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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

29 March 2019

Dear Ms MAK,

**Re: Follow-up Questions on Offence of
Behaviour of Insulting the National Anthem**

Regarding the letter from Hon KWOK Ka-ki of 22 March, our reply is set out below.

2. The legislative principle of the National Anthem Bill (the Bill) is to fully reflect the legislative purpose and intent of the National Anthem Law as national 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 has struck a balance between these two principles, by applying national law in a manner that is consistent with the legal system in Hong Kong.

3. The focus of the Bill is two-pronged. Firstly, to provide that the national anthem is a symbol and sign of the People's Republic of China,

and to promote respect for the national anthem by means of directional provisions. Part 2 of the Bill stipulates the standard, etiquette and occasions for playing and singing the national anthem, which are all directional provisions that do not carry any penalty. Secondly, to prescribe the penalties for publicly and intentionally insulting the national anthem or misusing the national anthem. These provisions are contained in Part 3 of the Bill.

Education matters

4. Clause 9 of the Bill requires 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 primary and secondary subject curricula, such as General Studies for primary schools, Music for primary and secondary schools, and Moral, Civic and National Education. 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 Bill in 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.

5. The spirit of Clause 9 of the Bill is to educate students to respect the national anthem. The EDB will issue relevant 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 related 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.

6. As we stated in paragraph 15 of LC Paper No. CB(2)995/18-19(01), Clause 9 or other provisions of the Bill do not make a contravention against the directions given by the Secretary for Education regarding Clause 9 a criminal offence and thus there are no sanctions. The EDB has all along had administrative measures in place, for example, giving verbal/written advice and warnings, to follow up on irregularities identified in school operation (including not complying with the directions given by the Secretary for Education). If individual schools still do not comply with the

requirements and make rectifications, power is conferred by relevant provisions of the Education Ordinance to follow up. It is the inherent responsibility of school education to cultivate in students a sense of national identity. At primary and secondary levels, students are taught to sing the national anthem. Society has no objection to educating students to respect the national anthem. We do not envisage that schools will violate the directions given by the Secretary for Education in enforcing Clause 9 of the Bill. Schools have all along been complying with the Education Ordinance, relevant legislation and the guidelines from the EDB. We trust that they will do the same in the implementation of the National Anthem Ordinance.

Offences relating to the national anthem

7. In his letter, Hon KWOK raised questions on whether certain scenarios would contravene clause 7 of the Bill. We must emphasise that the legislative purpose of clause 7 of the Bill is to prohibit acts of publicly and intentionally insulting the national anthem. These principles form the basis for determining whether a case contravenes the law. The Police would, based on the actual circumstances and the evidence collected in each case, make an assessment in accordance with the law. The relevant authorities will only initiate prosecution upon gathering sufficient evidence showing that the relevant act constitutes a public and intentional insult of the national anthem. The prosecution bears the burden of proof, and the courts will apply the usual standard of proof for criminal cases in Hong Kong (i.e. beyond reasonable doubt) in making a fair decision on the case. Since *mens rea* is required for establishing a contravention of clause 7 of the Bill, there is absolutely no need for members of the public to worry about "inadvertently contravening the law" if they do not intend to insult the national anthem.

8. Hon KWOK considers the definition of "insult" in clause 7 of the Bill to be vague. Having considered the important constitutional status of the national anthem, the need to preserve the dignity of the national anthem as a unique symbol and sign of the country, and the judgment of the Court of Final Appeal in *HKSAR v. Ng Kung Siu and another* (1999), clause 7(8) of the Bill defines "insult" as "in relation to the national anthem, means to undermine the dignity of the national anthem as a symbol and sign of the People's Republic of China". This shows that the word "insult" in the relevant provisions can only mean to undermine the dignity of the national anthem as a symbol and sign of the People's Republic of China, which provides certainty to the meaning of the term and a clear basis for the court when adjudicating cases. It must be stressed that whether a certain act

constitutes an “insulting act” is a question of fact and has to be assessed based on the actual circumstances of each case.

9. On whether publicly expressing negative opinions or feelings on the national anthem would constitute an act of insulting the national anthem, clause 7 of the Bill only prohibits members of the public from expressing opinions by way of publicly and intentionally insulting the national anthem. The Bill does not restrict the content of the expression, and it is not the legislative intent of the Bill to require members of the public to accept that the national anthem is pleasing to the ear. Therefore, the mere expression of dislike of the national anthem will not constitute the offence of insulting the national anthem in the Bill. Whether or not a crime is committed depends on whether or not the manner of expression and intent constitute an act of publicly and intentionally insulting the national anthem as stipulated in the draft Bill.

10. Regarding mistakes made during the playing and singing of the national anthem publicly, in order to prove that such mistakes constitute an insulting act as stipulated in clause 7(1) of the Bill, the prosecution must prove that the person concerned had, with intent to insult the national anthem, performed such act publicly and intentionally. As with the investigation of other offences, the Police would gather evidence from various channels. On completion of the investigation, the Police would examine all the evidence collected, and seek advice from the Department of Justice when needed, to determine whether prosecution should be instituted.

11. During large-scale public events, if there is any contravention of the National Anthem Ordinance, the Police will gather evidence and carry out investigations in accordance with law, and initiate prosecution where there is sufficient evidence. The Police have extensive experience in handling large-scale public events. If someone contravenes any law at a public event, police officers will take appropriate actions according to actual circumstances, gather evidence and conduct follow-up investigation.

12. As for the question concerning “Adventure of a football fan” (a translation of “《球迷奇遇記》”) and “Full day love”(a translation of “《全日愛》”), we are of the view that these two songs, on the whole, will not be regarded as the national anthem under clause 8 of the Bill and thus fall outside of the scope prohibited by Part 3 of the Bill.

Creative freedom

13. We have explained in detail in paragraph 5 of LC Paper No. CB(2)893/18-19(02) that the Bill imposes limited and reasonable restrictions on freedom of speech and expression, and does not contravene the guarantee of freedom of speech and expression in the Basic Law. In addition, to protect reasonable publication of materials that insult the national anthem (e.g. fair reporting by the media or for teaching purposes by teachers, etc.), and to make it clear to the public that such acts of publication with no intent to insult the national anthem will not constitute a criminal offence, clause 7(5) of the Bill clearly provides that a person does not commit an offence if the person who publishes materials insulting the national anthem has no intent to insult the national anthem. Therefore, the Bill does not undermine the academic and creative freedoms protected by Article 34 of the Basic Law.

Clause 7(7) – Prosecution time limit

14. As we mentioned in paragraph 18 of LC Paper No. CB(2)893/18-19(02), the enforcement agencies consider that contraventions of clause 7 is likely to involve large numbers of persons or activities over the Internet, which requires more time in investigating and collecting evidence. To strike a balance between effective law enforcement and a reasonable time bar for initiating prosecution, clause 7(7) of the Bill sets the prosecution time bar as the period of one year after the date on which the offence is discovered by, or comes to the notice of, the Commissioner of Police, or the period of two years after the date on which the offence is committed, whichever is the earlier.

Yours sincerely,



(Ms Cordelia LAM)

for Secretary for Constitutional and Mainland Affairs

c.c. Secretary for Education

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