of Canada and Singapore are in English.

<p>Portugal</p>	<p>Article 332 “Insult of national or regional symbols” of the Portuguese Penal Code provides that:</p> <p>(1) Any person, by words, gestures, dissemination of writings, or by other means of communication with the public, who publicly insults the Portuguese Republic, the national flag, the national anthem, the national emblem or arms of Portuguese sovereignty, or lacks the respect due to them, shall be liable to imprisonment not exceeding two years or a fine up to 240 daily rates.</p> <p>(2) If the acts described in the previous paragraph are practised against the Autonomous Regions, or the regional flags, anthems or emblems of the respective Autonomous Regions, the person shall be liable to imprisonment not exceeding one year or a fine up to 120 daily rates.</p>
<p>Singapore</p>	<p>The rules made in accordance with the Singapore Arms and Flag and National Anthem Act (Chapter 296) requires the following :</p> <p>Occasions for performing National Anthem 11.(1)The National Anthem shall be performed when the President receives a general salute.</p> <p>(2) The National Anthem may be performed or sung on any appropriate occasion.</p> <p>Respect for National Anthem 12. When the National Anthem is performed or sung, every person present shall stand up as a mark of respect.</p> <p>Musical arrangements of National Anthem 13.(1) Any person performing or singing the National Anthem shall perform or sing the National Anthem according to the official arrangement in the Third Schedule or any other arrangement permitted under paragraph (2).</p> <p>(2) The National Anthem may be rearranged in any manner that is in keeping with the dignity due to the National Anthem, subject to the following conditions:</p>

	<p>(a) the National Anthem shall not be incorporated into any other composition or medley; and (b) every arrangement of the National Anthem shall accurately reflect the complete tune and the complete official lyrics of the National Anthem.</p> <p>(3) Any person who sings the National Anthem— (a) shall follow the official lyrics in the Third Schedule; and (b) shall not sing any translation of those lyrics.</p> <p>Penalties</p> <p>14.(3) Any person who knowingly performs or sings the National Anthem in contravention of rule 13(1) or (3) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$1,000.</p> <p>(4) Any person, who without reasonable excuse, contravenes rule 12 shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$1,000.</p>
Canada	National Anthem Act of Canada states that the song “O Canada” is designated as the national anthem of Canada.
Japan	Article 2 of the Act on National Flag and Anthem of Japan states that the national anthem of Japan is Kimigayo.