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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 TAM Man-ho, Jeremy of 22 March, our reply is set out below.

2. In his letter, Hon TAM 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. 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 have no intent to insult the national anthem.

3. If a performer inadvertently goes out of tune during a performance of the national anthem with no intent to insult the national anthem, such inadvertent mistake would not constitute the offence of insulting the national anthem under clause 7 of the Bill. If the prosecution has to prove that any behaviour constitutes an insulting act stipulated in clause 7(1) of the Bill, the prosecution must prove that the person concerned, 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 the advice of the Department of Justice when needed, to determine whether prosecution should be instituted.

4. Clause 3 of the Bill stipulates that the national anthem must be played and sung in a way that is in keeping with its dignity. Playing and singing the national anthem in accordance with the national anthem stipulated in Schedule 1 and 2 of the Bill can demonstrate the musical image of the national anthem well and manifest the solemnity of the national anthem. Whether performing the national anthem in other musical styles will constitute publicly and intentionally insulting the national anthem is a question of fact and has to be assessed based on the actual circumstances of each case. The principles set out in paragraph 2 will apply.

5. 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 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." On top of proving that the behaviours concerned constitute the "publish" act provided in clause 7(3) or 7(4) of the Bill, prosecutors would also need to

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

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. The principles for assessing whether a certain publishing act contravenes clause 7(3) or 7(4) of the Bill are the same as those mentioned in paragraph 2.

6. Regarding the question on whether behaviour of primary students will contravene clause 7 of the Bill, according to common law principles, the requirement for proving that a child is capable of and has the necessary mens rea of committing a crime is much higher than in the case of an adult. Section 3 of the Juvenile Offenders Ordinance (Cap. 226) conclusively presumes that no child under the age of 10 years can be guilty of an offence. The law also presumes that a child between the ages of 10 and 14 is incapable of committing a crime, unless the prosecution proves beyond reasonable doubt that, at the time of the offence, the child was well aware that his or her act was seriously wrong, and not merely being naughty or mischievous. Students' improper behaviour within the school premises 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 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.

Yours sincerely,



(Ms Cordelia LAM)

for Secretary for Constitutional and Mainland Affairs

c.c. Secretary for Education

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