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LC Paper No. CB(2)1517/18-19(01)

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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

23 May 2019

Dear Ms MAK,

Bills Committee on National Anthem Bill

Committee Stage amendments proposed by Members

We refer to your letters dated 18 and 20 May 2019, enclosing the Committee Stage amendments to the National Anthem Bill proposed by various Members of the Legislative Council. The response from the Government is enclosed at the **Annex**.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Cordelia Lam', written over a faint circular stamp.

(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)

**Government response to the Committee Stage amendments
to the National Anthem Bill proposed by Members**

On 4 November 2017, the Standing Committee of the 12th National People’s Congress (“NPCSC”) adopted the decision to add the Law of the People’s Republic of China on National Anthem (“National Anthem Law”) to Annex III to the Basic Law. According to Article 18(2) of the Basic Law, the national laws listed in Annex III to the Basic Law shall be applied locally by way of promulgation or legislation by the Hong Kong Special Administrative Region (“HKSAR”). It is thus the responsibility of the HKSAR Government to implement the National Anthem Law locally.

2. Having regard to the common law system practised in Hong Kong, as well as the actual circumstances in Hong Kong, the HKSAR Government will implement the National Anthem Law in HKSAR by local legislation instead of by promulgation. This approach is consistent with the “one country, two systems” principle, and is also consistent with the implementation of the Law of the People’s Republic of China on the National Flag (“National Flag Law”) and the Law of the People’s Republic of China on the National Emblem (“National Emblem Law”), both of which have been adapted and implemented in Hong Kong by the National Flag and National Emblem Ordinance (“NFNEO”).

3. 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.

4. Having reviewed the Committee Stage amendments (“CSAs”) proposed by various Members in detail, the HKSAR Government do not support the CSAs. Detailed justifications are provided below.

1. CSAs proposed by Hon Gary FAN Kwok-wai (LC Paper No. CB(2)1484/18-19(01))

(a) Deleting clause 3 (standard for playing and singing)

5. Clause 3 of the Bill provides for the standard for playing and singing the national anthem, i.e. the national anthem must be played and sung in a way that is in keeping with its dignity. This clause reflects Article 6 of the National Anthem Law and also provides guidance for the public by describing the standard relating to the playing and singing of the national anthem. Thus, we do not support deleting clause 3.

(b) Deleting clause 7 (offence of insulting behaviour)

6. 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. Secondly, to prescribe the penalties for publicly and intentionally insulting the national anthem or misusing the national anthem to deter such behaviour. Clause 7 of the Bill is drafted based on Article 15 of the National Anthem Law. As the CSA is not in line with the legislative principle of the Bill, we do not support this CSA.

(c) Deleting clause 9 (inclusion in primary and secondary education)

7. To embody the spirit of Article 11 of the National Anthem Law, clause 9 requires the Secretary for Education to give directions for the inclusion of the national anthem in primary and secondary education. It is the 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. The Education Bureau (EDB) will issue relevant circulars and guidelines to all primary and secondary schools in due course. Clause 9 of the Bill reflects the legislative purpose of the National Anthem Law and at the same time gives due regard to the actual circumstances in Hong Kong. Thus, we do not support deleting clause 9.

(d) Amending clause 10(4)

8. This CSA proposes to change the delegation of the power to stipulate a date for the purposes of clause 10(3) from the Chief Executive to the Chief Executive in Council. Currently, the NFNEO provides that the Chief Executive may stipulate the organizations 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. Such stipulation must be published in the Gazette and is not subsidiary legislation. We made reference to this arrangement when drafting clause 10 of the Bill – the Chief Executive may stipulate a date on which the national anthem must be broadcast by an announcement in the public interest or material in the public interest, and such stipulation must be published in the Gazette as soon as practicable after it is made. We are of the view that the arrangement provided in clause 10(4) is appropriate, and thus we do not support this CSA.

(e) Deleting item 8 in Schedule 3 (a major sporting event held by the Government)

9. Clause 5 of the Bill stipulates that on each occasion set out in Schedule 3 of the Bill, the national anthem must be played and sung. Article 4 of the National Anthem Law stipulates the occasions on which the national anthem shall be played and sung, which includes “major sport events”. With reference to the content of Article 4 of the National Anthem Law and adjustments in the light of the actual circumstances in Hong Kong, we adopt “a major sporting event held by the Government” in Schedule 3. We are of the view that Schedule 3 to the Bill can fully reflect the legislative purpose and intent of the National Anthem Law and at the same time can give due regard to the actual circumstances in Hong Kong. Thus, we do not support this CSA.

2. CSAs proposed by Hon Claudia MO (LC Paper No. CB(2)1497/18-19(03))

(a) Deleting item 1(c) in Schedule 3 (oath-taking ceremony for taking the Judicial Oath)

(b) Deleing item 1(e) in Schedule 3 (oath-taking ceremony for taking the Legislative Council Oath)

(c) Deleting item 9 in Schedule 3 (Ceremonial Opening of the Legal Year)

10. As we mentioned in LC Paper No. CB(2)893/18-19(01), clause 5 of the Bill stipulates that on each occasion set out in Schedule 3 of the Bill, the national anthem must be played and sung. With reference to the content of Article 4 of the National Anthem Law and adjustments in the light of the actual circumstances in Hong Kong, the occasions in Schedule 3 include official occasions of the Government, the oath-taking ceremonies of principal members of the executive authorities, legislature and judiciary when they assume office, national flag raising ceremonies, major sporting events held by the Government, and the Ceremonial Opening of the Legal Year. Currently, the Ceremonial Opening of the Legal Year already includes the playing and singing of the national anthem. The Judiciary also has no objection to the inclusion of the Ceremonial Opening of the Legal Year in Schedule 3. We are of the view that Schedule 3 to the Bill can fully reflect the legislative purpose and intent of the National Anthem Law and at the same time can give due regard to the actual circumstances in Hong Kong. Thus, we do not support this CSA.

(d) Amending clause 11(1) by deleting “予以” in the Chinese text

11. We have made reference to clause 9(1) of the NFNEO for the expressions in clause 11(1) of the Bill. Since the purpose of clause 11(1) of the Bill is the same as that of clause 9(1) of the NFNEO, and the NFNEO has been effective since implementation, we are of the view that the same expressions should be used in the Bill as far as possible to avoid creating unnecessary public concerns. Textually speaking, “進行調查” and “予以檢控” form two sets of phrases. “檢控” and “調查” take place in sequence, and adding a suitable verb to each of them shows there is a difference between them. Should “予以” be deleted, the phrase will read as “進行調查及檢控”. “調查及檢控” would serve as the object of “進行” and constitute a juxtaposition phrase conveying a sense that both are similar, thereby affecting the textual meaning. We are of the view that the expressions used in clause 11(1) are appropriate, and therefore do not support this CSA.

(e) Amending clause 11(2) by deleting “改編本” and substituting “適應本”

12. Clause 9(2) of the NFNEO provides that “[i]f there are inconsistencies between this Ordinance and a national law promulgated under Annex III of the Basic Law, this Ordinance is to be interpreted and applied as a special application or adaptation of the national law.” We have made reference to clause 9(2) of the NFNEO for the expressions in clause 11(2) of the Bill. Since the purpose of clause 11(2) of the Bill is the same as that of clause 9(2) of the NFNEO, and the NFNEO has been effective since implementation, we are of the view that the same expressions should be used in the Bill as far as possible to avoid creating unnecessary public concerns. Moreover, the term “改編本” is also used as the Chinese equivalent of “adaptation” in section 29 and related provisions of the Copyright Ordinance (Cap. 39), whereas the term “適應本” is not used in existing legislation. We are of the view that the expressions used in clause 11(2) are appropriate, and therefore do not support this CSA.

3. CSAs proposed by Hon CHAN Chi-chuen (LC Paper No. CB(2)1497/18-19(01))

(a) Deleting clause 5(2)

13. Clause 5 of the Bill implements Article 4 of the National Anthem Law with amendments to suit the actual circumstances of Hong Kong. Clause 5(2) stipulates that the Chief Executive in Council may, by notice published in the Gazette, amend Schedule 3. According to clause 5(2), if there is a need to amend Schedule 3 in future, the HKSAR Government will carry out the relevant amendment in the form of subsidiary legislation (negative vetting procedures). This arrangement is more appropriate than amending Schedule 3 by a bill. Since it is possible that Schedule 3 has to be amended in future, we must clearly state the mechanism for amending Schedule 3 in the Bill. Thus, we do not support this CSA.

(b) Deleting clause 6(1)(c) and clause 6(5)

14. Based on Article 8 of the National Anthem Law, clause 6 of the Bill prohibits misuse of the national anthem or its lyrics or score. This CSA proposes to delete clauses about the prohibition of the use of the national anthem or its lyrics or score on an occasion, at a place, or for a

purpose prescribed by the Chief Executive in Council. According to clause 6(1)(c) and 6(5), if there is a need to add an occasion, a place, or a purpose as a prohibited use of the national anthem or its lyrics or score in future, the HKSAR Government will carry out the relevant addition in the form of subsidiary legislation (negative vetting procedures). This arrangement is more appropriate than handling the relevant addition by a bill. Since it is possible that an occasion, a place, or a purpose has to be added as a prohibited use of the national anthem or its lyrics or score in future, we must clearly state the mechanism for such amendment in the Bill. Thus, we do not support this CSA.

(c) Deleting clause 7(2) and clause 7(4)

(d) Deleting “or (4)” in clause 7(5)

15. These CSAs propose to delete clauses mentioning “insults the national anthem in any way”/“the insulting in any way of the national anthem”. Clause 7 of the Bill is drafted based on Article 15 of the National Anthem Law. “Insults the national anthem in any way” in clause 7 of the Bill is similar to “insults the national anthem in any other manner” in Article 15 of the National Anthem Law. Since deleting clauses mentioning “insults the national anthem in any way”/“the insulting in any way of the national anthem” is not consistent with the legislative intent of Article 15 of the National Anthem Law, we do not support these CSAs.

(e) Amending clause 7(6) to reduce the level of penalty

16. This CSA proposes to reduce the level of penalty for contravening clause 7 of the Bill from a fine at level 5 (i.e. \$50,000) and imprisonment for 3 years to a fine at level 1 (i.e. \$2,000) and imprisonment for 1 month. As we mentioned in LC Paper No. CB(2)1127/18-19(21), the level of penalty provided in clause 7(6) of the Bill is the same as the level of penalty for the offence of desecrating the national flag or national emblem under the NFNEO. Similar to the national flag and the national emblem, the national anthem is the sign and symbol of the country. We are of the view that setting the level of penalty for the offence of insulting the national anthem at the same level as the penalty for the offence of desecrating the national flag or national emblem is appropriate, and thus we do not support this CSA. We must emphasise that a fine at level 5 and imprisonment for 3 years is the maximum level of penalty of the offence of insulting the national anthem. The court has the power to impose sentences in

accordance with the actual circumstances of each case.

(f) Amending clause 7(7) to reduce the prosecution time bar

17. This CSA proposes to reduce the specified prosecution time bar provided in clause 7(7) from “(a) 1 year after the date on which the offence is discovered by, or comes to the notice of, the Commissioner of Police; or (b) 2 years after the date on which the offence is committed, whichever is the earlier” to “(a) 30 days after the date on which the offence is discovered by, or comes to the notice of, the Commissioner of Police; or (b) 60 days after the date on which the offence is committed, whichever is the earlier”. As we mentioned in LC Paper No. CB(2)893/18-19(02) and CB(2)1127/18-19(15), 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 investigation and collection of 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. Since the CSA will have impact on the effective enforcement of the Bill, we do not support this CSA.

4. CSAs proposed by Dr Hon Fernando CHEUNG Chiu-hung (LC Paper No. CB(2)1497/18-19(04))

(a) Amending paragraph 2 of the Preamble

18. Paragraph 2 of the Preamble reflects Article 3 and Article 5 of the National Anthem Law. This CSA proposes to amend “all individuals and organizations” in paragraph 2 of the Preamble to “Chinese citizens”. The national anthem is a symbol and sign of the People’s Republic of China (PRC); thus everyone, being PRC citizen or not, should respect the national anthem, as we should also respect the national anthems of other countries. In order to make it clear that every person and organization should respect the national anthem, the HKSAR Government uses the term “all individuals and organizations” in the Preamble. According to our understanding, everyone in China, regardless of being PRC citizen or non-PRC citizen, has to abide by the National Anthem Law. Therefore, paragraph 2 of the Preamble is in line with the legislative intent of the National Anthem Law, and we do not support this CSA.

(b) Amending paragraph 3 of the Preamble

19. Paragraph 3 of the Preamble reflects Article 1 of the National Anthem Law. This CSA proposes to delete “and to promote patriotism” from paragraph 3 of the Preamble. We are of the view that this CSA fails to reflect the legislative intent of Article 1 of the National Anthem Law accurately, and thus we do not support this CSA.

(c) Amending clause 6 to delete provisions creating offence, and consequentially amending paragraph 8 of the Explanatory Memorandum

(d) Amending clause 7 to delete provisions creating offence, and consequentially amending paragraph 9 of the Explanatory Memorandum

20. 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. Secondly, to prescribe the penalties for publicly and intentionally insulting the national anthem or misusing the national anthem to deter such behaviour. As the CSAs are not in line with the legislative principle of the Bill, we do not support these CSAs.

21. Regarding the proposed amendments to paragraphs 8 and 9 of the Explanatory Memorandum, it is worth noting that the Explanatory Memorandum is not part of the proposed legislative text and will not be published with the Ordinance after it is enacted. Therefore, we are of the view that CSAs relating to the Explanatory Memorandum should not be dealt with.

(e) Adding clause (iii) after clause 9(1)(b)(ii) to stipulate that patriotism is love of one’s country, not of a government

22. Clause 9 of the Bill is based on Article 11 of the National Anthem Law and at the same time has given due regard to the actual circumstances in Hong Kong. The content of clause 9(1)(b) corresponds to “students...gain a better understanding of its history and connotation and obey the etiquette for playing and singing the national anthem” in Article 11 of the National Anthem Law. Since this CSA deviates from the legislative intent of Article 11 of the National Anthem Law, we do not support this CSA.

(f) Deleting clause 11(1)

23. Clause 11(1) of the Bill provides that offences in relation to the national anthem in Hong Kong are investigated, and persons are prosecuted, according to the laws of Hong Kong, which is similar to clause 9(1) of the NFNEO. The NFNEO has been effective since implementation. In order to avoid creating unnecessary public concerns or future disputes, we are of the view that it is necessary to include in the Bill provisions similar to clause 9 of the NFNEO. Therefore, we do not support this CSA.

5. CSA proposed by Hon IP Kin-yuen (LC Paper No. CB(2)1497/18-19(02))

24. This CSA proposes to amend “directions” in clause 9(1) to “circulars”. To embody the spirit of Article 11 of the National Anthem Law, clause 9 requires the Secretary for Education to give directions for the inclusion of the national anthem in primary and secondary education. As to in what form the directions would be given, it is an administrative decision by EDB and not a statutory requirement. Thus, we do not support this CSA. The EDB will give the relevant directions to all primary and secondary schools in an appropriate form through the existing mechanism in future.