

政制及內地事務局
政府總部

香港添馬添美道2號
政府總部東翼



CONSTITUTIONAL AND MAINLAND AFFAIRS BUREAU
GOVERNMENT SECRETARIAT

EAST WING
CENTRAL GOVERNMENT OFFICES
2 TIM MEI AVENUE, TAMAR
HONG KONG

本署檔號 Our Ref : CMAB E4/1/1
電話 Tel No : 2810 2333
傳真 Faxline : 2524 7437

(By email and fax)
(Fax no.: 2509 9055)

[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 MOK Charles Peter of 16 March, our reply is set out below.

Content of online publishing

2. Clause 7(3) of the National Anthem Bill (the Bill) provides that a person commits an offence if, with intent to insult the national anthem, the person intentionally publishes (a) altered lyrics or an altered score of the national anthem; or (b) the national anthem played and sung in a distorted or disrespectful way. Clause 7(4) of the Bill provides that 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. Clause 7(8) of the Bill provides that in section 7, “publish” includes (a) to communicate to the public in any form, including speaking,

writing, printing, displaying notices, broadcasting, screening and playing of tapes or other recorded material; and (b) to distribute, disseminate or make available to the public.

3. In his letter, Hon MOK raised questions on whether uploading or distributing materials which insult the national anthem on online platforms and social platforms would constitute an offence. According to clause 7(8) of the Bill, distributing, disseminating or making available to the public materials which insult the national anthem on online platforms and social platforms can constitute the act of “publish” in clause 7(3) and 7(4), which is in line with the legislative intent of the National Anthem Law. According to the report on proposed amendments to the “Law of the People’s Republic of China on the National Anthem (Second Draft)” by the Legislative Affairs Commission of the National People’s Congress¹, “irrespective of whether it takes place at a public place in the real world or on the Internet, it is an act of publicly insulting the national anthem through ways of public dissemination, and will cause harm to the dignity of the country and to public order. Legal liability should be pursued in accordance with the National Anthem Law.” Whether or not the materials distributed, disseminated or made available to the public constitute materials which insult the national anthem is a question of fact and has to be assessed based on the actual circumstances of each case. Words, sounds and images are all covered by the definition of “to communicate...in any form” under clause 7(8) of the Bill.

4. On top of proving that the behaviours concerned constitute a “publishing” act provided in clause 7(3) or 7(4) of the Bill, prosecutors would also need to prove that the person concerned had, with intent to insult the national anthem, intentionally published the relevant materials, in order to initiate prosecution under clause 7(3) or 7(4) of the Bill. 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.

5. To determine whether a specific “publishing” act would contravene clause 7 of the Bill, the Police would, based on the actual circumstances and the evidence collected in each case, make an assessment in accordance with the law and the aforementioned principles. If the

¹ Full report (Chinese only): http://www.npc.gov.cn/npc/xinwen/2017-09/01/content_2028099.htm

relevant agencies could establish the act and the intent and decide to prosecute, 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.

Internet Service Providers

6. Whether or not Internet Service Providers (ISPs) would be criminally liable to a specific act of publishing by a user depends on whether or not the ISPs have the intent to insult the national anthem and the evidence gathered by the enforcement agencies. Generally speaking, it would be difficult to establish that the ISPs have intent to insult the national anthem if they are not aware of the publishing of materials which insult the national anthem on the Internet by users. We believe that, after the Bill is passed and comes into effect, the ISPs, in accordance with their existing practice of preventing users from uploading illegal materials, will take appropriate measures on their own to prevent users from uploading content in contravention of the Bill.

Enforcement and removal of materials

7. If it is found that someone has allegedly published materials that insult the national anthem on the Internet, the Police will contact the relevant ISP to remove such materials. This approach is consistent with the handling of other illegal materials published on the Internet.

8. Regarding local ISPs, if it is necessary to obtain personal data of users, the Police will issue the request to the organisation concerned pursuant to the relevant exemption provision in the Personal Data (Privacy) Ordinance (Cap. 486), or apply for a court warrant. The Police will seek the assistance of overseas enforcement agencies through the established mutual legal assistance procedures when necessary.

Location of the act of publishing

9. According to common law principles, after its passage, the Bill will only apply to behaviours in Hong Kong. For online behaviours, the Internet Protocol (IP) address of the person who publishes the materials or the IP address of the platform on which the materials are published is not the only factor to be considered when determining whether those behaviours take place in Hong Kong territory. If there are cross-border elements in a case, for example, using an overseas IP address to publish illegal information, enforcement agencies will seek assistance from

overseas enforcement agencies when needed during the investigation process, and will seek legal advice before taking prosecution action.

Materials before the Bill takes effect

10. In general, the laws passed by the Legislative Council will only take effect after passage of the laws and gazettal of the laws (or on a certain date after gazettal of the laws in accordance with the method stipulated in law). Based on the legal principle generally applied in Hong Kong, the Bill does not have retrospective effect.

11. If, after the Bill takes effect, a person, with intent to insult the national anthem, intentionally publishes materials which insult the national anthem as provided in clause 7(3) or 7(4), even though those materials are produced before the Bill takes effect, the person concerned may still contravene clause 7 of the Bill, since the act of publishing takes place after the Bill has come into effect. If a person continues to publish materials which insult the national anthem in order to insult the national anthem after the Bill takes effect, that person may contravene clause 7 of the Bill.

Yours sincerely,



(Ms Cordelia LAM)

for Secretary for Constitutional and Mainland Affairs

c.c. 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)

Secretary for Security

(Attn: Mr Andrew TSANG, Fax no.: 2810 7702)