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Ms LAM Wai-ki, Cordelia
Principal Assistant Secretary for
(Constitutional & Mainland Affairs)
Constitutional and Mainland Affairs Bureau
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2 Tim Mei Avenue, Tamar, Hong Kong

Dear Ms LAM,

National Flag and National Emblem (Amendment) Bill 2021

We are scrutinizing the captioned Bill with a view to advising Members on its legal and drafting aspects. To facilitate Members' consideration of the Bill, we should be grateful if you could clarify the matters set out in **Annex**.

We would appreciate your early reply in both English and Chinese as soon as possible. Meanwhile, as our scrutiny of the Bill continues, our further enquiries, if any, may follow in due course.

Yours sincerely,

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c.c. Department of Justice
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Annex

1. Clause 5 of the Bill seeks to amend section 3 of the National Flag and National Emblem Ordinance (116 of 1997) ("NFNEO") by empowering the Chief Executive ("CE") to stipulate the organizations that must use the design of the national emblem in a prominent position on the home page of their websites (proposed new section 3(2A)), and to make stipulations in relation to the recovery and disposal of national flags and national emblems (proposed new section 3(3A)). Section 10 of NFNEO provides that a stipulation made by CE under NFNEO is not subsidiary legislation, and must be published in the Gazette as soon as is reasonably practicable after it is made. Please clarify:
 - (a) what are the legal consequences (if any) for non-compliance with these stipulations and consider whether it is necessary for the Bill to provide expressly for such consequences; and
 - (b) whether non-compliance with any of these stipulations would be regarded as an act that "desecrates the national flag or national emblem... in any other way", thereby constituting an offence under the proposed new section 7(1).
2. Clause 6 of the Bill seeks to amend section 4 of NFNEO to provide for additional circumstances in which the national flag and national emblem must not be used or disposed of inappropriately; and clause 7 proposes to add a new section 4A to NFNEO to provide for the etiquette for taking part in or attending a national flag raising ceremony. Please consider whether it is necessary for the Bill to provide expressly what are the legal consequences (if any) for non-compliance with the proposed new section 4(2) to (5) and the proposed new section 4A, and clarify whether non-compliance with any of these provisions would be regarded as an act that "desecrates the national flag or national emblem... in any other way", thereby constituting an offence under the proposed new section 7(1).
3. Clause 8 of the Bill seeks to amend, among others, section 5(1) of NFNEO to remove the requirement that the national flag for flying may be manufactured in the Hong Kong Special Administrative Region ("HKSAR") only by enterprises designated by the Central People's Government ("CPG") ("the manufacture requirement"). It is noted that the requirement under section 5(3) of NFNEO that the display or use of the national emblem in unusual dimensions is subject to CPG's prior approval is also proposed to be removed. In this regard, please clarify the reason for not similarly removing or changing the manufacture requirement applicable to the national emblem for hanging under section 5(1) of NFNEO.

4. Under the new section 7(1) proposed in clause 10 of the Bill, a person would commit an offence if the person publicly and intentionally (as opposed to "wilfully" under the existing section 7) desecrates the national flag or national emblem by burning, mutilating, scrawling on, defiling or trampling on it or its image or in any other way. In *Shum Kwok Sher v HKSAR* [2002] 3 HKC, Sir Anthony Mason NPJ in considering the meaning of "wilfully" said (at paragraph 85) that: "In other words, 'wilfully' signifies knowledge or advertence to the consequences, as well as intent to do an act or refrain from doing an act." In view of the difference in the meaning between "intentionally" and "wilfully", please clarify whether the offence under the proposed new section 7(1) would only require the prosecution to prove that an accused has the intent to do an act of desecration without the need to also prove that the accused foresaw the consequences of his act.
5. Under the proposed new section 4(2), a national flag or a national emblem must not be displayed upside down, and must not be displayed or used in any way that undermines the dignity of the national flag or the national emblem; and under the proposed new section 4A(c), when the national flag is being raised during a national flag raising ceremony, the persons taking part in or attending the ceremony must not behave in a way that undermines the dignity of the national flag. Please clarify whether any non-compliance with the proposed new sections 4(2) or 4A(c) would fall within the meaning of desecrating the national flag or national emblem in any other way, thereby constituting an offence under the proposed new section 7(1).
6. Clause 11 of the Bill proposes to add a new section 7A(1) to NFNEO to require the Secretary for Education ("Secretary") to give directions for the inclusion of the national flag and national emblem in primary education and in secondary education, and for matters relating to the daily display of the national flag and the weekly conduct of a national flag raising ceremony ("flag display and raising matters"). The proposed new section 7A(2) seeks to provide that for dealing with flag display and raising matters, post secondary education institutions must make reference to the directions given by the Secretary. Please consider whether it is necessary for the Bill to provide expressly:
 - (a) whether a direction under the proposed new section 7A(1) of NFNEO is or is not subsidiary legislation subject to negative vetting by the Legislative Council (see, for example, the proposed section 7B(5) of NFNEO); and

- (b) what are the legal consequences (if any) if schools or post secondary institutions fail to comply with or make reference to the Secretary's directions under the proposed new section 7A(1)(a) and (b) of NFNEO.
7. Clause 16 of the Bill seeks to amend Schedule 3 to NFNEO to provide for, among others, the use of the national flag at mourning ceremonies. Under section 4 of the proposed new provisions on "Use of national flag at mourning ceremonies", a national flag used at a mourning ceremony must be recovered for safekeeping after the ceremony concerned ends. Please consider whether it is necessary for the Bill to provide expressly:
- (a) who (for example, the organizer of the mourning ceremony, or the family of the deceased) would be responsible for the recovery and safekeeping of the national flag after the ceremony concerned ends; and
 - (b) what are the legal consequences (if any) for non-compliance with this provision on recovery and safekeeping of the national flag, and whether non-compliance with this provision would be regarded as an act that "desecrates the national flag or national emblem... in any other way", thereby constituting an offence under the proposed new section 7(1).
