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HONG KONG BAR ASSOCIATION

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2 April 2019

The Honourable Martin LIAO Cheung-kong, SBS, JP
Chairman
Bills Committee on National Anthem Bill
Legislative Council Complex
1 Legislative Council Road, Central
Hong Kong.

Dear

National Anthem Bill

Please find a copy of the Submission of the Hong Kong Bar Association dated 2 April 2019 in respect of the National Anthem Bill for your consideration of all members of the Bills Committee.

Yours sincerely,

Philip Dykes SC
Chairman

香港大律師公會

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Submission of the Hong Kong Bar Association

In respect of the National Anthem Bill

Background

1. Under Article 11 of the Basic Law, “*no law enacted by the legislature of Hong Kong Special Administrative Region shall contravene the Basic Law*”. When the Legislative Council (“Legco”) enacts a piece of legislation, it has a constitutional duty to ensure and be satisfied that the legislation under deliberation does not contravene the Basic Law.
2. The purposes of the National Anthem Bill (“the Bill”) are: -
 - (i) to pronounce that since the national anthem is the symbol and sign of The People’s Republic of China directional provisions are enacted to lead people to respect the national anthem; and
 - (ii) to introduce criminal penalties for people who publicly and intentionally insult the national anthem or misuse the national anthem.

3. The Bill was published in the Gazette on 11 January 2019. It seeks to implement the Law of the People's Republic of China on National Anthem ("NAL") in Hong Kong by local legislation. It was introduced for first reading and second reading in Legislative Council on 23 January 2019.
4. While the Hong Kong Bar Association ("HKBA") agrees that national anthem deserves respect, it notes with concern various parts of the Bill and submits its views below.

General Principles

5. HKBA accepts that the national anthem is a symbol of The People's Republic of China. HKBA further accepts that certain conduct that is disrespectful to the national anthem should be prohibited by law. However, if and when conduct is to be criminalized, the prohibited conduct should be clearly defined in compliance with the principle of certainty of the law, could be easily understood by citizens and should not unduly restrict citizens' constitutional right to freedom of expression.

Preamble and Part 2 – Playing and Singing of National Anthem

6. The Preamble seeks to provide the context of introducing the Bill by adapting Articles 1, 3 and 5 of the National Law, namely that legislation is enacted to promote patriotism.¹

¹ Article 1 of the National Anthem Law provides: "為了維護國歌的尊嚴，規範國歌的奏唱、播放和使用，增強公民的國家觀念，弘揚愛國主義精神，培育和踐行社會主義核心價值觀，根據憲法，制定本法。"

7. Part 2 of the Bill (Clauses 3 to 5)² spells out the standard and etiquette for playing and singing the National Anthem, as well as the occasions in which the national anthem must be played and sung. However, it does not provide for any consequence of non-compliance.
8. It is submitted that such aspirational and directional provisions are extremely rare and unusual at common law and in the legislation of Hong Kong. Hong Kong local legislation invariably seeks to define legal rights, status and obligations of persons and entities and consequences of breaches. The provisions in the Preamble and Part 2 are social or ideological in nature stating only the objective of promoting patriotism and general social etiquette which are more appropriate to be left to promotion by the Government through education or other channels, and not be made the subject matter of statutory provisions.
9. By Article 8 of the Basic Law the common law previously in force in Hong Kong before the handover shall be maintained. There is a fundamental difference between the common law which provides for well-defined rights and obligations of citizens and actionable remedies with certainty, and the law in force in the socialist legal system of Mainland China which would include political ideology and conceptual guidance. The Preamble and Part 2 of the Bill deviate from the good traditions of the common law with no perceivable justifiable reasons.

² Clause 3 reflects Article 6 of the National Anthem Law; Clause 4 is drafted on the basis of Article 7 of the National Anthem Law; and Clause 5 adapts Article 4 of the National Law to suit the actual circumstances in Hong Kong.

10. It is noted that the National Flag and National Emblem Ordinance (Instrument A401) which implements the PRC National Flag Law does not have similar aspirational provisions, notwithstanding that the PRC National Flag Law similarly expressly states that the law is enacted to promote patriotism.³
11. Although Part 2 does not provide for any consequences for non-compliance, it may give rise to unintended indirect consequences and therefore uncertainty and unease among citizens of Hong Kong.
12. For example, Clause 5 provides for the playing and singing of the national anthem on each of the occasions⁴ set out in Schedule 3, which can be amended by the Chief Executive in Council by Gazette notice.
13. Under the Bill, the national anthem shall be sung and performed when legislators, judicial officers and principal officials are sworn in. However, neither Clause 5 nor Schedule 3 clearly specifies the persons who are obliged to sing and/or perform the national anthem. For instance, it is unclear whether every person present is required to sing the national anthem when it is played. It is also unclear whether a person who takes part in an occasion when the national anthem is played and sung fails (or even refuses) to sing the national anthem him/herself will, for example, be regarded as

³ Article 1 of the National Flag Law provides: “為了維護國旗的尊嚴，增強公民的國家觀念，發揚愛國主義精神，根據憲法，制定本法。”

⁴ Oath-taking ceremony and national flag rising ceremony.

“behaving in a way disrespectful to the national anthem” under Clause 4(2)(b) – by not singing it.

14. A further legitimate concern is whether, in the case of the oath-taking by legislators, a legislator-elect would be disqualified for failing to show up or sing or perform the national anthem ahead of their swearing-in. Government officials have on a number of occasions expressed the view that the playing of the national anthem forms part of the official oaths and therefore legislators might be in violation of the Oaths and Declarations Ordinance (Cap. 11) if their actions or even absence during the performance of the national anthem is not in compliance with Part 2 of the Bill.⁵ While neither the Legislative Council Oath under section 19 of the Oaths and Declarations Ordinance (Cap.11) nor the Bill explicitly mentioned that failure to conform to the etiquette mentioned in Part 2 of the Bill shall constitute a reason of disqualification of a legislator from serving, it is unclear whether their conduct, such as absence from the session when the national anthem is played or failure to sing the national anthem when it is played or failure to observe the etiquette mentioned in Part 2, and hence a lack of respect being shown to the nation could be taken into consideration in determining whether they have taken a valid oath.

15. Further, taking the occasion of taking Judicial Oath under section 17 of the Oaths and Declarations Ordinance (Cap. 11) in Schedule

⁵ For example, the Secretary for Constitutional and Mainland Affairs Mr Patrick Nip Tak-kuen was reported on SCMP (9 January 2019) as saying lawmakers-elect may be disqualified for failing to show up when the national anthem was played just ahead of their swearing-in, depending on the rationale they offered for not being present. “If lawmakers-elect state before the occasion that their absence is an expression of a political view, the person who administers the oath will consider it in deciding whether the oaths are valid.”

3(1)(c) as an example, it is not clear whether Part 2 in particular Clause 5 would require judges, whether conversant in Chinese or Putonghua or not, to sing the national anthem during the oath-taking ceremony and the consequence of failure to comply with this obligation. Further, if any prospective judicial officer is regarded as having failed to observe the etiquette when the national anthem is performed under Clause 4, would that alleged non-compliance disqualify that person from becoming a judicial officer? It is noted that the Judicial Oath requires a judge to “*uphold the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China, bear allegiance to the Hong Kong Special Administrative Region of the People’s Republic of China, serve the Hong Kong Special Administrative Region conscientiously, dutifully, in full accordance with the law, honestly and with integrity, safeguard the law and administer justice without fear or favour, self-interest or deceit*”. Neither the national anthem nor any display of patriotism is part of the current requirement under the Judicial Oath. Unless the Government clarifies the precise effect of non-compliance with Clause 3 (national anthem must be played and sung in a way in keeping with its dignity) and Clause 4 (etiquette to observe when the national anthem is performed), the combined effect of the National Anthem legislation and Cap. 11 may be to disqualify a person from serving as a judicial officer.

16. In order to avoid any unintended effect, we submit that Part 2 should be excluded from the National Anthem legislation and in any event should not be in the form as it now stands. The

performance of the national anthem on various occasions may simply be regulated by way of implementation of executive policy.

17. The exclusion of Part 2 does not in any way diminish the spirit of protecting dignity of the national anthem; nor does it affect the intended purpose of the legislation to promote the national anthem as a symbol of The People's Republic of China. As mentioned, the National Flag and National Emblem Ordinance which was enacted in 1997 to provide for the use and protection of the national flag and national emblem in Hong Kong does not include any preamble and similar provisions included in Part 2 of the Bill, but such absence does not detract from the objective of the ordinance to protect the national flag and national emblem as a symbol of the nation.
18. HKBA suggests that if it were considered necessary to refer to political ideology, objectives and aspirations, the appropriate method is, rather than including the Preamble and Part 2 in the Bill as part of the law, to include them in Legco paper regarding the purpose of introducing the Bill and/or publishing Chief Executive's stipulations when seeking to pass the Bill as law.
19. Further, if it is the intention that the Preamble and failure to observe the etiquette in Part 2 should not have any legal consequence, this intention should be made clear in the Bill itself. This will dispel any misunderstanding, concern and worries of the public that there are hidden or unintended direct or indirect legal consequences upon non-compliance of any of the provisions in the Preamble and Part 2. It is a fundamental principle of the rule of

law that a person should not be penalised or adversely affected except under clear law. Therefore, if Part 2 is to be retained, it should at least be clearly provided that any act of non-compliance with the Preamble and Part 2 does not per se amount to any breach of any law and should not be taken into consideration in determining any breach of any law whether under the other parts of the Bill or otherwise.

Part 3 – Protection of National Anthem

20. Part 3 of the Bill (Clauses 6 to 8) contains provisions relating to creation of criminal offences relating to misuse of the national anthem and insulting behaviour towards the national anthem.
21. Clause 6(2) prohibits the national anthem from being used in a public place as “background music”. It is entirely unclear what is meant by “background music”. We also fail to see why playing the national anthem in a public place should be banned, particularly when the purpose of introducing the Bill is to promote general awareness to the national anthem. There is no similar prohibition against displaying the national flag or national emblem in public under the National Flag and National Emblem Ordinance.
22. Clause 7(7) extended the time limit for prosecution to 1 year after the offence is discovered by the police or 2 years after the offence is committed (whichever is earlier), which has already aroused public concern. Since Clause 6 and Clause 7 create only summary offences, Section 26 of the Magistrates Ordinance (Cap. 227) would have applied in the following terms: “*in any case of an*

offence, other than an indictable offence, where no time is limited by any enactment for making any complaint or laying any information in respect of such offence, such complaint shall be made of such information laid within 6 months from the time when the matter of such complaint of information respectively arose”.

23. It is submitted that the extension of time for prosecution under Clause 7(7)(a) and (b) is unjustified and unwarranted. The offences created in Part 3 do not carry exceptional serious maximum penalties when compared with other summary offences. There is no evidence to show that the usual 6 months’ limitation period in such cases of conduct envisaged in Clauses 6 and 7 would cause problem in the police investigation process or be beyond their resources. It has been suggested that police need more time to carry out an investigation of a breach under the Bill as it may involve a large number of people, such as offending conduct during a football match. This is hardly convincing. The very nature of the conduct criminalised under Clauses 6 and 7 is relatively straight forward. The investigation is not complicated and collection of evidence by way of video recorded at the scene of the alleged crime or from eye witnesses or otherwise is not in any way different in nature from many other offences relating to public order, which may also involve a large number of people⁶. Nor is such investigation different from any other comparable criminal

⁶ For example, various offences under the Public Order Ordinance (Cap.245) which are triable either way, such as Unlawful Assembly (s.18(3)); Riot (s19(2)); Rioters demolishing buildings, etc. (s.20); Fighting in public (s.25); Proposing violence at public gatherings (s.26).

acts such as those relating to insulting the National Flag⁷. The difficulties are exaggerated and unsubstantiated.

24. HKBA considers that there is no justification for the usual limitation period not to be applied to the offences created in the Bill⁸. On the other hand, given the political nature of these offences, a prolonged period for prosecution may cause unnecessary anxiety and speculation on the reasons for prosecution, which is not conducive to maintaining public confidence in the rule of law.

Part 4 – Promotion of National Anthem

25. Part 4 of the Bill (Clauses 9 and 10) contains provisions relating to inclusion of the national anthem in primary and secondary education, as well as in sound broadcasting and domestic television programme services.
26. The teaching and promotion of the national anthem at schools and to the public is purely an administrative matter which may be pronounced by the Government and there is no need for any law to be enacted before such administrative decisions and guidance as a matter of policy be made and implemented. Not only that the enactment of Clauses 9 and 10 adds nothing to the existing powers

⁷ National Flag and National Emblem Ordinance, s.7.

⁸ It should be noted that **none** of the aforementioned public order offences allow for an extended limitation period when tried summarily. As an exception to the rule, the Magistrates Ordinance (Cap.227) s.26A allows 12 months to lay a charge in respect of certain summary offences concerning aviation where there has been an accident. Considering that aviation accidents may involve evidence spread over a wide area, require multiple expert witnesses and highly technical investigation, a longer time limit is arguably justifiable – even then it is only extended to 12 months and subject to additional requirements, namely, public notice of an investigation and a direction by the Chief Executive.

of the Government and other statutory bodies to promote the national anthem in the regime of the Education Ordinance and other licensing statutory framework in ways they think fit, the enactment of Clause 9 would again give rise to legitimate suspicion and worries of the public that there would be legal consequences flowing from non-compliance of the directives by statutory bodies, corporations and individuals. Again, if these provisions do not carry with them legal consequences of non-compliance, they are unnecessary. If they do carry legal consequences, they ought to be made clear in the Bill. In the premises, there is no justification and need to enact Clauses 9 and 10 of the Bill as they now stand.

Dated this 2nd day of April 2019.

HONG KONG BAR ASSOCIATION