

Invitation to comment

This consultation paper has been issued by the Law Reform Commission's Charities Sub-committee to elicit views and comment from the public on the recommendations for change that it contains.

While all expressions of views on the paper would be welcome, the Sub-committee would particularly appreciate receiving your responses to the following questions, *including, in each case if possible, the reasons for your answers*:

(Definition of charity – Chapter 5)

- Q1.** Do you think that there should be a clear statutory definition of what constitutes a charitable purpose? (See Recommendation 1¹.)
- Q2.** If you have answered "yes" to Question 1, please also answer the following questions:
- (a) Do you think that the statutory definition of what constitutes a charitable purpose that is exclusively charitable should include all of the heads of charitable purpose set out in Recommendation 2²?
 - (b) If not, which head or heads do you think should be deleted from the list? Which should be amended, and how? Are there any other heads which you think should be added to the list of heads of charitable purpose?
 - (c) Do you think that charities falling under any of the heads of charitable purpose must be also for the public benefit? (See Recommendation 2.)
 - (d) Do you think that "*The advancement of human rights, conflict resolution or reconciliation*" should be included in the statutory list of heads of charitable purpose? (See Recommendation 2.)

1 At para 5.42.
2 At para 5.128.

(Legal structures of charities – Chapter 6)

- Q3.** Do you think that the various existing legal forms for charities should be reformed? (See Recommendation 3³.)
- Q4.** If you have answered "yes" to Question 3, please also answer the following questions:
- (a) Do you think that the current system of allowing a variety of legal forms of charitable organisations to exist should continue, and if so, what modifications, if any, should be made to it? (See Recommendation 3.)
 - (b) Alternatively, do you think that a unitary approach of imposing one uniform model of charitable organisation structure should be adopted, and if so, what form should that model take? (See Recommendation 3.)

(Registration of charities – Chapter 7)

- Q5.** Do you agree that all charitable organisations which:
- (a) make any charitable appeal to the public; and/or
 - (b) seek tax exemption
- should be required to register? (See Recommendation 4⁴.)
- Q6.** If you agree that charitable organisations should be registered, but do not agree with the pre-conditions for registration set out in Question 5(a) and (b), please answer the following questions:
- (a) which pre-condition(s) do you think should not be required, and why? Are there other pre-conditions which you think should be included, and why? (See Recommendation 4.)
 - (b) Do you agree that the list of registered charitable organisations should be established and maintained by the future charity commission? (See Recommendation 4.)
 - (c) Do you agree that this list should be available for public inspection? (See Recommendation 4.)
 - (d) Do you agree that the application process for registration should not be subject to public notification? (See Recommendation 4.)

3 At para 6.41.

4 At para 7.37.

- (e) Do you agree that whether the use of particular names of charitable bodies is allowed or disallowed should be left to the future charity commission to determine, on a case by case basis? (See Recommendation 4.)

(Framework for governance, accounting and reporting by charities – Chapter 8)

- Q7.** Do you think that registered charitable organisations should be required to file an annual activity report to the future charity commission, and if so, should the report be provided in a standard form and should it cover the list of matters set out in Recommendation 5⁵? Are there any matters which you think should be deleted from the list? Are there any matters which should be added?
- Q8.** Do you think that charity trustees or directors of a registered charity should be under a duty to declare any conflicts of interest and personal interests? (See Recommendation 6⁶.)
- Q9.** Recommendation 7⁷ proposes that:
- "(1) *Registered charitable organisations with an annual income exceeding \$500,000 should be required to file an auditors' report and financial statements with the future charity commission.*
- (2) *Without prejudice to the statutory requirements under the Companies Ordinance (Cap 32), registered charitable organisations with an annual income not exceeding \$500,000 should be required to file financial statements certified by the Board of these charitable organisations with the future charity commission.*
- (3) *The auditor's report and financial statements submitted by charitable organisations to the future charity commission should be accessible to the public."*

Do you agree with the requirements set out in Recommendation 7? If not, which requirements do you think should be deleted? Are there other requirements which you think should be added?

5 At para 8.20.
6 At para 8.24.
7 At para 8.29.

- Q10.** Do you think that for every charity registered with the future charity commission, an activities report and financial statements should be filed with the future charity commission on an annual basis, and if so, what should be the contents included in the annual report of activities? (See Recommendation 7.)
- Q11.** Do you think that charity trustees or directors of a registered charity should be under a statutory duty to keep proper accounting records of the charity which are sufficient to show and explain all transactions of the charity, and if so, should such records be retained for at least seven years? (See Recommendation 8⁸.)
- Q12.** Do you agree that the future charity commission should be vested with the power to investigate any alleged mismanagement and misconduct of charitable organisations with regard to its charitable objects? (See Recommendation 9⁹.)
- Q13.** If you have answered "yes" to Question 12, do you agree that in the exercise of this power to investigate alleged mismanagement and misconduct of a charitable organisation, the future charity commission should have power, in respect of a particular charity under investigation, to investigate the charity's funding, property and activities and to obtain relevant information, including documents, records, books and accounts from the charity? (See Recommendation 9.)
- Q14.** Do you agree that during the course of investigations of the type set out in Question 13, there should be appropriate safeguards to ensure confidentiality? (See Recommendation 9.)
- Q15.** Do you agree that any person who intentionally or recklessly provides false or misleading information to the future charity commission or its appointed investigators, or fails to provide the information required for the purpose of investigation, or alters, conceals or destroys any document required for production for the purpose of an investigation, should be guilty of a criminal offence? (See Recommendation 10¹⁰.)
- Q16.** Do you agree that the future charity commission should be vested with powers relating to enforcement and remedies in cases of non-compliance by charities with their legal obligations? (See Recommendation 11¹¹.)

8 At para 8.33.
9 At para 8.42.
10 At para 8.44.
11 At para 8.50.

Q17. If you have answered "yes" to Question 16, do you agree that these powers should include, but not be limited to:

- "(1) de-registration of a charity from the register of charities;*
- (2) referring criminal offences to appropriate law enforcement agencies;*
- (3) referring possible civil actions to the Secretary for Justice; and*
- (4) powers for the purpose of protection of property of charities"*

as listed in Recommendation 11? If not, which powers should not be included? Which additional powers relating to enforcement and remedies, if any, should be given to the future charity commission?

Q18. Do you think that the future charity commission should be vested with the power to protect charities' property in cases of misconduct or mismanagement in their administration? (See Recommendation 12¹².)

Q19. If you have answered "yes" to Question 18, do you agree that this power should include, but not be limited to, the powers to:

- "(1) appoint additional trustees or directors of the charity;*
- (2) suspend or remove trustees, directors or officers of the charity;*
- (3) vest property of charities in an official custodian; and*
- (4) require persons holding property on behalf of the charity not to part with the property without the approval of the future charity commission"*

as listed in Recommendation 12? If not, which powers should not be included? Which additional powers to protect property of charities, if any, should be given to the future charity commission?

(Regulation of fundraising activities – Chapter 9)

Q20. Do you think that there should be a sole regulatory body (a "one-stop shop") to process and grant all permits and licences necessary for charitable fundraising, and to monitor the use of funds raised by such activities? (See Recommendation 13(1)¹³.)

12 At para 8.51.

13 At para 9.44.

- Q21.** If you have answered "yes" to Question 20, please also answer the following questions:
- (a) Do you think that this "*one-stop shop*" service should be provided by the future charity commission, and that the commission should be vested with the powers and duties currently exercised by the Social Welfare Department, the Food and Environmental Hygiene Department and the Television and Entertainment Licencing Authority in relation to authorising charity fundraising activities in public places and those involving lotteries? (See Recommendation 13(2).)
 - (b) Do you think that the future charity commission should be responsible for enabling public access to information on fundraising activities and for providing an enquiry response service to the public? (See Recommendation 13(3).)
- Q22.** How, and to what extent, do you think solicitation of donations via the internet should be regulated in order to minimise the risk of abuse, while at the same time not unduly inhibiting the work of *bona fide* charities? (See paragraph 9.48.)
- Q23.** Do you agree that for all forms of charitable fundraising activities, the registration number of any charitable organisation involved in those activities should be prominently displayed on any related documents, or displayed on any means through which appeals for charitable donations are made (such as solicitation leaflets)? (See Recommendation 14¹⁴.)
- Q24.** Do you agree that the future charity commission should carry out the initiatives listed in Recommendation 15¹⁵ to promote good practice by professional fundraisers and, if not, which initiatives should not be included? Are there other initiatives which you think should be added to the list?
- Q25.** Do you think that there should be an express power given to the future charity commission to sanction organisations for non-compliance with the terms laid down in codes of conduct issued by the commission? (See paragraph 9.57.)

14 At para 9.48.

15 At para 9.51.

(Charities and tax – Chapter 10)

- Q26.** Do you agree that existing powers of tax exemption and functions of periodic review of charities for taxation purposes should remain with the Inland Revenue Department? (See Recommendation 16(1)¹⁶.)
- Q27.** Do you agree that tax exemption should be granted to a charity by the Inland Revenue Department only when the charity has been registered with the future charity commission and, subject to this, there should be no change to the existing law on the taxation of charities in Hong Kong? (See Recommendation 16(2) and (3).)
- Q28.** Do you think that the future charity commission should collaborate with the Inland Revenue Department as far as possible, particularly by the provision of relevant charities' accounts information, to facilitate the Inland Revenue Department's functions in assessing charities for tax where appropriate? (See Recommendation 16(4).)
- Q29.** Do you agree that the Administration should ensure that sufficient resources are allocated to the Inland Revenue Department to carry out the function of reviewing annual accounts submitted by charities to the future charity commission? (See Recommendation 16(5).)

(The cy-près doctrine – Chapter 11)

- Q30.** Do you think that legislation should be introduced in Hong Kong along the lines of the English statutory model of the *cy-près* doctrine (comprised in provisions of the English Charities Act 1993, as amended in 2006), so as to provide a statutory basis for the *cy-près* doctrine in Hong Kong and to broaden the scope of its application? (See Recommendation 17¹⁷.)
- Q31.** If you have answered "yes" to Question 30, do you agree that in line with the English model, the *cy-près* doctrine should be broadened in Hong Kong so that it may apply in the situations listed in Recommendation 17, even where it is not impossible or impractical to carry out the charitable purpose of the charitable trust? (See Recommendation 17.)
- Q32.** Do you agree that the future charity commission should be empowered by statute to administer the application of the *cy-près* doctrine in particular cases? (See Recommendation 17.)

16 At para 10.42.

17 At para 11.27.

(Establishment of a charity commission for Hong Kong – Chapter 12)

- Q33.** Do you think that a charity commission should be set up as a sole regulatory body for charities in Hong Kong? (See Recommendation 18¹⁸.)
- Q34.** If you have answered "yes" to Question 33, do you agree to the objectives of the future charity commission set out in Recommendation 18? If not, what objectives do you think should not be included in the list? Are there other objectives which you think should be added to the list?
- Q35.** Do you agree that the future charity commission should have the functions and powers set out at Recommendation 19¹⁹? If not, which functions and powers should not be included in the list? Which additional functions and powers, if any, should be given to the future charity commission?
- Q36.** Do you agree that a charitable organisation or person aggrieved by a decision of the future charity commission, either:
- "(1) in its refusal to register an organisation as a charitable organisation;*
 - (2) in the exercise of its powers relating to enforcement and remedies due to non-compliance of charities with their legal obligations; or*
 - (3) in the application of the cy-près doctrine"*
- should have the right to appeal to the Court of First Instance? (See Recommendation 20²⁰.)
- Q37.** Do you think that appeals relating to applications for fundraising permits and licences should be handled by the Administrative Appeals Board or by a new administrative appeal system set up for the purpose? (See paragraph 12.45.)

18 At para 12.11.
19 At para 12.43.
20 At para 12.44.