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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 the National Anthem Bill

Regarding the letter from Hon IP Kin-yuen 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.

Etiquette for playing and singing the national anthem

4. Clause 4 of the Bill stipulates that while the national anthem is being played and sung, the etiquette to be followed by the persons who take part in or attend the occasion is (a) to stand solemnly and deport themselves with dignity; and (b) to not behave in a way disrespectful to the national anthem. Clause 4 is a directional provision which carries no penalty. As we mentioned in paragraph 12 in LC Paper No. CB(2)893/18-19(02), 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.

5. During the playing of a recording of the national anthem on an occasion, if the playing of the national anthem is affected by failures of the sound system, we believe that the event organiser can take appropriate contingencies measures in view of the actual circumstances and provide clear guidance for those who are taking part in or attending the occasion.

6. While the national anthem is being played and sung, staff members who are present may continue to perform their duties but their actions should not affect the course of playing and singing of the national anthem and the solemnity of the occasion.

Offences relating to the national anthem

7. In his letter, Hon IP 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 the law has been breached. 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.

8. Regarding the questions on whether the interference of the playing and singing of the national anthem by the noise created by people outside the venue, publishing previous versions of the lyrics of “March of the Volunteers”, composing new lyrics or score for the national anthem as a proposal for the Central Government’s consideration, and poor translation of the lyrics of the national anthem will constitute an offence under clause 7 of the Bill, on top of proving that the behaviours constitute an insulting act stipulated in clause 7 of the Bill, the prosecution must also prove that the person concerned, with intent to insult the national anthem, performed such act publicly and intentionally, before prosecution can be instituted under clause 7 of the Bill. 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. 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 the advice of the Department of Justice when needed, to determine whether prosecution should be instituted.

9. Hon IP proposed that clause 7(5) of the Bill should adopt the exemption approach adopted in Division III of the Copyright Ordinance (Cap. 528). We are of the view that the current drafting approach of clause 7(5) of the Bill is more in line with the legislative intent to **protect all publishing acts without intent to insult the national anthem**. If we adopt the approach of **listing exempted acts** in drafting, there are **chances** that some publishing acts with no intent to insult the national anthem **could be omitted**.

Local legislation of the National Anthem Law by the Macao Special Administrative Region

10. The Legislative Assembly of the Macao Special Administrative Region passed the Use and Protection of the National Flag, National Emblem and National Anthem (Amendment) Bill on 24 January 2019 to implement the National Anthem Law in Macao. The amended legislation implements Article 15 of the National Anthem Law by the following provisions¹ –

¹ The legislation is available in Chinese and Portuguese only. English translation is for reference only.

13. Offence of insulting the symbol and sign of the country

1. A person who intentionally and publicly insults the symbol and sign of the country through words, movements or disseminating documents, or through other means of communicating with the public, especially by the following behaviours, is liable to imprisonment for a maximum of 3 years or a fine up to 360 daily rates:

(i) burning, mutilating, scrawling on, defiling or trampling on the national flag or the national emblem;

(ii) altering the lyrics or score of the national anthem, playing and singing the national anthem in a distorted, disrespectful way.

In the above provisions in the Use and Protection of the National Flag, National Emblem and National Anthem, “altering the lyrics or score of the national anthem, playing and singing the national anthem in a distorted, disrespectful way” is highlighted as an example of “intentionally and publicly insults the symbol and sign of the country through words, movements or disseminating documents, or through other means of communicating with the public”, but not the only behaviour of insulting the national anthem.

Education matters

11. Pursuant to the powers conferred by the Education Ordinance, the Education Bureau (EDB) has all along been implementing related tasks, including conducting inspections on schools and their premises; processing registration of schools, school managers and school teachers; approving applications for serving as school supervisors and principals in accordance with the relevant provisions. On the other hand, the EDB could cancel, refuse or withdraw the registration or approval of individual education practitioners or schools based on grounds stipulated in the relevant provisions. Exercising the above powers conferred by the Education Ordinance has no direct relationship with the Bill. Responsibilities performed by the EDB in accordance with the Education Ordinance cover a wide spectrum, and the statistical information requested is not available.

12. At present, an EDB circular memorandum can be issued in the name of the Permanent Secretary for Education or the Secretary for Education. As a general rule, the official correspondence or circular

memorandum issued by the EDB is signed off by the Secretary for Education.

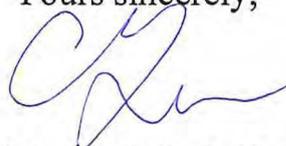
13. The development of primary and secondary students' personalities, characters and values are susceptible to many factors. Occasional improper behaviour on part of students is not necessarily the fault of the schools and therefore it is not justifiable to jump to the conclusion that "the school is not being managed satisfactorily" as set out in the Education Ordinance. As a matter of fact, according to the Education Ordinance, school mismanagement is not a justification for the cancellation of the registration of a school manager, or withdrawal of the approval to serve as a school supervisor or principal. In recent years, no primary or secondary school manager has had his/her registration cancelled for allowing or deliberately overlooking the Incorporated Management Committee's non-compliance with the directions issued by the EDB under relevant provisions. Thus it can be seen that schools have all along been acting in accordance 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.

14. 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 and the learning contents 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. The spirit of Clause 9 of the Bill is to educate students to respect the national anthem. How this is done is a matter of learning and teaching, and falls under the professional purview of teachers. Students' improper behaviour should be left to the professional judgement of the school and teachers and be dealt with in such a way that the purpose of education is served. For individual behaviour that shows disrespect for the national anthem, schools should, in light of their own context and usual counselling and guidance arrangements, handle the case in a reasonable, fair and lawful manner. If a teacher encounters difficulties in teaching or their teaching falls short of expectations, as with the learning and teaching of other curricula, schools should study the issue and provide necessary support for improvement. It is an unnecessary worry to suspect that the EDB would, as a result of this, invoke the Education Ordinance and take legal actions against any principal or teacher.

15. The EDB will issue relevant circulars and guidelines to all primary and secondary schools in due course. In general, these circulars and guidelines will apply to all who are responsible for decision-making and implementation of educational measures in every school, i.e. the School Management Committee/Incorporated Management Committee, principal 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. Schools should handle any act of intentionally insulting the national anthem within the school premises according to the spirit of school-based management. As with the handling of other behavioural issues on campus, it is a manifestation of professionalism in school management to assess under which circumstances the case should be handled by the school or be reported to the Police.

16. As for determining whether or not a behaviour constitutes publicly insulting or disrespecting the national anthem and thus is in contravention of the Bill, the actual circumstances of each case should be considered and there should be no generalisation. The principles set out in paragraph 7 will apply.

Yours sincerely,



(Ms Cordelia LAM)

for Secretary for Constitutional and Mainland Affairs

c.c. Secretary for Education

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

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