



## **Establishment of a Reporting System on the Physical Cross-Boundary Transportation of Large Quantities of Currency and Bearer Negotiable Instruments**

### **SUBMISSIONS**

1. The Law Society has reviewed the Consultation Paper “*Establishment of a Reporting System on the Physical Cross-Boundary Transportation of Large Quantities of Currency and Bearer Negotiable Instruments*” (“the Consultation Paper”) published by the Security Bureau in July 2015. We have the following observations.
2. In the submissions below, we shall set out our remarks on the general principles before we are to comment on the specific questions laid out in the Consultation Paper.

### **PRINCIPLES TO BE CONSIDERED**

3. The Law Society notes that the consultation represents an effort for Hong Kong to move towards compliance with standards established under Recommendation 32 (“R32 System”) of the Financial Action Task Force. It is said that “[the] R32 System is one of the measures necessary in such a framework. The purpose is to enable law enforcement agencies to detect and stop the physical movement of illicit funds across the boundaries of different jurisdictions” (Press Release on 21 July 2015; see also §1.7 of the Consultation Paper).
4. The Law Society recognizes the importance of combating money laundering and terrorist financing activities. In principle, we have no problem with the proposition that Hong Kong should have in place the legal framework and measures to, amongst others, detect the transportation of currency and bearer negotiable instruments (CBNIs, as defined in the Consultation Paper); and

where there is suspicion of links to money laundering, terrorist financing or predicate offences, to stop or restrain such CBNIs. In the process, jurisdictions should also apply proportionate and dissuasive sanctions against false disclosure or declaration (§1.4, *ibid*). We nevertheless consider that in the consideration of introducing or adapting (if so desirable) the R32 system to Hong Kong the relevant provisions in the Basic Law must not be overlooked.

5. On the other hand, the Administration should make use of the opportunity to review those legislations on money laundering and terrorist financing offences currently in force, and consider whether there should be any necessary amendments to bring Hong Kong to work more closely with the international circle, and to continue to enhance Hong Kong's reputation as an international financial centre.

## **THE BASIC LAW ARTICLES**

6. The following articles of the Basic Law are considered to be relevant:

### **Article 31**

Hong Kong residents shall have freedom of movement within the Hong Kong Special Administrative Region and freedom of emigration to other countries and regions. They shall have freedom to travel and to enter or leave the Region. Unless restrained by law, holders of valid travel documents shall be free to leave the Region without special authorization.

### **Article 112**

No foreign exchange control policies shall be applied in the Hong Kong Special Administrative Region. The Hong Kong dollar shall be freely convertible. Markets for foreign exchange, gold, securities, futures and the like shall continue.

The Government of the Hong Kong Special Administrative Region shall safeguard the free flow of capital within, into and out of the Region.

### **Article 115**

The Hong Kong Special Administrative Region shall pursue the policy of free trade and safeguard the free movement of goods, intangible assets and capital.

7. Thus, there shall not be any currency control introduced in whatsoever manner and under whatever label by way of the R32 system. Any restriction on legitimate flow of capital within, into and out of the HKSAR is in clear breach of the Basic Law and cannot be allowed (see Articles 112 and 115 above).
8. Collateral to the above is that there cannot be any restrictions on freedom of travel, arising out of Government policies, which is in breach of Article 31 (see also Article 8 of the Hong Kong Bill of Rights).
9. In the past, the Courts in Hong Kong have received cases in which Article 31 was cited and relied in the parties' challenges. The jurisprudence established in those cases should provide the Administration with the relevant guidelines when considering the R32 System.
10. It is cardinal that restrictions on the right to travel must among other things be proportional, and
  - (a) it is justified as necessary;
  - (b) it is rationally connected to the protection of the rights of others; and
  - (c) the means used to impair the right to travel must be no more than is necessary to protect the rights of others.<sup>1</sup>
11. By way of illustration, the Court has held that the following restrictions violate Article 31:
  - (a) To deprive a non-permanent resident, whose limit of stay under the Immigration Ordinance has not expired, of his right to re-enter Hong Kong simply by reason of him having travelled outside Hong Kong is contrary to Article 31. "Permission" must be construed to include permission previously given where a limit of stay is still current at the time of re-entry. Therefore, such a non-permanent resident is entitled to land and does not need a further grant of permission to land.<sup>2</sup>
  - (b) Legislation that required a bankrupt to notify the trustee in bankruptcy of his itinerary and where he could be contacted when

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<sup>1</sup> *Official Receiver & Trustee in Bankruptcy of Chan Wing Hing v. Chan Wing Hing* (2006) 9 HKCFAR 545; *Yau Man Fai George v. Director of Social Welfare* HCAL 69/2009 (21 June 2010)

<sup>2</sup> *Gurung Kesh Bahadur v. Director of Immigration* (2002) 5 HKCFAR 480

travelling outside Hong Kong, failure of which would lead to a suspension of the relevant bankruptcy period until his return, went beyond what was necessary for the protection of the rights of creditors, and was therefore unconstitutional.<sup>3</sup>

## OTHER LEGISLATION IN FORCE

12. We note that money laundering and terrorist financing offences are currently prescribed in the *Drug Trafficking (Recovery of Proceeds) Ordinance* (Cap. 405), the *Organized and Serious Crimes Ordinance* (Cap. 455), and the *United Nations (Anti-Terrorism Measures) Ordinance* (Cap. 575). There is also the *Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance* (Cap. 615) which asks places a statutory obligation upon specified financial institutions and asks them to conduct customer due diligence on their clients and keep relevant records (§1.6, *ibid*).
13. We do not at this stage have specific comments on the efficacy of the above anti-money laundering regime, but we note the above is not immune to legal challenges (see e.g. *Interush Ltd v Commissioner of Police* HCAL 167/2014). Presentation of legal challenges does not necessarily suggest deficiency in the regimen, but we consider that it is prudent to have a relevant and timely review. To echo what has been set out in the Consultation Paper, the introduction of any necessary measures (e.g. the R32 System as proposed) “has to work hand in hand with other measures in order that Hong Kong could have an effective AML/CFT regime” (§1.8, *ibid*).

## SANCTIONS

14. On sanctions, the Consultation Paper states the following.

“3.25 As required by FATF, effective, proportionate and dissuasive sanctions should be put in place to deal with persons who fail to make a declaration, or make a false declaration or disclosure, on the CBNIs physically transported...

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<sup>3</sup> *Official Receiver & Trustee in Bankruptcy of Chan Wing Hing v. Chan Wing Hing* (2006) 9 HKCFAR 545

3.27 For Hong Kong... [the Bureau proposes] that for the failure to report CBNIs transported as required or making false declarations or disclosures, a fixed penalty system be put in place, but applicable only to first-time offenders who have not previously committed any money laundering or terrorist financing offences. Other cases should be subject to court proceedings which might lead to more rigorous punishment comprising fines and imprisonment... “

15. Subject to a review of the bill to be released, we in principle agree to the above formulation, i.e. a fixed administrative penalty for the first-time offenders. For other cases, those should be brought to the Court for adjudication and sentencing.
16. We have considered whether the offences should be of summary nature or whether they should be indictable offences. We have no views at this stage, but when the Administration is to consider the nature of these offences, the Administration might wish to take into account factors including the service of the summons and the desirability of maintaining criminal records, if any, for such offences.
17. We could suggest the Administration to consider a tariff or a tier system in formulating the level of fines for the offences under this R32 system.

## **VIEWS ON SPECIFIC CONSULTATION QUESTIONS**

18. Our views on the specific consultation questions are set out in the following. Where relevant, the abbreviations and paragraph numberings below follow those in the Consultation Paper.

***Question 1** What are your views on the principles we have adopted in devising Hong Kong’s R32 System? What other major factors do you think we should take into account?*

19. We agree to the principles adopted in devising Hong Kong’s R32 System.

***Question 2** Do you have any views for Hong Kong to adopt a mixed system for passengers?*

20. We agree to the proposed mixed system as set out in §3.4 of the Consultation Paper, which is reproduced below.

Cross-boundary transportation		Proposed reporting type
Passengers	Outgoing	<b>Disclosure</b> <i>(i.e. to report upon request)</i>
	Incoming	<b>Declaration</b> <i>(i.e. to report proactively if CBNI's carried are above designated threshold)</i>
Cargoes	Outgoing and incoming	

**Question 3** *What do you think of the proposed arrangement of implementing a declaration system with advance electronic submission of information for importing and exporting cargoes?*

21. We agree to the proposed arrangement of implementing a declaration system with advance electronic submission of information for importing and exporting cargoes.

**Question 4** *Should FATF's recommended threshold of USD/EUR 15,000 (equivalent to around HK\$120,000) be adopted as the designated threshold for Hong Kong's R32 System? Or should a lower/higher threshold be adopted?*

22. We agree for Hong Kong to adopt HK\$120,000 as the designated threshold for Hong Kong's R32 System.

**Question 5** *For declarations, should we follow the commonly adopted practice of requiring only those transporting CBNI's above the designated threshold to report? Or should all passengers/persons responsible for a cargo be required to declare, regardless of the amount of CBNI's they transport?*

23. We consider that only those transporting CBNI's above the designated threshold need to be reported.

*Question 6 Do you think that Hong Kong's R32 System should or should not include specific items such as casino tokens and bearer share certificates?*

24. In our views, Hong Kong's R32 System should not include specific items such as casino tokens and bearer share certificates

*Question 7 Do you think that Hong Kong should not regulate the posting of CBNIs via the mail system at this stage?*

25. We think that Hong Kong should not regulate the posting of CBNIs via the mail system at this stage

*Question 8 Do you have any suggestions on how we could enhance the publicity for the implementation of the R32 System so that members of the public and relevant practitioners could be well informed?*

26. We have no specific suggestions on promotion campaign but we do consider that it is of paramount importance that, if implemented, a clear message must appropriately and relevantly be disseminated to the public and the practitioners. Appropriate use of APIs, as one of the channels, is indispensable.

**The Law Society of Hong Kong  
13 October 2015**