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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

20 May 2019

Dear Ms MAK,

Supplementary Information on the National Anthem Bill

Regarding the questions raised by members at the meetings of the Bills Committee on 27 April, 29 April, 2 May and 4 May this year, our reply is set out below.

Penalties associated with the Law of the People's Republic of China on the National Anthem

2. Other than Article 8 and Article 15 of the Law of the People's Republic of China on the National Anthem (the National Anthem Law), there is no penalty for other provisions of the National Anthem Law in the Mainland. The provisions related to the offence of contravening Article 8 and Article 15 of the National Anthem Law are as follows –

Provisions of the National Anthem Law	Corresponding penalties in the Mainland ¹
Article 8	<p><u>Advertising Law of the People's Republic of China Article 9</u></p> <p>An advertisement shall be prohibited from: (1) using, or using in a disguised form, the national flag, national anthem, national emblem, military flag, military song, or military emblem of the People's Republic of China; ...</p> <p>Article 57</p> <p>For any of the following conduct, the administrative department for industry and commerce shall order cessation of publishing the advertisement and impose a fine of not less than 200,000 yuan nor more than one million yuan on the advertiser, and if there is any aggravated circumstances, the administrative department for industry and commerce may revoke the business license of the offender, and the advertisement censoring authority shall revoke the advertisement censorship approval document and decline to accept the advertisement censorship application of the offender within one year; and the administrative department for industry and commerce shall confiscate the advertising expenses received by the advertising agent or advertisement publisher and impose a fine of not less than 200,000 yuan nor more than one million yuan on it, and if there is any aggravated circumstances, may revoke its business license or advertisement publishing registration certificate.</p> <p>(1) An advertisement falling under the prohibitive circumstances as set out in Article 9 or 10 of this Law is published ...</p>

¹ English translation is for reference only.

	<p><u>Trademark Law of the People's Republic of China Article 10</u></p> <p>The following signs shall not be used as trademarks:</p> <p>(1) those identical with or similar to the State name, national flag, national emblem, national anthem, military flag, military emblem, military song, or decorations of the People's Republic of China, with names of the places where the Central and State organs are located, or with the names and designs of landmark buildings;...</p> <p>Article 52</p> <p>Where a person uses an unregistered trademark as a registered trademark, or the use of an unregistered trademark violates the provision of Article 10 of this law, the local administrative authority for industry and commerce shall stop the use of the trademarks, order the offender to rectify the situation within a specified time limit, and may in addition circulate a notice of criticism. Where the volume of illegal business is more than 50,000 yuan, a fine of less than 20% of the volume of the illegal business may be imposed, and where there is no volume of illegal business or the volume of illegal business is less than 50,000 yuan, a fine of less than 10,000 yuan may be imposed.</p>
Article 15	<p><u>Criminal Law of the People's Republic of China Article 299</u></p> <p>Whoever desecrates the national flag or the national emblem of the People's Republic of China by intentionally burning, mutilating, scrawling on, defiling or trampling upon it in a public place shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention, public surveillance or deprivation of political rights.</p> <p>Whoever deliberately alters the lyrics or</p>

	music of the national anthem, or plays or sings the national anthem in a deliberately distorted or disrespectful manner, or insults the national anthem in any other manner, in a public place, when circumstances are serious, shall be punished in accordance with the stipulations of the preceding paragraph.
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Legislative purpose of Article 8 of the National Anthem Law

3. Some members are of the view that Article 8 of the National Anthem Law does not prohibit the use of the score of the national anthem in trademarks, commercial advertisements, private funeral events or other unsuitable occasions. According to our understanding, Article 8 of the National Anthem Law clearly stipulates that the national anthem “shall not be used, or covertly used” on unsuitable occasions, and “covertly used” includes the use of the lyrics or score of the national anthem on those occasions. The national anthem is a symbol and sign of the country; it is solemn and should be respected. The lyrics and score of the national anthem are components of the national anthem and represent the national anthem. Therefore, they are also solemn and should be respected and regulated. As such, based on the drafting principles of common law, we clearly state that the lyrics or score of the national anthem must not be used on unsuitable occasions, at unsuitable places, or for unsuitable purposes in clause 6 of the National Anthem Bill (the Bill). This approach is fully consistent with the legislative purpose of Article 8 of the National Anthem Law.

4. On whether the national anthem can be used at non-private funeral events (such as state funerals), there is no relevant statutory requirement in the National Anthem Law at present. Thus, there is no need to provide for such regulation during the local legislation by the Government of the Hong Kong Special Administrative Region (HKSAR).

Clause 7 of the Bill

5. Clause 7(2) of the Bill stipulates that a person commits an offence if the person publicly and intentionally insults the national anthem in any way. A member requests the HKSAR Government to provide examples of criminal offences in existing laws in Hong Kong with the expression "in any way" (以任何方式) for reference. Some relevant ordinances are

provided in **Annex** for reference. Members can also search for more relevant laws through the Hong Kong e-Legislation².

6. A member asked whether the level of penalty provided in clause 7(6) of the Bill is the same for those who incite, aid and abet others to contravene clause 7 of the Bill. As regards incitement, section 101I(2) of the Criminal Procedure Ordinance (Cap. 221) provides that if a person is convicted of incitement to commit an offence for which a maximum penalty is provided by any Ordinance, and no penalty is otherwise provided by any Ordinance for incitement, the person shall be liable to that maximum penalty. Since the Bill does not provide for an alternative penalty for incitement of an offence under clause 7(6) of the Bill, the level of penalty for an incitement to commit such offence is the same as the level of penalty for the offence itself.

7. As regards aiding and abetting the commission of an offence under clause 7(6) of the Bill, section 89 of the Criminal Procedure Ordinance (Cap. 221) provides that a person who aids or abets the commission of an offence shall be guilty of the like offence. It follows therefore that a person who aids or abets another to commit an offence under clause 7(6) of the Bill would be liable to the same penalty as the principal offender.

8. Regarding the meaning of the date on which the offence is “discovered by”, or “comes to the notice of”, the Commissioner of Police in clause 7(7)(a), according to case authorities, an offence is “discovered by” or “comes to the notice of” the Commissioner of Police when the Commissioner of Police has knowledge, based on credible information, of the relevant and material facts that found the essential elements of the offence (including the identity of the offender).

9. As to whether there is any precedent court case in relations to insulting the dignity of a piece of music in common law jurisdictions, we have not come across any relevant cases when gathering information on cases relating to insulting the dignity of national anthems. Regarding the dignity of the national anthem as a symbol and sign of the People’s Republic of China, as we mentioned in LC Paper No. CB(2)893/18-19(02), the Court of Final Appeal stated in the judgment of *HKSAR v. Ng Kung Siu and another* (1999) that “[t]he 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

² Website: <https://www.elegislation.gov.hk/>

Kong Special Administrative Region, has a legitimate interest in protecting their national flag, the unique symbol of the Nation.” Same as the national flag and the national emblem, the national anthem is a symbol and sign of the country as stipulated in the Constitution, and therefore represents the dignity of the country.

Education matters

10. A member requested the Government to explain in writing, under what circumstances would a school be considered as meeting the requirement in clause 9 of the Bill. As we mentioned in LC Paper No. CB(2)1127/18-19(21), clause 9 of the Bill requires the Secretary for Education to give directions for the inclusion of the national anthem in primary and secondary education. The party giving the directions (i.e. the Secretary for Education), instead of the party following them, takes legal responsibility under clause 9. It is an inherent responsibility of schools to foster a sense of national identity among students. At primary and secondary levels, students are taught to sing the national anthem and the learning of the national anthem are covered in the subject curricula. Society has no objection to educating students to respect the national anthem. We do not envisage schools’ violation of the directions to be given by the Secretary for Education in enforcing clause 9 of the Bill. As regards how students should be taught, like the learning and teaching of other curricula, this falls under the professional purview of teachers.

11. The implementation of clause 9 of the Bill is related to the Education Ordinance (Cap. 279). We are not aware of examples in existing laws in Hong Kong statutes with similar arrangement. We must emphasise that the purpose of clause 9 of the Bill is to implement Article 11 of the National Anthem Law. We consider that the current drafting is appropriate as it can fully reflect the legislative purpose of the National Anthem Law and at the same time can give due regard to the actual circumstances in Hong Kong.

Announcements in the public interest on the national anthem

12. The schedule set by the Information Services Department for the relevant licensees to broadcast announcements in the public interest (APIs) on television already includes the API on the national anthem, and does not entail the allocation of additional time to broadcast the national anthem. The API on the national anthem is now broadcast once daily on television channels including TVB Jade and TVB News, ViuTV 99, Hong Kong Open TV, i-Cable News Channel and i-Cable News Channel (HD), and now News Channel and now Business News Channel; as well

as once daily from Monday to Friday (except public holidays) on i-Cable Finance Info Channel and i-Cable Finance Info Channel (HD). It is also broadcast once daily on RTHK TV Channel 31 (digital channel) and 31A (analogue channel).

13. At present, the Government has not produced any radio APIs on the national anthem and therefore no arrangement has been made to broadcast the national anthem on radio stations. Upon passage of the Bill, we will provide radio APIs in relation to the national anthem as soon as possible and arrange for broadcast on radio stations.

Mechanism for making applications on the use of the national flag or its design

14. The National Flag and National Emblem Ordinance (NFNEO) provides for the use and protection of the national flag and national emblem in the Hong Kong Special Administrative Region. Specifically, under section 6(1), the national flag or its design must not be displayed or used in—

- (a) trademarks or advertisements;
- (b) private funeral activities; or
- (c) other occasions on which or places at which the display or use of the national flag or its design is restricted or prohibited under a stipulation made by the Chief Executive.

Under section 6(2), the national emblem or its design must not be displayed or used in—

- (a) trademarks or advertisements;
- (b) furnishings or ornaments in everyday life;
- (c) private activities of celebration or condolence; or
- (d) other occasions on which or places at which the display or use of the national emblem or its design is restricted or prohibited under a stipulation made by the Chief Executive.

15. Under section 3(2) of the same Ordinance, the Chief Executive may stipulate the organisations which must display or use the national flag and the national emblem, and the other places at which, the occasions on which, the manner in which and the conditions under which, the national flag and the national emblem must be displayed or used. The Chief Executive may also authorise, restrict or prohibit the display or use of the national flag, the national emblem or their designs in the stipulation.

16. The stipulations made by the Chief Executive was gazetted in 2016, i.e. the “Stipulations for the Display and Use of the National Flag and National Emblem and the Regional Flag and Regional Emblem” (the “Stipulations”) under section 3(2) of the NFNEO and section 3(1) of the Regional Flag and Regional Emblem Ordinance. According to paragraph 4 of the Stipulations, a person shall not use the national flag or its design in connection with any trade, calling or profession, or the logo, seal or badge of any non-governmental organisation, except with the prior approval of the Deputy Director of Administration or where the proposed use relates to the business of the Government Secretariat and conforms to the guidelines issued by the Director of Administration, the prior approval from a directorate officer of D2 level or above in the Office/Bureau involved is obtained. Prior application to the Deputy Director of Administration on the use of the national flag or its design should be made in writing.

17. Each application will be considered on its own merits. Generally speaking, apart from complying with the statutory requirements of the Ordinance (including, among others, those under section 6 of the NFNEO), other relevant factors will also be taken into account, such as the purpose and nature of the application as well as that of the events/occasions where the national flag or its design will be used.

18. In 2017 and 2018, 50 applications for use of the national flag or its design were received from applicants other than the government bureaux and departments (i.e. members of public, organisations, etc.). 48 were approved in accordance with the above statutory requirements, Stipulations and approval considerations. All of them involved the use of the national flag or its design for one-off and non-profit making events/projects of some significance or for educational purpose.

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
Mr Derek LAU, Fax no.: 2845 1609)

Director of Administration
(Attn: Miss Stancy OWN, Fax no.: 2804 6552)

Laws for reference

Cap. title	Provisions containing “in any way” or similar phrases
Cap. 212 Offences against the Person Ordinance	<p>20. Attempting to choke, etc., in order to commit indictable offence</p> <p>Any person who—</p> <p>(a) by any means whatsoever, attempts to choke, suffocate, or strangle any other person; or</p> <p>(b) by any means calculated to choke, suffocate, or strangle, attempts to render any other person insensible, unconscious, or incapable of resistance, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing, any indictable offence, shall be guilty of an offence triable upon indictment, and shall be liable to imprisonment for life.</p> <p>48. Concealing birth of child</p> <p>Any person who in any manner disposes of the dead body of a child with intent to conceal the fact of its birth, whether the child died before, or during, or after birth, commits an offence and is liable on conviction to imprisonment for 2 years.</p>
Cap. 228 Summary Offences Ordinance	<p>4. Nuisances committed in public places, etc.</p> <p>Any person who without lawful authority or excuse—</p> <p>(1) ...or in any manner defiles or pollutes any well, stream or watercourse used by any of the inhabitants of Hong Kong or for the supplying with water of ships resorting thereto;</p> <p>...shall be liable to a fine of \$500 or to imprisonment for 3 months.</p>

<p>Cap. 313 Shipping and Port Control Ordinance</p>	<p>72. Endangering the safety of others</p> <p>Any person who by any unlawful act, or in any manner whatsoever without reasonable excuse, endangers or causes to be endangered the safety of any person conveyed in or being in or upon any vessel or in the sea commits an offence and is liable—</p> <p>(a) on conviction on indictment to a fine of \$200,000 and to imprisonment for 4 years; and</p> <p>(b) on summary conviction to a fine of \$200,000 and to imprisonment for 2 years.</p>
<p>Cap. 374O Road Traffic (Parking On Private Roads) Regulations</p>	<p>14. Offences in relation to signs, road markings and immobilization devices</p> <p>(1) No person shall—</p> <p>(a) move, damage, or interfere in any way with, any sign erected or placed under these regulations on a private road; or</p> <p>(b) obscure, deface, alter or obliterate any road marking placed under these regulations on a private road, except—</p> <p>(i) with the approval in writing of the owner of that road; or</p> <p>(ii) under and in accordance with any Ordinance.</p> <p>(2) No person without the consent of the owner of the private road concerned or an authorized officer in respect of that road shall remove, damage, or interfere in any way with any approved immobilization device fitted to a vehicle under these regulations.</p> <p>(3) No person shall for the purposes of these regulations fix an immobilization device to a vehicle except an approved immobilization device.</p> <p>(4) Any person who contravenes subregulation (1), (2) or (3) commits an offence and is liable to a fine of \$2,000.</p>

<p>Cap. 382 Legislative Council (Powers and Privileges) Ordinance</p>	<p>19. Interference with members, officers or witnesses</p> <p>Any person who—</p> <p>(c) tampers with, deters, threatens, molests or in any way unduly influences any witness in regard to any evidence to be given by him before the Council or a committee; or</p> <p>(d) threatens, molests or in any way punishes or injures or attempts to punish or injure any person for having given evidence before the Council or a committee or on account of any evidence which he has given before the Council or a committee,</p> <p>commits an offence and is liable to a fine of \$10,000 and to imprisonment for 12 months.</p>
<p>Cap. 548 Merchant Shipping (Local Vessels) Ordinance</p>	<p>32. Endangering the safety of others</p> <p>Any person (wherever he may be) who by any unlawful act, or in any manner whatsoever without reasonable excuse, endangers or causes to be endangered the safety of any person conveyed in or being in or upon any local vessel or in the sea commits an offence and is liable—</p> <p>(a) on conviction on indictment to a fine of \$200,000 and to imprisonment for 4 years; and</p> <p>(b) on summary conviction to a fine of \$200,000 and to imprisonment for 2 years.</p> <p>33. Scuttling or beaching vessel</p> <p>Any person who, by any unlawful act or in any manner whatsoever without reasonable excuse—</p> <p>(a) disables, abandons, scuttles or beaches any local vessel within the waters of Hong Kong; or</p> <p>(b) fails to notify the Director thereof within 24 hours immediately following that disablement, abandonment, scuttling or beaching,</p> <p>commits an offence and is liable—</p> <p>(i) on conviction on indictment to a fine of \$200,000</p>

	<p>and to imprisonment for 4 years; and (ii) on summary conviction to a fine of \$200,000 and to imprisonment for 2 years.</p>
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