

THE LAW REFORM COMMISSION OF HONG KONG

CHARITIES SUB-COMMITTEE

CONSULTATION PAPER

CHARITIES

This consultation paper can be found on the Internet at:
<<http://www.hkreform.gov.hk>>

JUNE 2011

This Consultation Paper has been prepared by the Charities Sub-committee of the Law Reform Commission. It does not represent the final views of either the Sub-committee or the Law Reform Commission, and is circulated for comment and discussion only.

The Sub-committee would be grateful for comments on this Consultation Paper by 16 September 2011. All correspondence should be addressed to:

*The Secretary
The Charities Sub-committee
The Law Reform Commission
20th Floor, Harcourt House
39 Gloucester Road
Wanchai
Hong Kong*

Telephone: (852) 2528 0472

Fax: (852) 2865 2902

E-mail: hklrc@hkreform.gov.hk

It may be helpful for the Commission and the Sub-committee, either in discussion with others or in any subsequent report, to be able to refer to and attribute comments submitted in response to this Consultation Paper. Any request to treat all or part of a response in confidence will, of course, be respected, but if no such request is made, the Commission will assume that the response is not intended to be confidential.

It is the Commission's usual practice to acknowledge by name in the final report anyone who responds to a consultation paper. If you do not wish such an acknowledgment, please say so in your response.

THE LAW REFORM COMMISSION OF HONG KONG

CHARITIES SUB-COMMITTEE

CONSULTATION PAPER

CHARITIES

CONTENTS

<i>Chapter</i>	<i>Page</i>
Preface	1
Introduction	1
Terms of reference	2
Membership of the Sub-committee	2
Format of this paper	3
 1. Introduction to charities in Hong Kong	 5
What is a charity?	5
The growth of philanthropy in Hong Kong	6
The need to review Hong Kong's charity law	7
<i>Other initiatives in relation to non-profit organisations in Hong Kong</i>	8
<i>Objectives of the review by the Sub-committee</i>	9
 2. Overview of the current legal position in Hong Kong	 12
Introduction	12
The legal definition of "charity"	12
The privileges associated with charitable status	14
<i>Tax privileges</i>	14
<i>Other advantages of charitable status</i>	16
Formation of a charity: the legal structures available	17
Oversight of charitable organisations	18
<i>Charities established by statute</i>	18
<i>Charities receiving Government subvention</i>	18
<i>Other charities</i>	18

Chapter	Page
<i>Oversight by the Inland Revenue Department</i>	19
<i>Oversight by the Companies Registry</i>	19
<i>Oversight by the Secretary for Justice as "protector of charities" (parens patriae)</i>	19
<i>Oversight by other Government departments</i>	20
Oversight of fundraising activities	21
<i>Existing oversight by the Social Welfare Department, TELA and other authorities</i>	21
<i>Types of fundraising activity not subject to Government monitoring</i>	22
Dissolution of charities and the doctrine of "cy-près"	22
 3. Perceived deficiencies in the regulatory framework for supervision of charities in Hong Kong	 23
Introduction	23
Problems in the oversight of charitable organisations in Hong Kong	23
<i>Out-dated definition of charity</i>	24
<i>Lack of a coherent system for the registration of charities</i>	24
<i>Inconsistent standards or requirements on governance, accounting and reporting by charities</i>	25
<i>Limited control of charitable fundraising</i>	26
Conclusions	27
 4. Overview of the law of charities in other jurisdictions	 28
Introduction	28
Australia	28
Canada	29
England and Wales	30
Ireland	32
New Zealand	35
Scotland	36
Singapore	37
South Africa	39
 5. Conclusions and proposals on the definition of charity	 42
Current situation in Hong Kong	42
<i>The legal definition of "charity"</i>	42
<i>Historical development of the common law position on charities</i>	42
<i>The specific heads of "charitable purpose" at common law</i>	44
<i>Purposes held not to be charitable</i>	47

Chapter	Page
<i>The extent to which "charity" is defined under Hong Kong legislation</i>	48
Problems with the current law and the need for reform	51
<i>Outdated definition</i>	52
<i>The law is confusing and unclear</i>	52
Pros and cons of having a statutory definition	53
Issues to be considered in defining charitable status	54
<i>Exclusively charitable purposes</i>	54
<i>"Public benefit" versus "private benefit"</i>	54
<i>"Public benefit" rather than "altruism"</i>	56
<i>"Charitable purposes" rather than "charitable activities"</i>	56
<i>Other considerations</i>	57
Possible reform models: definitions in other jurisdictions	58
<i>England and Wales</i>	58
<i>Scotland</i>	60
Categories of charitable purpose - our proposals	63
<i>"The prevention or relief of poverty"</i>	63
<i>"The advancement of education"</i>	64
<i>"The advancement of religion"</i>	65
<i>"The advancement of health"</i>	65
<i>"The saving of lives"</i>	66
<i>"The advancement of citizenship or community development"</i>	68
<i>"The advancement of the arts, heritage, culture or science"</i>	69
<i>"The advancement of public participation in sport"</i>	69
<i>"The provision of recreational facilities, or the organisation of recreational activities, with the object of improving the conditions of life for the persons for whom the facilities or activities are primarily intended"</i>	71
<i>"The advancement of human rights, conflict resolution or reconciliation"</i>	73
<i>"The promotion of religious or racial harmony"</i>	76
<i>"The promotion of equality and diversity"</i>	77
<i>"The advancement of environmental protection or improvement"</i>	77
<i>"The relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage"</i>	77
<i>"The advancement of animal welfare"</i>	78
<i>"Any other purpose that may reasonably be regarded as analogous to any of the preceding purposes"</i>	78
6. Conclusions and proposals on the legal structures of charities	81
Introduction	81
Current situation in Hong Kong	81

Chapter	Page
Types of charitable organisation structure	81
Governing instrument	87
Legal structures of charities in other jurisdictions	87
Our proposal	88
<i>Option 1 – a unitary model for charities</i>	88
<i>Option 2 - maintaining a variety of legal forms for charities</i>	89
Conclusions	90
 7. Conclusions and proposals on registration of charities	 91
Introduction	91
Current situation in Hong Kong	91
<i>Lack of a formal register of charities</i>	91
Registration systems for charities in other jurisdictions	95
Should there be a register of charities in Hong Kong?	97
<i>The effects of registration and non-registration compared</i>	97
<i>Compulsory or voluntary system</i>	98
<i>Decision on charitable status</i>	99
<i>Objection by third parties to registration</i>	99
<i>Exemption from regulation and the regulation of specific charities</i>	99
<i>Charities with an overseas element</i>	100
Our proposal	101
 8. Proposed framework for governance, accounting and reporting by charities	 103
Current situation in Hong Kong	103
<i>Inland Revenue Department requirements</i>	103
<i>Companies Ordinance (Cap 32) and Societies Ordinance (Cap 151) requirements</i>	104
<i>Social Welfare Department requirements</i>	104
<i>Home Affairs Bureau requirements</i>	104
<i>Education Bureau requirements</i>	105
<i>Department of Health requirements</i>	106
Monitoring systems of charities in other jurisdictions	107
<i>England and Wales</i>	107
<i>Ireland</i>	107
<i>New Zealand</i>	108
Our proposed framework for reporting and accounting by charities in Hong Kong	109
(1) <i>Compliance with charitable objects</i>	109
(2) <i>Notification of change of particulars</i>	109
(3) <i>Disclosure of interests and matters relating to governance</i>	110
(4) <i>Financial reporting</i>	111
(5) <i>Powers of investigation</i>	113

Chapter	Page
(6) <i>Providing false or misleading information to be an offence</i>	116
Enforcement and remedies	117
(1) <i>Removal of charitable status</i>	117
(2) <i>Referring criminal offences to the appropriate law enforcement agencies</i>	117
(3) <i>Civil actions</i>	117
(4) <i>Protection of the property of a charity</i>	117
 9. Conclusions and proposals on the regulation of fundraising activities	 120
Introduction	120
Current situation in Hong Kong	120
<i>The extent of statutory regulation of charitable fundraising activities</i>	120
<i>The development of voluntary guidelines on charitable fundraising</i>	125
Monitoring of fundraising activities in other jurisdictions	130
<i>England and Wales</i>	130
<i>Ireland</i>	132
Our conclusions and proposals on the regulation of fundraising activities in Hong Kong	133
<i>Our recommendations on charitable fundraising</i>	135
 10. Charities and tax	 140
Introduction	140
Current situation in Hong Kong	140
<i>Tax exemptions for charitable organisations</i>	141
<i>Tax deductions for charitable donations</i>	143
<i>Filing of accounts and reports</i>	144
Charities and tax in other jurisdictions	145
<i>England and Wales</i>	145
<i>Ireland</i>	146
<i>New Zealand</i>	147
<i>Scotland</i>	149
Our conclusions and proposals on the taxation of charities in Hong Kong	150
 11. Conclusions and proposals on the cy-près doctrine	 152
Introduction	152
The situation in Hong Kong regarding the <i>cy-près</i> doctrine, resulting trusts and dissolution of charities	152

Chapter	Page
<i>The cy-près doctrine and resulting trusts at common law</i>	152
<i>Dissolution of charitable organisations</i>	155
The application of the <i>cy-près</i> doctrine in other jurisdictions	156
<i>England and Wales</i>	157
Our conclusions and proposals on variation of charities in Hong Kong	165
 12. Conclusions and proposals on the establishment of a charity commission for Hong Kong	 166
Need for a 'one-stop shop'?	166
Overseas experience	167
<i>England and Wales</i>	168
<i>Ireland</i>	168
<i>New Zealand</i>	169
Our proposals for the establishment of a charity commission	170
<i>The objectives of the future charity commission</i>	170
<i>The interplay between the role of the future charity commission and the Secretary for Justice as protector of charities</i>	170
<i>The general characteristics of the future charity commission</i>	171
<i>The functions and powers of the future charity commission</i>	172
<i>Appeal mechanism</i>	176
 Invitation to comment	 178
 Summary of recommendations	 186
 Annex 1	
 The law in other jurisdictions on the definition of charity	 196
 Annex 2	
 The law in other jurisdictions on the legal structures of charities	 205
 Annex 3	
 The law in other jurisdictions on registration of charities	 217

Chapter	Page
Annex 4	
The law in other jurisdictions on governance, accounting and reporting by charities	226
Annex 5	
Summary of the legal requirements for filing of annual financial reports with the charities monitory authorities in overseas jurisdictions	238
Annex 6	
The law in other jurisdictions on the regulation of fundraising activities	242
Annex 7	
The law in other jurisdictions on charities and tax	263
Annex 8	
The law in other jurisdictions on the <i>cy-près</i> doctrine	287
Annex 9	
The law in other jurisdictions on the establishment of a charity commission or equivalent body	305

Preface

Introduction

1. It is estimated that there are approximately 6,000 charities operating in Hong Kong.¹ During the course of the fiscal year 2008-9 alone, around \$8 billion dollars was raised in Hong Kong through charitable donations.² This is more than double the figure for the year 2000-1.³ Our vibrant charity sector therefore has much to be proud of.

2. Faced with a similar rapid growth in charitable-giving in recent years, a number of overseas jurisdictions have undertaken major reforms of their laws on charities. These developments have been aimed at both protecting the interests of charitable donors and supporting the activities of charities by providing a modern and streamlined charity law framework in which they can operate.⁴

3. In Hong Kong, such a comprehensive legal framework for regulating charities does not yet exist. There is limited statutory definition of what constitutes a "charity" or a "charitable purpose". There is also a limited system of oversight to ensure that donations are properly applied to the purposes for which they have been solicited,⁵ and legislation relating to charities which qualify for tax exemption appears in various *ad hoc* provisions.⁶

4. An entity is entitled to tax exemption if it is recognised by the Inland Revenue Department as a charitable institution or trust of a public character, but that department is not responsible for registering charities, or for monitoring their conduct. There is also no statutory requirement in Hong Kong for charitable organisations to submit annual reports or accounts

1 See *Inland Revenue Department Annual Report (2009-2010)*, at 45, which states: "As at 31 March 2010, the number of charities exempt from tax was 6,380, of which 581 charities were granted [tax] exemption during the year. The list of charities exempt from tax is available on the [Inland Revenue Department] Homepage."

2 According to the data provided by the Inland Revenue Department, the amounts of approved charitable donations allowed under profits tax and salaries tax for the year of assessment 2008-09, were \$3.03 billion and \$5.01 billion respectively.

3 See *Inland Revenue Department Annual Report (2001-02)*, at 68, where it is stated that: "For the year of assessment 2000-01, the amounts of approved charitable donations allowed under Profits Tax and Salaries Tax were \$0.83 billion and \$2.08 billion respectively."

4 Examples include the Charities Act 2006 in England and Wales, the Charities Act 2005 in New Zealand, and in Scotland, the Charities and Trustee Investment (Scotland) Act 2005.

5 Guidelines to promote best practice in charity fundraising activities have been introduced in recent years, but adoption of these is purely voluntary: see: Social Welfare Department, *Reference Guide on Best Practices for Charitable Fund-Raising Activities* (2004), available at: http://www.swd.gov.hk/en/index/site_pubsvc/page_controlofc/sub_referencecg/, and Social Welfare Department, *Guidance Notes on Internal Financial Controls for Charitable Fund-Raising Activities* (2004) available at: http://www.swd.gov.hk/doc/Control_of_Char/gnifc_e.pdf.

6 See, for example, sections 2(1) and 88 of the Inland Revenue Ordinance (Cap 112) and section 2 of the Registered Trustee Ordinance (Cap 306).

reporting their finances. Instead, the Hong Kong Inland Revenue Department will only call for accounts, annual reports or other documents for the purpose of reviewing the exemption status of a particular organisation so as to ensure that the organisation is still charitable and its activities are compatible with its objects. However, this inspection of accounts of charitable organisation is not mandatory under the existing law.

5. The question of the need for greater monitoring of charitable organisations has been widely discussed by the community in recent years, and it has become a matter of major public interest that a system should be put in place to both regulate charities and enhance their transparency. The Law Reform Commission has therefore been asked by the Secretary for Justice and the Chief Justice to review the law as it applies to charities in Hong Kong.

Terms of reference

6. In June 2007, the Chief Justice and the Secretary for Justice asked the Law Reform Commission to review this subject. The terms of reference are:

"To review the law and regulatory framework relating to charities in Hong Kong and to make such recommendations for reform as may be considered appropriate."

Membership of the Sub-committee

7. In September 2007, a sub-committee was appointed to review the subject. The members of the Sub-committee are:

Mr Bernard C Chan, GBS, JP (Chairman)	Chairman Hong Kong Council of Social Service
Mr Eric Bohm	CEO WWF Hong Kong
Mr John Budge, SBS, JP	Partner Wilkinson & Grist
Mrs Pamela Chan, BBS, JP	Former Chief Executive of Consumer Council
Ms Christine M S Fang, JP	Chief Executive Hong Kong Council of Social Service
Mr Godfrey Lam, SC	Senior Counsel

Mrs Connie Ngan (until May 2010)	CEO (Lotteries Fund) Subventions Branch Social Welfare Department
Mr Herbert Tsoi, BBS, JP	Partner Herbert Tsoi & Partners
Ms Florence Wai (from May 2010)	CEO (Lotteries Fund) Subventions Branch Social Welfare Department
Mr Leonard Wong Ching-ping (from September 2007 to September 2008) (from September 2010)	Chief Assessor (Special Duties) Inland Revenue Department
Mrs Wendy Yip Sham Yin-har (from September 2008 to September 2010)	Chief Assessor (Special Duties) Inland Revenue Department

8. Ms Kitty Fung, Senior Government Counsel in the Law Reform Commission Secretariat, is the secretary to the Sub-committee. Ms Judy Cheung, Senior Government Counsel, was the secretary until May 2009. The Sub-committee considered the reference over the course of twenty-five meetings between October 2007 and October 2010. The recommendations in this paper are the result of those discussions. They represent the Sub-committee's preliminary views, presented for consideration by the community.

Format of this paper

9. Chapter 1 of this paper introduces the types, numbers and nature of charitable organisations in Hong Kong, and their impact on Hong Kong society. The chapter also discusses the objectives of the review by the Sub-committee.

10. Chapters 2 and 3 consider, respectively, the current legal position in Hong Kong on charities and the perceived limitations in the existing legal framework. Recent developments in other jurisdictions are considered in Chapter 4.

11. The definition of "*charity*" is considered in Chapter 5, including the Sub-committee's proposals for reform on this issue. An analysis of relevant legal structures and the Sub-committee's discussions on this topic are set out in Chapter 6. The Subcommittee's conclusions and proposals on the registration of charities are considered in Chapters 7. The Sub-committee's proposed framework for governance, accounting and reporting by charities is the subject of Chapter 8.

12. Issues related to the regulation of fundraising activities and the Sub-committee's proposals in this regard are discussed in Chapter 9. The Sub-committee's conclusions and proposals on charities and tax are discussed in Chapter 10, and the dissolution of charities and the *cy-près* doctrine in Chapter 11. The Sub-committee's proposals in relation to establishing a Charities Commission for Hong Kong are set out in Chapter 12.

13. The Sub-committee welcomes any views, comments and suggestions on the issues presented in this paper. These will greatly assist the Sub-committee to reach its final conclusions in this important area.

Chapter 1

Introduction to charities in Hong Kong

1.1 In this chapter, we briefly outline the features of a charity, the unique issues which arise in relation to charities and why there is now a pressing need for a review of the law in this area.

What is a charity?

1.2 Currently, there are more than 6,000 tax-exempt charitable organisations in Hong Kong.¹ These organisations are most commonly created in the form of one of the following:

- a company incorporated under the Companies Ordinance (Cap 32), which may be a company limited by shares or by guarantee, or a company incorporated overseas and registered under Part XI of the Companies Ordinance;
- an unincorporated association which may or may not be required to be registered under the Societies Ordinance (Cap 151);
- a trust; or
- a statutory body established under a specific Hong Kong Ordinance.

1.3 In order for an institution or a trust to be considered "*a charity*", it must be established "*for purposes which are exclusively charitable according to law*".² Charitable purposes are currently defined by case law³ in Hong Kong and include:

- the relief of poverty;
- the advancement of education;
- the advancement of religion; and
- other purposes of a charitable nature beneficial to the community not falling under any of the preceding heads.

1 According to the statistics of the Inland Revenue Department, the number of charities granted tax exemption is 6,380 as at the year ending 31 March 2010.

2 Inland Revenue Department, *A Tax Guide for Charitable Institutions and Trusts of a Public Character* (revised ed Sep 2010) at http://www.ird.gov.hk/eng/tax/ach_tgc.htm.

3 *Special Commissioners of Income Tax v Pemsel* [1891] 3 Tax Cases 53, at 96, per Lord Macnaghten.

1.4 It is in practice essential that a charity is established by a written governing instrument. The type of instrument adopted would depend on the particular circumstances of the charity proposed and the preferences of the promoters or founders of the organisation.

1.5 A significant benefit of creating a charitable organisation is that the organisation itself is not generally liable to tax and those who make donations to it may claim the amount donated as a deduction from their assessable income. Section 88 of the Inland Revenue Ordinance (Cap 112) provides that *"any charitable institution or trust of a public character"* is exempt from tax and shall be deemed always to have been exempt. Sections 16D and 26C of the Inland Revenue Ordinance allow a deduction for approved charitable donations to be made by a person during the year of assessment. Under the Ordinance, the term *"approved charitable donation"* is defined as *"a donation of money for charitable purposes to a charitable institution or trust of a public character which is exempt from tax under section 88 or to the Government, for charitable purposes"*.⁴

1.6 A common misconception is that a charity is equivalent to a *"voluntary"* or *"non-profit-making"* organisation or non-government organisation (NGO). The Inland Revenue Department notes, however:

*"Not all 'Voluntary' or so-called 'non-profit-making' organisations are charities, however worthy their causes may be. In fact, there is no provision in the Inland Revenue Ordinance which exempts a 'voluntary' or 'non-profit-making' organisation from tax."*⁵

The growth of philanthropy in Hong Kong

1.7 The growing interest in philanthropy in Hong Kong is illustrated by statistics from the Inland Revenue Department. For the year of assessment 2000-2001, the approved charitable donations allowed for deduction under profits tax and salaries tax amounted to \$0.83 billion and \$2.08 billion respectively.⁶ These figures had increased to \$3.03 billion and \$5.01 billion respectively for the year of assessment 2008-2009.⁷ It is likely that the actual amount of donations made each year by donors is significantly greater than this because some donors may not have lodged their claims with the Department, or they may not have had chargeable income or assessable profits in the relevant year, or the amount of their donations may have exceeded the maximum ceiling allowable for deduction on their assessable income.⁸

4 Section 2(1), Inland Revenue Ordinance (Cap 112).

5 Inland Revenue Department, *A Tax Guide for Charitable Institutions and Trusts of a Public Character* (revised ed Sep 2010) at http://www.ird.gov.hk/eng/tax/ach_tgc.htm.

6 Inland Revenue Department, *Annual Report 2001-02*, at 68.

7 According to the data provided by the Inland Revenue Department.

8 See sections 16D(2)(c) and 26C(2A)(b), Inland Revenue Ordinance (Cap 112). This ceiling figure may vary from year to year. The current figure, *"for any year of assessment"*

1.8 The Inland Revenue Department has provided information from its records on the number of charitable organisations recognised for tax exemption purposes, as at December 2007, under the four main categories of charitable purpose. Out of the 5,123 charitable organisations included, the breakdown was as follows:

Relief of poverty	1,037
Advancement of education	1,790
Advancement of religion	1,773
Others	523

1.9 As an indication of how rapidly charities are increasing in Hong Kong, just over a year later, at the end of March 2009, the total number of charities recognised for tax exemption purposes, according to figures provided by the Inland Revenue Department, had reached 5,898. This figure, which does not include charitable organisations that have not applied for tax exemption, represents an increase of 775 recognised charities (ie, more than 13% of the total) in just over one year.

The need to review Hong Kong's charity law

1.10 The tax-exempt status of charitable institutions greatly enhances the good work that they are able to do for the community. However, the rapid rise in philanthropy and the growing numbers of charities operating here has highlighted the need to ensure that these organisations operate properly and the monies they collect are applied to the charitable purposes for which they were donated. The Ombudsman has observed:

"Fund-raising for charity is part of Hong Kong's way of life. Our community has a proud record of enthusiastic readiness to help the vulnerable and the under-privileged. In view of the considerable amount of money involved, there has been community concern from time to time over whether such fund-raising activities are properly run and the donations responsibly used. Many want to be assured of effective monitoring and expect a reasonable degree of responsible control."⁹

1.11 The lack of co-ordinated oversight of charitable activities, and the public's deepening concern over this, receives regular mention in the press.¹⁰

commencing on or after 1 April 2008", is 35%: see sections 16D(2)(d) and 26C(2A)(c), Inland Revenue Ordinance (Cap 112).

9 Office of the Ombudsman, *Investigation Report: Monitoring of Charitable Fund-Raising Activities* (Feb 2003), at para 1.1.

10 For example: "As charity numbers grow, so do doubts", *South China Morning Post* (20 Aug 2007); "Our charitable heart needs looking after", *South China Morning Post* (20 Aug 2007); "Control of charities may be bolstered", *South China Morning Post* (20 Aug 2007); "Donors, aid groups welcome proposal to regulate charities", *South China Morning Post* (21 Aug 2007); "Regulation of charitable fund-raising activities proposed in Hong Kong", *Oriental Daily*

Other initiatives in relation to non-profit organisations in Hong Kong

1.12 Since 1998, with the assistance of the Hong Kong Institute of Certified Public Accountants and the Independent Commission Against Corruption (ICAC), the Social Welfare Department has issued a set of Guidance Notes on Internal Financial Controls for Charitable Fund-Raising Activities.¹¹ These Guidance Notes *"include advice on basic controls to ensure that income and expenditure generated from charitable fund-raising activities are properly documented and that such income is spent for the designated purpose."*¹²

1.13 In June 2002, the Social Welfare Department issued a useful booklet entitled, *Leading your NGO: Corporate Governance: A Reference Guide for NGO Boards*,¹³ which discusses the principles of accountability and corporate responsibility, and corporate governance generally.

1.14 Prior to the Law Reform Commission's current study, the Office of the Ombudsman produced a report in 2003 on the direct investigation it had initiated into the monitoring of charitable fundraising activities.¹⁴ The investigation found that controls on charities were inconsistent and incomplete and there were insufficient transparency and accountability in the system. The Ombudsman recommended that in the short to medium term, a Code of Practice on good administration and management of charities should be drawn up and that the Social Welfare Department should maintain, for public inspection, a central register of charities which comply with the requirements under the Code as well as introduce a scheme for monitoring the *bona fides* of those seeking to be included in this register. In the longer term, the Ombudsman recommended a wider and more comprehensive review of charities' regulation.¹⁵

1.15 In order to strengthen the administrative control over charitable fundraising activities, with a view to enhancing charities' transparency and accountability, the Social Welfare Department conducted a public consultation exercise in 2003 and then introduced in 2004 a Reference Guide on Best Practices for Charitable Fund-Raising Activities for adoption by charities under

(21 Aug 2007); "Is a law needed to regulate charities?", *South China Morning Post* (22 Aug 2007); "Be more open", *South China Morning Post* (23 Aug 2007); "Regulation proposed as charities grow by 40% within eight years in Hong Kong", *Ming Pao* (25 May 2008); "President's message: The regulation of charities", *Hong Kong Lawyer* (Nov 2008); "Academic urges simplification as regulatory authorities duplicate their efforts", *Ming Pao* (11 Apr 2009); "Fund-raising corruption; seven cases of understatement in sale of lotteries reported in three years", *Ming Pao* (7 Oct 2009).

11 See http://www.swd.gov.hk/doc/Control_of_Char/gnifc_e.pdf.

12 See LC Paper No. CB(2)2046/06-07(05), at para 25.

13 Available from the Social Welfare Department's website at: <http://www.swd.gov.hk/doc/ngo/corp-gov-eng.pdf>.

14 Office of the Ombudsman, *Investigation report: Monitoring of Charitable Fund Raising Activities* (Feb 2003). See Executive Summary of the Report at: http://www.ombudsman.gov.hk/concluded/2003_02_01.doc.

15 Same as above. See Executive Summary to the Report, at para 18.

a self-regulatory system.¹⁶ The Reference Guide suggests best practices in the areas of donor's rights, fundraising practices and financial accountability.¹⁷

1.16 More recently, the Commissioner for the ICAC made the following statement in the 2008-2009 Policy Address:

*"The number of charitable organizations in Hong Kong has increased from some 4,000 in 2005 to over 5,300 in 2008 and the tax deductible charitable donations in 2006/2007 approached \$6 billion. We have to ensure that the enormous amount of public donations are properly safeguarded and used. We will conduct a corruption prevention study on the fund raising activities of these charitable organizations with a view to enhancing the control over the activities and disbursement of donation proceeds. We will promulgate a Code of Conduct and a Best Practice Guide together with the relevant regulatory bodies to assist charitable organizations in reviewing and strengthening their governance framework and management practices. We will also organize seminars for their staff to raise their ethical awareness."*¹⁸

1.17 In October 2009, the ICAC published the Best Practice Checklist for the Management of Charities and Fundraising Activities to help charitable organisations in Hong Kong to strengthen internal governance and improve transparency and accountability in fundraising activities. The best practice checklist recommends practical measures to help these organisations minimise the risks of corruption and other crimes through strengthening internal controls.¹⁹

1.18 The welfare NGO sector has also initiated a voluntary online self-disclosure platform (www.wisegiving.org.hk) to enhance charity accountability standards on governance, finances, fundraising, service quality and information transparency.

Objectives of the review by the Sub-committee

1.19 Public confidence in charities is essential in providing a vibrant future for solving some of the world's most pressing problems, such as relief of poverty, assistance for the advancement of education, health and religion, etc. Public confidence in charities influences charitable giving and volunteering, and charity employee recruitment, and encourages charities to dedicate resources towards their goals and programmes.

16 See http://www.swd.gov.hk/en/index/site_pubsvc/page_controlofc/sub_referencecg/.

17 See discussion of the Guide in Legislative Council Panel on Welfare Services paper, LC Paper No. CB(2)2046/06-07(05), at paras 23 to 24, available at: <http://www.legco.gov.hk/yr06-07/english/panels/ws/papers/ws0611cb2-2046-5-e.pdf>.

18 See LC Paper No. CB(2)66/08-09(02), at para 18, available at: <http://www.legco.gov.hk/yr08-09/english/panels/se/papers/se1021cb2-66-2-e.pdf>.

19 http://www.icac.org.hk/en/news_and_events/pr2/index_uid_846.html.

1.20 We note that in Hong Kong, despite recent initiatives, public concern is growing over how charities are regulated, and there are calls from many quarters for tighter controls and increased transparency to be implemented.

1.21 Having regard to the circumstances of Hong Kong and taking account of overseas developments, the Sub-committee has determined that its objectives in this current review should be to:

- modernise charity law;
- provide greater clarity in charity law;
- develop greater accountability and transparency to enhance public trust and confidence; and
- ensure effective, fair and proportionate regulation of charities while maintaining the sector's independence and autonomy.

Modernising charity law and providing greater clarity

1.22 As will be discussed in more detail in the subsequent chapters of this paper, the current law on charitable status is outdated and unclear. The law on charitable purposes requires updating and may need to be codified to provide clarity and certainty. There is also a need for clearer focus in the law on the issue of public benefit.

Developing greater accountability and transparency in order to build public trust and confidence

1.23 We note that in some cases, accountability requirements to beneficiaries and donors of charities are not sufficiently clear. It is important that the charitable sector should produce sufficiently accessible and relevant information about its activities, in order to meet the needs of the public and to avert unnecessary public concern.

1.24 Fundraising activities form a major source of the income of some charities. There should be clear requirements or guidelines on fundraising activities as these can strongly influence public attitudes. As discussed in more detail later in this paper, we consider that a simplified licensing system for public collections should be introduced. Although we do not under-estimate the strength of self-regulatory initiatives, we consider that charities should be overseen by an independent body and that good practice in fundraising should be widely promoted.

Ensuring effective, fair and proportionate regulation of charities while maintaining the sector's independence and autonomy

1.25 As will be discussed in more detail later in this paper, effective and fair regulation of charities is needed. Such regulation also has to be

proportionate and should no more than is necessary to improve the system in order that the sector's independence and autonomy be maintained.

1.26 It is our view that the regulation of charities should aim to achieve the following:

- ensure compliance with charity law;
- enhance accountability to beneficiaries and donors;
- improve public trust and confidence; and
- encourage charities to maximise their social and economic potential.

Chapter 2

Overview of the current legal position in Hong Kong

Introduction

2.1 In this chapter, we briefly examine the legal definition of "*charity*", the advantages which flow from being a charitable organisation, the legal structures which are available for their formation and the extent to which charities and charitable activities are regulated in Hong Kong. Each of these areas will be covered in more detail in the later chapters of this paper.

The legal definition of "*charity*"

2.2 Generally speaking, the meaning of the term "*charity*" under Hong Kong law follows the common law, and is concerned with whether the particular purposes of the organisation or activity are "*charitable*" in the legal sense. As observed in a standard legal reference work the terms "*charity*", "*charitable*", "*charitable objects*" and "*charitable purposes*" have technical meanings in law which may differ in some respects from the popular view of these expressions.¹

*"The word 'charitable', when used in its legal sense, covers many objects which a layman might not consider to be included under that word, but it excludes some benevolent or philanthropic activities which a layman might consider charitable."*²

2.3 In order to be considered a charity, an organisation must be established for purposes which are exclusively charitable according to law.³ The leading common law authority on the definition of charity, which is expressly applied by both the courts in Hong Kong⁴ and the Inland Revenue Department,⁵ is the famous dictum of Lord Macnaghten in the 1891 case of *Income Tax Special Purposes Commissioners v Pemsel*.⁶ In that case, Lord Macnaghten listed "*four principal divisions*" of charitable purposes:

1 *Halsbury's Laws of England*, Vol 5(2) (2001 Reissue), at para 2.

2 Same as above.

3 Jean Warburton, *Tudor on Charities* (Sweet & Maxwell 2003, 9th ed), at 12-13.

4 See, for example: *Ng Chi-fong v Hui Ho Pui-fun* [1987] HKLR 462; *Re Tsing Shan Monastery* [2003] 1 HKLRD 237, at 242; and *Cheung Man Yu v Lau Yuen Ching & Ors* [2007] 4 HKC 314 (CA), at para 25.

5 See Inland Revenue Department information pamphlet, *A Tax Guide for Charitable Institutions and Trusts of a Public Character* (revised ed Sep 2010), at: http://www.ird.gov.hk/eng/tax/ach_tgc.htm.

6 [1891] AC 531 (HL).

- (1) trusts for the relief of poverty;
- (2) trusts for the advancement of education;
- (3) trusts for the advancement of religion; and
- (4) trusts for other purposes beneficial to the community not falling under any of the preceding heads.⁷

2.4 This list was itself based on English legislation dating back to 1601, namely the preamble to the Charitable Uses Act 1601 in England, also known as the Statute of Charitable Uses or the Statute of Elizabeth I.⁸

2.5 Specific heads of "*charitable purpose*" which have developed over time under the common law include the following:

- the relief of poverty;
- the advancement of education;
- the advancement of religion;
- the establishment of religious institutions of a public character;
- the promotion of health;
- the relief of victims of a disaster;
- the relief of disabled persons;
- the protection of animals; and
- the preservation of the environment.

2.6 Examples of purposes which have been identified in the courts as *not* being "*charitable*" in the legal sense include those which are political in nature,⁹ those which promote the benefits of the founders or subscribers of the organisation, those which encourage a particular sport (as opposed to sports generally) and those for the provision of a playing field, recreation ground or scholarship fund for employees of a particular company or industry.¹⁰

2.7 The scope of the definition of charity, both at common law and under statute, is discussed in more detail in Chapter 5 of this paper.

⁷ [1891] AC 531, at 583 (HL).

⁸ *Halsbury's Laws of England*, Vol 5(2) (2001 Reissue), at para 2.

⁹ Hubert Picarda, *The Law and Practice Relating to Charities* (Butterworths, 1999), at 167.

¹⁰ See discussion in Inland Revenue Department, *Departmental Interpretation and Practice Notes, No 37 (Revised) Concessionary Deductions: Section 26C: Approved Charitable Donations* (Sep 2006), at para 9, available at: http://www.ird.gov.hk/eng/pdf/e_dipn37.pdf.

The privileges associated with charitable status

2.8 In terms of legal and economic implications, there are a number of advantages associated with being identified as "*charitable*" under Hong Kong law.

Tax privileges

2.9 A key benefit of being recognised as a charitable institution or trust of a public character is that under the provisions of the Inland Revenue Ordinance (Cap 112), the charitable organisation itself is not generally liable to tax, and donations to such an organisation can be tax deductible. These advantages are discussed briefly below. (For a more detailed discussion of the position on charities and tax in Hong Kong, see Chapter 10 of this paper.)

A charity's tax exempt status

2.10 The Inland Revenue Department in Hong Kong maintains a list of organisations which have successfully applied for tax exemption through being recognised by the Department as a "*charitable institution or trust of a public character*", within the scope of section 88 of the Inland Revenue Ordinance (Cap 112).¹¹ Notwithstanding the general tax exemption contained in section 88 of the Ordinance, where a trade or business is carried on by a charity, the profits so derived are exempt from tax only if:

- the profits from the trade or business carried on by the charity are to be applied solely for charitable purposes; and
- the profits are not to be expended substantially outside Hong Kong;

and either:

- the trade or business of the charity is exercised in the course of the carrying out of the expressed objects of the charity; or
- the work in connection with the trade or business of the charity is mainly carried on by persons for whose benefit the charity is established.¹²

2.11 A further qualification is that only charities under the jurisdiction of the Hong Kong courts qualify for exemption, that is, those that have been established in Hong Kong, or the "*Hong Kong establishment of overseas charities such as those deemed to be established in Hong Kong under section*

11 The online version of this list is available at: http://www.ird.gov.hk/eng/tax/ach_index.htm.

12 Section 88, Inland Revenue Ordinance (Cap 112).

4 of the Societies Ordinance or registered under Part XI of the Companies Ordinance."¹³

Tax deductions for charitable donations

2.12 The Inland Revenue Department has noted:

*"In its ordinary sense, the word 'donation' means a gift. A 'gift' is the transfer of property in a thing without any valuable consideration. To constitute a gift, the property transferred must be transferred voluntarily and not as a result of a contractual obligation to transfer it. Further, the transferor cannot receive any benefit or advantage of a material character by way of return."*¹⁴

2.13 Under section 26C of the Inland Revenue Ordinance (Cap 112), a taxpayer may deduct any *"approved charitable donations"* made by him (in the aggregate sum of not less than HK\$100) from his assessable profits or chargeable income during a year of assessment. The term *"approved charitable donation"* is defined under section 2(1) of the Ordinance as *"a donation of money to any charitable institution or trust of a public character which is exempt from tax under section 88 or to the Government, for charitable purposes."* Section 16D of the Ordinance also allows deductions for approved charitable donations to be made by a taxpayer who is subject to profits tax. Deductions under both sections are subject to a current ceiling of 35% of the assessable income or profits.¹⁵

2.14 It should be emphasised that the gift in this context must be a donation of money. A gift of land, or a work of art (which is classified as *"movable property"*), would not be deductible for income tax purposes (though it may be exempt from stamp duty, as noted below).¹⁶

2.15 Although for charitable donations the tax exemption benefit is conferred directly upon the donor rather than on the charity, these provisions clearly bring an indirect benefit for charity, as they have the economic effect of making a donation to a charity more 'efficient', and thus making such a donation more attractive from the donor's point of view than a donation to a non-charitable body.

13 Inland Revenue Department information pamphlet, *A Tax Guide for Charitable Institutions and Trusts of a Public Character* (revised ed Sep 2010), available at: http://www.ird.gov.hk/eng/tax/ach_tgc.htm.

14 Inland Revenue Department, *Departmental Interpretation and Practice Notes, No 37 (Revised) Concessionary Deductions: Section 26C: Approved Charitable Donations* (Sep 2006), at para 3, available at: http://www.ird.gov.hk/eng/pdf/e_dipn37.pdf. The authority cited for this statement is *Sanford Yung-tao Yung v CIR* [1979] 1 HKTC 1081.

15 Section 16D(2)(b) or 26C(2A)(c), Inland Revenue Ordinance (Cap 112). This ceiling figure may vary from year to year. For example, section 26C(2A) states that: *"The percentages specified ... shall be - (a) for any year of assessment up to and including the year of assessment commencing on 1 April 2002, 10%; (b) for the year of assessment commencing on 1 April 2003 or any subsequent year of assessment up to and including the year of assessment commencing on 1 April 2007, 25%; (c) for any year of assessment commencing on or after 1 April 2008, 35%."*

16 Susan Collins, "The Rise of Charitable Giving", *Hong Kong Lawyer* (Apr 2001) 84, at 85.

Exemption from stamp duty

2.16 The making of a gift to charity which is not in the form of money, such as a gift of land or a work of art, would be exempt from stamp duty.¹⁷

Other advantages of charitable status

Exemption from some statutory registration requirements

2.17 Charities may be exempt from certain statutory registration requirements, such as registration as a society under the Societies Ordinance (Cap 151)¹⁸ and registration under the Business Registration Ordinance (Cap 310).¹⁹

Exemption from the rule against perpetuities

2.18 The common law rule against perpetuities provides that generally, a gift or trust must "vest" in the intended beneficiary before the end of a certain period, otherwise the gift or trust will be void "*as tending to a perpetuity*".²⁰ However, gifts to charity enjoy a privileged position in this regard. The courts are prepared to see property tied up for as long as the purposes for which the gift is given are charitable.

2.19 In the Hong Kong case of *Hong Kong & Shanghai Bank Hong Kong (Trustee) Ltd v The Incorporated Trustee of the Islamic Community Fund of Hong Kong & Others*, Rhind J, in deciding whether the gift in question was a charitable gift, stated that:

*"It is only if the whole of the gift is for exclusively charitable purposes that the gift will be upheld as a valid charitable bequest. In the event of any part of the gift ... being for a non-charitable purpose, the whole of the gift will fail on the basis that it offends the rule against perpetuities."*²¹

Court's broad discretion to uphold charitable gift

2.20 The courts are also more lenient in upholding the validity of a charitable gift even though the instrument creating it is badly expressed. The court is often prepared to find a valid or 'good' trust even if the testamentary disposition to charity is in imprecise terms (in which case precise terms would be laid down by the court). As long as a gift to charity manifested a "*general*

17 Section 44, Stamp Duty Ordinance (Cap 117). See Susan Collins, above, at 85.

18 Section 5A(2), Societies Ordinance (Cap 151).

19 Section 16(a), Business Registration Ordinance (Cap 310).

20 Jean Warburton, *Tudor on Charities* (Sweet & Maxwell 2003, 9th ed), at 149. See also the Perpetuities and Accumulations Ordinance (Cap 257) which is applicable to testamentary dispositions taking effect after 13 March 1970.

21 [1984] 1 HKC 152, at 155.

*charitable intention*²² that is sufficient to make it good. The precise terms that are considered essential to make good other dispositions are not required to make good a gift to charity.²³

Substitution of charitable purposes

2.21 If the purposes of a charity were initially, or have become, incapable of execution, the courts are able to provide new purposes as near as possible (in Norman French, "*cy-près*") to the original charitable purposes. Associated with this power is a specific provision in the Probate and Administration Ordinance (Cap 10) concerning general charitable testamentary gifts, which empowers the court, on the application of the Secretary for Justice, to approve a scheme for the disposal of the gift for such charitable purposes as it thinks fit.²⁴ (The scope and application of the *cy-près* doctrine in Hong Kong is discussed in Chapter 11 of this paper.)

Formation of a charity: the legal structures available

2.22 As a matter of practice, it is essential that a charity is established by a written governing instrument.²⁵ The type of instrument adopted would depend on the circumstances of the charity proposed, and the preferences of the promoters or founders of the organisation. Charitable organisations in Hong Kong are most commonly created in the form of either:

- a company incorporated under the Companies Ordinance (Cap 32), which may be a company limited by shares or by guarantee, or a company incorporated overseas and registered under Part XI of the Companies Ordinance;
- an unincorporated association, which may or may not be required to be registered under the Societies Ordinance (Cap 151);
- a trust; or
- a statutory body established by statute, such as the Tung Wah Group Hospitals (established under Cap 1051) and Po Leung Kuk (established under Cap 1040).

22 Jean Warburton, *Tudor on Charities* (Sweet & Maxwell 2003, 9th ed), at 452-453.

23 There are other special rules such as that charities trustees can act by a majority instead of unanimously which is the position for private trusts unless the trust deed otherwise provides: *Re Whiteley* [1910] 1 Ch 600, at 608, and that the 6-year limitation period applies to an action by a beneficiary under a trust but not to an action by the Attorney General (in Hong Kong the Secretary for Justice) as protector of charities: *AG v Cocke* [1988] 2 All ER 391.

24 See section 3(4), Probate and Administration Ordinance (Cap 10).

25 Inland Revenue Department information pamphlet, *A Tax Guide for Charitable Institutions and Trusts of a Public Character* (revised ed Sep 2010), at para 7, available at: http://www.ird.gov.hk/eng/tax/ach_tgc.htm.

2.23 The different types of legal structure for charities in Hong Kong are examined in detail in Chapter 6 of this paper.

Oversight of charitable organisations

2.24 Depending on the type of charity, Government monitoring in Hong Kong ranges from "*stringent statutory overall control*" to limited scrutiny of specified activities only.²⁶ These areas of oversight are set out briefly below. (A fuller discussion of the relevant issues is presented in Chapters 8 and 9 of this paper.)

Charities established by statute

2.25 The controls imposed on charities established by statute and governed by their own legislation are "*clear and comprehensive*"²⁷ and are largely set out in the relevant establishing Ordinances.²⁸ These statutory organisations are required to account for the use of all their proceeds, to prepare and keep proper audited accounts of all transactions, and to be open at all reasonable times for inspection by any director of the organisation and any person appointed for the purpose by the Chief Executive.²⁹

Charities receiving Government subvention

2.26 Charitable organisations which are subvented by the Government (such as some non-governmental organisations providing services related to welfare, education, medical services and the arts) are regulated by the Government to the extent that the relevant bureau or department to which they report monitors the use of their Government subvention.³⁰

Other charities

2.27 Subject to the oversight mechanisms discussed below, other types of charities are generally allowed to operate autonomously under their own governing bodies and according to their own rules and regulations.³¹ These organisations include private charities and non-governmental charitable organisations which are neither statutory nor subvented, and overseas charities established in Hong Kong.

26 Office of the Ombudsman, *Investigation Report: Monitoring of Charitable Fund Raising Activities* (Feb 2003), at para 5.3.

27 Same as above, at para 5.4.

28 See, for example, the long list of matters set out in the Schedule to the Tung Wah Group of Hospitals Ordinance (Cap 1051).

29 Office of the Ombudsman, *Investigation Report: Monitoring of Charitable Fund Raising Activities* (Feb 2003), at para 2.4.

30 Same as above, at paras 5.4 and 2.5.

31 Same as above, at para 2.6.

Oversight by the Inland Revenue Department

2.28 As noted earlier, the Inland Revenue Department is only responsible for the tax exemption aspects of charitable organisations. The Department is not responsible for registering charities, nor for monitoring their conduct. There is also no statutory requirement in Hong Kong for charitable organisations to submit annual reports or accounts to report on their finances. Instead, the Inland Revenue Department will only call for accounts, annual reports or other documents for the purpose of conducting a periodic review of the exemption status of a particular organisation so as to ensure that the organisation is still charitable and its activities are compatible with its objects.³² The Inland Revenue Department has noted, however, that this inspection of accounts of charitable organisation is not mandatory under the existing law.³³

2.29 A charity which exists in the form of an incorporated company would need to submit audited accounts to the Inland Revenue Department, usually once every four years, as part of the Department's periodic review of charities noted above. In contrast, charities existing in the form of societies or unincorporated associations are only required to submit copies of self-certified accounts.

Oversight by the Companies Registry

2.30 The Companies Registry does not oversee charities in its own right. The Registrar of Companies requires companies incorporated under the Companies Ordinance (Cap 32) to file with the Companies Registry every year an annual return containing specified particulars.³⁴ Only those charitable organisations which are formed as a company incorporated under the Companies Ordinance are required to file annual returns.

Oversight by the Secretary for Justice as "protector of charities" (parens patriae)

2.31 The Secretary for Justice in Hong Kong has assumed the duties of the former Attorney General as the protector of charities. In this role, the Secretary for Justice is necessarily a party to charity proceedings and represents the beneficial interest, or objects, of the charity.³⁵ *"By protecting the interests of charity generally, the Secretary for Justice contributes to a framework of supervision and control over charities."*³⁶

32 Section 51(1), Inland Revenue Ordinance (Cap 112).

33 Inland Revenue Department information pamphlet, *A Tax Guide for Charitable Institutions and Trusts of a Public Character* (revised ed Sep 2010), at para 17, available at: http://www.ird.gov.hk/eng/tax/ach_tgc.htm.

34 Section 107, Companies Ordinance (Cap 32).

35 Hon Wong Yan Lung, "The Secretary for Justice As the Protector of the Public Interest: Continuity and Development" (2007) 37 HKLJ 319, at 333. See also *Halsbury's Laws of England*, Vol 5(1) (2004 Reissue), at para 516.

36 Hon Wong Yan Lung, "The Secretary for Justice As the Protector of the Public Interest: Continuity and Development" (2007) 37 HKLJ 319, at 333.

2.32 Although the Secretary for Justice is not a "*regulator*" of charities as such, section 57A of the Trustee Ordinance (Cap 29) empowers the Secretary for Justice to act if there is a case of a breach of a charitable trust or the need for better administration of a charitable trust. Section 57A states that the court may provide relief, make an order or give directions as it thinks just relating to a charitable trust upon an application made to it:

- (a) by:
 - (i) two or more persons who have the consent in writing of the Secretary for Justice to make the application;
 - (ii) the Secretary for Justice; or
 - (iii) all or any or more of the trustees or persons administering the trust, or persons claiming to administer the trust, or persons otherwise interested in the trust; and
- (b) either:
 - (i) complaining of a breach of the trust or supposed breach of the trust; or
 - (ii) for the purposes of the better administration of the trust.

2.33 Since 1997, the Secretary for Justice has played a role in a number of charity cases.³⁷

Oversight by other Government departments

2.34 As well as the Government departments listed above, certain other departments exercise some oversight functions in relation to charities falling within their purview. These include: the Home Affairs Bureau, in relation to its role of co-ordinating policy on recreation and sport and the facilities for these activities; the Education Bureau, with regard to its monitoring of the provision of education services; and the Department of Health, which has responsibility for ensuring that healthcare institutions are fit for the services they provide.

37 *Ng Chi-fong and Others v Hui Ho Pui-fun and Others* [1987] 4 HKLR 462; *Ip Cheung-kwok v Sin Hua Bank Trustee Ltd and Others* [1990] 2 HKLR 499; *HSBC Trustee (Hong Kong) Limited v Wilhelmina Wu and Others* (1997) HCMP 1861/1997; *HSBC Trustee (Hong Kong) Limited in their capacity as trustees of the Sir Robert Ho Tung Charitable Fund v Secretary for Justice and Others* (1999) HCMP 1975/1997; *Hong Kong Housing Services for Refugees Ltd v Secretary for Justice* (1999) HCMP 6007/1999; *To Kan Chi & Others v Pui Man Yau & Others* (1998) HCMP 2084/1994; *To Kan Chi & Others v Pui Man Yau and Others* (2000) CACV 32/1999; *Secretary for Justice v To Kan Chi and Others* [2000] 3 HKCFAR 481; *Fujino Wong Annie Mei Mei & Others v Lauren Eiko Lai Ying Fujino & Others* (2004) HCMP 5179/2001 (the Chi Lin Nunnery case).

Oversight of fundraising activities

Existing oversight by the Social Welfare Department, TELA and other authorities

2.35 If a charity wishes to raise funds through an activity held in a public place, such as a flag day, it must first obtain a public subscription permit from the Social Welfare Department under section 4(17)(i) of the Summary Offences Ordinance (Cap 228). This section makes it an offence for any person to organise or participate in *"any collection of money or sale or exchange for donations of badges, tokens or similar articles in a public place"*, except in accordance with a permit issued by the Director of Social Welfare for a collection, sale or exchange for charitable purposes. The aim of this control is to limit public nuisance and to maintain order.³⁸

2.36 Charitable fundraising activities which involve on-street selling may be subject to the Hawker Regulation (Cap 132A), and would require advance application to the Food and Environmental Hygiene Department for a temporary hawker licence for on-street selling activities.

2.37 Similarly, if a charity wishes to raise funds through a lottery, a licence is required from the Commissioner for Television and Entertainment Licensing (TELA) under section 22(1)(a)(i) of the Gambling Ordinance (Cap 148). This is aimed at restricting gambling activities.³⁹ It is an offence under the Gambling Ordinance for licence holders to violate the conditions imposed by the TELA in granting lottery licences. Offenders are liable on conviction to a fine of \$50,000 and to imprisonment for two years.⁴⁰ TELA may also revoke the lottery licences issued, and may reject future applications submitted by the same organisation.

2.38 In order to *"guard against unscrupulous use of the proceeds raised through these fund-raising activities"*, both TELA and the Social Welfare Department require applicants for permits and licences to provide audited accounts of the specified fundraising event as a condition of approval.⁴¹ For charitable organisations which are issued with a public subscription permit by the Social Welfare Department for charitable fundraising activities in public places, they are required to submit audited financial statements for the fundraising activities to the Social Welfare Department within 90 days after the fundraising events. For flag days as well as other charitable public fundraising activities where monies donated are to be spent outside Hong Kong, the audited account together with the auditor's opinion should be published in at least one local Chinese Language newspaper and one local English newspaper within 90 days of the last day specified in the permit, and

38 See discussion in Office of the Ombudsman, *Investigation Report: Monitoring of Charitable Fund Raising Activities* (Feb 2003), at para 3.5.

39 Same as above, at paras 3.2-3.5.

40 Pursuant to section 22(7), Gambling Ordinance (Cap 148).

41 See Office of the Ombudsman, *Investigation Report: Monitoring of Charitable Fund Raising Activities* (Feb 2003), at para 3.6.

copies of the newspaper cuttings should be forwarded to the Director of Social Welfare at the same time.

Types of fundraising activity not subject to Government monitoring

2.39 Charitable organisations in Hong Kong may engage in a variety of fundraising activities which fall outside any scheme of monitoring by Government authorities, such as those imposed by the Social Welfare Department or TELA described above. Types of fundraising activity not subject to monitoring include charity auctions, charity balls, concerts, dinners, walks, film premiers, shows in the mass media, requests for charity donations by mail and advertisements or charity phone-in arrangements which involve appeals to the public.⁴²

Dissolution of charities and the doctrine of "cy-près"

2.40 The Inland Revenue Department has sought to make administrative provision regarding the transfer or donation of the assets of charities in the event of their dissolution. In its guide to charitable organisations wishing to seek tax exemption under section 88 of the Inland Revenue Ordinance (Cap 112), the department states that one of the clauses which the governing instrument of such an organisation should contain is a clause *"specifying how the assets should be dealt with upon its dissolution (The remaining assets should normally be donated to other charities)"*.⁴³ Accordingly, organisations seeking tax exemption under section 88 should provide a clause to this effect in the organisation's governing instrument for the department's consideration.

2.41 In the case of general charitable gifts, the court is empowered to provide new purposes as near as possible (in Norman French, *"cy-près"*) to the original if they are initially, or have become, incapable of execution. Associated with this power is a specific provision in the Probate and Administration Ordinance (Cap 10) concerning charitable testamentary gifts, which empowers the court, on the application of the Secretary for Justice, to approve a scheme for the disposal of the gift for such charitable purposes as it thinks fit.⁴⁴ Further discussion of these issues appears in Chapter 11 of this paper.

42 Same as above, at para 3.1.

43 See Inland Revenue Department information pamphlet, *A Tax Guide for Charitable Institutions and Trusts of a Public Character* (revised ed Sep 2010), at para 9(e), available at: http://www.ird.gov.hk/eng/tax/ach_tgc.htm.

44 See section 3(4) of the Probate and Administration Ordinance (Cap 10), which provides: *"Where a testator gives, devises or bequeaths any part of his estate for unspecified charitable purposes, otherwise than on trust, the court shall have jurisdiction, on the application of the Secretary for Justice, to approve a scheme for the disposal of the gift, devise or bequest for such charitable purposes as it thinks fit."*

Chapter 3

Perceived deficiencies in the regulatory framework for supervision of charities in Hong Kong

Introduction

3.1 In the previous chapter we set out a brief analysis of the existing statutory and procedural requirements relating to charities in Hong Kong. In this chapter, we highlight how this system of oversight is perceived to be deficient, both in the monitoring of charitable organisations and their fundraising activities, and in supporting the efficient operation of charities. Each of the issues raised here will be discussed in more detail in later chapters of this paper.

Problems in the oversight of charitable organisations in Hong Kong

3.2 We saw earlier in this paper that the number of tax-exempt charitable organisations has been dramatically on the rise in Hong Kong in recent years. As a result of this, it has become increasingly apparent that there are serious limitations in our current system of monitoring charities. A report issued by the Ombudsman in 2003¹ described the Government's monitoring of charities as —*partial and patchy, fragmented and ineffective*.² It was observed that there was insufficient transparency and accountability in the operations of charities, and that the oversight measures which do exist do not cover all charitable bodies or all charitable fundraising activities.³

3.3 From the point of view of the charities operating in Hong Kong, the fact that the current oversight measures are vested in a variety of Government authorities, each imposing their own requirements and standards in differing circumstances, must create some degree of confusion and does not support the efficient operation of charities.

3.4 These and other perceived limitations in the current system of oversight of charities are discussed below.

1 Office of the Ombudsman, *Investigation Report: Monitoring of Charitable Fund Raising Activities* (Feb 2003).

2 Same as above, at para 6.1(c).

3 Same as above, at Chapter 5 and para 6.1.

Out-dated definition of charity

3.5 As we saw in the previous chapter, the definition of "*charity*" in Hong Kong is not based upon a clear statutory definition, but upon the common law interpretation of English legislation dating back hundreds of years, namely to the preamble to the 1601 Statute of Elizabeth I. The terminology used in the preamble (which is set out in full and discussed in Chapter 5) is archaic and not suited to modern conditions.

3.6 The leading case authority on the definition of charity is acknowledged to be the 1891 decision of the House of Lords in *Pemsel*.⁴ Lord Macnaghten's famous dictum in that case, which sought to enunciate the four principal divisions of charitable purpose (ie, the relief of poverty, the advancement of education, the advancement of religion and any other purpose not falling under these three heads), is still applied today, although it too may be seen as being out of touch with modern sensibilities. In particular, the fact that many of the more recently developed charitable purposes necessarily fall within the vague 'any other purpose' classification, has resulted in evolving case law on charitable purposes which is confusing and unclear.⁵

3.7 These and other issues related to the definition of charity are considered in more detail in Chapter 5 of this paper.

Lack of a coherent system for the registration of charities

3.8 As noted in Chapter 2, the Inland Revenue Department is not responsible for registering or monitoring charities, and the Department's list of organisations that have been granted tax exemption status under section 88 of the Inland Revenue Ordinance (Cap 112) does not constitute a formal 'register' of charitable organisations as such. There may be a danger, however, that the public (and hence potential charity donors) may perceive that the grant of tax exemption status and inclusion on this list confers on those charities "*a cloak of respectability and the semblance of official sanction not intended by the Inland Revenue Ordinance.*"⁶

3.9 We examine in Chapter 7 the need for a proper system of registration of charities in Hong Kong, both to facilitate the monitoring of charities and to ensure that potential donors may be properly informed about the status of individual charities.

4 *Income Tax Special Purposes Commissioners v Pemsel* [1891] AC 531, at 583 (HL).

5 As observed as early as 1922 in *In re Tetley* [1922 T 468]; [1923] 1 Ch 258, at 266 (CA), *per* Lord Sterndale, MR.

6 As observed in Office of the Ombudsman, *Investigation Report: Monitoring of Charitable Fund Raising Activities* (Feb 2003), at para 5.12.

Inconsistent standards or requirements on governance, accounting and reporting by charities

3.10 As discussed elsewhere in this paper,⁷ charitable organisations may be established under a number of different legal structures in Hong Kong, including statutory bodies, incorporated companies, charitable trusts and societies. While we have observed no particular problem with the range of legal forms that charities may take (as we discuss further in Chapter 6), we note that each of these types of organisation structure can involve differing legislative requirements at the time of the organisation's formation and throughout the duration of its operations. Under the current system of oversight, statutory charities established under a specific Ordinance can be subject to stringent statutory control,⁸ while other types of charities may be subject to limited scrutiny of specified activities only, or even, in some cases, to a total lack of scrutiny.⁹

3.11 For example, statutory charities are required to account for the use of all their proceeds, to prepare and keep proper audited accounts of all transactions, and to be open at all reasonable times for inspection by any director of the organisation and any person appointed by the Chief Executive.¹⁰ Charitable organisations which are subvented by the Government (such as some non-governmental organisations providing services related to welfare, education, medical services and the arts) are regulated by the Government to the extent that the relevant bureau or department to which they report monitors the use of their Government subvention.¹¹ Charitable organisations established under the Companies Ordinance (Cap 32) are required to prepare audited accounts in order to fulfil requirements under that Ordinance. This is not the case for charitable organisations established as societies registered under the Societies Ordinance (Cap 151), however. Further, charities which are neither statutory nor subvented may be allowed to operate autonomously under their own governing bodies and according to their own rules and regulations.¹²

3.12 In Chapter 8, we consider and propose an improved framework for governance, accounting and reporting requirements for charities in Hong Kong.

7 See Chapter 2 and Chapter 6 of this paper.

8 See, for example, the long list of matters set out in the Schedule to the Tung Wah Group of Hospitals Ordinance (Cap 1051).

9 Such as non-statutory and non-subvented charities that do not raise funds in public places or organise lotteries to raise funds. These charities are not subject to any Government control over the amount of charitable donations received or the disposal of such funds. See Office of the Ombudsman, *Investigation Report: Monitoring of Charitable Fund Raising Activities* (Feb 2003), at para 5.3.

10 Same as above, at para 2.4.

11 Same as above, at paras 5.4 and 2.5.

12 Same as above, at para 2.6.

Limited control of charitable fundraising

3.13 As explained in Chapter 2, Government oversight of the fundraising activities of charities is confined specifically to those activities requiring the permission of the Social Welfare Department, the Food and Environmental Hygiene Department or the Television and Entertainment Licensing Authority, such as flag days, on-street selling and lotteries. It has been observed that while these authorities display a commendable sense of duty in exercising control over the use of proceeds from fundraising activities, insofar as their respective legislation permits, such scrutiny can be only partial and limited.¹³ For other forms of fundraising activity such as charity auctions, balls, concerts, dinners, or requests for donations by mail or through advertisements, no government oversight applies, as these charitable appeals do not require either a permit or a licence.¹⁴

3.14 As we will explore further in Chapter 9, a number of limitations have been identified in the existing regulatory measures on fundraising.

- From the perspective of charities, those wishing to conduct certain fundraising activities have to apply to one or more of a range of government departments, each with varying procedures and requirements, in order to be granted approval.
- From the public's point of view, there is a lack of access to information on fundraising activities and there is no centralised information point or hotline where the public can make enquiries about fundraising activities.
- There are no statutory provisions setting out the detailed requirements for fundraising by charitable organisations, covering such issues as internal controls, accountability and transparency. While some broad guidelines and best practice manuals on fundraising exist, these are all voluntary guidelines that have been developed over time by different departments or authorities. As there may be certain areas of overlap as well as some gaps amongst these, they do not provide a coherent system of guidance to charities.

3.15 We are also concerned about the current difficulties in verifying donations made to other parts of the world or to the remote areas of Mainland China (for example, for the relief of the earthquake disaster in Sichuan). We feel that not only is greater Government monitoring required in this area, but also more emphasis should be placed on the work of auditors of charitable organisations in carrying out audits on donations received.

3.16 It has been suggested elsewhere that some degree of donor transparency could be built into the system, to provide information on who

13 Same as above, at para 5.7.

14 Same as above, at para 3.1.

donates to charity, in what amounts, for what purposes and with what expectations.¹⁵ Having considered this, we do not think that donor transparency is an issue. Instead, we tend to take the view that it is important to protect donors' personal information and privacy, as some donors would prefer to remain anonymous in their charitable giving.

Conclusions

3.17 Compared to a number of overseas jurisdictions with comprehensive charities legislation, which will be discussed later in this paper, it is evident that Hong Kong lacks a coherent legislative framework for the establishment and regulation of charities and their fundraising activities. As we have seen, depending on the type of charity, Government monitoring in Hong Kong ranges from strict statutory control to limited scrutiny only of specific activities.¹⁶ Further, the supervisory functions which do exist are inconveniently spread across a variety of authorities, each with their own set of requirements.

3.18 In particular, there is little information available to enable donors to verify that the organisations they may wish to make donations to are in fact valid charities not bogus operations, or to ensure that the money they wish to donate will be well spent.

3.19 It is with the aim of addressing and remedying these perceived deficiencies that we have put forward the proposals which are presented later in this paper.

15 The Asia Foundation, *Report to the Hong Kong Leadership Council of the Asia Foundation: More Effective Philanthropy in Hong Kong - Findings and Recommendations* (Revised Nov 13, 2006), at paras 1 to 2.

16 Office of the Ombudsman, *Investigation Report: Monitoring of Charitable Fund Raising Activities* (Feb 2003), at para 5.6.

Chapter 4

Overview of the law of charities in other jurisdictions

Introduction

4.1 In this chapter, we briefly overview the law relating to charities in several other jurisdictions, most of which have introduced legislation in this field. Certain aspects of these legal models will also be more fully explored at appropriate junctures in the coming chapters. Although the background and circumstances of these jurisdictions may differ in some respects from those in Hong Kong, the problems and issues which arise in relation to charities are broadly the same.

Australia

4.2 Although there has been a significant effort to reform charity law in Australia,¹ this has not yet materialised into major reform² apart from the Extension of Charitable Purpose Act 2004 (Commonwealth), which mainly concerns the definition of charity. There have, however, been piecemeal reforms to legislation dealing with incorporated associations, fundraising and charitable gaming in various states and territories, as well as an incremental development of taxation compliance measures for exempt and deductible entities.

4.3 Both the state and federal charity laws in Australia closely follow the English definition of charity based on the Preamble to the Elizabethan Statute of Charitable Uses in 1601. In addition, English case authority is

1 See for example, Industry Commission (Canberra), *Charitable Organisations in Australia*, Report No 45, AGPS (1995); *Inquiry into the Definition of Charities and Related Organisations*, at <http://www.cdi.gov.au>; Board of Taxation, *Consultation on the Definition of a Charity – A report to the Treasurer* (2003), at <http://www.taxboard.gov.au>; *Senate Economics Committee Report* (2008), at http://www.aph.gov.au/senate/committee/economics_ctte/charities_08/index.htm. One commentator has noted: "Various Australian inquiries and reports have produced 12,920 pages of public submissions, 56 days of hearings, 45 site visits, 1344 pages of official reports" : M McGregor-Lowndes, "Australia: critical drivers, barriers, outcomes and unresolved issues and future challenges", presented at the *Modernising Charity Law Conference* held in Brisbane, from 16 to 18 April 2009, at 2.

2 Professor McGregor-Lowndes, cited above, continues, at 3, "*The Industry Commission which examined charitable organisations in a long and wide-ranging report in 1995 made a number of findings and recommendations about the inconsistent and poor state of [Australian Taxation Office] regulation and uncertainty of the law of charity. Its recommendations have never been squarely addressed by the federal government, partly as a consequence of the report being released at a time of a change of government. Some basic issues such as accounting standards, national legal form and funding arrangements identified for reform are still awaiting attention.*"

consistently used as the basis for Australian law in both federal and state courts. Professor Myles McGregor-Lowndes has summarised the common law position in Australia in the following terms:

*"State courts mainly refer to the definition of charity in respect of the supervision of charitable trusts, dispositions in wills, fundraising regulation and in connection with various statutes governing local tax exemptions. The federal courts have been dominated by cases stemming from the federal income tax legislation's exemption of 'charitable institutions'. For thirty years the only significant charity case pursued to the ultimate appeal court was Commissioner of Land Tax (NSW) v. Joyce which was essentially concerned with whether charitable trustees could be an 'institution' for the purposes of taxation exemption. Without a vibrant case flow the common law began to show signs of ossification and there was no quasi-judicial body such as a Charity Commission to promote new understandings of charity relevant to the current environment."*³

4.4 Theoretically, state Attorneys General are responsible for supervising charitable trusts, but in practice the Australian Taxation Office serves as the closest body to a national regulator. There is, however, no requirement on annual reporting, financial or otherwise, from its endorsed charitable organisations. A register of charitable organisations with taxation exemption status has only been compiled by the Australian Taxation Office since the year 2000.

Canada

4.5 The provinces in Canada have the power to supervise charities under the Canadian constitution. In practice, however, the *de facto* primary regulator of charities is the Canada Revenue Agency (the "CRA"), the federal taxing authority. This is because exemption from the payment of tax on income and the ability to offer tax credits to donors (the main benefits to charities), are provided in the federal Income Tax Act. Organisations may apply to the CRA for registration as charities which are then subject to audit and enforcement activities by the Charities Directorate under the CRA.

4.6 In Canada, only Ontario has a formal mechanism for supervision of charities. The Office of the Public Guardian and Trustee exercises some supervisory authority over charities, mainly in relation to fiduciary responsibilities of trustees. Some provinces have statutory provisions primarily on control over the fundraising activities of non-profit organisations.⁴

³ M McGregor-Lowndes, same as above, at 2 to 3.

⁴ Some provinces can, under federal legislation, issue licences to organisations undertaking charitable activities allowing them to use lotteries or participate in casinos to raise funds. Under such licensing regimes, provinces have established different eligibility rules and created different rules as to what is charitable in each province: see B Wyatt, "Overview from Canada", presented at the *Modernising Charity Law Conference* held in Brisbane, from 16 to 18 April 2009, at 4.

4.7 There are few court cases establishing what is charitable in Canada. In the past few decades, the Supreme Court of Canada has heard only three charity law cases. There are also barriers to developing charity law through the courts in Canada.⁵

4.8 Canada has also considered a new type of regulator, similar in nature and design to the Charity Commission of England and Wales. A fundamental problem which has been identified, however, is that such a model is not compatible with Canada's constitutional structure.⁶

England and Wales

4.9 The Charities Act 2006 ("the English 2006 Act") defines what constitutes a charity and charitable purposes and establishes a regulatory framework for charities. This represents a major overhaul of charity legislation. The Explanatory Notes to the English 2006 Act record that its origins lie in a review of the law and regulation of charities and other not-for-profit organisations commissioned by the Prime Minister in 2001, leading on from the Deakin Commission's report,⁷ which called for, amongst other things, reform of charity law.⁸

5 *"Appeals from the regulator's decisions to deny charitable registration or to remove registration do not proceed to a trial court for hearings, but rather are conducted, based on the record, by the Federal Court of Appeal. Whereas taxpayers may proceed through informal internal appeal mechanisms within CRA and then go to the Tax Court of Canada, the same does not hold true for organizations that are denied charitable registration or wish to protest the revocation of their charitable status. The cost and formality of a hearing before Canada's second-highest federal court is a prohibitive exercise for all but the most wealthy. Other decisions made by the regulator are, in most cases, subject to judicial review by the Federal Court Trial Division. No such cases have been brought, largely because those other types of decisions are of little consequence to most charities."* See B Wyatt, same as above, at 5.

6 *"As noted earlier, the primary responsibility for the supervision of charities constitutionally belongs to the provinces. The federal government's authority over charities comes only from the fact that there are benefits given to charities under the Income Tax Act, a federal statute. In essence, therefore, the Charities Directorate's role is limited to ensuring that an organization qualifies (and maintains qualification for) those benefits. However, given that those benefits are the sole reason most organizations seek charitable status, the federal role becomes paramount in fact, if not in law.*

By contrast, a significant role of the Charity Commission of England and Wales is to ensure that trustees of charities exercise their fiduciary responsibility over that property which is impressed with a charitable trust. This is a role that, under Canada's constitution, would be within the exclusive jurisdiction of the provinces. ... Given Canada's political make-up, such a model is unlikely." See B Wyatt, same as above, at 9.

7 Commission on the Future of the Voluntary Sector, *Meeting the Challenge of Change: Voluntary Action into the 21st Century* (1996) - also known as the "Deakin Report".

8 Provided by the National Archives at: <http://www.legislation.gov.uk/ukpga/2006/50/contents>
Strategy Unit Press Release, "Prime Minister Announces Voluntary Sector Review", 3 July 2001, CAB 128/01. The English 2006 Act implements a majority of the accepted recommendations of the Strategy Unit, with the remainder having been implemented either through other legislation or by administrative action.

It should be noted that more recently, a new Charities Bill to consolidate previous charities legislation was placed before the UK Parliament in March 2011. As part of this consolidation, the Bill includes provisions from the Recreational Charities Act 1958, the Charities Act 1993 and the Charities Act 2006, leading to the repeal of the former two Acts and some sections (including sections 1 to 9 and 11 to 44) and some Schedules of the Charities Act 2006. It is expected that the substantive provisions comprised in Part 3 of the Charities Act 2006 (relating to funding for charitable, benevolent or philanthropic institutions) will remain unaffected,

4.10 The English 2006 Act is to come into force in stages. The regulatory framework in the Act is as follows.

- (a) Part 1 defines the meaning of "*charity*" and "*charitable purposes*".
- (b) Chapter 1 of Part 2 regulates charities, creating a new Charity Commission as a corporate body, setting out its objectives, functions and duties, abolishing the existing Charity Commissioner and transferring its functions, rights and liabilities to the new Charity Commission⁹ (the trend is to shift the regulatory responsibilities (including the responsibility to determine whether an applicant is charitable in nature) from the tax agency to a more independent body).¹⁰
- (c) Chapter 2 of Part 2 establishes a new Charity Tribunal which hears appeals against decisions of the new Charity Commission (so as to provide an alternative to the courts system for the review of regulatory decisions), and also hears referrals from the Charity Commission or the Attorney General; a party may, however, appeal to the High Court against the Tribunal's decision (section 8).
- (d) Chapter 3 of Part 2 provides for registration of charities (which is considered to be a vital basis for an efficient regulatory system, and granting public access to the register is intended to enhance transparency).
- (e) Chapter 8 of Part 2 introduces the new concept of the "*Charitable Incorporated Organisation*" which can be established with limited or unlimited liability, but only for charitable purposes. It is anticipated by the United Kingdom Government that this new type of legal structure will be better suited to give effect to charitable purposes and to streamline governance, as well as reduce the personal liability of trustees and simplify the regulatory burden.

however.

9 "For most purposes, the Commission now has a jurisdiction and exercises powers concurrent with those of the High Court and Commissioners are vested with the same powers as the Attorney General as regards taking proceedings in relation to charities." See K O'Halloran, "Regulatory Reforms: England & Wales, Ireland, Northern Ireland and Scotland", presented at the *Modernising Charity Law Conference* held in Brisbane, from 16 to 18 April 2009, at 2.

10 K O'Halloran, same as above, at 6, has observed that, "*The issue as to which agency in the regulatory framework bears responsibility for applying the public benefit test is of crucial importance to charities and for the development of the charitable sector. Where, in keeping with the traditional policing role, that responsibility rested with the tax collecting agency then, to some degree, the test had to operate in an exclusionary manner as that agency's raison d'être required it to protect and maximize the nation's tax revenue base. This has been recognized in the UK jurisdictions and in Ireland where one outcome of their charity law reform processes has been to remove this responsibility from the tax agency and assign it instead to a more independent government body. In England & Wales and Northern Ireland, but not in Scotland and Ireland, the legislature has vested that body with High Court powers.*"

- (f) In terms of regulating for good governance, provisions on removal, suspension, remuneration and disqualification of charity trustees, etc, are included (in sections 19 to 21, Chapter 9 of Part 2). The legislation also provides for assistance and supervision of charities by the courts and the Commission, and includes, for example, a power to enter premises and seize documents in section 26.
- (g) Part 3 of the 2006 Act provides, *inter alia*, an integrated approach to "*public charitable collections*" and, more generally, regulates fundraising.¹¹

4.11 It is worth mentioning that the traditional common law powers of the High Court and the Attorney General¹² to protect, supervise and amend charitable trusts have been largely statutorily transferred to or assumed by the Charity Commission since the Charities Act 1993.¹³ This diminishing role of the High Court and the Attorney General (or Lord Advocate in Scotland) is also evidenced in Ireland and Scotland.

Ireland

4.12 For a long time, charities in Ireland were governed mainly by the Charities Acts of 1961 and 1973, as amended by the Social Welfare (Miscellaneous Provisions) Act 2002. This was a conservative regime modelled on the Charities Act 1960 in England. The lead regulatory agency was the Revenue Commission, with the Commissioners of Charitable Donations and Bequests in a monitoring and support role.

4.13 The enactment of the Charities Act 2009 ("the Irish 2009 Act") in March 2009 followed studies of the charities sector and calls for reform from the Law Society of Ireland, the Department of Community, Rural and Gaeltacht Affairs and the Irish Law Reform Commission.¹⁴ In publishing the Charities

11 Most of the provisions in this Part are to implement the Home Office's proposals to introduce a unified system to regulate public charitable collections throughout England and Wales: see Home Office, *Public Collections for Charitable, Philanthropic and Benevolent Purposes* (2003). K O'Halloran has also commented, "*The present government policy in all jurisdictions is to bring the law relating to fundraising into the main body of charity law, give the lead regulatory body oversight of fundraising practice but also to await and review the outcome of the charity sector's efforts to develop an effective policy of self-regulation of fundraising practices before deciding whether to make use of its reserved power to introduce mandatory regulations.*" See K O'Halloran, above, at 13.

12 "*The ancient parens patriae jurisdiction of the Crown in relation to charities, and the right to bring proceedings in respect of them, devolved from the Lord Chancellor to become vested in the Attorney General. These powers have been described as 'theoretically limitless' because they 'spring from the direct responsibility of the Crown for those who cannot look after themselves'. However, the traditional role of the Attorney General, exercising the parens patriae powers to protect and supervise, is no longer fully operational in any of the UK or Irish jurisdictions.*" See K O'Halloran, same as above, at 15.

13 K O'Halloran, same as above, at 14.

14 Law Society of Ireland, *Charity Law: The Case for Reform* (2002); Department of Community, Rural and Gaeltacht Affairs, *Establishing a Modern Statutory Framework for Charities* (2003); Irish Law Reform Commission, *Legal Structures for Charities* (2006).

Bill in April 2007, the Department of Community, Rural and Gaeltacht Affairs identified the following as being the key policy reform issues:

- *"The charities sector in Ireland is unregulated.*
- *This effectively means that there is no body which has:*
 - *the specific aim of supervising the sector*
 - *the statutory powers to either maintain a register of charities or to subject the sector to regulatory scrutiny.*
- *There is therefore no such thing as a registered charity in Ireland at present.*
- *There is no statutory definition of what a 'charity' is.*
- *There is no reliable information on*
 - *the number of active charities*
 - *what their financial worth is*
 - *how they spend their funds.*"¹⁵

4.14 The regulatory framework in the Irish 2009 Act is set out below:¹⁶

- (a) Part 1 defines the meaning of *"charitable purpose"*.
- (b) Part 2 establishes a new Charitable Regulatory Authority (the "Authority"): shifting the regulatory responsibilities (including the responsibility to determine whether an applicant is charitable in nature) from the tax agency to a more independent body, and transferring all functions relating to charitable organisations or charitable trusts vested in the Attorney General to the Authority (section 38).¹⁷
- (c) Part 3 regulates charitable organisations by way of:
 - establishing a register of charitable organisations in which all charities must register;¹⁸
 - making it an offence for an unregistered charitable organisation to carry on activities in Ireland;¹⁹

15 The Government of Ireland, *Revised European Social Charter 6th National Report on the implementation of the European Social Charter (revised)*, 25 September 2009. Available at: http://www.coe.int/t/dghl/monitoring/socialcharter/reporting/statereports/Ireland6_en.pdf

16 The Irish 2009 Act, together with the Charities Acts 1961 and 1973, and the Street and House to House Collections Act 1962, now provide a composite regulatory framework for charities.

17 See K O'Halloran, above, at 6.

18 Section 39, Irish 2009 Act.

19 Section 41, Irish 2009 Act.

- empowering the Authority to refuse registration to a charitable organisation whose name is likely to mislead the public as to its purposes or activities;²⁰
 - imposing a duty to keep proper accounts available for inspection and to prepare an annual statement of accounts;²¹
 - requiring charitable organisations to submit to the Authority annual activity reports which are to be made publicly available;²² and
 - regulating for good governance: provisions on disqualification of charity trustees, etc.²³
- (d) Part 4 of the Irish 2009 Act provides for protection of charitable organisations by way of:
- investigating affairs of charitable organisations;²⁴
 - entering and searching premises;²⁵ and
 - empowering the High Court to make orders to protect charitable organisations.²⁶
- (e) Part 5 establishes the Charity Appeals Tribunal to hear appeals from decisions of the Authority, a cheaper and quicker means of reviewing regulatory decisions;²⁷ and
- (f) Part 6 provides for, *inter alia*, the dissolution of Commissioners of Charitable Donations and Bequests for Ireland, and transferring functions, land and other property from the Commissioners to the Authority.

4.15 It is noteworthy that the Irish 2009 Act has not introduced the concept of the Charitable Incorporated Organisation as in some jurisdictions, and has not reformed the law on fundraising activities which has always been governed by legislative provisions that are quite detached from charity law and have no specific application to charities.²⁸ Unlike its counterparts in England

20 Section 42, Irish 2009 Act.

21 Sections 47 and 48, Irish 2009 Act.

22 Sections 52 and 54, Irish 2009 Act.

23 Sections 55, 90 and 91, Irish 2009 Act.

24 Section 64, Irish 2009 Act.

25 Section 69, Irish 2009 Act.

26 Section 74, Irish 2009 Act. However, K O'Halloran states: "*In the virtual absence of any provisions addressing the powers of the High Court, it is to be assumed that the traditional and increasingly marginal role of this body in the affairs of charities will continue relatively unchanged.*" See K O'Halloran, above, at 15.

27 There is, however, a right of appeal to the High Court on points of law (section 80, Irish 2009 Act).

28 K O'Halloran, above, at 12 to 13, see footnote 55: "*The only reference to fundraising in the 2009 Act is the s. 97(1) provision which reserves a power to make regulations in relation to charitable fundraising.*"

and Scotland, the Irish 2009 Act has built-in provisions for continuous contribution from the sector through representative panels.²⁹

New Zealand

4.16 Before the advent of the Charities Act 2005 ("the New Zealand 2005 Act") which establishes the Charities Commission (the "Commission"), the Inland Revenue Department operated a system whereby organisations could ask for written confirmation that they qualified as tax exempt on charitable grounds. However, there was no legal requirement for doing so and many entities claimed themselves as charities.³⁰ The New Zealand 2005 Act was assented to in April 2005, and the intent behind the Act is to regulate and to monitor the charity sector in New Zealand.

4.17 The New Zealand 2005 Act establishes the Commission which is to assess an entity's application for charitable status. An entity, with a charitable status, will benefit from two fiscal advantages. The direct advantage is the exemption of the charitable trust from income tax, while the indirect one is that donors to registered charitable trusts may qualify for tax credits.³¹ The regulatory framework in the New Zealand 2005 Act is as follows:

- (a) Part 1 establishes the Commission, and sets out its functions, powers and obligations;
- (b) sections 4 and 5 in Part 1 define "*charitable entity*" and "*charitable purpose*";
- (c) Subpart 1 of Part 2 provides for, *inter alia*, registration and de-registration of societies, institutions, and trustees of trusts as charitable entities; and
- (d) Subpart 2 of Part 2 provides for, *inter alia*, the regulatory role of the Commission, including,

29 Section 36 provides that: "*the terms of reference of a panel may include the making of observations or proposals on the following: performance of the new regulatory body; any developments within the European Union or internationally that have implications for that body; initiatives which that body could usefully take with related costings; any policy, document, guidelines or code of conduct, issued or proposed to be issued by that body; the performance of the charities sector in any particular area or respect; and an assessment of the effectiveness of the regulation of the administration and operation of charitable fundraising through codes of conduct.*"

30 T Garrett, "Establishing a Charities Commission in New Zealand", presented at the *Modernising Charity Law Conference* held in Brisbane, from 16 to 18 April 2009, at 1.

31 Fiscal advantages of charitable status are governed by the Income Tax Act 2007, not the Charities Act 2005. See M Gousmett, "An Overview of the Main Policies used to Encourage Philanthropy in New Zealand", presented at the *Modernising Charity Law Conference* held in Brisbane, from 16 to 18 April 2009, at 4.

- (i) requiring charitable entities and certain other persons to comply with certain obligations, for example, charitable entities' duties to prepare annual returns (section 41);
- (ii) empowering the Commission to examine and inquire into any charitable entity or any relevant person and making it an offence for non-compliance with a notice issued by the Commission (sections 50 and 52);
- (iii) empowering the Commission to issue a warning notice to a charitable entity (section 54);
- (iv) empowering the Commission to impose an administrative penalty (section 58);
- (v) providing for a right of appeal to the High Court against the Commission's decision (section 59); and
- (vi) empowering the High Court to make an interim order pending determination of an appeal (section 60).

Scotland

4.18 The statutory regulation of charities is of relatively recent origin in Scotland. The first such legislation was Part I of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 which came into force in 1992. The main regulatory body was the Revenue Commission, responsible for determining both charitable status and eligibility for tax exemption.³² In Scotland, the traditional *parens patriae* role of the Attorney General in relation to charities is unknown, but the office of Lord Advocate is vested with some similar responsibilities.³³

4.19 However, following a Scottish review of charity law,³⁴ there is a new regulatory framework as enshrined in the Charities and Trustee Investment (Scotland) Act 2005 ("the Scottish 2005 Act"):

- (a) establishing the Office of the Scottish Charity Regulator, a new independent lead regulatory body: shifting the regulatory responsibilities (including the responsibility to determine whether an applicant is charitable in nature) from the tax agency to a more independent body (Chapter 1 of Part 1);
- (b) setting out the test for "*charitable purposes*" (in section 7);
- (c) setting up the Scottish Charity Register (Chapter 2 of Part 1);

³² K O'Halloran, above, at 1.

³³ K O'Halloran, above, at 16 (footnote 75).

³⁴ Scottish Charity Law Review Commission, *Charity Scotland: The Report of the Scottish Charity Law Review Commission* (2001).

- (d) providing for access to information and information disclosure (Chapter 3 of Part 1);
- (e) providing for, *inter alia*, the supervisory role of the Office of the Scottish Charity Regulator (Chapter 4 of Part 1);
- (f) empowering the Court of Session to regulate charities when there is misconduct, maladministration or misrepresentation (section 34);
- (g) imposing a duty to keep accounts and report matters (Chapter 6 of Part 1);
- (h) introducing the Scottish Charitable Incorporated Organisation, similar to its English counterpart, which is intended to streamline governance, reduce the personal liability of trustees and simplify the regulatory burden (Chapter 7 of Part 1);
- (i) regulating for good governance: provisions on duties, remuneration and disqualification of charity trustees (Chapter 9 of Part 1);
- (j) establishing the Scottish Charity Appeals Panel, a cheaper and quicker means of reviewing regulatory decisions (Chapter 10 of Part 1);³⁵ and
- (k) modifying the regulatory regime for fundraising (Part 2).³⁶

Singapore

4.20 There was a major review in Singapore of the charity regulatory framework by the Inter-Ministry Committee (IMC) on Regulation of Charities and Institutions of a Public Character in 2006.³⁷ The Singapore government fully accepted the IMC's recommendations in the same year.³⁸

4.21 The existing law on charities in Singapore is contained in the Charities Act (Cap 37), as significantly amended by the Charities (Amendment) Act 2007 upon implementation of the IMC's recommendations.³⁹ The Singapore Charities Act provides for the registration of charities, the

35 There is a right of appeal to the Court of Session against a Panel decision (section 78).

36 Public charitable collections have been regulated under section 119 of the Civic Government (Scotland) Act 1982, and application for street and door-to-door collections is made to local authorities or in certain circumstances to the Secretary of State for Scotland.

37 See: <http://app1.mcys.gov.sg/PressRoom/TheInterMinistryCommitteeOnTheRegulationOf.aspx> MCYS Media release No: 02/2006.

38 See: <http://app1.mcys.gov.sg/Portals/0/Summary/pressroom/9-2006.pdf>.

MCYS Media release No: 09/2006.

39 MCYS Media release No: 09/2006, at para 5: some of the recommendations do not require legislative amendments.

administration of charities and their affairs, the regulation of charities and institutions of a public character, the regulation of fundraising activities carried on in connection with charities and other institutions and the conduct of fundraising appeals.

4.22 The regulatory framework in the Act is set out below:

- (a) section 2 in Part I defines, *inter alia*, "charity" and "charitable purposes";
- (b) Part II provides for the appointment of the Commissioner of Charities (the Commissioner) and sets out the Commissioner's objectives and general functions;
- (c) Part IIA establishes a Charity Council so as to promote good governance and self-regulation in the charity sector;
- (d) Part III provides for registration of charities and inquiries into charities;
- (e) Part IV requires, *inter alia*, charities to keep accounting records, prepare annual statements of accounts and annual reports, and provides for public inspection of annual reports, etc;
- (f) Part VI provides for the application of property, cy-près and assistance and supervision of charities by the court and the Commissioner, including suspension, removal and disqualification of trustees;
- (g) Part VII controls fundraising for charitable institutions;
- (h) Part VIII prohibits making a fundraising appeal to any member of the public without a permit; and
- (i) Part VIIIA provides for the appointment of Sector Administrators who, in assisting the Commissioner, are in charge of overseeing both the charities and institutions of a public character in their respective sectors as designated by the relevant Minister in the Gazette.

4.23 The main regulator is the Commissioner who is under the purview of the Ministry of Community Development, Youth and Sports. The Commissioner is assisted by Sector Administrators. Each Sector Administrator is responsible for a specific charity sector: social services, healthcare, education, arts & heritage, community and sports.⁴⁰ In parallel, there is the people-sector led Charity Council to promote good governance

⁴⁰ Commissioner of Charities, *Commissioner of Charities Annual Report for the Year Ending 31 December 2006*, at para 3. See also Low Puk Yeong, "Singapore Charity Regulatory Framework", presented at the *Modernising Charity Law Conference* held in Brisbane, from 16 to 18 April 2009, at 7.

and self-regulation as well as to advise the Commissioner on major charity issues.

South Africa

4.24 South Africa's legal system is a mixed system, combining elements of Roman Dutch law and English common law. South Africa has therefore developed a law of charitable trusts which, while sharing elements with English common law jurisdictions, is quite distinctive.

4.25 In 1994, President Nelson Mandela appointed the Commission of Enquiry To Investigate the Tax Structure of South Africa. This Commission's Ninth Interim Report dealt exclusively with the fiscal issues affecting non-profit organisations.⁴¹ As a result, the income tax and related fiscal legislation on charitable organisations has undergone significant changes.⁴²

4.26 In South Africa, charitable organisations are regulated by both the South African Revenue Service's Tax Exemption Unit ("TEU") and the National Department of Social Development's Directorate of Non-Profit Organisations ("NPO Directorate").

4.27 With the purpose of ensuring specialised and uniform treatment and preventing abuse, the TEU was specifically established to determine applications for exemption and annually assess tax-exempt organisations under the Income Tax Act, 58 of 1962 ("the South Africa 1962 Act"). The TEU is thus entrusted with the task of regulating charitable organisations under the South Africa 1962 Act and of registering and revoking charitable tax-exempt status.

4.28 The NPO Directorate registers organisations under the Non Profit Organisations Act, 71 of 1997 ("the South Africa 1997 Act") which was enacted to encourage and support organisations by creating an enabling environment for organisations to flourish, and setting and maintaining adequate standards of governance, accountability and transparency. Chapter 2 of the South Africa 1997 Act provides for some measures for creating an enabling environment for such organisations.⁴³

4.29 There are three legal forms of non-profit organisations and four tiers in the regulatory framework for not-for-profit organisations.

41 M Parker and M Katz, "Reforming the Regulation of Charitable Organisations: the South African Perspective" presented at the *Modernising Charity Law Conference* held in Brisbane, from 16 to 18 April 2009, at paras 2.1 to 2.4.

42 The amended section 30 in the South Africa 1962 Act has introduced the concepts of the "*public benefit organisation*" and "*public benefit activity*".

43 These measures include establishment of the Directorate for Nonprofit Organisations, issuance of model documents and codes of good practice by the Directorate, the Minister's report on the activities of the Directorate, maintaining a panel of Arbitrators and the Arbitration Tribunal, and establishment of Advisory or Technical Committees.

Consequently, an organisation may have to comply with various requirements and regulations at different tiers.⁴⁴

4.30 Within the first tier, such an organisation can be in one of the following legal forms:

- (a) a voluntary association under common law (usually small community based organisations);
- (b) a trust under the Trust Property Control Act 1988 and common law; and
- (c) a company limited by guarantee under section 21 of the Companies Act 1973 ("*associations incorporated not for gain*").

4.31 Within the second tier, an organisation of any of the above forms may, by fulfilling certain requirements, apply for the status of a registered non-profit organisation under the South Africa 1997 Act. This is perceived to be the entry point in the regulatory framework for organisations to derive benefits from the enabling environment, as it provides a registration facility for all public non-profit entities.

4.32 At the third tier, a non-profit organisation may, by fulfilling the requirements, apply for the status of "*public benefit organisation*" under section 30 of the South Africa 1962 Act.

4.33 Within the fourth tier, "*public benefit organisations*" may have two major benefits under section 30 of the South Africa 1962 Act, namely: tax exemption, and donor deductibility for contributions to those "*public benefit organisations*" that carry out certain specified "*public benefit activities*" ("*public benefit organisations with donor-deductible status*").

44 The Department of Social Development, Republic of South Africa has stated, "One of these challenges is the fragmented regulatory framework as it requires too many registration processes to comply with. Even for a sophisticated and well-resourced organisation, the numerous registration processes and compliance procedures are frustrating. For example, a section 21 company may often have to register three times (Registrar of Companies, NPO Directorate and Tax Exemption Unit of SARS) and comply with three different regulatory bodies that require different kinds of information. Organisations then have to amend their founding documents and reporting requirements. In effect, the current environment may lead to inevitable variances in the perceived status of NPOs, and over time, undermines the status accorded to these legal entities. In addition, the lack of integration between the regulatory agencies reinforces unnecessary duplication of resources. ... One of the key recommendations of the Impact Assessment of the NPO Act is that the Minister of Social Development should facilitate a process to review and align legislation to allow for an integrated regulatory framework that allows for consistency within the legal framework for registering NPOs. This will require a high level political facilitation between Ministries of Trade and Industry, Justice and Constitutional Development, and Finance. The purpose of such an interaction should be to redefine the NPO Act and other relevant legislation so as to ultimately establish a single legislation mechanism for registering NPOs." See Department of Social Development, Republic of South Africa, Directorate: Non-profit Organisations Business Plan of the MTEF PERIOD 2007-08/2008-09 (2007), at para 3.3, available at http://www.dsd.gov.za/npo/index.php?option=com_docman&task=cat_view&gid=30&Itemid=116

4.34 The legislative provisions in South Africa relating to non-profit organisations also include the following requirements and regulations:⁴⁵

- (a) registration under the South Africa 1997 Act and its cancellation on non-compliance;
- (b) governance requirements, such as founding documents (written constitution for a voluntary association, trust deed for a trust, memorandum and articles of association for a company limited by guarantee under section 21 of the Act);
- (c) responsibilities and liabilities of governing bodies of such organisations;
- (d) report requirements to various government agencies;
- (e) public access to information;
- (f) accounting and auditing requirements; and
- (g) regulations on fundraising activities.

45 See T Brewis, "Summary of Regulatory System for NGOs in South Africa" at <http://www.ngoregnet.org/Library/Summary%20of%20the%20South%20African%20regulatory%20system%20TB.doc>

Chapter 5

Conclusions and proposals on the definition of charity

5.1 In this chapter, we examine in detail how the concept of "*charity*" is defined in law. We set out the problems with the current law and present arguments for and against having a statutory definition of "*charitable purposes*", before concluding that such a definition is desirable. We then consider the essential elements of such a definition after reviewing the relevant legislation in other jurisdictions.

Current situation in Hong Kong

The legal definition of "charity"

5.2 "*A trust, in order to be charitable must have objects which are exclusively charitable.*"¹ As we saw in Chapter 2, the meaning of the term "*charity*" under Hong Kong law follows the common law, and is concerned with whether the particular purposes of the organisation or activity are "*charitable*" in the legal sense.

Historical development of the common law position on charities

5.3 Lord Macnaghten's dictum in the 1891 case of *Income Tax Special Purposes Commissioners v Pemsel* is the leading common law authority on the definition of charity. His Lordship stated in that case:

*"'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."*²

5.4 Lord Macnaghten's list of "*four principal divisions*" of charitable purposes was itself derived from the preamble to the Charitable Uses Act 1601 in England, also known as the Statute of Charitable Uses or the Statute of Elizabeth I.³ The charitable purposes set out in the preamble (expressed in modernised English) included:

1 Jean Warburton, *Tudor on Charities* (Sweet & Maxwell 2003, 9th ed), at 12-13.

2 [1891] AC 531 (HL), at 583.

3 *Halsbury's Laws of England*, Vol 5(2) (2001 Reissue), at para 2.

*"The relief of aged, impotent and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities; the repair of bridges, ports, havens, causeways, churches, sea-banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; the marriages of poor maids, the supportation, aid and help of young tradesmen, handicraftsmen, and persons decayed; the relief or redemption of prisoners or captives; and the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes."*⁴

5.5 In commenting on the statute and its preamble in his judgment in *Pemsel*, Lord Macnaghten stated:

*"The object of that statute [of Elizabeth I] was merely to provide new machinery for the reformation of abuses in regard to charities. But by a singular construction it was held to authorize certain gifts to charity which otherwise would have been void. And it contained in the preamble a list of charities so varied and comprehensive that it became the practice of the court to refer to it as a sort of index or chart. At the same time it has never been forgotten that the 'objects there enumerated' ... are not to be taken as the only objects of charity, but are given as instances."*⁵

5.6 The Charitable Uses Act 1601 was repealed by the Mortmain and Charitable Uses Act 1888, with the exception of the Act's preamble, which was set out in full in section 13 of the 1888 Act. This Act itself was subsequently repealed in England by the Charities Act 1960. As to the effect of this repeal on the status of the preamble, it has been commented:

*"With the repeal of the 1888 Act by the Charities Act 1960, the preamble is no longer on the statute book, but the preamble never had any statutory operation, and its final repeal does not affect the authority of the cases decided on it nor the principles on which future cases are to be decided."*⁶

5.7 The current common law position on what may constitute a "charitable purpose" is that the purpose must fall either within the list of purposes set out in the preamble to the statute of Elizabeth I, or within one of the four categories of charitable purposes laid down by Lord Macnaghten which are derived from the preamble.⁷ The purpose must be also "for the public benefit". At common law, this is presumed until the contrary is proven

4 As set out in *Hong Kong & Shanghai Bank Hong Kong (Trustee) Ltd v The Incorporated Trustee of the Islamic Community Fund of Hong Kong & Others* [1984] 1 HKC 152, at 156 (HCt), per Rhind J, referring to Picarda, *The Law and Practice Relating to Charities* (Butterworths, 1999), at 8.

5 *Income Tax Special Purposes Commissioners v Pemsel* [1891] AC 531, at 581 (HL).

6 *Halsbury's Laws of England*, Vol 5(2) (2001 Reissue), at para 2, note 7.

7 Same as above, at para 2.

for Lord Macnaghten's first three heads of charitable purpose: the prevention of poverty, the advancement of education and the advancement of religion. (It should be noted, however, that this common law presumption was removed by statute in England in 2006.⁸⁾)

5.8 For purposes falling within Lord Macnaghten's fourth head (ie, trusts for other purposes beneficial to the community not falling under any of the preceding heads), it has been stated that such a purpose, *"must be within the spirit and intendment of the ancient statute [of Elizabeth], either directly or by analogy with decided cases on the same point, or it must have been declared to be charitable by some other statute."*⁹ In order to satisfy the "public benefit" test, a charitable purpose under this head *"must be both beneficial **and** available to a sufficient section of the community."*¹⁰

The specific heads of "charitable purpose" at common law

Relief of poverty

5.9 The preamble to the English Charitable Uses Act 1601 lists the relief of aged, impotent and poor people, but these words are to be construed disjunctively,¹¹ so that the relief of poor persons is charitable *per se* and there is no need for them to be also "aged" or "impotent" at the same time in order to satisfy the object of charity. The word "poverty" is a relative term and has not been defined by the courts or statute. It is a question of degree depending on the circumstances.¹² It is clear from some cases that there is no need for a person to be destitute in order to satisfy the meaning of poverty.¹³

5.10 In *Trustees of the Mary Clark Home v Andersons*, Channell J said:

*"That seems to lead to the conclusion that the expression 'poor person' in a trust for the benefit of poor persons does not mean the very poorest, the absolutely destitute; the word 'poor' is more or less relative. The difficulty in such a case as the present is to determine from which point of view the question is to be looked at, for obviously very different views may be held as to what is poverty and what is riches."*¹⁴

8 With the enactment of the Charities Act 2006. See section 3(2) of the Act.

9 Halsbury, same as above. Emphasis added.

10 Halsbury, same as above. Emphasis added.

11 *Joseph Rowntree Memorial Trust Housing Assoc Ltd v A-G* [1983] Ch 159, at 171 to 174.

12 Nuzhat Malik, "Defining 'Charity' and 'Charitable Purposes' in the United Kingdom", *The International Journal of Not-for-Profit Law*, Vol 11, No 1 (Nov 2008): http://www.icnl.org/knowledge/ijnl/vol11iss1/special_2.htm.

13 *Re Coulthurst* [1951] Ch 661 at 665, 666.

14 (1904) 2 KB 645, at 655.

The advancement of education

5.11 "Aspects of the advancement of education are specifically mentioned in the Preamble, namely, 'schools of learning, free schools and scholars in universities' and also 'the education and preferment of orphans'. ... [F]ee-paying schools (provided they do not distribute profits other than for charitable purposes) can be charitable."¹⁵

5.12 Charity law gives a wide meaning to "education" and does not limit it to education by a teacher in a classroom, playground or sports field.¹⁶ In order to be charitable for the advancement of education, the organisation must be for an educational purpose which the law regards as charitable and fall within the spirit and intendment of the preamble to the Statute of Elizabeth I. Further, the education for which the donor intends to provide must be of educational value to the community and the benefits must be available to the public or to a sufficiently important section of the community.¹⁷

5.13 In *Ng Chi-fong v Hui Ho Pui-fun*,¹⁸ Rhind J held that "the development of culture" generally is a charitable purpose within the educational advancement head of charity, and that in a Chinese community like Hong Kong "the development of Chinese culture" is charitable.

The advancement of religion

5.14 It has been observed that the purpose of the preamble to the Statute of Elizabeth I was to illustrate charitable purposes and was not meant to draw up an exhaustive definition of charity.¹⁹ On this basis, "advancement of religion", though not specifically referred to in the preamble (the nearest example listed being the "the repair of churches"), has been held to be a head of charitable purpose.²⁰

5.15 A gift for religious purposes has to satisfy two conditions in order to come within the meaning of Lord Macnaghten's third head of charity. First, the gift must contribute to the advancement of religion as that word is interpreted by the courts. Secondly, the gift must promote the religious instruction or education of the public.²¹

5.16 As noted above, the preamble to the Statute of Elizabeth I specifically provides that the repair of churches is a religious purpose. Gifts which are considered as charitable for religious purposes include building, endowing, maintaining or repairing places of worship, providing suitable furniture or ornaments, facilitating the conduct of religious services, and

15 Peter Luxton, *The Law of Charities* (Oxford University Press, 2001), at 118.

16 See: Charity Commission of England and Wales Guidance, *The Advancement of Education for the Public Benefit*, (Dec 2008), available at: http://www.charitycommission.gov.uk/Charity_requirements_guidance/Charity_essentials/Public_benefit/pbdduc.aspx

17 Jean Warburton, *Tudor on Charities* (Sweet & Maxwell 2003, 9th ed), at 47.

18 [1987] HKLR 462.

19 Hubert Picarda, *The Law and Practice Relating to Charities* (Butterworths, 1999), at 72.

20 See same as above.

21 Jean Warburton, *Tudor on Charities* (Sweet & Maxwell 2003, 9th ed), at 73.

promoting the strictly religious work carried on in connection with the place of worship.²²

5.17 The Charity Commissioners of England and Wales (the predecessor of the Charity Commission) required evidence that an abbey, monastery, or convent promoted religion in a way which conferred a sufficient degree of public benefit before registering it as a charity.²³ It has been considered that the presumption of charity will be rebutted, and public benefit will have to be shown positively, *"if there is evidence that the purpose is subversive of all morality, or it is a new belief system, or if there has been public concern expressed about the organisation carrying out the particular purpose, or if it is focused too narrowly on its adherents."*²⁴

Promotion of health

5.18 The protection of human life is a well established charitable purpose within the preamble to the Statute of Elizabeth I. A trust for the promotion of health is charitable. This includes the prevention, cure or treatment of diseases for the promotion of health. A number of purposes connected with health beyond simply the relief of the sick have been regarded as charitable.²⁵ A trust which is to establish or maintain a hospital, a ward or a bed in a hospital is charitable under this head. A trust for the study of the causes, cure or treatment of diseases, or to maintain conditions conducive to health, is also regarded as charitable.²⁶

Relief of victims of a disaster

5.19 Some disaster funds are regarded as charitable if the purpose is to relieve the needs of those who have suffered, whether directly as victims or indirectly as members of the victims' families. This purpose falls within the head of the *"relief of distress"* in the preamble to the Statute of Elizabeth I.²⁷

Relief of disabled persons

5.20 The preamble to the Statute of Elizabeth I refers to *"the relief of impotent people"*. A dictionary definition of *"impotent"* is *"powerless, helpless, ineffective; physically weak, decrepit"*.²⁸ In modern language, this refers to persons under a physical or mental disability.²⁹ It is sufficiently wide to cover not only those suffering from permanent disability, whether of body or mind, but those temporarily incapacitated by injury or illness, or in need of rest, and young children incapable of protecting themselves from the consequences of cruelty or neglect.³⁰ As the preamble is to be construed disjunctively in

22 Same as above, at 83.

23 Peter Luxton, *The Law of Charities* (Oxford University Press, 2001), at 132-133.

24 Jean Warburton, *Tudor on Charities* (Sweet & Maxwell 2003, 9th ed), at 78.

25 Same as above, at 107.

26 American Law Institute, *Restatement of the Law*, Trusts 2d, Vol 2, para 372.

27 Peter Luxton, *The Law of Charities* (Oxford University Press, 2001), at 141.

28 Lesley Brown, *The New Shorter Oxford English Dictionary*, (Clarendon Press, 1993).

29 Peter Luxton, *The Law of Charities* (Oxford University Press, 2001), at 139.

30 Jean Warburton, *Tudor on Charities* (Sweet & Maxwell 2003, 9th ed), at 35.

respect of *"the relief of the aged, impotent and poor people"*, there is no need for an impotent person to be also poor or aged in order to be the object of charity.

Protection of animals

5.21 A trust for the protection or welfare of animals, irrespective of whether or not they are useful to man, is *prima facie* charitable within the fourth head of the *Pemsel* case.³¹ A trust, the purpose of which is to look after animals generally or a particular species of animal, may be regarded as a good charitable trust.³²

5.22 In *Re Wedgwood*, Swinfen Eady L-J stated:

*"A gift for the benefit and protection of animals tends to promote and encourage kindness towards them, to discourage cruelty, and to ameliorate the condition of the brute creation, and thus to stimulate humane and generous sentiments in man towards the lower animals, and by these means promote feelings of humanity and morality generally, repress brutality, and thus elevate the human race. That such purposes are eminently charitable, in the accepted legal sense of that term, is amply established by the cases to which the Master of the Rolls has referred."*³³

Preservation of the environment

5.23 The preservation of the environment, including its flora and fauna, is a recognised charitable purpose. Other general examples under this head include: research into waste recycling processes; promotion of the protection of endangered flora and fauna; education of the public on the ecological importance of trees and their planting, care and protection; advancement of education and research in the field of energy and energy related subjects, such as forms of renewable energy; and education of the public in the value of clean air and methods and consequences of air pollution.³⁴

Purposes held not to be charitable

5.24 Conversely, a trust for political purposes is not charitable. This rule, which is sometimes called *"the rule against politics,"* is easy to state but not to apply, and the cases disclose inconsistencies. It has been observed that the *"[UK] Charity Commissioners have been at pains to clarify what they conceive to be objectionable in the field and over the years have issued guidelines setting out their views on the laws."*³⁵

31 Same as above, at 128.

32 Peter Luxton, *The Law of Charities* (Oxford University Press, 2001), at 157.

33 [1915] 1 Ch 113, at 122.

34 Hubert Picarda, *The Law and Practice Relating to Charities* (Butterworths, 1999), at 164 to 165.

35 Same as above, at 167.

5.25 The term "*political*" as used in the law of charities to describe objects or activities is, as explained by Picarda, not confined to the party political. The following have been held political:

*" ... furthering the interests of any political party; advocating or opposing any change in the law, policy or administrative practice of this country; seeking to bring about changes in the law of another country; seeking to bring about a reversal of government policy or of particular decisions of governmental authorities in a foreign country; the promotion of peace, international understanding or friendship between groups (except in the interests of racial harmony within the nation); the elimination of war or the cessation of a particular war; efforts or attempts to sway public opinion on controversial social issues."*³⁶

5.26 Other purposes of organisations which have been identified as not being "*charitable*" in the legal sense include: those which promote the benefits of the founders or subscribers of the organisation; those which encourage a particular sport such as football or cycling (as opposed to sports generally); and those set up to provide a playing field, recreation ground or scholarship fund for employees of a particular company or industry.³⁷

The extent to which "charity" is defined under Hong Kong legislation

Inland Revenue Ordinance (Cap 112)

5.27 As we have seen earlier, the Inland Revenue Department in Hong Kong maintains a list of organisations which have successfully applied for tax exemption through recognition as a "*charitable institution or trust of a public character*", within the scope of section 88 of the Inland Revenue Ordinance (Cap112).³⁸ Section 88 of the Inland Revenue Ordinance (Cap112) states:

"Notwithstanding anything to the contrary in this Ordinance contained there shall be exempt and there shall be deemed always to have been exempt from tax any charitable institution or trust of a public character:

Provided that where a trade or business is carried on by any such institution or trust the profits derived from such trade or business shall be exempt and shall be deemed to have been exempt from tax only if such profits are applied solely for charitable purposes and are not expended substantially outside Hong Kong and either -

36 Same as above, at 167.

37 See discussion in Inland Revenue Department, Departmental Interpretation and Practice Notes, No 37 (Revised) *Concessionary Deductions: Section 26C: Approved Charitable Donations* (Sep 2006), at para 9, available at: http://www.ird.gov.hk/eng/pdf/e_dipn37.pdf.

38 The online version of this list is available at: <http://www.ird.gov.hk/eng/tax/ach.htm>.

- (a) *the trade or business is exercised in the course of the actual carrying out of the expressed objects of such institution or trust; or*
- (b) *the work in connection with the trade or business is mainly carried on by persons for whose benefit such institution or trust is established."*

5.28 While the terms "charitable institution or trust of a public character" and "charitable purposes" are not defined in the Ordinance, the term "approved charitable donation" is defined, as meaning "a donation of money to any charitable institution or trust of a public character which is exempt from tax under section 88 or to the Government, for charitable purposes."³⁹ As noted earlier, in practice the Inland Revenue Department looks to the common law to determine whether an organisation can be said to have been established for charitable purposes,⁴⁰ in particular to Lord Macnaghten's four principal divisions of charitable purpose in *Income Tax Special Purposes Commissioners v Pemsel*.⁴¹ In order to be considered a charity, the organisation must be established for purposes which are exclusively charitable according to law. The Department states: "It is not permissible for a body to have mixed objectives, some of which are charitable and others which are non-charitable."⁴²

5.29 The Inland Revenue Department has made available to the public the set of interpretation and practice notes⁴³ that it applies in determining whether particular donations are considered tax deductible as "approved charitable donations". These have no binding force, however, and do not affect a taxpayer's right of objection or appeal "to the Commissioner [of Inland Revenue], the Board of Review or the Court."⁴⁴

5.30 Paragraph 9 of these interpretation and practice notes states:

"A purpose is not charitable unless it is directed to the public or a sufficient cross section of the public. In general, an organisation cannot be classified as charitable if, in principle, it is established for the benefit of specific individuals. It is not possible to lay down a precise rule as to what constitutes a sufficient cross section of the public. Over the years, the courts have considered various situations where charitable status was claimed. In summary, the courts' decisions have been –

39 Section 2(1), Inland Revenue Ordinance (Cap 112).

40 Inland Revenue Department information pamphlet, *A Tax Guide for Charitable Institutions and Trusts of a Public Character* (revised ed, Sept 2010), available at http://www.ird.gov.hk/eng/tax/ach_tgc.htm.

41 [1891] AC 531 (HL).

42 Inland Revenue Department, Departmental Interpretation and Practice Notes, No 37 (Revised) *Concessionary Deductions: Section 26C: Approved Charitable Donations* (Sep 2006), available at: http://www.ird.gov.hk/eng/pdf/e_dipn37.pdf.

43 Same as above.

44 Same as above, front cover.

- *Purposes held to be charitable purposes*
 - *Relief of poor people*
 - *Relief of victims of a particular disaster*
 - *Relief of sickness*
 - *Relief of physically and mentally disabled*
 - *Establishment or maintenance of non-profit-making schools*
 - *Provision of scholarships*
 - *Diffusion of knowledge of particular academic subjects*
 - *Establishment or maintenance of a church*
 - *Establishment of religious institutions of a public character*
 - *Prevention of cruelty to animals*
 - *Protection and safeguarding of the environment or countryside*
- *Purposes held not to be charitable purposes*
 - *Attainment of a political object*
 - *Promotion of the benefits of the founders or subscribers*
 - *Encouragement of a particular sport such as football or cycling*
 - *Provision of a playing field, recreation ground or scholarship fund for employees of a particular company or industry."*

Registered Trustees Incorporation Ordinance (Cap 306)

5.31 The Registered Trustees Incorporation Ordinance (Cap 306) governs the incorporation of trustees appointed by certain bodies, associations and communities of persons, and the incorporation of trustees of charitable trusts.⁴⁵ For the purposes of the Ordinance, the term "*charity*" is defined in section 2(1) as meaning, "*any trust or organization established by deed or otherwise for a charitable purpose.*"

5.32 Section 2(1) of the Registered Trustees Incorporation Ordinance (Cap 306) defines the term "*charitable purpose*" as including:

- "(a) *the relief of poverty;*
- (b) *the advancement of art, education, learning, literature, science or research;*
- (c) *the making of provision for-*

45 See Long Title to the Registered Trustees Incorporation Ordinance (Cap 306).

- (i) *the cure, alleviation or prevention of; or*
- (ii) *the care of persons suffering from or subjected to, any disease, infirmity or disability affecting human beings (including the care of women before, during and after child birth);*
- (d) *the advancement of religion;*
- (e) *any ecclesiastical purpose;*
- (f) *the promotion of the moral, social and physical well-being of the community; and*
- (g) *any other purpose beneficial to the community not specified in paragraphs (a) to (f).*⁴⁶

Problems with the current law and the need for reform

5.33 As we have seen, in order for a body to be considered a charity under Hong Kong law, it must be established "*for purposes which are exclusively charitable according to law*".⁴⁷ Our definition of "*charitable purpose*", even to this day, is based on Lord Macnaghten's 1891 statement of the four categories of charitable purposes⁴⁸ which was itself based on the preamble to the Charitable Uses Act 1601 in England.⁴⁹

5.34 Clearly, there are difficulties in attempting to determine the scope of what should constitute a charity in twenty-first century Hong Kong by reference to a statute from Tudor England, and from case law founded in the Victorian era. We outline some of these difficulties below.

46 Section 2(1), Registered Trustees Incorporation Ordinance (Cap 306). Section 2(2) of the Ordinance adds that: "*Where the objects of any body of persons or charity involve the acquisition of gain by such body of persons or charity or any of its individual members or trustees, as the case may be, such body of persons or charity shall not be a body of persons or charity for the purposes of this Ordinance.*" This is further qualified by section 2(3), which states: "*For the purposes of subsection (2), the receipt by an individual member or trustee of any body of persons or charity of remuneration in respect of any professional services rendered to such body of persons or charity where the will, deed, rules, regulations or other instrument creating, constituting or regulating the same so permits shall not be an acquisition of gain.*"

47 Inland Revenue Department, *A Tax Guide for Charitable Institutions and Trusts of a Public Character* (revised ed Sept 2010) at <http://www.ird.gov.hk/eng/tax/ach_tgc.htm>

48 *Special Commissioners of Income Tax v Pemsel* [1891] Vol 3 Tax Cases 53, at 96, per Lord Macnaghten.

49 Also known as the Statute of Charitable Uses or the Statute of Elizabeth I. The preamble sets out a long and varied list of examples of purposes which were charitable: see *Halsbury's Laws of England*, Vol 5(2) (2001 Reissue), at para 2.

Outdated definition

5.35 The language of the preamble to the 1601 Act is archaic and unsuited to modern conditions. Many of the examples to which it refers bear little relevance to the current world. The emphasis of Lord Macnaghten's four categories of charitable purpose appears equally out of touch with modern sensibilities. While there may be little dispute about identifying the "*relief of poverty*" and the "*advancement of education*" as appropriate charitable purposes, some might argue that the "*advancement of religion*" does not deserve to be singled out for special prominence when all other purposes (such as care for the sick and aged, prevention of cruelty, environmental protection, encouragement of sport, etc) are lumped together within an overall fourth category of "*other purposes beneficial to the community*."

5.36 The determination of what amounts to a charitable purpose relies on case law emanating from the nineteenth century and the archaic language of a seventeenth century statute. Neither is readily accessible to the layman, and the guidance they would offer him in any event is limited. There is a strong case for arguing that it is in the interests of both the general public and charitable organisations themselves that the legal definition of what amounts to a charitable purpose should be clear, accessible and in tune with current values.

The law is confusing and unclear

5.37 As we saw in Chapter 3, there is no general statutory scheme for the registration or regulation of charities in Hong Kong. Under the provisions of the Inland Revenue Ordinance (Cap 112), an organisation accepted as a charity by the Inland Revenue Department is not generally liable to tax and donations to such organisations are tax deductible. There is, however, no statutory definition in the Inland Revenue Ordinance of what amounts to a charity, and the Inland Revenue Department is therefore obliged to look to the common law in determining whether an organisation can be said to have been established for "*charitable purposes*". That case law is less than clear.

5.38 The fourth head of Lord Macnaghten's language in *Pemsel's* case, namely "*trusts for other purposes beneficial to the community, not falling under any of the preceding heads*", offers little guidance as to what is, and what is not, a charitable purpose. It leaves wide scope for doubt and ambiguity, which can be resolved only by expensive litigation. It is hardly surprising that Lord Sterndale, MR, once said: "*I am unable to find any principle which will guide one easily, and safely, through the tangle of the cases as to what is and what is not a charitable gift*".⁵⁰

50 *In re Tetley* [1922 T 468]; [1923] 1 Ch 258, at 266 (CA).

Pros and cons of having a statutory definition

5.39 The principal arguments in favour of a statutory definition are that:

- (a) it would provide greater accessibility and clarity of the law, assisting both donors and charitable organisations themselves;
- (b) it could reflect relevant current values and the wide range of activities now undertaken by charitable organisations, in a way which the old case law cannot;
- (c) it is undesirable that the granting of tax concessions to an organisation and its donors under the Inland Revenue Ordinance should be determined by the application of administrative guidelines (even those based on the common law), rather than a clear statutory definition;
- (d) a clear statutory definition of the organisations which are to be regulated is essential if a statutory scheme for the regulation of charitable organisations is to be established; and
- (e) the creation of a statutory definition of what amounts to a charity would be in line with the general trend of legal development in the common law world.

5.40 The principal arguments against the introduction of a statutory definition are that:

- (a) no statutory definition can hope to foresee every future development in charitable giving and it would lose the flexibility inherent in case law which allows gradual change over time to meet changing social circumstances; and
- (b) a statutory definition would not avoid the need for litigation in difficult cases, but it would lose the benefit of case law established over many years.

5.41 In elaboration of the first argument against a statutory definition, as late as 1989, a White Paper in the United Kingdom concluded that:

"an attempt to define charity by any of these means [i.e. listing the purposes which are deemed to be charitable, enacting a definition of charity based on Lord Macnaghten's classification, or defining 'charitable purposes' as 'purposes beneficial to the community'] would be fraught with difficulty, and might put at risk the flexibility of the present law which is both its strength and its most valuable feature. In particular, [the Government] consider

that there would be great dangers in attempting to specify in statute those objects which are to be regarded as charitable".⁵¹

That view was, of course, subsequently rejected by the Government in putting forward the definition of "*charitable purpose*" contained in the English Charities Act 2006 ("the English 2006 Act").

5.42 In our view, however, the case for a statutory definition is overwhelming. It cannot be a sound basis for objection that a statutory definition would remove the benefit of existing case law, when that case law has been found to be ambiguous and uncertain. No statutory definition can hope to foresee every eventuality, but a definition which provides a broad range of categories, while retaining some measure of flexibility to recognise purposes not falling within a specific category, would constitute an improvement on Lord Macnaghten's four categories of charitable purposes. We therefore recommend that there should be a clear statutory definition of what constitutes a charitable purpose. The later part of this chapter will consider the essential elements of such a definition, after reviewing the relevant legislation in other jurisdictions.

Recommendation 1

We recommend that there should be a clear statutory definition of what constitutes a charitable purpose.

Issues to be considered in defining charitable status

5.43 Having concluded that there should be a clear statutory statement of what constitutes a charitable purpose, there are a number of issues relevant to deciding *how* charitable status should be defined.

Exclusively charitable purposes

5.44 The current law requires that, to be recognised as charitable, an organisation must have purposes that are exclusively charitable. An alternative would be to allow charitable status to organisations whose purposes are mixed but this would be at odds with the approach adopted in other jurisdictions.

"Public benefit" versus "private benefit"

5.45 The definition of "*charitable purpose*" adopted in other common law jurisdictions focuses on "*public benefit*", as distinct from "*private benefit*".

51 UK Home Office, *Charities: A Framework for the Future* (1989) Cm 694, at para 2.11.

Some jurisdictions require specific steps to be taken to satisfy a test of *"public benefit"*.

5.46 In reviewing the position of charities there, a UK Strategy Unit report on charities and the not-for-profit sector discussed self-help organisations and drew a distinction between private and public benefit in these organisations:

*"Self-help organisations are important in that they empower beneficiaries to help both themselves and others. Our consultation revealed that there is confusion over whether self-help organisations can obtain charitable status. At present, self-help organisations which have open membership may be charitable, but organisations run by a small number of people for their own benefit cannot. This distinction helpfully draws a line between private and public benefit."*⁵²

5.47 The UK Strategy Unit report also sets out a list of characteristics which are indicative of *"public benefit"*:

- "➤ *The organisation benefits the public as a whole or a sufficient section of it.*
- *The beneficiaries are not defined in terms of a personal or contractual relationship.*
- *The beneficiaries should not be defined by an inappropriate or capricious link.*
- *Membership and benefits should be available to all those who fall within the class of beneficiaries.*
- *Any private benefit arises directly out of the pursuit of the charity's objects or is legitimately incidental to them.*
- *The amount of private benefit should be reasonable.*
- *Charges should be reasonable and should not exclude a substantial proportion of the beneficiary class.*
- *The service provided should not cater only for the financially well off. It should in principle be open to all potential beneficiaries."*⁵³

52 UK Strategy Unit Report, *Private Action, Public Benefit: A Review of Charities and the Wider Not-For-Profit Sector* (Sep 2002), at 41.

53 Same as above, at 37.

"Public benefit" rather than "altruism"

5.48 It has always been emphasised in case law that "public benefit" is central to charity, but this is different from "altruism". The significance of the public benefit requirement rather than "altruism" is highlighted in the UK Strategy Unit's report:

"The Government considers that public benefit should continue to be one of the essential requirements of charitable status. Both the recent report by the National Council for Voluntary Organisations on the definition of charity,⁵⁴ and the Scottish McFadden report,⁵⁵ reiterate the central importance of public benefit to the concept of charity. A recent opinion poll conducted by NCVO confirmed that 88% of those asked agreed that a registered charity should be able to demonstrate that its activities provide a benefit to society. The response was particularly strong amongst 18-24 year olds, where 95% agreed.

Although the acceptable level of public benefit can be difficult to judge, this does not diminish its relevance. Removing this concept from the definition of what is charitable and replacing it or combining it with another, untested concept - such as altruism as has been suggested in Australia⁵⁶ - would create unacceptable uncertainty in law, and would have few advantages."⁵⁷

"Charitable purposes" rather than "charitable activities"

5.49 It has also been observed that "charitable purposes" should be emphasised, rather than "charitable activities". The UK Strategy Unit report discussed this issue:

"Some have argued that the best way to emphasise public benefit would be to base charitable status on activities, rather than purposes. However, the main advantage of focusing on stated purposes is that it allows for flexibility in how the organisation chooses to achieve these purposes. This gives organisations the independence to undertake the activities they deem most effective in achieving their purposes, as well as the flexibility to respond to problems in new and innovative ways. It is not widely appreciated, however, that the tax reliefs associated with charitable status already depend on funds being applied to

54 National Council of Voluntary Organisations, *For the Public Benefit? A Consultation Document on Charity Law Reform* (2001).

55 Scottish Executive, *The Report of the Scottish Charity Law Review Commission* (2001) (known as "The McFadden report" after the Chair, Jean McFadden).

56 Committee of Inquiry, *Report of the Inquiry into the Definition of Charities and Related Organisations* (Jun 2001).

57 UK Strategy Unit Report, *Private Action, Public Benefit: A Review of Charities and the Wider Not-For-Profit Sector* (Sep 2002), at 39.

charitable purposes. A stricter activities test would also imply a degree of state oversight and control of voluntary organisations that would be onerous and stifling of initiative and innovation."⁵⁸

Other considerations

Ensure all currently charitable purposes included

5.50 We have discerned no reason for excluding any existing charitable purposes from the statutory definition. Thus in drawing up a statutory definition of charitable purposes for Hong Kong, care should be taken to ensure that the definition does not exclude any purposes which are currently charitable. At the same time, any expansion of the definition to include purposes which are not currently charitable should proceed cautiously, with due consideration being given to possible implications for government resources in terms both of subventions and loss of tax revenue.

5.51 A report by the UK Home Office in 2003 considered that *"the specific purposes contained in the list [of charitable purposes] should reflect major areas of charitable endeavour which have, or should have, strong public recognition."*⁵⁹ Adopting that reasoning, it could be argued that the purposes to be specifically listed in a statutory definition for Hong Kong should reflect major areas of charitable endeavour here which have, or should have, strong public recognition.

Existing case law

5.52 As noted by the UK Strategy Unit in its report, although the existing law may be anomalous, there is also a body of helpful case law that has considered specific questions, such as the scope and meaning of "education" in the context of charity law. As the Strategy Unit's report points out:

*"Removing all reference to existing case law would create significant uncertainty for existing charities, and would mean that many of the same points would have to be unnecessarily explored again by the courts."*⁶⁰

5.53 It is not our intention that existing case law should be done away with, other than where it is clearly at odds with the meaning of the new statutory definition we propose.

58 Same as above, at 38.

59 UK Home Office, *Charities and Not-for-Profits: A Modern Legal Framework, The Government's response to "Private Action, Public Benefit"* (July 2003), at 9.

60 UK Strategy Unit Report, *Private Action, Public Benefit: A Review of Charities and the Wider Not-For-Profit Sector* (Sep 2002), at 41.

Possible reform models: definitions in other jurisdictions

5.54 The Sub-committee has studied various overseas models on the definition of charitable purposes. In doing so, we note our preference for the approaches adopted in England and Wales, and in Scotland. A summary of these approaches is set out below. Details of models adopted in other jurisdictions are discussed in Annex 1 of this paper.

England and Wales

5.55 Section 1 of the English 2006 Act defines a charity to mean:

- "(1) ... an institution which –*
- (a) is established for charitable purposes only, and*
 - (b) falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities.*
- (2) The definition of 'charity' in subsection (1) does not apply for the purposes of an enactment if a different definition of that term applies for those purposes by virtue of that or any other enactment.*
- (3) A reference in any enactment or document to a charity within the meaning of the Charitable Uses Act 1601 (c 4) or the preamble to it is to be construed as a reference to a charity as defined by subsection (1)."*

5.56 Section 2(1) of the English 2006 Act defines a charitable purpose as one which falls within the purposes listed in section 2(2) of the Act, and is for the public benefit. The listed purposes are:

- "(a) the prevention or relief of poverty;*
- (b) the advancement of education;*
- (c) the advancement of religion;*
- (d) the advancement of health or the saving of lives;*
- (e) the advancement of citizenship or community development;*
- (f) the advancement of the arts, culture, heritage or science;*
- (g) the advancement of amateur sport;*

- (h) *the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;*
- (i) *the advancement of environmental protection or improvement;*
- (j) *the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;*
- (k) *the advancement of animal welfare;*
- (l) *the promotion of the efficiency of the armed forces of the Crown, or of the efficiency of the police, fire and rescue services or ambulance services;*
- (m) *any other purposes within subsection (4)."*

5.57 Section 2(3) offers further explanation of some of these purposes in section 2(2) as follows:

- "(a) *in paragraph (c) 'religion' includes —*
 - (i) *a religion which involves belief in more than one god, and*
 - (ii) *a religion which does not involve belief in a god;*
- (b) *in paragraph (d) 'the advancement of health' includes the prevention or relief of sickness, disease or human suffering;*
- (c) *paragraph (e) includes —*
 - (i) *rural or urban regeneration, and*
 - (ii) *the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities;*
- (d) *in paragraph (g) 'sport' means sports or games which promote health by involving physical or mental skill or exertion;*
- (e) *paragraph (j) includes relief given by the provision of accommodation or care to the persons mentioned in that paragraph; and*

- (f) *in paragraph (l) 'fire and rescue services' means services provided by fire and rescue authorities under Part 2 of the Fire and Rescue Services Act 2004 (c 21)."*

5.58 Section 2(4) explains that *"any other purposes"* in section 2(2)(m) above covers:

- "(a) any purposes not within paragraphs (a) to (l) of subsection (2) but recognised as charitable purposes under existing charity law or by virtue of section 1 of the Recreational Charities Act 1958 (c 17);*
- (b) any purposes that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within any of those paragraphs or paragraph (a) above; and*
- (c) any purposes that may reasonably be regarded as analogous to, or within the spirit of, any purposes which have been recognised under charity law as falling within paragraph (b) above or this paragraph."*

5.59 In effect, this means that anything currently regarded as charitable will continue to be so. It is significant, however, that both limbs of the charity test must be satisfied, ie, the charity's purpose must fall within one of the listed categories *and* it must be *"for the public benefit"*. Section 3(2) goes on to state that there is to be no presumption that a particular purpose is for the public benefit. This effectively removes the previous common law presumption that charities for the prevention or relief of poverty, the advancement of education or the advancement of religion were for the public benefit.

5.60 There is no definition of what amounts to *"public benefit"* beyond section 3(3)'s statement that *"any reference to the public benefit is a reference to the public benefit as that term is understood for the purposes of the law relating to charities in England and Wales."*

5.61 The Charity Commission is required by section 4 of the Act to issue guidance on the operation of the public benefit requirement, and must carry out public consultation before it does so.

Scotland

5.62 In order to be registered as a charity under the Charities and Trustee Investment (Scotland) Act 2005 ("the Scottish 2005 Act"), a body must satisfy the *"charity test"* set out in section 7. A body meets this test if:

- "(a) its purposes consist only of one or more of the charitable purposes, and*

- (b) *it provides (or, in the case of an applicant, provides or intends to provide) public benefit in Scotland or elsewhere."*

5.63 Section 7(2) of the Scottish 2005 Act defines "*charitable purposes*" as:

- "(a) the prevention or relief of poverty,*
- (b) the advancement of education,*
- (c) the advancement of religion,*
- (d) the advancement of health,*
- (e) the saving of lives,*
- (f) the advancement of citizenship or community development,*
- (g) the advancement of the arts, heritage, culture or science,*
- (h) the advancement of public participation in sport,*
- (i) the provision of recreational facilities, or the organisation of recreational activities, with the object of improving the conditions of life for the persons for whom the facilities or activities are primarily intended,*
- (j) the advancement of human rights, conflict resolution or reconciliation,*
- (k) the promotion of religious or racial harmony,*
- (l) the promotion of equality and diversity,*
- (m) the advancement of environmental protection or improvement,*
- (n) the relief of those in need by reason of age, ill-health, disability, financial hardship or other disadvantage,*
- (o) the advancement of animal welfare,*
- (p) any other purpose that may reasonably be regarded as analogous to any of the preceding purposes."*

5.64 Section 7(3) of the Act provides further explanation in respect of some of these charitable purposes in section 7(2):

- "(a) *in paragraph (d), 'the advancement of health' includes the prevention or relief of sickness, disease or human suffering,*
- (b) *paragraph (f) includes —*
 - (i) *rural or urban regeneration, and*
 - (ii) *the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities,*
- (c) *in paragraph (h), 'sport' means sport which involves physical skill and exertion,*
- (d) *paragraph (i) applies only in relation to recreational facilities or activities which are –*
 - (i) *primarily intended for persons who have need of them by reason of their age, ill-health, disability, financial hardship or other disadvantage, or*
 - (ii) *available to members of the public at large or to male or female members of the public at large,*
- (e) *paragraph (n) includes relief given by the provision of accommodation or care, and*
- (f) *for the purposes of paragraph (p), the advancement of any philosophical belief (whether or not involving belief in a god) is analogous to the purpose set out in paragraph (c)."*

5.65 Section 8(1) of the Act provides that, for the purposes of deciding whether section 7(1)'s "*charity test*" has been met, no purpose can be presumed to be "*for the public benefit*". Section 8(2) lists the following factors which must be considered in deciding whether a body provides "*public benefit*":

- "(a) *how any –*
 - (i) *benefit gained or likely to be gained by members of the body or any other persons (other than as members of the public), and*
 - (ii) *disbenefit incurred or likely to be incurred by the public,*

in consequence of the body exercising its functions compares with the benefit gained or likely to be gained by the public in that consequence, and

- (b) *where benefit is, or is likely to be, provided to a section of the public only, whether any condition on obtaining that benefit (including any charge or fee) is unduly restrictive."*

Categories of charitable purpose - our proposals

5.66 We concluded and recommended in the earlier part of this chapter that there should be a clear statutory statement of what constitutes a charitable purpose. We noted various issues that were relevant to how this definition should be arrived at and then reviewed possible reform models in other jurisdictions.

5.67 As noted earlier, in devising a definition suitable for Hong Kong, we believe that the legislation in England and Scotland in particular provides a useful starting point, taking account of our shared legal heritage. In the paragraphs which follow, we therefore consider the various categories included in the statutory definition of charitable purposes in these two jurisdictions, and set out our view as to whether or not each of these categories should be included in Hong Kong's statutory definition. (Except where noted, the heading for each part of the discussion below reflects the wording in the Scottish 2005 Act, while aspects of the English 2006 Act which diverge from this are referred to in the discussion under each head.)

"The prevention or relief of poverty"

5.68 Under the charities legislation in both England and Scotland, the first charitable purpose listed is *"the prevention or relief of poverty"*⁶¹.

5.69 In our view, there can be no doubt that the prevention of poverty should be one of the heads of charitable purpose, reflecting the existing common law. However, the question arises as to whether *"relief of poverty"* could be interpreted as *"promotion of wealth"*, rather than *"prevention of poverty."* The argument is in our view academic. In England, *"prevention of poverty"* is understood to include *"preventing those who are poor from becoming poorer and preventing persons who are not poor from becoming poor"*.⁶² The majority of the Sub-committee are of the opinion that *"prevention of poverty"* should be included in the new statutory definition. We recommend that *"the prevention or relief of poverty,"* should be one of the heads of charitable purposes, with the qualification that the *"prevention of*

61 See section 2(2)(a) of the English 2006 Act and section 7(2)(a) of the Scottish 2005 Act.

62 Charity Commission for England and Wales, *Commentary on the Descriptions of Charitable Purposes in the Charities Act 2006* (2009), at: http://www.charity-commission.gov.uk/Charity_requirements_guidance/Charity_essentials/Public_benefit/corcom1.asp

poverty" means to "help those who might fall below the poverty line unless help were given".

"The advancement of education"

5.70 The advancement of education is listed as the second head of charitable purpose under both the Scottish 2005 Act and the English 2006 Act.⁶³

5.71 As we saw earlier, in England and Wales prior to the English 2006 Act, purposes for the advancement of education (or the relief of poverty or the advancement of religion) were presumed to be for the public benefit unless the presumption was rebutted by evidence to the contrary. In other cases, public benefit had to be shown. Part 1 of the English 2006 Act, however, has removed this presumption of public benefit in respect of education (as well as in respect of the relief of poverty and the advancement of religion). As a consequence, *"independent schools"* or *"private schools"* in England and Wales are now subject to the *"public benefit"* test imposed by the English 2006 Act, and must acquire charitable status in order to take advantage of the tax benefit of that status. In this regard, we note the UK Strategy Unit's observations:

*"Some charities charge fees for the provision of services. Charging fees that are affordable to large sections of the population will not affect the public character of the charity. However, those charities that charge have to ensure that they have a public character, that is, that they provide access for those who would be excluded because of the fees. For example, to maintain their charitable status, independent schools which charge high fees have to make significant provision for those who cannot pay full fees and the majority probably do so already."*⁶⁴

5.72 In order to satisfy the public benefit test, independent schools in England have had to do more to share their facilities and expertise with a wider range of children.⁶⁵ This has included the setting up of scholarships and bursaries to provide financial assistance to students who would otherwise not be able to afford the relevant school fees.

5.73 We recommend that the advancement of education should be one of the heads of charitable purpose, reflecting the existing position under common law. Similar to the situation in England and Wales, however, we consider that, in determining whether private schools in Hong Kong are able to

63 See section 2(2)(b) of the English 2006 Act and section 7(2)(b) of the Scottish 2005 Act.

64 UK Strategy Unit Report, *Private Action, Public Benefit, A Review of Charities and the Wider Not-For-Profit Sector* (Sep 2002), at 41.

65 BBC One-minute World News, Mike Baker, "School charity test or class war?" (17 July 2009), at: http://news.bbc.co.uk/2/hi/uk_news/education/8156757.stm

acquire charitable status, their purpose for the advancement of education should also satisfy the requirement for public benefit.⁶⁶

"The advancement of religion"

5.74 Under both section 7(2)(c) of the Scottish 2005 Act and section 2(2)(c) of the English 2006 Act, *"the advancement of religion"* is stated as one of the charitable purposes. Section 2(3) of the English 2006 Act further explains that *"religion" includes —*

- (i) *a religion which involves belief in more than one god, and*
- (ii) *a religion which does not involve belief in a god."*

This implies that *"religion"* for the purposes of the English legislation may involve belief either in no god, one god, or more than one god.

5.75 The further clarification provided under the Scottish 2005 Act is expressed differently. Section 7(3)(f) states that, *"... the advancement of any philosophical belief (whether or not involving belief in a god) is analogous to the purpose set out in paragraph (c) [the advancement of religion]."*

5.76 While we observe that the advancement of religion is included as a charitable purpose in existing common law and most statutory definitions, we note that a number of jurisdictions have included additional clarification of what amounts to *"religion"*. We favour the inclusion of the advancement of religion as a charitable purpose. We also note that the *"advancement"* of religion could be said to imply some element of proselytising, rather than the mere maintenance of belief or the enhancement of religious knowledge. It may be that some other form of words should encapsulate this particular purpose. We are of the view that, as with the advancement of education, purposes for the advancement of religion should also satisfy the public benefit test.

"The advancement of health"

5.77 In the Scottish 2005 Act, *"the advancement of health"* appears in section 7(2)(d) as one head of charitable purpose, while section 7(2)(e) lists *"the saving of lives"* as another. In contrast, section 2(2)(d) of the English 2006 Act combines *"the advancement of health or the saving of lives"* as one head of charitable purpose. We note also that both the Scottish and English legislation defines *"the advancement of health"* to include *"the prevention or relief of sickness, disease or human suffering"*.⁶⁷

66 The Sub-committee notes that it has recently been reported that a famous overseas private school plans to set up a private school in Hong Kong. At the date of publication of this paper, it is unknown as to whether this school will, in due course, apply for charitable status.

67 See section 2(3)(b) of the English 2006 Act and section 7(3)(a) of the Scottish 2006 Act.

5.78 In England and Wales, the English Charity Commission has also issued guidance on the meaning of the charitable purpose *"the advancement of health and the saving of lives"* in section 2(2)(d) of the English 2006 Act. In relation to the first part of this head, *"the advancement of health"*, the Commission's guidance states that:

"1. The advancement of health includes the prevention or relief of sickness, disease or human suffering, as well as the promotion of health. It includes conventional methods as well as complementary, alternative or holistic methods which are concerned with healing mind, body and spirit in the alleviation of symptoms and the cure of illness. To be charitable there needs to be sufficient evidence of the efficacy of the method to be used. Assessing the efficacy of different therapies will depend upon what benefits are claimed for it (i.e. whether it is diagnostic, curative, therapeutic and/or palliative) and whether it is offered as a complement to conventional medicine or as an alternative. Each case is considered on its merits but the House of Lords Report on complementary and alternative medicine^[68] provides a useful guide.

2. The relief of sickness extends beyond the treatment or provision of care, such as a hospital, to the provision of items, services and facilities to ease the suffering or assist the recovery of people who are sick, convalescent, disabled or infirm or to provide comforts for patients."⁶⁹

5.79 In line with the Scottish approach, we recommend that *"the advancement of health"*, as a separate head, should be one of the categories of charitable purposes. We also consider that an express explication that this head includes *"the prevention or relief of sickness, disease or human suffering"* should be included in Hong Kong's definition.

"The saving of lives"

5.80 Under section 7(2)(e) of the Scottish 2005 Act, *"the saving of lives"* is set out as a separate head of charitable purpose. The Scottish Charity Regulator has stated that it considers that this:

"... includes a range of activity directed towards saving people whose lives are in danger and protecting life. Activities in pursuit of this purpose might include the provision of rescue

68 House of Lords, *Science and Technology: Sixth Report: Complementary and Alternative Medicine* (21 Nov 2000), available at:
<http://www.publications.parliament.uk/pa/ld199900/ldselect/ldscitech/123/12302.htm#a1>

69 See Charity Commission website at:
http://www.charity-commission.gov.uk/Charity_requirements_guidance/charity_essentials/public_benefit/Advancement_of_health.aspx

*services or training in first aid or other life-saving techniques."*⁷⁰

5.81 As noted earlier, section 2(2)(d) of the English 2006 Act sets out the combined head of *"the advancement of health or the saving of lives"* as one of the charitable purposes. The English Charity Commission's guidance on the meaning of *"the advancement of health and the saving of lives"* states that:

"The saving of lives includes a range of charitable activity directed towards saving people whose lives are in danger and protecting life and property.

Examples of the sorts of charities and charitable purposes falling within this description include:

charities that provide (conventional and/or complementary, alternative or holistic) medical treatment, care and healing, such as hospitals and healing centres, and charities supporting their work or associated with them, e.g. Hospital Leagues of Friends;
charities that provide comforts, items, services and facilities for people who are sick, convalescent, disabled or infirm, e.g. Hospital Radio;
medical research charities;
charities that provide services and facilities for medical practitioners, such as homes for nurses;
charities that ensure the proper standards of medical practice, e.g. the General Medical Council;
charities that promote activities that have a proven beneficial effect on health;
charities that provide rescue services, such as lifeboats, mountain rescue, fire, ambulance, air ambulance and first aid services, or which assist the work of the police and rescue services for example by providing emergency radio communication at national and local disasters;
charities set up to assist the victims of natural disasters or war;
the provision of life saving or self defence classes;
*the provision of blood transfusion services."*⁷¹

5.82 In line with the approach under the Scottish legislation, we recommend that *"the saving of lives"*, as a separate head, should be one of the categories of charitable purposes.

70 Office of the Scottish Charity Regulator, *Meeting the Charity Test, Draft Guidance for Consultation*, Jan 2008.

71 Charity Commission for England and Wales, *Guidance on the Advancement of health or the saving of lives*, available at:
http://www.charity-commission.gov.uk/charity_requirements_guidance/Charity_essentials/public_benefit/Advancement_of_health.aspx.

"The advancement of citizenship or community development"

5.83 Under section 7(2)(f) of the Scottish 2005 Act, *"the advancement of citizenship or community development"* is one of the charitable purposes. Section 7(3)(b) further explains that this head includes:

- "(i) rural or urban regeneration, and*
- (ii) the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities."*

5.84 Identical provisions appear in the English 2006 Act.⁷² As has been observed by the English Charity Commission, the advancement of citizenship or community development covers a broad group of charitable purposes directed towards support for social and community infrastructure which is focused on the community rather than the individual.⁷³ Examples of the types of charities and charitable purposes belonging to this category include the promotion of civic responsibility and good citizenship (such as good citizenship award schemes, Scout and Guide groups), the promotion of urban and rural regeneration,⁷⁴ the promotion of volunteering and the promotion of the voluntary sector⁷⁵ and the promotion of the efficiency and effectiveness of charities and the effective use of charitable resources.⁷⁶

72 See sections 2(2)(e) and 2(3)(c) of the English 2006 Act.

73 Charity Commission for England and Wales, *Guidance on Charitable Purposes*, available at: http://www.charitycommission.gov.uk/Charity_requirements_guidance/charity_essentials/public_benefit/Advancing_community_development.aspx

74 The Charity Commission issued a guidance note (RR 2) to explain the extent to which the promotion of urban and rural regeneration is charitable for the public benefit. *"Charitable regeneration organisations can achieve this by the maintenance or improvement of the physical, social and economic infrastructure and by assisting people who are at a disadvantage because of their social and economic circumstances. Regeneration organisations might do some, or all, of the following:*

- provide financial or other assistance to people who are poor;*
- provide housing for those in need and help to improve housing standards generally in those parts of an area of deprivation where poor housing is a problem;*
- help unemployed people find employment;*
- provide education, training and re-training opportunities and work experience, especially for unemployed people;*
- provide financial or technical assistance or advice to new business or existing business where it would lead to training and employment opportunities for unemployed people;*
- provide land and buildings on favourable terms to business in order to create training and employment opportunities for unemployed people;*
- provide, maintain and improve roads and accessibility to main transport routes;*
- provide, maintain and improve recreational facilities;*
- preserve buildings in the area which are of historic or architectural importance;*
- provide public amenities."*

Available at: http://www.charitycommission.gov.uk/Charity_requirements_guidance/charity_essentials/public_benefit/Advancing_community_development.aspx

75 The Charity Commission issued a guidance note (RR 13) to explain the extent to which the promotion of the voluntary sector for the public benefit is charitable, available at: http://www.charitycommission.gov.uk/Charity_requirements_guidance/charity_essentials/public_benefit/Advancing_community_development.aspx

76 The Charity Commission issued a guidance note (RR 14) to provide criteria for determining when organisations concerned with promoting the efficiency and effectiveness of charities and

5.85 We agree and recommend that this should be one of the heads of charitable purposes included in the definition.

"The advancement of the arts, heritage, culture or science"

5.86 Under section 7(2)(g) of the Scottish 2005 Act, *"the advancement of the arts, heritage, culture or science"* is one of the heads of charitable purpose. An almost identical head appears in section 2(2)(f) of the English 2006 Act, except that the words *"heritage"* and *"culture"* have been transposed.

5.87 The advancement of the arts covers a wide range of charitable activities, including promoting various forms of art at a national, professional and local and amateur level, the provision of arts facilities and encouraging high standards of art. *"Culture"* is a broad term often used in the context of advancing art or heritage. *"Heritage"* might be regarded as part of a country's local or national history and traditions which are passed down through successive generations. Advancing heritage includes charities for the preservation of historic land and buildings. The advancement of science includes scientific research and charities connected with various learned societies and institutions. Examples of the sorts of charities and charitable purposes falling within this head include art galleries, arts festivals and arts councils, charities that promote or encourage high standards of, the arts of drama, ballet, music, singing and so on, the promotion of crafts and craftsmanship and scientific research projects.⁷⁷

5.88 We agree that this should be one of the heads of charitable purposes and so recommend.

"The advancement of public participation in sport"

5.89 At common law, the promotion of sport *per se*, irrespective of whether or not it relates to one, or more than one, kind of sport, is not charitable. For example, in *In re Nottage*⁷⁸ it was held that a gift for the encouragement of a mere sport, though it might be beneficial to the public, could not be upheld as charitable. Both the English and Scottish legislation,

the effective use of charitable resources for the benefit of the public can themselves be regarded as charitable. This guidance is concerned with organisations that offer services or support to charities or whose activities will assist non-charitable, as well as charitable, organisations to employ their resources more effectively to achieve exclusively charitable purposes.

Available at: http://www.charitycommission.gov.uk/Charity_requirements_guidance/charity_essentials/public_benefit/Advancing_community_development.aspx

77 The Charity Commission of England and Wales, *Guidance on the advancement of the arts, culture, heritage or science*, available at:

http://www.charity-commission.gov.uk/Charity_requirements_guidance/charity_essentials/public_benefit/Advancement_of_the_arts.aspx

78 [1895] 2 Ch 649.

however, now includes a specific charitable head relating to sports, each Act adopting a slightly different form of words.

5.90 Section 7(2)(h) of the Scottish 2005 Act cites "*the advancement of public participation in sport*", while in England, section 2(2)(g) of the English 2006 Act refers to "*the advancement of amateur sport*". In the case of the English head, section 2(3)(d) explains that "*sport*" means "*sports or games which promote health by involving physical or mental skill or exertion*".⁷⁹ In relation to the Scottish head, section 7(3)(c) of the Scottish 2005 Act states that "*sport*" in section 7(2)(h) means "*sport which involves physical skill and exertion*".

5.91 We have considered whether a head along the lines of one or other of the UK's statutory formulations should be included within Hong Kong's new definition of charitable purposes and have concluded that it should not for two reasons. First, a number of charities that could fall within such a head would be covered already by other heads of charitable purpose. For example, whilst bodies whose sole object is the promotion of sport are not regarded as charitable for tax exemption purposes by the Hong Kong Inland Revenue Department, the Department considers organisations established for the purpose of "*the promotion of public participation in recreation/sport to promote health*" to be charitable, as their purpose would be for "*the advancement of health*" which falls within the fourth head of the *Pemsel* case (namely, "*other purposes beneficial to the community not falling under any of the preceding heads*"). We have already recommended (at paragraph 5.79 above) that the new legislative definition of charitable purposes should include a specific head for "*the advancement of health*", confirming and continuing existing practice.

5.92 Secondly, we are concerned that if "*the advancement of public participation in sport*" were to be added as a head of charitable purpose, some organisations not previously considered as charities may become eligible to be so designated, with consequential tax implications. The Sub-committee accordingly considers that a separate head relating to sports along the lines of the Scottish or English provisions should not be included in the new statutory definition.

79 According to the *Guidance on The advancement of amateur sport* issued by the Charity Commission, examples of the sorts of charities and charitable purposes falling within this description include charities advancing sport at a local club, eg, local football, rugby, tennis clubs etc, multisports centres and other organisations concerned with the promotion of a particular amateur sport or game, available at: http://www.charity-commission.gov.uk/Charity_requirements_guidance/charity_essentials/public_benefit/Advancing_amateur_sport.aspx.

"The provision of recreational facilities, or the organisation of recreational activities, with the object of improving the conditions of life for the persons for whom the facilities or activities are primarily intended"

5.93 Section 1(1) of the Recreational Charities Act 1958⁸⁰ in the UK provides that it shall be deemed to be charitable:

"to provide, or assist in the provision of, facilities for recreation or other leisure-time occupation, if the facilities are provided in the interests of social welfare."

Section 1(2) provides that facilities will not be considered to have been provided in the interests of social welfare unless they are *"provided with the object of improving the conditions of life for the persons for whom the facilities are primarily intended"* and either:

- "(i) those persons have need of such facilities as aforesaid by reason of their youth, age, infirmity or disablement, poverty or social and economic circumstances; or*
- (ii) the facilities are to be available to the members or female members of the public at large."*

5.94 The Scottish 2005 Act re-stated this charitable purpose in slightly different (and gender-neutral) form but the effect remains broadly the same. Section 7(2)(i) of the 2005 Act includes in the list of charitable purposes:

"the provision of recreational facilities, or the organisation of recreational activities, with the object of improving the conditions of life for the persons for whom the facilities or activities are primarily intended".

Section 7(3)(d) further provides that recreational facilities or activities will only be considered charitable if they are:

- "(i) primarily intended for persons who have need of them by reason of their age, ill-health, disability, financial hardship or other disadvantage, or*
- (ii) available to members of the public at large or to male or female members of the public at large."*

5.95 The inclusion of this charitable purpose in the Scottish legislation ensures continuity with the Recreational Charities Act 1958 and so ensures

80 It should be noted that this 1958 Act is likely to be repealed as part of a consolidation of charities legislation now comprised in a new Charities Bill put before the UK Parliament in March 2011. The Bill includes the provisions discussed above and others from the Recreational Charities Act 1958, the Charities Act 1993 and the Charities Act 2006, leading to the repeal of the former two Acts and some sections (sections 1 to 9 and 11 to 44) and some Schedules of the Charities Act 2006.)

that purposes that were regarded by HM Revenue and Customs as charitable under the 1958 Act in Scotland will continue to be charitable.⁸¹

5.96 Where a body only provides facilities or activities to a limited section of the public and not to the (male or female) public as a whole, that section of the public must be defined in terms of need as set out in section 7(3)(d)(i) of the Act if the body's purposes are to qualify as charitable, and the body must then demonstrate that the benefit is being provided primarily to that section of the public. An example would be a club providing recreational or sporting facilities for teenagers with learning difficulties.⁸²

5.97 The English legislation takes a somewhat different approach to that of the Scottish 2005 Act but its effect is also to ensure that purposes deemed charitable under the 1958 Act remain so. Instead of incorporating a provision in similar terms to section 1 of the Recreational Charities Act 1958, the English 2006 Act provided by section 2(4) that any purposes recognised as charitable by virtue of section 1 of the 1958 Act continue to be so treated.

5.98 Hong Kong has no legislation equivalent to the Recreational Charities Act 1958 to determine whether or not the provision of particular recreational facilities amounts to a charitable purpose or not and must instead rely on the common law. The Recreational Charities Act 1958 was passed to confirm the charitable status of a wide range of recreational organisations, previously treated as charitable, whose position was in doubt following the decision of the House of Lords in *Commissioner of Inland Revenue v Baddeley*.⁸³ The purpose of the Act was essentially corrective: it was not intended to extend charitable status to a wider range of recreational organisations, but to restore the position which existed before the House of Lords' decision.

5.99 At common law, it may be that the provision of recreational facilities would be regarded in certain circumstances as charitable, as being conducive to "*the advancement of health*", which falls within the fourth head of the *Pemsel* case. Under the existing practice adopted by the Inland Revenue Department in Hong Kong, bodies providing purely recreational facilities for sports, such as tennis, rugby, and so on, are not treated as charitable.

5.100 There are practical problems in including in the new statutory list of charitable purposes a head which could widen the scope of charity beyond the bounds set by current practice. In the absence of a definition of what constitutes "*recreational facilities*" for charitable purposes it is possible that, for instance, commercial ventures or facilities of doubtful public benefit might fall within the new head. Recreational purposes or facilities that may be regarded as deserving of charitable status are likely to be covered by the other proposed heads such as advancement of health or advancement of

81 Office of the Scottish Charity Regulator, *Meeting the Charity Test, Draft Guidance for Consultation*, Jan 2008.

82 Office of the Scottish Charity Regulator, *Meeting the Charity Test, Draft Guidance for Consultation*, Jan 2008.

83 [1955] AC 572.

community development. On balance, therefore, the Sub-committee is of the view that this should not be one of the heads of charitable purposes under the new statutory definition.

"The advancement of human rights, conflict resolution or reconciliation"

5.101 Section 2(2)(h) of the English 2006 Act includes within the list of charitable purposes *"the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity."* Section 7(2) of the Scottish legislation splits this omnibus head into three separate parts:

- "(j) the advancement of human rights, conflict resolution or reconciliation,*
- (k) the promotion of religious or racial harmony,*
- (l) the promotion of equality and diversity".*

We prefer the Scottish approach and have separated our consideration of these issues accordingly.

5.102 *"The advancement of human rights, conflict resolution or reconciliation"* are all areas of increasing importance and public concern. In the charitable context, however, a distinction must be drawn between activities in these areas which are for political purposes and those which are not. The former will not be considered charitable. Unfortunately, although the law is clear that charities must not have political objects, there is little direct guidance from the courts on how the line is to be drawn between activities by charities in a political context in pursuance of their charitable objects, which are permissible, and those which have become "too political" and do not qualify as charitable.⁸⁴ An early authority is the House of Lords decision in *Bowman v Secular Society Ltd*, where Lord Parker of Waddington stated the general principles to be applied as follows:

*"[A] trust for the attainment of political objects has always been held invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift."*⁸⁵

5.103 In *McGovern v Att-Gen*, Slade J stated that:

"[T]he court will not regard as charitable a trust of which a main object is to procure an alteration of the law of the United Kingdom for one or both of two reasons: first, the court will

84 The Charity Commission for England and Wales, CC 9 - *Campaigning and Political Activities by Charities* (Version March 2008).

85 [1917] AC 406, at 442.

*ordinarily have no sufficient means of judging as a matter of evidence whether the proposed change will or will not be for the public benefit. Secondly, even if the evidence suffices to enable it to form a prima facie opinion that a change in the law is desirable, it must still decide the case on the principle that the law is right as it stands, since to do otherwise would usurp the functions of the legislature."*⁸⁶

5.104 Slade J summarised his conclusions in relation to trusts for political purposes in the following terms:

"(1) Even if it otherwise appears to fall within the spirit and intendment of the preamble to the Statute of Elizabeth, a trust for political purposes falling within the spirit of Lord Parker's pronouncement in Bowman's case can never be regarded as being for public benefit in the manner which the law regards as charitable.

*(2) Trusts for political purposes falling within the spirit of this pronouncement include, inter alia, trusts of which a direct and principal purpose is either (i) to further the interests of a particular political party; or (ii) to procure changes in laws of this country; or (iii) to procure changes in the laws of a foreign country; or (iv) to procure a reversal of government policy or of particular decisions of governmental authorities in this country; or (v) to procure a reversal of government policy or of particular decisions of governmental authorities in a foreign country."*⁸⁷

5.105 More recently, the English Charity Commission has issued a guideline under CC 9 - *Campaigning and Political Activities by Charities* (March 2008)⁸⁸ which seeks to provide guidance to charity trustees on the extent to which they may properly engage in activities of a political nature. The Charity Commission states that the guidelines are under constant review to ensure that they are developed appropriately in the light of its experience of their impact upon the activities of charities.⁸⁹ This guideline (which replaces the earlier version of CC 9 (2004) and the Questions and Answers on CC 9 (2007)) focuses on the freedoms and possibilities for charities to engage in campaigning and other types of political activities, and on the restrictions and risks that trustees must bear in mind.

5.106 At the heart of the guideline is the principle that an organisation cannot be charitable if the purposes or objects of the organisation itself are political. A political purpose, according to the guideline, means any purpose directed at furthering the interests of any political party, or securing or

86 [1982] Ch 321, at 336, 337.

87 [1982] Ch 321 at 340.

88 The Charity Commission for England and Wales, *CC 9 - Campaigning and Political Activities by Charities* (March 2008), available at: <http://www.charity-commission.gov.uk/Publications/cc9.aspx>

89 The Charity Commission for England and Wales, *CC 9 - Campaigning and Political Activities by Charities* (Version March 2008).

opposing any change in the law or in the policy or decisions of central government, local authorities or other public bodies, whether in the United Kingdom or abroad.

5.107 The definitions of "*campaigning*" and "*political activity*" for the purpose of the guideline, and based on charity law, are provided in Section C4 of CC 9. The word "*campaigning*" refers to "*awareness-raising and to efforts to educate or involve the public by mobilising their support on a particular issue, or to influence or change public attitudes.*" It also refers to "*campaigning activity which aims to ensure that existing laws are observed.*" This is distinguished from an activity which involves trying to secure support for, or oppose, a change in the law or in the policy or decisions of central government, local authorities or other public bodies, whether in the United Kingdom or abroad, and which is referred to in the guideline as "*political activity*".

5.108 The guideline states that "*campaigning*" and "*political activity*" can be legitimate and valuable activities for charities to undertake. However, the particular political campaigning or political activity must be undertaken by a charity *only in the context of supporting the delivery of its charitable purposes*. Examples of campaigning which are considered charitable activities might include:

- a health charity promoting the benefits of a balanced diet in reducing heart problems;
- a refugee charity, emphasising the positive contribution that refugees have made to society and calling for Government to enforce existing legislation that supports the rights of refugees;
- a children's charity, drawing attention to the dangers of domestic violence and child abuse; or
- a human rights charity calling on a government to observe certain fundamental human rights, and for the practice of torture to be abolished.

5.109 An activity aimed at ensuring that an existing law is observed would fall under "*campaigning*", while an activity to preserve an existing piece of legislation, where a charity opposes its being repealed or amended, would fall under "*political activity*". The Charity Commission's guideline observes that there may be situations where the carrying out of a political activity is the best way for charity trustees to support the charity's purposes, and a charity may choose to focus most or all of its resources on political activity for a period. However, the key issue for charity trustees is the need to ensure that this activity is not, and does not become, the reason for the charity's existence.⁹⁰

5.110 Notwithstanding this attempt by the English Charity Commission to clarify the distinction, it is clear that the line is very fine indeed between

90 The Charity Commission for England and Wales, CC 9 - *Campaigning and Political Activities by Charities* (March 2008), available at: <http://www.charity-commission.gov.uk/Publications/cc9.aspx>

activities which are political, but which can be carried out nonetheless by a charity in the context of supporting the delivery of its charitable purposes, and those activities which have political objects and cannot be carried out by a charity. The reality is that it will often be difficult to distinguish between the two kinds of activities and we accept that this is an area which may give rise to uncertainty and ambiguity.

5.111 A recent landmark appeal case in Australia has shown that fundamentally different approaches can be taken on this issue in different common law jurisdictions. In the 2010 case of *Aid/Watch Incorporated v Commissioner of Taxation*,⁹¹ the High Court of Australia (following a series of conflicting lower level findings on the issue⁹²) held that it was possible for an organisation to be regarded as charitable even though it had "*political objects*", as long as it was regarded as fulfilling a purpose beneficial to the community within the fourth head in the *Pemsel* case. Aid/Watch had the stated object of promoting greater efficiency and effectiveness of foreign aid. In the High Court judgment, the court found that the generation of public debate by lawful means about the efficiency of foreign aid which was directed to the relief of poverty was itself a purpose beneficial to the community within the fourth head in the *Pemsel* case. The court also decided that in Australia, unlike England, there was no general doctrine which excluded from charitable purposes "*political objects*" (as was indicated in the English decision in *McGovern v Attorney-General*). Therefore, an organisation's purposes should not be disqualified from being charitable by the application of a broadly expressed "*political objects*" doctrine.

5.112 The Sub-committee has no difficulty with the proposition that the advancement of human rights can well be charitable. We note, however, the view that there is a need to distinguish charitable from political purposes and the difficulty of defining the distinction. We invite comments specifically on whether this particular category should be included in the statutory definition and how it should be defined.

"The promotion of religious or racial harmony"

5.113 Section 7(2)(k) of the Scottish 2005 Act includes "*the advancement of religious or racial harmony*" as one of the charitable purposes. As noted earlier, section 2(2)(h) of the English 2006 Act includes this head

91 [2010] HCA 42.

92 From 14 July 2000, Aid/Watch Incorporated was endorsed as a "*charitable institution*" and thus an entity exempt from income tax liability under the Income Tax Assessment Act 1997 (Cth). It was also endorsed as a "*charitable institution*" for the purposes of the Fringe Benefits Tax Assessment Act 1986 (Cth) and the A New Tax System (Goods and Services Tax) Act 1999 (Cth). These endorsements were revoked by the the Commissioner of Taxation with effect from 2 October 2006. Aid/Watch subsequently lodged an objection to the revocations, which was disallowed by the Commissioner on 6 March 2007. On 28 July 2008, the Administrative Appeals Tribunal ("the AAT") set aside the decision of the Commissioner and determined that Aid/Watch was a "*charitable institution*" within the meaning of the relevant legislation. Upon appeal by the Commissioner, the Full Court of the Federal Court set aside the decision of the AAT and affirmed the objection decision of the Commissioner. Aid/Watch then appealed to the High Court of Australia, where, in *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42, the appeal was allowed and the decision of the AAT was restored.

within the combined head of *"the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity"*.

5.114 Under the existing practice adopted by the Inland Revenue Department in Hong Kong, bodies whose object is *"the promotion of religious or racial harmony"* are treated as charitable. We consider that the present practice should continue and recommend that this should be one of the heads of charitable purposes.

"The promotion of equality and diversity"

5.115 As with the previous head, section 7(2)(l) of the Scottish 2005 Act includes *"the promotion of equality and diversity"* as one of the charitable purposes, while this is included in section 2(2)(h) of the English 2006 Act under the combined head of *"the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity"*.

5.116 Under the existing practice adopted by the Inland Revenue Department in Hong Kong, bodies whose object is *"the promotion of equality and diversity"* are treated as charitable. We consider that the present practice should continue and recommend that this should be one of the heads of charitable purposes.

"The advancement of environmental protection or improvement"

5.117 Section 7(2)(m) of the Scottish 2005 Act provides that *"the advancement of environmental protection or improvement"* as one of the charitable purposes. An identical purpose is provided under section 2(2)(i) of the English 2006 Act.

5.118 Under the existing practice adopted by the Inland Revenue Department in Hong Kong, bodies whose object is *"the advancement of environmental protection or improvement"* are treated as charitable. We consider that the present practice should continue and recommend that this should be one of the heads of charitable purposes.

"The relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage"

5.119 This head of charitable purpose is set out in section 7(2)(n) of the Scottish 2005 Act. Section 7(3)(e) further explains that section 7(2)(n) includes *"relief given by the provision of accommodation or care"*. An identical head of charitable purpose is included in section 2(2)(j) of the English 2006 Act with a similar elaboration in section 2(3)(e) of the Act.

5.120 Under the existing practice adopted by the Inland Revenue Department in Hong Kong, bodies whose object is *"the relief of those in need by reason of youth, age, ill-health, disability financial hardship or other disadvantage"* are treated as charitable. We consider that the present practice should continue and recommend that this should be one of the heads of charitable purposes.

"The advancement of animal welfare"

5.121 The charitable purpose of *"the advancement of animal welfare"* is listed as one of the charitable purposes both in section 7(2)(o) of the Scottish 2005 Act and section 2(2)(k) of the English 2006 Act. At common law, the advancement of animal welfare is regarded as falling within the fourth charitable head of the *Pemsel* case. Accordingly, under the existing practice adopted by the Inland Revenue Department in Hong Kong, bodies whose object is *"the advancement of animal welfare"* are charitable.

5.122 We are of the view and recommend that this should remain as a charitable purpose under the new statutory definition.

"Any other purpose that may reasonably be regarded as analogous to any of the preceding purposes"

5.123 Section 2(2)(m) of the English 2006 Act includes as one of the heads of charitable purposes *"any other purposes that are recognized as charitable"*. Section 2(4)(a) of the Act provides that *"any other purposes"* covers any purposes not within the other charitable heads but which are recognised as charitable purposes under existing charity law. Section 2(4)(b) and (c) provides that *"any other purposes"* are purposes that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within the other defined heads (for section 2(4)(b)), or which have been recognised under charity law as falling within paragraph (b) (for section 2(4)(c)). In other words, under section 2(4)(a) of the English 2006 Act, all the charitable purposes previously accepted would still be considered as charitable after enactment of the Act in 2006.

5.124 Section 2(4)(a) of the English 2006 Act refers to what are recognised as charitable purposes according to both charity (common) law and section 1 of the Recreational Charities Act 1958, but not the charitable purposes listed in section 2(2)(a) to (l). In contrast, section 2(4)(b) and (c) refers to what are regarded as *"analogous to or within the spirit of"* any purposes recognised as charitable purposes under the heads in section 2(2)(a) to (l), charity (common) law *and* the Recreational Charities Act 1958. The scope of section 2(4) is therefore very wide.

5.125 In Scotland, the various charitable purposes are set out at section 7(2)(a) to (p) of the Scottish 2005 Act. A 'catch all' provision at section 7(2)(p) includes *"any other purpose that may reasonably be regarded*

as analogous to any of the preceding purposes". It would appear that *"any analogous purpose"* must be in relation to the heads already provided in section 7(2)(a) to (o), as there is no reference in the legislation to any other legislation, or existing charity law under the common law. (The only refinement to this appears to be section 7(3)(f) of the Scottish 2005 Act, which provides that *"for the purposes of paragraph (p), the advancement of any philosophical belief (whether or not involving belief in a god) is analogous to the purpose set out in paragraph (c)"*, ie, *"the advancement of religion"*.) The scope of charitable purposes provided under the Scottish Act would therefore appear to be much more restrictive than the English provision.

5.126 In Ireland, the relevant legislation in essence used the four categories derived from the *Pemsel* case. In section 3(1)(d) of the Irish Charities Act 2009, *"any other purpose that is of benefit to the community"* is one of the four charitable purposes. Section 3(11) offers some guidance as to what amounts to a *"purpose that is of benefit to the community"* for the purposes of section 3(1)(d), and considerably extends the scope of *"charitable purpose"* beyond the advancement of education and religion and the prevention or relief of poverty or economic hardship set out in section 3(1).

5.127 Under the existing practice adopted by the Inland Revenue Department in Hong Kong, bodies whose purposes fall within the fourth head of the *Pemsel* case (ie, purposes beneficial to the community not falling under the heads of relief of poverty, advancement of education or the advancement of religion) are charitable.

5.128 The Sub-committee discussed at length the contrasting scope of this head under common law principles and the UK statutory models. We think it important to allow sufficient flexibility to enable the scope of charitable purpose to adjust to meet social and economic changes, while at the same time providing sufficient clarity to avoid ambiguity and uncertainty. After careful consideration, we have reached the view that a proper balance is struck by adopting the formula *"any other purpose that is of benefit to the community"*. Given the proposal of a more elaborate list of heads of charitable purposes, we believe that the object of making the law more transparent and accessible is not adversely affected by having a residual head. We therefore recommend that this should be included in the statutory list as a residual head of charitable purpose.

Recommendation 2

We recommend that the statutory definition of what constitutes a charitable purpose that is exclusively charitable should include the following heads:

- (1) The prevention or relief of poverty;⁹³**

93 Subject to further refinements suggested in paragraph 5.69 above.

- (2) The advancement of education;
- (3) The advancement of religion;⁹⁴
- (4) The advancement of health;
- (5) The saving of lives;
- (6) The advancement of citizenship or community development;
- (7) The advancement of arts, culture, heritage or science;
- (8) The promotion of religious or racial harmony;
- (9) The promotion of equality and diversity;
- (10) The advancement of environmental protection or improvement;
- (11) The relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;
- (12) The advancement of animal welfare;
- (13) Any other purpose that is of benefit to the community.

We further recommend that, whichever head of charitable purpose the particular purpose falls under, it must be also for the public benefit.⁹⁵

In relation to *"The advancement of human rights, conflict resolution or reconciliation"*, we welcome the public's views as to whether these purposes should be included in the list of charitable purposes.

⁹⁴ Subject to further refinements suggested in paragraph 5.76 above.

⁹⁵ We note that this would have the effect of removing the present common law presumption that purposes for the relief of poverty, the advancement of education and the advancement of religion are *prima facie* charitable and for the public benefit.

Chapter 6

Conclusions and proposals on the legal structures of charities

Introduction

6.1 In this chapter, we examine in more detail the current position regarding the legal structure of charities, both in Hong Kong and in overseas jurisdictions, and consider possible options for reform.

Current situation in Hong Kong

Types of charitable organisation structure

6.2 As discussed briefly in Chapter 2, a charitable organisation in Hong Kong can take one of a variety of legal forms, including:

- an unincorporated association which may or may not be required to be registered under the Societies Ordinance (Cap 151);
- a trust;
- a company incorporated under the Companies Ordinance (Cap 32), which may be a company limited by shares or by guarantee, or a company incorporated overseas; or
- a statutory body incorporated under a specific Ordinance.

6.3 According to Inland Revenue Department statistics, in December 2007, the distribution of charities across these various legal forms was as follows:

Form	No. of Organisations
Corporation	3,680
Society	626
Trust	406
Others ¹	411
Total	5,123

¹ According to statistics of the Inland Revenue Department, the forms of charities classified as "Others" comprise mostly incorporated management committees (IMC) established under the Education Ordinance (Cap 279). The rest are statutory bodies, *ad hoc* special committees and overseas companies registered under Part XI of the Companies Ordinance (Cap 32).

Societies

6.4 An unincorporated association is a voluntary group of people (members) defined and bound together by a set of rules (often referred to as a constitution) and called by a distinctive name.² Examples of such associations are unincorporated members' clubs, unincorporated charitable institutions and voluntary associations for the purpose of carrying out functions of a social character. Associations of this kind have no legal entity and therefore cannot enter into contracts, sue or be sued, in the association's name or on its behalf (except where such power has been expressly conferred by legislation). Where work has been done for, or goods supplied to, such an association, the question of liability is governed by the rules which apply to contracts made through an agent. The only persons who can be made liable are those who actually gave the order for the work or the goods, or who either expressly or impliedly authorised the giving of the order on their behalf, or who ratified the order after it had been given.³

6.5 An unincorporated association usually continues in existence independently of changes in the composition of its membership.⁴ In order to qualify as a *charitable* unincorporated association, as distinct from other kinds of unincorporated associations, the objects of the association must be restricted to charitable purposes and its rules will contain a dissolution clause requiring surplus property to be given to other charitable purposes rather than be distributed among its members. The main advantages of an unincorporated association as a vehicle to conduct a charity "*are that it is flexible (in that its constitution can be tailored to fit the individual case), inexpensive to run, and free of statutory controls.*"⁵ In Hong Kong, however, such an association may or may not be registered under the Societies Ordinance (Cap 151).

6.6 The Societies Ordinance was first introduced in 1949 in order to govern societies formed in Hong Kong. The Ordinance provided a notification system for the establishment of societies and prohibited the operation of certain societies. Section 5 of the Ordinance requires a local society, within one month of its establishment or deemed establishment, to apply in the specified form to the Societies Officer⁶ of the Hong Kong Police Force for registration or exemption from registration under the Ordinance. A "*local society*" means any society organised and established in Hong Kong or having its headquarters or chief place of business in Hong Kong, and includes any society deemed to be established in Hong Kong.⁷ Two examples of charitable bodies registered as societies under the Societies Ordinance are The Samaritans and the Hong Kong Blind Union.

2 *Re Macaulay's Estate* [1943] Ch 435, at 436.

3 *Halsbury's Laws of Hong Kong – Commentary* (LexisNexis 2009), at para 115.143.

4 G Dal Pont, *Charity Law in Australia and New Zealand* (Oxford University Press 2000), at 365.

5 G Dal Pont, above, at 366.

6 "Societies Officer" means the Societies Officer and any Assistant Societies Officer appointed in accordance with the provisions of section 3 of the Societies Ordinance (Cap 151).

7 Section 2 of the Societies Ordinance (Cap 151).

6.7 A society is deemed to be established in Hong Kong even where it is organised and has its headquarters or chief place of business outside Hong Kong, if any of its office-bearers or members resides in Hong Kong, or if a person in Hong Kong manages or assists in the management of the society, or solicits or collects money or subscriptions in Hong Kong on its behalf.

6.8 The Societies Officer may exempt a society or a branch of the society from registration if he is satisfied that the society or the branch is established solely for religious, charitable, social or recreational purposes, or as a rural committee or a federation or other association of rural committees. The Societies Officer exempts a society by issuing a certificate of exemption from registration in the specified form.

6.9 Under section 5A of the Societies Ordinance, the Societies Officer may, after consultation with the Secretary for Security, refuse to register or to exempt from registration a society or a branch of a society:

- (a) if he reasonably believes that the refusal is necessary in the interests of national security or public safety, public order or the protection of the rights and freedoms of others; or
- (b) if the society or the branch is a political body that has a connection with a foreign political organisation or a political organisation of Taiwan.

6.10 Under section 11 of the Societies Ordinance, the Societies Officer keeps a list of all societies and branches which have been registered or exempted from registration, setting out the names of the societies and the branches, and the respective addresses of the principal places of business of the societies and the branches and the places or premises owned or occupied by the societies. The list kept by the Societies Officer is open to inspection by any person free of charge during officer hours at the Societies Office.

6.11 Under section 15 of the Societies Ordinance, the Societies Officer may at any time require the society to furnish him in writing with such information as he may reasonably require for the performance of his functions under the Ordinance. The information required may include the income, the source of the income and the expenditure of the society or its branch. A society or its branch which has been registered or exempted from registration is also required under section 10 of the Ordinance to inform the Societies Officer in writing within one month if it changes its name, objects, officer-bearers or principal place of business or closes a branch which is registered or exempted from registration under the Ordinance.

A trust

6.12 A trust may be defined as *"the relationship that arises wherever a person (called the trustee) holds property for the benefit of some other persons (who are termed beneficiaries) or for some objects permitted by law, in such a way that the real benefit of the property accrues, not to the trustee, but to the*

*beneficiaries or objects of the trust.*⁸ A trustee owes a fiduciary duty to act in the best interests of the beneficiaries of the trust and to ensure that its assets are protected.

6.13 A charitable trust is a trust formed for charitable purposes. It is usually set up by a group of persons who make a declaration of trust outlining the purposes of the trust. It may also be created by a settlor or testator who transfers or bequeaths funds or property to trustees upon trust for wholly and exclusively charitable purposes.⁹ The governing document of a charitable trust is the trust instrument which sets out the purposes of the trust and the powers of the trustees.¹⁰ In addition to the content of the trust deed, the legal rights, duties, obligations and discretionary powers of trustees, together with limitations on their personal liabilities, may also be prescribed in common law and legislation.¹¹

6.14 To a large extent, charitable trusts are governed by the same principles and body of case law as general trusts. In order to qualify as a valid charitable trust, as distinguished from a valid non-charitable trust, the trust must be created in language sufficient to show the settlor's intention and the subject matter of the gift must be capable of being ascertained. There must also be certainty that all potential objects are charitable.¹²

6.15 The trust law regime in Hong Kong is based on English common law and equity principles supplemented by various Ordinances. Essentially, there are two categories of trust law provisions. The first category comprises "*mandatory*" rules, meaning those statutory provisions which cannot be excluded by the terms of the trust instrument. Examples are the rules against perpetuities and excessive accumulations of income.¹³ The second category is "*non-mandatory*" or "*default*" provisions which apply to the trust if there is no trust instrument or where the trust instrument is silent on a particular issue.¹⁴

6.16 The Trustee Ordinance (Cap 29), which is modelled substantially on the Trustees Act 1925 of the England and Wales, was first enacted in 1934 to supplement and amend the common law relating to trustees, including trustees' powers, the appointment and discharge of trustees and registration of trust companies.¹⁵ Most provisions in the Trustee Ordinance belong to the category of "*non-mandatory*" or "*default*" provisions. Trustees of charitable funds may be trust companies registered under the Trustee Ordinance.

8 Financial Services and the Treasury Bureau, *Review of the Trustee Ordinance and Related Matters: Consultation Paper* (Jun 2009), at para 1.1. The *Consultation Conclusions* to the review were published in February 2010, available at: http://www.fstb.gov.hk/fsb/topical/to_review.htm

9 The Law Reform Commission of Ireland, *Consultation Paper on Charitable Trust Law: General Proposals* (2005, LRC CP 36), at 1.

10 The Law Reform Commission of Ireland, same as above.

11 *Halsbury's Laws of Hong Kong – Commentary* (LexisNexis 2009), at para 335.409.

12 Jean Warburton, *Tudor on Charities* (Sweet & Maxwell 2003, 9th ed), at 134, 137 and 141.

13 See related legislative provisions in the Perpetuities and Accumulations Ordinance (Cap 257).

14 Financial Services and the Treasury Bureau, above, at para 1.3.

15 The Trustee Ordinance (Cap 29), which has not been substantially amended since its enactment, is currently under review: see Financial Services and the Treasury Bureau, above.

6.17 Another Ordinance in this area is the Registered Trustees Incorporation Ordinance (Cap 306). The purpose of this Ordinance is to *"facilitate the incorporation of trustees appointed by certain bodies, associations and communities of persons, and of trustees of charities and to make provision for purposes connected therewith."*¹⁶

6.18 Under section 3 of the Ordinance, the duly appointed trustees of any body of persons or charity may apply to the Registrar of Companies for a certificate of incorporation. This certificate, which is granted by the Chief Executive, may contain any conditions or directions and may be cancelled or amended by the Chief Executive at any time. Under section 4(2) of the Ordinance, the trustees and their successors in office will be a body corporate by the name specified in the certificate and it may sue and be sued, and will have and use a common seal. The Registrar of Companies maintains a register of all such registered trustee corporations which is open to public inspection.

6.19 Not all registered trustee corporations are charitable bodies. Under section 2 of the Ordinance, *"charity"* means any trust or organisation established by deed or otherwise for a charitable purpose.¹⁷ Section 2 also provides that under the Ordinance, *"body of persons"* means (a) any community of persons bound together by custom, religion, kinship, nationality or regional or local interests, or (b) any body or association of persons established for any charitable purpose.¹⁸ An example of a charitable body incorporated under the Registered Trustees Incorporation Ordinance is The Society for the Aid and Rehabilitation of Drug Abusers.

6.20 It should be noted that the act of incorporation does not negate the potential liability of incorporated registered trustees for breaches of trust. Under section 11 of the Ordinance, all trustees constituting the registered corporation are chargeable for the trust property coming into their hands, and are answerable and accountable for their own acts, receipts, act of neglect, and default, and for the due administration of the trusts and trust property in the same manner and to the same extent as if the incorporation had not been effected.

16 See Long Title, Registered Trustees Incorporation Ordinance (Cap 306).

17 *"Charitable purpose"* is defined under section 2 of the Registered Trustees Incorporation Ordinance (Cap 306) to include –

- (a) the relief of poverty;
- (b) the advancement of art, education, learning, literature, science or research;
- (c) the making of provision for –
 - (i) the cure, alleviation or prevention of; or
 - (ii) the care of persons suffering from or subjected to, any disease, infirmity or disability affecting human beings (including the care of women before, during and after child birth);
- (d) the advancement of religion;
- (e) any ecclesiastical purpose;
- (f) the promotion of the moral, social and physical well-being of the community; and
- (g) any other purpose beneficial to the community not specified in paragraphs (a) to (f).

18 *Halsbury's Laws of Hong Kong – Commentary* (LexisNexis 2009), at para 335.409.

A company incorporated under the Companies Ordinance (Cap 32)

6.21 The fundamental difference between a corporation and other business entities is that a corporation is treated in law as a legal person (it is often described as "*an artificial person*" or "*a body corporate*"). The fact of incorporation confers legal personality and a corporation is usually referred to as having a separate legal personality.¹⁹ Accordingly, the law will treat a corporation as independent from the persons who make up the company.²⁰

6.22 Section 21(1) of the Companies Ordinance (Cap 32) states that where it is proved to the satisfaction of the Registrar of Companies that an association about to be formed as a limited company is to be formed for promoting commerce, art, science, religion, charity, or any other useful object, and intends to apply any of its profits or other income in promoting its objects, as well as to prohibit the payment of any dividend to its members, the Registrar may by licence direct that the association be registered as a company with limited liability, without the addition of "*Limited*" to its name in English and/or Chinese.

6.23 Many charitable entities register as a company "*limited by guarantee*", if there is no capital involved, or "*limited by shares*". Similar to the structure of a private limited company, such an organisation will have a Board of Directors, members and a local secretary. The members can either be individuals or corporations.²¹ If a charity is also a limited liability company, it will be required as a matter of course to comply with all the statutory disclosure requirements of the Companies Ordinance (Cap 32). Examples of charitable bodies incorporated under the Companies Ordinance (Cap 32) are the Hong Kong Committee for UNICEF and the Society for the Prevention of Cruelty to Animals (Hong Kong) Trustees Incorporated.

A body corporate incorporated by statute

6.24 There are a number of charitable bodies corporate in Hong Kong which have been established by legislation. The relevant statutes provide for various matters relating to the body corporate, including the objects and powers of the corporation, the membership of the corporation, the composition of the board, the advisory board, meetings and procedure. Examples of these bodies corporate are Caritas – Hong Kong which is incorporated under the Caritas – Hong Kong Incorporation Ordinance (Cap 1092), the Po Leung Kuk which is incorporated under the Po Leung Kuk Ordinance (Cap 1040) and the Tung Wah Group of Hospitals which is incorporated under the Tung Wah Groups of Hospitals Ordinance (Cap 1051).

19 This legal proposition is not set out in the Companies Ordinance (Cap 32) but is derived from English common law cases: see *Good Profit Development Ltd v Leung Hoi* [1993] 2 HKLR 176, [1992] 2 HKC 539; *Salomon v Salomon & Co Ltd* [1897] AC 22, HL; *Macaura v Northern Assurance Co Ltd and others* [1925] AC 619, HL; *Lee v Lee's Air Farming Ltd* [1961] AC 12, [1960] 3 All ER 420, PC; *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258, [1983] 2 All ER 563, CA (Eng).

20 Halsbury's Laws of Hong Kong – *Commentary* (LexisNexis 2009), at para 95.0007.

21 Invest HK, *Setting up a Non-profit/Charitable Organisation in Hong Kong* (Mar 2010).

A body corporate incorporated overseas

6.25 There are a number of charitable bodies corporate which are incorporated overseas and which carry out charitable work substantially overseas. Being overseas companies incorporated outside Hong Kong and having an established place of business in Hong Kong, they are required to register under Part XI of the Companies Ordinance (Cap 32). Under section 333 of the Companies Ordinance, a non-Hong Kong company that establishes a place of business in Hong Kong is required within one month of the establishment to apply to the Registrar of Companies in a specified form and to provide documents, such as a certified copy of the charter, statutes or memorandum (including articles, if any) of the company and a certified copy of the company's certificate of incorporation. The Registrar of Companies maintains a register of non-Hong Kong companies that have complied with section 333. An example of a charitable body incorporated overseas is Project Orbis International, Inc.

Governing instrument

6.26 It is essential that a charity be established by a written governing instrument. As we have noted from the discussion of the various charity structures above, the type of instrument adopted would depend on the particular circumstances of the proposed charity and the preferences of the promoters or founders of the organisation.

Legal structures of charities in other jurisdictions

6.27 Similar to the situation in Hong Kong, charitable organisations in other jurisdictions exist in a variety of legal forms. Some of these are highlighted below. (A more detailed study of legal structures of charities existing in overseas jurisdictions is at Annex 2 of this paper).

6.28 In England and Wales, a large proportion of charities is established in the form of companies limited by guarantee. Other charities exist in the form of a limited liability structure or as unincorporated associations. A new concept of the charitable incorporated organisation was created in England under section 69A of the Charities Act 1993 (as inserted by section 34 of the Charities Act 2006). This new legal form, the provisions of which are yet to be implemented, is intended to combine the advantages of a corporate structure with the burden of registering with both the English Charity Commission and the Registrar of Companies. The Charity Commission is also established under the Act. A register of charities, kept by the Charity Commission, contains the names of every charity registered and other particulars and information relating to such charity. The Act provides a framework for reporting and accounting by charities.

6.29 In Ireland, charities exist in the form of a body corporate or unincorporated body of persons or charitable trust. The Charities Regulatory

Authority was established under section 13 of the Irish Charities Act 2009. One of the major functions of the Charities Regulatory Authority is to establish and maintain a register of charitable organisations and to monitor and ensure compliance of charitable organisations with the Act.

6.30 In Scotland, charities can be constituted in a variety of legal forms, but most are constituted either as trusts, unincorporated associations or companies limited by guarantee. Charitable companies are subject to dual regulation and have to report to both the Registrar of Companies and the Office of the Scottish Charity Regulator (OSCR). The Scottish legislation, like the Charities Act 2006 in England, has introduced a new legal form that charities may wish to adopt. Section 49 of the Charities and Trustee Investment (Scotland) Act 2005 provides that a charity may be constituted as a "*Scottish charitable incorporated organisation*" (SCIO), which is a body corporate having a constitution, a principal office in Scotland, and with two or more members, but without having to become a company or industrial and provident society. SCIOs are to be regulated by the OSCR. Unlike a company limited by guarantee, the members of a SCIO will have no liability to contribute to the assets if the body is wound up. A public register of charities is kept by the OSCR and it has the role of monitoring registered charities for their compliance with charity legislation.

Our proposal

6.31 As we have seen, the common law does not impose any particular restrictions on the structure that a charity may take, and charities in Hong Kong have been established in a variety of legal forms. These include: unincorporated associations which may or may not be required to be registered under the Societies Ordinance (Cap 151); trusts; companies incorporated under the Companies Ordinance (Cap 32) which are limited by shares or guarantee, or companies in some cases incorporated overseas; or statutory bodies incorporated under specific Ordinances. In the course of our review, we have considered certain options regarding the legal form that charitable organisations should adopt.

Option 1 – a unitary model for charities

6.32 One option for reform would be to restrict charitable organisations to one type of entity, such as to companies limited by guarantee or companies limited by shares. Advantages of this option are that there would be greater clarity and certainty, both within the charity sector and in the community, about the form and nature of charitable organisations, and it would also facilitate uniformity in monitoring and regulating these entities.

6.33 One way that this reform could be effected would be to introduce a statutory requirement that all new applicants to become charitable organisations would need to adopt one type of entity, while existing charitable organisations would be allowed to retain their original legal form.

Alternatively, the reform could require all existing charitable organisations to be converted to the specified single type of entity as well.

6.34 The disadvantage of adopting this single-entity corporate option, however, is that it may be difficult to determine which legal form should be adopted. We note that there have been arguments in Australia that all charities should be required to be incorporated as companies limited by guarantee as a way of ensuring that the assets of a charity are used for the intended purposes. It was suggested that:

*"[A]ll charities [should] be incorporated as companies limited by guarantee in order to provide high standards of accountability, ownership and purpose as well as transparency in their use of funds and distribution of assets ... [and] uniform laws should be adopted in order to preserve the integrity of charities."*²²

6.35 The counter-argument, however, was that it was not practical to do so, as there would be great difficulty in requiring charities, especially those established as trusts, to assume a new legal guise. In some cases, it might prove impossible.

6.36 We note that at present in Hong Kong, for good risk management reasons, social enterprises related to non-governmental organisations (NGOs) are usually incorporated as companies limited by shares.

6.37 We have also considered the possibility of creating a new legal form of charitable organisation along the lines of the charitable incorporated organisation (CIO) introduced in England and Wales. While we note the various advantages of this new model which are anticipated by the English Charities Commission, we also note that many of the regulatory requirements for companies existing in England and Wales do not apply to companies in Hong Kong.²³

Option 2 - maintaining a variety of legal forms for charities

6.38 As well as the unitary model approach, we have also considered the option of maintaining the status quo of allowing different legal forms of

22 *Report of the inquiry into the definition of charities and related organisations*, Australia, June 2001, Chapter 11.

23 The companies legislation in Hong Kong is based largely on the UK Companies Act 1948 and some subsequent reforms, such as those contained in the UK Companies Act 1976. Since that time, however, the companies legislation in the UK has undergone substantial reform and is now comprised in the Companies Act 2006.

Examples of the regulatory differences between Hong Kong companies legislation and that in the UK are :

- (i) the existence of a company names adjudication system under the UK Companies Act 2006, which is not reflected in the Companies Ordinance (Cap 32) in Hong Kong; and
- (ii) the codification in the Companies Act 2006 of some of the directors' fiduciary duties and duties of care and skill while the general duties of directors in Hong Kong remain governed by common law.

See Financial Services and the Treasury Bureau, *Consultation Paper on Draft Companies Bill, First Phase Consultation* (December 2009), at Chapters 2 and 3.

charitable organisation to co-exist. The advantages of this approach are, first, that charities are free to choose the legal form best suited to their needs and secondly, existing organisations will not have to spend the time, effort and expense in converting from their existing legal form to another legal form, which may be particularly burdensome for small charities.

Conclusions

6.39 We note that at present, there is no obvious problem in Hong Kong with respect to the legal forms that charitable organisations may take. We note also that imposing stringent requirements on the types of legal forms that may operate here may cause considerable hardship to charitable bodies, especially small ones.

6.40 If a unitary approach were to be adopted, particularly for the purposes of registration of charities, we consider that a company limited by guarantee would be the preferred legal form.

6.41 On balance, our preliminary view is that there is no compelling reason to require charitable organisations to exist in only one legal form rather than a variety of legal forms. However, we remain open to consider other views on this. Our major concern is that in whatever approach is adopted, charitable organisations should be well governed and should be as transparent as possible in their operations. We therefore invite views from the public on what legal form or forms charitable organisations should take, including whether different alternative legal forms should co-exist, or a single legal form should be used.

Recommendation 3

We invite views from the public on whether, and to what extent, the various existing legal forms for charities should be reformed.

In particular, we invite comments on:

- (1) whether 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; and**
- (2) whether, in the alternative, a unitary approach of imposing one uniform model of charitable organisation structure should be adopted, and if so, what form that model should take.**

Chapter 7

Conclusions and proposals on registration of charities

Introduction

7.1 In this chapter, we examine in more detail the current position regarding registration of charities in Hong Kong. We look at the different approaches adopted in overseas jurisdictions and consider the introduction of a registration system for charities in Hong Kong.

Current situation in Hong Kong

Lack of a formal register of charities

7.2 As discussed briefly in Chapter 2, currently there is no formal, established registration system for charitable organisations in Hong Kong and no government authority with overall responsibility in this area. Separate lists exist for different purposes but these are not formal lists of all charitable organisations. Some charitable organisations may not appear in any of these lists. This means that in some cases, members of the public may not be able to ascertain whether an organisation in Hong Kong representing itself as a charity is in fact a charity.

The list of tax- exempt charities maintained by the Inland Revenue Department

7.3 The Inland Revenue Department maintains the largest available list of charities in Hong Kong, but it only includes those organisations which have successfully been recognised as charitable institutions or trusts of a public character for the purpose of section 88 of the Inland Revenue Ordinance (Cap 112).¹ This list is available online at the Inland Revenue Department homepage² and runs at present to over 800 A4 pages. The information on the list includes (in alphabetical order): the name in English and/or Chinese of each tax-exempt charitable organisation; the date from which its tax exemption status was recognised; and the names of any of the organisation's branches.

1 An organisation may be granted tax exemption in Hong Kong if it is recognised by the Inland Revenue Department as being a "charitable institution or trust of a public character" for the purpose of section 88 of the Inland Revenue Ordinance (Cap 112).

2 http://www.ird.gov.hk/eng/tax/ach_index.htm.

7.4 According to the Inland Revenue Department's statistics, the number of charities that were granted with tax exemption in recent years was as follows:

(Charities Granted Tax Exemption)

<i>As at year ending</i>	<i>Number</i>
31.3.2005	4,162
31.3.2006	4,435
31.3.2007	4,832
31.3.2008	5,311
31.3.2009	5,898
31.3.2010	6,380

7.5 It is evident from this that over the past six years, the number of charities has been steadily increasing. It should be emphasised, however, that although the Inland Revenue Department maintains its extensive list of tax exempt charities, it is neither responsible for the registration of charities nor for the monitoring of their operations.

Lists of charities maintained under other Ordinances

7.6 As we saw from the statistics on forms of charities set out in Chapter 6, the majority of tax-exempt charities in Hong Kong which are recognised by the Inland Revenue Department are established as companies limited by guarantee.³ As such, they are required to be registered under the Companies Ordinance (Cap 32) and to comply with the statutory disclosure requirements of that Ordinance. Apart from this, however, the Companies Registry, like the Inland Revenue Department, does not have a role in monitoring charities as such. The Companies Registry maintains lists of companies registered with it, including locally and overseas incorporated companies. Information, such as the date of a company's incorporation, registration, dissolution, company name history, company status, winding-up mode, charges and place of incorporation (of non-Hong Kong companies), are accessible to the public online via the electronic search services.⁴

7.7 The Social Welfare Department maintains a list of non-government organisations (NGOs) receiving subvention allocation from the Government. It contains a list of names in English and Chinese of the organisations receiving subvention and the respective subvention amount. This list is accessible to the public via the internet and is regularly updated.

7.8 The Societies Ordinance (Cap 151) provides a notification system for the establishment of societies in Hong Kong and prohibits the

³ See the table showing the different forms of charities in Hong Kong at para 6.3, above.

⁴ <http://www.icris.cr.gov.hk/csci/>

operation of certain societies. Section 5 of the Ordinance requires a local society, within one month of its establishment or deemed establishment, to apply in the specified form to the Societies Officer of the Hong Kong Police Force for registration or exemption from registration under the Ordinance. Charitable organisations which are societies may seek exemption by establishing to the satisfaction of the Societies Officer that they are established solely for religious or charitable purposes. Not all charitable societies seek exemption, so some remain registered under the Ordinance (for example, the Samaritans and the Hong Kong Blind Union), however the number of registered societies is small when compared to the total number of tax-exempt charities in Hong Kong.⁵

7.9 The Home Affairs Bureau maintains the following lists relating to:

(i) Trust funds -

This list contains the names of the trust funds and their annual statements of accounts relating to the funds. This information is available to the public for inspection on request.⁶

(ii) Chinese temples -

There are several lists maintained by the Home Affairs Bureau regarding Chinese temples. The first is a list of Chinese temples directly administered by the Chinese Temples Committee constituted under the Chinese Temples Ordinance (Cap 153). This contains the names of the Chinese Temples and their particulars, such as their background and address.

A second list includes delegated temples where management is delegated to other organisations. This contains the names of the Chinese temples, their address and the delegated management organisations.

A third list contains particulars of temples registered under the Chinese Temples Ordinance (Cap 153), however, a minority of Chinese temples which have not disclosed their particulars are not included in the list.

These lists are available for public inspection at the reception counter of the Home Affairs Bureau or on the internet.⁷

(iii) Chinese permanent cemeteries –

There is a list of Chinese Permanent Cemeteries which contains the names of these cemeteries and their statements of accounts.

5 See the table showing the different forms of tax-exempt charities in Hong Kong at para 6.3, above.

6 http://www.hab.gov.hk/eng/access_to_informaion/list_of_available_information/listpub.htm.

7 <http://www.ctc.org.hk>.

This information is available for public inspection at the reception counter of the Home Affairs Bureau.

7.10 The Education Bureau maintains a list of schools registered under the Education Ordinance (Cap 279). This list contains in respect of each school the registration status (provisionally registered or registered), school registration number, date of provisional registration or registration, registered premises, permitted accommodation of classrooms and boarding rooms, and the approved courses and school fees.⁸ This list is accessible to the public on the Education Bureau homepage.⁹ Also, the University Grants Committee has uploaded on its homepage a current list of the approved grants for University Grants Committee-funded institutions.¹⁰

7.11 The Hospital Authority maintains a list of hospitals and clinics operated by the Hospital Authority. This list contains the names of the hospitals and clinics, addresses, scope of services, visiting hours and other general information. This list is accessible to the public on the Hospital Authority homepage.¹¹

7.12 As we have seen in earlier chapters, there are also a number of charitable bodies in Hong Kong which have been established by legislation and so their names appear in the list of Hong Kong Ordinances.¹² These organisations are monitored only within the terms of their individual statutory regimes, however, and represent a tiny minority of the total number of charitable organisations in Hong Kong.

'Registration' requirements for individual charity activities

7.13 Charitable organisations have to seek permission from the Social Welfare Department for individual fundraising activities in public places. The Social Welfare Department grants public subscription permits for collections of charitable donations in public places in response to applications made to it under section 4(17)(i) of the Summary Offences Ordinance (Cap 228). The Department maintains a list of subscription permits for charitable fundraising activities in public places which are currently in effect. This list contains information about the dates and venue of the approved fundraising activities, the name of the organisations and the respective public subscription permit number. The Social Welfare Department also maintains a list of flag day organisers for the current flag selling year. This list contains information about the date and region in which flag selling will take place and the respective organisations issued with the public subscription permit.¹³ Both lists maintained by the Social Welfare Department are available on the internet, but there is a limit on the length of time that this information is maintained on

8 Excluding schools exempted under the Education (Exemption) (Private Schools Offering Non-formal Curriculum) Order) (Cap 279F).

9 <http://www.edb.gov.hk>.

10 <http://www.ugc.edu.hk>.

11 <http://www.ha.org.hk>.

12 For the online Laws of Hong Kong database, see the Department of Justice's Bilingual Laws Information System (BLIS) at: <http://www.legislation.gov.hk/>

13 http://www.swd.gov.hk/en/index/site_pubsvc/page_controlofc/sub_recentlyap/.

the lists. It should be noted that, save as to this limited role in relation to fundraising activities, the Social Welfare Department is not responsible for the registration of charities or monitoring of their operations.

7.14 Through the procedure for granting lottery licences,¹⁴ the Television and Entertainment Licensing Authority (TELA) also plays a limited role in supervising charitable fundraising activities. TELA maintains a list of organisations granted with lottery licences for a specified lottery period. The list contains the name and licence number of the relevant organisation(s) and the period in which the lottery is to take place. A separate list is kept by TELA in respect of the income and expenditure statements of lottery events which are available for public inspection. This list contains information about the name of the organisations, the respective period of ticket sales, the respective licence number, the date of licence issued and the date of the income and expenditure statements received. These lists are available on the internet and the information contained in the lists is time limited. Again, TELA does not have any responsibility in relation to the registration of charities or in otherwise monitoring them.

7.15 Both charitable and non-charitable organisations are required to apply for temporary hawker licences from the Food and Environmental Hygiene Department (FEHD) in connection with on-street selling activities. The temporary hawker licence granted by the Director of FEHD permits the licensee to hawk for a period not exceeding one month for the purpose specified in the licence, and subject to any conditions specified in the licence. In processing these applications, the FEHD will consult relevant departments including the Police, Lands Department, Home Affairs Department or Social Welfare Department. The FEHD maintains a list of the organisation issued with temporary hawker licences for fundraising purposes. It specifies the district of such fundraising activities, the approved period of activity, the approved time of activity, the name of the organisations, the approved location of the activities and the main commodities for sale.¹⁵

Registration systems for charities in other jurisdictions

7.16 A number of jurisdictions that we have examined have registration systems for charities. Details of these registration systems in other jurisdictions are at Annex 3 of this paper.

14 As discussed earlier in relation to fundraising activities carried out through a lottery, a licence is required from the Commissioner for Television and Entertainment Licensing (TELA) under section 22(1)(a)(i) of the Gambling Ordinance (Cap 148). Section 22(3) of the Gambling Ordinance (Cap 148) provides that the licence granted under section 22(1)(a)(i) shall be subject to prescribed conditions and to any other conditions that the Commissioner for Television and Entertainment Licensing may impose. TELA's *Reference Guide on the Organisation of Lottery Activities* (see: http://www.tela.gov.hk/document/eng/form/licensing/lottery/01/lottery_e.pdf) sets out the prescribed conditions for the grant of a lottery licence. These are largely similar to the conditions imposed on the grant of public subscription permits by the Social Welfare Department discussed above. TELA also makes available for public inspection copies of auditors' reports and income and expenditure statements for moneys raised by the sale of lottery tickets.

15 http://www.fehd.gov.hk/english/pleasant_environment/hawker/fundrasing.html.

7.17 We have observed that generally within these systems, the register of charities is maintained by the charity regulatory body of that jurisdiction. For example, in England and Wales, a register of charities is kept by the English Charity Commission and the register contains the name of every charity registered and other particulars and information relating to each such charity. The English Charity Commission is empowered to remove from the register any institution which is no longer considered as a charity, and any charity which has ceased to exist or does not operate. The register (including the entries cancelled when institutions are removed from the register) is open to public inspection at all reasonable times. Under section 3A of the English Charities Act 1993, every charity must be registered in the register of charities unless they are "*exempted charities*", "*excepted charities*" or small charities.¹⁶

7.18 Similar to England and Wales, a Charities Regulatory Authority is to be set up by the Irish Charities Act 2009. The Authority will establish and maintain a register of charitable organisations and will monitor and ensure the compliance of charitable organisations with the Act. The Charities Regulatory Authority is also empowered to remove a charitable organisation from the register for other reasons, such as where the name of the charitable organisation has been changed, the charitable organisation which is a body corporate has convicted an offence on indictment, or the Charities Regulatory Authority is of the opinion that the registered body is not a charitable organisation.

7.19 The New Zealand Charities Commission was established under section 8 of the New Zealand Charities Act 2005. Under section 21 of the Act, a register called "*the register of charitable entities*" has been established. Registration by charitable organisations is voluntary, but only charities registered with the Charities Commission are eligible for tax exemption status. Under section 22 of the Act, the purposes of the register are to enable members of the public to determine whether an entity is registered as a charitable entity under the Act, obtain information concerning the nature, activities, and purposes of charitable entities, and information as to how to contact a charitable entity. The Commission is empowered to remove an entity from the register under certain circumstances specified in the Act.

7.20 The Charities and Trustee Investment (Scotland) Act 2005 established the Office of the Scottish Charity Regulator (OSCR). Under section 3 of the Act, the OSCR must keep a register of charities, to be known as the "*Scottish Charity Register*". The Scottish Charity Register is available for public inspection at all reasonable times at its principal office, or at such other places as the OSCR thinks fit. Under section 30 of the Scottish Act, the OSCR is obliged to remove a charity from the Scottish Charity Register if, as a result of inquiries made about the charity, it is found that the charity no longer meets the charity test.¹⁷

16 Further information on these types of charities can be found in Annex 3 of this paper.

17 Under section 5 of the Charities and Trustee Investment (Scotland) Act, the OSCR may enter an applicant in the Scottish Charity Register only if it considers that the applicant meets the charity test of the Act. A body meets the charity test if –

Should there be a register of charities in Hong Kong?

7.21 As we saw earlier in this chapter, over the last six years, the number of charities recognised for tax exemption purposes in Hong Kong has been steadily increasing. We also saw that there is no comprehensive system for registration of charitable organisations here and no government authority with overall responsibility to maintain such a register. Such lists of charities as do exist are piecemeal in their coverage and so do not enable members of the public to ascertain the charitable status of an organisation in all cases. This situation gives rise to growing concern, given both the numbers of organisations and the enormous amounts of money involved.

7.22 We have seen in this chapter that a number of jurisdictions, such as England and Wales, Ireland, Scotland and New Zealand, have systems of registration for charitable organisations. We consider that there is a need for a registration system in Hong Kong, particularly to cover charitable organisations which make charitable appeals to the public and those allowed to claim tax exemption.

The effects of registration and non-registration compared

7.23 We have considered the various advantages and disadvantages of having a register of charities in Hong Kong. We consider that the advantages are:

- (a) the charitable status of organisations will be determined based on a set of clear and transparent criteria adopted for the purpose of registration;
- (b) the list of charitable organisations will be contained in a register which can be inspected by the public;
- (c) the charitable status of registered charitable organisations can be reviewed regularly to ensure that they maintain their charitable status;
- (d) charitable organisations will be better monitored and administered, and will have the benefit of the promotion of good governance and the enhancing of transparency and accountability with respect to their charitable activities and accounts;
- (e) members of the public will have easy access to up-to-date information about charitable organisations, thus the work carried

(a) its purposes consist of one or more of the charitable purposes, and

(b) it provides (or, in the case of an applicant, provides or intends to provide) public benefit in Scotland or elsewhere.

out by these charitable organisations can be easily promoted to the public;

- (f) the public will be better protected from fraudulent and deceitful acts by organisations falsely claiming to be charities; and
- (g) the register of charitable organisations will serve as conclusive proof of an organisation's charitable status for the purposes of tax exemption, other privileges and administration.

7.24 We note that the disadvantages of having a registration system in Hong Kong may include :

- (a) that extra administrative expenses and work will be incurred and required by existing charitable organisations in order to become registered and maintain registration, and such expenses and work will be especially burdensome for small charities; and
- (b) the resources implications and the administrative and jurisdictional issues that may arise in having a registration system.

7.25 After carefully considering the advantages and disadvantages set out above, we consider that it is obviously in the public interest that a registration system should be put in place. In principle, we consider that an organisation can only enjoy tax exemption and make public charitable appeals if it is a registered charitable organisation. A registration system will enhance accountability and transparency through the disclosure of information and accounts by charitable organisations.

Compulsory or voluntary system

7.26 We have considered a number of overseas jurisdictions with registration systems for charitable organisations. Nearly all of these require compulsory registration. South Africa is one of the few jurisdictions which does not require compulsory registration. However, it is provided in their law that only registered non-profit organisations which qualify as approved public benefit organisations will be eligible for tax exemption. The registration of charitable organisations in New Zealand is also voluntary. In line with South Africa, however, only *registered* charitable organisation can enjoy tax exemptions.

7.27 Taking into account the overseas experience, we consider that to better protect the public, registration should be *compulsory* for all charitable organisations which make charitable appeals to the general public and seek to enjoy tax exemption.

7.28 We note that there are certain charities (foundations) in Hong Kong which do not make appeals to the general public for donations. If they

were nonetheless to seek tax exemption, they should also be subject to the proposed registration system. Only charitable organisations which do not claim tax exemption and do not make any public charitable appeals would not be required to register as charities under the new system.

Decision on charitable status

7.29 In Chapter 12 of this paper, we recommend the establishment of a charity commission for Hong Kong. We propose that it will be the role of this new body to establish and maintain a register of charitable organisations. It will be the duty of the future charity commission to ensure that a charitable organisation satisfies the definition of charity (ie, that it has been established for exclusively charitable purposes) prior to its registration. The discussion of the definition of charity has already been dealt with in Chapter 5. We consider also that the charitable status of an organisation should be determined by the future charity commission.

Objection by third parties to registration

7.30 We consider that an application for registration as a charitable organisation is a private application which should not be subject to public notification. Therefore, we do not think that there should be an objection procedure established to allow third parties to object to the registration of a particular body as a charity. Any organisation which considers that its name has been passed-off by another body may resort to civil proceedings against the particular body alleged to be in breach. We consider that the matter relating to allowing or disallowing the use of particular names of charitable bodies should be left to the future charity commission to determine on a case by case basis.

Exemption from regulation and the regulation of specific charities

7.31 As discussed above, we consider that organisations which carry out fundraising activities and seek to have tax exemption should be subject to registration. We have considered the possibility of allowing some organisations to be exempted from registration. For example, should small churches be exempted from registration, as the process of registration may generate additional administrative work and expense? It is also noted from the table below that 724 charitable organisations have an annual income of or below \$50,000.¹⁸ Therefore, the administrative costs involved in registration may be out of proportion to the annual income of these small charitable organisations.

18 These annual income figures are based on the annual financial statements submitted by charities to the Inland Revenue Department (IRD) as at December 2007. Since the IRD conducts periodic reviews on charities at different intervals, the latest year in which the financial statements were available for each case differs. Also, some charities have no financial statements available because they have not yet been subject to the IRD's periodic review or their financial statements were still pending at that time.

(Approximate income range of charities)

<i>Annual Income (HK\$)</i>	<i>No. of Cases</i>
> 200,000	2,078
150,001 to 200,000	124
100,001 to 150,000	128
50,001 to 100,000	175
0 < 50,000	724
Total	3,229

7.32 Further, some organisations, such as schools, universities, churches or statutorily incorporated bodies are already governed by existing Ordinances. We note that in some jurisdictions, such as England and Wales and Singapore, certain institutions are considered exempt or excepted charities which do not require registration as they are already regulated by other regulatory bodies.

7.33 We have considered in depth the issue of whether exemption from registration should be granted for some charitable institutions, especially small charities. However, we have a concern that allowing small charitable organisations which have an annual income below a stipulated threshold to be exempt from registration may lead to abuses due to a lack of monitoring. In order to avoid confusion to the public about the legitimate charitable status of these small charities, and to avoid possible abuses, we consider that no exemption from registration should be granted to any type of charitable institutions, except those which do not claim tax exemption and do not make any public charitable appeals. This will ensure that almost all charitable organisations will be subject to the same regulatory and monitoring system and accountability requirements. They will also enjoy the same tax benefits and public recognition of their charitable status.

Charities with an overseas element

7.34 In respect of the future charity commission's powers in maintaining and administering the register of charities, we note that some charities may have an overseas element. These charities are bodies corporate which are incorporated overseas and which carry out charitable work substantially overseas. If these bodies corporate have a place of business in Hong Kong, they are required to register under Part XI of the Companies Ordinance (Cap 32) and comply with the statutory disclosure requirements of that Ordinance. At present, such charities may also seek tax exemption from the Inland Revenue Department. We consider that these charities with an overseas element should be required to register with the future charity commission in the same way as *"local"* charities.

7.35 In respect of the regulation of individual fundraising activities by charities where the monies donated are to be spent outside Hong Kong, the Social Welfare Department has monitoring measures which are set out in the permit conditions for conducting general charitable fundraising activities.¹⁹ These conditions apply whether the charitable bodies are local charities or corporates with an overseas element.

7.36 As mentioned earlier in this chapter, we recommend the establishment of a charity commission for Hong Kong. We consider that there should not be any difference in the registration procedure between charities with "*an overseas element*" and local charities. In relation to authorising charity fundraising activities in public places and those involving lotteries, including fundraising activities by charities with an overseas element, we propose in Chapter 9 that the future charity 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 Licensing Authority. As for individual fundraising activities involving monies donated to be spent outside Hong Kong, we consider that it should be the role of this new body to determine the detailed requirements for these activities.

Our proposal

7.37 There is at present no single piece of legislation governing charitable organisations in Hong Kong. We consider that a charity commission should be established to monitor charitable organisations and we will discuss this proposal in greater detail in Chapter 12. We are also of the view that all charitable organisations which are granted tax exemption status and carry on fundraising activities should be registered with the future charity commission. A list of the registered charitable organisations should be available for public inspection.

19 Condition (8) of the permit conditions requires that where the monies donated are to be spent outside Hong Kong, the audited accounts together with auditor's opinion should be published in at least one local Chinese language newspaper and one local English language newspaper within 90 days of the last day specified in the permit. Copies of the newspaper cuttings should be forwarded to the Director of Social Welfare at the same time. For fundraising events with a gross income not exceeding HK\$50,000, permit holders may choose to either publish in local newspapers the audited accounts in English and Chinese within 90 days of the last day of the approved fundraising activities specified in the permit, or publish the audited accounts by placing them on the organisation's own website or in the organisation's annual report, its newsletter or a special circular to its members. Permit holders should also notify the Director of Social Welfare of such publication.

The above permit condition can also be accessed via the following link:

http://www.swd.gov.hk/doc/Control_of_Char/PSP%20conditions%2020071203e.pdf.

Recommendation 4

We recommend that all charitable organisations which:

- (1) make any charitable appeal to the public; and/or**
- (2) seek tax exemption**

should be subject to the requirement of registration.

We recommend that the list of registered charitable organisations should be established and maintained by the future charity commission and that this list should be available for public inspection.

We recommend that the application process for registration should not be subject to public notification.

We recommend that the matter relating to allowing or disallowing the use of particular names of charitable bodies should be left to the future charity commission to determine, on a case by case basis.

Chapter 8

Proposed framework for governance, accounting and reporting by charities

8.1 In this chapter, we examine in detail the management and governance of charities as well as accounting and reporting by charities. We consider the requirements of charities to comply with the duty of public disclosure and declarations of conflicts of interest. We also consider the powers of the future charity commission to investigate reports of breaches of trust and maladministration by charities and their officers, as well as enforcement powers and remedies.

Current situation in Hong Kong

8.2 As discussed in previous chapters, in Hong Kong there is no single piece of legislation governing charitable organisations. Existing government monitoring of charities is fragmented and is mainly confined to charitable fundraising activities, such as the controls exercised by the Social Welfare Department, the Food and Environmental Hygiene Department and the Television and Entertainment Licensing Authority. We have set out these requirements below, together with those monitoring and service standards requirements applying to non-government organisations (NGOs) which receive government subvention.

Inland Revenue Department requirements

8.3 At present, tax-exempt charitable organisations recognised by the Inland Revenue Department are subject to periodic review. Questionnaires are sent to these organisations for completion and return within one month. They are also required to file their financial statements and reports on activities they have conducted. The Inland Revenue Department examines their replies to the questionnaires and their financial statements to ensure that the objects of these charitable organisations are still charitable and their activities are compatible with their objects, before they may continue to be granted tax exempt status. Failure to furnish information required by the questionnaire may lead to the withdrawal of the tax exemption status.

Companies Ordinance (Cap 32) and Societies Ordinance (Cap 151) requirements

8.4 As most of the charitable organisations in Hong Kong are limited companies, they are required also to prepare audited accounts in order to fulfil the requirement under the Companies Ordinance (Cap 32). For charitable organisations which exist as unincorporated organisations, such as societies registered under the Societies Ordinance (Cap 151), there are no legislative requirements for filing audited accounts.

Social Welfare Department requirements

8.5 The Social Welfare Department provides a one-stop service together with advice, guidance and support to NGOs on issues relating to performance monitoring and subventions matters.¹ The Service Performance Monitoring System (SPMS) operated by the Department has the purpose of enabling the Social Welfare Department and NGOs operating subvented services to provide more efficient, customer-focused, accountable and output-driven welfare services.² Under SPMS, service performance is to be assessed on the basis of Funding and Service Agreements and a generic set of Service Quality Standards drawn up between the Social Welfare Department and NGOs operating subvented services. These documents define the obligations of the Social Welfare Department to service operators, the role of the department in overseeing the performance of the service operators, the kind of services to be provided, the performance standards and the basis of subvention.³

Home Affairs Bureau requirements

8.6 The Home Affairs Bureau formulates and co-ordinates policy and legislation for developing recreation and sport in Hong Kong and co-ordinates the strategic planning of recreational and sports facilities. Some of its principal objectives include co-ordinating the provision of quality recreational and sports facilities, encouraging collaboration among different sectors of the community in fostering a strong sporting culture in the community, and supporting and facilitating the implementation of initiatives which help make Hong Kong a major location for international sporting events.⁴ The Bureau also has overall responsibility for overseeing the management of Chinese temples and Chinese permanent cemeteries, administration of trust funds for which the trustee is The Secretary for Home

1 See Social Welfare Department website, at:
http://www.swd.gov.hk/doc/annreport0507/en/14_other.html.

2 http://www.swd.gov.hk/en/index/site_ngo/page_serviceper/sub_objectives/.

3 http://www.swd.gov.hk/en/index/site_ngo/page_serviceper/sub_fundingand/.

4 See Home Affairs Bureau website, at:
http://www.hab.gov.hk/en/policy_responsibilities/Recreation_Sport_and_Entertainment_Licensing/sport.htm.

Affairs Incorporated⁵ and management of the properties of The Secretary for Home Affairs Incorporated. The Trust Funds and Temples Joint Secretariat provides administrative support for the Chinese Temples Committee and a number of trust funds.⁶ In addition, the Home Affairs Bureau provides administrative support for the Hong Kong Jockey Club Music and Dance Fund and The Lord Wilson Heritage Trust.

Education Bureau requirements

8.7 The Education Bureau monitors the services provided by the University Grants Committee, the Student Financial Assistance Agency, the Hong Kong Examinations and Assessment Authority, the Hong Kong Council for Accreditation of Academic and Vocational Qualifications and the Vocational Training Council. It also oversees the effective implementation of education programmes.⁷

8.8 The management committee of a school is required to sign a Service Agreement with the Government under certain situations.⁸ The schools concerned are required to submit a School Development Plan⁹ to the

5 The Secretary for Home Affairs Incorporated is established as a corporation sole under the Secretary for Home Affairs Incorporation Ordinance (Cap 1044) for the time being performing the duties of the office of Secretary for Home Affairs. A number of trust funds with education or other specific purposes are operated under the Ordinance.

http://www.hab.gov.hk/en/policy_responsibilities/District_Community_and_Public_Relations/trustfnd.htm.

6 Trust funds administered by the Home Affairs Bureau include Brewin Trust Fund (Cap 1077), Chinese Temples Fund (Cap 153A), General Chinese Charities Fund (Cap 153B), Grantham Scholarships Fund (Cap 1076), Li Po Chun Charitable Trust Fund (Cap.1110), The Lord Wilson United World Colleges Scholarship Fund, Sir Edward Youde Memorial Fund (Cap 1140), Sir Robert Black Trust Fund (Cap 1101) and Sir Murray MacLehose Trust Fund (Cap 1118).

7 <http://www.edb.gov.hk/index.aspx?nodeID=128&langno=1>

8 These situations include:

(a) The school sponsoring body (SSB) has received substantive infrastructural support from the Government for

- operating a new aided/ direct subsidy scheme (DSS) school; or
- whole-day conversion of a primary school; or
- reprovisioning/ in-situ redevelopment/ new extension of existing school premises.

(b) The school is admitted to the DSS.

(c) Two or more schools merge into one school except under the following situations:

- The merged school comprises school under the same SSB; or
- The merged school, though comprises schools under different SSBs, operates on the premises of its school sponsoring body.

To enter into the Service Agreement, schools concerned have to fulfil the following three conditions:

(a) The management committee is an incorporated body. It can be incorporated under

- the Education Ordinance (Cap 279) as an Incorporated Management Committee; or
- the Companies Ordinance (Cap 32) as a School Management Committee company.

(b) The management committee as an incorporation has acquired a tax exemption status under section 88 of the Inland Revenue Ordinance (Cap 112).

(c) The proposed School Development Plan has been endorsed by the relevant District School Development Section of the Bureau.

Available at <http://www.edb.gov.hk/index.aspx?nodeID=7672&langno=1>

9 The School Development Plan should set out clearly the tasks or measures to achieve the targets of the major objectives, the success criteria for assessing the achievement, and the priorities of school development.

Bureau which will be used as a yardstick to assess the performance of the school during the term of the first School Management Committee Service Agreement or Incorporated Management Committee Service Agreement.¹⁰

Department of Health requirements

8.9 The Office for Registration of Healthcare Institutions, which was formally set up in 2005 under the Department of Health, is primarily responsible for ensuring that healthcare institutions are fit for the services they are to provide. In carrying out these functions, the Director of Health enforces relevant provisions of the Hospitals, Nursing Homes and Maternity Homes Registration Ordinance (Cap 165), the Medical Clinics Ordinance (Cap 343) and (in relation to school health care facilities) the Education Ordinance (Cap 279).¹¹ The compliance of individual institutions with these statutory requirements is monitored through field inspections, scrutiny of the institution's activities and complaint statistics, issuing advice and warnings, and by direct handling of complaints lodged by the public against the institutions.

8.10 Private hospitals are required to be registered with the Director of Health under the Hospitals, Nursing Homes and Maternity Homes Registration Ordinance (Cap 165) and this registration may be subject to conditions relating to accommodation, staffing or equipment. The Director is also empowered to inspect any hospital premises and records which are required to be kept under the Ordinance. For the purpose of applying for re-registration, private hospitals are required to submit annual reports on their organisational structure, staffing, facilities, equipment and services, staff development, education and training, and their future service and development plans.

8.11 A "*Code of Practice for Private Hospitals, Nursing Homes and Maternity Homes*" was promulgated in 2003, and has been implemented since 2004. This Code of Practice sets out the standards of good practice for health care institutions to adopt in order to provide quality care to patients. The Code states requirements relating to the management of staff, management of the premises and services, policies and procedures and the system to deal with complaints. The Code also includes requirements on specific types of clinical and support services. Professional standards and regulatory standards are applicable to all private hospitals, nursing homes and maternity homes. In assessing the suitability for registration and re-registration of healthcare institutions under the Ordinance, the Director of Health will take into account their compliance with the requirements of the Code.¹²

10 <http://www.edb.gov.hk/index.aspx?nodeID=7672&langno=1>

11 See Department of Health website, at:
http://www.dh.gov.hk/english/main/main_orhi/main_orhi.html.

12 Department of Health, *Department of Health Annual Report 2006/2007* at 52, 53; Department of Health, "Legislative Council Panel on Health Services Code of Practice for Private Hospitals" (Jan 2004).

Monitoring systems of charities in other jurisdictions

8.12 In the course of our deliberations, we have examined the systems for regulating and monitoring charities in a number of jurisdictions. These are set out in detail in Annex 4 of this paper. Broadly speaking, the approach is for charities monitoring authorities to set up a suitable framework for reporting and accounting by charities. The authorities are empowered to conduct inquiries of problematic charities and to act for their protection.

England and Wales

8.13 In England and Wales, the Charities Act 1993 provides a framework for reporting and accounting by charities.¹³ The Charity Commission may require registered charities shortly after the end of their financial year to complete, depending on their income, either an annual update form or an annual return. Charities with a total income exceeding £25,000 are required to complete and submit their annual reports to the Commission under section 45 of the Charities Act 1993. The annual return contains basic financial details, and details of the charity's contacts, trustees, activities and its classification. Under section 41 of the Act, the trustees of a charity which is not a company must keep accounting records which are sufficient to show and explain all the charity's transactions. Under section 42 of the Act, the charity trustees are required to prepare a statement of accounts in respect of each financial year. However, they may elect to prepare a receipts and payments account and statement of assets and liabilities instead of a statement of accounts if the charity's gross income in any financial year does not exceed £250,000. The Charity Commission has a power to institute inquiries with regard to charities either generally or for particular purposes under section 8 of the Act. Under section 18 of the Act, the Commission is empowered to act for the protection of charities in various ways, such as to suspend any charity trustee, to appoint additional charity trustees necessary for the proper administration of the charity and to vest any property held by or in trust for the charity in the official custodian.

Ireland

8.14 In Ireland, the charity trustees of a charitable organisation are required under section 47 of the Irish Charities Act 2009 to keep proper books of account. They are also required under section 48 in respect of each financial year to prepare a statement of accounts in a prescribed form containing prescribed information. Where the gross income or expenditure of a charitable organisation in a financial year does not exceed €100,000, the

13 It should be noted that a new Charities Bill was put before the UK Parliament in March 2011 with the object of consolidating the Charities Act 1993 and other enactments relating to charities. As part of this consolidation, the Bill has included provisions from the Recreational Charities Act 1958, the Charities Act 1993 and the Charities Act 2006, leading to the repeal of the former two Acts and some sections (sections 1 to 9 and 11 to 44) and some Schedules of the Charities Act 2006.

charity trustees may, instead of preparing an annual statement of accounts in respect of that year, prepare an income and expenditure account and a statement of the assets and liabilities of the charitable organisation. A charitable organisation is also required under section 50 of the Act to file an annual audited account if its gross income or total expenditure exceeds a prescribed amount not greater than €500,000. Under section 52 of the Act, the charity trustees of a charitable organisation are required to prepare and submit to the Authority a report in respect of its activities in that financial year not later than ten months after the end of each financial year. The Charities Regulatory Authority will make available for inspection by members of the public all annual reports and documents kept by the Charities Regulatory Authority at all reasonable times and at such place or places as it determines. It is also empowered under the Act to protect any charitable organisations by appointing an inspector to investigate the affairs of a charitable organisation.

New Zealand

8.15 In New Zealand, every charitable entity is required under section 41 of the New Zealand Charities Act 2005 to ensure that within six months after each balance date of the entity, an annual return is submitted to the New Zealand Charities Commission. The form of the return and particulars contained in the returns and directions to be complied with are prescribed by the Minister. Under section 50 of the Act, the Commission is empowered to inquire into any charitable entity and any person who was engaged in conduct that is in breach of the Act, or serious wrongdoing in connection with a charitable entity. The Commission may give a warning notice to a charitable entity or a person in connection with a charitable entity that has engaged in a breach of the Act, including a breach of section 37¹⁴ (passing itself off as a registered charitable entity) or serious wrongdoing, or where a charitable entity is no longer qualified to be registered as a charitable entity. The Commission may de-register a registered charitable entity under section 31 of the Act upon satisfaction of certain grounds specified in the Act.

14 Section 37 of the New Zealand Charities Act reads –
 "(1) A person must not –
 (a) use a style or title including the words 'registered charitable entity'; or
 (b) state or imply, or permit a statement or implication, that –
 (i) the person is registered as a charitable entity under this Act; or
 (ii) an entity that the person acts on behalf of is registered as a charitable entity under this Act.
 (2) Subsection (1) does not apply to –
 (a) a charitable entity; or
 (b) a person who acts on behalf of a charitable entity.
 (3) A person must not state or imply, or permit a statement or implication, that the person acts on behalf of a charitable entity if the person does not act on behalf of that charitable entity."

Our proposed framework for reporting and accounting by charities in Hong Kong

8.16 Based on our study on reporting and monitoring mechanisms in overseas jurisdictions, we consider that it is important that a monitoring mechanism should be in place in order to serve the major objectives of transparency, openness and accountability to the donors and beneficiaries of charities and to the general public. A monitoring mechanism which aims to achieve these major objectives would help to promote trust and confidence on the part of the public while meeting their philanthropic needs.

8.17 To achieve these objectives, we consider that the monitoring of charities should be based on the following principles.

(1) *Compliance with charitable objects*

8.18 We consider that the future charity commission should be under a duty to ensure that a registered charitable organisation will comply with its charitable objects in order to maintain its registration. A registered charitable organisation should be required to file annually an activity report stating any change of charitable objects and the main activities carried out to fulfil the charitable objects. With due consideration to the burden that may be imposed on small charities, such a report should be provided in a standard form specified by the future charity commission.

(2) *Notification of change of particulars*

8.19 We consider that a registered charitable organisation should be required to notify the future charity commission of any change of directors and registered office address in its annual activity report.

8.20 The future charity commission should be empowered to take appropriate and proportionate measures to investigate and enforce compliance with these requirements. (We will discuss these powers in greater detail in Chapter 12 of this paper.)

Recommendation 5

We recommend that registered charitable organisations should be required to file an annual activity report to the future charity commission. Such a report should be provided in a standard form and matters covered should include –

- (1) change of charitable objects;**

- | | |
|-----|---|
| (2) | main activities carried out to fulfil the charitable objects; |
| (3) | change of directors; |
| (4) | change of registered office address. |

(3) *Disclosure of interests and matters relating to governance*

8.21 We consider that the future charity commission should be responsible for the management and governance of charities by promoting the greater compliance with the legal obligations of charity trustees or directors when managing their charitable organisations. Compliance on the part of the charity trustees or directors with their legal obligations is necessary to ensure that charities are accountable to donors, beneficiaries and the general public. This could be done by requiring charity trustees or directors of a registered charitable organisation to keep and produce accounts, to provide an annual report and an annual return to the future charity commission. Such documents may be accessible to the public to ensure that the charity trustees or directors are under a duty of public disclosure.

8.22 Furthermore, charity trustees or directors are under a fiduciary duty to exercise their powers for the purposes for which they were conferred, and *bona fide* for the benefit of the charity and not to put themselves in a position in which their duties to the charity and their personal interests conflict.¹⁵ Charitable trustees or directors should be subject to a duty to declare any conflicts of interest.

8.23 We propose that the future charity commission should be empowered to conduct investigations of problematic charities. If misconduct or mismanagement is found in the administration of the charity, the future charity commission should be empowered to suspend or remove the relevant persons from managing the charity, or order any property held by the charity to be vested instead in an official custodian.

8.24 As will be discussed in Chapter 12, we also consider that the future charity commission should establish statutory or non-statutory codes of practice relating to disclosure, conflicts of interest, declarations of personal interest and good governance.

15 Jean Warburton, *Tudor on Charities* (Sweet & Maxwell 2003, 9th ed) at 282.

Recommendation 6

We recommend that charity trustees or directors of a registered charity should be under a duty to declare any conflicts of interest and personal interests.

(4) Financial reporting

Filing accounts and statements

8.25 From our study of overseas jurisdictions, we note that nearly all of the monitoring authorities require charitable organisations to submit an annual financial return after the end of their financial year. A table summarising the legal requirements for filing of annual financial reports with the charities monitoring authorities in overseas jurisdictions is at Annex 5 of this paper. We note that in some jurisdictions, such as England and Wales, different filing requirements are imposed according to a charity's gross income and the aggregate value of its assets.

8.26 While we can appreciate that there would be advantages in applying different thresholds to charities depending on their size, we are of the view that, for the local situation, there would be significant benefit in having a simple structure, especially when the registration system for charities is to be first established. We are also concerned about some small charitable organisations that may be affected by the filing requirements. We note that a number of small charitable organisations in Hong Kong operate on a self-help basis, with no, or at most one, full-time member of staff. We consider that small charities should not be overburdened with the administrative requirements of preparing and filing audited accounts. We also consider that an annual income of \$500,000 is an appropriate threshold to determine whether an organisation is financially capable of hiring full-time staff for the purpose of complying with the more stringent filing requirements.

8.27 Taking into account the financial and resource implications for charities in meeting filing requirements, we recommend that only charitable organisations with an annual income exceeding \$500,000 should be required to file audited accounts and a statement of accounts with the future charity commission. We propose that registered charitable organisations with an annual income not exceeding \$500,000 would not be required to file audited accounts (though without prejudice to any requirements to which they, if a company, are subject under the Companies Ordinance (Cap 32)), but would still be required to file an account or financial statement certified by the board of the charitable organisation, and these accounts should also be subject to the power of investigation by the future charity commission.

8.28 Apart from the need for charitable organisations to file an annual statement of accounts to the future charity commission and an annual activity

report in a standard form, we consider that these documents filed with the future charity commission should be accessible to the public. This would achieve the objectives of transparency, openness and accountability by charitable organisations, and would prevent abuse and encourage proper application of funds.

8.29 Provisionally, we consider that every charity registering with the future charity commissioner should file both its activities report and financial statements annually with the charity commission in a standard form specified by the charity commission.

Recommendation 7

We recommend 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.**

We also invite views from the public on –

- (1) whether, 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**
- (2) the contents to be included in the annual report of activities.**

Maintaining accounting records

8.30 We have considered a number of overseas jurisdictions, and many of them, such as England and Wales, Ireland, Scotland and Singapore

impose a legal obligation on the charity or the charity trustees to keep proper books of account.

8.31 Having taken into account the experience of these overseas jurisdictions, we consider that charity trustees or directors of a charity should be required to ensure that accounting records in respect of the charity are kept which are sufficient to show and explain all the transactions of the charity. These records must disclose at any time, with reasonable accuracy, the financial position of the charity at that time, and enable the trustees or directors to ensure that any statements of accounts prepared by them comply with the statutory requirements.

8.32 With regard to the period that such records must be maintained, in some jurisdictions, such as Scotland and New Zealand, it is specified that accounting records of charitable organisations must be retained for at least six years. In determining the appropriate period for charities to retain accounting records in Hong Kong, we have also considered local practice. It is a requirement under section 121 of the Companies Ordinance (Cap 32) that books of account of companies should be kept for seven years. According to Rule 10 of the Solicitors' Accounts Rules (Cap 159F) and the Solicitors' Guide to Professional Conduct, every solicitor is required to preserve for at least six years from the date of the last entry, all books, accounts and records kept by him. Under section 4 of the Limitation Ordinance (Cap 347), the time bar for bringing a civil claim is six years.¹⁶

8.33 To ensure consistency with the requirement under the Companies Ordinance, we consider that seven years is an appropriate period for the retention of accounting records by charities.

Recommendation 8

We recommend 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 a charity. Such records should be retained for at least seven years.

(5) Powers of investigation

8.34 We consider that the ability of the future charity commission to investigate and check abuses is crucial to building and maintaining public confidence. In most overseas jurisdictions, the regulatory authority is vested with statutory power to investigate any reports of breaches of trust and maladministration by charities or their officers. In England and Wales, the

¹⁶ Though not where the action is brought by a beneficiary under a trust in a case of fraud: see section 20, Limitation Ordinance (Cap 347).

Charity Commission is vested with wide powers to investigate and institute inquiries, either generally or for particular purposes, and to investigate any mismanagement and misconduct within charities. It also has the power to protect charity assets at risk and take action against those persons responsible for misconduct and mismanagement in a charity.

8.35 When charities' assets, reputation, services or beneficiaries have been harmed or are at risk of abuse or damage, the aim of the Charity Commission is to stop the abuse or damage and put charities back on a proper footing for the future. Its work involves identifying and investigating causes of misconduct or mismanagement in the administration of charities and resolving the problems that it finds.¹⁷

8.36 The Charity Commission has issued a guideline entitled, *CC45 - Regulatory Compliance Casework: Guidance for charities and their advisers*, which seeks to provide guidance to help trustees of charities and their advisers to understand the regulatory role of the Commission, including its compliance work in relation to identifying and investigating apparent misconduct or mismanagement in the administration of charities. Details of the Commission's regulatory role and how it conducts regulatory compliance work are set out in section C1 of CC 45. According to CC 45, "misconduct" includes "any act that the person committing it knew (or ought to have known) was criminal, unlawful or improper." "Mismanagement" includes "doing anything to: lose or misuse significant charitable resources; seriously undermine a charity's reputation; or put beneficiaries at risk."

8.37 In more serious cases, the Commission may open a statutory inquiry, which may involve using its remedial and protective powers when it is appropriate and proportionate to do so.

8.38 The Commission's guideline CC 45 lists a number of examples of problems within charities which may give rise to a regulatory compliance case and have the potential to be dealt with under a statutory inquiry. These examples include:

- a charity has poor internal controls or administrative procedures that prevent the charity from functioning properly or put charity assets at some risk;
- a charity has governance problems that have been created by a failure to act on the part of trustees or officers of a charity;
- there is an unresolved disagreement between trustees that has resulted in failure to observe charity law or put the charity's assets or beneficiaries at risk;
- charity assets have been lost or misapplied;

17 The Charity Commission for England and Wales, *CC45 - Regulatory Compliance Casework: Guidance for charities and their advisers* (June 2008), at section C1, available at : <http://www.charity-commission.gov.uk/Publications/cc45.aspx>.

- charity trustees or individuals with connections to the charity have received unauthorised or significant private benefits through their work with the charity; or the way the charity is run is allowing these to arise and conflicts of interest are not being properly managed;
- irregular fundraising activity has taken place, whether by the charity or by others on behalf of the charity and the charity trustees are not dealing with this properly.¹⁸

8.39 In Scotland, the Office of the Scottish Charity Regulator is vested with similar wide power to make inquiries and investigate charitable organisations.

8.40 While it is essential for the future charity commission to be empowered to investigate and check into alleged abuses within charities, we consider that care would need to be taken in defining the trigger-points for initiating an investigation so as to ensure that these were not too open-ended. We consider also that it is important to safeguard the reputation of a charity under investigation by avoiding premature disclosure of information relating to the investigation which could have an adverse or damaging effect on the charity's credibility.

8.41 We note that in England and Wales, the Charity Commission takes a cautious approach towards the disclosure of information relating to charities being investigated. The Commission has issued a guideline entitled, *CC46 - Statutory Inquiries into Charities: Guidance for charities and their advisers*. The purpose of this guideline is to help charities and their advisers to understand what it means when the Commission opens a statutory inquiry. Section E2 of CC46 deals with the question as to whether the information provided by the charity trustees will be kept confidential. It is stated in the guideline that all information, whether personal or otherwise, is held securely by the Commission, and the Commission undertakes to treat and handle the information provided for the purposes of an investigation appropriately and with care. The guideline goes on to note that in certain circumstances, however, the Commission may be required to disclose the information in accordance with the principles of data protection, or within its role as the regulator of charities. The most common form of disclosure is where the Commission publishes the outcome of the inquiry in a Statement of Results of Inquiry.¹⁹

8.42 In line with the approach adopted in the United Kingdom models, we consider that it is essential that the future charity commission should have the power, when necessary, to investigate charities, and obtain information on activities, documents, records, books and accounts from charities under investigation. We also consider that appropriate safeguards are needed to

18 The Charity Commission for England and Wales, *CC45 - Regulatory Compliance Casework: Guidance for charities and their advisers* (June 2008), at section C2, available at: <http://www.charity-commission.gov.uk/Publications/cc45.aspx>.

19 *CC46 - Statutory Inquiries into Charities: Guidance for charities and their advisers*, (March 2010) at section E2, available at: <http://www.charity-commission.gov.uk/Publications/cc46.aspx>.

ensure the confidentiality of such investigations in the light of their sensitivity and the need to protect the credibility of charities.

Recommendation 9

We recommend 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.

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. During the course of such investigations, there should be appropriate safeguards to ensure confidentiality.

(6) *Providing false or misleading information to be an offence*

8.44 To buttress the power of investigation of the future charity commission where it has been exercised, we also recommend that any person who intentionally or recklessly provides false or misleading information to the future charity commission or its appointed investigators should be guilty of an offence. In line with the approach in some overseas jurisdictions, we propose that this offence should be statutory. This would provide an appropriate deterrent in the case of persons under investigation for any misconduct or maladministration in relation to charities.

Recommendation 10

We recommend 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, will be guilty of an offence.

Enforcement and remedies

8.45 Monitoring charities through proper enforcement procedures and remedial action will ensure charities meet their legal obligations and operate in accordance with their proper purposes. The future charity commission should be empowered to take appropriate and proportionate measures to investigate and enforce compliance with specified requirements. Based on the experience of overseas jurisdictions, we note that there are different enforcement powers and remedies and that these may be applied to charitable organisations to different degrees, depending on the severity and persistence of the default in complying with their legal obligations. Subject to due process, the following are possible approaches to the issues of enforcement and remedies.

(1) *Removal of charitable status*

8.46 In all of the overseas jurisdictions which have a registration system, the regulatory authorities of registered charities have the power to de-register charities. However, such an act is only exercised in cases of significant or persistent failure to meet the charity's legal obligations or those of the persons in charge. In New Zealand, for example, de-registration of charities due to non-compliance by charities with their legal obligations is preceded by a written warning to the concerned charitable organisation or the person connected with the organisation.

(2) *Referring criminal offences to the appropriate law enforcement agencies*

8.47 In case of possible criminal acts involved in the misconduct or mismanagement in the administration of the charity which come to light in the course of an inquiry, the future charity commission should have power to refer the case to appropriate law enforcement agencies.

(3) *Civil actions*

8.48 Should possible civil actions be called for in the course of an inquiry into charitable organisations or persons connected with the misconduct or mismanagement of the charity, the future charity commission should have the power to refer the matter to the Secretary for Justice, as protector of charities, to pursue further action.

(4) *Protection of the property of a charity*

8.49 A practical and effective remedial action is to protect the property of a charity in order to prevent further damage arising from misconduct or mismanagement. In overseas jurisdictions, such as England

and Wales, the Charity Commission has wide power to act for the purposes of protection of property, such as to appoint additional charity trustees and suspend or remove trustees or officers of the charity, to vest property of a charity in an official custodian and to require persons holding property on behalf of the charity not to part with the property without the approval of the Commission.

8.50 We consider that in order to maintain public confidence and to encourage proper governance within charities, proper enforcement powers and remedies should be in place, and that these powers, as set out in Recommendation 11, should be vested in the future charity commission.

Recommendation 11

We recommend that the future charity commission should be vested with powers relating to enforcement and remedies in the case of non-compliance by charities with their legal obligations.

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.**

8.51 Further, we consider that the power of the future charity commission to protect the property of charities in cases of misconduct or mismanagement should include various powers, as set out in Recommendation 12 below. As these powers would be exercised only in extreme cases (where, for example, a charity's trustees are suspected of engaging in illegal activities involving charitable trust properties), we consider that the vesting of these powers in the future charity commission would be appropriate and necessary for the better protection of the public.

Recommendation 12

We recommend that the future charity commission should be vested with the power to protect property of charities in cases of misconduct or mismanagement in the administration of charities, and 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.**

Chapter 9

Conclusions and proposals on the regulation of fundraising activities

Introduction

9.1 In this chapter, we examine in detail the various measures currently in use in Hong Kong to regulate the fundraising activities conducted by charitable organisations. The adequacy or otherwise of these measures will be considered. We also examine the various measures adopted in other jurisdictions to regulate fundraising. Our proposals for improving the regulation of charitable fundraising in Hong Kong are set out later in this chapter.

Current situation in Hong Kong

The extent of statutory regulation of charitable fundraising activities

9.2 The fundraising activities of all charitable organisations in Hong Kong, whether statutory or non-statutory, which are conducted in public places (such as collections of donations or charity sales), or involve the sale of lottery tickets, have to be approved by the Government in advance, and a permit or a licence has to be obtained from the appropriate Government authority before these activities can be carried out. The government departments and bureaux concerned include the Social Welfare Department, the Home Affairs Bureau, the Food and Environmental Hygiene Department and the Television and Entertainment Licensing Authority. The various requirements for these authorisations are discussed later in this chapter.

9.3 Other charity activities involving appeals to the public, such as charity auctions, balls, concerts, dinners, walks, film premieres, shows in the mass media, requests for donations by mail and advertisements or phone-in arrangements, do not require a permit or licence. The organisers of these charitable activities are not obliged to disclose, either to the Government or the public, the amount of donations received or how these funds are disposed of.¹ The use of these proceeds is therefore *"not subject to any Government monitoring or public scrutiny."*²

1 Office of the Ombudsman, *Investigation Report: Monitoring of Charitable Fund Raising Activities* (Feb 2003), at para 3.1.

2 Same as above.

Regulation of fundraising activities by the Social Welfare Department and the Home Affairs Bureau

9.4 As noted above, there are generally two situations where the Government's prior approval is required for the carrying out of charitable fundraising activities. The first is where the fundraising activity is held in a public place. The purpose of requiring approval in this case appears to be to ensure that public order is maintained.

9.5 Section 4(17)(i) and (ii) of the Summary Offences Ordinance (Cap 228), under the section heading "Nuisances and miscellaneous offences", provides:

"Any person who without lawful authority or excuse –

(17) organizes, provides equipment for, or participates in any collection of money or sale or exchange for donations of badges, tokens or similar articles in a public place except under and in accordance with a permit issued-

(i) for a collection, sale or exchange for charitable purposes, by the Director of Social Welfare; or

(ii) for a collection, sale or exchange for any other purpose, by the Secretary for Home Affairs;..."

Section 2(1) of the Summary Offences Ordinance (Cap 228) defines "*public place*" to include:

"... all piers, thoroughfares, streets, roads, lanes, alleys, courts, squares, archways, waterways, passages, paths, ways and places to which the public have access either continuously or periodically, whether the same are the property of the Government or of private persons."

9.6 *Social Welfare Department authorisation.* If any charity wishes to collect donations for a charitable purpose through an activity to be held in a public place, it must first obtain a "*public subscription permit*" from the Social Welfare Department. Before the permit is issued, the Department will check to ensure that the purpose of the proposed fundraising activity is consistent with the charitable objects of the charity and that approval from the management authority of the venues concerned has been granted for the activity.

9.7 There are two different application procedures under the public subscription permit system, depending on whether the activity held is a "*flag day*" or a "*general charitable fundraising activity in a public place*" (such as the sale of badges or tokens for donations, or the collection of donations by the

setting up of donation boxes in stationed counters). Two separate application forms and eligibility criteria apply.³

9.8 The Social Welfare Department's document, *Explanatory Notes for the application of Public Subscription Permit*,⁴ explains the various conditions which must be complied with, and to which the applicant for the permit must agree, in order for the permit to be issued. These conditions include that the funds raised must be used for the purpose specified in the application form. Condition (4) in the *Explanatory Notes* states that:

"Within 90 days of the last date specified in the Permit, the Permittee shall cause the money received from the public subscription, less any expenses incurred, including expenses in printing and stationery, to be applied or to be credited to the bank account, for the purpose for which the permit is issued."

9.9 A further requirement is that an audited account of the fundraising activity must be produced and presented to the Department within 90 days of the last date specified in the permit. The audited account must indicate the amount of net proceeds collected and how and for what purpose these have been used. For flag days, as well as other general fundraising activities where the monies are to be spent outside Hong Kong, the audited accounts together with the auditor's opinion or review report for flag days should be published in one Chinese and one English local newspaper within 90 days after the fundraising activities.

9.10 *Home Affairs Bureau authorisation.* As noted above, section 4(17)(ii) of the Summary Offences Ordinance (Cap 228) provides that a permit from the Secretary for Home Affairs is required for fundraising in a public place for purposes which are other than charitable. Fundraising activities carried out by "*non-charitable*" organisations, such as political organisations for example, fall within the ambit of the section. Failing to obtain a valid permit constitutes an offence under section 4(17) of the Ordinance, and a person committing such an offence is liable to a maximum fine of \$2,000 and imprisonment for three months.⁵ The law primarily intends to ensure that the collections of donations are made in an orderly manner and that unauthorised collections which may cause a nuisance are prohibited.

3 The two application forms, with explanatory notes, and separate notes of eligibility criteria are available on the SWD website at:

(for flag days)

http://www.swd.gov.hk/doc_sc/Control_of_Char/FD%20Application%20Form%202010-11.pdf.

http://www.swd.gov.hk/doc/Control_of_Char/FD%20eligibility%20criteria%2020080201e.pdf.

(for general fundraising activities)

http://www.swd.gov.hk/doc/Control_of_Char/PSP%20Application%20Form%2020110218.doc.

http://www.swd.gov.hk/doc/Control_of_Char/PSP%20criteria%2020061019e.pdf.

4 <http://www.swd.gov.hk/en/index/>.

5 See: section 113C(2) of the Criminal Procedure Ordinance (Cap 221).

Regulation of fundraising activities by the Food and Environmental Hygiene Department

9.11 Another regulatory measure that applies to charitable fundraising activities carried out in public places is the need to apply in advance to the Food and Environmental Hygiene Department for a temporary hawkers licence for on-street selling activities. Upon receipt of an application for a temporary hawkers licence, the Food and Environmental Hygiene Department consults other relevant government departments, including the Police, the Lands Department, the Home Affairs Department or the Social Welfare Department to see if there is any objection.⁶ Once granted, the temporary hawkers licence permits the licensee to hawk for a period not exceeding one month. The organisation concerned is required to comply with the licensing conditions contained in the licence as well as the relevant provisions imposed under the Hawkers Regulation (Cap 132AI). The relevant government departments may also impose further conditions to regulate the fundraising activities of the organisation.

Regulation of fundraising activities by the Television and Entertainment Licensing Authority

9.12 The second situation where the Government's prior approval is required for charitable fundraising is where the fundraising activity is carried out through a lottery. If a charity wishes to raise funds by this means a licence is required from the Commissioner for Television and Entertainment Licensing (TELA) under section 22(1)(a)(i) of the Gambling Ordinance (Cap 148). This section states:

"(1) The Commissioner for Television and Entertainment Licensing may -

(a) by licence authorize -

(i) the promotion and conduct of any lottery for the purposes of a club, association or other body of persons approved by the Commissioner for Television and Entertainment Licensing; ..."

9.13 The applicant organisation must be a bona-fide non-profit-making organisation registered in Hong Kong. If the organisation is not a charitable institution or trust of a public character exempt from tax under Section 88 of the Inland Revenue Ordinance (Cap 112), a lottery event may still be organised by such an organisation for the benefit of a charity if the charity provides an acknowledgement consent letter and an approval letter certifying tax exemption under section 88 of the Inland Revenue Ordinance.

9.14 Section 2 of the Gambling Ordinance (Cap 148) defines "lottery" to include:

6 <http://www.fehd.gov.hk/english/news/details/23-10-2009-2200.html>.

- "(a) *a raffle;*
 - (b) a sweepstake;*
 - (c) tse fa (字花);*
 - (d) hung piu (紅票);*
 - (e) po piu (鋪票);*
 - (f) any competition for money or other property success in which -*
 - (i) involves guessing or estimating the results of future events, or of past events the results of which are not generally known; or*
 - (ii) does not depend to a substantial degree upon the exercise of skill by the competitors; and*
 - (g) any game, method, device or scheme for distributing or allotting prizes by lot or chance,*
- whether promoted, conducted or managed in or outside Hong Kong;"*

9.15 Section 22(3) of the Gambling Ordinance (Cap 148) provides that the licence granted under section 22(1)(a)(i) shall be subject to prescribed conditions and to any other conditions that the Commissioner for Television and Entertainment Licensing may impose. TELA's *Reference Guide on the Organisation of Lottery Activities*⁷ sets out the prescribed conditions for the grant of a lottery licence. These are largely similar to the conditions imposed on the grant of public subscription permits by the Social Welfare Department discussed above. TELA also makes available for public inspection copies of auditors' reports and income and expenditure statements for moneys raised by the sale of lottery tickets. These documents are kept for one year at the office of the Licensing Section of TELA.

9.16 Non-compliance with any of the conditions provided in the licence constitutes a criminal offence under section 22(6) and (7) of the Gambling Ordinance (Cap 148), which provides:

"(6) Where a condition of any such licence is contravened, the person to whom the licence was issued commits an offence unless he proves that the contravention occurred without his

7 http://www.tela.gov.hk/document/eng/form/licensing/lottery/01/lottery_e.pdf.

consent or connivance and that he exercised all due diligence to prevent it.

(7) Any person who commits an offence under subsection (6) is liable on conviction to a fine of \$50,000 and to imprisonment for 2 years."

9.17 In cases of breach, section 22(4) the Ordinance also provides that the lottery licence may be cancelled at any time by the Commissioner for TELA, regardless of whether any person has been convicted of an offence under section 22(6) the Ordinance.

The development of voluntary guidelines on charitable fundraising

9.18 To supplement these limited statutory measures which regulate fundraising, the initiative has been taken by the Social Welfare Department, the Hong Kong Institute of Certified Public Accountants and, more recently, by the Independent Commission Against Corruption, to produce non-mandatory practice guidelines for those involved with charitable fundraising activities.

Guidelines issued by the Social Welfare Department

9.19 The Social Welfare Department issued two sets of guidance notes related to charitable fundraising in 1998 and 2004, respectively. In its *Guidance Note on Internal Financial Controls for Charitable Fund-raising Activities*" issued in 1998,⁸ the Department *"proposes some basic controls to be considered by charitable fund-raising organisations with a view to ensuring that the income generated from charitable fund-raising activities is spent for the designated purpose and that such income and expenditure is properly documented."*⁹ Specific topics covered by the Guidance Note include that:

- charitable fundraising organisations should have a well defined organisational structure;
- they should ensure that their staff involved in fundraising are competent and properly trained; and
- measures to prevent financial mistakes and abuse, such as segregating duties related to financial collection, preparation of receipts, payments and accounts recording should be observed, and carefully defined procedures should be developed within the organisation to deal with these areas.

9.20 The Guidance Note offers the following further *"helpful hints"* in relation to the most common fundraising activities in Hong Kong, including flag days, collection boxes placed in stationed counters, charity sales of

8 Available on the SWD website at: http://www.swd.gov.hk/doc/Control_of_Char/gnifc_e.pdf.

9 Same as above, at para 1.

commodities, charity walks, charity balls, concerts, variety shows and film premieres:

"For flag days

- *Collectors should be properly supervised.*
- *Collections should be carried out by a two-person team.*
- *Collection bags/boxes should be properly numbered and sealed.*
- *Collectors should sign a receipt and return collection bags/boxes.*

For collection boxes placed in stationed counters which are manned by collectors

- *Collection boxes should be regularly open and the contents should be counted and recorded in the presence of at least two people authorized by the agency management.*
- *Issue of official receipts signed by the collectors, if possible, upon the receipt of donations. These receipts may be issued in two copies, one to the donor and the other to be attached to the report addressed by the collectors to their supervisor.*

For charity sale of commodities (such as cookies and gift packs)

- *The sale proceeds should be regularly counted and recorded in the presence of at least two people authorized by the charitable fund-raising organisation.*
- *Issue of official receipts signed by the collectors, if possible, upon the receipt of donations. These receipts may be issued in two copies, one to the donor and the other to be attached to the report addressed by the collectors to their supervisor.*
- *Reconciliation should be made between the opening and closing balances and units sold.*

For charity walk receiving donations after the event

- *Incoming post should be opened at the earliest opportunity and in the presence of two responsible people. Rotation of post-opening staff should be considered where practical.*

- *All incoming cheques and cash should be recorded immediately and entries verified by someone other than the person who has made the entry.*
- *The security of unopened mail should be ensured.*

For charity ball, concert and film premiere

- *Issue of official receipts signed by the collectors should be made for each transaction of ticket sale. These receipts may be issued in two copies, one to the purchaser and the other to be attached to the report addressed by the collectors to their supervisor.*
- *All tickets must be pre-numbered and their issue or delivery must be properly recorded.*
- *A record be kept of which tickets have been sold.*
- *A reconciliation be made of receipts against tickets sold.*

For charity show through the mass media

- *The pledged donation made by donors should be properly recorded. Should cancellation of the pledged donation be required afterwards, it has to be verified by someone other than the person who has made the entry.*
- *The incoming cheques and cash from the donors should be recorded immediately and entries verified by someone other than the person who has made the entry.*

For appeal for donations through advertisements, telephone calls, letters and leaflets

- *Similar controls as charity walk."*

9.21 The second set of guidance issued by the Social Welfare Department is the *Reference Guide on Best Practices for Charitable Fundraising Activities*¹⁰ issued in 2004. The Reference Guide is divided into three parts, covering donors' rights, fundraising practices and financial accountability. The Reference Guide is for voluntary adoption by charities. Paragraph 7 of the document states that:

"Charities that voluntarily adopt this Reference Guide commit to fundraising practices that respect donors' right to truthful information and to privacy. They also commit to managing

10 Available on the SWD website at:
http://www.swd.gov.hk/doc/Control_of_Char/Booklet%2020100603e.pdf.

responsibly the funds that donors entrust to them, and to reporting their financial affairs accurately and completely."

9.22 The explanatory Leaflet¹¹ for the Reference Guide sets out the following "Gist of Reference Guide provisions":

"A. Donors' Right

- All donors are entitled to receive an official receipt for the amount of the donation.*
- All fundraising solicitations will disclose the Charity's name and the purpose for which funds are requested.*
- Donors and prospective donors are entitled to (or an opportunity to examine), upon request, the Charity's most recent annual report and audited financial statements, etc.*
- Donor's requests to remain anonymous will be respected.*

B. Fundraising Practices

- Fundraising solicitations on behalf of the Charity will be truthful.*
- The Charity will cease immediately solicitation of a prospective donor who identifies the solicitation as harassment or undue pressure.*
- The Charity will respond promptly to a donor's request to amend the donor's standing donation instruction.*
- Fund-raisers should not be paid finders' fees, commissions or other payments based on the number of donors secured or the value of funds raised, etc.*

C. Financial Accountability

- The Charity's financial affairs will be conducted in a responsible manner, consistent with the applicable legal requirements and relevant ethical or professional obligations.*
- Annual financial report will be factual and accurate in all material respects and externally audited, disclosing: e.g. the total amount of fund-raising revenues and the total amount of fund-raising expenses, etc.*

11 http://www.swd.gov.hk/doc/Control_of_Char/Leaflet%2020100603e2.PDF.

- *No more will be spent on administration and fund-raising than is required to ensure effective management and resource development.*
- *The cost-effectiveness of the Charity's fundraising programme will be reviewed regularly by the governing board."*

Guidelines issued by the Hong Kong Institute of Certified Public Accountants

9.23 Further guidance on financial reporting on fundraising activities carried out in public places with permits issued by the Social Welfare Department has been issued by the Hong Kong Institute of Certified Public Accountants. The *Practice Note 850 Review of Flag Day Accounts* was first issued in August 1999¹² and the *Circular on Reporting on General Charitable Fundraising Activities Covered by Public Subscription Permits issued by the Social Welfare Department (Other than Flag Days)* was published in November 2007,¹³ both of which were aimed primarily at accounting practitioners.

Guidelines issued by the Independent Commission Against Corruption

9.24 In October 2009, the Independent Commission Against Corruption published its *Best Practice Checklist: Management of Charities and Fundraising Activities*.¹⁴ In issuing these best practice guidelines, the Commissioner for the ICAC stressed that *"despite the relatively small number of complaints, the risk of corruption and other crimes involving management of charities and fund-raising activities should not be underestimated in view of the substantial donations made each year."*¹⁵

9.25 The Commissioner noted that the ICAC recommends in the practice guidelines, *"practical measures to help these organisations minimize such risks through strengthening internal controls."*¹⁶ These include that charitable organisations should adopt:

- proper budgeting
- good record-keeping
- regular auditing of accounts
- capping of administrative expenses

12 Available on the HKICPA's website at:
http://app1.hkicpa.org.hk/ebook/HKSA_Members_Handbook_Master/volumeIII/pn850.pdf.

13 Available on the HKICPA website at:
http://www.hkicpa.org.hk/professionaltechnical/assurance/rm/GCFA_0711.pdf.

14 Available on the ICAC website at:
http://www.icac.org.hk/filemanager/en/Content_1031/fund_raising.pdf.

15 See Press Release, "ICAC launches guidelines to enhance governance and transparency in fund-raising" (6 October 2009) at:
http://www.icac.org.hk/en/news_and_events/pr2/index_uid_846.html.

16 Same as above.

- safe-keeping of donations, and
- publicising audited accounts of fundraising activities.¹⁷

9.26 In order to promote the use of these best practice guidelines, it is intended that the Social Welfare Department, TELA and the Inland Revenue Department will help distribute copies of the ICAC guidelines to charitable bodies upon their application for permits, exemptions or licenses.¹⁸

Monitoring of fundraising activities in other jurisdictions

9.27 We have set out in Annex 6 of this paper a detailed review of the systems for regulating fundraising activities which apply in a number of overseas jurisdictions. It is evident from this that the nature and degree of oversight varies from jurisdiction to jurisdiction. We have found the examples of the systems in England and Ireland particularly instructive and have summarised these below. We note that under the Irish system in particular, recent legislation has been enacted to provide detailed provisions on how charity proceeds are to be collected, handled and accounted for. These measures have wide application, and include provisions dealing with the most modern methods of charity collection as well as the advent of "*professional fundraisers*".

England and Wales

9.28 In England and Wales, the statutory requirements governing public fundraising collections are provided in the House-to-House Collections Act 1939 and the Police, Factories etc (Miscellaneous Provisions) Act 1916. In addition, the Charity Commission has issued two sets of guidance notes: *CC8 – Internal Financial Controls for Charities*¹⁹ and *CC20 – Charities and Fundraising*.²⁰

9.29 For fundraising activities carried out by telephone, CC20 states that charities should ensure that they do not make unsolicited calls to numbers registered on the Telephone Preference System (TPS). (TPS is the official central opt-out register in UK on which customers can record their preference not to receive unsolicited sales or marketing calls.²¹) Charities may however continue to call donors on the TPS who they have an ongoing relationship with and who have agreed to be contacted by the charity. All fundraising activity involving recording or taking down personal details is subject to data protection laws. Charities that use face-to-face fundraising, online fundraising, direct mail, events, broadcast or telephone fundraising and which handle personal details such as names, contact details and credit

17 Same as above.

18 Same as above.

19 <http://www.charity-commission.gov.uk/publications/cc8.aspx>

20 <http://www.charity-commission.gov.uk/publications/cc20.aspx>, at section A1.

21 <http://www.mpsonline.org.uk/tps/>

or debit details should be aware of and comply with the Data Protection Act 1998.²²

9.30 For charity funds sent to charities by post, charity trustees are advised in CC8²³ that charities should open the incoming post at the earliest opportunity and in the presence of two unrelated persons. Cheques and cash that come in by post have to be immediately recorded and banked. It is also suggested in CC8 that the post-opening staff should be rotated and security of unopened mail should be ensured.

9.31 Where fundraising is conducted by means of public collections, CC8 advises²⁴ that trustees have to ensure that these collections are carried out in accordance with the statutory requirements governing public collections (set out in the House-to-House Collections Act 1939 and the Police, Factories etc (Miscellaneous Provisions) Act 1916). CC8 also advises that in the course of public collections, collection boxes must be sealed, individually numbered and documented. Static collection boxes should be opened regularly and contents counted in the presence of at least two persons so authorised by the trustees.

9.32 With regard to fundraising and sponsored events, CC8 states²⁵ that charity trustees holding these events should ensure that the charities are in control of the funds raised on their behalf, so that they can receive all the money they are entitled to from these events.

9.33 For society lotteries, CC20 states²⁶ that it will be necessary to register with the Gambling Commission where the sale of lottery tickets exceeds £20,000 in value, or exceeds £250,000 when taken together with sales from previous lotteries in the same year. Sale of lottery tickets below these thresholds would only require registration with the local authority.

9.34 Where a charity engages the services of a "*professional fund-raiser*" or a "*commercial participator*"²⁷ in a fundraising activity, CC20

22 <http://www.charity-commission.gov.uk/publications/cc20.aspx>, at section E4.

23 <http://www.charity-commission.gov.uk/publications/cc8.aspx>, at section C1.

24 <http://www.charity-commission.gov.uk/publications/cc8.aspx>, at section C1.

25 <http://www.charity-commission.gov.uk/publications/cc8.aspx>, at section C2.

26 <http://www.charity-commission.gov.uk/publications/cc20.aspx>, at section E5.

27 The terms "*professional fundraiser*" and "*commercial participator*" are defined in section A4 of CC20 at <http://www.charity-commission.gov.uk/publications/cc20.aspx>. The definitions are as follows:

"A professional fundraiser is anyone who carries on a commercial fundraising business, wholly or mainly fundraising for charitable purposes; or any other person who is paid to solicit money or other property for charity. This does not include:

- a charity or a 'connected company';*
- any officer or employee of the charity or connected company;*
- a trustee of the charity, acting as trustee;*
- any public charitable collector, other than promoters;*
- people who solicit funds on TV or radio;*
- any commercial participator; or*
- anyone who is paid no more than £1,000 for a particular appeal, or no more than £10 per day or £1,000 per year where there is no specific appeal.*

A commercial participator is not a fundraising business but a commercial enterprise that takes part in a promotional venture, such as an advertising or sales campaign, where the public are

provides²⁸ that the "*solicitation statement*" made by these professionals has to provide certain information to the public. Where the services of a commercial participator are required, the commercial participator must provide certain information, such as which charity will benefit from the promotional venture and what proportion of the proceeds will be given to the charity.²⁹

Ireland

9.35 Until 2009, charitable fundraising activities in Ireland were solely regulated by the Charities Acts 1961 and 1973, and the Street and House to House Collections Act 1962. In February 2009, the Charities Act 2009 was enacted and this now co-exists with the earlier controlling legislation. The provisions of the 2009 Act will come into force in stages.³⁰

9.36 The main areas of impact of the 2009 Act on the previous system of fundraising controls appear to be that:³¹

"Both cash and non-cash (i.e. direct debits, standing orders etc) charitable fundraising from the public will require permits from the Gardaí [the Irish Police], and only registered charities will be able to conduct charitable fundraising.

Sealed collection boxes will be the standard requirement for collections in public places and the boxes will have to display the name and charity number of the charity (the Regulator has the discretion to make an exception to the sealed collection box rule to facilitate the making of change for token sellers).

*Charities that fundraise will be expected to comply with the non-statutory Statement of Principles for Fundraising (available at www.ictr.ie), and will also be expected to comply with specific Codes of Good Practice for Fundraising when they are developed."*³²

9.37 A new definition of "*collection*" is provided under section 93 of the 2009 Act which states:

informed that contributions will be given to or applied for the benefit of a charity. A commercial participator may be subject to the same regulatory requirements as professional fundraisers if all of its activities are for 'charitable purposes'."

28 <http://www.charity-commission.gov.uk/publications/cc20.aspx>, at section E7.

29 <http://www.charity-commission.gov.uk/publications/cc20.aspx>, at section E7.

30 <http://www.pobail.ie/en/CharitiesRegulation/PRIN%20FEATTHECHARITIESACT09.pdf>, at 1, para 1.

31 See Factsheet issued by the Wheel entitled *The Charities Act 2009* at:

http://www.wheel.ie/sites/default/files/Charities_Act_2009_Factsheet.pdf

According to the information provided at <http://www.wheel.ie/about>, "*The Wheel is a support and representative body connecting community and voluntary organisations and charities across Ireland. Established in 1999, The Wheel has evolved to become a resource centre and forum for the community and voluntary sector.*"

32 http://www.wheel.ie/sites/default/files/Charities_Act_2009_Factsheet.pdf, at para 2.3.

"collection' means the collection or attempted collection of money from the public in any public place or places or by house to house visits or both in such place or places and by such visits for the benefit (actual, alleged or implied) of a particular object, whether charitable or not, and whether —

(a) any consideration is or is not given, or

(b) any badge, emblem or other token is or is not exchanged or offered in exchange,

for money so collected, but does not include exempt activity, begging or receiving alms;"

9.38 Section 93 also introduces new definitions of *"money"* and *"non-cash collection"*. Through the 2009 reforms, new methods of collection, which were previously unknown under the 1962 Act (such as direct debits and standing orders), are now written into the law and are subject to regulation and control when used in a charity fundraising activity.

9.39 The new reforms will also encompass the use of non-statutory codes of practice. In line with this, a draft *Statement Of Guiding Principles For Fundraising* has already been issued.³³ This document, which was drawn up by charity fundraising practitioners and donors,³⁴ is stated to be intended *"to complement and build on the existing legal framework within which all charities operate"*, and *"seeks to go further than the minimum legal requirements by offering a set of overarching principles and some guidance about how fundraising should be approached and organised."*³⁵

Our conclusions and proposals on the regulation of fundraising activities in Hong Kong

9.40 As we saw earlier in this chapter, regulation of fundraising activities in Hong Kong under the existing system is confined to measures to maintain public order, public hygiene, and to prevent gambling. For charity collections *not* requiring prior approval from the Social Welfare Department (SWD), the Food and Environmental Hygiene Department (FEHD) or the Television and Entertainment Licensing Authority (TELA) (ie, those not carried out in a public place or involving lotteries³⁶), there seems to be no mechanism through which the Government or the public can effectively monitor how the monies raised are spent.

33 See Irish Charities Tax Research Ltd, *Statement Of Guiding Principles For Fundraising: Draft Proposals* (Feb 2008) at: [http://www.ictr.ie/files/R3.%20Guiding%20Principles%20of%20Fundraising%20Draft%20State ment%20-%20Oct%202007.pdf](http://www.ictr.ie/files/R3.%20Guiding%20Principles%20of%20Fundraising%20Draft%20Statement%20-%20Oct%202007.pdf)

34 Same as above, at 9.

35 Same as above.

36 Such as charitable auctions, balls, concerts, dinners, walks, film premiere, shows in mass media, request for donation by mail, advertisements or phone-in arrangements: see *The Ombudsman Report*, at para 6 at ii.

9.41 Some key limitations of the existing regulatory measures on fundraising are summarised below.

- As we have seen, charities wishing to conduct certain fundraising activities (ie, those in a public place or involving lotteries) have to apply to one or more of a range of government departments (including SWD and TELA), each with varying procedures and requirements, in order to be granted permission.
- While SWD and TELA endeavour responsibly to carry out what checks they can, neither SWD nor TELA appear to impose a "*fit and proper*" test on applicant organisations to ensure that they are persons of integrity. (Only in the case of flag day applications is the applicant required to have a three-year track record of charity work, and for other general fundraising activities, the applicant may not be granted with a permit if the applicant has breached the permit conditions in its previous fundraising activity.)
- There is a lack of public access to information on fundraising activities and there is no centralised information point or hotline where the public can make enquiries about fundraising activities carried on in public.
- While some broad guidelines and best practice manuals on fundraising exist, there are no statutory provisions setting out detailed fundraising requirements of charitable organisations, covering such issues as internal controls, accountability and transparency.
- The various guidelines which have been issued in the area of charity fundraising in Hong Kong are all voluntary, non-statutory guidelines which charitable organisations may or may not choose to follow. These guidelines have been developed over time by different departments or authorities. Consequently, there may be certain areas of overlap as well as gaps, where important issues may be covered in insufficient detail or may not be covered at all.
- While the terms and conditions imposed on lottery licences by TELA are backed by criminal sanction, and it is an offence under section 4(17) of the Summary Offences Ordinance (Cap 228) to hold a fundraising activity in a public place without a permit, the terms and conditions imposed on the grant of permits by SWD and temporary hawker licences by FEHD are administrative only. The only sanction for a breach of these terms appears to be that the charity may not be granted a permit or licence in future.

Our recommendations on charitable fundraising

9.42 In the course of our deliberations, we have endeavoured to formulate proposals to directly address the perceived weaknesses in the current system of regulating charitable fundraising in Hong Kong. Our guiding principle has been that such activities should be conducted in future in a more transparent and accountable manner. Nonetheless, we are also highly conscious that any future regulatory measures should be no more than is necessary to improve the system, as we would not wish to see introduced unnecessary inconvenience, either to the dedicated charitable organisations and voluntary agencies which carry out this important charity work, or to the philanthropic public which provides their donations so generously. In balancing these two objectives, we believe overall a relatively light-handed approach in this area is appropriate.

Regulatory measures on fundraising activities in public places and lotteries

9.43 The Sub-committee considers that the existing limited regulation of fundraising activities by charities in Hong Kong is a matter of concern. A particular issue is the lack of transparency in how charity donations which are collected are used, and to what extent they are used for their intended charitable purposes. We also note the potential for confusion which may arise from the differing requirements and procedures of the various government departments which have responsibilities in this area. Furthermore, there is a lack of public access to information on fundraising activities.

9.44 After careful deliberation of different possible options for reform, the Sub-committee has concluded that the regulatory functions in relation to fundraising activities which are currently performed by SWD, FEHD and TELA should be transferred to the future charity commission, which we have recommended elsewhere in this paper should be established.

Recommendation 13

We recommend that:

- (1) 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;**
- (2) this "one-stop shop" service should be provided by the future charity commission which 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 Licensing Authority in relation to authorising charity fundraising activities in public places and those involving lotteries; and**

- (3) the future charity commission should be responsible for enabling public access to information relating to fundraising activities and for providing an enquiry response service to the public.**

Other types of fundraising activity

9.45 For the time being, the Sub-committee does not propose legislation to regulate other types of fundraising activity, such as charitable balls and concerts, or solicitation letters and solicitation through electronic means such as internet and SMS from individuals or charities. We consider, however, that for all charitable fundraising activities, whether in the public domain or otherwise, the fundraising body concerned should be required prominently to display its charity registration number in the course of carrying out its fundraising activities. That should include a requirement that the charity display its registration number on its website or on any material soliciting donations.

9.46 There has recently been extensive press coverage of a case involving the founder of a charity who was convicted of having sexual relations with an under-age child at a children's home in Yunnan run by the charity concerned.³⁷ Concern was expressed that the charity continued to solicit contributions via its website after the conviction. In the light of that case, there have been calls for this avenue of collection to be regulated. There are, however, practical difficulties in devising workable controls on internet collection and there is little that can be done to prevent the deliberately fraudulent from soliciting donations online, particularly if the individual or organisation has no physical presence in Hong Kong.

9.47 One measure which we believe could assist the public is a statutory requirement that any charity registered in Hong Kong under our proposed new legislative scheme should be required to display its registration number on its website. Coupled with a campaign to raise public awareness of the new provisions, we think that would offer the public some assurance of the legitimacy of the particular charity when donating online. We envisage that members of the public would be able to check the validity of the charity's registration via the future charity commission.

9.48 Solicitation of donations via the internet is an expanding and fast-changing area of charitable giving. We would particularly welcome views and suggestions from the public as to how and to what extent these activities 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.

37 See, for instance, "Social worker gets eight years for child sex", *SCMP*, 7 January 2011 and "Orphan mercy man gets 8 years for child sex", *The Standard*, 7 January 2011. Similar reports appeared the same day in *Ming Pao*, the *Oriental Daily News*, the *Sun* and the *HK Economic Times*.

Recommendation 14

We recommend that, for all forms of charitable fundraising activities, the registration number of any charitable organisation involved in the 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).

Professional fundraisers

9.49 The Sub-committee is aware that there has been a substantial growth in the use of professional fundraisers in recent years and we consider that the extent to which their activities should be regulated is an important issue. We note that in overseas jurisdictions, such as Ireland, non-statutory codes of good practice are adopted to regulate the activities of professional fundraisers. The Sub-committee is of the view that the future charity commission should develop codes of practice along these lines. We also propose that the future charity commission should consider the feasibility of requiring professional fundraisers to register with the commission.

9.50 We note that one reason for reviewing the position of professional fundraisers in Hong Kong is that at present, a donor signing a standing order to donate to a particular charity may not realise that the donation collectors are professional fundraisers who are in fact paid by the charity on whose behalf the funds are raised, and that part of the funds donated would be used to pay these professional fundraisers. The remuneration may be paid in different ways, such as by a monthly basic fee or a commission fee. The Sub-committee believes that there is a need for greater disclosure to the future charity commission and the public about the remuneration of professional fundraisers. The Sub-committee considers that as a matter of good practice, professional fundraisers or commercial participators and charities should make sufficient disclosure of any prior written agreement between them. The making of a solicitation statement, such as that used under the system in England and Wales discussed earlier, is also a good practice which should be encouraged.

9.51 The Sub-committee is also concerned about the hiring of elderly persons by professional fundraisers to solicit donations on the street. In order to avoid any exploitation of the elderly during such activities, we propose that the future charity commission should review the matter and issue appropriate guidelines.

Recommendation 15

In relation to professional fundraisers, we recommend that:

- (1) the future charity commission should develop and issue non-statutory codes of good practice to regulate the activities of professional fundraisers;**
- (2) the future charity commission should consider the feasibility of requiring professional fundraisers to register with it;**
- (3) the future charity commission should encourage as a matter of good practice among professional fundraisers or commercial participators (including, but not limited to) -**
 - (a) the making of solicitation statements (such as those used under the system in England and Wales) by professional fundraisers;**
 - (b) disclosure of their remuneration to the future charity commission and the public;**
 - (c) disclosure to the future charity commission of any prior written agreement between them and charities; and**
- (4) the future charity commission should review the position and issue guidelines concerning the hiring of elderly persons to solicit donations on the street.**

Ad hoc fundraising

9.52 Unfortunately, in recent years there appears to have been an increasing need for charities to undertake *ad hoc* fundraising activities in response to major natural disasters. We have considered therefore whether a special mechanism is required for these *ad hoc* fundraising efforts. We note that at present, there are special arrangements in place where the Social Welfare Department accords high priority and exercises flexibility in processing applications for such *ad hoc* public subscription permits.

9.53 As there is an existing special arrangement for the fast-track processing of applications relating to *ad hoc* fundraising for natural disasters, the Sub-committee considers that similar administrative measures should be adopted in future. We also consider that the details of these arrangements should be a matter for the future charity commission to determine.

Further possible issues for consideration in the future

9.54 One area on which the Sub-committee has not yet formulated any provisional proposals is whether there should be further legal sanctions introduced for non-compliance with regulatory measures over charitable fundraising activities.

9.55 As we noted earlier in this chapter, legal sanctions are already in place for carrying out certain fundraising activities without the necessary permits and licences. Offenders who raise funds in a public place without a permit are liable to be prosecuted under the Summary Offences Ordinance (Cap 228), while those raising funds through the sale of lottery tickets without a licence are liable to be prosecuted under the Gambling Ordinance (Cap 148). There is also the administrative sanction imposed by the Social Welfare Department against non-complying organisations, which is that a permit may in future be refused to charities which have previously breached permit conditions.

9.56 The Sub-committee has recommended in Recommendation 13 that the powers and duties currently exercised by the Social Welfare Department, the Food and Environmental Hygiene Department and the Television and Entertainment Licensing Authority in relation to authorising charity fundraising activities in public places and those involving lotteries should be vested with the future charity commission. The Sub-committee is of the view, however, that the role and authority of these departments in initiating prosecutions of charitable organisations which are in breach of the law should be taken up by the Police or other relevant authorities. The Sub-committee does not consider that the future charity commission should be responsible for prosecuting non-complying organisations. However, concerns have been raised by members of the Sub-committee as to what administrative sanctions the future charity commission may be able to impose when the charity's non-compliance relates to a breach of requirements laid down in guidelines or codes of conduct issued by the charity commission. The Sub-committee has not yet developed any firm views on this.

9.57 The Sub-committee would like to seek public input on whether 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.

Chapter 10

Charities and tax

Introduction

10.1 As we have observed earlier, a significant benefit of creating a charitable organisation is that the organisation itself is not generally liable to tax and those who make donations to it may claim the amount donated as a deduction from their assessable income.¹ In this chapter, we review the special taxation position of charities, both in Hong Kong and overseas, and consider the extent to which any reform may be required.

Current situation in Hong Kong

10.2 An entity may be granted tax exemption in Hong Kong if it is accepted by the Inland Revenue Department as a "*charitable institution*" or "*trust of a public character*" under section 88 of the Inland Revenue Ordinance (Cap 112). The Department maintains a list of charities in Hong Kong which have successfully applied for tax exempt status. However, as we have seen earlier in this paper, the Department is not responsible for registering charities, nor for monitoring their conduct. According to the Inland Revenue Department's statistics, the number of charities that have been granted tax exemption in recent years is as follows:

(Charities Granted Tax Exemption)

<i>As at year ending</i>	<i>Number</i>
31.3.2005	4,162
31.3.2006	4,435
31.3.2007	4,832
31.3.2008	5,311
31.3.2009	5,898
31.3.2010	6,380

10.3 There is no statutory requirement in Hong Kong for charitable organisations to prepare (unless they are in the form of a company incorporated under the Companies Ordinance (Cap 32)), or in any case to submit, annual reports or accounts reporting their finances. The Inland

1 See Chapter 1, above, at para 1.5.

Revenue Department will only call for accounts, annual reports or other documents for the purpose of conducting a periodic review of a tax exempt organisation so as to ensure that the organisation is still charitable and its activities are compatible with its objects.²

Tax exemptions for charitable organisations

10.4 As noted above, tax exemption may be granted to an organisation if it is a charitable institution or trust of a public character within the scope of section 88 of the Inland Revenue Ordinance (Cap 112).³ The definition of charitable purposes was discussed in Chapters 2 and 5 of this paper. We have noted that while the terms "*charitable institution*", "*trust of a public character*" and "*charitable purposes*" are not defined in the Inland Revenue Ordinance, the term "*approved charitable donation*" is defined, as meaning "*a donation of money to any charitable institution or trust of a public character which is exempt from tax under section 88 or to the Government, for charitable purposes.*"⁴

10.5 In practice, the Inland Revenue Department looks to the common law to determine whether an organisation can be accepted as being established for charitable purposes,⁵ in particular to Lord Macnaghten's four principal divisions of charitable purpose set out in *Income Tax Special Purposes Commissioners v Pemsel*.⁶ Further, the organisation must have been established for exclusively charitable purposes.⁷

10.6 Section 88 of the Inland Revenue Ordinance (Cap 112) states:

"Notwithstanding anything to the contrary in this Ordinance contained there shall be exempt and there shall be deemed always to have been exempt from tax any charitable institution or trust of a public character:

Provided that where a trade or business is carried on by any such institution or trust the profits derived from such trade or business shall be exempt and shall be deemed to have been exempt from tax only if such profits are applied solely for charitable purposes and are not expended substantially outside Hong Kong and either -

2 See Chapter 2, above, at para 2.28.

3 The online version of this list is available at: http://www.ird.gov.hk/eng/tax/ach_index.htm.

4 Section 2(1), Inland Revenue Ordinance (Cap 112). See Chapter 2, above, at para 2.22.

5 Inland Revenue Department information pamphlet, *A Tax Guide for Charitable Institutions and Trusts of a Public Character* (revised ed, Sept 2010), available at: http://www.ird.gov.hk/eng/tax/ach_tgc.htm.

6 [1891] AC 531 (HL). See also Chapter 5, above, at paras 5.3 to 5.8.

7 Inland Revenue Department, *Departmental Interpretation and Practice Notes, No 37 (Revised) Concessionary Deductions: Section 26C: Approved Charitable Donations* (Sep 2006), available at: http://www.ird.gov.hk/eng/pdf/e_dipn37.pdf.

- (a) *the trade or business is exercised in the course of the actual carrying out of the expressed objects of such institution or trust; or*
- (b) *the work in connection with the trade or business is mainly carried on by persons for whose benefit such institution or trust is established."*

10.7 A further condition is that only charities under the jurisdiction of the Hong Kong courts are eligible for exemption. These include charities that have been established in Hong Kong, or the *"Hong Kong establishment of overseas charities such as those deemed to be established in Hong Kong under section 4 of the Societies Ordinance or registered under Part XI of the Companies Ordinance."*⁸

10.8 It is evident that under the proviso to section 88 of the Inland Revenue Ordinance (Cap 112) a charity may trade or carry on a business and still be entitled to tax exemption where the conditions set out in the proviso are satisfied, namely that:

- the profits from the trade or business carried on by the charity are applied solely for charitable purposes;
 - the profits are not expended substantially outside Hong Kong;
- and either:
- the trade or business of the charity is exercised in the course of the actual carrying out of the expressed objects of the charity; or
 - the work in connection with the trade or business of the charity is mainly carried on by those for whose benefit the charity is established.

10.9 The application of the proviso to section 88 of the Ordinance has been considered recently by the Inland Revenue Board of Review⁹ and the Court of First Instance¹⁰ in a case concerning the Church Body of the Hong Kong Sheng Kung Hui, which is the incorporation of the Anglican Church in Hong Kong.

10.10 The case turned on the application of the proviso to section 88 and whether the profit to the Church generated from a land development

8 Inland Revenue Department information pamphlet, *A Tax Guide for Charitable Institutions and Trusts of a Public Character* (revised ed, Sept 2010), available at: http://www.ird.gov.hk/eng/tax/ach_tgc.htm.

9 Case No D14/08, (2008-09) Vol 23 Inland Revenue Board of Decisions. Decision available at: http://www.info.gov.hk/bor/eng/pdf/dv_23first/d1408.pdf.

10 *Church Body of the Hong Kong Sheng Kung Hui v Commissioner of Inland Revenue*; *Hong Kong Sheng Kung Hui Foundation v Commissioner of Inland Revenue* (Jan 2010) HCIA 2/2009. Decision available at: http://legalref.judiciary.gov.hk/lrs/common/ju/ju_frame.jsp?DIS=69523&currpage=T.

transaction was to be considered as 'capital holding' for charitable purposes or 'trading or business' for non-charitable purposes. Both the Inland Revenue Board of Review and the Court of First Instance on appeal held that the onus was on the charity to positively establish that it had satisfied all of the requirements of section 88. In this case, it was held that there was a lack of evidence substantiating the Church's claim that the profits derived from the transaction (the 'trade or business' in this case) were used "*solely for charitable purposes*". Accordingly, the Church was found to be liable to profits tax on the monies which it had made from the transaction.

10.11 At the time of writing this paper, an appeal has been lodged to the Court of Appeal.

Tax deductions for charitable donations

10.12 As we noted in Chapter 2,¹¹ under section 26C of the Inland Revenue Ordinance (Cap112), a taxpayer may deduct any "*approved charitable donations*" made by him (in the aggregate sum of not less than HK\$100) from his assessable profits or chargeable income during a year of assessment. The term "*approved charitable donation*" is defined, as noted above, under section 2(1) of the Ordinance. Section 16D of the Ordinance also allows deductions for approved charitable donations to be made by a taxpayer who is subject to profits tax. Deductions under both sections are subject to a current ceiling of 35% of the assessable income or profits.¹² The table below sets out figures provided by the Inland Revenue Department for the total amount of approved charitable donations allowed as tax deductions in Hong Kong in recent years.

*(Amount of Approved Charitable Donations
Allowed for Deduction)*

<i>Year of Assessment</i>	<i>Profits Tax (\$ billion)</i>	<i>Salaries Tax (\$ billion)</i>	<i>Total (\$ billion)</i>
2003/04	1.28	2.89	4.17
2004/05	1.72	3.39	5.11
2005/06	1.79	3.40	5.19
2006/07	2.15	3.76	5.91
2007/08	2.51	4.52	7.03
2008/09	3.03	5.01	8.04

11 See Chapter 2, above, at para 2.13.

12 Section 16D(2)(b) or 26C(2A)(c), Inland Revenue Ordinance (Cap 112). This ceiling figure may vary from year to year. For example, section 26C(2A) states that: "*The percentages specified ... shall be - (a) for any year of assessment up to and including the year of assessment commencing on 1 April 2002, 10%; (b) for the year of assessment commencing on 1 April 2003 or any subsequent year of assessment up to and including the year of assessment commencing on 1 April 2007, 25%; (c) for any year of assessment commencing on or after 1 April 2008, 35%.*"

10.13 The Inland Revenue Department has made available to the public the interpretation and practice notes¹³ that it applies in determining whether particular donations are considered "*approved charitable donations*" for tax deduction purposes. These are discussed in Chapter 2 of this paper. However, the interpretation and practice notes have no binding force, and do not affect a taxpayer's right of objection or appeal "*to the Commissioner [of Inland Revenue], the Board of Review or the Court.*"¹⁴

Filing of accounts and reports

10.14 At present, the tax exemption status of a charity is subject to periodic review by the Inland Revenue Department. In general, the review is conducted every four years in respect of each charity. The Department conducts more frequent or earlier reviews on individual cases as and when necessary to protect the revenue. In conducting the review, the Department requests the charity to furnish within one month its accounts, annual reports, other documents and information (including details of the charity's activities) to verify that its objects are still charitable and its activities are compatible with its expressed objects.

10.15 If a tax-exempt charity is found to have engaged in other activities, clarification will be sought if these appear to be at variance with the charitable objects stated in its governing instrument. The Inland Revenue Department will then go over the further information received and take a decision on whether the tax exemption status should be continued or withdrawn. Before the tax exemption status is withdrawn, the Department will usually ask the charity, should it wish to maintain its exemption status, for explanations and to take remedial measures such as immediate termination of the inappropriate investments and activities, and to pay the tax payable. Under the current legislation, the Department is empowered to raise assessments and demand tax within six years after the expiration of the relevant year of assessment. If the charity fails to comply with the necessary requirements within a stipulated period, the Department would immediately withdraw its tax exemption status, similar to its action against those charities which have given no reply to the review or have ceased operation.

10.16 The decision of the Inland Revenue Department is taken pursuant to the Inland Revenue Ordinance (Cap 112) for the purposes of revenue protection. The charity has a right to apply to the court for judicial review of the Department's withdrawal of its tax exemption status. It could also dispute the tax assessments through the statutory objection and appeal procedures under the Ordinance.

13 Same as above.

14 Inland Revenue Department information pamphlet, *A Tax Guide for Charitable Institutions and Trusts of a Public Character* (revised ed, Sept 2010), available at: http://www.ird.gov.hk/eng/tax/ach_tgc.htm. See Chapter 2, above, at para 2.22.

10.17 As most charitable organisations are limited companies by guarantee, they are required to satisfy the requirements for preparing audited accounts under the Companies Ordinance (Cap 32). For charitable organisations which exist as unincorporated organisations, such as societies registered under the Societies Ordinance (Cap 151), there are no legislative requirements for the preparation of audited accounts.

Charities and tax in other jurisdictions

10.18 As is the case in Hong Kong, in other common law jurisdictions, charitable organisations are granted tax exemptions on the income they receive for charitable purposes. Annex 7 presents a detailed analysis of the law relating to charities and taxation in a number of these overseas jurisdictions.

10.19 As part of our deliberations on the powers and duties which should reside with the future charity commission for Hong Kong, one of the issues we have considered is the extent to which its role should interface with that of the Inland Revenue Department for the purposes of assessing the tax exemption status of charities. Reviewing the position overseas, we have focused on the charity commissions or similar bodies in England, Scotland, Ireland and New Zealand, and have studied the 'division of labour' between their respective charity commissions and taxation authorities in handling tax exemptions for charities. As our findings below indicate, generally there is a clear demarcation in the roles between these two types of authorities, with the responsibility for assessing a charity's eligibility for tax exemption resting firmly with the relevant tax authority.

England and Wales

10.20 The main provisions dealing with statutory exemptions from tax on the income and profits of a charity in England and Wales are contained in section 505 of the Income and Corporation Taxes Act 1988, and cover a wide range of financial gains. The authority to which charities have to apply for tax exemption is noted in section 505(1) of the 1988 Act as being "*the Board*".

10.21 The word "*Board*" is defined in section 832 of the 1988 Act to mean "*the Commissioners of Inland Revenue*" (ie, of HM Revenue and Customs). Thus, under section 505(1) of the 1988 Act, a claim for exemption from taxation for the types of income and profits mentioned in section 505(1) has to be made to the Commissioners of Inland Revenue, not the Charity Commission for England and Wales.

10.22 The Charities Act 1993, which was amended by the Charities Act 2006, provides in section 1A that one of the main responsibilities of the Charity Commission is to regulate the running of charities in England and Wales. Section 1C of the 1993 Act provides that the major functions of the English Charity Commission are: to facilitate the better administration of

charities; to investigate any misconduct or mismanagement in the administration of charities; and to provide remedial or protective actions to charities that have been mismanaged. Section 1D of the 1993 Act provides for the general duties of the Charity Commission.

10.23 In section 3A of the 1993 Act, it is stated that, unless otherwise provided, charities have to register with the Charity Commission and section 3B of the 1993 Act places charity trustees under a duty to apply to the Charity Commission for their charities to be registered. Section 3 of the 1993 Act provides that the Register of Charities is to be kept by the Charity Commission. Once a charity has been registered with the Commission, it will be recognised by the Commissioners of Inland Revenue as a charity for the purposes of tax-exemption. If HM Revenue and Customs is satisfied that a body is established for wholly charitable purposes, it will then allocate a charity tax reference number to the charity.

10.24 With regard to the requirements for charities to submit accounts to the Charity Commission, although section 43 of the 1993 Act provides that annual audits or examinations of accounts of charities which are not companies have to be submitted to the Charity Commission, and section 44A(2) of the 1993 Act provides that an auditor of a charity which is not a company has a duty to report matters mentioned in the section to the Charity Commission, there is no indication in these provisions that the submission of these financial documents or information is for the purposes of tax-assessment or the granting of tax-exemption.

10.25 From the provisions discussed above, in particular section 505 of the 1988 Act, it would appear that in England and Wales the tax assessment powers and functions in relation to charities lie with the Board (ie, the Commissioners of Inland Revenue, as part of the HM Revenue and Customs) and not with the English Charity Commission.

Ireland

10.26 In Ireland, the Charities Regulatory Authority was created under the Charities Act 2009, and the general functions of the Authority are set out in section 14 of the 2009 Act. Under this section, the Authority is tasked with the responsibility for ensuring that charities are operating within the conditions and requirements imposed upon charities and their trustees under the 2009 Act. (We note, however, that this legislation will be coming into force in Ireland in phases.)

10.27 Section 39 of the 2009 Act provides that a register of charitable organisations is to be established and maintained by the Charities Regulatory Authority. Section 39(3) of the Act provides that a charitable organisation intending to operate or carry on activities has to apply to the Authority to be registered. Trustees of charities are under a duty to register on behalf of their charities.

10.28 Notwithstanding the supervisory role of the Authority with respect to the operation of charities in Ireland, section 7(1) of the 2009 Act specifically provides that nothing in the 2009 Act "*shall operate to affect the law in relation to the levying or collection of any tax or the determination of eligibility for exemption from liability to pay any tax.*" Further, in providing for charities' exemption from liabilities to pay tax, section 7(2) of the 2009 Act states that:

"(2) The Revenue Commissioners shall not be bound by a determination of the [Charities Regulatory] Authority as to whether a purpose is of public benefit or not in the performance by them of any function under or in connection with

- (a) section 207, 208 or 609 of the Taxes Consolidation Act 1997,*
- (b) section 17 or 76 of the Capital Acquisitions Tax Consolidation Act 2003, or*
- (c) section 82 of the Stamp Duties Consolidation Act 1999."*

10.29 In other words, the granting of tax exemptions appears to be a matter solely for the Revenue Commissioners. A 2009 booklet issued by the Revenue Commissioners, entitled *Applying For Relief From Tax on The Income and Property of Charities*,¹⁵ sets out the various tax exemptions which are available to charities, including income tax, corporation tax (in the case of companies), capital gains tax, deposit interest retention tax, capital acquisitions tax, stamp duty and dividend withholding tax.¹⁶ The booklet states that the Revenue Commissioners are responsible for determining claims for tax exemptions from charities, and for assessing whether claims are established for charitable purposes only.¹⁷

New Zealand

10.30 In New Zealand, the processes of recognition of charitable status and the granting of tax exemptions are kept separate and are dealt with by the New Zealand Charities Commission and the Inland Revenue respectively, but the two organisations work in close collaboration on the aspect of charities' governance.

10.31 The New Zealand Charities Commission was established under the Charities Act 2005. The major functions of the Charities Commission are to establish and maintain a registration and monitoring system for charitable

15 <http://www.revenue.ie/en/tax/it/leaflets/chy1.doc>.

16 Same as above, at 2.

17 Same as above, at 3.

organisations.¹⁸ Charitable organisations in New Zealand have to be registered in the Charities Register. One of the benefits of registering a charity is that registration entitles a registered charity to tax exemptions, and only registered charities will be exempt from income tax chargeable under the Income Tax Act 2007. The Charities Commission's website states:

*"Charities registered under the Charities Act are generally eligible for exemptions from income tax on some, or all, of their income. They do not need to apply to Inland Revenue for those exemptions. Once registered, they receive information from Inland Revenue outlining the exemptions they are entitled to and what they have to do to comply with the requirements for the exemptions."*¹⁹

10.32 Organisations that require recognition as registered charities apply to the Charities Commission. If the Commission decides that they meet the criteria, they will be listed on its public register.²⁰ Once they are registered, charities have to file an annual return within six months of their balance date (the end of their financial year) and notify the Charities Commission within three months if certain information about their organisation changes.

10.33 The Charities Commission is responsible for monitoring the annual returns submitted by registered charities.²¹ This would appear to be carried out for the purpose of maintaining good governance of charities, rather than necessarily to determine whether or not tax exemption status should be granted, or continue to be granted, to them. The Commission's website states, *"the Inland Revenue remains responsible for administering the revenue acts and retains the right to audit charities to ensure that they continue to be eligible for tax exemptions."*

10.34 We have been advised by the Charities Commission, however, that it makes an electronic transmission to the Inland Revenue every day, providing it with a data-feed of its decisions, as well as detailed information about charities. It would appear that the Inland Revenue generally accepts the Commission's judgment as to whether an entity is a genuine charity and then grants the appropriate tax exemptions based on the relevant tax laws. The Charities Commission also advises the Inland Revenue of applicants who have had their applications declined and charities that have been de-registered. (The Commission de-registers charities because they do not meet their obligations to file annual returns and financial records with the Commission or, upon closer examination of their activities, they appear to be engaged in non-charitable projects or in serious wrong-doing. In addition, a number of charities request to be de-registered because they are wound up.)

18 New Zealand Charities Commission, *A Guide to the Charities Act*, (9 Feb 2010). <http://www.charities.govt.nz/LinkClick.aspx?fileticket=k7itel0ezdQ%3d&tabid=217&mid=833>

19 Same as above.

20 <http://www.register.charities.govt.nz/CharitiesRegister/>.

21 Same as above.

Scotland

10.35 While there is no charity commission in Scotland, there is an organisation performing functions similar to a charity commission called the Office of the Scottish Charity Regulator (OSCR), which has the responsibilities of granting charitable status to a charity, keeping a public register of charities and regulating the operation of charities in Scotland. The general functions of the OSCR are set out in section 1(5) of the Charities and Trustee Investment (Scotland) Act 2005 as being:

- "(a) to determine whether bodies are charities,*
- (b) to keep a public register of charities,*
- (c) to encourage, facilitate and monitor compliance by charities with the provisions of this Act,*
- (d) to identify and investigate apparent misconduct in the administration of charities and to take remedial or protective action in relation to such misconduct, and*
- (e) to give information or advice, or to make proposals, to the Scottish Ministers on matters relating to OSCR's functions."*

10.36 Section 4 of the 2005 Act provides that organisations intending to be recognised as charities and to be entered in the Register of Charities have to apply for registration with the OSCR. Section 5(1) of the Act provides that the OSCR may approve an applicant and enter the name of the applicant in the Register of Charities only if it is satisfied that the applicant has met the charity test set out in section 7 of the 2005 Act. Entry of the name of an organisation in the Register of Charities means that the organisation has been granted charitable status. Only once such status has been conferred can the charity apply to HM Revenue and Customs for tax exemption.

10.37 In Scotland, all applications from charities for tax exemption have to be made to, and are considered by, HM Revenue and Customs. If HM Revenue and Customs is satisfied that a body is established for wholly charitable purposes, it will allocate a charity tax reference number to the body.

10.38 Although section 44 of the 2005 Act imposes upon a charity the duty to keep proper accounting records, and to provide a copy of the statement of account to the OSCR, there is no indication in the section (or in section 45 that follows – on the failure of charities to provide statements of account) that these two sections are for any tax assessment purposes. Again, the OSCR is authorised to obtain documents and information from charities under sections 22 and 29 of the 2005 Act. However, it appears that the objective for obtaining information is not to facilitate the OSCR's checking of charities' accounts for the purposes of considering the granting of tax exemption status, but rather because if any charity no longer meets the charity test, section 30 of the 2005 Act provides that the charity can be removed from the Register of Charities.

Our conclusions and proposals on the taxation of charities in Hong Kong

10.39 In the course of our deliberations, we have carefully considered whether any change should be made to the taxation position of charities in Hong Kong. We have also reviewed whether, in the event of the future charity commission being established, the existing tax exemption powers and functions of the Inland Revenue Department in periodic review of charities should be transferred to the future charity commission.

10.40 After carefully considering these issues, we have concluded that, while applications for recognition of charitable status should be made to the future charity commission (as proposed elsewhere in this paper), the existing tax exemption powers and periodic review of charities for taxation purposes should remain with the Inland Revenue Department. We have reached this conclusion on the basis that the current system is generally working well and largely reflects the position adopted in other common law jurisdictions, including those where charity commissions have already been established.

10.41 We note the example of useful administrative collaboration, however, between the charity commission and the tax authority in New Zealand. We are of the view that the future charity commission, by the provision of relevant charities' accounts information to the Inland Revenue Department, should facilitate as far as possible the periodic review by the Department of a charity's entitlement to continued tax exemption. In particular, the future charity commission should report suspicious cases of possible abuse to the Department for investigation.

10.42 A further point that we would like to stress is the importance of sufficient resources being allocated to the Inland Revenue Department to carry out the function of reviewing the accounts of charities to ensure that their income is generated solely for charitable purposes in compliance with the law. This is a highly important function, underpinning to a large extent, the public's confidence in the charity sector.

Recommendation 16

We recommend:

- (1) that existing powers of tax exemption and functions of periodic review of charities for taxation purposes should remain with the Inland Revenue Department;**

- (2) tax exemption may be granted to a charity by the Inland Revenue Department only when the charity has been registered with the future charity commission;**
- (3) subject to (2) above, no change to the existing law on the taxation of charities in Hong Kong;**
- (4) 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 Department's functions in assessing charities for tax where appropriate; and**
- (5) 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.**

Chapter 11

Conclusions and proposals on the *cy-près* doctrine

Introduction

11.1 In this chapter, we examine the law relating to the variation and dissolution of charities, focusing in particular on the "*cy-près doctrine*" and how this is applied in Hong Kong and in other jurisdictions.¹ Our conclusions and proposals for reform in this area are presented at the end of this chapter.

The situation in Hong Kong regarding the *cy-près* doctrine, resulting trusts and dissolution of charities

11.2 While a number of other jurisdictions have moved towards a statutory framework for the variation of charities, Hong Kong still adopts the common law basis for the *cy-près* doctrine. The scope of this doctrine is discussed below.

The cy-près doctrine and resulting trusts at common law

11.3 As we have discussed in earlier chapters of this paper, generally charitable trusts are set up for the advancement of *particular* charitable purposes. The trustees of a charitable trust are under a duty to make use of the property vested in the charitable trust to advance the charitable purposes of the trust. Occasionally, a situation might arise where the stated purpose becomes "*impossible or impractical to be effectuated*,"² that is, the trust can no longer carry out the purposes for which it was first created. Without the court's intervention, a gift in these circumstances may fail and the trust property may have to be returned to the donor or the donor's estate under the *resulting trust* principle. This is because the charitable trustees are not the intended beneficiary of the charitable trust, and so do not have any beneficial interest in the trust's property. If certain required conditions are met, however, the court can use the *cy-près* doctrine to order that the property of the charity should be used for a purpose which is as near as possible to the expressed or original intention of the donor. If this is achieved, the gift will not fail.

1 The term "*cy-près*" means "*as near as*". See B A Garner (ed), *Black's Law Dictionary* (West Group, 1999) at 392.

2 L Ma, *Equity and Trusts Law in Hong Kong* (Lexis Nexis, 2009), at para 16-67.

11.4 The donor's intention is crucial in deciding whether the *cy-près* doctrine can be applied. If any "*general charitable intention*" is found under the trust, the doctrine of *cy-près* will allow the trust property to be applied for other purposes which are as near as possible to the expressed intentions of the donor, so that the trust property can remain dedicated to charity. It has been stated that:

*"It is a fundamental principle of the law of charities that wherever a clear intention to devote property to charity is shown, and that intention is not confined to a particular form of charity which is initially impracticable, or a purpose which is illegal, effect must be given to it. The law distinguishes between the charitable intention and the mode of executing it and makes provision for the charitable intention to be carried into effect cy-près, that is to say, by substituting for the mode indicated by the donor another mode as similar as possible to the mode indicated."*³

11.5 A gift may be in danger of failing because it is impossible from the outset to carry out. In *Re Davis*,⁴ a specific gift of £500 "*to the Home for the Homeless, 27, Red Lion Square, London*" failed because the institution nominated by the testatrix in her will had never existed.⁵ The court nevertheless held that as a general charitable intention could be inferred from the will, the *cy-près* doctrine would apply.

11.6 The decision in *Ironmongers' Company v AG*⁶ is another illustration of this point. In this case, a testator clearly and unequivocally directed that his estate was to be applied only to certain specific purposes, including one half of the estate to "*the redemption of British slaves in Turkey or Barbary ...*"⁷ and one quarter of the estate to "*charity schools in the city and suburbs of London, where the education is according to the Church of England ...*"⁸ By the time the estate was to be divided, however, there were no longer any British slaves in Turkey or Barbary to be redeemed, so this purpose had become impossible to perform. It was held in this case that the *cy-près* doctrine could apply so that the bulk of the money from the estate could be used for the second purpose, of supporting charity schools in England and Wales where the education was according to the Church of England. The court held that although the first object (which it found was intended to benefit the British community at large) could not be extended because the court could find nothing analogous or *cy-près* to it, one of the other charitable purposes specified by the testator could be extended, as something in this was found to be *cy-près* to the general charitable purpose of the first objective.⁹

3 Jean Warburton, *Tudor on Charities* (Sweet & Maxwell 2003, 9th ed), at 435 to 436.

4 [1902] 1 Ch 876.

5 L Ma, *Equity and Trusts Law in Hong Kong* (Lexis Nexis, 2009), at para 16-69.

6 (1844) 10 CI & F 908, 8 ER 983.

7 (1844) 10 CI & F 908, 8 ER 983, at 983 to 984. (Slaves were "*redeemed*" by being purchased and then set free.)

8 (1844) 10 CI & F 908, 8 ER 983, at 983 to 984.

9 *Ironmongers' Company v AG* (1844) 10 CI & F 908, 8 ER 983, at 987.

11.7 In the case of *Re Welsh Hospital (Netley) Fund*,¹⁰ the charitable purpose could originally be carried out, but this position later changed. This case concerned a large charitable fund which had been raised in Wales at the outbreak of the First World War for the building and running of a hospital for wounded and ailing Welsh soldiers. The fund was created by contributions from various sources, including substantial donations from private individuals, as well as proceeds from concerts and other entertainments, and from street and church collections all across Wales. The hospital was closed in 1919 after the war had ended, but a surplus of funds remained. It was suggested that this should be applied for the foundation of scholarships for the study of medicine and surgery by persons of Welsh nationality at the University of Wales. The matter was brought before the court for a direction on whether the trustees could apply the surplus funds in this way, or whether the funds had to revert back to the subscribers under a resulting trust.

11.8 The court held that a general charitable intention to benefit sick and wounded Welshmen could be inferred from the trust, and so the court was at liberty to apply the surplus funds *cy-près*. Lawrence J set out the following reasons for the decision:

"The fund was created by contributions from various sources and in varying amounts So far as regards the contributors to entertainments, street collections, etc., I have no hesitation in holding that they must be taken to have parted with their money out and out. It is inconceivable that any person paying for a concert ticket or placing a coin in a collecting box presented to him in the street should have intended that any part of the money so contributed should be returned to him when the immediate object for which the concert was given or the collection made had come to an end. To draw such an inference would be absurd on the face of it.

So far as regards individual subscribers of substantial amounts, the proper inference to be drawn is not quite so plain. In my opinion, however, these subscribers must be taken to have known that they were contributing to a general fund which was being raised in the manner I have described, and that their contributions would be aggregated with the proceeds of entertainments, street collections, etc., and would not in any way be ear-marked. They must, I think, also be taken to have known that the total funds collected from every source would be applied for the purpose of the charity without discriminating between the moneys derived from any particular source. In these circumstances I am of opinion that the true inference to be drawn is that these subscribers intended to part with their contributions out and out, and that they did not intend that the surplus, if any, of their contributions should be returned to them

10 [1921] 1 Ch 655.

when the immediate object of the charity should have come to an end.

*In the result I hold that although all the contributions were in the first instance made for the particular purpose of building, equipping and maintaining the Welsh Hospital at Netley, the main underlying object of the contributors was to provide money for the comfort of sick and wounded Welshmen, and that all the subscribers intended to devote their contributions not only to the particular object, but generally to the benefit of their sick and wounded countrymen. That being so, the Court is, in my judgment, at liberty to apply the surplus of the fund cy-près."*¹¹

11.9 A Hong Kong example where the *cy-près* doctrine was discussed is the case of *Hong Kong Housing Services for Refugees Ltd v Secretary for Justice*.¹² This concerned a charitable company, the purpose of which was to promote the welfare of Vietnamese refugees in Hong Kong refugee camps. When these camps were subsequently closed and the charitable company dissolved, directions were sought from the court as to whether Caritas, which also ran projects for refugees, was disqualified under clause 8 of the charitable company's memorandum from being able to receive the company's surplus assets and income. Ribeiro J (as he then was) held that on the facts of the case and on the true construction of clause 8, Caritas had not been disqualified as a recipient of the company's surplus assets and income. Ribeiro J further held that, even if his views about the effect of clause 8 were incorrect, he would be prepared to rely on the court's jurisdiction to direct the surplus charitable assets to be applied *cy-près*, and to direct a transfer of the surplus charitable assets and income to Caritas.¹³

11.10 Associated with this power of the court to provide new purposes as near as possible to the original ones under the *cy-près* doctrine is a specific provision in the Probate and Administration Ordinance (Cap 10) concerning general charitable testamentary gifts, which empowers the court, on the application of the Secretary for Justice, to approve a scheme for the disposal of the gift for such charitable purposes as it thinks fit.¹⁴

Dissolution of charitable organisations

11.11 The method through which a charitable organisation in Hong Kong may be dissolved depends on the type of legal structure that the

11 [1921] 1 Ch 655, at 660 to 661.

12 [1999] 3 HKLRD 510.

13 [1999] 3 HKLRD 510, at 519. For a wider discussion of the application of the *cy-près* doctrine in Hong Kong, see: *Halsbury's Laws of Hong Kong - Commentary* (2009 LexisNexis Hong Kong), at para 400.102.

14 See section 3(4) of the Probate and Administration Ordinance (Cap 10), which provides: "Where a testator gives, devises or bequeaths any part of his estate for unspecified charitable purposes, otherwise than on trust, the court shall have jurisdiction, on the application of the Secretary for Justice, to approve a scheme for the disposal of the gift, devise or bequest for such charitable purposes as it thinks fit."

charitable organisation comprises. (The different types of charitable organisation structure were discussed earlier in Chapter 6.)

11.12 Elsewhere in this paper, we have examined the conditions which must be met before a charitable organisation can be granted exemption from tax by the Inland Revenue Department. In its guide to charitable organisations wishing to seek tax exemption under section 88 of the Inland Revenue Ordinance (Cap 112), the Department states that one of the clauses which the governing instrument of such an organisation should contain is a clause "*specifying how the assets should be dealt with upon its dissolution. (The remaining assets should normally be donated to other charities).*"¹⁵ Accordingly, organisations seeking tax exemption under section 88 should provide a clause to this effect in the organisation's governing instrument for the Department's consideration.

11.13 For a charity which exists in the form of an unincorporated association, there may be a dissolution clause in its rules requiring surplus property to be given to other charitable purposes and not distributed among its members. This clause should appear in the constitution of a charity registered under the Societies Ordinance (Cap 151). (In addition, section 14 of the Ordinance provides that where a registered society or an exempted society dissolves itself, the office-bearers of the society immediately before such dissolution must, not later than one month after the dissolution takes effect, notify the Societies Officer of the dissolution in writing.)

11.14 In the case of charitable trusts, the relevant clause relating to the distribution of assets on dissolution will appear in the trust deed of the charitable trust. For a charitable company incorporated under the Companies Ordinance (Cap 32), the relevant clause will appear in its memorandum and articles of association. The mode of dissolution of a charitable body established by statute is governed by the provisions of its creating legislation.

The application of the *cy-près* doctrine in other jurisdictions

11.15 While the *cy-près* doctrine as applied in Hong Kong is derived from and follows the common law, a number of overseas jurisdictions have broadened the scope of the doctrine and codified it in legislation. We have closely examined a number of statutory *cy-près* regimes in different overseas jurisdictions such as England and Wales, Scotland, Ireland, Australia, New Zealand and South Africa. While legislative changes in these jurisdictions have, in different ways, broadened the application of the *cy-près* doctrine, we consider the English model, which is analysed in detail below, to be a particularly useful model for Hong Kong.

11.16 An analysis of each of the other jurisdictions we have considered under this head is presented in Annex 8 of this paper.

15 See Inland Revenue Department information pamphlet, *A Tax Guide for Charitable Institutions and Trusts of a Public Character* (revised ed Sept 2010), at para 9(e), available at: http://www.ird.gov.hk/eng/tax/ach_tgc.htm.

England and Wales

11.17 In England and Wales, the *cy-près* doctrine has undergone substantial change from the common law position still followed in Hong Kong. As a result, the occasions on which the doctrine may be applied are much wider than simply where the charitable purpose of a trust property has become impossible or impracticable to be carried out, as in Hong Kong. The statutory provisions which brought about this change were comprised in section 13 of the Charities Act 1960, then by sections 13 and 14 of the Charities Act 1993 (the 1993 Act), which was amended by the Charities Act 2006 (the 2006 Act) by the addition of new sections 14A and 14B.¹⁶

11.18 The occasions on which the *cy-près* doctrine can apply to trust property in England and Wales are now provided in section 13(1) of the 1993 Act, as revised by the 2006 Act. Under this new section 13(1), property in a charitable trust can be applied *cy-près* even where it is not impossible or impractical to carry out the charitable purpose for which it was created. Section 13(1) of the 1993 Act states:

- "(1) Subject to subsection (2) below, the circumstances in which the original purposes of a charitable gift can be altered to allow the property given or part of it to be applied cy-près shall be as follows —*
- (a) where the original purposes, in whole or in part —*
 - (i) have been as far as may be fulfilled; or*
 - (ii) cannot be carried out, or not according to the directions given and to the spirit of the gift; or*
 - (b) where the original purposes provide a use for part only of the property available by virtue of the gift; or*
 - (c) where the property available by virtue of the gift and other property applicable for similar purposes can be more effectively used in conjunction, and to that end can suitably, regard being had to the appropriate considerations, be made applicable to common purposes; or*
 - (d) where the original purposes were laid down by reference to an area which then was but has since ceased to be a unit for some other purpose, or by reference to a class of persons or to an area which has for any reason since ceased to be suitable,*

16 Jean Warburton, *Tudor on Charities* (Sweet & Maxwell 2003, 9th ed), at 435 to 436.

regard being had to the appropriate considerations, or to be practical in administering the gift; or

- (e) *where the original purposes, in whole or in part, have, since they were laid down –*
 - (i) *been adequately provided for by other means; or*
 - (ii) *ceased, as being useless or harmful to the community or for other reasons, to be in law charitable; or*
 - (iii) *ceased in any other way to provide a suitable and effective method of using the property available by virtue of the gift, regard being had to the appropriate considerations."*

11.19 Section 13(1) of the 1993 Act refers to the "original purposes" of a charitable gift. This term is defined in section 13(3) of the 1993 Act to also mean *"the existing or current purposes if the original purposes have already been amended."* The term *"the appropriate considerations"* mentioned in section 13(1) of the 1993 Act is defined in section 13(1A) of the 1993 Act in the following terms:

"(1A) In subsection (1) above 'the appropriate considerations' means-

- (a) (on the one hand) the spirit of the gift concerned, and*
- (b) (on the other) the social and economic circumstances prevailing at the proposed alteration of the original purposes."*

11.20 It is noted in the *Operational Guidance on Application of Property Cy-près*, issued by the Charity Commission for England and Wales¹⁷ that failure of objects is not always required for applying property cy-près:

"However, it is important to note that the circumstances which permit a cy-près application of a charity's property are not restricted to 'failure' and therefore the trustees do not necessarily have to demonstrate that the charity's purposes are incapable of being carried out or wholly impracticable, particularly when current social and economic circumstances are also taken into account.

In some cases a cy-près application may be justified under the other provisions of section 13(1), even though the purposes of the charity can still be carried out. For example, we can make cy-près Schemes without the current objects 'failing' under:

17 http://www.charitycommission.gov.uk/about_us/ogs/index002.aspx.

- *s.13(1)(b), where a charity's objects may be completely workable but do not provide a use for all of the available income or property;*
- *s.13(1)(c), where a charity is proposing to amalgamate with another charity with similar objects; the question of 'failure' is irrelevant; or*
- *s.13(1)(e), which may allow a charity to make a case that the purposes have ceased in any way to be a suitable and effective method of using the charity's property (bearing in mind the spirit of the gift **and** current social and economic circumstances)."*

11.21 Under the 1993 Act, another situation in which the *cy-près* doctrine can apply is where the purpose of property given for a specific charitable purpose has failed, and the donors are either unknown or have disclaimed their rights to have the property returned. In these circumstances, section 14 of the 1993 Act provides that the *cy-près* doctrine applies. This section states:

- "(1) Property given for specific charitable purposes which fail shall be applicable cy-près as if given for charitable purposes generally, where it belongs —*
- (a) to a donor who after —*
 - (i) the prescribed advertisements and inquiries have been published and made, and*
 - (ii) the prescribed period beginning with the publication of those advertisements has expired,**cannot be identified or cannot be found; or*
 - (b) to a donor who has executed a disclaimer in the prescribed form of his right to have the property returned.*
- (2) Where the prescribed advertisements and inquiries have been published and made by or on behalf of trustees with respect to any such property, the trustees shall not be liable to any person in respect of the property if no claim by him to be interested in it is received by them before the expiry of the period mentioned in subsection (1)(a)(ii) above.*
- (3) For the purposes of this section property shall be conclusively presumed without any advertisement or inquiry to belong to donors who cannot be identified, in so far as it consists —*

- (a) *of the proceeds of cash collections made by means of collecting boxes or by other means not adapted for distinguishing one gift from another; or*
 - (b) *of the proceeds of any lottery, competition, entertainment, sale or similar money-raising activity, after allowing for property given to provide prizes or articles for sale or otherwise to enable the activity to be undertaken.*
- (4) *The court or the Commission may by order direct that property not falling within subsection (3) above shall for the purposes of this section be treated without any advertisement or inquiry as belonging to donors who cannot be identified where it appears to the court or the Commission either –*
 - (a) *that it would be unreasonable, having regard to the amounts likely to be returned to the donors, to incur expense with a view to returning the property; or*
 - (b) *that it would be unreasonable, having regard to the nature, circumstances and amounts of the gifts, and to the lapse of time since the gifts were made, for the donors to expect the property to be returned.*
- (5) *Where property is applied cy-près by virtue of this section, the donor shall be deemed to have parted with all his interest at the time when the gift was made; but where property is so applied as belonging to donors who cannot be identified or cannot be found, and is not so applied by virtue of subsection (3) or (4) above —*
 - (a) *the scheme shall specify the total amount of that property; and*
 - (b) *the donor of any part of that amount shall be entitled, if he makes a claim not later than six months after the date on which the scheme is made, to recover from the charity for which the property is applied a sum equal to that part, less any expenses properly incurred by the charity trustees after that date in connection with claims relating to his gift; and*
 - (c) *the scheme may include directions as to the provision to be made for meeting any such claim.*

(6) *Where —*

- (a) *any sum is, in accordance with any such directions, set aside for meeting any such claims, but*
- (b) *the aggregate amount of any such claims actually made exceeds the relevant amount,*

then, if the Commission so directs, each of the donors in question shall be entitled only to such proportion of the relevant amount as the amount of his claim bears to the aggregate amount referred to in paragraph (b) above; and for this purpose 'the relevant amount' means the amount of the sum so set aside after deduction of any expenses properly incurred by the charity trustees in connection with claims relating to the donors' gifts.

- (7) *For the purposes of this section, charitable purposes shall be deemed to 'fail' where any difficulty in applying property to those purposes makes that property or the part not applicable cy-près available to be returned to the donors.*
- (8) *In this section 'prescribed' means prescribed by regulations made by the Commission; and such regulations may, as respects the advertisements which are to be published for the purposes of subsection (1)(a) above, make provision as to the form and content of such advertisements as well as the manner in which they are to be published.*
- (9) *Any regulations made by the Commission under this section shall be published by the Commission in such manner as it thinks fit.*
- (10) *In this section, except in so far as the context otherwise requires, references to a donor include persons claiming through or under the original donor, and references to property given include the property for the time being representing the property originally given or property derived from it.*
- (11) *This section shall apply to property given for charitable purposes, notwithstanding that it was so given before the commencement of this Act."*

11.22 Section 14A of the 1993 Act provides that the cy-près doctrine applies in the situation where property is given for a specific charitable

purpose in response to "a solicitation", which is defined in section 14A(2) of the 1993 Act. Section 14A provides:

- "(1) This section applies to property given –
 - (a) for specific charitable purposes, and
 - (b) in response to a solicitation within subsection (2) below.*
- (2) A solicitation is within this subsection if –
 - (a) it is made for specific charitable purposes, and
 - (b) it is accompanied by a statement to the effect that property given in response to it will, in the event of those purposes failing, be applicable cy-près as if given for charitable purposes generally, unless the donor makes a relevant declaration at the time of making the gift.*
- (3) A 'relevant declaration' is a declaration in writing by the donor to the effect that, in the event of the specific charitable purposes failing, he wishes the trustees holding the property to give him the opportunity to request the return of the property in question (or a sum equal to its value at the time of the making of the gift).*
- (4) Subsections (5) and (6) below apply if –
 - (a) a person has given property as mentioned in subsection (1) above,
 - (b) the specific charitable purposes fail, and
 - (c) the donor has made a relevant declaration.*
- (5) The trustees holding the property must take the prescribed steps for the purpose of –
 - (a) informing the donor of the failure of the purposes,
 - (b) enquiring whether he wishes to request the return of the property or (a sum equal to its value), and
 - (c) if within the prescribed period he makes such a request, returning the property (or such a sum) to him.*
- (6) If those trustees have taken all appropriate prescribed steps but –
 - (a) they have failed to find the donor, or
 - (b) the donor does not within the prescribed period request the return of the property (or a sum equal to its value),section 14(1) above shall apply to the property as if it belonged to a donor within paragraph (b) of that subsection (application of property where donor has disclaimed right to return of property).*

- (7) *If –*
 - (a) *a person has given property as mentioned in subsection (1) above,*
 - (b) *the specific charitable purposes fail, and*
 - (c) *the donor has not made a relevant declaration,**section 14(1) above shall similarly apply to the property as if it belonged to a donor within paragraph (b) of that subsection.*
- (8) *For the purposes of this section –*
 - (a) *'solicitation' means a solicitation made in any manner and however communicated to the persons to whom it is addressed,*
 - (b) *it is irrelevant whether any consideration is or is to be given in return for the property in question, and*
 - (c) *where any appeal consists of both solicitations that are accompanied by statements within subsection (2)(b) and solicitations that are not so accompanied, a person giving property as a result of the appeal is to be taken to have responded to the former solicitations and not the latter, unless he proves otherwise.*
- (9) *In this section 'prescribed' means prescribed by regulations made by the Commission, and any such regulations shall be published by the Commission in such manner as it thinks fit.*
- (10) *Subsections (7) and (10) of section 14 shall apply for the purposes of this section as they apply for the purposes of section 14."*

11.23 The English statutory model makes specific provision for the dissolution of a charitable incorporated body. Section 61(1) of the 1993 Act states that the Charity Commission may make an order to dissolve an incorporated charitable body where it is satisfied as to one of the following situations:

- "(a) that an incorporated body has no assets or does not operate, or*
- (b) that the relevant charity in the case of an incorporated body has ceased to exist, or*
- (c) that the institution previously constituting, or treated by the Commission as constituting, any such charity has ceased to be, or as the case may be was not at the time of the body's incorporation, a charity, or*

- (d) *that the purposes of the relevant charity in the case of an incorporated body have been achieved so far as is possible or are in practice incapable of being achieved."*

11.24 Accordingly, where, for example, the purpose of a charity is incapable of being achieved and the *cy-près* doctrine is considered inappropriate, dissolution of the incorporated body would be a possible outcome.

11.25 The powers of the Charity Commission to deal with the property held by the charity at the time of the dissolution order are set out in section 61(3) and (4) of the 1993 Act:

"(3) Subject to subsection (4) below, an order made under this section with respect to an incorporated body shall have the effect of vesting in the trustees of the relevant charity, in trust for that charity, all property for the time being vested —

- (a) in the body, or*
- (b) in any other person (apart from the official custodian),*

in trust for that charity.

(4) If the Charity Commission so directs in the order —

- (a) all or any specified part of that property shall, instead of vesting in the trustees of the relevant charity, vest -*

- (i) in a specified person as trustee for, or nominee of, that charity, or*
- (ii) in such persons (other than the trustees of the relevant charity) as may be specified;*

- (b) any specified investments, or any specified class or description of investments, held by any person in trust for the relevant charity shall be transferred-*

- (i) to the trustees of that charity, or*
- (ii) to any such person or persons as is or are mentioned in paragraph (a)(i) or (ii) above;*

and for this purpose 'specified' means specified by the Commission in the order."

Our conclusions and proposals on variation of charities in Hong Kong

11.26 We note that cases in Hong Kong requiring the application of the *cy-près* doctrine appear to be relatively rare, but that the conditions which must be met under the common law before the doctrine can be utilised are extremely strict. We are concerned that this could lead to situations where funds raised for a charitable purpose cannot be used, ultimately, for that purpose, and so must be returned to the donors, however logistically difficult that may be.

11.27 Having reviewed overseas developments, where several jurisdictions have moved towards a statutory basis for the doctrine and a broadening of the situations where it may be applied, we have come to the view that a similar approach should be adopted in Hong Kong. Of the overseas models we have considered, we find the legislative approach implemented in England and Wales to be particularly useful.

Recommendation 17

We recommend the introduction in Hong Kong of legislation 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 doctrine in Hong Kong and to broaden the scope of its application.

In line with the English model, we recommend that the *cy-près* doctrine should be broadened in Hong Kong so that it may apply in the following situations even where it is not impossible or impractical to carry out the charitable purpose of the charitable trust:

- (1) where property given for a specific charitable purpose has failed, and the donors are either unknown or have disclaimed their rights to have the property returned;**
- (2) where property is given for a specific charitable purpose in response to a solicitation;**
- (3) where a charitable body has dissolved.**

We also recommend that the future charity commission should be empowered by statute to administer the application of the *cy-près* doctrine in particular cases.

Chapter 12

Conclusions and proposals on the establishment of a charity commission for Hong Kong

12.1 In this chapter, we consider the need for setting up a charity commission for the regulation of charitable organisations. We also examine in detail matters such as the various objectives and characteristics of the future charity commission, its functions and powers, as well as an appropriate appeal mechanism against decisions of the charity commission.

Need for a 'one-stop shop'?

12.2 As we have seen throughout this paper, there are a number of shortcomings in the existing system of regulating charities. Fundamental to these is the absence of a single regulatory authority administering a comprehensive, central register of charities. The current monitoring arrangements for charities and their fundraising activities appear to be fragmented and cumbersome, involving split responsibilities across different authorities, each applying different monitoring mechanisms and standards.

12.3 We therefore consider that there is a need for, as far as possible, a 'one-stop shop' which can serve as a centralised body and take over the functions of the various government authorities responsible for monitoring charitable organisations and their fundraising activities. We note below the significant advantages of this approach.

(1) *Enhanced effectiveness of the charities' monitoring system*

Having a sole regulatory body would facilitate greater effectiveness in monitoring and regulating charitable organisations. This would lead to greater public trust and confidence in charities.

(2) *Centralised policy*

Having a sole regulatory body with a centralised policy on charities would ensure greater consistency in the practice of charitable organisations on matters such as fundraising. It would help to promote greater accountability and transparency in relation to charitable activities and would be an effective

means of building public confidence and trust in charitable organisations.

(3) *Greater accountability and accessibility to information*

Having a sole regulatory body that is more accountable and accessible would benefit the public in gaining access to information about charitable organisations. Members of the public would then be better able to make appropriate and informed decisions regarding their donations.

(4) *Enhanced efficiency*

A sole regulatory body would enhance efficiency in the processing of applications relating to fundraising activities. It would save the time and effort of charitable organisations in having to go to different Government departments or authorities to obtain different types of licences or approvals.

(5) *Lower administrative costs*

Having a sole regulatory body to monitor charitable organisations would not only reduce the administrative costs for the Government resulting from overlapping functions of different Government departments and bodies, but would also lower the administrative costs of non-government organisations.

12.4 As we have already indicated in this paper, we propose that this regulatory body should take the form of a charity commission along the lines of those now established in several other common law jurisdictions. Our recommendations on this are set out later in this chapter.

12.5 While charity organisations will be expected to abide by the requirements laid down by the future charity commission, we consider it is important that the charity commission should adopt the role of a 'light-touch' regulator and that the new regulatory regime should not significantly add to the expenditure of charitable organisations.

Overseas experience

12.6 A number of jurisdictions have a centralised regulatory body for charities performing important functions, such as maintaining a register of charities, monitoring charities' compliance with their legal obligations, instituting inquiries and protecting funds and property of charities in cases of misconduct or mismanagement. A brief description of the functions of each of the charity commissions in England and Wales, Ireland and New Zealand is set out below. Further details of these, as well as other overseas charity regulatory authorities are set out in Annex 9 of this paper.

England and Wales

12.7 In England and Wales, the functions and duties of the Charity Commission are set out in the Charities Act 1993, as amended in 2006.¹ These functions and duties include:

- (1) to ensure that the management of charities, and the conduct of their various fundraising activities are properly carried out by the charity trustees and all responsible personnel of the charities;
- (2) to redress the problems arising from misconduct and mismanagement of charities; and
- (3) to ensure that charity funds have been properly used.

12.8 We note that in performing its functions, the Charity Commission is specifically required by legislation to adopt a moderate and sensitive approach so as not to discourage any innovation by or on behalf of charities. The Commission is under a general duty whilst in the performance of its functions to act in a way which is compatible with the encouragement of all forms of charitable giving as well as voluntary participation in charity work.

Ireland

12.9 In Ireland, the Charities Regulatory Authority was established under section 13 of the Irish Charities Act 2009. The major functions of the Authority include:

- (1) to increase public trust and confidence in the management and administration of charitable trusts and charitable organisations;
- (2) to promote compliance by charity trustees with their duties in the control and management of charitable trusts and charitable organisations;
- (3) to ensure the accountability of charitable organisations to donors and beneficiaries of charitable gifts and to the public;
- (4) to promote understanding of the requirement that charitable purposes confer a public benefit;
- (5) to establish and maintain a register of charitable organisations;
- (6) to ensure and monitor compliance by charitable organisations with the Charities Act 2009;

¹ It should be noted that a new Charities Bill was placed before the UK Parliament in March 2011 with the object of consolidating the Charities Act 1993 and other enactments relating to charities.

- (7) to carry out investigations in accordance with the Act; and
- (8) to encourage and facilitate the better administration and management of charitable organisations by the provision of information or advice.

New Zealand

12.10 The New Zealand Charities Commission was established under section 8 of the New Zealand Charities Act 2005. The main functions of the Charities Commission include:

- (1) to promote public trust and confidence in the charitable sector;
- (2) to encourage and promote the effective use of charitable resources;
- (3) to educate and assist charities in relation to matters of good governance and management;
- (4) to receive, consider, and process applications for registration as charitable entities;
- (5) to ensure that the register of charitable entities is compiled and maintained;
- (6) to receive, consider, and process annual returns submitted by charitable entities;
- (7) to supply information and documents in appropriate circumstances for the purposes of the Inland Revenue Acts;
- (8) to monitor charitable entities and their activities to ensure that entities that are registered as charitable entities continue to be qualified for registration as charitable entities;
- (9) to inquire into charitable entities and persons who have engaged in or are engaging in conduct that constitutes, or may constitute, a breach of the Act or serious wrongdoing in connection with a charitable entity; and
- (10) to monitor and promote compliance with the Act, including, by taking prosecutions for offences against the Act in appropriate circumstances.

Our proposals for the establishment of a charity commission

The objectives of the future charity commission

12.11 We consider that a charity commission should be established in Hong Kong to assume the role of regulator of charities. This commission should be, as far as possible, a 'one-stop shop' in relation to charities, and should have the various objectives we recommend below.

Recommendation 18

We recommend that a charity commission should be set up as a sole regulatory body for charities.

The objectives of the charity commission would be:

- (1) to increase public trust and confidence in charities;**
- (2) to enhance transparency and accountability to donors and beneficiaries;**
- (3) to promote good governance and good management practice on matters related to charities; and**
- (4) to promote greater compliance among charities with their legal obligations.**

The interplay between the role of the future charity commission and the Secretary for Justice as protector of charities

12.12 In the course of our deliberations, we have considered the issue of the interplay between the future charity commission and the Secretary for Justice in his role as protector of charities in the light of the experience in England and Wales.

12.13 Since 1 July 1997, the rights² which were previously enjoyed by Hong Kong's then Attorney General³ in the courts of Hong Kong are now exercisable by the Secretary for Justice. The Secretary for Justice, like his counterpart in England and Wales, has many powers and duties, including his role as *parens patriae* in charity matters.

12.14 In England, while the Charity Commission plays an important statutory role in the supervision and control over charities, the Attorney

2 Except for those rights which are inconsistent with the Basic Law: see section 5, Legal Officers Ordinance (Cap 87).

3 By virtue of section 5 of the Legal Officers Ordinance (Cap 87) (now repealed), these rights were similar to the rights enjoyed by the Attorney General of England.

General also contributes to this framework in his duty to protect the interests of charity generally, as the Attorney General represents the beneficial interest, or 'objects', of the charity. The Attorney General, who may appear either in person or by counsel, is generally a necessary party to all claims relating to charities, other than those commenced by the Charity Commission.⁴

12.15 In relation to the power to act for the protection of charities, in England, the Charity Commission may exercise the same powers as the Attorney General with respect to the taking of legal proceedings with reference to charities, or the property or affairs of charities, as are exercisable by the Attorney General acting *ex officio*. The only exception to these powers is that the Charity Commission cannot present a petition for the winding up of a charitable company.⁵ The practice and procedure for proceedings taken out by the Charity Commission are the same as those taken out by the Attorney General acting *ex officio*, in particular as regards costs. However, these powers are exercisable by the Commission only with the agreement of the Attorney General.⁶

12.16 Having considered the example in England and Wales, the Sub-committee considers that the Secretary for Justice should continue to contribute to the framework of supervision and control over charities which will be implemented by the future charity commission. Furthermore, the Secretary for Justice will continue to be a necessary party to all claims relating to charities in order to represent the beneficial interest or objects of the charity. It is noted that the future charity commission, in the course of exercising the powers and functions recommended in the paper, would not be vested with the power to take legal proceedings in relation to charity cases. Instead, as previously discussed and recommended in Chapter 8, the future charity commission should have the power to refer possible civil actions to the Secretary for Justice in relation to enforcement and remedies in cases of non-compliance by charities with their legal obligations.

The general characteristics of the future charity commission

12.17 Taking into account the overseas experience with respect to charity regulatory bodies, we consider that the future charity commission should have the general characteristics set out below.

(1) Proportionate power

12.18 Since the future charity commission will have a duty to ensure that charitable organisations comply with their legal obligations, a variety of powers will be vested in the commission. These proposed powers are set out later in this chapter.

4 Halsbury's Laws of England, Vol 8 (2010 5th ed), at para 583 and 599.

5 Section 63(1), Charities Act 1993: see same as above, at para 234.

6 Halsbury's Laws of England, Vol 8 (2010 5th ed), at para 553. In cases where it appears to the Charity Commission that it is desirable for legal proceedings in relation to a charity to be taken by the Attorney General, the Commission would send the Attorney General the relevant statements and particulars to explain the matter: at para 593.

12.19 We emphasise that these powers of the future charity commission should be exercised in a fair, reasonable and proportionate manner. In line with the approach taken in England and Wales, we consider that the commission should adopt a 'light touch', moderate and sensitive approach in the exercise of its statutory powers, so as not to discourage innovation in the charity sector or voluntary participation in charity work.

(2) Accountability

12.20 We consider that, in line with other statutory commissions in Hong Kong, such as the Equal Opportunities Commission and Securities and Future Commission, there should be a proper appeal mechanism for any person or organisation aggrieved by the decision of the charity commission. We propose that such an appeal could be made to the Court of First Instance. This proposal is discussed further later in this chapter.

(3) Transparency

12.21 In setting up an effective system of regulation and monitoring of charities, the future charity commission should publish clear and transparent guidelines to enable charitable organisations to have a clear understanding of the procedures and requirements relating to charity matters, such as registration and fundraising. This would also help to build public trust and confidence in charitable organisations and the new regulatory regime.

The functions and powers of the future charity commission

12.22 As we have recommended above, we consider that the future charity commission should have the role of a regulator and should be responsible for promoting good governance and good practice management on matters related to charities.

12.23 In order to achieve its objectives, we consider that the future charity commission should be equipped with the functions and powers set out below.

(1) Maintaining and administering the register of charities

12.24 We propose that one of the major functions of the future charity commission will be to determine the charitable status of organisations and to maintain a register of all charitable organisations operating in Hong Kong. This register should be open for inspection by members of the public. We further propose that the future charity commission should determine, on a case by case basis, matters related to allowing or disallowing the use of particular names of charitable bodies. Details of these proposed powers are discussed in Chapter 7.

12.25 As discussed in Chapter 10, charitable organisations which have their charitable status approved and registered by the charity commission may apply to the Inland Revenue Department for tax exemption.

12.26 In the course of considering the powers of the future charity commission to register charities, we have considered also whether there should be a residual power to enable the future charity commission to refuse to register organisations as charities in certain cases, even where they appear to meet the charity test. This might apply, for example, in rare cases where there is reasonable evidence to suggest that, even though the application on its face complies with the charity test, those applying to establish the charity have an underlying intention to make use of it for other non-charitable purposes.

12.27 In Scotland, the Office of the Scottish Charity Regulator (OSCR) must not refuse to register an applicant which meets the charity test unless certain conditions apply.⁷ These conditions are that the OSCR considers that the applicant for registration has an 'objectionable name'⁸ or the application falls within the scope of regulations made under the Act for this purpose.⁹ In England and Wales, the role of the Charity Commission in registering charities does not appear to be expressed in similar mandatory terms. Instead, the Commission's role in "[d]etermining whether institutions are or are not charities" is set out as the first 'general function' of the Charity Commission included under section 1C of the Charities Act 1993, while the Commission's role in maintaining "*an accurate and up-to-date register of charities*"¹⁰ is stated to be within the scope of its fifth general function.¹¹ The Charity Commission is also stated to have an incidental power to deal with matters relating to the performance of its functions and general duties.¹² However, whether this incidental power may be exercised, for example, to refuse charity registration in any particular case, is unclear.

12.28 The Sub-committee considers that one of the advantages of the future charity commission having a residual power to refuse the granting of an application for registration is that it would allow flexibility in dealing with applications. Such a residual power would need to be clearly defined (for

7 See section 5, Charities and Trustee Investment (Scotland) Act 2005.

8 For the purposes of section 10, Charities and Trustee Investment (Scotland) Act 2005.

9 See section 6, Charities and Trustee Investment (Scotland) Act 2005, which states:

"(1) the Scottish Ministers may by regulations make such further provision in relation to the procedure for applying and determining applications for entry in the Register... as they think fit.

(2) such regulations may in particular make provision about—

(a) information and documents which must be specified in or accompany an application,

(b) the form and manner in which applications must be made,

(c) the period within which the OSCR must make a decision on an application and

(d) circumstances in which OSCR must refuse to enter a body in the register."

To-date, it appears that no regulations have been made under this section.

10 Section 1C(2), Charities Act 1993.

11 Section 1C(3), Charities Act 1993.

12 Under section 1E(1) of the Charities Act 1993, the Commission is given power to deal with matters relating to the performance of its functions and general duties which are set out in section 1C and 1D of the 1993 Act. Section 1E(1) states: "*The Commission has power to do anything which is calculated to facilitate, or is conducive or incidental to, the performance of any of its functions or general duties.*"

example, in statutory regulations which would limit the circumstances in which the power may be exercised). A safeguard against the abuse of such a power is that it is proposed elsewhere in this chapter that applicants aggrieved by a decision of the future charity commission may appeal to the Court of First Instance against the decision.

12.29 A disadvantage of the future charity commission having such a residual power to refuse registration even where the charity test appears to have been satisfied, is that it may create uncertainty in the law and raises the possibility of a lack of transparency in the functioning of the future charity commission. It may also be regarded as unnecessary, as it is proposed elsewhere in this paper that the future charity commission will have the power to de-register charities in, for example, cases of impropriety.

12.30 On balance, however, we consider that the future charity commission should have a clearly defined residual power to refuse an application for registration in appropriate cases.

(2) Monitoring compliance by charities with their legal obligations

12.31 We propose that the future charity commission will be the regulator responsible for monitoring charitable organisations to ensure their compliance with their legal obligations. This will include the need for charities to comply with certain filing requirements imposed by the future charity commission, as set out earlier in Recommendation 7 in Chapter 8.

12.32 The future charity commission should be under a duty to ensure that registered charitable organisations continue to comply with their charitable objects in order to maintain registration with the commission, and, as proposed in Recommendation 5 in Chapter 8, that charities file returns with the commission on any change of charitable objects.

12.33 As we have noted earlier, while charitable organisations need to abide by the requirements laid down by the charity commission, we consider that the new regime should not add to the expenditure of charitable organisations and that the commission should adopt a 'light-touch' approach in regulating the charities sector.

(3) Vetting applications in relation to fundraising activities

12.34 As set out in the recommendations in Chapter 9, the future charity commission should be the sole regulatory body to grant all permits and licences necessary for charitable fundraising. In assuming this role, the commission should take up the monitoring functions in relation to fundraising activities which are currently performed by the Social Welfare Department, the Food and Environmental Hygiene Department and the Television and Entertainment Licensing Authority.

12.35 The future charity commission should advise charities on their legal obligations arising from fundraising activities carried out by them.

These obligations should be expressed in codes of practice or guidelines to be issued by the commission in easily understood terms to facilitate proper compliance.

12.36 The future charity commission should also ensure public access to information relating to fundraising activities by charitable organisations and provide an enquiry service for the public.

(4) Promotion of good governance and good management practice

12.37 As we noted earlier in this paper, the future charity commission should be responsible for the macro governance of charities, and should set up statutory or non-statutory codes of practice on matters related to charities, such as internal controls, accountability and transparency, good governance, good practice, conflicts of interest and declarations of personal interest.

(5) Investigative powers relating to misconduct and maladministration

12.38 As discussed in Chapter 8, we consider that the ability of the future charity commission to investigate and check abuses is crucial to promoting good governance among charities and building and maintaining public confidence. As a result, we propose in Recommendation 9 in Chapter 8 that the commission should be vested with the power to investigate any mismanagement and misconduct by charitable organisations.

12.39 In any case where a report is made to the charity commission concerning mismanagement or misconduct of a charitable organisation or its officers, or where the commission itself takes the initiative to investigate, the commission should have the power to conduct an investigation by itself or any persons, such as accountants and legal practitioners, appointed by the commission.

12.40 As part of its powers to investigate mismanagement or misconduct of charitable organisations, the future charity commission and its appointed investigators should be empowered to obtain information on activities and request documents, records, books and accounts or copies thereof from charities under investigation.

12.41 In order to enable effective exercise of the powers of the future charity commission and the appointed investigators, we consider that any person who intentionally or recklessly provides false or misleading information, or fails to provide the information for the purpose of investigation, or alters, conceals or destroys any document required to be produced for the purpose of investigation, will be guilty of an offence.

(6) Enforcement and remedies

12.42 We propose that the future charity commission should be vested with powers of enforcement, and that there should be remedies available to ensure compliance by charities with their legal obligations and obligations of

proper performance in accordance their charitable objectives. Our detailed proposals on these matters are set out in Chapter 8.

(7) Application of the cy-près doctrine

12.43 In Chapter 11, we propose that legislation should be introduced to broaden the application of the *cy-près* doctrine in Hong Kong. We consider that the future charity commission should be empowered to apply this broadened scope of the doctrine to property held in a charitable trust under the circumstances set out in Recommendation 17 in Chapter 11.

Recommendation 19

We recommend that the future charity commission should have the following functions and powers:

- (1) To determine whether organisations are or are not charities;**
- (2) To maintain and administer the register of charities, including a power to refuse registration in appropriate cases;**
- (3) To monitor compliance by charities with their legal obligations;**
- (4) To vet applications for requisite approval in relation to fundraising activities;**
- (5) To promote good governance and good practice among charities;**
- (6) To investigate, either by itself or by appointed investigators, into misconduct or maladministration by charitable organisations or their officers;**
- (7) To enforce decisions and to grant remedies; and**
- (8) To apply the cy-près doctrine.**

Appeal mechanism

12.44 To balance the vesting of these powers in the future charity commission and to ensure fairness, we consider that an appeal mechanism should be in place to enable charitable organisations or aggrieved persons to appeal against certain decisions of the future charity commission. We consider that this right of appeal should apply to the exercise of the

commission's various powers relating to enforcement and remedies due to non-compliance of charities with their legal obligations and the application of the *cy-près doctrine*. We also consider that the right of appeal should extend to a decision of the commission to refuse to register an organisation as a charitable organisation. We consider that appeals in such cases should be made to the Court of First Instance.

Recommendation 20

We recommend that a charitable organisation or person aggrieved by the 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*;**

shall have the right to appeal to the Court of First Instance.

12.45 In respect of appeals relating to applications for fundraising permits and licences, we consider that such appeals should be handled by the Administrative Appeals Board or by a new administrative appeal system set up for the purpose.

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.

Summary of recommendations

(The recommendations below are to be found in Chapter 5 of this consultation paper on Conclusions and proposals on the definition of charity)

Recommendation 1

(Pros and cons of having a statutory definition)

We recommend that there should be a clear statutory definition of what constitutes a charitable purpose. (para 5.42)

Recommendation 2

(Categories of charitable purpose - our proposals)

We recommend that the statutory definition of what constitutes a charitable purpose that is exclusively charitable should include the following heads:

- (1) The prevention or relief of poverty;¹
- (2) The advancement of education;
- (3) The advancement of religion;²
- (4) The advancement of health;
- (5) The saving of lives;
- (6) The advancement of citizenship or community development;
- (7) The advancement of arts, culture, heritage or science;
- (8) The promotion of religious or racial harmony;
- (9) The promotion of equality and diversity;
- (10) The advancement of environmental protection or improvement;

1 Subject to further refinements suggested in paragraph 5.69.

2 Subject to further refinements suggested in paragraph 5.76.

- (11) The relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;
- (12) The advancement of animal welfare;
- (13) Any other purpose that is of benefit to the community.

We further recommend that, whichever head of charitable purpose the particular purpose falls under, it must be also for the public benefit.³

In relation to "*The advancement of human rights, conflict resolution or reconciliation*", we welcome the public's views as to whether these purposes should be included in the list of charitable purposes. (paras 5.66-5.128)

(The recommendations below are to be found in Chapter 6 of this consultation paper on Conclusions and proposals on the legal structures of charities)

Recommendation 3

(Conclusions)

We invite views from the public on whether, and to what extent, the various existing legal forms for charities should be reformed.

In particular, we invite comments on:

- (1) whether 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; and
- (2) whether, in the alternative, a unitary approach of imposing one uniform model of charitable organisation structure should be adopted, and if so, what form that model should take. (paras 6.39-6.41)

³ We note that this would have the effect of removing the present common law presumption that purposes for the relief of poverty, the advancement of education and the advancement of religion are *prima facie* charitable and for the public benefit.

(The recommendations below are to be found in Chapter 7 of this consultation paper on Conclusions and proposals on registration of charities)

Recommendation 4

(Our proposal)

We recommend that all charitable organisations which:

- (1) make any charitable appeal to the public; and/or
- (2) seek tax exemption

should be subject to the requirement of registration.

We recommend that the list of registered charitable organisations should be established and maintained by the future charity commission and that this list should be available for public inspection.

We recommend that the application process for registration should not be subject to public notification.

We recommend that the matter relating to allowing or disallowing the use of particular names of charitable bodies should be left to the future charity commission to determine, on a case by case basis. (para 7.37)

(The recommendations below are to be found in Chapter 8 of this consultation paper on Proposed framework for governance, accounting and reporting by charities)

Recommendation 5

(Notification of change of particulars)

We recommend that registered charitable organisations should be required to file an annual activity report to the future charity commission. Such a report should be provided in a standard form and matters covered should include –

- (1) change of charitable objects;
- (2) main activities carried out to fulfil the charitable objects;
- (3) change of directors;
- (4) change of registered office address. (paras 8.16-8.20)

Recommendation 6

(Disclosure of interests and matters relating to governance)

We recommend that charity trustees or directors of a registered charity should be under a duty to declare any conflicts of interest and personal interests. (paras 8.21-8.24)

Recommendation 7

(Filing accounts and statements)

We recommend 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.

We also invite views from the public on –

- (1) whether, 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
- (2) the contents to be included in the annual report of activities. (paras 8.25-8.29)

Recommendation 8

(Maintaining accounting records)

We recommend 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 a charity. Such records should be retained for at least seven years. (paras 8.30-8.33)

Recommendation 9

(Powers of investigation)

We recommend 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.

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. During the course of such investigations, there should be appropriate safeguards to ensure confidentiality. (paras 8.34-8.42)

Recommendation 10

(Providing false or misleading information to be an offence)

We recommend 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, will be guilty of an offence. (para 8.44)

Recommendation 11

(Protection of the property of a charity)

We recommend that the future charity commission should be vested with powers relating to enforcement and remedies in the case of non-compliance by charities with their legal obligations.

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. (paras 8.49-8.50)

Recommendation 12

(Protection of the property of a charity)

We recommend that the future charity commission should be vested with the power to protect property of charities in cases of misconduct or mismanagement in the administration of charities, and 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. (para 8.51)

(The recommendations below are to be found in Chapter 9 of this consultation paper on Conclusions and proposals on the regulation of fundraising activities)

Recommendation 13

(Regulatory measures on fundraising activities in public places and lotteries)

We recommend that:

- (1) 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;
- (2) this "*one-stop shop*" service should be provided by the future charity commission which 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 Licensing Authority in relation to authorising charity fundraising activities in public places and those involving lotteries; and
- (3) the future charity commission should be responsible for enabling public access to information relating to fundraising activities and for providing an enquiry response service to the public. (paras 9.43-9.44)

Recommendation 14

(Other types of fundraising activity)

We recommend that, for all forms of charitable fundraising activities, the registration number of any charitable organisation involved in the 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). (paras 9.45-9.48)

Recommendation 15

(Professional fundraisers)

In relation to professional fundraisers, we recommend that:

- (1) the future charity commission should develop and issue non-statutory codes of good practice to regulate the activities of professional fundraisers;
- (2) the future charity commission should consider the feasibility of requiring professional fundraisers to register with it;
- (3) the future charity commission should encourage as a matter of good practice among professional fundraisers or commercial participators (including, but not limited to) -
 - (a) the making of solicitation statements (such as those used under the system in England and Wales) by professional fundraisers;
 - (b) disclosure of their remuneration to the future charity commission and the public;
 - (c) disclosure to the future charity commission of any prior written agreement between them and charities; and
- (4) the future charity commission should review the position and issue guidelines concerning the hiring of elderly persons to solicit donations on the street. (paras 9.49-9.51)

(The recommendations below are to be found in Chapter 10 of this consultation paper on Charities and tax)

Recommendation 16

(Our conclusions and proposals on the taxation of charities in Hong Kong)

We recommend:

- (1) that existing powers of tax exemption and functions of periodic review of charities for taxation purposes should remain with the Inland Revenue Department;
- (2) tax exemption may be granted to a charity by the Inland Revenue Department only when the charity has been registered with the future charity commission;
- (3) subject to (2) above, no change to the existing law on the taxation of charities in Hong Kong;
- (4) 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 Department's functions in assessing charities for tax where appropriate; and
- (5) 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. (paras 10.39-10.42)

(The recommendations below are to be found in Chapter 11 of this consultation paper on Conclusions and proposals on the cy-près doctrine)

Recommendation 17

(Our conclusions and proposals on variation of charities in Hong Kong)

We recommend the introduction in Hong Kong of legislation 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 doctrine in Hong Kong and to broaden the scope of its application.

In line with the English model, we recommend that the *cy-près* doctrine should be broadened in Hong Kong so that it may apply in the following situations

even where it is not impossible or impractical to carry out the charitable purpose of the charitable trust:

- (1) where property given for a specific charitable purpose has failed, and the donors are either unknown or have disclaimed their rights to have the property returned;
- (2) where property is given for a specific charitable purpose in response to a solicitation;
- (3) where a charitable body has dissolved.

We also recommend that the future charity commission should be empowered by statute to administer the application of the *cy-près* doctrine in particular cases. (paras 11.26-11.27)

(The recommendations below are to be found in Chapter 12 of this consultation paper on Conclusions and proposals on the establishment of a charity commission for Hong Kong)

Recommendation 18

(The objectives of the future charity commission)

We recommend that a charity commission should be set up as a sole regulatory body for charities.

The objectives of the charity commission would be:

- (1) to increase public trust and confidence in charities;
- (2) to enhance transparency and accountability to donors and beneficiaries;
- (3) to promote good governance and good management practice on matters related to charities; and
- (4) to promote greater compliance among charities with their legal obligations. (para 12.11)

Recommendation 19

(The functions and powers of the future charity commission)

We recommend that the future charity commission should have the following functions and powers:

- (1) To determine whether organisations are or are not charities;
- (2) To maintain and administer the register of charities, including a power to refuse registration in appropriate cases;
- (3) To monitor compliance by charities with their legal obligations;
- (4) To vet applications for requisite approval in relation to fundraising activities;
- (5) To promote good governance and good practice among charities;
- (6) To investigate, either by itself or by appointed investigators, into misconduct or maladministration by charitable organisations or their officers;
- (7) To enforce decisions and to grant remedies; and
- (8) To apply the *cy-près* doctrine. (paras 12.22-12.43)

Recommendation 20

(Appeal mechanism)

We recommend that a charitable organisation or person aggrieved by the 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;

shall have the right to appeal to the Court of First Instance. (para 12.44)

The law in other jurisdictions on the definition of charity¹

Australia

Australian Commonwealth

1. Section 3 of the Extension of Charitable Purpose Act 2004 states that:

"charity means a charitable institution, a charitable fund or any other kind of charitable body."

2. This Act comprises perhaps the most significant charity law reform introduced in Australia in recent years. The consequence of this legislation was an extension of certain aspects of the definition of charitable purposes. Section 4(1) provides that, without limiting what constitutes a charitable purpose, charitable purpose includes *"the provision of child care services on a non-profit basis."*

3. In relation to *"public benefit"*, section 5(1) of the Act explains that an institution has a purpose that is *"for the public benefit"* to the extent that it is:

- "(a) an open and non-discriminatory self-help group ...; or*
- (b) a closed or contemplative religious order that regularly undertakes prayerful intervention at the request of members of the public."*

4. Section 5(2) provides that an institution is an *"open and non-discriminatory self-help group"* if:

- "(a) it is an association of individuals that has an open and non-discriminatory membership; and*
- (b) it is established for the purpose of assisting individuals affected by:*
 - (i) a particular disadvantage or discrimination; or*
 - (ii) a need, arising out of a particular disadvantage or discrimination, that is not being met; and*

¹ Please note that the discussion of the law on the purpose of charity in the jurisdictions of England and Wales and Scotland is set out in Chapter 5 of this paper.

- (c) *it is made up of, and controlled by, individuals who are affected by the disadvantage or discrimination; and*
- (d) *all of its criteria for membership relate to its purpose; and*
- (e) *its membership is open to any individual who satisfies the criteria."*

New South Wales

5. Section 4(1) of the Charitable Fundraising Act 1991 defines charitable purpose as including *"any benevolent, philanthropic or patriotic purpose."*

Queensland

6. Charitable purpose is defined under section 2 of the Charitable Funds Act 1958 as meaning:

"... every purpose which in accordance with the law of England is a charitable purpose, and, without limiting or otherwise affecting the foregoing, includes all or any of the following –

- (a) *the supply of help, aid, relief, assistance, or support howsoever to any persons in distress (including, but without limiting the generality thereof, the supply of the physical wants of any such persons);*
- (b) *the education or instruction (spiritual, mental, physical, technical, or social) and the reformation, employment, or care of any persons;*
- (c) *any public purpose (whether of any of the purposes before enumerated or not) being a purpose in which the general interest of the community or a substantial section of the community (at large or in a particular locality), as opposed to the particular interest of individuals, is directly and vitally concerned;*
- (d) *the construction, carrying out, maintenance, or repair of buildings, works, and places for any of the purposes aforementioned;*
- (e) *any benevolent or philanthropic purpose (whether of the purposes before enumerated or not);*
- (f) *any analogous purpose declared either generally or in the particular case for the purposes of this Act by the Governor in Council by order in council published in the gazette to be a charitable purpose."*

Victoria

7. In Victoria, section 8 of the Charities Act 1978 defines charity as, *"any institution which is established for purposes which according to the law of Victoria are charitable."*

Canada

8. The federal Income Tax Act contains no definition of *"charity"* and the courts apply the *Pemsel* categorisations in determining whether an organisation is charitable.

Alberta

9. In Alberta, however, the Charitable Fund-raising Act 2000² has defined both *"charitable organisation"* and *"charitable purpose"*.

10. Section 1(1)(b) of the Act provides that *"charitable organisation"* means:

- "(i) any incorporated or unincorporated organization that is formed for a charitable purpose, or*
- (ii) a person who makes solicitations for contributions to be used for a charitable purpose and who is not connected to any incorporated or unincorporated organization that is formed for the charitable purpose for which the solicitation is made".*

11. Under the Act, *"contribution"* means money, goods or services or a promise or pledge to give money, goods or services.³

12. Section 1(1)(c) states that *"charitable purpose"* includes:

"a philanthropic, benevolent, educational, health, humane, religious, cultural, artistic or recreational purpose, so long as the purpose is not part of a business".

Ireland

13. Section 2(1) of the Irish Charities Act 2009 defines *"charitable organisation"* to mean:

- "(a) the trustees of a charitable trust, or*

2 Chapter C-9 RSA 2000.

3 Section 1(1)(d) of the Charitable Fund-raising Act 2000, Chapter C-9 RSA 2000.

- (b) *a body corporate or an unincorporated body of persons –*
 - (i) *that promotes a charitable purpose only,*
 - (ii) *that, under its constitution, is required to apply all of its property (both real and personal) in furtherance of that purpose, except for moneys expended –*
 - (I) *in the operation and maintenance of the body, including moneys paid in remuneration and superannuation of members of the staff of the body, and*
 - (II) *in the case of a religious organisation or community, on accommodation and care of members of the organisation or community,*
- and*
- (iii) *none of the property of which is payable to the members of the body other than in accordance with section 89, but shall not include an excluded body.⁴*

14. Section 3(2) provides that a charitable purpose must be "*of public benefit*" and section 3(1) lists the following charitable purposes:

- "(a) the prevention or relief of poverty or economic hardship;*
- (b) the advancement of education;*
- (c) the advancement of religion;*
- (d) any other purpose that is of benefit to the community."*

15. Section 3(3) provides that a gift shall not be "*of public benefit*" unless:

- "(a) it is intended to benefit the public or a section of the public, and*

4 Section 2(1) of the Irish 2009 Act explains that, "*excluded body*" means (a) a political party, or a body that promotes a political party or candidate, (b) a body that promotes a political cause, unless the promotion of that cause relates directly to the advancement of the charitable purposes of the body, (c) an approved body of persons within the meaning of section 235 of the Taxes Consolidation Act 1997, (d) a trade union or a representative body of employers, (e) a chamber of commerce, or (f) a body that promotes purposes that are (i) unlawful, (ii) contrary to public morality, (iii) contrary to public policy, (iv) in support of terrorism or terrorist activities, whether in the State or outside the State, or (v) for the benefit of an organisation, membership of which is lawful.

- (b) *in a case where it confers a benefit on a person other than in his or her capacity as a member of the public or a section of the public, any such benefit is reasonable in all of the circumstances, and is ancillary to, and necessary, for the furtherance of the public benefit."*

16. Section 3(4) introduces a rebuttable presumption that "a gift for the advancement of religion is of public benefit" and further provisions in relation to religion are found at sections 3(5), (6), (9) and (10). These include:

- "(5) *The Authority shall not make a determination that a gift for the advancement of religion is not of public benefit without the consent of the Attorney General.*
- (6) *A charitable gift for the purpose of the advancement of religion shall have effect, and the terms upon which it is given shall be construed, in accordance with the laws, canons, ordinances and tenets of the religion concerned.*
- ...
- (9) *There shall be no appeal to the Tribunal from a determination of the Authority to which subsection (5) applies.*
- (10) *For the purposes of this section, a gift is not a gift for the advancement of religion if it is made to or for the benefit of an organisation or cult —*
 - (a) *the principal object of which is the making of profit, or*
 - (b) *that employs oppressive psychological manipulation —*
 - (i) *of its followers, or*
 - (ii) *for the purpose of gaining new followers."*

17. In determining whether a gift is of public benefit or not, section 3(7) requires account to be taken of:

- "(a) *any limitation imposed by the donor of the gift on the class of persons who may benefit from the gift and whether or not such limitation is justified and reasonable, having regard to the nature of the purpose of the gift, and*
- (b) *the amount of any charge payable for any service provided in furtherance of the purpose for which the gift is given and whether it is likely to limit the number of*

persons or classes of person who will benefit from the gift."

18. By virtue of section 3(8), a limitation referred to in subsection (7) shall not be justified and reasonable if all of the intended beneficiaries of the gift or a significant number of them have a personal connection with the donor of the gift.

19. Section 3(11) offers some guidance as to what amounts to a "*purpose that is of benefit to the community*" for the purposes of section 3(1)(d), and considerably extends the scope of "*charitable purpose*" beyond the advancement of education and religion and the prevention or relief of poverty or economic hardship set out in section 3(1). Section 3(11) provides that a "*purpose of benefit to the community*" includes:

- "(a) the advancement of community welfare including the relief of those in need by reason of youth, age, ill-health, or disability,*
- (b) the advancement of community development, including rural or urban regeneration,*
- (c) the promotion of civic responsibility or voluntary work,*
- (d) the promotion of health, including the prevention or relief of sickness, disease or human suffering,*
- (e) the advancement of conflict resolution or reconciliation,*
- (f) the promotion of religious or racial harmony and harmonious community relations,*
- (g) the protection of the natural environment,*
- (h) the advancement of environmental sustainability,*
- (i) the advancement of the efficient and effective use of the property of charitable organisations,*
- (j) the prevention or relief of suffering of animals,*
- (k) the advancement of the arts, culture, heritage or sciences, and*
- (l) the integration of those who are disadvantaged, and the promotion of their full participation, in society."*

New Zealand

20. Section 4(1) of the New Zealand's Charities Act 2005 defines charity to mean *"a society, an institution, or the trustees of a trust that is or are registered as a charitable entity under this Act."* Section 5(1) provides that, unless the context otherwise requires, *"charitable purpose"* includes:

"every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community."

Further, section 5(3) provides that:

"... if the purposes of a trust, society, or an institution include a non-charitable purpose (for example, advocacy) that is merely ancillary to a charitable purpose of the trust, society, or institution, the presence of that non-charitable purpose does not prevent the trustees of the trust, the society, or the institution from qualifying for registration as a charitable entity."

Singapore

21. Section 2(1) of Singapore's Charities Act (Cap 37) defines a charity as *"any institution, corporate or not, which is established for charitable purposes and is subject to the control of the High Court in exercise of the Court's jurisdiction with respect to charities."* It also provides that *"charitable purposes"* means, *"purposes which are exclusively charitable according to the law of Singapore"* and *"charitable company"* means, *"a charity which is a company or other body corporate"*. While this definition does not define *"charitable purposes"* in a concrete fashion, the following categories have been recognised as charitable purposes in practice in Singapore:⁵

- (a) the relief of poverty;
- (b) the advancement of education;
- (c) the advancement of religion; and
- (d) other purposes beneficial to the community, which include:
 - the advancement of health;
 - the advancement of citizenship or community development;
 - the advancement of arts, heritage or science;

5 Singapore Commissioner of Charities, Commissioner of Charities Annual Report for the Year Ending 31 December 2006, at para 12.

- the advancement of environmental protection or improvement;
- the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantages;
- the advancement of animal welfare; and
- the advancement of sport, where the sport advances health through physical skill and exertion.

South Africa

22. To be eligible for tax exemption under the South Africa Income Tax Act 1962, a public benefit organisation has to carry out public benefit activities. Section 30(1) defines "*public benefit activity*" as:

- "(a) any activity listed in Part I of the Ninth Schedule [to the Act]; and*
- (b) any other activity determined by the Minister from time to time by notice in the Gazette to be of a benevolent nature, having regard to the needs, interests and well - being of the general public".*

The activities referred to in Part I of the Ninth Schedule are in respect of the following areas:

- (a) welfare and humanitarian;
- (b) health care;
- (c) land and housing;
- (d) education and development;
- (e) religion, belief or philosophy;
- (f) cultural;
- (g) conservation, environmental and animal welfare;
- (h) research and consumer rights;
- (i) sport;

- (j) provision of funds, assets or other resources; and
- (k) miscellaneous.

23. The same section defines a *"public benefit organisation"* as any organisation:

"(a) which is –

- (i) a company formed and incorporated under section 21 of the Companies Act, 1973 (Act No. 61 of 1973), or a trust or an association of persons that has been incorporated, formed or established in the Republic; or*
- (ii) any branch within the Republic of any company, association or trust incorporated, formed or established in terms of the laws of any country other than the Republic that is exempt from tax on income in that other country;*

(b) of which the sole or principal object is carrying on one or more public benefit activities, where –

- (i) all such activities are carried on in a non - profit manner and with an altruistic or philanthropic intent;*
- (ii) no such activity is intended to directly or indirectly promote the economic self - interest of any fiduciary or employee of the organisation, otherwise than by way of reasonable remuneration payable to that fiduciary or employee; and*

(c) where –

- (i) each such activity carried on by that organisation is for the benefit of, or is widely accessible to, the general public at large, including any sector thereof (other than small and exclusive groups); ..."*

The law in other jurisdictions on the legal structures of charities

Australia

1. Both state and federal charity law in Australia closely follows the English definition of charity based on the Preamble to the Elizabethan Statute of Charitable Uses in 1601, and the common law imposes no specific restrictions on the structure that a charity may take. Further, although state Attorneys General are theoretically responsible for supervising charitable trusts, the Australian Taxation Office, in practice, serves as a national regulator.

2. At the Commonwealth level, the Extension of Charitable Purpose Act 2004 defines a charity as a charitable institution, a charitable fund or any other kind of charitable body. Under the Act, the word "*entity*" has the same meaning as in the Income Tax Assessment Act 1997 (Cth), which refers to an entity as including:

- (a) an individual;
- (b) a body corporate;
- (c) a body politic;
- (d) a partnership;
- (e) any other unincorporated association or body of persons;
- (f) a trust;
- (g) a superannuation fund; and
- (h) an approved deposit fund.¹

3. In 2003, major reform of Australian charity law was attempted with the introduction of the Charities Bill. This sought to introduce a legislative definition of both charity and charitable purpose and was intended to apply to all Commonwealth legislation to replace the previous common law interpretation. In particular, the definition was intended to apply in taxation law, providing a clear framework within which to assess the eligibility of entities for certain tax concessions. The core definition in the Bill identified a charity, a charitable institution or any other kind of charitable body, and required that the entity be not-for profit, with a dominant charitable purpose that was, with some exceptions, for the public benefit. There was some restriction proposed under the Bill on the type of entity that would be considered a charity; for example,

¹ Sections 960-100, Income Tax Assessment Act 1997 (Cth).

individuals, partnerships, political parties, superannuation funds and government bodies would not meet the definition. Entities that could meet the definition included, without restriction, a body corporate, a corporation sole, an association or body of persons whether incorporated or not and a trust.² After consultation on the workability of the legislative definition of a charity, primarily with organisations intended to fall within the new definition, however, the Charities Bill 2003 was not implemented.³

Canada

4. As with the position in Australia, under the Canadian constitution, supervision of charities is within the jurisdiction of the provinces, however in practice, it is the federal taxing authority, the Canada Revenue Agency, which is seen as the primary regulator of charities.

5. This situation has arisen because the major benefits available to charities, the exemption from the payment of tax on income and the ability to offer tax credits to donors, are provisions contained in the federal Income Tax Act. Organisations apply to the Canada Revenue Agency for registration as charities and, if approved, are then subject to audit and enforcement activity by the Canada Revenue Agency's Charities Directorate.⁴

6. Under the federal Income Tax Act, a *"charitable organisation"* is defined as:

"an organisation, whether or not incorporated,

(a) all the resources of which are devoted to charitable activities carried on by the organisation itself,

(b) no part of the income of which is payable to, or is otherwise available for, the personal benefit of any proprietor, member, shareholder, trustee or settler thereof,

(c) more than 50% of the directors, trustees, officers or like officials of which deal with each other and with each of the

2 J Staples, "NGOs out in the Cold: Howard government policy towards NGOs" [2007] UNSWLRS 8.

3 There were three dominant issues arising from the consultation. First, the main concern was that the draft definition appeared to limit the amount of advocacy a charity could undertake and still retain charitable status. The 'disqualifying purpose' clause was regarded widely as more restrictive than the common law. Secondly, many respondents, particularly those representing some of the large religious organisations, were concerned that the draft definition did not provide clarity about the many different entities formed to more efficiently further the charitable purposes of organisations. Thirdly, what was proposed in the Bill was that charitable bodies were at risk of losing their charitable status if they engaged in, or had engaged in, conduct that amounted to a serious offence, even if there was no conviction. This provision did not reflect the common law and there was wide support for its removal. See: Board of Taxation, *Consultation on the Definition of a Charity, A Report to the Treasurer* (Dec 2003).

4 B Wyatt, *Overview from Canada*, presented at the *Modernising Charity Law Conference* held in Brisbane, from 16 to 18 April 2009.

other directors, trustees, officers or officials at arm's length, and

- (d) *where it has been designated as a private foundation or public foundation pursuant to subsection (6.3) of this section or subsection 110(8.1) or (8.2) of the Income Tax Act, chapter 148 of the Revised Statutes of Canada, 1952, or has applied after February 15, 1984 for registration under paragraph 110(8)(c) of that Act or under the definition 'registered charity' in subsection 248(1), not more than 50% of the capital of which has been contributed or otherwise paid into the organisation by one person or members of a group of persons who do not deal with each other at arm's length and, for the purpose of this paragraph, a reference to any person or to members of a group does not include a reference to Her Majesty in right of Canada or a province, a municipality, another registered charity that is not a private foundation, or any club, society or association described in paragraph 149(1)(l)."*

England and Wales

7. The majority of charities in England and Wales exist in the form of charitable trusts. From the late nineteenth century onwards, and after the Companies Act 1862, more charities adopted a limited liability structure. Now, a large number of charities are registered in the form of a company limited by guarantee. The third common form of legal structure used by charities in England and Wales is an unincorporated association. In addition to the three structures of common application, charities may also exist as friendly societies, industrial and provident societies, or as corporations, including eleemosynary corporations, and substantial charities having a clear public purpose may be established as charitable corporations by statute, Church Measure or Royal Charter.⁵

8. The new concept of the "*Charitable Incorporated Organisation*" (CIO) was created under section 69A in Part VIIIA of the 1993 Act (as inserted by section 34 of the Charities Act 2006) and has not yet been implemented. It was intended that this new type of legal structure would be better suited to give effect to charitable purposes, would streamline governance, would reduce the personal liability of trustees and simplify the regulatory burden. Prior to the creation of this new legal form, charities could be set up with a corporate structure bringing them under the requirements of company law as well as charity law. In particular, they would have to register both with the Charity Commission and the Registrar of Companies and provide accounts and returns to both. As the company framework was designed primarily for commercial organisations, this meant that it was not always a suitable vehicle

5 Jean Warburton, *Tudor on Charities* (Sweet & Maxwell 2003, 9th ed), at 131.

for charities. The CIO was intended to combine the advantages of a corporate structure, such as reduced risk of personal liability, without the burden of dual regulation.

9. Section 69A of the 1993 Act provides that the CIO has to be a body corporate, that it should have a constitution, and:

- it should have a principal office, which should be in England or in Wales;
- it should have one or more members;
- the members may be either not liable to contribute to the assets of the CIO if it is wound up, or liable to do so up to a maximum amount each;
- a CIO's constitution should state its name, its purpose, whether its principal office in England or in Wales, and whether or not its members are liable to contribute to its assets if it is wound up, and (if they are) up to what amount;
- a CIO's constitution should make provision about who is eligible for membership and how a person becomes a member; about the appointment of one or more persons who are to be charity trustees of the CIO and about any conditions of eligibility for such appointment; and containing directions about the application of property of the CIO on its dissolution; and
- a CIO's constitution should be in the form specified in regulations made by the Charity Commission, or as near to that form as the circumstances permit.

10. Section 69Q of the 1993 Act (as inserted by section 34 of the Charities Act 2006) provides that the Minister may, by regulations, make further provision about applications for registration of CIOs, as well as the conversion of existing charitable companies, registered societies and community interest companies into CIOs, the amalgamation of CIOs, and other matters relating to CIOs generally.

11. When this new form of charitable organisation was introduced, it was envisaged by the Charities Commission in England and Wales that it would have the following advantages over a company structure:

- (a) a single registration. A charitable company has to register with the Registrar of Companies and the Charity Commission. A CIO will only need to register with the Commission;
- (b) less onerous requirements for preparing accounts. The general regime in the Charities Act 1993 will apply, so small CIOs will be

able to prepare receipts and payments accounts, whilst larger charities will prepare accrual accounts;

- (c) less onerous reporting requirements. CIOs will only prepare an annual report under the Charities Act 1993. Under company law, companies have to prepare a directors' report as well;
- (d) one annual return. Charitable companies have to prepare an annual return under company law and, normally, a separate return under charity law;
- (e) less onerous filing requirements. CIOs will only have to send accounts, reports and returns to the Commission. Charitable companies have to send these to the Commission and the Registrar of Companies;
- (f) less onerous requirements relating to reporting of constitutional and governance changes. CIOs will be subject to a less extensive range of reporting requirements than charitable companies and will only have to report to the Charities Commission;
- (g) lower costs for charities. The Commission makes no charges for registration and filing of information. Simpler constitutional form – the Commission will produce model forms of constitution which will include fewer fixed governance provisions than is the case with companies;
- (h) more straightforward arrangements for merger and reconstruction. The Charities Act 2006 contains a number of provisions designed to facilitate merger and reconstruction which are not available to charitable companies;
- (i) an enforcement regime which does not penalise the charity for the conduct of its directors; and
- (j) codified duties for directors and members which reflect the charitable nature of the CIO.⁶

Ireland

12. The Irish Law Reform Commission published a *Report on Charitable Trusts and Legal Structures for Charities* in October 2006. Paragraph 2.11 of the report stated:

"[I]n Ireland, 44% of the 6,700 charities granted tax-exempt status by the Revenue Commissioners are currently constituted

6 http://www.charity-commission.gov.uk/Library/about_us/ccnews26.pdf.

as companies limited by guarantee. By contrast of the 170,000 charities registered with the Charity Commission for England and Wales only 15% are constituted as companies. The principal reason why charities opt for incorporation is to avail of the protection afforded by limited liability and also because certain grants are only available to incorporated organisations. The [Irish] Commission considers that many charities are forced to incorporate as companies simply because there is currently no other option available to them if they wish to avail of the benefits of limited liability for their members or to avail of certain grants. The Commission therefore recommends that the general reform of charity regulation should include the issue of the legal structure of charities."

13. Commenting on charity reform proposals which had then recently been put forward by the Irish government, the Law Reform Commission stated:

"2.07 The General Scheme for the Charities Regulation Bill 2006 does not make any provision for a new legal form for charities. The press release which accompanied the publication of the draft Bill contained the following comment on the issue:

'Charities have the choice of a number of different legal forms, e.g., unincorporated, such as a trust or an unincorporated association, or incorporated, such as a company (usually limited by guarantee, rather than shares).

The question of whether there could be a new legal form, especially for charities, has been raised by bodies such as the Law Society and the Law Reform Commission. Substantive consideration by the charities sector as to how any new legal form should be different from the current company limited by guarantee has yet to take place. No charities-specific comments were received in response to the public consultation on the proposals of the Company Law Review Group for reform of company law.

It is not intended to hold up progress in introducing legislation to regulate the charities sector for the first time in Ireland, as promised by the Government, pending consideration of separate, longer-term questions such as this.

However, in conjunction with relevant Government Departments and other bodies, the Department of Community, Rural and Gaeltacht Affairs will continue to

7 The Law Reform Commission of Ireland, *Report: Charitable trusts and legal structures for charities* (2006, LRC 80-2006), at para 2.11.

monitor developments, including the outcome of the review foreseen in the UK within five years of the proposed introduction of a new form of incorporation for charities, the Charitable Incorporated Organisation (CIO).⁸

2.08 This passage appears to suggest that the Department was mindful to postpone consideration of this issue but it also suggests that the primary objective was to ensure that it would not hold up the general reform process.⁹

14. The Irish Law Reform Commission observed that the development of a legal structure for charities should be seen as an integral part of the reform process. A separate new legal structure would provide an opportunity to streamline the registration and regulation of charities so that all charities regardless of their legal status would be subject to the same form of regulation.¹⁰

15. The Irish Charities Act 2009 provides for the regulation of charitable organisations and the establishment of the Charities Regulatory Authority. The Authority is required under the Act to establish and maintain a register of charitable organisations after consultation with the Revenue Commissioners. "*Charitable organisation*" is defined under section 2 of the Act to mean the trustees of a charitable trust, or a body corporate or an unincorporated body of persons –

- "(i) that promotes a charitable purpose only,*
 - (ii) that, under its constitution, is required to apply all of its property (both real and personal) in furtherance of that purpose, except for moneys expended –*
 - (I) in the operation and maintenance of the body, including moneys paid in remuneration and superannuation of members of the staff of the body, and*
 - (II) in the case of religious organisation or community, on accommodation and care of members of the organisation or community, and*
 - (iii) none of the property of which is payable to the members of the body other than in accordance with section 89,*
- but shall not include an excluded body."*

8 <http://www.pobail.ie/en/CharitiesRegulation/PressReleasesSpeeches/file,6891,en.pdf>.

9 The Law Reform Commission of Ireland, above, at paras 2.07 to 2.08.

10 The Law Reform Commission of Ireland, above, at para 2.10.

Under section 2, "excluded body" means –

- "(a) a political party, or a body that promotes a political party or candidate,*
- (b) a body that promotes a political cause, unless the promotion of that cause relates directly to the advancement of the charitable purposes of the body,*
- (c) an approved body of persons within the meaning of section 235 of the Taxes Consolidation Act 1997,*
- (d) a trade union or a representative body of employers,*
- (e) a chamber of commerce, or*
- (f) a body that promotes purposes that are –*
 - (i) unlawful,*
 - (ii) contrary to public morality,*
 - (iii) contrary to public policy,*
 - (iv) in support of terrorism or terrorist activities, whether in the State or outside the State, or*
 - (v) for the benefit of an organisation, membership of which is unlawful."*

New Zealand

16. The principal legislation on charities in New Zealand is the Charities Act 2005. Section 13 of the Act sets out the requirements which must be satisfied to qualify for registration:

- "(a) in the case of the trustees of a trust, the trust is of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes; and*
- (b) in the case of a society or an institution, the society or institution -*
 - (i) is established and maintained exclusively for charitable purposes; and*
 - (ii) is not carried on for the private pecuniary profit of any individual; and*

- (c) *the entity has a name that complies with section 15;¹¹ and*
- (d) *all of the officers of the entity are qualified to be officers of a charitable entity under section 16.¹²*

17. It is voluntary for charitable organisations to register with the Charities Commission. A charity that chooses not to register with the Commission will still be able to call itself a charity and solicit funds from the public. However, a charity that chooses not to register will no longer qualify for tax exempt status, and it will not be able to call itself a "*registered charitable entity*". Under section 17 of the Act, a charitable entity must submit its application to the Commission in the prescribed form and accompanied by the prescribed documents. Under section 40 of the Act, every charitable entity must ensure that it sends or delivers to the Commission notice of any of changes relating to matters such as the name of the charitable entity or the address for service of the charitable entity.

Scotland

18. Scottish charities can be constituted in a variety of legal forms, including industrial and provident societies and statutory corporations, but

-
- 11 Section 15 of the New Zealand Charities Act -
"The name of an entity complies with this section if –
 (a) *the entity is incorporated under that name under the Incorporated Societies Act 1908;*
or
 (b) *the entity is incorporated under that name under the Charitable Trusts Act 1957; or*
 (c) *the entity is incorporated under that name under the Companies Act 1993; or*
 (d) *the entity is established, or constituted, by an Act under that name; or*
 (e) *in any other case, in the opinion of the Commission, the name is not –*
 (i) *offensive; or*
 (ii) *liable to mislead the public."*
- 12 Section 16 of the New Zealand Charities Act -
 "(1) A person who is not disqualified by this section is qualified to be an officer of a charitable entity.
 (2) The following persons are disqualified from being officers of charitable entities:
 (a) an individual who is an undischarged bankrupt;
 (b) an individual who is under the age of 16 years;
 (c) an individual who, or a body corporate that, has been convicted of a crime involving dishonesty (within the meaning of section 2(1) of the Crimes Act 1961) and has been sentenced for that crime within the last 7 years;
 (d) an individual who is prohibited from being a director or promoter of, or being concerned or taking part in the management of, an incorporated or unincorporated body under the Companies Act 1993, the Securities Act 1978, the Securities Markets Act 1988, or the Takeovers Act 1993;
 (e) an individual who, or a body corporate that, is disqualified from being an officer of a charitable entity under section 31(4);
 (f) an individual who is subject to a property order made under the Protection of Personal and Property Rights Act 1988, or whose property is managed by a trustee corporation under section 32 of that Act;
 (g) a body corporate that is being wound up, is in liquidation or receivership, or is subject to statutory management under the Corporations (Investigation and Management) Act 1989;
 (h) in relation to any particular entity, an individual who, or a body corporate that, does not comply with any qualifications for officers contained in the rules of that entity.
 ..."

most are constituted either as trusts, unincorporated associations or companies limited by guarantee. Charitable companies are subject to dual regulation and have to report to both the Registrar of Companies and the Office of the Scottish Charity Regulator (OSCR).

19. The OSCR was established under section 1 of the Charities and Trustee Investment (Scotland) Act 2005. The general functions of the Regulator are to determine charitable status, keep a public register of charities, encourage, facilitate and monitor compliance with charity legislation, investigate misconduct and take remedial or protective action if necessary and to advise or make proposals to the Scottish Ministers on matters relating to its functions. The Regulator is also empowered under the Act to conduct inquiries about charities and to take necessary action relating to the misconduct of charities following inquiries.

20. Following a fundamental review of company legislation in 2001, the independent Company Law Review Steering Group concluded that there should be a new vehicle for incorporating charities and that this vehicle should be exclusively for charities, offering all benefits of incorporation, including limited liability, without the need for dual regulation. The Scottish Charity Law Review Commission endorsed the proposals of the Company Law Review and recommended that a new incorporation vehicle should be made available to Scottish charities. As a "*body corporate*", a Scottish charitable incorporated organisation (SCIO) would be a legal person, distinct from its members and charity trustees, giving it the capacity to employ its own staff, to contract in its own right, the ability to own its own property and to sue and be sued. As the SCIO would be liable for its own debts, this would offer protection to members from personal financial liability but with less onerous regulatory and reporting requirements than are currently imposed on charitable companies. The SCIO would enjoy the benefits of single, and therefore more streamlined, registration and reporting requirements, subject to the monitoring and filing requirements imposed by OSCR.

21. Under section 56 of the Act, a charity existing as a company or a registered society within the meaning of the Industrial and Provident Societies Act 1965 may apply to the Regulator to be converted into a SCIO.

Singapore

22. The existing law on charities in Singapore is contained in the Charities Act (Cap 37), as significantly amended by the Charities (Amendment) Act 2007. Any organisation established for exclusively charitable purposes and which carries out activities to achieve these purposes must apply for registration with the Commissioner of Charities within three months of its set-up.

23. The Commissioner of Charities is appointed under section 3 of the Act. The Commissioner is empowered under section 4 to promote the effective use of charitable resources by encouraging the development of

better methods of administration, by giving charity trustees information on any matter affecting the charity and by investigating and checking abuses.

24. Charities in Singapore can register with the Commissioner in either one of the following three types of legal forms, namely, a company limited by guarantee, a society¹³ and a charitable trust. Under section 2 of the Act:

"'charity' means any institution, corporate or not, which is established for charitable purposes and is subject to the control of the High Court in exercise of the Court's jurisdiction with respect to charities ...

'charitable company' means a charity which is a company or other body corporate ...

'Institution' includes any trust or undertaking".

South Africa

25. In South Africa, the legal framework for not-for-profit and non-governmental organisations consists of four primary tiers. Only the third legislative tier enables a non-profit organisation to apply for the status of a *"public benefit organisation"*. These are entitled to a broad range of fiscal benefits, including partial income tax exemption, exemption from donations tax, and exemption on transfer duty on immovable property. The fourth legislative tier allows a public benefit organisation to apply for the right to receive tax-deductible donations.

26. Apart from satisfying the various other requirements contained in section 30 of the Income Tax Act of South Africa, an organisation must

13 Societies are registered with the Registrar of Societies and are governed by the Singapore Societies Act. A "society" under the Societies Act includes "any club, company, partnership or association of ten or more persons, whatever its nature or object, but does not include –

- (a) any company registered under any written law relating to companies for the time being in force in Singapore;
- (b) any company or association constituted under any written law;
- (ba) any limited liability partnership registered under the Limited Liability Partnerships Act 2005;
- (c) any trade union registered or required to be registered under any written law relating to trade unions for the time being in force in Singapore;
- (d) any co-operate society registered as such under any written law;
- (e) any mutual benefit organisation registered as such under any written law relating to mutual benefit organisations for the time being in force in Singapore;
- (f) any company, association or partnership, consisting of not more than 20 persons, formed for the sole purpose of carrying on any lawful business that has for its object the acquisition of gain by the company, association or partnership, or the individual members thereof;
- (fa) any class, society or association of foreign insurers carrying on insurance business in Singapore under any foreign insurer scheme established under Part IIA of the Insurance Act (Cap 142); or
- (g) any school or management committee of a school constituted under any law regulating schools for the time being in force in Singapore."

satisfy certain requirements in terms of legal structure in order to qualify as a public benefit organisation. The organisation must be a "section 21 company",¹⁴ a charitable trust, a voluntary association, or *"any agency or branch within the Republic of any company, association, or trust incorporated, formed, or established in terms of the laws of any country other than the Republic that is exempt from tax on income in that other country."*

¹⁴ Section 21(1) of the Companies Act 1973 of South Africa refers to incorporation of associations not for gain and provides that –

"(1) Any association –

- (a) *formed or to be formed for any lawful purpose;*
- (b) *having the main object of promoting religion, arts, sciences, education, charity, recreation, or any other cultural or social activity or communal or group interests;*
- (c) *which intends to apply its profits (if any) or other income in promoting its said main object;*
- (d) *which prohibits the payment of any dividend to its members; and*
- (e) *which complies with the requirements of this section in respect to its formation and registration,*
may be incorporated as a company limited by guarantee."

The law in other jurisdictions on registration of charities

Australia

1. There is no single piece of legislation governing the registration of charitable organisations in Australia. As in Hong Kong, the most substantial listing of charitable organisations relates to those seeking of tax-exempt status. At the Commonwealth level, "*charitable institutions*" and "*charitable funds*" in Australia may be exempt from income tax under the Income Tax Assessment Act 1997 if they are endorsed by the Australian Taxation Office as being income tax exempt charities. A register of income tax exempt charities has been compiled by the Australian Taxation office since the year 2000.

2. Under the Income Tax Assessment Act 1997 (Cth), a charitable institution is an institution that is established and run to advance or promote a charitable purpose. A charitable fund is a fund established under an instrument of trust or a will for a charitable purpose. A charitable institution will carry on charitable activities while a charitable fund mainly manages, and/or holds trust property to make distributions to other entities or people. If the trustee itself mainly carries on activities that are charitable, the fund will be treated as a charitable institution and not as a charitable fund.

3. The Australian Taxation Office may revoke a tax exempt charity's endorsement if it is not entitled to be endorsed or it has not provided information or documents within the specified time after a request has been made by the Australian Taxation Office.¹

Canada

4. The Canada Revenue Agency is the primary regulator of charities in Canada. Under the Canadian federal Income Tax Act, organisations apply to the Canada Revenue Agency for registration as charities and, if approved, are then subject to audit and enforcement activity by the Canada Revenue Agency's Charities Directorate.

5. A charitable entity must have the status of a "*registered charity*" in order to be entitled to the privileges offered to charities under the Canadian federal Income Tax Act. In deciding whether an organisation is entitled to registered status, the Canada Revenue Agency relies on a reasonably traditional interpretation of the common law tests, as well as the provisions of the Act itself.

¹ Australian Taxation Office, *Income Tax Guide for Non-profit Organisations* (Mar 2007), at 63.

6. *"Registered charity"* is defined under the federal Income Tax Act as *"a charitable organisation, private foundation or public foundation"* (or *"a branch, section, congregation, parish, or other division"* of any of these), that is resident in Canada, that was established or created in Canada, and that is registered with the Minister of National Revenue. Each of the three subdivisions of registered charity, namely *"charitable organisation"*, *"private foundation"*, and *"public foundation"* are separately defined and regulated under the federal Income Tax Act.²

7. Under section 168 of the Act, the Minister may revoke the registration of a registered charity in certain circumstances, such as where an application is made by the registered charity to the Minister in writing for revocation of its registration, cessation of the registered charity to comply with the requirements of the Act and failure to file an information return as and when required under the Act or a regulation.

England and Wales

8. The Charities Act 2006 provides for the establishment and functions of the Charity Commission for England and Wales and the Charity Tribunal and makes other amendments to the law concerning charities.

9. A register of charities is kept by the English Charity Commission. The register contains the name of every charity registered and other particulars as well as information relating to each such charity as the Commission thinks fit. The Commission is empowered to remove from the register any institution which is no longer considered as a charity, and any charity which has ceased to exist or does not operate. The register (including the entries cancelled when institutions are removed from the register) is open to public inspection at all reasonable times. Copies or particulars of the trusts of any registered charity which are kept by the Commission are also open to public inspection at all reasonable times.

10. Under section 3A of the Charities Act 1993, every charity must be registered in the register of charities unless they fall within the following categories –

(a) *exempt charity*

The Charities Act 1993 confers exempt status on educational bodies, including higher education corporations, further education corporations, and foundation and voluntary schools. These charities are essentially outside the scope of registration because they are regarded as adequately supervised by other regulators. For example, charitable industrial and provident societies are exempt because they are registered with the

2 B Wyatt, *Overview from Canada*, presented at the Modernising Charity Law Conference held in Brisbane, from 16 to 18 April 2009.

Financial Services Authority. Several national museums are exempt because they are already supervised to some extent by the government.

In 2002, the Strategy Unit commissioned by the Prime Minister proposed (amongst other proposals to modernise charity law) changes to the exempt charity regime. It recommended that:

- the regulators of exempt charities should monitor compliance with charity law;
- the Charity Commission should have wider jurisdiction over exempt charities; and
- exempt charities without a main regulator should be registered with the Commission.³

As a result of these recommendations, some charities lost their exempt status entirely, although the bulk of them, at least initially, continue to be exempt from registration as excepted charities. Where charities remain exempt, they still have a 'principal regulator', with responsibility for monitoring compliance with charity law, and the Charity Commission's powers to intervene in their activities are significantly expanded.

- (b) *Excepted charity.* A charity which, for the time being, –
- (i) is permanently or temporarily excepted by order of the Charity Commission, and
 - (ii) complies with any conditions of the exception,
- and whose gross income does not exceed £100,000.

Certain categories of charity are "*excepted*" from the requirement to register with the Charity Commission. Though they are subject to the jurisdiction of the Charity Commission in many other respects, they are not required to register. They are, in most cases, not required to file annual reports and returns with the Charity Commission. The rationale for excluding them from these requirements is that they are already registered with their own umbrella or support groups. The main categories of excepted charities are certain voluntary schools, Boy Scout and Girl Guide charities, certain charities for the advancement of religion, certain charities for the promotion of efficiency in the armed forces and universities which are not exempt charities.⁴

3 Cabinet Office, Strategy Unit, Private Action, Public Benefit, A Review of Charities and the Wider Not-For Profit Section, September 2002, at paras 7.93 to 7.96.

4 Jean Warburton, *Tudor on Charities* (Sweet & Maxwell 2003, 9th ed), at 25.

- (c) A charity which for the time being –
 - (i) is, or is of a description, permanently or temporarily excepted by regulations made by the Secretary of State, and
 - (ii) complies with any conditions of the exception,and whose gross income does not exceed £100,000; and
- (d) A charity whose gross income does not exceed £5,000.

Small charities do not need to register until their income reaches the £5,000 threshold, but are still required to register with HM Revenue and Customs in order to claim tax relief. However, they may choose to register voluntarily. If they do register voluntarily, they may subsequently demand to be removed while they remain below the threshold.

Ireland

11. The Charities Regulatory Authority was established under section 13 of the Irish Charities Act 2009. One of the major functions of the Charities Regulatory Authority is to establish and maintain a register of charitable organisations and monitor and ensure compliance of charitable organisations with the Irish Charities Act 2009. Under section 39 of the Act, the Charities Regulatory Authority shall, after consultation with the Revenue Commissioners, establish and maintain a register of charitable organisations in such form as it considers appropriate (including in electronic form).

12. A charitable organisation that intends to operate or carry on activities in Ireland needs to apply to the Charities Regulatory Authority to be registered, and it is the duty of the charity trustees of the charitable organisation concerned to make the application on behalf of the charitable organisation.

13. It is an offence under section 41 of the Act for an unregistered or not deemed to be registered charitable organisation to carry on charitable activities. Under section 39(6) of the Act, the Charities Regulatory Authority may exempt an applicant for registration as it considers appropriate where it is of the opinion that compliance by the applicant with those requirements would be unduly onerous having regard to its circumstances.

14. In terms of transitional provisions, under section 40 of the Act, a charitable organisation which was entitled, immediately before the commencement of section 39 of the Act, to a tax exemption under section 207 or 208 of the Taxes Consolidation Act 1997, and was issued by the Revenue Commissioners a number commonly referred to as a "*CHY number*" for the

purposes of such exemption, is deemed to be registered in the register for so long as it is entitled to such exemption.

15. Under section 43 of the Act, the Charities Regulatory Authority is obliged to remove from the register all of the information entered in relation to a body, and that body will cease to be registered if, after consultation with the Garda Síochána (Irish term for their Police), it is of the opinion that a body registered in the register is, or has become, an "*excluded body*" by virtue of its promoting purposes that are –

- (a) unlawful,
- (b) contrary to public morality,
- (c) contrary to public policy,
- (d) in support of terrorism or terrorist activities, or
- (e) for the benefit of an organisation, membership of which is unlawful.

16. The Charities Regulatory Authority is also empowered to remove a charitable organisation from the register for other reasons, such as the name of the charitable organisation has been changed, the charitable organisation which is a body corporate has convicted an offence on indictment, or the Charities Regulatory Authority is of the opinion that the registered body is not a charitable organisation.

New Zealand

17. The New Zealand Charities Commission was established under section 8 of the New Zealand Charities Act 2005. It is responsible for registering and monitoring charitable organisations in New Zealand, as well as providing support and education to the charitable sector on good governance and management.

18. Under section 21 of the Act, a register called "*the register of charitable entities*" is established. It can be an electronic register or kept in any other manner that the New Zealand Charities Commission thinks fit. A person is able to conduct a search of the register by reference to the name of the charitable entity, its registration number, the name of its officer or any other prescribed criteria. The Commission is empowered to refuse access to the register or otherwise suspend the operation of the register, in whole or in part, if the Commission considers that it is not practical to provide access to it.

19. Registration by charitable organisations is voluntary. However only charities registered with the Charities Commission are eligible for tax exemption status. Under section 22 of the Act, the purposes of the register are to enable members of the public to determine whether an entity is

registered as a charitable entity under the Act, obtain information concerning the nature, activities, and purposes of charitable entities, and information as to how to contact a charitable entity.

20. All charitable entities are required to complete an annual return in relation to the entity and to send or deliver this to the Commission within six months after each balance date of the entity.

21. The Commission is empowered to remove an entity from the register if –

- (a) the entity is not, or is no longer, qualified for registration as a charitable entity;
- (b) there has been a significant or persistent failure by the entity to meet its obligations under the Act or any other enactment;
- (c) there has been a significant or persistent failure by any one or more of the officers of the entity to meet their obligations under the Act;
- (d) there has been a significant or persistent failure by any one or more collectors who act on behalf of the entity to meet their obligations under the Act;
- (e) the entity has engaged in serious wrongdoing or any person has engaged in serious wrongdoing in connection with the entity; or
- (f) the entity has sent or delivered to the Commission a request to be removed from the register.

22. Unless an entity is a registered charitable entity or a person acts on behalf of a charitable entity, it is an offence under section 38 of the Act for a person to use a style or title including the words "*registered charitable entity*"; or state or imply, or permit a statement or implication, that the person is registered as a charitable entity under the Act, or that the person acts on behalf of is registered as a charitable entity under the Act.

Scotland

23. The Charities and Trustee Investment (Scotland) Act 2005 established the Office of the Scottish Charity Regulator (OSCR). Some of the functions of the OSCR set out in the Act are to determine whether certain bodies are charities, to maintain a public register of charities, and to encourage, facilitate and monitor compliance by charities with the provisions of the Act.

24. Under section 3 of the Act, the OSCR must keep a register of charities, to be known as the "*Scottish Charity Register*". The register

contains a separate entry for each charity entered in it and information about the charity such as its name, its principal office or, where it does not have such an office, the name and address of one of its charity trustees and the purposes of the charity. The Scottish Charity Register is available for public inspection at all reasonable times at its principal office, or at such other places as the OSCR thinks fit.

25. One key principle of the Act is that all significant operations by charities within Scotland should be regulated by the OSCR, regardless of where that charity was first registered. This is intended to provide a level playing field for all charities operating in Scotland, and to ensure fairness and consistency. Any organisation that wishes to refer to itself as "*a charity*", "*charitable body*", "*registered charity*" or a "*charity registered in Scotland*" must apply to the OSCR for registration, since a body which refers to itself in any of these ways is to be treated as representing itself as a body entered in the register. This includes a charity registered (or excepted or exempt from registration) with the Charity Commission in England and Wales (or another foreign charity). Such a charity is required to register with the OSCR if it wishes to call itself a charity and if it owns or occupies land or premises in Scotland, or if it carries out activities in an office, shop or similar premises in Scotland.

26. An organisation that is not currently a Scottish charity, however, and does not occupy land or premises in Scotland or carry out activities in any shop, office or similar premises in Scotland, could refer to itself as a charity if it is entitled to refer to itself as a charity in the country under whose law it was established, but only if, in making that reference, it also refers to it being established under the law of that country. For example, a charity registered (or excepted for registration) in England and Wales, that does not occupy premises in Scotland could, in Scotland, refer to itself as "*a charity registered (or excepted or exempt from registration) in England and Wales*". Such a charity does not need to register with the OSCR.⁵

27. Under section 30 of the Act, the OSCR is obliged to remove a charity from the Scottish Charity Register if, as a result of inquiries made about the charity, it is found that the charity no longer meets the charity test.⁶

Singapore

28. The Commissioner of Charities in Singapore was established under the Singapore Charities Act (Cap 37). Some of the general functions of the Commissioner of Charities include the determination of whether or not

5 The Office of the Scottish Charity Regulator, *Meeting the Charity Test*, at paras 11.1.1-11.1.3.

6 Under section 5 of the Charities and Trustee Investment (Scotland) Act, the OSCR may enter an applicant in the Scottish Charity Register only if it considers that the applicant meets the charity test of the Act. A body meets the charity test if –
(a) its purposes consist of one or more of the charitable purposes, and
(b) it provides (or, in the case of an applicant, provides or intends to provide) public benefit in Scotland or elsewhere.

institutions are charities, and to encourage and facilitate the better administration of charities.

29. Under section 5 of the Act, a register of charities is kept by the Commissioner of Charities. The register of charities is open to public inspection at all reasonable times.⁷ The Commissioner has the power to refuse to register an institution as a charity –

- (a) if it appears to the Commissioner that the registration of the institution will be contrary to the public interest; or
- (b) on such other ground as the Minister may prescribe.

30. It is the duty of the charity trustees of any charity which is neither registered nor excepted from registration to apply for it to be registered. The charity is required to submit relevant documents and information to the Commissioner within three months after its establishment or such longer period as the Commissioner may allow at his discretion. Any person who fails to carry out any of the duties imposed under the Act is guilty of an offence.

31. Any person affected by the registration of an institution as a charity may, on the ground that it is not a charity, object to its being entered by the Commissioner in the register, or apply to the Commissioner for it to be removed from the register.⁸ The Commissioner is also empowered to remove an institution from the register if it appears to him that the continued registration of the institution as a charity is contrary to the public interest or on such other ground as the Minister may prescribe.

32. The following charitable institutions are exempted from registration under the Act -

- (a) any university or educational institution, hospital or religious body established by an Act of the Singapore Parliament; and
- (b) any other institution which the Minister by order declares to be an exempt charity for the purposes of the Singapore Charities Act.

33. Any charity which is excepted by regulations made under the Act is also not required to be registered.⁹

7 Section 5, Singapore Charities Act (Cap 37).

8 Same as above, section 6.

9 Same as above, section 5(5) and the Schedule.

South Africa

34. Under section 4 of the Nonprofit Organisations Act of South Africa, a Directorate for Nonprofit Organisations is established within the national department by the Minister. Some of the main functions of the Directorate include developing and implementing policy and determining and implementing programs.

35. Any non-profit organisation that is not an organ of state may apply to the Director of Nonprofit Organisations for registration. The Director is tasked to maintain a register in the prescribed form of all non-profit organisations that have been registered, those whose registrations have been cancelled, and all non-profit organisations that have voluntarily deregistered or have been wound up or dissolved.¹⁰ It is an offence under section 29 of the Act for any organisations to represent themselves as being validly registered under the Act unless they are so registered.

36. A registered non-profit organisation is under the duty to provide reports and information to the Director of Nonprofit Organisations within nine months after the end of its financial year, such as a narrative report of its activities in the prescribed manner, its financial statements and the accounting officer's report, and the names and physical business and residential addresses of its office.

37. The Minister may prescribe benefits or allowances applicable to registered non-profit organisations, after consultation with the committees of the two Houses of Parliament responsible for welfare, and with the concurrence of every Minister whose department is affected by a particular benefit or allowance.

38. A non-profit organisation must obtain approval from the Commissioner under section 30 of the Income Tax Act of South Africa in order to be an approved "*public benefit organisation*". Only a non-profit organisation with the status of a public benefit organisation is entitled to a broad range of fiscal benefits.

39. In the case of non-compliance with the constitution and obligations by a registered non-profit organisation, the Director of Nonprofit Organisations will send a compliance notice in the prescribed form to the organisation. If it fails to comply promptly with the notice, or makes material false representations in any document submitted to the Director, the Director will cancel its certificate of registration and its registration.

10 Section 24, Nonprofit Organisations Act, No. 71 of 1997.

The law in other jurisdictions on governance, accounting and reporting by charities

Australia

1. Charitable institutions and charitable funds may be exempt from income tax under the Income Tax Assessment Act 1997 if they are endorsed by the Australian Taxation Office as income tax exempt charities. The Australian Taxation Office will carry out regular reviews of endorsed income tax exempt charities in order to help establish whether these charitable organisations are in fact entitled to endorsement. The Australian Taxation Office may request these organisations to provide information and documents that are relevant to their entitlement to endorsement and they will be given at least 28 days to provide the required information and documents. Failure to comply with such a request can lead to the endorsement being revoked, and to prosecution.
2. The Australian Business Register displays on its website details about charities that have been endorsed to enjoy charity tax concessions. These details include the type of charity (for example, charitable fund, charitable institution, public benevolent institution or health promotion charity), the type of charity tax the organisation has been endorsed to access (for example, income tax exemption and Goods and Services Tax concessions) and the date of effect of each endorsement. If a charity does not want this information publicly displayed, it will need to waive its entitlement to the related concessions. Other information, such as office bearer information is not disclosed on the Australian Business Register.¹
3. There is no statutory requirement at the Commonwealth level for charitable organisations to file reports or audited accounts to government authorities.

Canada

4. The Canada Revenue Agency is seen as the primary regulator of charities. Organisations apply to the Canada Revenue Agency for registration as charities and, if approved, are then subject to audit and enforcement activity by the Canada Revenue Agency's Charities Directorate.² Once an organisation is registered as a charity, it must file an annual form, known as "*Registered Charity Information Return*", together with its financial statements within six months of the charity's fiscal period, and it must continue

¹ Australian Taxation Office, *Income tax guide for non-profit organisations* (Mar 2007), at 62.

² B Wyatt, "*Overview from Canada*", presented at the *Modernising Charity Law Conference*, held in Brisbane, from 16 to 18 April 2009.

to meet the other requirements of the Canadian federal Income Tax Act. Under section 188.1(6), any registered charity that fails to file information returns for a taxation year is liable to a penalty.

5. A registered charity is under a duty to maintain adequate books and records and make them available for audit upon request. The charity is also obliged to keep the Charities Directorate updated on changes to the organisation. These include changes to its address, directors, legal or operating name, purposes, activities and structure.

6. A variety of different types of information about registered charities is available to the public. This includes a registered charity's governing document, most of the application form, the public portions of the annual return, and the financial statements filed with the Charities Directorate.

7. If a registered charity does not meet its obligations under the Act, it may be subject to a penalty and/or lose its registration. If a charity's registration is revoked, it will no longer be exempt from tax unless it qualifies as a non-profit organisation. It cannot issue official donation receipts and must transfer its property to an eligible donee or be subject to a revocation tax which is equivalent to the full value of its remaining assets.³

England and Wales

8. The Charities Act 1993 provides a framework for reporting and accounting by charities.⁴ The Charity Commission may require registered charities shortly after the end of their financial year to complete, depending on their income, either an annual update form or an annual return. Charities with a total income exceeding £25,000 are required to complete and submit their annual reports to the Commission under section 45 of the 1993 Act. Trustees are under a legal duty to complete and submit an annual report to the Commission. The annual return contains basic financial details, and details of the charity's contacts, trustees, activities and its classification.

9. Under section 41 of the Act, the trustees of a charity which is not a company must keep accounting records which are sufficient to show and explain all the charity's transactions. These records (for example, cash books, invoices and receipts) must be retained for at least six years. These accounting records should be made available to the public on request. It is open to trustees to charge a reasonable amount to cover the costs of complying with public requests, such as photocopying and postage. The

3 Canada Revenue Agency, Registering a Charity for Income Tax Purposes, Rev 2008.

4 It should be noted that a new Charities Bill was placed before the UK Parliament in March 2011 with the object of consolidating the Charities Act 1993 and other enactments relating to charities. As part of the consolidation, the Bill has included provisions from the Recreational Charities Act 1958, the Charities Act 1993 and the Charities Act 2006, leading to the repeal of the former two Acts and some sections (sections 1 to 9 and 11 to 44) and some Schedules of the Charities Act 2006.

annual report should also be available to the public on request where one is required to be prepared.⁵

10. Under section 42 of the Act, the charity trustees are required to prepare a statement of accounts in respect of each financial year. However, they may elect to prepare a receipts and payments account and statement of assets and liabilities instead of a statement of accounts if the charity's gross income in any financial year does not exceed £250,000.

11. Under section 43 of the Act, except for National Health Service Charities, the accounts of charities should be audited if they have a gross income in that year which exceeds £500,000, or where the charity's gross income exceeds £100,000 and at the end of that year the aggregate value of its assets (before deduction of liabilities) exceeds £3.26 million. These accounts must be kept for at least six years from the end of the financial year to which the statement relates. Where it appears to the Commission that this obligation has not been complied with, the Commission may by order require the accounts of the charity for that year to be audited. The expenses of any audit carried out by an auditor appointed by the Commission will be recoverable by the Commission from the charity trustees of the charity concerned. These charity trustees are personally, jointly and severally liable for those expenses.

12. Where the gross income of a charity does not exceed £250,000, an independent examination can provide an external check on the accounts and can be carried out by any person with the relevant ability and experience. The purpose is to allow trustees of smaller charities to opt for this simpler form of external scrutiny in place of an audit. The auditor has a 'whistleblowing' duty where the auditor, in the course of his audit, identifies a matter which relates to the activities or affairs of the charity and which the auditor has reasonable cause to believe is likely to be of material significance for the purposes of the exercise of the Charity Commission of its functions. Under regulations made under the Act, an auditor or an independent examiner is conferred with a right of access with respect to books, documents and other records which relate to the charity concerned, and is entitled to require information and explanations from past or present charity trustees or trustees for the charity, or from past or present officers or employees of the charity.

13. The Charity Commission has a power to institute inquiries with regard to charities either generally or for particular purposes under section 8 of the Act. The Commission may direct any person to furnish information, such as accounts and statements with respect to any matter in question and copies of documents in his custody or under his control.

14. Under section 18 of the Act, the Commission is empowered to act for the protection of charities. Where an inquiry is instituted with respect to any charity, and the Commission is satisfied that there is or has

5 The Charity Commission for England and Wales, *Charity Reporting and Accounting the Essentials* (April 2009).

been any misconduct or mismanagement in the administration of the charity, or that it is necessary or desirable to act for the purpose of protecting the property of the charity, the Commission may do one or more of the following things –

- (i) suspend any trustee, charity trustee, officer, agent or employee of the charity from the exercise of his office or employment pending consideration being given to his removal;
- (ii) appoint additional charity trustees necessary for the proper administration of the charity;
- (iii) vest any property held by or in trust for the charity in the official custodian, or require the persons in whom any such property is vested to transfer it to him, or appoint any person to transfer any such property to him;
- (iv) order any person who holds any property on behalf of the charity, or of any trustee, not to part with the property without the approval of the Commission;
- (v) order any debtor of the charity not to make any payment in or towards the discharge of his liability to the charity without the approval of the Commission;
- (vi) restrict the transactions which may be entered into, or the nature or amount of payments which may be made, in the administration of the charity without the approval of the Commission;
- (vii) appoint an interim manager, who shall act as receiver and manager in respect of the property and affairs of the charity.

The Commission is also empowered to remove any trustee, charity trustee, officer, agent or employee of the charity who has been responsible for or privy to the misconduct or mismanagement and to establish a scheme for the administration of the charity.

Ireland

15. Under section 47 of the Irish Charities Act 2009, the charity trustees of a charitable organisation must keep proper books of account. They are also required under section 48 in respect of each financial year to prepare a statement of accounts in a prescribed form containing prescribed information. Where the gross income or expenditure of a charitable organisation in a financial year does not exceed €100,000, the charity trustees may, instead of preparing an annual statement of accounts in respect of that year, prepare an income and expenditure account and a statement of the assets and liabilities of the charitable organisation. The Registrar of

Companies is under a duty to give a copy of the annual return and copies of all documents annexed to the annual return of a company to the Charities Regulatory Authority as soon as practicable after receiving them from the company in respect of which it has received a notification under section 39(17) that the charity has been established.⁶

16. The accounts of a charitable organisation in respect of a financial year need to be audited not later than nine months after the end of the relevant financial year by a qualified person if the gross income or total expenditure of the charitable organisation exceeds a prescribed amount not greater than €500,000. The requirement for preparing an annual statement of accounts, income and expenditure account⁷ or annual audited accounts under sections 48 and 50 does not apply to the following -

- (a) a charitable organisation that is a company,
- (b) an education body,
- (c) a charitable organisation in respect of a financial year in which its gross income or total expenditure is less than –
 - (i) €10,000, or
 - (ii) such greater amount not exceeding €50,000,
- (d) in relation to a centre for education designated by the Minister under section 10(4) of the Charities Act 1998.

17. Under section 52 of the Charities Act 2009, the charity trustees of a charitable organisation are required to prepare and submit to the Authority a report in respect of its activities in that financial year not later than ten months after the end of each financial year. Under section 53 of the Act, the Authority may direct a charitable organisation in writing to provide the Authority with such information as it may reasonably require to enable it to perform its functions. The Authority will make available for inspection by members of the public all annual reports and documents kept by the Authority at all reasonable times and at such place or places as it determines. This requirement, however, does not apply to the annual reports and documents of private charitable trusts.

18. Under section 55 of the Act, a person will cease to be qualified for the position of charity trustee of a charitable organisation if that person –

- (a) is adjudicated bankrupt,

6 Under section 39(17) of the Irish Charities Act 2009, the Charities Regulatory Authority will notify the Registrar of Companies in writing as soon as a company is registered as a charitable organisation.

7 Section 48 of the Irish Charities Act 2009 –
"... (3)(a) Where the gross income or expenditure of a charitable organisation in a financial year does not exceed €100,000, the charity trustees may, instead of preparing an annual statement of accounts in respect of that year, prepare an income and expenditure account in respect of, and a statement of the assets and liabilities of, the charitable organisation. ..."

- (b) makes a composition or arrangement with creditors,
- (c) is a company that is in the course of being wound up,
- (d) is convicted on indictment of an offence,
- (e) is sentenced to a term of imprisonment by a court of competent jurisdiction,
- (f) is the subject of an order under section 160 of the Companies Act 1990⁸ or is prohibited, removed or suspended from being a trustee of a scheme under the Pensions Acts 1990 to 2008,
- (g) has been removed from the position of charity trustee of a charitable organisation by an order of the High Court under section 74.

19. Under section 55(4) of the Act, the Authority establishes and maintains a register of all persons who have ceased to hold the position of charity trustee of a charitable organisation. Such register is made available for inspection by members of the public at all reasonable times at the principal office of the Authority. A person who is acting as a charitable trustee in respect of a charitable organisation while disqualified is personally liable for the debts of the charitable organisation incurred as a result of his act in purported performance of the functions of charity trustee of the charitable organisation when he was not qualified to hold such position.

20. Part 4 of the Act deals with the protection of charitable organisations. The Authority may appoint an inspector to investigate the affairs of a charitable organisation. Under section 65 of the Act, a charity trustee or agent of a charitable organisation, when required to do so by an inspector, is required to –

- (a) produce to the inspector all books, documents, bank accounts and other records of or relating to the charitable organisation that are in his possession, under his control or within his procurement,
- (b) attend before the inspector, and
- (c) give to the inspector all assistance in connection with the

8 Section 160 of the Companies Act 1990 –

"(1) Where a person is convicted on indictment of any indictable offence in relation to a company, or involving fraud or dishonesty, then during the period of five years from the date of conviction or such other period as the court, on the application of the prosecutor and having regard to all the circumstances of the case, may order –

- (a) he shall not be appointed or act as an auditor, director or other officer, receiver, liquidator or examiner or be in any way, whether directly or indirectly, concerned or take part in the promotion, formation or management of any company or any society registered under the Industrial and Provident Societies Acts, 1893 to 1978;
- (b) he shall be deemed, for the purposes of this Act, to be subject to a disqualification order for that period. ..."

investigation which he is reasonably capable of giving.

21. Under section 66 of the Act, an inspector appointed may make interim reports to the Authority and on the conclusion of the investigation, will make a final report to the Authority. The Authority may furnish a copy of a report of an inspector to the charitable organisation that is the subject of the report on request and subject to payment of a prescribed fee. It may also furnish such a report to persons specified in the Act, which includes the charity trustee of the charitable organisation that is the subject of the report, any person whose conduct is referred to in the report, the auditors of that charitable organisation, any other person whose financial interests appear to the Authority to be affected by the matters dealt with in the report, the Central Bank, the Revenue Commissioners, or the Director of Public Prosecutions.

22. The Authority is empowered under section 68 of the Act to require a charitable organisation or the charity trustees of a charitable organisation to produce books, documents or other records if the Authority is of opinion that –

- (a) it is necessary to examine them for the purpose of determining whether an inspector should be appointed to conduct an investigation into the affairs of the charitable organisation;
- (b) the affairs of the body are being or have been conducted with intent to defraud any person;
- (c) any act or omission committed by or on behalf of the charitable organisation is, or would be unlawful if committed, or
- (d) the body was formed for any fraudulent or other unlawful purpose.

23. Under section 69 of the Act, upon the application of an inspector appointed by the Authority, a judge of the District Court may issue a warrant authorising a named inspector or a named person, accompanied by officers or members of staff of the Authority or members of the Garda Síochána (Irish term for their Police) to enter the premises (if necessary, by the use of reasonable force) and to search the premises and inspect and take possession of all books, documents or records that are the subject of a requirement under section 68 of the Act.

New Zealand

24. Under section 41 of the New Zealand Charities Act 2005, every charitable entity must ensure that within six months after each balance date of the entity, an annual return is submitted to the New Zealand Charities Commission. The form of the return and particulars contained in the returns and directions to be complied with are prescribed by the Minister. The required particulars include a copy of its financial accounts, either audited or

unaudited, which will be publicly available at the homepage of the Commission.⁹

25. Under section 50 of the Act, the Commission is empowered to inquire into any charitable entity and any person who was engaged in conduct that is in breach of the Act, or serious wrongdoing in connection with a charitable entity. This power includes the power to examine and inquire into the following matters in connection with the charitable entity or person -

- (a) the activities and proposed activities of the charitable entity or person;
- (b) the nature, objects, and purposes of the charitable entity;
- (c) the management and administration of the charitable entity;
- (d) the results and outcomes achieved by the charitable entity or person; and
- (e) the value, condition, management, and application of the property and income belonging to the charitable entity or person.

26. The Commission is also empowered under sections 51 and 53 of the Act to require any person to supply to the Commission any information for the purposes of assisting anyone in the exercise of his powers under the Act or detecting and prosecuting offences under any other Act.

27. The Commission may give a warning notice to a charitable entity or a person in connection with a charitable entity that has engaged in a breach of the Act, including a breach of sections 37¹⁰ (passing itself off as a registered charitable entity) or serious wrongdoing, or a charitable entity is no longer qualified to be registered as a charitable entity. Upon prior notice to the charitable organisations concerned, the Commission may publish a notice that contains information or statements about the name of the charitable entity or person and a statement to the effect that the Commission considers that the charitable entity or person has committed breaches. The notice may also contain a statement of the action that the Commission has taken, or is considering taking, in relation to those matters and a summary of the grounds for the Commission's opinion.

9 <http://www.charities.govt.nz/Home/tabid/92/Default.aspx>

10 Section 37 of the New Zealand Charities Act –

"(1) A person must not –

- (a) use a style or title including the words 'registered charitable entity'; or
- (b) state or imply, or permit a statement or implication, that –
 - (i) the person is registered as a charitable entity under this Act; or
 - (ii) an entity that the person acts on behalf of is registered as a charitable entity under this Act.

(2) Subsection (1) does not apply to –

- (a) a charitable entity; or
- (b) a person who acts on behalf of a charitable entity.

(3) A person must not state or imply, or permit a statement or implication, that the person acts on behalf of a charitable entity if the person does not act on behalf of that charitable entity."

28. The Commission may de-register a registered charitable entity under section 31 of the Act and the grounds for deregistration are –

- (a) the entity is not, or is no longer, qualified for registration as a charitable entity; or
- (b) there has been a significant or persistent failure by the entity to meet its obligations under the Act or any other enactment; or
- (c) there has been a significant or persistent failure by any one or more of the officers of the entity to meet their obligations under the Act; or
- (d) there has been a significant or persistent failure by any one or more collectors who act on behalf of the entity to meet their obligations under the Act; or
- (e) the entity has engaged in serious wrongdoing or any person has engaged in serious wrongdoing in connection with the entity; or
- (f) the entity has sent or delivered to the Commission a request to be removed from the register.

Scotland

29. Under section 44 of the Charities and Trustee Investment (Scotland) Act 2005, all charities are required to keep proper accounting records. Charities must also prepare an annual statement of account and report on their activities, have these audited or independently examined and provide a copy of the statement to the Office of the Scottish Charity Regulator. Charities must keep accounting records for at least six years. There are regulations on accounting which set out different requirements for different classes or types of charities. For instance, religious bodies may be allowed to prepare accounts in a slightly different format, as long as they meet equivalent standards to other charities. Regulations also set out the thresholds by which different sizes of charity must prepare different levels of detail in their accounts and undergo different levels of audit or examination.¹¹

30. Section 45 of the Act provides that the Office of the Scottish Charity Regulator may appoint someone to prepare a statement of accounts for a charity that fails to send a copy to the office within the period prescribed in accounting regulations. The appointed person has powers of entry to the charity's premises, access to financial documents and can demand information from charity trustees or employees. The costs in doing so of the Office of the Scottish Charity Regulator and the appointed persons may be charged to the charity trustees. Failure to comply with an appointed person's

¹¹ Explanatory Notes of Charities and Trustee Investment (Scotland) Act 2005, para 60.

requirements is an offence with a liability for a fine of level 3 on the standard scale (currently £1000).

31. Section 46 of the Act imposes a duty on persons who are appointed to carry out an independent audit or examination of a charity's statement of account to report in writing immediately to the Office of the Scottish Charity Regulator any matter which they have reasonable cause to believe is likely to be of a material significance for the Regulator's functions to make inquiries and take regulatory action.

32. Section 66 of the Act sets out the general duty of care that charity trustees must follow. Charity trustees are required to act in the interests of the charity and to ensure that the charity acts consistently with its purposes and that they act with a level of care and diligence that is reasonably expected of someone managing another's affairs. A charity trustee has to avoid a conflict of interest which may arise between the charity and any person responsible for his appointment as a charity trustee. If such circumstances arise, the charity trustee must put the interests of the charity before those of the person appointing him. Where another duty prevents the charity trustee from doing that, he must disclose the conflicting interest to the charity and not participate in any decision of the other charity trustees with respect to the matter in question. A charity trustee has a duty to ensure that a charity complies with the requirements of the Act. A breach of the trustee's general duties is to be treated as misconduct in the administration of a charity.

33. Under section 28 of the Act, the Office of the Scottish Charity Regulator is empowered to make inquiries about charities, other bodies or a person appearing to represent themselves as a charity for either general or particular purposes. Under section 29 of the Act, the Office of the Scottish Charity Regulator may require any charity to provide it with documents or information which it considers necessary for its inquiries, unless the charity would be entitled to refuse on the grounds of confidentiality in the Court of Session.

34. The Office of the Scottish Charity Regulator will take actions under section 30 of the Act if it appears to it that as a result of inquiries, a charity no longer meets the charity test. It must either direct the charity to take any necessary steps to meet the test or remove the charity from the register. If the charity fails to comply with such direction, the Regulator must remove it from the register. The Regulator is empowered under section 31 of the Act to suspend a charity trustee, agent or employee for the protection of a charity's property if it appears to it that there has been misconduct in the administration of a charity, or to ensure that the property is used for charitable purposes. Another way of protecting the property of a charity is for the Office of the Scottish Charity Regulator to give a direction to restrict any transaction or payments that may be made in the administration of the body without its consent. It may also direct a financial institution or person holding property for a charity not to part with the property without the Regulator's consent. Where it appears to the Regulator following inquiries that a body or person has been falsely representing itself to be a charity, it may direct the body or person

to stop representing itself as a charity and to pay to the charity or body any assets that it has collected. It may also direct a bank to pay sums collected for the charity or not to part with the property without its consent.

35. Under section 34 of the Act, the Office of the Scottish Charity Regulator may, following its inquiries, apply to the Court of Session for further actions to be taken to protect the property of the charity or to ensure that property is used for the purposes of the charity.

Singapore

36. It is the duty of charity trustees under section 12 of the Singapore Charities Act to ensure that accounting records are kept in respect of the charity and these should be sufficient to show and explain all the transactions of the charity. This includes the requirement to disclose at any time, with reasonable accuracy, the financial position of the charity. The accounting records should contain entries showing from day to day all sums of money received and expended by the charity, and the matters in respect of which the receipt and expenditure take place and a record of the assets and liabilities of the charity.

37. Under section 13 of the Act, the charity trustees of a charity are required to prepare in respect of each financial year of the charity, a statement of accounts complying with such requirements in prescribed form and contents. This requirement is applicable to charities if the gross income of which in any financial year exceeds S\$50,000. For those with gross income in any financial year not exceeding S\$50,000, the charity trustees may, in respect of that year, elect to prepare receipts and payments account and a statement of assets and liabilities instead of a statement of accounts. The requirement is also not applicable to an exempt charity or a charity which is a company. For a charity with gross income or total expenditure in the immediately preceding year which exceeds S\$250,000, the accounts of the charity for that year will need to be audited by a public accountant.

38. The charity trustees of a charity have to prepare an annual report for each financial year of the charity which contains a report by the trustees on the activities of the charity during that year and such other information relating to the charity or its trustees or officers. The annual report has to be submitted by the charity trustees to the Commissioner within six months from the end of that year. Any annual report or other document kept by the Commissioner is open to public inspection at all reasonable times.

39. Under section 8 of the Act, the Commissioner may from time to time institute inquiries with regard to charities, or a particular charity, either generally or for particular purposes. The Commissioner or a person appointed by him to conduct the inquiry may by order require any person to furnish information (such as accounts and statements in writing) with respect to any matter in question at the inquiry, copies of documents in his custody relating to matters in question at the inquiry, and to verify such copies by

statutory declaration. The Commissioner is also empowered under section 26 of the Act to appoint a receiver and manager in respect of the property and affairs of a charity as he thinks fit.

40. Under section 27 of the Act, a person will be disqualified by the Commissioner for being a charity trustee or trustee of a charity if –

- (a) he has been convicted, whether in Singapore or elsewhere, of any offence involving dishonesty or deception;
- (b) he has been adjudged bankrupt, and has not been discharged;
- (c) he has made a composition or arrangement with, or granted a trust deed for his creditors and has not been discharged in respect of it;
- (d) he has been removed from the office of charity trustee or trustee for a charity by an order made by the Commissioner or by the High Court on the ground of any misconduct or mismanagement in the administration of the charity for which he was responsible; or
- (e) he is subject to a disqualification order under the Companies Act (Cap 50).

South Africa

41. Under section 17 of the South Africa Nonprofit Organisations Act, every registered nonprofit organisation must keep accounting records of its income, expenditure, assets and liabilities in accordance with the standards of generally accepted accounting practice. The organisation must within six months after the end of its financial year, draw up financial statements which include at least a statement of income and expenditure for that financial year, and a balance sheet showing its assets, liabilities and financial position as at the end of that financial year.

42. Within nine months after the end of its financial year, every registered nonprofit organisation must provide information in writing to the Director of Nonprofit Organisations, such as a narrative report of its activities in the prescribed manner, together with its financial statements and the accounting officer's report.

43. If the accounting officer of a registered nonprofit organisation becomes aware of any instance in which the organisation has failed to comply with the financial provisions of the Act or its constitution, the accounting officer must notify the Director of the occurrence within one month after becoming aware of it, and in writing describe in detail the nature of the non-compliance. The duty imposed on an accounting officer in doing so supersedes the duty of confidentiality owed to the organisation by the accounting officer.

**Summary of the legal requirements for filing of
annual financial reports with the Charities Monitoring Authorities
in overseas jurisdictions**

	Are charities required to file financial reports to the relevant charities authority?	Financial reporting requirements, including the various thresholds (if applicable)
Australia	X	
Canada	✓	<ul style="list-style-type: none"> - Registered charities are subject to audit and enforcement activity by the Canada Revenue Agency's Charities Directorate. They must file an annual form, known as "<i>Registered Charity Information Return</i>", within six months of the end of the charity's fiscal period, and they must continue to meet the other requirements of the Canadian federal Income Tax Act. - Registered charities are required to provide a separate copy of the organisation's most recent financial statements as part of their filing requirements for the annual information return. Financial statements must at least consist of both a statement of revenue and expenditure and a statement of assets and liabilities for a particular fiscal period. They should show the different sources of an organisation's income and how they spent their money. - If the registered charity has income over CAD\$250,000, the Charities Directorate recommends that financial statements be professionally audited, otherwise, the treasurer for the charity should sign them.
England and Wales	✓	<ul style="list-style-type: none"> - Charities with a total income exceeding £25,000 are required to complete and submit their annual reports to the Charity Commission. The annual return contains basic financial details, and details of the charity's contacts, trustees, activities and its classification. - The annual reports should be accompanied by:

	Are charities required to file financial reports to the relevant charities authority?	Financial reporting requirements, including the various thresholds (if applicable)
		<p>(a) the statement of accounts in any case where its gross income in any financial year exceeds £250,000;</p> <p>(b) if the charity's gross income in any financial year does not exceed £250,000, it may elect to prepare the following instead of a statement of accounts, namely –</p> <ul style="list-style-type: none"> (i) a receipts and payments account, and (ii) a statement of assets and liabilities. <p>- A copy of the auditor's report should also be filed where the accounts of the charity have been audited under section 43 of the Charities Act¹ or a copy of the report made by the person carrying out the examination pursuant to section 43 of the Act.²</p>
Ireland	✓	<ul style="list-style-type: none"> - A charitable organisation is required to prepare a statement of accounts in a prescribed form containing the prescribed information. - Where the gross income or expenditure of a charitable organisation in a financial year does not exceed €100,000, the charity trustees may, instead of preparing an annual statement of accounts in respect of that year, prepare an income and expenditure account and a statement of the assets and liabilities of the charitable organisation. - The charity trustees of a charitable organisation are required to prepare and submit to the Charities Regulatory Authority a report in respect of its activities in that financial year not later than ten months after the end of each financial year. The following is required to be attached to the

1 The requirement for auditing applies if –

- (a) the charity's gross income in that year exceeds £500,000; or
- (b) the charity's gross income in that year exceeds the accounts threshold of £100,000 and at the end of the year the aggregate value of its assets (before deduction of liabilities) exceeds £3.26 million.

2 If the requirement for auditing does not apply to a financial year of a charity but its gross income in that year exceeds £25,000, the accounts of the charity for that year shall, at the election of the charity trustees, either –

- (a) be examined by an independent examiner, that is to say, an independent person who is reasonably believed by the trustees to have the requisite ability and practical experience to carry out a competent examination of the accounts; or
- (b) be audited.

	Are charities required to file financial reports to the relevant charities authority?	Financial reporting requirements, including the various thresholds (if applicable)
		<p>annual report submitted by a charitable organisation:</p> <p>(a) copy of the annual statement of accounts or the income and expenditure account and the statement of assets and liabilities; or</p> <p>(b) a copy of the auditor's report; or</p> <p>(c) a copy of the independent person's report.</p>
New Zealand	✓	<ul style="list-style-type: none"> - Every charitable entity must submit an annual return together with a copy of the financial accounts of the charitable entity to the New Zealand Charities Commission.
Scotland	✓	<ul style="list-style-type: none"> - All charities are required to prepare an annual statement of account and report on their activities, have these audited or independently examined and provide a copy of the statement to the Office of the Scottish Charity Regulator.
Singapore	✓	<ul style="list-style-type: none"> - Charities with a gross income which in any financial year exceeds S\$50,000 are required to prepare in respect of each financial year of the charity a statement of accounts complying with such requirements in the prescribed form and contents. - For those charities with a gross income in any financial year not exceeding S\$50,000, the charity trustees may, in respect of that year, elect to prepare receipts and payments account and a statement of assets and liabilities instead of a statement of accounts. - The above requirements are not applicable to an exempt charity or a charity which is a company. - For a charity with a gross income or total expenditure in the immediately preceding year which exceeds S\$250,000, the accounts of the charity for that year will need to be audited by a public accountant. - The charity trustees of a charity have to prepare an annual report for each financial year of the charity which contains a report by the trustees on the activities of the charity during that year and the statement of accounts prepared for the financial year and

	Are charities required to file financial reports to the relevant charities authority?	Financial reporting requirements, including the various thresholds (if applicable)
		the accounts of the charity for that year which have been audited or examined for that year.
South Africa	✓	<ul style="list-style-type: none"> - Every registered nonprofit organisation must provide information in writing to the Director of Nonprofit Organisations, such as a narrative report of its activities in the prescribed manner, together with its financial statements and the accounting officer's report. - The financial statements include at least a statement of income and expenditure for that financial year, and a balance sheet showing its assets, liabilities and financial position as at the end of that financial year.

The law in other jurisdictions on the regulation of fundraising activities

Australia

1. In Australia, each state has its own separate legislation on the regulation of charitable fundraising.

Australian Capital Territory

2. Fundraising activities in the Australian Capital Territory (ACT) are controlled and regulated by the Charitable Collections Act 2003 and the Charitable Collections Regulation, both of which came into force in September 2009.

3. Section 7(1) of the 2003 Act defines a "*collection*" as, the soliciting or receiving by a person of money or a benefit if, before or during the soliciting or receiving, the person represents that the purpose of the soliciting or receiving (or of an activity or enterprise of which it is a part) is or includes a charitable purpose.

4. Under section 14 of the 2003 Act, it is an offence for a person to conduct a collection without being authorized by a licence. Where a collection is carried out in person, section 9 stipulates that information with regard to the purpose of the collection, how and where the net proceeds of the collection will be spent and a business telephone number for the licensee, must be provided.¹ Similar requirements are imposed under section 9 in relation to collections carried out by telephone, collections carried out by written request, collections carried out from or through websites and collections carried out through collection bins.

New South Wales

5. For the purposes of the Charitable Fundraising Act 1991, the soliciting or receiving by a person of any money, property or other benefit constitutes a "*fundraising appeal*" if, before or in the course of doing so, the person represents that the purpose of the soliciting or receiving (or of an activity or enterprise of which it is a part) is or includes a charitable purpose.² Section 16(6) of the 1991 Act provides that if the Minister has not disposed of

1 Section 9(1), Charitable Collections Act 2003 (ACT).

2 Section 5, Charitable Fundraising Act 1991 (NSW). (This is similar to the ACT definition of "*collection*" discussed above.) Under section 4 of the NSW Act, "*charitable purpose*" is defined in terms which are broader than the general law, to include a benevolent, philanthropic or patriotic purpose: see the discussion of these provisions in Gino Dal Pont, *Charity Law in Australia and New Zealand* (2000, OUP), at 391.

an application for an authority to conduct a fundraising appeal within 60 days after the date of the receipt of notice for the application, the application is taken to have been approved "*subject only to such conditions as may be prescribed by regulations made for the purposes of this subsection.*" A number of measures to control different fundraising activities are provided in the Charitable Fundraising Regulation 2008. Schedule 1 to the 2008 Regulation lists out the conditions to be complied with where an authority for a fundraising appeal is taken to have been granted under section 16(6) of the Act.

6. For fundraising activities carried out through direct marketing, such as by telephone, facsimile or direct mailing, the authorised fundraisers must ensure a number of matters, including that the content of all direct marketing communications is not misleading or deceptive or likely to mislead or deceive. Where persons being solicited request the source from which the authorised fundraiser obtained their names and other details, the person has to be informed. Where a person requests the removal of their name and other details from the source used in the fundraising appeal, the authorised fundraiser must ensure that this is done as soon as practicable. The 2008 Regulation also stipulates that the name and other details of a person must not be provided or sold to any other person or organisation without the express consent of the person concerned. The authorised fundraiser also has to ensure that in each direct marketing contract entered into for the purchase of goods or services valued at more than AUD100, the purchaser is given the right to cancel the contract within five business days, and the purchaser should be notified of such a right at the time of entering into the contract.³

7. The 2008 Regulation provides that collection boxes or similar devices used to collect donations of money must be properly sealed, securely constructed, consecutively numbered and clearly labelled with the name of the authorised fundraiser.⁴ Similar, and even more detailed, requirements are imposed for fundraising appeals where goods or materials donated are collected jointly with a trader, and the collection devices are bins or bags.⁵

8. Where a trader conducts a fundraising appeal involving the supply of goods or services, the 2008 Regulation requires that records of the goods and services supplied must be maintained by the trader, which (in the case of goods for sale) must include the date and number of units purchased or manufactured, together with their cost, the date and number of units sold and the gross income obtained.⁶ The 2008 Regulation prohibits any fundraising appeal which involves stopping people in motor vehicles while they are being driven on a road, including while vehicles are stopped temporarily, for example, at traffic lights.⁷

3 Charitable Fundraising Regulation 2008 (NSW), at para 12 of Schedule 1.

4 Same as above, at para 13 of Schedule 1.

5 Same as above, at para 16 of Schedule 1.

6 Same as above, at para 17 of Schedule 1.

7 Same as above, at para 25 of Schedule 1.

Queensland

9. The various types of charitable fundraising activities in Queensland are regulated and controlled by the Collections Act 1966 and the Collections Regulation 2008. Section 11 of the 1966 Act sets out the general conditions which must be observed *"in connection with every appeal for support"*. These conditions include that the appeal should be authorised in writing by the governing body of the charity or a person authorised by the governing body, that the promoter of the appeal is named in the authority, that the name of the charity and the fact that it is registered under the Act shall be specified at all times during the appeal, and all provisions of the Act and other relevant conditions shall be complied with.

10. For door-to-door appeals and street collections in Queensland, both the 1966 Act and the 2008 Regulation provide that an application, in the approved form, must be made to the Minister to conduct either of these fundraising activities. The governing body of an association intending to conduct these activities must issue to each collector a distinctive armlet or badge of the association and an authority in the approved form. The collector has to produce the authority if asked by anyone during the collection. The collector must wear the armlet or badge prominently when collecting, and must return it to the promoter when the collection has finished. At various points during the collection, the collector must return to the collection's promoter the collecting box or the receipt book which has been issued to him with an amount equalling the total contributions entered in the receipt book.⁸

11. Section 17(2) of the 1966 Act provides that in addition to the general conditions specified in section 11 of the Act, there are certain other conditions in Schedule 1 to the 2008 Regulation that have to be complied with by the promoters of collections through door-to-door appeals or street collections. These additional conditions are set out below as an example of detailed requirements of this type:

"1 An authority must clearly state the period, of not more than 2 months, for which it is in force and indicate that —

*(a) the association is a charity registered under the Act;
or*

(b) the objects of the association are a community purpose sanctioned under the Act.

2 The collector must give each person giving an amount to the association, whether in exchange for articles or otherwise, a ticket or receipt issued to the collector by the governing body of the association, unless the amount is given in exchange for a device, or a collecting box is used.

⁸ Section 18, Collections Regulation 2008 (QLD).

- 3 *Receipts for all donations must be issued on the carbon copy or numbered butt principle.*
- 4 *The governing body of the association must take reasonable steps to ensure all amounts collected are properly and promptly accounted for by the collector.*
- 5 *A child under 15 must not act as a collector without the previous written consent of 1 of the child's parents or guardians and, if the consent is given, the child must be accompanied by an adult.*
- 6 *A collector must not, for an appeal, visit any house before 9.00 a.m. or after 5.00 p.m. on any day.*
- 7 *A collector must not —*
 - (a) *by words or conduct, unreasonably annoy any person approached during a collection; or*
 - (b) *stay in, or at the door of, any place of residence or place of employment if asked to leave by any occupant of the place.*
- 8 *A collector must not intimidate any person so as to cause the person to make a donation or buy anything the person otherwise may not have made or bought.*
- 9 *Each collecting box issued to a collector by the governing body of an association must be —*
 - (a) *securely constructed to avoid tampering; and*
 - (b) *sealed before its issue to a collector; and*
 - (c) *clearly numbered for identification; and*
 - (d) *clearly labelled with the association's name.*
- 10 *A seal on a collecting box may only be broken by a person authorised by the governing body of the association to break the seal.*
- 11 *The governing body must supervise properly the issue and opening of collecting boxes and accounting for the contents of collecting boxes.*
- 12 *A collecting box left at a place of residence or employment must be collected or emptied at least once a month and*

the amount removed from the collecting box must be accounted for.

- 13 *Each device offered for sale must —*
 - (a) *have the price clearly marked on it or on a distinctive tab firmly attached to it; or*
 - (b) *if the Minister considers it is impracticable to have the price marked in accordance with paragraph (a) — be offered for sale in a way that the Minister considers clearly indicates the price to a potential buyer.*
- 14 *The governing body of the association must keep a record of all devices acquired, distributed, sold or unsold.*
- 15 *The governing body of an association must give the chief executive, within 1 month after the day of the appeal, a statement of receipts and expenditure of the appeal.*
- 16 *A collector must not take part in a collection commonly known as a 'hijack' collection, or wear a mask or use a toy firearm while collecting.*
- 17 *The governing body of an association must, at least once a month, collect and account for donations invited by association signs at a wishing well or other similar thing."*

South Australia

12. In South Australia, charitable fundraising activities are regulated by the Collections for Charitable Purposes Act 1939. A Code of Practice for the control of charitable collections was also issued in 1995 by the South Australian Government.⁹ This was last reviewed in December 2007.

13. For door-to-door collections, paragraph 2 of the Code stipulates that charitable organisations should ensure that their collectors are polite at all times and should be well-presented. It also states that there should not be any use of direct or implied pressure, harassment, intimidation or coercion in the course of collections. Collectors are to carry with them an authorised collection card and wear a name tag identifying the wearer and the organisation he is acting for.

14. In the case of door-to-door sales of goods, paragraph 10 of the Code states that where products are sold door-to-door by a commercial operator who offers to donate a portion of the sale proceeds for a charitable

9 http://www.olg.sa.gov.au/Lottery/Collections_for_Charitable_Purposes/codeofpracticecharit2000.pdf.

cause, the commercial nature of the activity must be made clear by the seller at the point of sale and the proposed benefit to the charity must be defined. Charities lending their name to a merchant or a commercial bin operator should seek to ensure that the standards which are recommended for charitable collections are applied also to the commercial activities which involve the use of the charity's name.

15. Paragraph 3 of the Code requires that donors in door-to-door collections should be given a numbered receipt for all donations of AUD2.00 or more. Tins and boxes used in collections should be of secure construction and sealed before they are issued to collectors. All seals should remain intact until the campaign is completed, when the tins and boxes should be opened only under the supervision of a person authorised by the charitable organisation to oversee the reconciliation of donations with receipts issued.

16. Paragraph 6 of the Code states, amongst other requirements, that where goods and clothing are donated and received through collection bins, charitable organisations should ensure that the information on the bins is clear and unambiguous. Charitable organisations lending their name to an operator of commercial bins in return for royalties from the proceeds of the bins should ensure that the public is not misled by any misleading information or over-emphasis on the charity's involvement. Charities also have to ensure that the value of the donations made is not dissipated by excessive commission or payment to third party collection agents.

17. Where telemarketing is used for charitable fundraising, paragraph 7 of the Code stipulates that the callers should identify themselves clearly and the charitable agency they represent. Further, the callers' intention to sell and/or solicit should not be disguised by any preliminary remarks, such as *"we are conducting some research"* or *"we are conducting a survey."*

Victoria

18. In Victoria, fundraising activities are governed by the Fundraising Act 1998 and the Fundraising Regulations 2009.

19. The requirements in relation to the identification badges to be worn by collectors are set out in section 9 of the 1998 Act and section 7 of the 2009 Regulations, including requirements as to the prominent display of the name of the person conducting the fundraising appeal and the name of the person to whom the badge is issued.

20. With regard to collection receptacles for collecting donations, section 10 of the 1998 Act requires a fundraiser to ensure that the receptacles placed in a public place have to be securely constructed, properly sealed and consecutively numbered. The receptacles must be clearly labelled with the name of the appeal or the name of the person conducting the appeal, and the causes on whose behalf the appeal is being conducted.

21. Requirements in relation to collections by telephone are provided under section 14 of the 1998 Act. Where the canvasser is participating in the appeal for money or some other financial reward, the person from whom the donation is sought, or to whom things are offered to be sold, must be told before the canvasser seeks the donation or offers anything for sale that the canvasser has been retained on a commercial basis. The name of the person employing the canvasser must also be disclosed.

22. Where a commercial fundraiser seeks donations, or offers to sell anything in a fundraising appeal by means of a document, section 15 of the 1998 Act provides that the commercial fundraiser must state on the document that it has been sent or distributed by a commercial fundraiser, and that the commercial fundraiser has been retained on a commercial basis to send or distribute the document.

23. Where other means of communication are used, section 15 of the 1998 Act provides that the commercial fundraiser must ensure that a donation is not sought, and an offer to sell not made, unless the person from whom the donation is sought, or to whom the offer is made, is informed of the fact that the communication has been made by a commercial fundraiser who has been retained on a commercial basis.

24. The requirements in relation to fundraising by direct debit are included under section 15A of the 1988 Act and require a fundraiser to ensure that the form used to enable donations by a person through direct debit facilities are easily legible and clearly expressed. (For example, where the form is printed or typed, a minimum of 10 point font has to be used.)

Western Australia

25. In Western Australia, charitable fundraising activities are regulated by the Charitable Collections Act 1946 and the Charitable Collections Regulations 1947. The control of street collections is provided for in the Street Collections (Regulation) Act 1940 and the Street Collections Regulations 1999.

26. Section 14 of the 1947 Regulations provides that telephone calls and house visits by collectors making an appeal or selling goods for a charitable purpose must not be made on Sundays or public holidays, or late at night or early in the morning, unless authorised in writing by the Minister.

27. For street collections, section 3 of the 1940 Act prohibits collections in any public street within the metropolitan area unless the collections are authorised by a permit in writing from the Minister, and that the conditions, if any, that are attached to such a permit and the provisions of the regulations are all complied with by the fundraiser. The 1999 Regulations stipulate a number of requirements that have to be complied with in street collections, including those related to the wearing of identification badges and

the security and use of collection boxes. For example, section 8 of the 1999 Regulations provides that where a person indicates to a collector that he wishes to contribute in a street collection, the collector must offer the person a collection box so as to enable the person to put the contribution into the box. However, where the contribution is given by that person to a collector, the latter must immediately put the money into a collection box.

Canada

28. In Canada, charitable fundraising activities at provincial and territorial levels are regulated and controlled by the Uniform Charitable Fundraising Act. Through this legislation, uniform standards are imposed upon "*charities*" and "*fundraising businesses*" involved in charitable fundraising across the country.¹⁰

29. Section 2(1) of the Act states:

"'charity' means an incorporated or unincorporated organization or a trust that is formed for a charitable purpose; ...

'fundraising business' means, ... a person or other entity that

- (a) is not a charity,*
- (b) makes solicitations on behalf of a charity, directly or indirectly, or manages, facilitates or is responsible for solicitations made by or on behalf of a charity,*
- (c) provides the services described in clause (b) for remuneration, and*
- (d) in the case of an individual, is not acting as an employee of the charity; ... "*

30. The word "*solicitation*" is defined in section 2(1) as:

- "(a) a direct or indirect request for a contribution in which it is stated or implied that the contribution will be used by a charity or for a charitable purpose, or*
- (b) a request for a contribution through a direct or indirect offer to sell goods or services in which it is stated or implied that all or a portion of the purchase price will be used by a charity or for a charitable purpose; ('solicitation').".*

10 http://www.ulcc.ca/en/poam2/Uniform_Charitable_Fundraising_Act_BN_En.pdf, at 1.

31. Under section 6 of the Act, solicitation by telephone, in person at someone's home or by fax can only be carried out within certain times of the day. Section 7 provides that a person making a solicitation has to, before accepting a contribution, provide the following information to the person to whom the solicitation is made:

- the name of the charity for which the solicitation is made
- the name of the person making the solicitation, if it is made by telephone or in person
- the name of the fundraising business and details of the remuneration it receives, if applicable
- details about the relevant cooling-off period, and instructions for obtaining a refund under that section.

32. Section 8 of the Act provides for a "*cooling off*" period within which a contributor can change his mind and demand a full refund, and sets out how this is to be processed in different circumstances. Section 9 of the Act provides that a receipt has to be given to a person who has made a monetary contribution of CAD10 or more.

33. Section 35(1) of the Act provides that a charity cannot engage a fundraising business to make solicitations on its behalf, or to manage, solicitations made on its behalf unless the charity and the fundraising business have entered into a fundraising agreement made in compliance with section 36 of the Act. Section 36 sets out the requirements of a fundraising agreement:

"A fundraising agreement shall be in writing and shall,

- (a) set out everything agreed to by the parties respecting the proposed fundraising, including all the rights and duties of both parties;*
- (b) state the estimated amounts of,*
 - (i) contributions to be received, and*
 - (ii) expenses;*
- (c) establish the fundraising business's remuneration and specify how it is to be calculated;*
- (d) specify the methods of solicitation to be used;*
- (e) if the solicitations will involve selling goods or services, describe the goods or services and specify the price for which they will be sold;*

- (f) *identify the account of the charity into which monetary contributions are to be deposited"*

34. There are situations where businesses represent that part of their sale proceeds will go to charity. Under the Act, businesses in this situation are regarded as *"retail incentive donors"*. Where such a representation has been made, section 37 of the Act provides that the retail incentive donor has to abide by the terms of the representation and has to donate to the charity, according to the terms of the representation, all or a portion of the purchase price for the relevant goods or services, or to use all or a portion of the purchase price for the charitable purpose stated in the representation.

35. Section 39 of the Act prohibits retail incentive donors from representing that they are raising funds for charities, or that part of the sale proceeds will go to charities, unless there is a written consent from the charity.

England and Wales

36. In England and Wales, the statutory requirements governing public fundraising collections are provided in the House-to-House Collections Act 1939 and the Police, Factories etc (Miscellaneous Provisions) Act 1916. In addition, the Charity Commission has issued two sets of guidance notes in relation to the fundraising activities of charities. CC8 – Internal Financial Controls for Charities¹¹ provides advice to trustees of charities on internal financial controls over a wide range of financial activities. CC20 – Charities and Fundraising provides guidance to charities on fundraising from the public for the benefit of charities and their beneficiaries. It also includes information on charity law as it applies to fundraising and the general principles that charities should follow when developing a fundraising strategy.¹²

37. For fundraising activities carried out by telephone, CC20 states that charities should ensure that they do not make unsolicited calls to numbers registered on the Telephone Preference System (TPS). (TPS is the official central opt-out register in the UK on which customers can record their preference not to receive unsolicited sales or marketing calls.¹³) Charities may however continue to call donors on the TPS who they have an ongoing relationship with and who have agreed to be contacted by the charity. All fundraising activity involving recording or taking down personal details is subject to data protection laws. Charities that use face-to-face fundraising, online fundraising, direct mail, events, broadcast or telephone fundraising and which handle personal details such as names, contact details and credit or debit details should be aware of and comply with the Data Protection Act 1998.¹⁴

11 <http://www.charity-commission.gov.uk/publications/cc8.aspx>.

12 <http://www.charity-commission.gov.uk/publications/cc20.aspx>, at section A1.

13 <http://www.mpsonline.org.uk/tps/>.

14 <http://www.charity-commission.gov.uk/publications/cc20.aspx>, at section E4.

38. For charity funds sent to charities by post, charity trustees are advised in CC8¹⁵ that charities should open the incoming post at the earliest opportunity and in the presence of two unrelated persons. Cheques and cash that come in by post have to be immediately recorded and banked. It is also suggested in CC8 that the post-opening staff should be rotated and security of unopened mail should be ensured. Furthermore, the charity trustees should consider the need to implement other controls, such as comparison of donations with past periods or receipts from previous appeals.¹⁶

39. Where fundraising is conducted by means of public collections, CC8 advises¹⁷ that trustees have to ensure that these collections are carried out in accordance with the statutory requirements governing public collections. These are set out in the House-to-House Collections Act 1939 and the Police, Factories etc (Miscellaneous Provisions) Act 1916. In CC20, the Commission notes¹⁸ that a permit or licence from the relevant authorities is required for raising money or selling goods for charity in streets or public places. The relevant authorities should therefore be consulted before charities embark on fundraising activities in public places. A licence or an exemption is needed for house-to-house collections and visits to public houses, offices and factories to appeal for money, property, or to sell things for charity. These activities are governed by provisions in the House-to-House Collections Act 1939 and the House-to-House Collections Regulations 1947 and 1963.¹⁹ The Charity Commission in CC8 also advises that in the course of public collections, collection boxes must be sealed, individually numbered and documented. Static collection boxes should be opened regularly and contents counted in the presence of the collectors and a numbered receipt given to them. Cash collected should be banked by the charity as soon as possible without deduction of expenses.²⁰

40. With regard to fundraising and sponsored events, the Commission states in CC8²¹ that charity trustees holding these events should ensure that the charities are in control of the funds raised on their behalf, so that they can receive all the money they are entitled to from these events. The Commission also advises that records containing the gross receipt and all costs incurred in fundraising events have to be kept; that tickets to be sold in fundraising events must be pre-numbered; there must be a record of all persons who have been issued with tickets to sell; and the ticket numbers allocated to each of these persons have to be recorded.

41. For society lotteries, CC20 states²² that where the sale of lottery tickets exceeds £20,000 in value, or exceeds £250,000 when taken together with sales from previous lotteries in the same year, it will be necessary to register with the Gambling Commission. Sale of lotteries below these

15 <http://www.charity-commission.gov.uk/publications/cc8.aspx>, at section C1.

16 <http://www.charity-commission.gov.uk/publications/cc8.aspx>, at section C1.

17 <http://www.charity-commission.gov.uk/publications/cc8.aspx>, at section C2.

18 <http://www.charity-commission.gov.uk/publications/cc20.aspx>, at section E6.

19 <http://www.charity-commission.gov.uk/publications/cc20.aspx>, at section E6.

20 <http://www.charity-commission.gov.uk/publications/cc8.aspx>, at section C2.

21 <http://www.charity-commission.gov.uk/publications/cc8.aspx>, at section C2.

22 <http://www.charity-commission.gov.uk/publications/cc20.aspx>, at section E5.

thresholds would only require registration with the local authority.

42. Where a charity engages the services of a "professional fund-raiser" or a "commercial participator"²³ in a fundraising activity, CC20 provides²⁴ that the "solicitation statement" made by these professionals has to provide certain information to the public. It is set out in section E7 that a paid fundraiser, including a professional fundraiser and a commercial participator, must state:

- " • *the proportions in which the charities will benefit (if they are fundraising for more than one charity) or how the proceeds of the appeal will be distributed to different charities (if they are fundraising for charitable purposes);*
- *whether they are an officer or employee of a charity or connected company or trustee of such an institution and are acting as a collector in that capacity; and*
- *that they are paid for acting as an officer, employee or trustee, or for acting as a collector."*

Where the services of a commercial participator are required, the commercial participator must indicate:²⁵

- " • *which charity or charities will benefit from the promotional venture;*
- *if there is more than one charity that will benefit from the venture, in what proportions the charities will respectively benefit; and*

23 The terms "professional fundraiser" and "commercial participator" are defined in section A4 of CC20 at <http://www.charity-commission.gov.uk/publications/cc20.aspx>. The definitions are as follows:

"A professional fundraiser is anyone who carries on a commercial fundraising business, wholly or mainly fundraising for charitable purposes; or any other person who is paid to solicit money or other property for charity. This does not include:

- *a charity or a 'connected company';*
- *any officer or employee of the charity or connected company;*
- *a trustee of the charity, acting as trustee;*
- *any public charitable collector, other than promoters;*
- *people who solicit funds on TV or radio;*
- *any commercial participator; or*
- *anyone who is paid no more than £1,000 for a particular appeal, or no more than £10 per day or £1,000 per year where there is no specific appeal.*

A commercial participator is not a fundraising business but a commercial enterprise that takes part in a promotional venture, such as an advertising or sales campaign, where the public are informed that contributions will be given to or applied for the benefit of a charity. A commercial participator may be subject to the same regulatory requirements as professional fundraisers if all of its activities are for 'charitable purposes'."

24 <http://www.charity-commission.gov.uk/publications/cc20.aspx>, at section E7.

25 <http://www.charity-commission.gov.uk/publications/cc20.aspx>, at section E7.

- *what proportion of the proceeds of the goods, services or promotional venture sold will be given to the charity or charities, or the total amount of the donation given to the charity as a result of sale of goods, services or running the promotional venture."*

Ireland

43. Until 2009, charitable fundraising activities in Ireland were solely regulated by the Charities Acts 1961 and 1973, and the Street and House to House Collections Act 1962. In February 2009, the Charities Act 2009 was enacted and this now co-exists with the earlier controlling legislation. The provisions of the 2009 Act will come into force in stages. A guide issued by the Department of Community, Rural and Gaeltacht Affairs in June 2010, entitled *"Principal Features of the Charities Act 2009"*²⁶, stated that:

*"The Charities Act 2009, together with the Charities Acts 1961 and 1973, and the Street and House to House Collections Act 1962, will provide for a composite regulatory framework for charities through a combination of new legislative provisions and retention of existing charities legislation, with updating, where appropriate."*²⁷

44. A number of the provisions in the 1962 Act have survived the amendments made to it. Under section 5 of the 1962 Act, anyone who proposes to hold a collection in a particular locality has to apply for a collection permit from the Chief Superintendent of that locality. Under section 8, conditions may be attached to a collection permit issued by a Chief Superintendent, including conditions prohibiting the holding of the collection in particular areas or at particular times, limiting the number of collectors who may be engaged in the collection, prohibiting the wearing of fancy dress, masks or disguises by the collectors engaged in the collection, and prohibiting the making of the collection by collectors in vehicles. A collection permit may be revoked by the Chief Superintendent under section 12 of the 1962 Act. Section 17 of the 1962 Act provides that a collector acting in a collection has to carry with him a collector's authorisation, which must be produced for inspection by a member of the Garda Síochána (the Irish Police) on demand.

45. With respect to the 2009 Act, its purpose, as stated by the Department in its guide to the Act, is *"to enact a reform of the law relating to charities in order to ensure accountability and to protect against abuse of charitable status and fraud. It will also enhance public trust and confidence in charities and increase transparency in the sector."*²⁸ The Guide sets out the

26 <http://www.pobail.ie/en/CharitiesRegulation/PRIN%20FEATTHECHARITIESACT09.pdf>.
 27 <http://www.pobail.ie/en/CharitiesRegulation/PRIN%20FEATTHECHARITIESACT09.pdf>, at 1, para 1.
 28 <http://www.pobail.ie/en/CharitiesRegulation/PRIN%20FEATTHECHARITIESACT09.pdf>, at 1, para 1.

reasons for initiating the reforms, and the methods which will be adopted in the reforms to modernise charity law, as follows:

"Fundraising is complex because of the wide range of methods it encompasses and the variety of organisations within the sector involved. It has evolved considerably since the passing of the primary legislation on collections, the Street and House to House Collections Act 1962.

The approach proposed in the Act is to develop a three-pronged approach through:

- (a) modernising aspects of the 1962 provisions to reflect changes in methods of collection, revising the definition of 'collection' itself and, in particular, introducing a permit regime for recently developed fundraising methods such as collection by way of direct debit or other 'promises of money';*
- (b) conferring the requisite powers on the Charities Regulator to require charities to provide information concerning their fundraising activities, e.g. in their applications for registration, as well as in their annual accounts and annual returns; and*
- (c) implementing agreed Codes of Good Practice in relation to the actual fundraising operations, while retaining reserve powers for the Minister, after consultation with the Authority, to make statutory regulations on the manner and conduct of fundraising if such an approach proves ineffective.*

*Work on the agreed Codes of Good Practice has already advanced significantly, in partnership with the charities sector."*²⁹

46. The main areas of impact of the 2009 Act on the previous system of fundraising controls appears to be that:³⁰

"Both cash and non-cash (i.e. direct debits, standing orders etc) charitable fundraising from the public will require permits from the Gardaí, and only registered charities will be able to conduct charitable fundraising.

29 <http://www.pobail.ie/en/CharitiesRegulation/PRIN%20FEATTHECHARITIESACT09.pdf>, at 7-8, para 7.

30 See Factsheet issued by the Wheel entitled *The Charities Act 2009* at: http://www.wheel.ie/sites/default/files/Charities_Act_2009_Factsheet.pdf. According to the information provided at <http://www.wheel.ie/about>, "The Wheel is a support and representative body connecting community and voluntary organisations and charities across Ireland. Established in 1999, The Wheel has evolved to become a resource centre and forum for the community and voluntary sector."

Sealed collection boxes will be the standard requirement for collections in public places and the boxes will have to display the name and charity number of the charity (the Regulator has the discretion to make an exception to the sealed collection box rule to facilitate the making of change for token sellers).

*Charities that fundraise will be expected to comply with the non-statutory Statement of Principles for Fundraising (available at www.ictr.ie), and will also be expected to comply with specific Codes of Good Practice for Fundraising when they are developed."*³¹

47. A new definition of "collection" is provided under section 93 of the 2009 Act which states:

"collection' means the collection or attempted collection of money from the public in any public place or places or by house to house visits or both in such place or places and by such visits for the benefit (actual, alleged or implied) of a particular object, whether charitable or not, and whether —

(a) any consideration is or is not given, or

(b) any badge, emblem or other token is or is not exchanged or offered in exchange,

for money so collected, but does not include exempt activity, begging or receiving alms"

48. Section 93 also introduces new definitions of "money" and "non-cash collection". Through the 2009 reforms, new methods of collection, which were previously unknown under the 1962 Act (such as direct debits and standing orders), are now written into the law and are subject to regulation and control when used in a charity fundraising activity.

49. As noted earlier, the new reforms will also encompass the use of non-statutory codes of practice. In line with this, a *Statement Of Guiding Principles For Fundraising* has already been issued.³² This document, which was drawn up by charity fundraising practitioners and donors,³³ is stated to be intended "to complement and build on the existing legal framework within which all charities operate", and "seeks to go further than the minimum legal requirements by offering a set of overarching principles and some guidance about how fundraising should be approached and organised."³⁴

31 http://www.wheel.ie/sites/default/files/Charities_Act_2009_Factsheet.pdf, at para 2.3.

32 See Irish Charities Tax Research Ltd, *Statement Of Guiding Principles For Fundraising* (Feb 2008) at: <http://www.ictr.ie/files/R2.%20Guiding%20Principles%20of%20Fundraising%20-%20Feb%202008.pdf>.

33 Same as above, at 9.

34 Same as above, at 9.

New Zealand

50. New Zealand's principal legislation governing charities is comprised in the Charities Act 2005. As we saw earlier in this paper, New Zealand, like England, has a charity commission to maintain a register of charities. However, while England has gone further and produced detailed Codes to influence how charity fundraising activities are to be carried out, New Zealand has not yet taken that step.

51. Fundraising activities by means of telephone and internet appeals are, however, regulated under section 39 of the 2005 Act. This states that where a collector acting on behalf of a charitable entity is requesting funds, canvassing for subscriptions, selling raffle or lottery tickets, or appealing for donations by means of the telephone or the internet, the collector is under a duty to disclose the registration number of the entity if requested to do so by a member of the public.

Scotland

52. In Scotland, regulation of charitable fundraising activities is provided in sections 81 to 92 of the Charities and Trustee Investment (Scotland) Act 2005.³⁵

53. "*Public benevolent collections*"³⁶ are regulated by section 85 of the 2005 Act. Under section 85(1) of the Act, an organiser of a public benevolent collection commits an offence if the collection is held in the area of a local authority without the local authority's consent given under section 86 of the Act. In granting its consent, the local authority may attach conditions under section 86(5) of the 2005 Act. These conditions may relate to the date, time or frequency of the collection; where it may take place; how it is to be conducted; the use of identification badges by collectors and the form of collection boxes, other containers and any other articles which may be used for the purposes of the collection.

54. Provisions to regulate the conduct of "*professional fundraisers*" and "*commercial participators*" in fundraising activities, including the definition

35 For a useful discussion of these control measures, see "*Charity Regulation in Scotland*" at: <http://iascl.talkbank.org/media/documents/OSCR-Charity-Regulation-in-Scotland-Overview.pdf>.

36 Section 84(2) defines "*Public benevolent collection*" as a collection from the public of money or promises of money (whether or not given by them for a consideration by way of goods or services) for the benefit of benevolent bodies or for charitable, benevolent or philanthropic purposes taken (a) in a public place, or (b) by means of visits to two or more houses or business premises.

of "*benevolent contributions*"³⁷ are contained in sections 79 to 81 of the 2005 Act.³⁸

55. Unauthorised fundraising is prohibited under section 82 of the 2005 Act. Under this section, an interdict (injunction) against a person raising funds for the benefit of a charity may be granted if the sheriff (equivalent to a District Court Judge) is satisfied either that the person in question is using methods of fundraising to which the benevolent body objects, that the person is not a fit and proper person to raise funds for the body, and the person is making representations that benevolent contributions are to be paid to the benevolent body but the body does not wish to be associated with that fundraising venture.

Singapore

56. In Singapore, fundraising activities carried out by charities are regulated by the Charities Act. Sections 33 to 38 of the Act, at Part VII, provide for the control of fundraising for charitable institutions, and the regulation of fundraising appeals is regulated by sections 39 to 40 of the Act, at Part VIII.

57. Supplementary to these legislative controls are guidelines set out in the *Code of Governance For Charities and Institutions of a Public Character*³⁹ issued by the Charity Council in 2011 which has refined the Code first published in 2007. The objectives of the Code are to:

"Make charities more effective by sharing recommended practices on how effective charities are governed and managed;

Provide guidance to Board members to help them carry out their duties as fiduciaries (representatives entrusted to act in the interests of the charity);

37 Section 79(1) of the 2005 Act defines "*benevolent contributions*", in relation to a representation made by a commercial participator or other person, to mean (a) the whole or part of (i) the consideration given for goods or services sold or supplied by that person, (ii) any proceeds (other than such consideration) of a promotional venture undertaken by that person, (b) sums given by that person by way of donation in connection with the sale or supply of such goods or services.

38 Section 79(1) of the 2005 Act defines a "*professional fundraiser*" as (a) a person (other than a benevolent body or a company connected with it) who carries on a fundraising business, (b) any other person who for reward solicits money or other property for the benefit of a benevolent body or for charitable, benevolent or philanthropic purposes otherwise than in the course of a fundraising venture undertaken by a person falling within paragraph (a).

Section 79(1) defines a "*commercial participator*" as a person who (a) carries on for profit a business other than a fundraising business, but (b) in the course of that business, engages in a promotional venture in the course of which it is represented that benevolent contributions are to be (i) given to or applied for the benefit of one or more particular benevolent bodies, or (ii) applied for charitable, benevolent or philanthropic purposes.

39 <http://www.charities.gov.sg/charity/charity/charityCMSFileDownload.do?id=27>.

*Boost public confidence in the charity sector by setting the standards of good governance for charities to aspire towards.*⁴⁰

The guidelines in the refined Code are applicable depending on the size of the charity.⁴¹ Unlike its legislative counterpart, the Code is not intended to be mandatory. It is stated in the preamble to the Code:

*"Charities differ greatly in size, activity and circumstances. Not all Code guidelines will apply to every charity. But all charities should go through the entire Code and take the necessary action to improve their governance."*⁴²

58. In Part VII of the Act, two types of persons are specifically mentioned as the persons carrying out fundraising for charitable institutions. They are professional fund-raisers⁴³ and the commercial participators.⁴⁴ In Part VII, various requirements are imposed on these persons who act on behalf of, or in the name of, a charitable organisation in a fundraising activity. The purpose of these controlling provisions is to enable the public and the charities concerned to know more about the role played by these fundraising professionals in the fundraising activity, and how the charity funds obtained in a fundraising activity are to be used and distributed.

59. Under section 34(1) of the Act, a professional fund-raiser is prohibited from soliciting money or other property for the benefit of a charitable institution unless there is an agreement with the institution and the prescribed requirements have been satisfied. Likewise, in section 34(2) of the Act, it is provided that a commercial participator is prohibited from representing that charitable contributions are to be given to, or applied for, the benefit of a charitable institution unless there is an agreement to that effect with the institution and the prescribed requirements have been satisfied. The reporting provisions imposed on professional fundraisers in relation to specific fundraising appeals are contained in section 35 of the Act.

60. The definition of *"fund-raising appeal"* appears in section 39(1) of the Act, which states:

40 <http://www.charities.gov.sg/charity/charity/charityCMSFileDownload.do?id=27>, at 5.

41 Charities with gross annual receipts of less than \$50,000 are required to comply with Basic I tier guidelines. Charities with gross annual receipts of \$50,000 and up to \$10 million are required to comply with Basic II tier guidelines. Large Charities with gross annual receipts of \$10 million or more are required to comply with Basic II and Enhanced guidelines. (All figures mentioned in this note refer to Singapore dollars.) Available at:

<http://www.charities.gov.sg/charity/charity/charityCMSFileDownload.do?id=27>, at 6.

42 <http://www.charities.gov.sg/charity/charity/charityCMSFileDownload.do?id=27>, at 5.

43 Section 33(1) of the Act defines a *"professional fund-raiser"* as (a) any person (apart from a charitable institution) who carries on a fundraising business; or (b) any other person (apart from a person excluded by virtue of subsection (2) or (3)) who for reward solicits money or other property for the benefit of a charitable institution, if he does so otherwise than in the course of any fundraising venture undertaken by a person falling within paragraph (a).

44 Section 33(1) of the Act provides that a *"commercial participator"*, in relation to any charitable institution, means any person who carries on for gain a business other than a fundraising business, but in the course of that business, engages in any promotional venture in the course of which it is represented that charitable contributions are to be given to or applied for the benefit of the institution.

"fund-raising appeal' means

- (a) an appeal, whether made expressly or impliedly, to any member of the public to give money or other property (whether for consideration or otherwise) which is made in association with a representation that the whole or any part of its proceeds is to be applied for charitable, benevolent or philanthropic purposes; or*
- (b) a receipt from any member of the public of any money or other property (whether for consideration or otherwise) which is given in whole or in part for any charitable, benevolent or philanthropic purposes".*

61. In respect of the standard of behaviour expected of a charity in fundraising activities, the Code specifies that *"The charity should ensure that its fundraising activities are transparent and ethical. It should account to its donors on what, how and when the funds would be used. The charity should also be prudent in engaging third party fundraisers."*⁴⁵ The Code further specifies that in conducting fundraising activities, the charity should ensure that its fundraising activities will preserve the integrity and transparency of the charity.⁴⁶

62. In the Basic II and Enhanced guidelines, charities are required to comply with further fundraising practices relating to accountability to donors on what, how and when the funds would be used. As specified earlier, the charity should also be prudent in engaging third party fundraisers. It is stated in the guidelines that -

- "(a) The charity should ensure that donors receive accurate and ethical advice about the charity, and the intended use, value and tax implications of donations.*
- (b) All collections should be properly recorded, promptly deposited and accounted for.*
- (c) The charity should respect donors' confidentiality. It should not disclose the identity of donors or share information on donors without prior permission from the donors."*⁴⁷

45 Singapore Charity Council, Code of Governance for Charities and Institutions of a Public Character (2011), available at: <http://www.charities.gov.sg/charity/charity/charityCMSFileDownload.do?id=27>, at BI-3, BII-7 and E9.

46 Same as above.

47 Singapore Charity Council, Code of Governance for Charities and Institutions of a Public Character (2011), available at: <http://www.charities.gov.sg/charity/charity/charityCMSFileDownload.do?id=27>, at BII-7 and E-9.

63. Charities are also required to comply with the following guideline:

"(a) *The charity should exercise due care in engaging third party fundraisers. It should take into account how the public may view its use of third party fundraisers.*

The use of a third party fundraiser, its rationale and fee arrangements should be approved by the Board and disclosed to potential donors.

(b) *In general, it is discouraged to pay third party fundraisers based on the value of donations raised. Fundraising targets should be set based on the charity's needs and disclosed to donors.*"⁴⁸

South Africa

64. In South Africa, "nonprofit organisations" (NPOs) are regulated by the Nonprofit Organisations Act 1997 and the *Codes of Good Practice for South African Non-profit Organisations (NPOs)*⁴⁹ issued under section 6(1)(b)(i) of the 1997 Act.

65. Regulation and control of fundraising activities of NPOs are provided in section B of the Codes. Under this, NPOs, and those connected with the fundraising work of NPOs, are advised to follow the "ethical values" that are stated in the Codes.⁵⁰ The ethical values stipulated include:⁵¹

- Honesty
- Integrity
- Promise keeping
- Fidelity/loyalty
- Fairness
- Caring for others
- Respect for others
- Transparency
- Responsible citizenship
- Pursuit of excellence
- Accountability
- Safeguard public trust.

66. For "professional fundraisers" who are under a contract with an NPO and raise funds for remuneration in the form of a commission or retainer or both, the Codes state that, as the public would expect those engaged in NPOs to behave in an exemplary way, professional fundraisers are expected

48 Same as above.

49 <http://www.dsd.gov.za/npo/dmdocuments/Model%20Codes%20of%20Good%20Practice.pdf>.

50 The Codes, at 21-23, available at:

<http://www.dsd.gov.za/npo/dmdocuments/Model%20Codes%20of%20Good%20Practice.pdf>.

51 The Codes, at 17-18, available at:

<http://www.dsd.gov.za/npo/dmdocuments/Model%20Codes%20of%20Good%20Practice.pdf>.

to carry out their fundraising work "... *in attitude and behaviour that rise above merely doing a job in a competent manner.*"⁵²

67. For NPOs handling fundraising themselves, the Codes state⁵³ that such a function should be carried out by the CEO, the fundraising committee appointed by a governing body, and some full-time or part-time staff, if any. In the Codes, it is stressed that any of the persons or organisations involved in fundraising activities conducted by or on behalf of NPOs should maintain "*organisational and professional standards based on traditional personal ethics.*"⁵⁴ The Codes also specify a number of further responsibilities which must be complied with by NPO fundraisers and outside fundraisers working for or on behalf of an NPO.⁵⁵

68. In hiring an outside fundraiser or a professional fundraiser who carries out fundraising activities for or on behalf of an NPO for a certain percentage of the funds raised or a retainer, the Codes suggest⁵⁶ that a detailed contract should be signed by both the NPO and the professional fundraiser. The contract should clearly state the parties' responsibilities and their income targets. Likely expenses that might incur in the fundraising process, such as administration or travel costs, and how these costs are to be controlled, should also be clearly stated in the contract. The contract should provide for regular opportunities for parties to review progress.

52 The Codes, at 22, available at:
<http://www.dsd.gov.za/npo/dmdocuments/Model%20Codes%20of%20Good%20Practice.pdf>.

53 The Codes, at 22, available at:
<http://www.dsd.gov.za/npo/dmdocuments/Model%20Codes%20of%20Good%20Practice.pdf>.

54 The Codes, at 23, available at:
<http://www.dsd.gov.za/npo/dmdocuments/Model%20Codes%20of%20Good%20Practice.pdf>.

55 The Codes, at 23-24, available at:
<http://www.dsd.gov.za/npo/dmdocuments/Model%20Codes%20of%20Good%20Practice.pdf>.

56 The Codes, at 25, available at:
<http://www.dsd.gov.za/npo/dmdocuments/Model%20Codes%20of%20Good%20Practice.pdf>.

The law in other jurisdictions on charities and tax

Australia

1. In Australia, charities are exempt from income tax under the Income Tax Assessment Act 1997 (the 1997 Act). Subdivision 50-A of the 1997 Act specifies the various entities that are exempt from income tax. A charity is one of the *"exempt entities"* under section 50-5 of the 1997 Act.

2. In section 50-5 of the 1997 Act, at item 1.1, charity is listed as an entity exempt from income tax in respect of its total ordinary and statutory income. Note 1 of section 50-1 of the 1997 Act provides that the ordinary and statutory income of charities that is exempt from income tax is called *"exempt income"*.

3. Section 50-5 of the 1997 Act provides that to be eligible for tax exemption, the charity has to meet a number of special conditions set out in sections 50-50 and 50-52 of the 1997 Act.

4. Section 50-50 of the 1997 Act sets out the special conditions as follows:

"An entity covered by item 1.1 or 1.2 is not exempt from income tax unless the entity:

- (a) has a physical presence in Australia and, to that extent, incurs its expenditure and pursues its objectives principally in Australia; or*
- (b) is an institution that meets the description and requirements in item 1 of the table in section 30-15; or*

1 The term *"Exempt income"* is defined in section 6-20 of the Income Tax Assessment Act 1997 to mean:

- "(1) An amount of ordinary income or statutory income is exempt income if it is made exempt from income tax by a provision of this Act or another Commonwealth law. For summary lists of provisions about exempt income, see sections 11-5, 11-10 and 11-15.*
- (2) Ordinary income is also exempt income to the extent that this Act excludes it (expressly or by implication) from being assessable income.*
- (3) By contrast, an amount of statutory income is exempt income only if it is made exempt from income tax by a provision of this Act outside this Division or another Commonwealth law.*
- (4) If an amount of ordinary income or statutory income is non-assessable non-exempt income, it is not exempt income.*

Note: An amount of non-assessable non-exempt income is not taken into account in working out the amount of a tax loss."

- (c) *is a prescribed institution which is located outside Australia and is exempt from income tax in the country in which it is resident; or*
- (d) *is a prescribed institution that has a physical presence in Australia but which incurs its expenditure and pursues its objectives principally outside Australia."*

5. The other special conditions that a charitable organisation has to satisfy before tax exemption can be granted are provided in section 50-52 of the 1997 Act:

"(1) An entity covered by item 1.1, 1.5, 1.5A, 1.5B or 4.1 is not exempt from income tax unless the entity is endorsed as exempt from income tax under Subdivision 50-B.

Note: The entity will not be exempt from income tax unless it also meets other conditions: see section 50-50 (for an entity covered by item 1.1), 50-57 (for an entity covered by item 1.5), 50-60 (for an entity covered by item 4.1).

(3) This section has effect despite all the other sections of this Subdivision.

Note: This means that an entity covered both by an item other than 1.1, 1.5, 1.5A, 1.5B or 4.1 and by one of those items is not exempt from income tax unless the entity is endorsed under Subdivision 50-B as exempt from income tax and the entity meets the requirements of whichever of sections 50-50, 50-57, 50-60 and 50-72 is relevant."

6. As noted above, section 50-52(1) of the 1997 Act provides that charity is not exempt from income tax unless it has been endorsed as exempt from income tax under Subdivision 50-B of the 1997 Act. Sections 50-100, 50-105, 50-110 are the provisions that fall within Subdivision 50B.

7. Section 50-100 provides that charities are only exempt from income tax if they are endorsed. Section 50-105 provides that the Commissioner must endorse an entity as exempt from income tax if it:

- "(a) is entitled to be endorsed as exempt from income tax; and*
- (b) has applied for that endorsement in accordance with Division 426 in Schedule 1 to the Taxation Administration Act 1953."*

8. Section 50-110 of the 1997 Act provides for the requirements which have to be met before a charity is entitled to be endorsed as exempt from income tax. Section 50-110 provides that:

"General rule

- (1) *An entity is entitled to be endorsed as exempt from income tax if the entity meets all the relevant requirements of this section.*

Which entities are entitled to be endorsed?

- (2) *To be entitled, the entity must be an entity covered by item 1.1, 1.5, 1.5A or 1.5B of the table in section 50-5 or item 4.1 of the table in section 50-20.*

Requirement for ABN

- (3) *To be entitled, the entity must have an *ABN.*

- (4) *However, for a trust:*

- (a) *covered by item 1.5 of the table in section 50-5 because the trust is covered by paragraph 50-80(1)(d); or*
- (b) *covered by item 1.5A of the table in section 50-5 (because the trust is covered by paragraph 50-80(1)(c));*

*to be entitled, the existing trust mentioned in paragraph 50-80(1)(a) must have an *ABN.*

Requirement to meet special conditions

- (5) *To be entitled:*

- (a) *the entity must meet the relevant conditions referred to in the column headed 'Special conditions' of whichever of items 1.1, 1.5, 1.5A and 1.5B of the table in section 50-5 and item 4.1 of the table in section 50-20 covers the entity; or*
- (b) *both of the following conditions must be met:*
 - (i) *the entity must not have carried on any activities as a charitable institution (if the entity is covered by item 1.1 of the table in section 50-5) or for public charitable purposes (if the entity is covered by item 1.5, 1.5A or 1.5B of that table);*
 - (ii) *there must be reasonable grounds for believing that the entity will meet the*

relevant conditions referred to in the column headed 'Special conditions' of whichever of items 1.1, 1.5, 1.5A or 1.5B of the table in section 50-5 covers the entity; or

- (c) if the entity is covered by item 4.1 of the table in section 50-20 and has not made any distributions -there must be reasonable grounds for believing that the entity will satisfy section 50-72.*
- (6) To avoid doubt, the condition set out in section 50-52 (requiring the entity to be endorsed under this Subdivision) is not a relevant condition for the purposes of subsection (5)."*

Canada

9. In Canada, under the Income Tax Act only registered charities are eligible for exemption from income tax. Due to this requirement, the registered status of a charity is crucial in determining whether an organisation established for public good would be entitled to exemption from income tax.

10. Section 127.2(2) of the Act provides that a person described in any of the paragraphs 149(1)(e) to (y) of the Act is eligible for exemption from income tax. Section 127.2(2) provides:

"(2) Where a taxpayer who was throughout a taxation year a person described in any of paragraphs 149(1)(e) to (y) files with the taxpayer's return of income under this Part for the year a prescribed form containing prescribed information, the taxpayer shall be deemed to have paid, on the day on which the return is filed, an amount, on account of the taxpayer's tax under this Part for the year, equal to the taxpayer's share-purchase tax credit for the year."

11. Thus, in Canada, only registered charities, as opposed to unregistered charities or other non-profit organisations, are exempt from income tax, as only the term "*registered charity*" is provided in section 149(1)(f) of the Act. A "*registered charity*", as defined in section 248(1) of the Act, means:

- "(a) a charitable organization, private foundation or public foundation, within the meanings assigned by subsection 149.1(1), that is resident in Canada and was either created or established in Canada, or*
- (b) a branch, section, parish, congregation or other division of an organization or foundation described in paragraph (a),*

that is resident in Canada and was either created or established in Canada and that receives donations on its own behalf,

that has applied to the Minister in prescribed form for registration and that is at that time registered as a charitable organization, private foundation or public foundation;"

12. The meanings assigned to a "charitable organisation" under section 149.1(1) of the Act are as follows:

"... an organization, whether or not incorporated,

- (a) all the resources of which are devoted to charitable activities carried on by the organization itself,*
- (b) no part of the income of which is payable to, or is otherwise available for, the personal benefit of any proprietor, member, shareholder, trustee or settlor thereof,*
- (c) more than 50% of the directors, trustees, officers or like officials of which deal with each other and with each of the other directors, trustees, officers or officials at arm's length, and*
- (d) where it has been designated as a private foundation or public foundation pursuant to subsection (6.3) of this section or subsection 110(8.1) or (8.2) of the Income Tax Act, chapter 148 of the Revised Statutes of Canada, 1952, or has applied after February 15, 1984 for registration under paragraph 110(8)(c) of that Act or under the definition 'registered charity' in subsection 248(1), not more than 50% of the capital of which has been contributed or otherwise paid into the organization by one person or members of a group of persons who do not deal with each other at arm's length and, for the purpose of this paragraph, a reference to any person or to members of a group does not include a reference to Her Majesty in right of Canada or a province, a municipality, another registered charity that is not a private foundation, or any club, society or association described in paragraph 149(1)(l)."*

England and Wales

13. In England and Wales, charities are eligible for exemption and relief from taxation on income and profits they receive. This is provided for under the Income and Corporation Taxes Act 1988. Section 505(1) of the 1988 Act deals with tax exemption, and section 505(2) and (3) of the same

Act deals with tax relief. Apart from these provisions, charities are also eligible to exemption from capital gains tax under section 256 of the Taxation of Chargeable Gains Act 1992.

14. The exemption and relief of charities from taxation on their income and profits under the Income and Corporation Taxes Act 1988 cover a wide range of financial gains, including land, trade, interest, annuities, dividends, shares of annuities, etc. In relation to tax exemption of charities, section 505(1) of the 1988 Act states:

"(1) Subject to subsections (2) and (3) below, the following exemptions shall be granted on a claim in that behalf to the Board —

(a) exemption from tax under Parts 3 and 4 of CTA 2009 in respect of any profits or gains arising in respect of rents or other receipts from an estate, interest or right in or over any land (whether situated in the United Kingdom or elsewhere) to the extent that the profits or gains -

(i) arise in respect of rents or receipts from an estate, interest or right vested in any person for charitable purposes; and

(ii) are applied to charitable purposes only;

(aa) exemption from tax under Parts 3 and 4 of CTA 2009, or under Parts 2 and 3 of ITTOIA 2005, in respect of distributions to which section 121 of the Finance Act 2006 (Real Estate Investment Trusts: distributions) applies to the extent that the distributions -

(i) arise in respect of shares vested in a person for charitable purposes; and

(ii) are applied to charitable purposes only;

(b) . . . ;

(c) exemption -

(i) . . .

(ii) from tax under section 299 of CTA 2009 (non-trading profits in respect of loan relationships),

(iizza) from tax under Part 9A of CTA 2009 (company distributions),

(iiza) from tax under Chapter 5 of Part 10 of that Act (distributions from unauthorised unit trusts),

(iizb) from tax under Chapter 7 of that Part (annual payments not otherwise charged),

(iic) from tax under Part 8 of CTA 2009 in respect of non-trading gains on intangible fixed assets,

where the income in question forms part of the income of a charitable company, or is, according to rules or regulations established by Act of Parliament, charter, decree, deed of trust or will, applicable to charitable purposes only, and so far as it is applied to charitable purposes only;

(d) exemption from tax in respect of public revenue dividends on securities which are in the name of trustees, to the extent that the dividends are applicable and applied only for the repair of -

- (i) any cathedral, college, church or chapel, or*
- (ii) any building used only for the purposes of divine worship;*

(e) exemption from tax under Part 3 of CTA 2009 in respect of the profits of any trade carried on by a charitable company (whether in the United Kingdom or elsewhere), if the profits are applied solely to the purposes of the charitable company and either -

- (i) the trade is exercised in the course of the actual carrying out of a primary purpose of the charitable company; or*
- (ii) the work in connection with the trade is mainly carried out by beneficiaries of the charitable company;*

(f) exemption from tax under Schedule D in respect of profits accruing to a charitable company from a lottery if the profits are applied solely to the charitable company's purposes and -

- (i) the lottery is an exempt lottery within the meaning of the Gambling Act 2005 by virtue of Part 1 or 4 of Schedule 11 to that Act;*
- (ii) the lottery is promoted in accordance with a lottery operating licence within the meaning of Part 5 of that Act; or*
- (iii) the lottery is promoted and conducted in accordance with Article 133 or 135 of the Betting, Gaming, Lotteries and Amusements (Northern Ireland) Order 1985."*

15. It is provided in section 505 (1B) that :

"For the purpose of subsection (1)(e) -

- (a) *where a trade is exercised partly in the course of the actual carrying out of a primary purpose of the charitable company and partly otherwise, each part shall be treated as a separate trade (for which purpose reasonable apportionment of expenses and receipts shall be made), and*
- (b) *where the work in connection with the trade is carried out partly but not mainly by beneficiaries, the part in connection with which work is carried on by beneficiaries and the other part shall be treated as separate trades (for which purpose reasonable apportionment of expenses and receipts shall be made)."*

Section 505(2) provides :

"Any payment which -

- (a) *is received by a charitable company from another charity; and*
- (b) *is not made for full consideration in money or money's worth; and*
- (c) *is not chargeable to corporation tax apart from this subsection; and*
- (d) *is not, apart from this subsection, of a description which (on a claim) would be eligible for relief from tax by virtue of any provision of subsection (1) above;*

shall be chargeable to corporation tax under the charge to corporation tax on income but shall be eligible for relief from tax under subsection (1)(c) above as if it were an annual payment."

Section 505(4) provides :

"If a charitable company incurs (or is treated as incurring) non-charitable expenditure in an accounting period, relief shall be disallowed in respect of such amount of relievable income and gains as equals the amount of the non-charitable expenditure."

Ireland

16. In Ireland, subject to prescribed conditions, income, profits or gains received by charities or charitable trusts are eligible for exemption from charges under different types of taxes. Recognised charities are thus eligible for exemption from taxes such as *"income tax", "capital acquisitions tax", "capital gains tax", "corporation tax", "tax arising from disposal of asset made*

to charities", "dividend withholding tax", "deposit interest retention tax" and "stamp duties" etc.

17. In relation to charges arising from "income", section 207 of the Taxes Consolidation Act 1997 provides exemption from income tax for income received and applied to charitable purposes only. Section 207(1) of the 1997 Act grants exemption to organisations from income tax chargeable under the relevant Schedules in the 1997 Act. Section 207(1) of the 1997 Act provides:

"(1) Exemption shall be granted –

(a) from income tax chargeable under Schedule D in respect of the rents and profits of any property belonging to any hospital, public school or almshouse, or vested in trustees for charitable purposes, in so far as those rents and profits are applied to charitable purposes only;

(b) from income tax chargeable —

(i) under Schedule C in respect of any interest, annuities, dividends or shares of annuities,

(ii) under Schedule D in respect of any yearly interest or other annual payment, and

(iii) under Schedule F in respect of any distribution, forming part of the income of any body of persons or trust established for charitable purposes only, or which, according to the rules or regulations established by statute, charter, decree, deed of trust or will, are applicable to charitable purposes only, and in so far as the same are applied to charitable purposes only;

(c) from income tax chargeable under Schedule C in respect of any interest, annuities, dividends or shares of annuities in the names of trustees applicable solely towards the repairs of any cathedral, college, church or chapel, or any building used solely for the purposes of divine worship, and in so far as the same are applied to those purposes."

18. Section 208 of the 1997 Act provides tax exemption to charities' "income" derived from lands and trades. The term "charity" is defined in section 208(1) of the 1997 Act to mean "any body of persons or trust established for charitable purposes only". Tax exemption for charities in respect of their income from lands and trades is provided under section 208(2) of the 1997 Act:

"(2) Exemption shall be granted –

- (a) from income tax chargeable under Case I (b) of Schedule D by virtue of section 18 (2) where the profits or gains so chargeable arise out of lands, tenements or hereditaments which are owned and occupied by a charity;*
- (b) from income tax chargeable under Schedule D in respect of the profits of a trade carried on by any charity, if the profits are applied solely to the purposes of the charity and either —*
 - (i) the trade is exercised in the course of the actual carrying out of a primary purpose of the charity, or*
 - (ii) the work in connection with the trade is mainly carried on by beneficiaries of the charity."*

19. Capital acquisitions tax is payable in Ireland where a person receives a gift or inheritance. However, under the Capital Acquisitions Tax Consolidation Act 2003 (the 2003 Act), charities are exempt from such a tax. Section 76 of the 2003 Act provides that a person who receives a gift or inheritance *"for public or charitable purposes"* is exempt from charges in tax. Section 76(2) of the 2003 Act provides as follows:

"(2) A gift or an inheritance which is taken for public or charitable purposes is exempt from tax and is not taken into account in computing tax, to the extent that the Commissioners are satisfied that it has been, or will be, applied to purposes which, in accordance with the law of the State, are public or charitable."

20. Charities are exempt from stamp duties under the Stamp Duties Consolidation Act 1999. Section 82(1) of the Act provides:

"(1) Stamp duty shall not be chargeable on any conveyance, transfer or lease of land made, or agreed to be made, for charitable purposes in the State or Northern Ireland to a body of persons established for charitable purposes only or to the trustees of a trust so established."

21. Other exemptions from tax in respect of income, profits or gains received by charities include exemptions from capital gains tax under section 690 of the 1997 Act, from corporation tax under section 79 of the 1997 Act, from tax arising from disposal of assets made to charities under section 611 of the 1997 Act, and from deposit interest retention tax under section 266 of the 1997 Act.

New Zealand

22. In New Zealand, charities are entitled to exemption from income tax. This is provided in Part C of the Income Tax Act 2007 under which income from business or trade-like activities carried out by charities is eligible for income tax exemption. Also, income from a charitable bequest can be tax exempt under the 2007 Act. Under the 2007 Act, however, only registered charities are eligible for exemption from income tax. Sections CW 41 to 43 of Part C of the 2007 Act respectively deal with *"non-business income"*, *"business income"*, and income from charitable bequests.

23. Section CW 34 of the 2007 Act provides for the types of *"non-business income"* of charities that are entitled to income tax exemption. The types of exempt income are specified in section CW 41(1) of the 2007 Act, the provisions of which state:

"(1) The following are exempt income:

- (a) an amount of income derived by a trustee in trust for charitable purposes;*
- (b) an amount of income derived by a society or institution established and maintained exclusively for charitable purposes and not carried on for the private pecuniary profit of any individual."*

24. The exemption granted under section CW 41(1) above, however, applies only to the *"non-business"* income of charities. Business income of charities, however, is not exempted under this section. This is provided in section CW 41(3) of the 2007 Act which states:

"(2) This section does not apply to an amount of income derived from a business carried on by, or for, or for the benefit of a trust, society, or institution of a kind referred to in subsection (1)."

25. The income tax exemption provided in section CW 41(1) of the 2007 Act is also not applicable to the income of council-controlled organisations. CW 41(4) of the 2007 Act provides as follows:

"(3) This section does not apply to an amount of income derived by –

- (a) a council-controlled organisation, other than a council-controlled organisation operating a hospital as a charitable activity;*
- (b) a local authority from a council-controlled organisation, other than from a council-controlled organisation operating a hospital as a charitable*

activity on behalf of the local authority."

26. As mentioned in the outset of this part, only registered charities are eligible for exemption from income tax. Section CW 41 of the 2007 Act stipulates that trustees, societies, or institutions that have not been registered under the Charities Act 2005 would be excluded from the income tax exemption provided in section CW 41(1) of the 2007 Act. Section CW 41(2) provides for this by stating:

"(2) This section does not apply to an amount of income if, at the time that the amount of income is derived, the trustee or trustees of the trust, the society, or the institution is not, or are not, a tax charity."

A "tax charity" is defined in CW 41(5) as:

- "(a) a trustee or trustees of a trust, a society, or an institution, registered as a charitable entity under the Charities Act 2005;*
- (b) a trustee or trustee of a trust, a society, or an institution (the entity), that -*
 - (i) has started, before 1 July 2008, to take reasonable steps in the process of preparing an application for registering the entity as a charitable entity under the Charities Act 2005; and*
 - (ii) intends to complete the process of preparing an application described in subparagraph (i); and*
 - (iii) has not been notified by the Commissioner that the entity is not a tax charity;*
- (c) a trustee or trustee of a trust, a society, or an institution, that is or are non-resident and carrying out its or their charitable purposes outside New Zealand, and which is approved as a tax charity by the Commissioner in circumstances where registration as a charitable entity under the Charities Act 2005 is unavailable."*

27. The 2007 Act also provides income tax exemption for "business income" of charities. The different types of exempt business income are specified in section CW 42(1) of the 2007 Act the terms of which are as follows:

"(1) Income derived directly or indirectly from a business carried on by, or for, or for the benefit of a trust, society, or institution of a kind referred to in section CW 41(1) is exempt income if —

- (a) *the trust, society, or institution carries out its charitable purposes in New Zealand; and*
- (b) *the trustee or trustees of the trust, the society, or the institution is or are, at the time that the income is derived, a tax charity; and*
- (c) *no person with some control over the business is able to direct or divert, to their own benefit or advantage, an amount derived from the business...."*

28. The income tax exemption provided in section CW 42(1) above, however, does not apply to the income of a council-controlled organisation. Section CW 42(2) of the 2007 Act provides:

"(2) This section does not apply to income derived by —

- (a) *a council-controlled organisation, other than a council-controlled organisation operating a hospital as a charitable activity;*
- (b) *a local authority from a council-controlled organisation, other than from a council-controlled organisation operating a hospital as a charitable activity on behalf of the local authority."*

29. Section CW 43 of the 2007 Act provides that income deriving from charitable bequests is also eligible to income tax exemption. Section CW 43(1) provides that income from an estate that has been left to a trust, society, or institution may be exempted from income tax. Section CW 43(1) of the 2007 Act provides that:

"(1) An amount of income derived by a deceased's executor or administrator is exempt income to the extent to which the requirements in subsections (2) and (3) are met, having regard to all relevant matters including —

- (a) *the terms of the deceased's will, including the rights of annuitants, legatees, and other beneficiaries; and*
- (b) *the nature and extent of the debts and liabilities of, and other charges against, the estate and their likely effect on the income and assets available for distribution to the beneficiaries; and*
- (c) *the shares and prospective shares of the beneficiaries in the income and assets of the*

estate."

The requirements in subsections (2) and (3) mentioned in section CW 43(1) above are:

"(2) The first requirement is that the amount arises from or is attributable to assets of the estate that have been left to a trust, society, or institution of a kind referred to in section CW 41(1)."

"(3) The second requirement is that the amount, if derived by the trust, society, or institution or by a business carried on by, or for, or for the benefit of it, would be exempt income under section CW 41 or CW 42."

30. Section CW 43(4) of the 2007 Act provides that, for the purpose of granting income tax exemption to a charitable bequest, being a tax charity is not required until the end of the income year that follows the income year in which the deceased died. Section CW 43(4) to (6) is relevant to the consideration of tax exemption for income from a charitable bequest. These provisions state:

"(4) An amount of income derived by a deceased's executor or administrator that is derived during the period beginning on the deceased's date of death and ending at the end of the income year that follows the income year in which the deceased died is not prevented from being exempt income under this section merely because the trustee or trustees of the trust, the society, or the institution is not, or are not, a tax charity.

(5) For the purposes of subsection (4), until the end of the income year that follows the income year in which the deceased died, the requirements in sections CW 41 and CW 42 for the trustee or trustees of the trust, the society, or the institution to be a tax charity must be disregarded when applying those sections for the purposes of this section.

(6) This section does not apply to an amount of income derived after the end of the income year that follows the income year in which the deceased died if, at the time that the amount of income is derived, the trustee or trustees of the trust, the society, or the institution is not, or are not, a tax charity."

31. In general, gifts to charities and certain bodies are exempt from income tax. Section 73(2) of the Estate and Gift Duties Act 1968 specifies a number of gifts that shall not constitute dutiable gifts. The classes of gifts that fall within this category are quite substantial. Examples include: any gifts to the New Zealand Historic Places Trust for the purposes of the Historic Places Act 1993; any gift of a protected New Zealand object (as defined in the Protected Objects Act 1975) to the Minister of Internal Affairs on behalf of the Crown, or to any library, museum, or other public institution for the benefit of

the public; and any gift to the Museum of New Zealand Te Papa Tongarewa Board for the purposes of the Museum of New Zealand Te Papa Tongarewa Act 1992.

32. Section 73(1) of the 1968 Act provides for the general exemption from income tax for gifts to charities and certain bodies. Under this section, any gift creating a charitable trust, or establishing any society or institution exclusively for charitable purposes, or any gift in aid of any such trust, society, or institution, shall not constitute a dutiable gift. Section 73(1) provides:

"(1) Any gift creating a charitable trust, or establishing any society or institution exclusively for charitable purposes, or any gift in aid of any such trust, society, or institution, shall not constitute a dutiable gift if, at the time that the gift is made, the society, institution, or trustees of the trust is or are a tax charity, as that term is defined under section CW 41(5) of the Income Tax Act 2007."

Scotland

33. Part 10 of the Income Tax Act 2007, at section 518(2), provides that some of the income of charitable trusts is to be exempt from charges to income tax. In sections 524 to 537 of the 2007 Act, provisions are made for exemption for charitable trusts of their different types of income from charges to income tax. *"Charitable trust"* is defined in section 519 of the 2007 Act to mean a trust established for charitable purposes only.

34. Section 524 of the 2007 Act provides for exemption from tax of profits of *"charitable trades"* carried out by charitable trusts. Section 524(1) of the 2007 Act provides that the income mentioned in section 524(2) of the 2007 Act is not to be taken into account in calculating the total income of a charitable trust if conditions A and B specified in section 524(3) and (4) are met. In section 524(2), it is provided that the income mentioned is not to be taken into account in calculating total income of a charitable trust. Section 524(2) states:

- "(a) the profits of a trade carried on by a charitable trust,*
- (b) amounts treated as adjustment income of a charitable trust under section 228 of ITTOIA 2005² in respect of a trade carried on by the trust, and*
- (c) post-cessation receipts arising from a trade carried on by a charitable trust which are received by the trustees of the trust or to which they are entitled."*

2 Under section 1017 of the Income Tax Act 2007, *"ITTOIA 2005"* means the Income Tax (Trading and Other Income) Act 2005 (c.5).

35. Section 524(3) and (4) of the 2007 Act defines conditions A and B in the following terms:

"(3) Condition A is —

- (a) in the case of the profits of a trade, that the profits are profits of a tax year in relation to which the trade is a charitable trade,*
- (b) in the case of an amount treated as adjustment income, that the amount arises in a tax year in relation to which the trade is a charitable trade, and*
- (c) in the case of a post-cessation receipt, that the trade was a charitable trade in relation to the tax year in which the cessation occurred.*

(4) Condition B is that the profits are, or the amount or post-cessation receipt is, (as the case may be) applied to the purposes of the charitable trust only.

(5) Sections 232(1) and (2), 235 and 236 of ITTOIA 2005 (when adjustment income is treated as arising) apply for the purposes of subsection (3) as they apply for the purposes of Chapter 17 of Part 2 of that Act."

36. The term "*charitable trade*" mentioned above is defined in section 525 of the 2007 Act to mean a trade carried on by a charitable trust in relation to a tax year if throughout the basis period for the tax year the trade is exercised in the course of carrying out a primary purpose of the charitable trust, or the work in connection with the trade is mainly carried out by beneficiaries of the charitable trust. Section 525(2) of the 2007 Act specifies that if a trade is only partly carrying out a primary purpose of the charitable trust and partly otherwise, each part will then be treated as a separate trade. Likewise, under section 525(3) of the 2007 Act, if the work in connection with a trade is carried out partly but not mainly by beneficiaries, the part in connection with which work is carried out by beneficiaries and the other part will then be treated as separate trades.

37. Section 526 of the 2007 Act provides exemption for profits of "*small scale trades*" carried out by charitable trusts. Under section 526(1) of the 2007 Act, the income specified in section 526(2) of the 2007 Act is not to be taken into account in calculating the total income of a charitable trust if conditions A and B as provided in section 526(4) and (5) of the 2007 Act are met. The income specified in section 526(2) of the 2007 Act is as follows:

"(2) The income referred to in subsection (1) is

- (a) the profits of a trade carried on by a charitable trust,*

- (b) *amounts treated as adjustment income of a charitable trust under section 228 of ITTOIA 2005 in respect of a trade carried on by the trust, and*
- (c) *post-cessation receipts arising from a trade carried on by a charitable trust which are received by the trustees of the trust or to which they are entitled."*

38. Conditions A and B mentioned in section 526(1) of the 2007 Act are provided for in section 526(4) and (5) of the 2007 Act in terms as follows:

"(4) Condition A is —

- (a) *in the case of the profits of a trade, that the profits are profits of a tax year in relation to which the condition specified in section 528 (condition as to trading and miscellaneous incoming resources) is met,*
- (b) *in the case of an amount treated as adjustment income, that the amount arises in such a tax year, and*
- (c) *in the case of a post-cessation receipt, that it is received in such a tax year.*

(5) Condition B is that the profits are, or the amount or post-cessation receipt is, (as the case may be) applied to the purposes of the charitable trust only."

39. Profits from *"fund-raising events"* of a charitable trust are also exempt from tax under section 529 of the 2007 Act. Section 529(1) of the 2007 Act provides that the profits of a trade carried on by a charitable trust are not taken into account in calculating its total income so far as the profits arise from a Value Added Tax (VAT)-exempt event. However, for section 529(1) to apply, the profits have to be applied to the purposes of the charitable trust only. Section 529(3) of the 2007 Act defines an event to be a VAT-exempt event if the supply of goods and services by the charitable trust in connection with the event would be exempt from VAT under Group 12 of Schedule 9 to the Value Added Tax Act 1994. Fund-raising events of charities and other qualifying bodies would fall within this category.

40. Profits from *"lotteries"* are exempt from tax under section 530 of the 2007 Act. Section 530(1) of the 2007 Act provides that the profits accruing to a charitable trust from a lottery are not to be taken into account in calculating its total income if conditions A and B are met. Conditions A and B are provided in section 530(2) and (3). They are as follows:

"(2) Condition A is that

- (a) *the lottery is an exempt lottery within the meaning of the Gambling Act 2005 by virtue of Part 1 or 4 of Schedule 11*

to that Act,

- (ab) the lottery is promoted in accordance with a lottery operating licence within the meaning of Part 5 of that Act, or*
- (b) the lottery is promoted and conducted in accordance with Article 133 or 135 of the Betting, Gaming, Lotteries and Amusements (Northern Ireland) Order 1985 (S.I. 1985/1204 (N.I. 11))."*

41. *"Property income"* received by charitable trusts is exempt from taxation under section 531 of the 2007 Act. Section 531(1) of the 2007 Act provides that trading income chargeable to income tax under Part 2 of ITTOIA 2005 as a result of section 261 of that Act, is not to be taken into account in calculating the total income of a charitable trust if the income arises in respect of rents or other receipts from an estate, interest or right in or over land; and the estate, interest or right is vested in any person in trust for a charitable trust or for charitable purposes. Similarly, section 531(2) of the 2007 Act provides that property income chargeable to income tax under Part 3 of ITTOIA 2005 is not taken into account in calculating total income if the income arises in respect of an estate, interest or right in or over land, and the estate, interest or right is vested in any person in trust for a charitable trust or for charitable purposes. Section 531(3) of the 2007 Act provides that section 531(1) to (2A) of the 2007 Act applies so far as the income is applied to charitable purposes only.

42. *"Savings and investment income"* of charitable trusts is exempt from taxation under section 532 of the 2007 Act. Section 532(1) of the 2007 Act provides that the income mentioned in subsection (2) would not be taken into account in calculating the total income of a charitable trust if it is an income of a charitable trust, or if it is required, under an Act, court judgment, charter, trust deed or will, to be applied for charitable purposes only. Section 532(2) of the 2007 Act provides:

"(2) The income referred to in subsection (1) is—

- (a) interest,*
- (b) a dividend or other distribution of a UK resident company,*
- (c) a dividend of a non-UK resident company,*
- (d) an annuity payment under a purchased life annuity,*
- (e) profits on the disposal of deeply discounted securities, or*
- (f) income treated for the purposes of Chapter 10 of Part 4 of ITTOIA 2005 (distributions from unauthorised unit trusts) as received by a unit holder from a scheme to which*

section 547 of that Act applies (unauthorised unit trust schemes)."

Section 532(4) of the 2007 Act, however, provides that subsection (1) mentioned above applies so far as the income is applied to charitable purposes only.

43. Section 533(1) of the 2007 Act provides that "*public revenue dividends on securities*" which are in the name of trustees are not to be taken into account in calculating the total income of a charitable trust if the dividends are applicable and applied only for the repair of a cathedral, college, church or chapel, or a building used only for the purposes of divine worship. Section 533(2) defines "*public revenue dividends*" to mean income from securities which is payable out of the public revenue, or income from securities issued by or on behalf of a government or a public or local authority in a country outside the United Kingdom.

44. Section 534 of the 2007 Act provides tax exemption for "*transactions in deposits*". Section 534(1) of the 2007 Act provides that profits or gains arising to a charitable trust from the disposal of exempt deposit rights are not to be taken into account in calculating its total income. "*Exempt deposit rights*" are defined by section 534(4) of the 2007 Act to mean:

- "(a) a right to receive, with or without interest, a principal amount stated in, or determined in accordance with, the current terms of issue of an eligible debt security, where in accordance with those terms the issue of uncertificated units of the eligible debt security corresponds to the issue of a certificate of deposit,*
- (b) a right to receive the principal amount stated in a certificate of deposit, with or without interest, and*
- (c) an uncertificated right to receive a principal amount, with or without interest, as a result of a deposit of money."*

However, for section 534(1) to apply, the profits or gains have to be applied to charitable purposes only.

45. Section 535 of the 2007 Act provides exemption for "*offshore income gains*". Section 535(1) of the 2007 Act provides that offshore income gains accruing to a charitable trust are not to be taken into account in calculating its total income. However, for section 535(1) to apply, the gain is applicable and applied to charitable purposes only.

46. Section 536 of the 2007 Act provides exemption for certain "*miscellaneous income*". Section 536(1) of the 2007 Act provides that the income mentioned in subsection (3) is not to be taken into account in calculating the total income of charitable trusts if —

- "(a) *it is income of a charitable trust, or*
- (b) it is required, under an Act, court judgment, charter, trust deed or will, to be applied to charitable purposes only."*

The income mentioned in section 536(3) of the 2007 Act is as follows:

- "(a) *royalties and other income from intellectual property that do not fall within Chapter 2 of Part 2 of ITTOIA 2005 (receipts of a trade etc),*
- (b) income derived from a relevant telecommunication right that is not income falling within Chapter 2 of Part 2 of ITTOIA 2005 (receipts of a trade etc),*
- (c) annual payments charged to tax under Chapter 7 of Part 5 of ITTOIA 2005, and*
- (d) relevant foreign distributions."*

Section 536(2) of the 2007 Act provides that section 536(1) applies if the income is applied to charitable purposes only.

47. Section 537 of the 2007 Act provides exemption for income from *"estates in administration"*. Section 537(1) of the 2007 Act provides that where a person liable for income tax on estate income is a trustee of a charitable trust, the estate income will not be taken into account in calculating the total income of the charitable trust. However, section 537(1) of the 2007 Act applies if the estate income is applied to the purposes of the charitable trust only.

Singapore

48. In Singapore, not all charitable organisations are eligible for income tax exemption. Under section 13(1)(zm) of the Income Tax Act (Cap 134), only registered charities or charities exempt from registration can be exempt from income tax.

49. Section 13(1)(zm) of the Income Tax Act (Cap 134) provides that *"the income of any charity registered or exempt from registration under the Charities Act (Cap. 37)"* shall be exempt from tax.

50. Thus, to be eligible for income tax exemption, an organisation has to first register itself as a *"charity"* which is defined in section 2(1) of the Charities Act (Cap 37) as:

"[A]ny institution, corporate or not, which is established for charitable purposes and is subject to the control of the High Court in exercise of the Court's jurisdiction with respect to

charities".

51. The term "*charitable purposes*" mentioned above is defined in section 2(1) of the Charities Act (Cap 37) to mean "*purposes which are exclusively charitable according to the law of Singapore*". Under this definition, the purposes of an organisation claiming exemption from income tax on the ground of it being a charitable organisation have to be "*exclusively*" charitable under the law of Singapore. Any "*non-charitable purpose*", it seems, would have frustrated the claim.

52. As noted above, charities in Singapore are entitled to exemption from income tax only if they have been registered. Registration of charities is provided in section 5(6)(a) of the Charities Act (Cap 37). Under this section, the charity trustees of a charity which has neither been registered nor excepted from registration have to, within three months after the establishment of the charity or such longer period as the Commissioner of Charities may allow, apply for the charity to be registered.

53. Charities in Singapore are also entitled to exemption from property tax. In section 6(6)(c) of the Property Tax Act (Cap 254), it is provided that all buildings or parts of buildings used exclusively for charitable purposes shall be exempted from payment of property tax.

South Africa

54. In South Africa, a "*public benefit organisation*" (PBO) is eligible to exemption from normal tax³ under section 10 of the Income Tax Act 1962 (the 1962 Act). A number of conditions, however, have to be fulfilled before an organisation or an association of persons can become a PBO. These conditions are provided in section 30 of the 1962 Act. They will be considered later in this section.

55. Under section 30(1) of the 1962 Act, a PBO is defined to mean an organisation:

- (a) which is a company formed under section 21 of the Companies Act, or a trust or an association of persons that has been incorporated, formed or established in South Africa; or any branch within South Africa of any company, association or trust incorporated, formed or established in any country other than South Africa that is exempt from tax on income in that other country;
- (b) of which the sole or principal object of the organisation is the carrying on one or more "*public benefit activities*" where:

3 Section 5(1) of the Income Tax Act, 1962 defines "*normal tax*" to mean "*income tax*" for the purposes of the 1962 Act.

"(i) all such activities are carried on in a non-profit manner and with an altruistic or philanthropic intent;

(ii) no such activity is intended to directly or indirectly promote the economic self - interest of any fiduciary or employee of the organisation, otherwise than by way of reasonable remuneration payable to that fiduciary or employee."

56. The term "*public benefit activity*" is defined in section 30(1)(a) and (b) of the 1962 Act to mean:

"(a) any activity listed in Part I of the Ninth Schedule; and

(b) any other activity determined by the Minister from time to time by notice in the Gazette to be of a benevolent nature, having regard to the needs, interests and well - being of the general public."

57. Exemptions from normal tax are provided in section 10(1) of the 1962 Act. Different situations under which tax exemption is granted are provided in the section. Section 10(1)(cN) of the 1962 Act, however, specifically provides for exemption from normal tax for a PBO. It is as follows:

"(1) There shall be exempt from normal tax ...

(cN) the receipts and accruals of any public benefit organisation approved by the Commissioner⁴ in terms of section 30 (3), to the extent that the receipts and accruals are derived -

(i) otherwise than from any business undertaking or trading activity; or

(ii) from any business undertaking or trading activity -

(aa) if the undertaking or activity -

(A) is integral and directly related to the sole or principal object of that public benefit organisation as contemplated in paragraph (b) of the definition of 'public benefit organisation' in section 30;

4 Section 1 of the 1962 Act defines "*Commissioner*" to mean the Commissioner for the South African Revenue Service.

- (B) *is carried out or conducted on a basis substantially the whole of which is directed towards the recovery of cost; and*
 - (C) *does not result in unfair competition in relation to taxable entities;*
- (bb) *if the undertaking or activity is of an occasional nature and undertaken substantially with assistance on a voluntary basis without compensation;*
- (cc) *if the undertaking or activity is approved by the Minister by notice in the Gazette, having regard to-*
 - (A) *the scope and benevolent nature of the undertaking or activity;*
 - (B) *the direct connection and interrelationship of the undertaking or activity with the sole or principal object of the public benefit organisation;*
 - (C) *the profitability of the undertaking or activity; and*
 - (D) *the level of economic distortion that may be caused by the tax exempt status of the public benefit organisation carrying out the undertaking or activity; or*
- (dd) *other than an undertaking or activity in respect of which item (aa), (bb) or (cc) applies and do not exceed the greater of -*
 - (i) *5 per cent of the total receipts and accruals of that public benefit organisation during the relevant year of assessment; or*
 - (ii) *R150 000."*

58. As noted above, under section 10(1)(cN), exemption from normal tax is only granted if the receipts and accruals of the public benefit organisation are approved by the Commissioner in terms of section 30 (3) of the 1962 Act. A number of conditions relating to the management and

operation of the PBO are provided in section 30(3). Section 30(3)(b)(i) and (ii) of the 1962 Act has the effect of preventing the management of the PBO from being controlled by a single person, and its funds from being misused. Section 30(3)(b)(i) and (ii) provides as follows:

"(i) required to have at least three persons, who are not connected persons in relation to each other, to accept the fiduciary responsibility of such organisation and no single person directly or indirectly controls the decision making powers relating to that organisation: Provided that the provisions of this subparagraph shall not apply in respect of any trust established in terms of a will of any person who died on or before 31 December 2003;

(ii) prohibited from directly or indirectly distributing any of its funds to any person (otherwise than in the course of undertaking any public benefit activity) and is required to utilise its funds solely for the object for which it has been established".

The law in other jurisdictions on the cy-près doctrine

1. While the *cy-près* doctrine as applied in Hong Kong is derived from and follows the common law, various overseas jurisdictions have broadened the scope of the doctrine and codified it in legislation. In Chapter 11, we closely examined the statutory model in England and Wales. A number of further overseas models are discussed below as examples of statutory *cy-près* regimes.

Australia

New South Wales

2. In New South Wales, section 11 of the Charitable Trusts Act 1993 (the NSW 1993 Act) provides that, in appropriate circumstances, a trustee is under a duty to secure the application of trust property *cy-près*. Section 11 states:

"A charitable trust places a trustee under a duty, if the case permits and requires the trust property or any part of it to be applied cy pres, to secure its effective use for charitable purposes by taking steps to enable it to be so applied."

3. Section 9 of the NSW 1993 Act, however, extends the occasions under which trust property can be applied *cy-près*. Section 9(1) of the NSW 1993 Act provides that the *cy-près* doctrine may also apply when the original purposes of the charitable trust have *"ceased to provide a suitable and effective method of using the trust property"*. It is important to note that the section does not provide for all the occasions under which trust property may be applied *cy-près*. It merely extends these occasions to cover those specified in section 9(1) of the NSW 1993 Act, which states:

"(1) *The circumstances in which the original purposes of a charitable trust can be altered to allow the trust property or any part of it to be applied cy pres include circumstances in which the original purposes, wholly or in part, have since they were laid down ceased to provide a suitable and effective method of using the trust property, having regard to the spirit of the trust.*

(2) *References in this section to the original purposes of a charitable trust are to be construed, if the application of the trust property or any part of it has been altered or regulated by a scheme or otherwise, as references to the*

purposes for which the trust property are for the time being applicable."

4. As mentioned at the beginning of Chapter 11, for the *cy-près* doctrine to apply, the donor must have "*a general charitable intention*" when the trust was first created. If this cannot be found in the settlement or the will, the court would have no power to allow the trust property to be applied for another purpose which is similar to the purpose expressly provided in the trust. Section 10 of the NSW 1993 Act provides that this general charitable intention of the donor is required for the *cy-près* doctrine to apply:

"(1) This Part does not affect the requirement that trust property can not be applied cy pres unless it is given with a general charitable intention.

(2) However, a general charitable intention is to be presumed unless there is evidence to the contrary in the instrument establishing the charitable trust."

Queensland

5. In Queensland, the situations in which the *cy-près* doctrine is applicable to trust property are provided in section 105 of the Trusts Act 1973. Section 105 provides:

"(1) Subject to subsection (2), the circumstances in which the original purposes of a charitable trust can be altered to allow the property given or part of it to be applied cy pres shall be as follows —

- (a) where the original purposes, in whole or in part —
 - (i) have been as far as may be fulfilled; or*
 - (ii) can not be carried out; or*
 - (iii) can not be carried out according to the directions given and to the spirit of the trust;**
- (b) where the original purposes provide a use for part only of the property available by virtue of the trust;*
- (c) where the property available by virtue of the trust and other property applicable for similar purposes can be more effectively used in conjunction, and to that end can suitably, regard being had to the spirit of the trust, be made applicable to common purposes;*
- (d) where the original purposes were laid down by reference to an area which then was but has since ceased to be a unit for some other purpose, or by*

reference to a class of persons or to an area which has for any reason since ceased to be suitable, regard being had to the spirit of the trust, or to be practical in administering the trust;

- (e) where the original purposes, in whole or in part, have, since they were laid down —
 - (i) been adequately provided for by other means; or*
 - (ii) ceased, as being useless or harmful to the community or for other reasons, to be in law charitable; or*
 - (iii) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the trust, regard being had to the spirit of the trust.**
- (2) Subsection (1) shall not affect the conditions which must be satisfied in order that property given for charitable purposes may be applied cy pres, except in so far as those conditions require a failure of the original purposes.*
- (3) References in subsections (1) and (2) to the original purposes of a trust shall be construed, where the application of the property given has been altered or regulated by a scheme or otherwise, as referring to the purposes for which the property is for the time being applicable."*

South Australia

6. In South Australia, section 69B of the Trustee Act 1936 (the 1936 Act) provides that the purposes for applying trust property may be altered by a trust variation scheme. The section lists out the circumstances under which the purposes for applying the trust property may be altered. Section 69B states:

- "(1) The purposes for which property is required or permitted to be applied in pursuance of a charitable trust may be altered by a scheme (a trust variation scheme) approved under this section in any of the following circumstances:*
 - (a) where the original purposes, in whole or in part —
 - (i) have been as far as possible fulfilled; or*
 - (ii) cannot be carried out, or not according to the directions given and to the spirit of the gift; or**

- (b) *where the original purposes provide a use for part only of the trust property; or*
- (c) *where the trust property could be more effectively used if combined with other property applicable for similar purposes and administered jointly with that property; or*
- (d) *where it is not reasonably practicable having regard to —*
 - (i) *the value of the trust property; or*
 - (ii) *changes in circumstances that have taken place since the constitution of the trust; or*
 - (iii) *any other relevant factor,**to apply the trust property in accordance with the original purposes; or*
- (e) *where the original purposes, in whole or in part —*
 - (i) *have been adequately provided for by other means; or*
 - (ii) *have ceased to be charitable purposes; or*
 - (iii) *have ceased to provide a suitable and effective method of using the trust property."*

7. The term "*original purposes*" referred to in section 69B(1) above is defined in section 69B(2) of the 1936 Act to include the situation where the purposes for which the trust property is to be applied have been altered or regulated by a scheme.

8. Under section 69B(3) of the 1936 Act, a trust variation scheme may be approved by the Supreme Court or the Attorney General, if the value of the trust property does not exceed AUD300,000, or another limit prescribed by regulation. The Supreme Court or the Attorney General, in their capacity as the "*relevant authority*" in considering trustees' applications for trust variation schemes have to take into account the following factors listed in section 69B(6) of the 1936 Act:

"(6) If the relevant authority is satisfied, on application under this section, that the variation of the terms of a trust proposed in a trust variation scheme —

- (a) *accords, as far as reasonably practicable, with the spirit of the trust; and*
- (b) *is justified in the circumstances of the particular case,*

the relevant authority may approve the trust variation scheme and the approved scheme prevails over

inconsistent provisions of a relevant instrument or declaration of trust."

Tasmania

9. In Tasmania, the variation of the purposes of a charitable trust is provided for in section 5(2) and (3) of the Variation of Trust Act 1994 (the 1994 Act). These provisions state:

"(2) If it has become impossible, impracticable or inexpedient to carry out the original purposes of a trust for charitable purposes in whole or in part, an application may be made for a variation of those purposes by a scheme approved under this Part.

(3) Without limiting the generality of subsection (2), an application for a variation of trust may be made in the following circumstances:

- (a) if the original purposes, in whole or in part –
 - (i) have been as far as possible fulfilled; or*
 - (ii) cannot be carried out, either at all or according to the directions given or to the spirit of the gift;**
- (b) if the original purposes provide a use for a part only of the trust property;*
- (c) if the trust property could be used more effectively if combined with other property applicable for similar purposes and administered jointly with that property;*
- (d) if it is not reasonably practicable to apply the trust property in accordance with the original purposes having regard to –
 - (i) the value of the trust property; or*
 - (ii) changes in circumstances; or*
 - (iii) any other relevant factor;**
- (e) if the original purposes, in whole or in part –
 - (i) have been adequately provided for by other means; or*
 - (ii) have ceased to be charitable purposes; or*
 - (iii) have ceased to provide a suitable and effective method of using the trust property."**

10. Section 5(4) of the 1994 Act provides that where a general charitable intention is required as a condition for the variation of the purposes

of a charitable trust, such a requirement will not be affected by the terms of the section.

Victoria

11. In Victoria, the occasions for applying trust property *cy-près* are provided in section 2 of Charities Act 1978 (the 1978 Act), which states:

"(1) Subject to sub-section (2), the circumstances in which the original purposes of a charitable gift can be altered to allow the property given or part of it to be applied cy prè s shall be as follows —

- (a) where the original purposes, in whole or in part —
 - (i) have been as far as may be fulfilled; or*
 - (ii) cannot be carried out, or not according to the directions given and to the spirit of the gift; or**
- (b) where the original purposes provide a use for part only of the property available by virtue of the gift; or*
- (c) where the property available by virtue of the gift and other property applicable for similar purposes can be more effectively used in conjunction, and to that end can suitably, regard being had to the spirit of the gift, be made applicable to common purposes; or*
- (d) where the original purposes were laid down by reference to an area which then was but has since ceased to be a unit for some other purpose, or by reference to a class of persons or to an area which has for any reason since ceased to be suitable, regard being had to the spirit of the gift, or to be practical in administering the gift; or*
- (e) where the original purposes, in whole or in part, have, since they were laid down —
 - (i) been adequately provided for by other means; or*
 - (ii) ceased, as being useless or harmful to the community or for other reasons, to be in law charitable; or*
 - (iii) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the gift, regard being had to the spirit of the gift.**

- (2) *Sub-section (1) shall not affect the conditions which must be satisfied in order that property given for charitable purposes may be applied cy près, except in so far as those conditions require a failure of the original purposes.*
- (3) *References in this section to the original purposes of a gift shall be construed, where the application of the property given has been altered or regulated by a scheme, by or under an Act or otherwise, as referring to the purposes for which the property is for the time being applicable."*

12. In some cases, the identity of donors might be unknown. This occurs when money is received from street collections. Also, donors might have disclaimed the right to have the property or the remaining portion of the property reverted back to them. Section 3 of the 1978 Act provides for these circumstances as follows:

- "(1) *Property given for specific charitable purposes which fail shall be applicable cy près as if given with a general charitable intention, where it has been given —*
 - (a) *by a donor who, after such advertisements and inquiries as are reasonable, cannot be identified or cannot be found; or*
 - (b) *by a donor who has executed a written disclaimer of his right to have the property returned.*
- (2) *For the purposes of this section property shall be conclusively presumed (without any advertisement or inquiry) to have been given by donors who cannot be identified, in so far as it consists —*
 - (a) *of the proceeds of cash collections made by means of collecting boxes or by other means not adapted for distinguishing one gift from another; or*
 - (b) *of the proceeds of any lottery, competition, entertainment, sale or similar money-raising activity, after allowing for property given to provide prizes or articles for sale or otherwise to enable the activity to be undertaken.*
- (3) *The court may by order direct that property not falling within sub-section (2) shall for the purposes of this section be treated (without any advertisement or inquiry) as having been given by donors who cannot be identified, where it appears to the court either —*

- (a) *that it would be unreasonable, having regard to the amounts likely to be returned to the donors, to incur expense with a view to returning the property; or*
 - (b) *that it would be unreasonable, having regard to the nature, circumstances and amount of the gifts, and to the lapse of time since the gifts were made, for the donors to expect the property to be returned.*
- (4) *Where property is applied cy près by virtue of this section, the donor shall be deemed to have parted with all his interest at the time when the gift was made; but where property is so applied as having been given by donors who cannot be identified or cannot be found, and is not so applied by virtue of sub-section (2) or (3) —*
- (a) *the scheme shall specify the total amount of that property; and*
 - (b) *the donor of any part of that amount shall be entitled, if he makes a claim not later than twelve months after the date on which the scheme is made, to recover from the charity for which the property is applied a sum equal to that part, less any expenses properly incurred by the charity trustees after that date in connexion with claims relating to his gift; and*
 - (c) *the scheme may include directions as to the provision to be made for meeting any such claim."*

13. Section 3(5) of the 1978 Act provides that a charitable purpose shall be deemed to "fail" where *"any difficulty in applying property to those purposes makes that property or the part not applicable cy près available to be returned to the donors."*

14. Section 3(6) of the 1978 Act extends the definitions of "a donor" and "property" beyond that of the original donor and the property originally given to the trust. Section 3(6) provides that *"... except in so far as the context otherwise requires, references to a donor include persons claiming through or under the original donor, and references to property given include the property for the time being representing the property originally given or property derived from it."*

Western Australia

15. In Western Australia, property held in trust for a charitable purpose may be disposed of for other charitable purposes in the situations listed under section 7 of the Charitable Trusts Act 1962 (the 1962 Act). Section 7 provides:

"(1) Subject to the provisions of subsection (3), where any property or income is given or held upon trust, or is to be applied, for any charitable purpose, and —

- (a) it is impossible, impracticable or inexpedient to carry out that purpose; or*
- (b) the amount available is inadequate to carry out that purpose; or*
- (c) that purpose has been effected already; or*
- (d) that purpose is illegal or useless or uncertain,*

then (whether or not there is any general charitable intention) the property and income, or any part or residue thereof, or the proceeds of sale thereof, shall be disposed of for some other charitable purpose, or a combination of such purposes, in accordance with a scheme approved under this Part.

(2) Subject to the provisions of subsection (3), where any property or income is given or held upon trust, or is to be applied, for any charitable purpose, and the property or income that has accrued or will accrue is more than is necessary for the purpose, then (whether or not there is any general charitable intention) any excess property or income or proceeds of sale may be disposed of for some other charitable purpose, or a combination of such purposes, in accordance with a scheme approved under this Part. "

16. As noted earlier, the *cy-près* doctrine at common law (and, for example, under the statutory regime in New South Wales discussed above) requires there to have been a "*general charitable intention*" on the part of the donor when the trust was first created before the doctrine may apply. However, section 7 of the 1962 Act does not require such a general charitable intention.

17. Further, where the trust property does not fall within any of the occasions set out in section 7(1) and (2) of the 1962 Act, the property can still be disposed of for a charitable purpose other than that set out when the trust was first created. Section 7B of the 1962 Act provides that this is permissible

if the charitable purpose of the trust could be more effectively carried out by combining the property and income with other property and income given or held on trust, or to be applied, for a similar purpose. Section 7B states:

"(1) *Where —*

(a) *any property or income is given or held upon trust, or is to be applied, for any charitable purpose; and*

(b) *the charitable purpose could be more effectively carried out if the property and income were combined with other property and income given or held on trust, or to be applied, for a similar purpose,*

then the property and income may be combined, and jointly administered and applied, with that other property and income in accordance with a scheme approved under this Part. "

Ireland

18. In Ireland, under the Charities Act 1961 (the 1961 Act), the original purposes of a charitable gift may be altered so as to enable the gift to be applied *cy-près*. In appropriate circumstances, trustees in a charitable trust are under a legal duty to ensure that the trust property is to be applied *cy-près*. This is provided in section 47(4) of the 1961 Act under which a charitable trustee is required to secure the effective use of the charitable property. In appropriate circumstances, trustees have to take steps to ensure that the property or some part of it is to be applied *cy-près*. Section 47(4) provides as follows:

"(4) *It is hereby declared that a trust for charitable purposes places a trustee under a duty, where, the case permits and requires the property or some part of it to be applied cy-près, to secure its effective use for charity by taking steps to enable it to be so applied."*

19. The situations in the 1961 Act under which the original purposes of a charitable gift may be altered are not confined to the limited circumstances where the original purposes have been fulfilled, or cannot be carried out. Rather, under section 47(1) of the 1961 Act, other circumstances such as where only part of the gift has been used to fulfill the original purposes, or the gift can be better used in conjunction with other property, for example, are also provided to allow the original purposes to be altered for the purpose of applying *cy-près* to the charitable property. The circumstances, in their totality, for altering the original purposes of a charitable gift are provided in section 47(1) and (2) of the 1961 Act, the terms of which are as follow:

"(1) Subject to subsection (2), the circumstances in which the original purposes of a charitable gift may be altered to allow the property given or part of it to be applied cy-près shall be as follow –

- (a) where the original purposes, in whole or in part –
 - (i) have been as far as may be fulfilled; or*
 - (ii) cannot be carried out, or cannot be carried out according to the directions given and to the spirit of the gift; or**
- (b) where the original purposes provide a use for part only of the property available by virtue of the gift; or*
- (c) where the property available by virtue of the gift and other property applicable for similar purposes can be more effectively used in conjunction, and to that end can suitably, regard being had to the spirit of the gift, be made applicable to common purposes; or*
- (d) where the original purposes were laid down by reference to an area which then was but has since ceased to be a unit for some other purpose, or by reference to a class of persons or to an area which has for any reason since ceased, either to be suitable, regard being had to the spirit of the gift, or to be practical in administering the gift; or*
- (e) where the original purposes, in whole or in part, have, since they were laid down –
 - (i) been adequately provided for by other means; or*
 - (ii) ceased, as being useless or harmful to the community or for other reasons, to be in law charitable; or*
 - (iii) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the gift, regard being had to the spirit of the gift.**

(2) Subsection (1) shall not affect the conditions which must be satisfied in order that property given for charitable purposes may be applied cy-près, except in so far as those conditions require a failure of the original purposes."

20. Where property has been given for a "non-charitable purpose" which fails,¹ section 48(1) of the 1961 Act provides that it can still be deemed

¹ Section 48 of the 1961 Act –
"*... (5) For the purposes of this section, purposes shall be deemed to fail where any difficulty in applying property to those purposes makes that property, or, in the case of property to be applied for charitable purposes, the part not applicable cy-près under section 47, available to be returned to the donors. ...*"

as given for a "*charitable purpose*" and the property can thus be applied *cy-près*. This is permissible only if either of the conditions in subsection (1)(a) or (1)(b) has been satisfied. Section 48(1) of the 1961 Act provides as follows:

"(1) Property given for specific charitable or non-charitable purposes which fail shall be applicable cy-près by a Court of competent jurisdiction as if given for charitable purposes generally, where it belongs —

- (a) to a donor who, after such advertisements and inquiries as are reasonable, cannot be identified or cannot be found; or*
- (b) to a donor who has executed a written disclaimer of his right to have the property returned,*

but in applying cy-près property given for specific non-charitable purposes regard shall be had to the wishes of the trustees or other persons in charge of the property."

21. Section 48(2) of the 1961 Act provides that, for the purposes of the section, property shall be conclusively presumed to belong to donors who cannot be identified, and no advertisement or inquiry is required, if the property consists:

- "(a) of the proceeds of cash collections made by means of collecting boxes or by other means not adapted for distinguishing one gift from another; or*
- (b) of the proceeds of any lottery, competition, entertainment, sale or similar money-raising activity, after allowing for property given to provide prizes or articles for sale or otherwise to enable the activity to be undertaken."*

22. Section 48(3) of the 1961 Act provides that the Court may order that property not falling within subsection (2) above shall be treated (without any advertisement or inquiry) as belonging to donors who cannot be identified, where it appears to the Court:

- "(a) that it would be unreasonable, having regard to the amounts likely to be returned to the donors, to incur expense with a view to returning the property; or*
- (b) that it would be unreasonable, having regard to the nature, circumstances and amount of the gifts, and to the lapse of time since the gifts were made, for the donors to expect the property to be returned."*

23. Where property is applied *cy-près* by virtue of section 48 of the 1961 Act, the donor shall be deemed to have parted with all his interest at the time when the gift was made, as provided in subsection (4). However where the property is so applied as belonging to donors who cannot be identified or cannot be found, and is not so applied by virtue of subsection (2) or (3) as mentioned above, subsection (4) further provides that:

- "(a) the scheme shall specify the total amount of that property;
and*
- (b) the donor of any part of that amount shall be entitled, if he makes a claim not later than twelve months after the date on which the scheme is made, to recover from the charity for which the property is applied a sum equal to that part, less any expenses properly incurred by the charity trustees after that date in connection with claims relating to his gift; and*
- (c) the scheme may include directions as to the provision to be made for meeting any such claim."*

New Zealand

24. In New Zealand, variations of the purposes in a charitable trust are provided for in the Charitable Trusts Act 1957 (the 1957 Act). Section 32 of the 1957 Act deals with disposal of property in charitable trusts; whereas section 40 deals with disposal of charitable funds raised by voluntary contribution.

25. Section 32 of the 1957 Act provides that where property or income is held upon trust for a charitable purpose, and:

- it has become impossible or impracticable or inexpedient to carry out that purpose,
- the amount available is inadequate to carry out that purpose,
- that purpose has been effected already,
- that purpose is illegal or useless or uncertain, or
- the property or the income which has accrued or will accrue is more than necessary for that purpose;

then, regardless of whether there is any general charitable intention or not, the property and income (and in the case of the accrued income scenario, any excess property or income or proceeds of sale) can be disposed of for some other charitable purpose.

26. Section 32(3) of the 1957 Act sets out the situations in which disposal of trust property pursuant to section 32(1) and (2) of the 1957 Act is

not allowed. These include where *"in accordance with any rule of law the intended gift thereof would otherwise lapse or fail and the property or income would not be applicable for any other charitable purpose"* and where *"the property or income can be disposed of under Part 4 of this Act."*

27. Part 4 (sections 38 to 50) of the 1957 Act governs charitable funds raised by voluntary contribution and section 38 provides the following definition of *"charitable purpose"* in this context:

*"In this Part of this Act, unless the context otherwise requires, the term **Charitable purpose** means every purpose which in accordance with the law of New Zealand is charitable; and includes the following purposes, whether or not they are beneficial to the community or to a section of the community:*

- (a) The supply of the physical wants of sick, aged, destitute, poor, or helpless persons, or of the expenses of funerals of poor persons;*
- (b) The education (physical, mental, technical, or social) of the poor or indigent or their children;*
- (c) The reformation of offenders, prostitutes, drunkards, or drug addicts;*
- (d) The employment and care of discharged offenders;*
- (e) The provision of religious instruction, either general or denominational;*
- (f) The support of libraries, reading rooms, lectures, and classes for instruction;*
- (g) The promotion of athletic sports and wholesome recreations and amusements;*
- (h) Contributions towards losses by fire and other inevitable accidents;*
- (i) Encouragement of skill, industry, and thrift;*
- (j) Rewards for acts of courage and self sacrifice; and*
- (k) The erection, laying out, maintenance, or repair of buildings and places for the furtherance of any of the purposes mentioned in this section."*

28. Section 39 of the 1957 Act defines the types of money to which Part 4 applies. Under section 39 of the 1957 Act, Part 4 applies:

"... to cases in which money has been raised for any charitable purpose by way of voluntary contribution, or by the sale of goods voluntarily contributed, or as the price of admission to any entertainment, or in any other manner of voluntary contribution, whether or not the money has been invested pending application for that charitable purpose."

29. In respect of charitable funds raised under Part 4 of the 1957 Act, the situations where these funds may be disposed of for other charitable purposes are provided in section 40, which states:

"(1) In any case to which this Part of this Act applies —

- (a) If it becomes impossible or impracticable or inexpedient to carry out the charitable purpose for which the money raised is held, or if the amount available is inadequate to carry out that purpose, or that purpose has been effected already, or that purpose is illegal or useless or uncertain; and*
- (b) If the money has not been entirely applied, and is not in the course of being applied, for the charitable purpose for which it is held at any time after the expiration of one year after the contribution or receipt of any part of the money or the sale of any part of the goods —*

then, whether or not there is any general charitable intention, the money and the income therefrom or any part of residue thereof shall be disposed of for some other charitable purpose, or a combination of such purposes, in the manner and subject to the provisions hereafter contained in this Part of this Act.

- (2) In any case to which this Part of this Act applies, if the money raised and the income which has accrued or will accrue therefrom or any residue thereof is more than is necessary to carry out the original charitable purpose, any excess money or income may be disposed of for some other charitable purpose, or a combination of such purposes, in the manner and subject to the provisions hereafter contained in this Part of this Act."*

Scotland

30. In Scotland, variation of the use of trust property held by a charity can be effected by a *"reorganisation scheme"*. The Charities and Trustee Investment (Scotland) Act 2005 (the 2005 Act) provides that application for approval to reorganise a charity under a reorganisation scheme

can be made by a charity to the Office of the Scottish Charity Regulator (OSCR) which is also capable, of its own accord or on the application of the relevant charity trustees, to apply to the Court of Session for the approval of a reorganisation scheme.

31. A reorganisation scheme under the 2005 Act involves variation of the charity's constitution, transfer of the charity's property and amalgamation of charities. The scheme is explained in section 42(3) of the 2005 Act as follows:

"(3) A 'reorganisation scheme' is a scheme for —

- (a) variation of the constitution of the charity (whether or not in relation to its purposes),*
- (b) transfer of the property of the charity (after satisfaction of any liabilities) to another charity (whether or not involving a change to the purposes of the other charity), or*
- (c) amalgamation of the charity with another charity."*

32. An application made by a charity for its reorganisation is governed by section 39 of the 2005 Act, while an application made by the OSCR is governed by section 40 of the Act. An application involving the OSCR's approval of a reorganisation scheme will only be approved if the reorganisation conditions provided in the 2005 Act have been satisfied. These conditions are defined in section 42(2) of the 2005 Act in terms as follows:

"(2) The 'reorganisation conditions' are —

- (a) that some or all of the purposes of the charity —*
 - (i) have been fulfilled as far as possible or adequately provided for by other means,*
 - (ii) can no longer be given effect to (whether or not in accordance with the directions or spirit of its constitution),*
 - (iii) have ceased to be charitable purposes, or*
 - (iv) have ceased in any other way to provide a suitable and effective method of using its property, having regard to the spirit of its constitution,*
- (b) that the purposes of the charity provide a use for only part of its property, and*

- (c) *that a provision of the charity's constitution (other than a provision setting out the charity's purposes) can no longer be given effect to or is otherwise no longer desirable."*

33. Section 40(1) of the 2005 Act provides:

"(1) Where OSCR considers –

- (a) *that any of the reorganisation conditions is satisfied in relation to a charity,*
- (b) *and that a reorganisation scheme proposed by it or by the charity trustees of the charity will –*
 - (i) *where the condition satisfied is that set out in paragraph (a) or (b) of section 42(2), enable the resources of the charity to be applied to better effect for charitable purposes consistently with the spirit of its constitution, having regard to changes in social and economic conditions since it was constituted, or*
 - (ii) *where the condition satisfied is that set out in paragraph (c) or (d) of that section, enable the charity to be administered more effectively,*

OSCR may, of its own accord or on the application of the charity trustees of the charity, apply to the Court of Session for approval of the scheme."

34. As noted earlier, the OSCR may of its own accord or on the application of the charity trustees of the charity, apply to the Court of Session for approval of the reorganisation scheme. The Court of Session may approve the proposed reorganisation scheme if it considers that the matters set out in paragraphs (a) and (b) of section 42(2) are satisfied in relation to the charity to which the application relates. Section 42(4) of the 2005 Act provides that nothing in section 40 of the 2005 Act would affect the power of the Court of Session to approve a *cy-près* scheme in relation to a charity.

South Africa

35. In South Africa, although trustees can still rely on the common law governing the application of the *cy-près* doctrine to vary the original purposes of a charitable trust, the enactment of the Trust Property Control Act

57 of 1988 (the 1988 Act) has provided another route through which the purposes of a trust can be varied.

36. Section 13 of the 1988 Act provides that where any provision of a trust document has brought about consequences which are beyond the contemplation or foresight of the founder of the trust, the court may vary the provision to bring about a just result. The text of section 13 states:

"If a trust instrument contains any provision which brings about consequences which in the opinion of the court the founder of a trust did not contemplate or foresee and which-

- (a) hampers the achievement of the objects of the founder; or*
- (b) prejudices the interests of beneficiaries; or*
- (c) is in conflict with the public interest,*

the court may, on application of the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust."

**The law in other jurisdictions on
the establishment of a charity commission
or equivalent body**

Australia

1. As discussed earlier, there is no single regulator for charities in Australia. The Australian Taxation Office serves as the closest body to a national regulator of charitable organisations. Its powers include managing and shaping tax, excise and superannuation systems that fund services for Australians.

Canada

2. Similar to the position in Australia, supervision of charities is the responsibility of the federal taxing authority, the Canada Revenue Agency, which is seen as the primary regulator of charities. There is no single regulator responsible for the supervision and monitoring of charities.

England and Wales

3. Prior to the establishment of the Charity Commission for England and Wales, charitable activities in England and Wales were regulated by the Charity Commissioners for England and Wales. Under the recently inserted section 1A of the Charities Act 1993 (inserted by the Charities Act 2006),¹ the office of the Commissioners was abolished and the functions of the Commissioner were transferred to the Commission, which is now the official body responsible for regulating charities in England and Wales.

4. Under a number of provisions included in the 1993 Act, the Commission is provided with statutory powers to investigate into mismanagement in charities; to suspend and/or remove from office persons in the charities who are responsible for the mismanagement; and to ensure that funds raised by charities are used for the purposes for which they are donated.

5. As we shall see in the paragraphs that follow, these powers conferred upon the Commission, together with its clearly stated objectives,

¹ It should be noted that a new Charities Bill has been put before the UK Parliament in March 2011, the object of which is to consolidate the Charities Act 1993 and other enactments relating to charities. As part of the consolidation, the Bill has included provisions from the Recreational Charities Act 1958, the Charities Act 1993 and the Charities Act 2006, leading to the repeal of the former two Acts and some sections (sections 1 to 9 and 11 to 44) and some Schedules of the Charities Act 2006.

are directly relevant to the regulation and control of the activities of English charities.

Objectives of the Commission

6. The objectives, functions and duties of the Charity Commission are respectively provided in sections 1B, 1C and 1D of the 1993 Act. The five objectives of the Charity Commission, are as follows:

- (a) The public confidence objective.
- (b) The public benefit objective.
- (c) The compliance objective.
- (d) The charitable resources objective.
- (e) The accountability objective.

7. These five objectives set out in clear and unequivocal terms the purposes which the Commission is expected to serve. These objectives highlight the regulatory role of the Commission in supervising the various activities carried out by the charitable organisations in England and Wales. These objectives are the cornerstones upon which the Commission's functions and duties are founded.

8. The regulatory function of the Commission is facilitated by the compliance objective, under which the Commission is tasked to promote amongst charity trustees greater compliance with their legal obligations when managing their charitable organisations. Compliance on the part of the charity trustees with their legal obligation is necessary for the fulfilment of the accountability objective under which the Commission is required to ensure that charities are accountable to donors, beneficiaries and the general public. As we have examined earlier in Chapter 8 and Annex 4 of this paper, the Commission is empowered by legislation to examine the accounts of charities, so investigation of problematic charities can be carried out by the Commission. If misconduct or mismanagement is found in the administration of the charity, the Commission may suspend or remove the relevant persons from managing the charity, or order any property held by the charity to be vested in an official custodian instead.

9. Under the public confidence objective, the Commission is required to work to increase public trust and confidence in charities. The charitable resources objective requires the Commission to promote a more effective use of charitable resources, while the public benefit objective calls for the Commission to promote awareness and understanding of the operation

of the "*public benefit requirement*" which is defined in section 1B(4) of the 1993 Act.²

General functions and duties of the Commission

10. The functions and duties of the Commission are to ensure that the management of the charities and the conduct of their various fundraising activities are properly carried out by the charity trustees and all responsible personnel of the charities; to redress the problems arising from misconduct and mismanagement of the charities; and to ensure that charity funds have been properly used.

11. The general functions of the Commission are stated in section 1C(2) of the 1993 Act. Under this section, the Commission is authorised to determine whether an institution is a charity or not. It also has the functions to encourage and to facilitate the better administration of charities; to identify and to investigate misconduct in and mismanagement of charities; to take appropriate remedial or protective action to redress the problem; and to determine in public charitable collections whether public collections certificates should be issued and remain in force. The Commission is also required under this section to maintain an accurate and up-to-date register of charities.

12. In performing its functions, the Commission is specifically required by legislation to adopt a moderate and sensitive approach so as not to discourage any innovation by or on behalf of charities. Accordingly, section 1D(2)2 of the 1993 Act provides that the Commission is under a general duty whilst in the performance of its functions to act in a way which is compatible with the encouragement of all forms of charitable giving, and voluntary participation in charity work. Section 1D(2)4 of the 1993 Act provides as follows:

"In performing its functions the Commission must, so far as relevant, have regard to the principles of best regulatory practice (including the principles under which regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed)."

2 The "*public benefit requirement*" is defined by section 1B(4) of the 1993 Act to mean the requirement in section 2(1)(b) of the Charities Act 2006 that a purpose falling within section 2(2) of that Act must be for the public benefit if it is to be a charitable purpose. Under section 2(1)(b) of the Charities Act 2006, a charitable purpose in England and Wales is a purpose which is for public benefit. Section 2(1)(a) of the Charities Act 2006, however, provides that for the purposes of the law of England and Wales, a charitable purpose is a purpose which falls within subsection (2). Subsection (2) in turn provides that, "[a] purpose falls within this subsection if it falls within any of the following descriptions of purposes ...". Examples of some of the descriptions mentioned in subsection (2) include the prevention or relief of poverty, the advancement of education, religion, health or the saving of lives, etc.

Register of charities

13. As noted above, the Commission is required to keep an accurate and up-to-date register of charities. Section 3(1) of the 1993 Act provides that *"[t]here shall continue to be a register of charities, which shall be kept by the Commission."* Subsection (3) provides that the register shall contain the name of every charity registered, and such other information and particulars about the charity as the Commission thinks fit.

14. Section 3A(1) of the 1993 Act provides that every charity must be registered in the register of charities unless it is not so required under subsection (2) which provides that charities not required to be registered include exempt charities; charities excepted by Commission's order or by regulations made by the Minister; and charities whose gross income do not exceed £5,000.

15. Institutions appearing on the register of charities are presumed to be charities, and the presumption is absolute and irrebuttable. Section 4(1) of the 1993 Act provides:

"Any institution shall for all purposes other than rectification of the register be conclusively presumed to be or to have been a charity at any time when it is or was on the register of charities."

16. Where a charity required to register has not done so, section 3B of the Act provides that the charity trustees are under a duty to apply to the Commission for the charities to be registered; to supply to the Commission copies of the charity trusts or particulars of them, and such other documents or information as the Commission may require for the application.

17. For a charity that has been registered, the trustees are under a duty pursuant to section 3B(3) of the 1993 Act to notify the Commission if *"...the institution ceases to exist, or if there is any change in its trusts or in the particulars of it entered in the register"*. This helps to prevent unscrupulous solicitation of donation in the name of charities which no longer exist.

18. The requirement that every charity, save those that fall within statutory exceptions, has to be registered is indeed significant. The general public can conclusively presume from seeing the name of an organisation appearing on the register of charities that it is a charity which is subject to regulation and control by the Commission. This helps to increase public trust and confidence in charities and in the fundraising activities they are carrying out.

The Commission's power to institute inquiries

19. Section 8 of the 1993 Act provides that, save for any exempt charity, the Commission may institute inquiries on charities. In the inquiry, the Commission may direct any person to furnish accounts and written

statements relevant to the inquiry. The Commission may also direct any person to provide written answers to any questions or inquiries made to him. The person may also be directed by the Commission to verify accounts, statements or answers by statutory declaration.

20. In the inquiries mentioned above, the Commission may also direct any person to furnish copies of documents under his control or custody, and to verify the copied documents by statutory declaration. The inquiry results and report may be printed and published by the Commission.

21. The investigative power conferred upon the Commission in the course of an inquiry is significant. Accounts and written statements, or persons involved in a fundraising activity suspected of being mismanaged are all subject to close scrutiny by the Commission. This power to institute inquiries has helped to promote greater compliance on the part of the charity trustees with their legal obligations when managing their charities.

Documents, records and information of use to the Commission

22. When the Commission is discharging any of its functions, section 9(1) of the 1993 Act provides that it may order any person to furnish it with any information relating to any charity that is in the possession of the person; or to require copies or extracts of documents which are relating to any charity and which are in the person's custody or control to be furnished to the Commission.

23. Section 10 of the 1993 Act provides that public authorities may disclose information to the Commission if the disclosure would enable or assist the Commission to discharge its functions.

24. Similarly, under section 10A of the 1993 Act, to assist a relevant public authority to discharge its functions, the Commission may disclose to it any information received by the Commission in connection with any of its functions.

25. Section 11 of the 1993 Act provides that it is an offence for a person to supply to the Commission information which is false or misleading in a material particular.

26. These powers conferred upon the Commission to request and to receive materials which would facilitate the discharge of the Commission's functions and duties are extremely important, as anyone relating to a charity which is problematic, or is under an inquiry, may be asked and/or ordered by the Commission to make available to it the information and documents that are necessary for the investigative work. The provision making it an offence to supply false or misleading information to the Commission would deter misleading the Commission through such means.

Protection of charities

27. In the course of the inquiry, where misconduct or mismanagement is found in the charity, or it is necessary and desirable to protect the charity's property, or to secure a proper application for the purposes of the charity of that property or of property coming to the charity, the Commissioner may, under section 18(1)(b) of the 1993 Act, deal with the charity in the following manner:

- (i) suspend any trustee, charity trustee, officer, agent or employee of the charity from the exercise of his office or employment pending consideration being given to his removal;
- (ii) appoint additional charity trustees necessary to administer the charity;
- (iii) vest the property held by or in trust for the charity in the official custodian;
- (iv) order any person holding the charity property not to part with it unless the Commission approves;
- (v) order any debtor of the charity not to pay to the charity without the approval of the Commission;
- (vi) by order restrict the transactions which may be entered into, or the nature or amount of the payment which may be made, in the administration of the charity without the approval of the Commission; and
- (vii) order the appointment of an interim manager and manager to handle the property and affairs of the charity.

28. If it is discovered in the inquiry that there is misconduct or mismanagement in the administration of the charity, and that it is necessary or desirable to protect the charity's property or to secure a proper application for the purposes of the charity of that property or of property coming to the charity, the Commission may, pursuant to section 18(2)(b)(i) of the 1993 Act, order the removal of any trustee, charity trustee, officer, agent or employee of the charity that is responsible for the misconduct or mismanagement.

29. Thus, for example, in the course of an inquiry where a charity trustee responsible for a fundraising activity is found to have misused the funds raised, the trustee can be suspended or removed from office under section 18 of the 1993 Act. The same applies to the other officers, agent or employees of the charity.

Implementation of cy-près and dissolution of charities by the Commission

30. The Commission or the court has the power to make schemes for the application of property *cy-près* by providing for the property to be

applied for such charitable purposes and by or on trust for such other charity, as it considers appropriate. The Commission is also empowered under section 61 of the 1993 Act to make an order to dissolve an incorporated body upon situations, such as –

- "(a) that an incorporated body has no assets or does not operate, or*
- (b) that the relevant charity in the case of an incorporated body has ceased to exist, or*
- (c) that the institution previously constituting, or treated by them as constituting, any such charity has ceased to be, or (as the case may be) was not at the time of the body's incorporation, a charity, or*
- (d) that the purposes of the relevant charity in the case of an incorporated body have been achieved so far as is possible or are in practice incapable of being achieved."*

Commission's guidance to charities

31. In the above discussion, the different objectives, functions, duties and powers of the Commission are set out for the purpose of showing that the Commission has been given the necessary statutory authority to oversee, regulate and control the activities of the charitable organisations in England and Wales. Certainly, the fundraising activities of the English charities are also within these statutory controls.

32. As mentioned above, one of the statutory objectives of the Commission is to promote amongst charity trustees greater compliance with their legal obligations when managing their charitable organisations. A number of different sets of guidance have been issued by the Commission for such a purpose. In the sets of guidance issued by the Commission, charities are advised, amongst other things, on their legal obligations arising from the fundraising activities carried out by them. Many of these legal obligations come from the statutory provisions mentioned earlier, and they are expressed in the guidance in easily understood terms for the compliance of those responsible for running the charities.

Ireland

33. In 2009, the Charities Regulatory Authority was established under section 13 of the Irish Charities Act 2009. Schedule 1 to the Act provides in detail for the establishment of the Charities Regulatory Authority. The Authority is a body corporate with perpetual succession and has the power to sue and be sued in its corporate name. With the consent of the Minister for Community, Rural and Gaeltacht Affairs and the Minister for

Finance, it has the power to acquire, hold and dispose of land, an interest in land and of any other property.

34. The general functions of the Authority include –

- (a) to increase public trust and confidence in the management and administration of charitable trusts and charitable organisations;
- (b) to promote compliance by charity trustees with their duties in the control and management of charitable trusts and charitable organisations;
- (c) to promote the effective use of the property of charitable trusts or charitable organisations;
- (d) to ensure the accountability of charitable organisations to donors and beneficiaries of charitable gifts and the public;
- (e) to promote understanding of the requirement that charitable purposes confer a public benefit;
- (f) to establish and maintain a register of charitable organisations;
- (g) to ensure and monitor compliance by charitable organisations with the Charities Act 2009;
- (h) to carry out investigations in accordance with the Act;
- (i) to encourage and facilitate the better administration and management of charitable organisations by the provision of information or advice;
- (j) to carry on such activities or publish such information (including statistical information) concerning charitable organisations and charitable trusts; and
- (k) to provide information (including statistical information) or advice, or make proposals, to the Minister on matters relating to the functions of the Authority.

35. One of the major functions of the Authority is to establish and maintain a register of charitable organisations and to monitor and ensure compliance by charitable organisations with the Irish Charities Act 2009. (Under section 39 of the Act, the Authority shall, after consultation with the Revenue Commissioners, establish and maintain a register of charitable organisations in such form as it considers appropriate, including in electronic form.)

36. Under section 52 of the Act, the charity trustees of a charitable organisation are required to prepare and submit to the Authority a report in

respect of its activities in that financial year not later than ten months after the end of each financial year. Under section 53 of the Act, the Authority may direct a charitable organisation in writing to provide the Authority with such information as it may reasonably require to enable it to perform its functions. The Authority will make available for inspection by members of the public all annual reports and documents kept by the Authority at all reasonable times and at such place or places as it determines.

37. Under section 55(4) of the Act, the Authority establishes and maintains a register of all persons who have ceased to hold the position of charity trustee of a charitable organisation. Such register is made available for inspection by members of the public at all reasonable times at the principal office of the Authority.

38. The Authority may appoint an inspector to investigate the affairs of a charitable organisation. Under section 66 of the Act, an inspector appointed may make interim reports to the Authority and on the conclusion of the investigation, will make a final report to the Authority. The Authority may furnish a copy of a report of an inspector to the charitable organisation that is the subject of the report on request and subject to payment of a prescribed fee.

39. The Authority is empowered under section 68 of the Act to require a charitable organisation or the charity trustees of a charitable organisation to produce books, documents or other records if the Authority is of opinion that –

- (a) it is necessary to examine them for the purpose of determining whether an inspector should be appointed to conduct an investigation into the affairs of the charitable organisation;
- (b) the affairs of the body are being or have been conducted with intent to defraud any person;
- (c) any act or omission committed by or on behalf of the charitable organisation is, or would be unlawful if committed; or
- (d) the body was formed for any fraudulent or other unlawful purpose.

New Zealand

40. The New Zealand Charities Commission is established under section 8 of the New Zealand Charities Act 2005. Under section 10 of the Act, the functions of the Commission are as follows –

- (a) to promote public trust and confidence in the charitable sector;

- (b) to encourage and promote the effective use of charitable resources;
- (c) to educate and assist charities in relation to matters of good governance and management;
- (d) to make appropriate information available to assist persons to make registration applications under the Act;
- (e) to receive, consider, and process applications for registration as charitable entities;
- (f) to ensure that the register of charitable entities is compiled and maintained;
- (g) to receive, consider, and process annual returns submitted by charitable entities;
- (h) to supply information and documents in appropriate circumstances for the purposes of the Inland Revenue Acts;
- (i) to monitor charitable entities and their activities to ensure that entities that are registered as charitable entities continue to be qualified for registration as charitable entities;
- (j) to inquire into charitable entities and into persons who have engaged in, or are engaging in, conduct that constitutes, or may constitute, a breach of this Act or serious wrongdoing in connection with charitable entity;
- (k) to monitor and promote compliance with the Act, including by taking prosecutions for offences against the Act in appropriate circumstances;
- (l) to consider, and to report and make recommendations on any matter (for example, a proposed government policy) relating to charities;
- (m) to stimulate and promote research into any matter relating to charities, for example –
 - (i) by collecting and disseminating information or research about charities;
 - (ii) by advising on areas where further research or information about charities should be undertaken or collected;

- (iii) by entering into contracts or arrangements for research or information about charities to be undertaken or collected; and
- (n) to carry out any other functions that the Minister may direct the Commission to perform in accordance with section 112 of the Crown Entities Act 2004.³

41. Under section 23 of the Act, the Commission holds the office of Registrar of the register of charities and must ensure that the register is compiled and maintained.

42. As discussed in Chapter 8 and Annex 4, the Commission is empowered to inquire into any charitable entity and any person who was engaged in conduct that is in breach of the Act, or serious wrongdoing in connection with a charitable entity. This power includes the power to examine and inquire into the matters in connection with the charitable entity or persons, such as the activities and proposed activities of the charitable entity or person, the nature, objects, and purposes of the charitable entity, the management and administration of the charitable entity, the results and outcomes achieved by the charitable entity or person, and the value, condition, management, and application of the property and income belonging to the charitable entity or person.

43. The Commission is also empowered under sections 51 and 53 of the Act to require any person to supply to the Commission any information for the purposes of assisting anyone in the exercise of his powers under the Act or detecting and prosecuting offences under any other Act.

44. The Commission may publish a notice that contains information or statements to the following effect:

- (a) the name of the charitable entity or person;
- (b) a statement to the effect that the Commission considers that –
 - (i) the charitable entity, or a person in connection with the charitable entity, has engaged in, or is engaging in, conduct that constitutes, or may constitute, a breach of the Charities Act 2005 or serious wrongdoing; or
 - (ii) the charitable entity is, or may be, no longer qualified to be registered as a charitable entity; or

3 Section 112 of the Crown Entities Act 2004 –
 "(1) If an Act, or a Crown entity company's constitution, gives the responsible Minister power to add to the functions of a Crown entity, the Minister may direct the entity to perform any additional function that is so added and that is consistent with the entity's objectives...."

- (iii) the person has engaged in, or is engaging in, conduct that constitutes, or may constitute, a breach of section 37 of the Act;
- (c) a statement of the action that the Commission has taken, or is considering taking, in relation to those matters;
- (d) a summary of the grounds for the Commission's opinion.

However, before the Commission exercises its powers, the Commission must give to the charitable entity or person notice of the Commission's decision to publish a notice, the reasons for its decision, and the right of the entity or person to appeal against its decision under section 59.

45. The Commission may give a warning notice to the charitable entity or person if the Commission considers that –

- (a) a charitable entity, or a person in connection with a charitable entity, has engaged in, or is engaging in, conduct that constitutes, or may constitute, a breach of the Act or serious wrongdoing; or
- (b) a charitable entity is, or may be, no longer qualified to be registered as a charitable entity; or
- (c) a person has engaged in, or is engaging in, conduct that constitutes, or may constitute, a breach of section 37.⁴

46. Under section 59 of the Act, a person who is aggrieved by a decision of the Commission under the Act may appeal to the High Court. An appeal under this section must be made by lodging a notice of appeal with the Registrar of the High Court in Wellington and with the Commission within 20 working days after the date of the decision, or any further time that the High Court may allow.

4 Section 37 of New Zealand Charities Act 2005 –
 "(1) A person must not –
 (a) use a style or title including the words 'registered charitable entity'; or
 (b) state or imply, or permit a statement or implication, that –
 (i) the person is registered as a charitable entity under this Act; or
 (ii) an entity that the person acts on behalf of is registered as a charitable entity under this Act.
 (2) Subsection (1) does not apply to –
 (a) a charitable entity; or
 (b) a person who acts on behalf of a charitable entity.
 (3) A person must not state or imply, or permit a statement or implication, that the person acts on behalf of a charitable entity if the person does not act on behalf of that charitable entity."

Scotland

47. The Scottish Charity Regulator is a body corporate established under section 1 of the Charities and Trustee Investment (Scotland) Act 2005 and has the following general functions :

- (a) to determine whether bodies are charities;
- (b) to keep a public register of charities;
- (c) to encourage, facilitate and monitor compliance by charities with the provisions of the Act;
- (d) to identify and investigate apparent misconduct in the administration of charities and to take remedial or protective action in relation to such misconduct; and
- (e) to give information or advice, or to make proposals, to the Scottish Ministers on matters relating to Office of the Scottish Charity Regulator's functions.

48. The Office of the Scottish Charity Regulator (OSCR) keeps a register of charities known as the Scottish Charity Register. A charity must seek the consent of the OSCR for actions relating to amendment of its constitution so far as it relates to its purposes, amalgamation with another body, winding itself up or dissolving itself, and application to the court in relation to such actions. A charity is required to notify the OSCR of any changes, such as any change in the principal office of the charity, any other details set out in its entry in the register and to its constitution. It must also notify the OSCR any administration order or an order for winding up made by the court and the appointment of a receiver in respect of any of the charity's property. The charity should set out in its notification the date on which the change, action, order or appointment took effect.

49. Under section 22 of the Act, the OSCR has the power to obtain information from charities which it requires in relation to the charity's entry in the register. It may also disclose any information to any public body or office-holder for any purpose connected with the exercise of its functions, or for the purpose of enabling or assisting the public body or office-holder to exercise any functions.

50. As mentioned in Chapter 8, the OSCR is empowered to make inquiries about charities, other bodies or a person appearing to represent themselves as a charity for either general or particular purposes. Under section 29 of the Act, the OSCR may require any charity to provide it with documents or information which it considers necessary for its inquiries, unless the charity would be entitled to refuse on the grounds of confidentiality in the Court of Session.

51. The OSCR will take actions under section 30 of the Act if it appears to it that as a result of inquiries, a charity no longer meets the charity test. It must either direct the charity to take any necessary steps to meet the test or remove the charity from the register. If the charity fails to comply with such direction, the Regulator must remove it from the register.

52. The Regulator is empowered under section 31 of the Act to suspend a charity trustee, agent or employee for the protection of a charity's property if it appears to it that there has been misconduct in the administration of a charity, or to ensure that the property is used for charitable purposes. Another way of protecting the property of a charity is for the OSCR to give a direction to restrict any transaction or payments that may be made in the administration of the body without its consent. It may also direct a financial institution or person holding property for a charity not to part with the property without the Regulator's consent. Where it appears to the Regulator following inquiries that a body has been falsely representing itself to be a charity, it may direct the body or person to stop representing itself as a charity and to pay to the charity or body any assets that it has collected. It may also direct a bank to pay sums collected for the charity or not to part with the property without its consent.

53. Under section 34 of the Act, the OSCR may, following its inquiries, apply to the Court of Session for further actions to be taken to protect the property of the charity or to ensure that property is used for the purposes of the charity.

54. Under section 39 of the Act, the OSCR is empowered, on the application of a charity, approve a reorganisation scheme proposed by the charity if it considers –

- (a) that any of the reorganisation conditions is satisfied in relation to the charity, and
- (b) that the proposed reorganisation scheme will –
 - (i) enable the resources of the charity to be applied to better effect for charitable purposes consistently with the spirit of its constitution, having regard to changes in social and economic conditions since it was constituted, or
 - (ii) enable the charity to be administered more effectively.

Singapore

55. A Commissioner of Charities is appointed by the Minister under section 3 of the Singapore Charities Act. Under section 4 of the Act, the objectives of the Commissioner are:

- (a) to maintain public trust and confidence in charities;

- (b) to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities;
- (c) to promote the effective use of charitable resources; and
- (d) to enhance the accountability of charities to donors, beneficiaries and the general public.

56. The general functions of the Commissioner are:

- (a) to determine whether institutions are or are not charities;
- (b) to encourage and facilitate the better administration of charities;
- (c) to identify and investigate apparent misconduct or mismanagement in the administration of charities;
- (d) to take remedial or protective action in connection with misconduct or mismanagement in the administration of charities;
- (e) to obtain, evaluate and disseminate information in connection with the performance of any of the Commissioner's functions or meeting any of the Commissioner's objectives;
- (f) to give information or advice, or make proposals, to the Minister on matters relating to any of the Commissioner's functions or meeting any of the Commissioner's objectives; and
- (g) to perform such other functions as the Minister may determine.

57. A Charity Council is established under section 4A of the Act. Its function is to advise the Commissioner on any question which he may refer to it in connection with the administration of the Act and the objectives and functions of the Commissioner. The Council also makes recommendations to the Commissioner in relation to the regulation of charities, and the promotion of self-regulation and good governance standards in the charity sector.

58. As discussed in Annex 3, the Commission keeps a register of charities in which the particulars of any registered charity are entered. Any institution which no longer appears to the Commissioner to be a charity shall be removed from the register. Any charity which ceases to exist or does not operate shall also be removed from the register. The Commissioner has the power to refuse to register an institution as a charity if it appears to the Commissioner that the registration of the institution will be contrary to the public interest or on such other ground as the Minister may prescribe. The Commissioner may give a direction requiring the name of the charity to be changed within such period as is specified in the direction.

59. Under section 8 of the Act, the Commissioner may from time to time institute inquiries with regard to charities or a particular charity or class of charities, either generally or for particular purposes. The Commissioner may either conduct such an inquiry himself or appoint a person to conduct it and make a report to him.

60. The Commissioner has the power to order, for the purpose of discharging his functions under the Act, any person to furnish the Commissioner with any information in his possession which relates to any charity; and to require any person who has in his custody or under his control any document which relates to any charity to furnish the Commissioner with a copy of or extract from the document; or unless the document forms part of the records or other documents of a court or public authority, to transmit the document itself to the Commissioner for his inspection.

61. Section 11 of the Act deals with the disclosure of information to and by the Commissioner. A body or person may disclose to the Commissioner any information received by that body or person for the purposes of any written law for the purpose of enabling or assisting the Commissioner to discharge any of his functions. This is not applicable, however, to the Comptroller of Income Tax and to any express restriction imposed by or under any other written law. The Comptroller may disclose to the Commissioner the following information:

- (a) the name and address of any institution which has for any purpose been treated by the Comptroller as established for charitable purposes;
- (b) information as to the purposes of an institution and the trusts under which it is established or regulated, where the disclosure is made by the Comptroller in order to give or obtain assistance in determining whether the institution ought for any purpose to be treated as established for charitable purposes; and
- (c) information with respect to an institution which has for any purpose been treated as so established but which appears to the Comptroller –
 - (i) to be, or to have been, carrying on activities which are not charitable; or
 - (ii) to be, or to have been, applying any of its funds for purposes which are not charitable.

Unless the information disclosed is subject to any express restriction on the disclosure of the information by the Commissioner, the Commissioner may disclose to a body or person any information received by him for the purposes of any written law, where the disclosure is made by the Commissioner for any purpose connected with the discharge of his functions and for the purpose of enabling or assisting that body or person to discharge any of its or his

functions. This section applies to the following bodies and persons:

- (a) any Government department;
- (b) any statutory authority;
- (c) any police officer; and
- (d) any other body or person discharging functions of a public nature.

62. Under section 24 of the Act, the Commissioner may by order, with the consent of the Attorney-General, exercise the same jurisdiction and powers as are exercisable by the High Court in charity proceedings for the following purposes:

- (a) establishing a scheme for the administration of a charity;
- (b) appointing, discharging or removing a charity trustee or trustee for a charity, or removing an officer or employee; and
- (c) vesting or transferring property, or requiring or entitling any person to call for or make any transfer of property or any payment.

However, the Commissioner does not have the jurisdiction to try or determine the title to any property as between a charity or trustee for a charity and a person holding or claiming the property or an interest in it adversely to the charity, or to try or determine any question as to the existence or extent of any charge or trust. The Commissioner shall not exercise his jurisdiction (not referred to him by order of the High Court) which, by reason of its contentious character, or of any special question of law or of fact which it may involve, or for other reasons the Commissioner may consider more fit to be adjudicated on by the High Court.

63. An appeal against any order of the Commissioner may at any time be brought in the High Court by the charity or any of the charity trustees, or any person interested in the charity, or by any person removed from any office or employment by the order.

64. The Commission is empowered under section 25 of the Act to act for the protection of charities if he is satisfied –

- (a) that there is or has been any misconduct or mismanagement in the administration of the charity; and
- (b) that it is necessary or desirable to act for the purpose of protecting the property of the charity or securing a proper application for the purposes of the charity of that property or of property coming to be charity.

65. The Commissioner may, with the consent of the Attorney-General, do one or more of the following things:

- (i) by order remove any trustee, charity trustee, officer, agent or employee of the charity who has been responsible for or privy to the misconduct or mismanagement or has by his conduct contributed to it or facilitated it;
- (ii) by order establish a scheme for the administration of the charity;
- (iii) notwithstanding anything in the trusts of the charity, by order restrict the transactions which may be entered into, or the nature or amount of the payments which may be made, in the administration of the charity, without his approval.
- (iv) by order suspend any trustee, charity trustee, officer, agent or employee of the charity from the exercise of his office or employment pending consideration being given to his removal;
- (v) by order appoint such number of additional charity trustees as he considers necessary for the proper administration of the charity;
- (vi) by order vest any property held by or in trust for the charity in the Public Trustee, or require the persons in whom any such property is vested to transfer it to the Public Trustee, or appoint any person to transfer any such property to him;
- (vii) order any person who holds any property on behalf of the charity, or of any trustee for it, not to part with the property without the approval of the Commissioner;
- (viii) order any debtor of the charity not to make any payment in or towards the discharge of his liability to the charity without the approval of the Commissioner;
- (ix) by order restrict the transactions which may be entered into, or the nature or amount of the payments which may be made, in the administration of the charity without the approval of the Commissioner; and
- (x) by order appoint a receiver and manager in respect of the property and affairs of the charity.

66. The Commissioner may remove a charity trustee by order made of his own motion where the trustee –

- (a) has been convicted of an offence involving dishonesty, fraud or moral turpitude;

- (b) is a bankrupt;
- (c) is a corporation in liquidation;
- (d) lacks capacity (within the meaning of the Mental Capacity Act 2008) to exercise his functions as trustee;
- (e) has not acted, and will not declare his willingness or unwillingness to act; or
- (f) is outside Singapore or cannot be found or does not act, and his absence or failure to act impedes the proper administration of the charity.

67. The Commissioner may, by order made of his own motion, appoint a person to be a charity trustee –

- (a) in place of a charity trustee removed by him under this section or otherwise;
- (b) where there are no charity trustees, or where by reason of vacancies in their number or the absence or incapacity of any of their number the charity cannot apply for the appointment;
- (c) where there is a single charity trustee, not being a corporation, and the Commissioner is of the opinion that it is necessary to increase the number for the proper administration of the charity; or
- (d) where the Commissioner is of the opinion that it is necessary for the proper administration of the charity to have an additional charity trustee, because one of the existing charity trustees who ought nevertheless to remain a charity trustee cannot be found or does not act or is outside Singapore.

Any person who contravenes such order made by the Commissioner shall be guilty of an offence.

68. The Commissioner is empowered under section 26A of the Act to direct the person concerned to apply the property in such manner as is specified in the order, if the Commissioner is satisfied –

- (a) that a person or persons in possession or control of any property held by or on trust for a charity is or are unwilling to apply it properly for the purposes of the charity; and
- (b) that it is necessary or desirable to make an order under this section for the purpose of securing a proper application of that property for the purposes of the charity.

Any person who contravenes such order shall be guilty of an offence.

69. Under section 31 of the Act, charity proceedings may be taken either by the charity, or by any of the charity trustees, or by any person interested in the charity, but not by any other person. No charity proceedings relating to a charity (other than an exempt charity) shall be entertained or proceeded with in any court unless the taking of the proceedings is authorised by order of the Commissioner. The Commissioner shall not, without special reasons, authorise the taking of charity proceedings where in his opinion the case can be dealt with by him under the powers of the Act. Such requirements do not apply to the taking of proceedings by the Attorney-General, with or without a relator.

70. Where it appears to the Commissioner, on an application for an order, that it is desirable for legal proceedings to be taken with reference to any charity (other than an exempt charity) or its property or affairs, and for the proceedings to be taken by the Attorney-General, the Commissioner shall inform the Attorney-General, and send him such statements and particulars as the Commissioner thinks necessary to explain the matter.

71. Appeals to the High Court against orders or decision of the Commissioner are regulated by Rules of Court. Under section 46 of the Act, on such an appeal, the Attorney-General shall be entitled to appear and be heard; and such other persons as the Rules allow or as the High Court may direct may appear and be heard. Section 47A of the Act provides that proceedings in respect of any offence under the Act or any regulations made thereunder may be conducted by any public officer who is authorised to conduct such proceedings by the Commissioner with the consent of the Attorney-General.

South Africa

72. A Directorate for Nonprofit Organisation has been established by the Minister under section 4 of the Nonprofit Organisations Act 1997. Under sections 5 and 6 of the Act, the Directorate is responsible for:

- (a) facilitating the process for developing and implementing policy;
- (b) determining and implementing programs, including programs –
 - (i) to support nonprofit organisations in their endeavour to register; and
 - (ii) to ensure that the standard of governance within nonprofit organisations is maintained and improved;
- (c) liaising with other organs of state and interested parties; and

- (d) facilitating the development and implementation of multi-sectoral and multi-disciplinary programs.

73. The Directorate must prepare and issue model documents, including model constitutions for nonprofit organisations, and a model of the narrative report to be submitted by registered nonprofit organisations to the Directorate. It must also prepare and issue codes of good practice for nonprofit organisations, and those persons, bodies and organisations making donations or grants to nonprofit organisations.

74. Any nonprofit organisation that is not an organ of state may apply to the Director for registration under section 12 of the Act. Under section 14 of the Act, upon refusal by the Director to register a nonprofit organisation, the organisation may appeal against the decision by submitting to the Directorate for consideration by an Arbitration Tribunal. If the Arbitration Tribunal upholds an appeal, the Director must register the organisation by entering its name in the register. In case of non-compliance with constitution and obligations by registered nonprofit organisation, the Director will send a compliance notice in the prescribed form to a registered nonprofit organisation and refer the nonprofit organisation to the South African Police Service for criminal investigation if it is satisfied that any non-compliance may constitute an offence.

75. Under section 21 of the Act, if a registered nonprofit organisation which has received a compliance notice sent by the Director does not comply timeously with the notice or makes material false representations in respect of the documents or reports submitted to the Director, the Director must cancel its certificate of registration and its registration. It will notify the organisation in writing of the cancellation, the reasons for it, and the date on which the registration was cancelled and amend the register accordingly.

76. A registered nonprofit organisation may refer the decision of the Director to cancel its registration for arbitration by an Arbitration Tribunal under section 22 of the Act.