



NATIONAL ANTHEM BILL

THE LAW SOCIETY'S SUBMISSION

1. The Standing Committee of the 12th National People's Congress on 4 November 2017 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. With this addition to Annex III of the Basic Law, the Hong Kong Special Administrative Region ("HKSAR") is obliged by virtue of art.18(2) of the Basic Law to apply the National Anthem Law locally by way of promulgation or legislation. The HKSAR Government chooses to implement the National Anthem Law in HKSAR by local legislation. We agree that legislation as opposed to promulgation is more appropriate, since the national anthem law has to be adapted for application in the HKSAR.
2. In the legislative process, the HKSAR Government should not lose sight of Article 39 of the Basic Law which provides that the provisions of the International Covenant on Civil and Political Rights (the "ICCPR") as applied to Hong Kong shall remain in force and shall be implemented through our laws. The Hong Kong Bill of Rights Ordinance is the embodiment of the ICCPR as applied to Hong Kong.
3. As a common law jurisdiction, our freedom of expression should continue to be protected under the proposed legislation. In this regard, the Court of Final Appeal in the landmark case of *HKSAR v Ng Kung Siu & Another* (1999) 2 HKCFAR 442 sets out the boundaries of the restriction on such freedom for the purpose of protecting the symbol of sovereignty. A similar restriction is now proposed in the National Anthem Bill (the "Bill") against abuse or insult of the national anthem.
4. Some controversies and arguments seem to have arisen from the proposed criminalization of abuses of the national anthem. Two penal provisions are

proposed in the Bill gazetted on 11 January 2019. They are respectively clause 6 (on misuse of national anthem) and clause 7 (insulting behaviour).

5. As for the time limit period for prosecution (cl.7(7)), we hold the view that the proposed 2-year period (after the alleged crime has been committed) is too long. The alleged acts are not technical. The usual 6-month time period as allowed for in the Magistrates Ordinance should be followed.
6. The offences of the legislation must be reasonable and proportionate. The penalties now proposed are a fine at level 2, for cl 6(4)(b) (currently at HK\$ 5,000) or level 5 for cl 6(4)(a) or cl 7(6)) (currently at HK\$ 50,000) or a maximum term of imprisonment for 3 years (cl 7(6)). The above 3-year term of imprisonment in our view is not proportionate.
7. We consider the Bill could be improved e.g. the Bill as currently drafted is silent on whether and if so how the national anthem could be played for the occasions set out in paragraph 1 of Schedule 3, when those occasions arise on an interim or an ad hoc basis. The Bill could also clarify the “*major*” sporting event” (item 8, Schedule 3) which the Government envisages, but which the public might not readily understand. Although we acknowledge the difficulties in defining criminality for offences under the Bill, we believe that it would be helpful for the legislation to provide clearer definitions in regards to words such as “*solemnly*” (cl 4(2)(a)), “*disrespectful*” (cl 4(2)(b)) and “*dignity*” (cl 7(8)(a)), because when the law is promulgated the public has the right to know in clear language the behaviour that is criminalized. Legal certainty and predictability are paramount in criminal law.

The Law Society of Hong Kong
21 May 2019