

THE LAW REFORM COMMISSION OF HONG KONG

REPORT

CHARITIES

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Preface

The Law Reform Commission's reference on charities

1. In June 2007, the Chief Justice and the Secretary for Justice referred the subject of the law of charities to the Law Reform Commission for review. 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."

2. A sub-committee was appointed in September 2007 to consider the subject. The members of the Sub-committee are:

The Hon Bernard C Chan, GBS, JP (Chairman)	Member, Executive Council Chairman Hong Kong Council of Social Service
Mr John Budge, SBS, JP	Solicitor Partner, Wilkinson & Grist
Mrs Pamela Chan, BBS, JP	Former Chief Executive of Consumer Council
Ms Christine M S Fang, BBS, JP	Former Chief Executive Hong Kong Council of Social Service
Mr Adam Koo¹	Chief Executive Officer WWF Hong Kong
Mr Herbert Tsoi, BBS, JP	Solicitor Partner, Herbert Tsoi & Partners
Ms Florence Wai²	Chief Executive Officer (Lotteries Fund) Social Welfare Department
Mr Leonard Wong³	Chief Assessor (Special Duties) Inland Revenue Department

1 From July 2012.

2 From May 2010.

3 From September 2007 to September 2008 and from September 2010 to present.

3. Former members who have served on the Sub-committee include Mr Eric Bohm,⁴ Mr Godfrey Lam, SC,⁵ Mrs Connie Ngan⁶ and Mrs Wendy Yip Sham Yin-har.⁷ The Sub-committee's secretary is Ms Kitty Fung, Deputy Principal Government Counsel (Acting) in the Law Reform Commission Secretariat. Ms Judy Cheung, Senior Government Counsel, was the secretary until May 2009.

4. Since its formation, the Sub-committee has met on a regular basis to discuss and consider the wide range of matters within its terms of reference.

Purpose and format of this report

5. After conducting a detailed study, including analysing the charities' regimes in a number of overseas jurisdictions, the Sub-committee issued a consultation paper in June 2011 to seek views and comments from the public. The consultation period officially ended on 16 September 2011, but was extended in response to requests from a number of members of the public. A total of 264 written responses were received and a list of these respondents can be found at Annex 1 to this report.

6. Chapter 1 of this report outlines the background of this law reform reference and an overview of the current law and regulatory framework relating to charities in Hong Kong. Chapter 2 discusses the legal definition of "*charity*" and sets out our recommendation in this area. Chapter 3 considers aspects of the legal structure of charities. Our discussion and recommendation on the registration of charities are set out in Chapter 4. Chapter 5 deals with the framework for governance, accounting and reporting by charities. Issues relating to the regulation of charitable fundraising activities, and our recommendations in this area, are set out in Chapter 6. Chapter 7 analyses the taxation position of charitable organisations and our recommendations on the extent to which any reform should be made. Our recommendation on the dissolution of charities and the *cy-près* doctrine are in Chapter 8. Our recommendation in relation to the establishment of a charity commission is set out in Chapter 9.

4 Former Chief Executive Officer, WWF Hong Kong, served from September 2007 to June 2012.

5 Served from September 2007 to January 2013.

6 Former Chief Executive Officer (Lotteries Fund), Social Welfare Department, served from September 2007 to May 2010.

7 Former Chief Assessor (Special Duties), Inland Revenue Department, served from September 2008 to September 2010.

Chapter 1

Introduction

1.1 In this chapter, we briefly outline the features of a charity, the unique issues which arise in relation to charities and why we have carried out a review of the law in this area.

What is a charity?

1.2 Currently, there are more than 7,500 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 7,592 as at the year ending 31 March 2013.

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-governmental 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 \$3.69 billion and \$5.76 billion respectively for the year of assessment 2011-2012.⁷ 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, the total number of charities recognised for tax exemption purposes at the end of March 2013, according to figures provided by the Inland Revenue Department, had reached 7,592. As compared with the previous year,⁹ the number of charitable organisations granted with tax exemption has increased by 398, representing more than 5% increase in just 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."*¹⁰

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.¹¹

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

9 According to the statistics of the Inland Revenue Department, the number of charities granted tax exemption is 7,194 as at the year ending 31 March 2012.

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

11 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 fundraising 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*.¹² 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."¹³

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*,¹⁴ 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.¹⁵ 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.¹⁶

1.15 In order to strengthen the administrative control over charitable fundraising activities, with a view to enhancing charities' transparency and

(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); "Fundraising corruption; seven cases of understatement in sale of lotteries reported in three years", *Ming Pao* (7 Oct 2009); "Social worker jailed for child molestation continues to solicit donations", *Ming Pao Daily News* (6 Jan 2011); "Charities sidestep supervision by raising funds outside permitted area with a hawker licence, New rule by SWD 'toothless' amid prevalent illegal street fundraising", *Ming Pao Daily News* (21 Aug 2011); "Charitable body hires bogus volunteers for fundraising", *Hong Kong Economic Times* (23 Jul 2012); "Charity business", *The Standard - China's Business Newspaper* (26 Oct 2012); "Transparency urged against high administrative and publicity costs of some charitable organisations", *Sing Tao Daily* (1 Mar 2013).

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

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

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

15 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.

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

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 a self-regulatory system.¹⁷ The Reference Guide suggests best practices in the areas of donor's rights, fundraising practices and financial accountability.¹⁸

1.16 In October 2008, 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."*¹⁹

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.²⁰

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,

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

18 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>.

19 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>.

20 http://www.icac.org.hk/filemanager/en/content_1031/fund_raising.pdf.

and charity employee recruitment, and encourages charities to dedicate resources towards their goals and programmes.

1.20 The Sub-committee had noted in the Consultation Paper on Charities ("the Consultation Paper")²¹ that despite such initiatives, there has been public concern over how charities are regulated as well as calls for tighter controls and increased transparency.²²

1.21 The Sub-committee had determined that its objectives in reviewing the current law and regulatory framework should be to:

- modernise the law relating to charity;
- provide greater clarity in the law relating to charity;
- 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.²³

Modernising charity law and providing greater clarity

1.22 The Sub-committee had observed that the current law on charitable status is in many respects outdated and unclear. It was of the opinion that the law on charitable purposes requires updating and may need to be codified to provide clarity and certainty. The Sub-committee had also considered that there is 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 The Sub-committee had noted 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.²⁴

1.24 Fundraising activities form a major source of the income of some charities. There should be clear requirements or guidelines on charitable fundraising activities as these can strongly influence public attitudes. The Sub-committee had considered that a simplified licensing system for public

21 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011).

22 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at para 1.20.

23 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at para 1.21.

24 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at para 1.23.

collections should be introduced.²⁵ Although the Sub-committee did not under-estimate the strength of self-regulatory initiatives, it had considered 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 The Sub-committee had considered that effective and fair regulation of charities is needed.²⁶ Such regulation also has to be proportionate and should be no more than is necessary to improve the system in order that the sector's independence and autonomy is maintained.

1.26 It was the Sub-committee's view that the regulation of charities should aim to achieve the following:

- ensure compliance with the law relating to charity;
- enhance accountability to beneficiaries and donors;
- improve public trust and confidence; and
- encourage charities to maximise their social and economic potential.²⁷

Overview of the current law and regulatory framework relating to charities in Hong Kong

The legal definition of "charity"

1.27 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. It has been observed that 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.²⁸

*"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."*²⁹

25 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at para 1.24.

26 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at para 1.25.

27 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at para 1.26.

28 *Halsbury's Laws of England*, Vol 8, 5th ed, (2010), at para 2.

29 Same as above.

1.28 In order to be considered a charity, an organisation must be established for purposes which are exclusively charitable according to law.³⁰ The leading common law authority on the definition of charity, which is expressly applied by both the courts in Hong Kong³¹ and the Inland Revenue Department,³² is the famous dictum of Lord Macnaghten in the 1891 case of *Income Tax Special Purposes Commissioners v Pemsel*.³³ In that case, Lord Macnaghten listed "four principal divisions" of charitable purposes:

- (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.³⁴

1.29 This list was itself based on English legislation dating back to 1601, namely the preamble to the Charitable Uses Act 1601 in England.³⁵

1.30 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.

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

31 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.

32 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.

33 [1891] AC 531 (HL).

34 [1891] AC 531, at 583 (HL).

35 *Halsbury's Laws of England*, Vol 8, 5th ed, (2010), at para 2, footnote 25.

1.31 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,³⁶ 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.³⁷

The privileges associated with charitable status

1.32 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

1.33 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.

(a) A charity's tax exempt status

1.34 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 (Cap112).³⁸ 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

36 Hubert Picarda, *The Law and Practice Relating to Charities* (Butterworths, 1999), 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_index.htm.

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.³⁹

1.35 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 4 of the Societies Ordinance or registered under Part XI of the Companies Ordinance."*⁴⁰

(b) *Tax deductions for charitable donations*

1.36 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."*⁴¹

1.37 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.⁴²

1.38 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

39 Section 88, 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 Sep 2010), available at: http://www.ird.gov.hk/eng/tax/ach_tgc.htm.

41 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.

42 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%."*

"movable property"), would not be deductible for income tax purposes (though it may be exempt from stamp duty, as noted below).⁴³

1.39 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.

(c) *Exemption from stamp duty*

1.40 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.⁴⁴

Other advantages of charitable status

(a) *Exemption from some statutory registration requirements*

1.41 Charities may be exempt from certain statutory registration requirements, such as registration as a society under the Societies Ordinance (Cap 151)⁴⁵ and registration under the Business Registration Ordinance (Cap 310).⁴⁶

(b) *Exemption from the rule against perpetuities*

1.42 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".⁴⁷ 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.

1.43 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."*⁴⁸

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

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

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

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

47 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.

48 [1984] 1 HKC 152, at 155.

(c) *Court's broad discretion to uphold charitable gift*

1.44 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 charitable intention*"⁴⁹ 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.⁵⁰

(d) *Substitution of charitable purposes*

1.45 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.⁵¹

(e) *Private treaty grant of land*

1.46 Land is made available by the Government by way of a private treaty grant at a nominal land premium to non-profit making educational, medical and charitable institutions for operating schools, hospitals and social welfare and other community facilities.⁵² It is also common for non-profit making organisations to apply to the Government for a private treaty grant of land for the provision of facilities that facilitate the promotion of the policies of the bureau concerned.⁵³

(f) *Priority block booking of sports facilities*

1.47 The Leisure and Cultural Services Department operates a booking system for utilisation of sports facilities managed by the Leisure and Cultural Services Department. Charitable organisations are eligible for priority booking ranging from 3 months to 12 months in advance.⁵⁴

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

50 There are other special rules such as 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.

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

52 http://www.yearbook.gov.hk/2003/english/chapter12/12_15.html.

53 http://www.hab.gov.hk/file_manager/en/documents/publications_and_press_releases/20050302q2_e.pdf.

54 Other eligible organisations include national sports associations, district or community sports clubs, schools, Government departments, *bona fide* associations and corporations for organising athletic meets and training, promoting and organising championships, leagues and other sports activities. Individuals can make advance booking of sessions not taken up by

Formation of a charity: the legal structures available

1.48 As a matter of practice, it is essential that a charity is established by a written governing instrument.⁵⁵ 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).

Oversight of charitable organisations

1.49 Depending on the type of charity, Government monitoring in Hong Kong ranges from "*stringent statutory overall control*" to limited scrutiny of specified activities only.⁵⁶ These areas of oversight are set out briefly below.

Types of charities

(a) Charities established by statute

1.50 The controls imposed on charities established by statute and governed by their own legislation are "*clear and comprehensive*"⁵⁷ and are largely set out in the relevant establishing Ordinances.⁵⁸ 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

such priority block booking within 10 days.

See: http://www.lcsd.gov.hk/en/ls_fac_improve.php.

55 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.

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

57 Same as above, at para 5.4.

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

at all reasonable times for inspection by any director of the organisation and any person appointed for the purpose by the Chief Executive.⁵⁹

(b) Charities receiving Government subvention

1.51 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.⁶⁰

(c) Other charities

1.52 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.⁶¹ These organisations include private charities and non-governmental charitable organisations which are neither statutory nor subvented, and overseas charities established in Hong Kong.

Oversight by the Inland Revenue Department

1.53 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 from time to time call for accounts, annual reports or other documents for the purpose of conducting a 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.⁶² The Inland Revenue Department has noted, however, that this inspection of accounts of charitable organisation is not mandatory under the existing law.⁶³

1.54 A charity which exists in the form of an incorporated company would need to submit audited accounts to the Inland Revenue Department from time to time, but not less than once every four years, as part of the Department's 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.

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

60 Same as above, at paras 5.4 and 2.5.

61 Same as above, at para 2.6.

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

63 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.

Oversight by the Companies Registry

1.55 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.⁶⁴ 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)

1.56 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.⁶⁵ *"By protecting the interests of charity generally, the Secretary for Justice contributes to a framework of supervision and control over charities."*⁶⁶

1.57 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.

64 Section 107, Companies Ordinance (Cap 32).

65 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 8 (2010) 5th ed, at para 590.

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

1.58 Since 1997, the Secretary for Justice has played a role in a number of charity cases.⁶⁷

Oversight by other Government departments

1.59 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.

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

1.60 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)*".⁶⁸ 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.

1.61 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.⁶⁹

67 *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; *Re Hang Tak Buddhist Hall Association Ltd* (2003) HCCW 796/2001; *Fujino Wong Annie Mei Mei & Others v Lauren Eiko Lai Ying Fujino & Others* (2004) HCMP 5179/2001 (the Chi Lin Nunnery case); *Estate of Ho Nai Chew* [2009] 5 HKLRD 129; *LLC (Statutory Will)* [2010] 3 HKLRD 16; *LLC (No 2)* [2010] 4 HKLRD 400; *Chinachem Charitable Foundation Ltd v Chan Chun Chuen* (2011) HCAP 8/2007.

68 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.

69 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,*

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

Problems in the oversight of charitable organisations in Hong Kong

1.62 As seen earlier, the dramatic rise in the number of tax-exempt charitable organisations in Hong Kong in recent years has highlighted the limitations in our current system of monitoring charities, with the report issued by the Ombudsman in 2003⁷⁰ describing the current regime as "*partial and patchy, fragmented and ineffective*."⁷¹ The Ombudsman 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.⁷²

1.63 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.

1.64 These and other perceived limitations in the current system of oversight of charities were discussed in detail in the Consultation Paper and are outlined briefly below.

Out-dated definition of charity

1.65 As seen earlier, 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 2) is archaic and not suited to modern conditions.

1.66 The leading case authority on the definition of charity is acknowledged to be the 1891 decision of the House of Lords in *Pemsel*.⁷³ 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

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."

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

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

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

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

within the vague "*any other purpose*" classification, has resulted in evolving case law on charitable purposes which is confusing and unclear.⁷⁴

Lack of a coherent system for the registration of charities

1.67 As noted earlier, 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.*"⁷⁵

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

1.68 As discussed in the Consultation Paper,⁷⁶ 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 the Sub-committee had observed no particular problem with the range of legal forms that charities may take, the Sub-committee had noted 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.⁷⁷ Under the current system of oversight, statutory charities established under a specific Ordinance can be subject to stringent statutory control,⁷⁸ 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.⁷⁹

1.69 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.⁸⁰ Charitable organisations which are subvented by the Government (such as some non-governmental organisations providing services related to welfare,

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

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

76 See Chapter 2 and Chapter 6, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011).

77 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at para 3.10.

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

79 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.

80 Same as above, at para 2.4.

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.⁸¹ Charitable organisations established under the Companies Ordinance (Cap 32) are required to prepare audited accounts in order to fulfil requirements under that Ordinance. However, this is not the case for charitable organisations established as societies registered under the Societies Ordinance (Cap 151). 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.⁸²

Limited control of charitable fundraising

1.70 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 Office of Licensing Authority,⁸³ such as flag days, on-street selling and lotteries. It was 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. 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.⁸⁴

1.71 In the Consultation Paper, a number of limitations were identified in the existing regulatory measures on charitable 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 charitable fundraising activities and there is no centralised information point or hotline where the public can make enquiries about these fundraising activities.
- There are no statutory provisions setting out the detailed requirements for charitable fundraising by charitable organisations, covering such issues as internal controls, accountability and transparency. While some broad guidelines

81 Same as above, at paras 5.4 and 2.5.

82 Same as above, at para 2.6.

83 With effect from 1 April 2012, the Office of the Licensing Authority of Home Affairs Department took over the function of the former Television and Entertainment Licensing Authority (TELA) in relation to entertainment licensing under the Miscellaneous Licences Ordinance (Cap 114), the Gambling Ordinance (Cap. 148) and the Amusement Game Centres Ordinance (Cap 435); see: <http://www.hadla.gov.hk/el>.

84 Office of the Ombudsman, Investigation Report: Monitoring of Charitable Fund Raising Activities (Feb 2003), at para 3.1.

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.

1.72 The Sub-committee was 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). It felt that not only was 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.

1.73 It was suggested in the Consultation Paper that some degree of donor transparency could be built into the system, to provide information on who donates to charity, in what amounts, for what purposes and with what expectations.⁸⁵ The Sub-committee had not thought that donor transparency is an issue. Instead, it had taken 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.

1.74 It was with the aim of addressing and remedying these perceived deficiencies that the Sub-committee had considered and put forward the proposals presented in the Consultation Paper. This report reconsiders those proposals in the light of the responses received from the public during the consultation.

85 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.

Chapter 2

Recommendations on the definition of charity

2.1 In Chapter 5 of the Consultation Paper, the Sub-committee had examined in depth the concept of "*charity*" as defined in law and made proposals on the essential elements of a definition. We will now set out in this chapter the current situation in Hong Kong, and review the position of some relevant jurisdictions. Then we will consider the consultees' responses and make the final recommendations.

Current situation in Hong Kong

The legal definition of "charity"

2.2 "*A trust, in order to be charitable must have objects which are exclusively charitable*".¹ 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

2.3 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

2.4 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 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 8 (2010) 5th ed, at para 2, footnote 25.

*"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

2.5 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

2.6 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

2.7 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 for Lord Macnaghten's first three heads of charitable purpose: the prevention

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 *Halsbury's Laws of England*, Vol 8 (2010) 5th ed, at para 2, footnote 25.

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)

2.8 For purposes falling within Lord Macnaghten's fourth head (i.e., 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 have an identifiable benefit and the benefit must be available to a sufficient section of the community.¹⁰

The specific heads of "charitable purpose" at common law

Relief of poverty

2.9 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

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

10 *Halsbury's Laws of England*, Vol 8 (2010) 5th ed, at para 6.

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/research/journal/vol11iss1/special_2.htm.

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

14 (1904) 2 KB 645, at 655.

The advancement of education

2.11 "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

2.12 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

2.13 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

2.14 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

2.15 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

2.16 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/detailed-guidance/charitable-purposes-and-public-benefit/charities-and-public-benefit/the-advancement-of-education-for-the-public-benefit/>.

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

2.17 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

2.18 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

2.19 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

2.20 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

2.21 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

2.22 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

2.23 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

2.24 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.

2.25 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

2.26 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)

2.27 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."*

2.28 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

2.29 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

2.30 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)

2.31 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 organisation established by deed or otherwise for a charitable purpose.*"

2.32 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;*

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

- (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).*⁴⁶

Problems with the current law and the need for reform

2.33 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

2.34 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.

Outdated definition

2.35 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

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.

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.*"

2.36 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

2.37 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.

2.38 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

Pros and cons of having a statutory definition

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

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

- (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.

2.40 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.

2.41 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

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

That view was, of course, subsequently rejected by the Government in putting forward the definition of "*charitable purpose*" contained in the English Charities Act 2006.⁵²

2.42 In the Consultation Paper, the Sub-committee had recommended that there should be a clear statutory definition of what constitutes a charitable purpose.⁵³

Consultees' responses

2.43 The results of the consultation indicate that a large majority of the consultees agreed to the proposal of having a clear statutory definition of what constitutes a charitable purpose. The main reason for the wide ranging support was that a clear statutory definition would help to provide greater certainty, which will make it easier for the public to understand the position under the law. A view expressed was that "*it would be desirable for the public to have clear-cut, primary legal materials on the definition of charitable purpose in the form of codified statutory provisions, covering as many core and recognized heads as possible, rather than on the reliance of archaic and dispersed common law sources.*"

2.44 The Law Society expressed the view that the adoption of the common law position developed under Lord Magnaghten's dictum in the *Pemsel* case was outdated. It was felt that the adoption of a clear statutory definition to recognise the wider scope of charitable purposes will enhance the development of charities in general and will encourage the general public to participate more in charitable activities.

2.45 A few respondents considered that in the process of the drawing up of a statutory definition, the reduction of uncertainties and the retention of flexibility must be duly considered.

2.46 In contrast to the above view point, a minority of the respondents expressed the opposite view that a statutory definition was not needed since the new definition would be too narrow and the adoption of the existing common law requirements was preferred.

Our view

2.47 We agree with the view expressed in the Consultation Paper that 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

52 The Charities Act 2011 came into effect on 14 March 2012. The 2011 Act is intended to make the law easier to understand by replacing most provisions of the Charities Acts 1992, 1993 and 2006 and all of the Recreational Charities Act 1958 with one single Act but no change is made to the law; see http://www.charity-commission.gov.uk/About_us/Regulation/charbill.aspx.

53 Recommendation 1, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), para 5.42.

case law, when that case law has been found to be ambiguous and uncertain. We share the same view as most of the consultees that a statutory definition would provide greater certainty to the law and facilitate better understanding and application of the law. It will also be a good way to encourage the general public to participate in charitable activities and enhance the development of charities in general.

2.48 As mentioned in the Consultation Paper, 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.

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

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

Exclusively charitable purposes

2.50 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.

2.51 Detailed discussion on the test of public benefit was made in paragraphs 2.46 to 2.50 of the Consultation Paper.

Other considerations

Ensure all currently charitable purposes included

2.52 In the Consultation Paper, the Sub-committee had expressed its view not to exclude 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.

2.53 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."*⁵⁴ 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

2.54 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."*⁵⁵

2.55 In the Consultation Paper, the Sub-committee had indicated clearly the intention not to do away with the existing case law, other than where it is clearly at odds with the meaning of the new statutory definition it had proposed.

Possible reform models: definitions in other jurisdictions

2.56 In the Consultation Paper, the Sub-committee had studied various overseas models on the definition of charitable purposes. In doing so, the Sub-committee had indicated its 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 were discussed in Annex 1 of the Consultation Paper.

England and Wales

2.57 Section 2 of the English Charities Act 2011 ("the English 2011

54 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.

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

Act") defines a "charitable purpose" to mean:

- "(1) *For the purposes of the law of England and Wales, a charitable purpose is a purpose which—*
 - (a) falls within section 3(1), and*
 - (b) is for the public benefit (see section 4).*
- (2) *Any reference in any enactment or document (in whatever terms)—*
 - (a) to charitable purposes, or*
 - (b) to institutions having purposes that are charitable under the law relating to charities in England and Wales,**is to be read in accordance with subsection (1). ..."*

2.58 Section 2(1) of the English 2011 Act defines a charitable purpose as one which falls within the purposes listed in section 3(1) 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 because 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—*
 - (i) *that are not within paragraphs (a) to (l) but are recognised as charitable purposes by virtue of section 5 (recreational and similar trusts, etc.) or under the old law,*
 - (ii) *that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within any of paragraphs (a) to (l) or sub-paragraph (i), or*
 - (iii) *that may reasonably be regarded as analogous to, or within the spirit of, any purposes which have been recognised, under the law relating to charities in England and Wales, as falling within sub-paragraph (ii) or this sub-paragraph."*

2.59 Section 3(2) offers further explanation of some of these purposes in section 3(1) as follows:

- "(2) *In subsection (1)—*
 - (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."*

2.60 Section 3(4) clarifies section 3(1)(m)(i) as follows:

"(4) In subsection (1)(m)(i), 'the old law' means the law relating to charities in England and Wales as in force immediately before 1 April 2008."

2.61 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, i.e., the charity's purpose must fall within one of the listed categories *and* it must be *"for the public benefit"*, as mentioned in sections 2(1) and 4(1). Section 4(2) goes on to state that it is not to be presumed that a particular purpose of a particular description 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.

2.62 There is no definition of what amounts to *"public benefit"* beyond section 4(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."*

2.63 The Charity Commission is required by section 17 of the English 2011 Act to issue guidance on the operation of the public benefit requirement, and must carry out public consultation before it does so.

Scotland

2.64 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."*

2.65 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."*

2.66 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)."*

2.67 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

2.68 In the Consultation Paper, the Sub-committee had considered various categories to be included in the statutory definition of charitable purpose. In devising a definition suitable for Hong Kong, the Sub-committee had believed that the legislation in England and Scotland in particular provided a useful starting point, taking account of our shared legal heritage. We set out below the relevant legislation in England and Scotland, the consultation responses and our view on the different heads of charitable purposes.

"The prevention or relief of poverty"

2.69 Recommendation 2(1) of the Consultation Paper proposed that *"The prevention or relief of poverty"* should be one of the heads of the statutory

definition of what constitutes a charitable purpose.⁵⁶

Consultees' responses

2.70 All of the consultees who responded on this head supported its inclusion in the statutory definition.

Our view

2.71 In our view, there is no doubt that the prevention or relief of poverty should be one of the heads of charitable purpose which reflects the existing common law. We recommend that *"the prevention or relief of poverty"* should be one of the heads of charitable purposes.

"The advancement of education"

2.72 *"The advancement of education"* is listed as the second head of charitable purpose under both the Scottish 2005 Act and the English 2011 Act.⁵⁷

2.73 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 2011 Act, and must acquire charitable status in order to take advantage of the tax benefit of that status. In this regard, the UK Strategy Unit's has the following 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

56 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), paras 5.68 and 5.69.

57 See section 3(1)(b) of the English 2011 Act and section 7(2)(b) of the Scottish 2005 Act.

those who cannot pay full fees and the majority probably do so already."⁵⁸

2.74 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.⁵⁹ 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.

2.75 In the Consultation Paper, the Sub-committee had recommended "*the advancement of education*" as one of the heads of charitable purpose.⁶⁰

Consultees' responses

2.76 The vast majority of the consultees who responded to this issue supported this recommended head.

Our view

2.77 We agree that this should be one of the heads of charitable purpose and so recommend.

"The advancement of religion"

2.78 Under both section 7(2)(c) of the Scottish 2005 Act and section 3(1)(c) of the English 2011 Act, "*the advancement of religion*" is stated as one of the charitable purposes. Section 3(2)(a) of the English 2011 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.

2.79 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].*"

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

59 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.

60 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), paras 5.70 to 5.73.

2.80 The Sub-committee had recommended in the Consultation Paper that "*the advancement of religion*" as one of the charitable purposes.⁶¹

Consultees' responses

2.81 The vast majority of the consultees who responded to this head supported its inclusion in the statutory definition. A number of these respondents were religious groups.

2.82 One of the respondents who was not in favour of including this head in the statutory definition expressed the view that though many of the religious bodies in Hong Kong provide charitable services to the community, charity and religion should not be treated as one. The respondent commented that the advancement of religion does not serve every citizen, but only serves the religion or the religious body concerned. The respondent expressed the view that people's well-being was not improved because of the deeds of these organisations. Moreover, it was considered that there was no effective mechanism at the current time to oversee and ensure that religious bodies would apply the charitable donations collected to charitable services.

2.83 Apart from the consideration as to whether or not "*the advancement of religion*" should be included as one of the heads of charitable purpose, some respondents expressed views on the requirement for this particular purpose to be also "*for the public benefit*". One respondent raised the concern that if the presumption of "*public benefit*" was to be removed in the new legislation, Christian churches and organisations would have to satisfy any relevant authority granting them their charitable status that the purpose of their activities are "*for the public benefit*". The result would be that it would be more difficult for new Christian churches and organisations to qualify as charities. Further, it was observed that existing Christian churches and organisations which are now considered as charities may find it more difficult to maintain their charitable status.

Our view

2.84 We have carefully considered the various opinions expressed by the respondents on this issue and we take the view that "*the advancement of religion*" has been well established by case law⁶² and regarded in the community as charitable. We therefore recommend that this should be a head within the statutory definition of charitable purpose.

61 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), paras 5.74 to 5.76.

62 *The Catholic Diocese of Hong Kong v Secretary for Justice*, HCAL 157/2005, 23 November 2006; *Gilmour Appellant v Coats and Others Respondents*, House of Lords, 8 April 1949, [1949] A.C. 426. In *Re Warre's Will Trusts*, *Wort v Salisbury Diocesan Board of Finance and Others*, Chancery Division, 28 April 1953, [1953] 1 W.L.R. 725, In *Re Banfield, decd*, *Lloyds Bank Ltd v Smith and Others*, Chancery Division, 21 November 1967, [1968] 1 W.L.R. 846, In *Re Hetherington, decd*, Chancery Division, 23 January 1989, [1990] Ch. 1.

2.85 As for the requirement to satisfy the test that the purpose of this head is "*for the public benefit*", we have carefully studied the valuable opinion expressed by the respondents. This will be separately considered in a later part of this chapter.

"The advancement of health"

2.86 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 3(1)(d) of the English 2011 Act combines "*the advancement of health or the saving of lives*" as one head of charitable purpose. Both the Scottish and English legislation defines "*the advancement of health*" to include "*the prevention or relief of sickness, disease or human suffering*".⁶³

2.87 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 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 (ie 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 medicine⁶⁴ 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."*⁶⁵

63 See section 3(2)(b) of the English 2011 Act and section 7(3)(a) of the Scottish 2005 Act.

64 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/ldsctech/123/12302.htm#a1>.

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

2.88 In line with the Scottish approach, the Sub-committee had recommended in the Consultation Paper that this head of *"the advancement of health"* should be included in Hong Kong's statutory definition of charitable purpose.⁶⁶

Consultees' responses

2.89 The vast majority of the respondents expressing views on this head supported its inclusion in the statutory definition.

Our view

2.90 In view of the general support from the respondents, we recommend that *"the advancement of health"* should be one of the heads of charitable purpose.

"The saving of lives"

2.91 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 services or training in first aid or other life-saving techniques."*⁶⁷

2.92 As noted earlier, section 3(1)(d) of the English 2011 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*

66 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), paras 5.77 to 5.79.

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

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.*"⁶⁸

2.93 In line with the approach under the Scottish legislation, the Sub-committee had recommended in the Consultation Paper that *"the saving of lives"*, as a separate head, should be one of the categories of charitable purposes.⁶⁹

Consultees' responses

2.94 There was general support from consultees who responded on this head for its inclusion in the statutory definition.

Our view

2.95 In view of the general support received, we recommend that this proposed head should be included in the categories of charitable purpose.

68 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.

69 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), paras 5.80 to 5.82.

"The advancement of citizenship or community development"

2.96 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."*

2.97 Identical provisions appear in the English 2011 Act.⁷⁰ 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.⁷¹ 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,⁷² the promotion of volunteering and the promotion of the voluntary sector⁷³ and the promotion of the efficiency and effectiveness of charities and the effective use of charitable resources.⁷⁴

70 See sections 3(1)(e) and 3(2)(c) of the English 2011 Act.

71 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.

72 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.

73 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.

74 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 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

2.98 The Sub-committee had recommended in the Consultation Paper that this should be one of the heads of charitable purposes included in the definition.⁷⁵

Consultees' responses

2.99 The vast majority of respondents expressing views on this head supported its inclusion in the list of charitable purposes. While providing support for this proposed head, the Bar Association considered that it is necessary to clarify its scope by adding a provision equivalent to section 7(3)(b) of the Scottish 2005 Act.⁷⁶

Our view

2.100 Having considered the views of the respondents, we recommend that this head should be one of the categories of the statutory definition of charitable purpose. Furthermore we agree to the suggestion of the Bar Association that the scope of this head should be clarified. We therefore recommend that this head should be subject to the following clarification as provided in section 7(3)(b) of the Scottish 2005 Act to include:

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

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

2.101 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 3(1)(f) of the English 2011 Act, except that the words *"heritage"* and *"culture"* have been transposed.

2.102 The advancement of the arts covers a wide range of charitable activities, including promoting various forms of art at a national, professional

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.

75 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), paras 5.83 to 5.85.

76 Section 7(3)(b) of the Scottish 2005 Act :

"(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."*

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 is 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

2.103 The Sub-committee had recommended in the Consultation Paper that this should be one of the heads of charitable purposes.⁷⁸

Consultees' responses

2.104 There was general support for the inclusion of this head among the respondents who responded on this head.

Our view

2.105 In view of the responses, we recommend that this head should be included in the statutory definition of charitable purpose.

"The advancement of public participation in sport"

2.106 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 *Re Nottage*⁷⁹ 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, however, now includes a specific charitable head relating to sports, each Act adopting a slightly different form of words.

2.107 Section 7(2)(h) of the Scottish 2005 Act cites "*the advancement of public participation in sport*", while in England, section 3(1)(g) of the English 2011 Act refers to "*the advancement of amateur sport*". In the case of the English head, section 3(2)(d) explains that "*sport*" means "*sports or games*

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

<http://www.charitycommission.gov.uk/detailed-guidance/charitable-purposes-and-public-benefit/guidance-on-charitable-purposes/the-advancement-of-the-arts-culture-heritage-or-science/>.

78 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), paras 5.86 to 5.88.

79 [1895] 2 Ch 649.

which promote health by involving physical or mental skill or exertion".⁸⁰ 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*".

2.108 In the Consultation Paper, the Sub-committee had 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. Then, the Sub-committee had decided for the following two reasons 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. Firstly, 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*"). The Sub-committee had made the recommendation in the Consultation Paper that the new legislative definition of charitable purposes should include a specific head for "*the advancement of health*", confirming and continuing existing practice.

2.109 Secondly, the Sub-committee was 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.

Consultees' responses

2.110 During the consultation process, a few responses advocated the inclusion of this head in the statutory definition of charitable purposes. It was considered by a respondent that in addition to health benefit, sports could produce positive impact on the life of a person, such as harmony, happiness, character building, and sense of pride, achievement and belonging. Another respondent expressed his opinion in support for the inclusion of this head for two reasons. Firstly, in other jurisdictions, such as England and Wales, Scotland and Singapore, "*the advancement of amateur sport*" or "*the advancement of health*" is treated as a charitable purpose. There are inevitably valid reasons why this is so treated. Secondly, in response to the concern raised by the Sub-committee that some organisations not previously

80 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.

considered as charities may become eligible to be so designated with consequential tax implications, it was suggested that administrative measures could be imposed to prevent abuses.

2.111 The Law Society expressed its opinion in favour of including the head "*the advancement of amateur sports*" in the statutory definition. It considered that well drafted guidelines can establish the parameters of this charitable purpose in order to overcome the concern of the Sub-committee that some organisations which are not previously considered as charities may become eligible to be so designated. Furthermore, any possible abuses such as gambling in some "*sports*" can be addressed by other means, such as by excluding them to qualify as a charity by virtue of its trading and profit element.

2.112 A respondent from the academic field also expressed in favour of adding this head (as opposed to being a spectator) as a charitable purpose for the reason that it has significant social benefit extending beyond health benefits.

Our view

2.113 We agree with the Sub-committee in the reasoning for not including this head as a charitable purpose as set out in the Consultation Paper. We also note the arguments set forth by some of the respondents in favour of including this head in the statutory definition. On balance, we are of the view that this should not be one of the heads of charitable purposes under the new statutory definition.

"The promotion of religious or racial harmony"

2.114 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 3(1)(h) of the English 2011 Act includes this head 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*".

2.115 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. In the Consultation Paper, the Sub-committee had considered that the present practice should continue and had recommended that this should be one of the heads of charitable purposes.⁸¹

81 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), paras 5.113 and 5.114.

Consultees' responses

2.116 There is general support from respondents who responded on this head.

Our view

2.117 In view of the consultees' responses, we recommend that this head should be included in the statutory definition of charitable purposes.

"The promotion of equality and diversity"

2.118 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 3(1)(h) of the English 2011 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"*.

2.119 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. The Sub-committee had considered that the present practice should continue and had recommended in the Consultation Paper that this should be one of the heads of charitable purpose.⁸²

Consultees' responses

2.120 There is general support for including this head in the statutory definition of charitable purposes from respondents who responded on this head. There was a suggestion that this head and the head *"the promotion of religious or racial harmony"* should be included in the head *"the advancement of human rights, conflict resolution or reconciliation"* in the same way as in section 3(1)(h) of the English 2011 Act.

Our view

2.121 It is clear from the responses that this head should be one of the heads for charitable purposes. Having also considered the option of having a combined head of *"the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity"* as in the case of the English 2011 Act, we prefer the way it is set out in the recommendation in the Consultation Paper, which follows the Scottish 2005 Act.

82 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), paras 5.115 and 5.116.

"The advancement of environmental protection or improvement"

2.122 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 3(1)(i) of the English 2011 Act.

2.123 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. The Sub-committee had considered in the Consultation Paper that the present practice should continue and recommended that this should be one of the heads of charitable purposes.⁸³

Consultees' responses

2.124 All the respondents who responded on this head agreed that this should be included in the statutory definition.

Our view

2.125 In view of the support of the consultees, we recommend that this head should be one of the heads of charitable purpose.

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

2.126 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 3(1)(j) of the English 2011 Act with a similar elaboration in section 3(2)(e) of the Act.

2.127 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. In the Consultation Paper, the Sub-committee had considered that the present practice should continue and had recommended that this should be one of the heads of charitable purposes.⁸⁴

83 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), paras 5.117 and 5.118.

84 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), paras 5.119 and 5.120.

Consultees' responses

2.128 There was general support among respondents who had responded on this head. However there were views expressing that this head may overlap the heads on "*the prevention or relief of poverty*" and "*advancement of health*". There were also views expressing that this head should be included as a sub-category under the head "*any other purpose that is of benefit to the community*".

Our view

2.129 We have considered the views of the respondents. We note that there may be overlaps between this head and other heads such as "*the prevention or relief of poverty*" and "*the advancement of health*". Having considered that overlaps between different heads are unavoidable and that this head will cover purposes which are not covered by other heads, we prefer to follow what is adopted in the Scottish 2005 Act and recommend that this head should be included in the statutory definition of charitable purposes.

"The advancement of animal welfare"

2.130 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 3(1)(k) of the English 2011 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.

2.131 The Sub-committee had recommended in the Consultation Paper that this should remain as a charitable purpose under the new statutory definition.⁸⁵

Consultees' responses

2.132 There was general support for including this head in the statutory definition of charitable purposes. There were respondents expressing the view that this head should include "*the prevention of cruelty to animals*".

Our view

2.133 We note the support by the respondents and have also considered the concerns expressed by some of the responses on whether this head includes the prevention of cruelty to animals. Taking reference from the

85 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), paras 5.121 and 5.122.

guidelines issued by the Charity Commission of England and Wales, "*the advancement of animal welfare*" includes "*any purposes directed towards the prevention or suppression of cruelty to animals or the prevention or relief of suffering by animals.*"⁸⁶

2.134 It is our clear intention that the prevention of cruelty to animals should fall within the meaning of this head. Based on the general support of the respondents, we recommend that this head should be included in the statutory definition of charitable purposes.

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

2.135 Section 3(1)(m)(i) of the English 2011 Act includes as one of the heads of charitable purposes "*that are not within paragraphs (a) to (l) but are recognised as charitable purposes by virtue of section 5 (recreational and similar trusts, etc.) or under the old law*". Section 3(1)(m)(ii) and 3(1)(m)(iii) provides that "*any other purposes*" are purposes "*that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within any of paragraphs (a) to (l) or sub-paragraph (i), or that may reasonably be regarded as analogous to, or within the spirit of, any purposes which have been recognised, under the law relating to charities in England and Wales, as falling within sub-paragraph (ii) or this sub-paragraph.*" Section 3(4) clarifies subsection (1)(m)(i) by stating that "*the old law*" means "*the law relating to charities in England and Wales as in force immediately before 1 April 2008.*" Section 5 incorporates section 1 of the Recreational Charities Act 1958 and provides -

- "(1) *It is charitable (and is to be treated as always having been charitable) to provide, or assist in the provision of, facilities for—*
- (a) *recreation, or*
(b) *other leisure-time occupation,*
- if the facilities are provided in the interests of social welfare.*
- (2) *The requirement that the facilities are provided in the interests of social welfare cannot be satisfied if the basic conditions are not met.*

86 The Charity Commission of England and Wales provides the following examples of the sorts of charities and charitable purposes falling within this head :

- charities promoting kindness and to prevent or suppress cruelty to animals;
- animal sanctuaries;
- the provision of veterinary care and treatment;
- charities concerned with the care and re-homing of animals that are abandoned, mistreated or lost;
- feral animal control, e.g. neutering.

See: http://www.charity-commission.gov.uk/charity_requirements_guidance/charity_essentials/public_benefit/advancing_animal_welfare.aspx.

- (3) *The basic conditions are—*
 - (a) *that the facilities are provided with the object of improving the conditions of life for the persons for whom the facilities are primarily intended, and*
 - (b) *that—*
 - (i) *those persons have need of the facilities because of their youth, age, infirmity or disability, poverty, or social and economic circumstances, or*
 - (ii) *the facilities are to be available to members of the public at large or to male, or to female, members of the public at large.*
- (4) *Subsection (1) applies in particular to—*
 - (a) *the provision of facilities at village halls, community centres and women's institutes, and*
 - (b) *the provision and maintenance of grounds and buildings to be used for purposes of recreation or leisure-time occupation, and extends to the provision of facilities for those purposes by the organising of any activity.*

But this is subject to the requirement that the facilities are provided in the interests of social welfare.
- (5) *Nothing in this section is to be treated as derogating from the public benefit requirement."*

2.136 Section 3(1)(m)(i) of the English 2011 Act refers to what are recognised as charitable purposes according to both charity (common) law and by virtue of section 5 relating to recreational and similar trusts, etc., but not the charitable purposes listed in section 3(1)(a) to (l). In contrast, section 3(1)(m)(ii) and (iii) refers to what are regarded as *"analogous to or within the spirit of"* any purposes recognised as charitable purposes under the heads in section 3(1)(a) to (l), charity (common) law *and* section 5 relating to recreational and similar trusts. The scope of section 3(1)(m) is therefore very wide.

2.137 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)"*, i.e., *"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.

2.138 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).

2.139 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 (i.e., purposes beneficial to the community not falling under the heads of relief of poverty, advancement of education or the advancement of religion) are charitable.

2.140 The Sub-committee had discussed at length the contrasting scope of this head under common law principles and the UK statutory models. It was considered by the Sub-committee that it is 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 by the Sub-committee, it had reached the view in the Consultation Paper 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, the Sub-committee had believed that the object of making the law more transparent and accessible is not adversely affected by having a residual head. The Sub-committee had therefore recommended in the Consultation Paper that this should be included in the statutory list as a residual head of charitable purpose.⁸⁷

Consultees' responses

2.141 The majority of the responses agreed to the inclusion of this head in the charitable purposes. However a few respondents expressed the view that it is too abstract and not entirely clear what this head is intended to cover. For instance, it was suggested useful for the proposed legislation to clarify what "*community*" means. In particular, whether a charity benefiting solely a place outside Hong Kong may qualify as a charity should be clarified. Furthermore, it was suggested that detailed conditions pertaining to "*any other purpose that is of benefit to the community*" be clearly specified.

2.142 One respondent ran into depth in discussing the implication of this head. The relevant UK judgements cited by the respondent brought out the point that the law is not static and should change as ideas about social value change. The respondent considered that there are two implications. Firstly, new objects and purposes not previously considered charitable may be

87 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), paras 5.123- 5.128.

held to be so. Secondly, objects and purposes previously regarded as charitable may no longer be held to be charitable.⁸⁸ Given the difference between charitable purpose and public purposes or purposes for the benefit of the public, if one is to stick to charity or charitable purpose in its true legal sense, it would seem to the respondent that similar restriction found in the UK statutory models should be considered for this head which (according to the wording as recommended in the Consultation Paper) seems to cover a wide category of institutions established for public benefit purposes. Otherwise, the scope of recognized charities will be enlarged and institutions with purposes not falling within the spirit and intendment of the Preamble (subject to modifications with the passage of time) will be included.

Our view

2.143 We note that the majority view supported this recommended head. However, we feel the need to address the comments made by some respondents concerning the lack of clarity in what is the meaning of "community" or what "*any other purpose that is of benefit to the community*" intends to cover.

2.144 As mentioned earlier, charity under Hong Kong law follows common law and the leading common law authority on the definition of charity is *Income Tax Special purposes Commissioner v Pemsel* which provided for the four categories of charitable purposes deriving from the preamble to the Charitable Uses Act 1601 in England. The fourth head of the Pemsel's heads of charity is "*other purposes beneficial to the community*" not falling under the preceding three heads of "*relief of poverty*", "*advancement of education*" and "*the advancement of religion*". A wealth of case law has been developed on the meaning of "*other purposes beneficial to the community*". We appreciate the advantages of providing a definition of this term are greater certainty and clarity. On the other hand, we are more concern about the need to "*keep the law as to charities moving as new social needs arise or old ones become obsolete or satisfied*".⁸⁹ Striking a balance between greater certainty and the need to allow sufficient flexibility to enable the scope of charitable purpose to adjust to meet social and economic changes, we favour the option to enable sufficient flexibility. We believe that providing a definition on the meaning of "community" will defeat the aim of allowing greater flexibility to cater for changes in the social and economic needs. We therefore recommend that this residual head of "*any other purpose that is of benefit to the community*" should be one of the statutory definition of charitable purposes.

88 *IRC v McMullen* [1981] AC 1 at 15E. Lord Wilberforce summarized the principle to be applied in *Scottish Burial Reform and Cremation Society v Glasgow Corporation* [1968] AC 138 at 154 when he said that the court's decisions "*have to keep the law as to charities moving according as new ideas arise or old ones become obsolete or satisfied... it is now accepted that what must be regarded is not the wording of the preamble itself, but the effect of decisions given by the courts as to its scope, decisions which have endeavoured to keep the law as to charities moving according as new social needs arise or old ones become obsolete or satisfied*".

89 *Scottish Burial Reform and Cremation Society v Glasgow Corporation* [1968] AC 138 at 154.

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

2.145 Section 3(1)(h) of the English 2011 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".*

The Sub-committee had preferred the Scottish approach in the consideration of this head.

2.146 All areas covered under *"the advancement of human rights, conflict resolution or reconciliation"* are 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.⁹⁰ 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."*⁹¹

2.147 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 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

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

91 [1917] AC 406, at 442.

*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."*⁹²

2.148 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."*⁹³

2.149 More recently, the English Charity Commission has issued a guideline under CC 9 - *Campaigning and Political Activities by Charities (March 2008)*⁹⁴ 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.⁹⁵ 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.

2.150 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 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.

92 [1982] Ch 321, at 336, 337.

93 [1982] Ch 321 at 340.

94 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>.

95 Same as above.

2.151 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"*.

2.152 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 the 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
- human rights charity calling on a government to observe certain fundamental human rights, and for the practice of torture to be abolished.

2.153 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.⁹⁶

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

96 Same as above.

two kinds of activities and the Sub-committee had accepted that this is an area which may give rise to uncertainty and ambiguity.

2.155 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*,⁹⁷ the High Court of Australia (following a series of conflicting lower level findings on the issue⁹⁸) 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.

2.156 It was mentioned in the Consultation Paper that the Sub-committee had no difficulty with the proposition that the advancement of human rights can well be charitable. The Sub-committee had noted, however, the view that there is a need to distinguish charitable from political purposes and the difficulty of defining the distinction. In the Consultation Paper, the Sub-committee had invited comments specifically on whether this particular category should be included in the statutory definition and how it should be defined.⁹⁹

Consultees' responses

2.157 There was an overwhelming response in support of the inclusion of this head in the statutory definition.

97 [2010] HCA 42.

98 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 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.

99 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), paras 5.101 to 5.112.

2.158 A number of respondents expressed concern about the charitable status of some existing charities currently engaged in humanitarian work becoming uncertain and being affected. It was claimed by a respondent which is a charity that in working to save the environment, many green groups were engaged in work "*advocating or opposing change in the law, policy and administrative practice*". Advocacy and campaign were considered by the respondent an essential part of their work in order to achieve the purpose of poverty alleviation. It was considered by the respondent that such work was a vital part of its charitable purpose on poverty reduction, and it would be unacceptable if such activities were regarded as "*political activities*" and thus fall outside the work of a charity. It was also considered by many respondents that at present, many campaign efforts, such as on poverty alleviation and the promotion of racial harmony were associated with government policies and laws and were being regarded as charitable activities. As the community needs to change with time in order to meet with the ever-evolving social challenges, it is inevitable that there should be changes to the law and policies. Non-governmental organisations (NGOs) often need to change policies and laws to achieve social harmony and improve people's livelihood and advocacy has long been recognised by the public as a charitable means to achieve social justice and equal opportunities.

2.159 While supporting the inclusion of this head in the statutory definition of charitable purposes, a number of respondents expressed the view that this head should be defined in clear and unambiguous terms and it should be made clear that no political organisation should be included in the definition.

2.160 Some respondents expressed the view that since Hong Kong has ratified a number of human rights instruments, including the UN Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, it is unreasonable not to include the advancement of human rights in the definition of charitable purpose. Furthermore, a number of charitable organisations have based their work on these human rights instruments. A respondent expressed the view that human rights are basic values on safeguarding human safety and dignity. The Basic Law and the Hong Kong Bill of Rights Ordinance have clearly stated the importance of human rights protection. It was considered clear that upholding human rights has long been implemented in Hong Kong and is a major responsibility of the Government and the civil society.

2.161 It was strongly advocated by one respondent from the academic field that it would be contrary to the spirit of the constitution to say that the activities undertaken by the organisation fall outside the scope of the charitable purposes even if such activities involve procurement of a change in the law. It was considered that only those activities which aim at furthering the interests of a particular political party should be regarded as political activities or as serving a political purpose, in which case the organisation in question can be considered as being incompatible with the charitable purposes. It was

considered that this interpretation is also more or less in line with the definition of a "*political body*" in the Societies Ordinance (Cap 151).¹⁰⁰ The respondent also considered that whether or not a charity is in compliance with its charitable purposes in campaigning for a change in the law through political activities does not necessarily involve discussions as to whether the change in the law eventually procures a public benefit. It was the respondent's view that no matter how a change in the law will affect the society in the end, the act of procuring a revision in the law to make it compatible with the requirements of human rights has already promoted public understanding and discussion of the existing laws and the standards of human rights. This in itself confers a public benefit. Therefore, those political activities which aim at promoting charitable purposes should also be regarded as being in compliance with the requirements of the charitable purposes.

2.162 A number of respondents from the social welfare sector gave the view that the International Federation of Social Workers and the International Association of Schools of Social Work, in their Ethics in Social Work, Statement of Principles, point out that the social work profession "*promotes social change*", and that "*principles of human rights and social justice are fundamental to social work*". In Hong Kong, The Code of Practice for Registered Social Workers also states in its Articles 1 and 4 (Part 1) respectively that the primary mission of social workers is to help people in need and to strive to address social problems and that social workers accept responsibility to advance social justice and to safeguard the cause of human rights. In case this head were to be excluded from the definition of charitable purposes, which appears to be at odds with what social workers are required to do by the international society and the local community, social workers would find themselves caught in a dilemma of either to risk the loss of charitable status of the institutions they are working for, or to act in violation of their code of practice.

2.163 A respondent considered that restriction on advocacy of policy is outdated and is seen as a regressive practice at international level if Hong Kong intends to tighten up or strictly apply the principle now. The respondent quoted the example of England and Wales where single issue campaigning organisations and voluntary activities are on the rise and there has been call for the relaxation of policy advocacy by charities from the UK society, with a view to facilitating the democratic policy-making process and formulating policies which benefit the public.¹⁰¹ The relevant requirement was relaxed by the UK government and the Charity Commission as a result. Moreover, the court of Australia held in a recent case 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.¹⁰²

100 Under section 2 of the Societies Ordinance (Cap 151), "*political body*" means -

(a) a political party or an organisation that purports to be a political party; or
 (b) an organisation whose principal function or main object is to promote or prepare a candidate for an election.

101 0.2.1, 0.2.3 Kennedy Report.

102 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), para 5.111.

2.164 The Hong Kong Bar Association considered that the "*advancement of human rights*" can probably be covered by substituting the head "*the promotion of equality and diversity*" with "*the protection of equality, diversity and social justice*". As for the part of the head relating to "*conflict resolution or reconciliation*", the Hong Kong Bar Association took the view that not all kinds of conflict resolution or reconciliation should be accorded charitable status. For instance, whilst the prevention of armed conflict in Africa is clearly a worthy cause which deserves legal recognition, it is difficult to see how the promotion of domestic arbitration or mediation could be put on the same plane.

2.165 Some respondents have expressed the view that the inclusion of "*conflict resolution or reconciliation*", which arguably covers activities on a national or international scale as well as those at an organisational or inter-personal level, may be casting the net too wide. It was worried that, akin to the advancement of human rights, activities pertaining to conflict resolution or reconciliation on the national or international level may be difficult to separate from activities with a political purpose. Moreover, it was observed that conflicts on the organisational and inter-personal level may be better addressed within the legal system or via alternative dispute resolution.

Our view

2.166 In the Consultation Paper, the Sub-committee had expressed the view that it has no difficulty with the proposition that the advancement of human rights can well be charitable. At the same time, the Sub-committee had pointed out the need to distinguish charitable from political purposes and the difficulty of defining the distinction and had thereby invited comments from the public on whether the specific category of the advancement of human rights should be included in the statutory definition and how the same should be defined.¹⁰³

2.167 It has become apparent to us almost immediately upon the release of the Consultation Paper that singling out this category for specific comments had led to a flurry of concern by members of the civil society, *inter alia*, NGOs, human rights groups and academics. In response to the views expressed in the submissions and comments received, we propose to delve deeper into issues surrounding the debate, with reference to the legislative frameworks and experiences of overseas jurisdictions in this area of law.

2.168 We will firstly consider whether the advancement of human rights should be considered as a separate statutory head of charitable purpose. Then we will proceed to consider whether "*conflict resolution and reconciliation*" should be included as a statutory head of charitable purpose.

103 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), para 5.112.

Whether or not the advancement of human rights should be a charitable purpose

2.169 There is overwhelming support by the civil society in Hong Kong for the inclusion of the advancement of human rights as a statutorily defined head of charitable purpose. Out of the 260 odd submissions received by the Sub-committee during the consultation period, the vast majority of respondents were in the affirmative that the "*advancement of human rights*" should be included as a charitable purpose. Strong and forceful arguments were put forward by many respondents from different sectors in support of the inclusion of this head.

2.170 In light of the observations put forward by the respondents, as well as the conceptual frameworks set out in case law and by the respondents, this section sets out the major arguments for and against the inclusion of the advancement of human rights as a charitable purpose.

(a) Arguments for the inclusion

(1) Human rights as universal values

2.171 Firstly, human rights are accepted as universal principles and core values in Hong Kong. Provisions for safeguarding human rights are enshrined in Chapter III of the Basic Law, under which the rights and freedoms of Hong Kong residents are set out. In particular, the International Covenant on Civil and Political Rights (ICCPR) has been incorporated into the laws of Hong Kong in the Bills of Rights Ordinance (Cap 383) by virtue of Article 39 of the Basic Law. The Hong Kong Government has ratified a number of conventions on human rights, including the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (United Nations Convention Against Torture) (CAT). Some of these conventions, notably CEDAW, stipulate that State Parties have the obligations to adopt all appropriate measures, including legislation, for the full realization of the rights recognized under the convention.¹⁰⁴

2.172 Moreover, the UN Declaration on Human Rights Defenders states that the government has a responsibility and duty to protect and promote all human rights and fundamental freedoms, as well as recognize and respect the roles and duties of human rights groups and activities in promoting and safeguarding such rights and support their work.¹⁰⁵

104 For example, see Article 3 of CEDAW.

105 As regards the legal character of the Declaration: The Declaration is not, in itself, a legally binding instrument. However, it contains a series of principles and rights that are based on human rights standards enshrined in other international instruments that are legally binding, such as the ICCPR. Moreover, the Declaration was adopted by consensus by the General Assembly and therefore represents a very strong commitment by States to its implementation. States are increasingly considering adopting the Declaration as binding national legislation.

2.173 Hence the inclusion of the advancement of human rights as a statutory charitable purpose is a logical extension in giving effect to the fundamental rights and freedoms recognized in these international conventions. It would be contrary to the spirit of our international obligations, and indeed our constitution, not to recognize the advancement of human rights on par with other charitable purposes.

(2) *Mental and moral improvement of humankind*

2.174 Secondly, a closer look at the common law reveals that the advancement of human rights *per se* has been established as fundamentally charitable. In *McGovern v Attorney General*,¹⁰⁶ although the court ultimately held that the primary manner in which the relief of prisoners of consciences would be achieved through pressure in national and international policies, which rendered the trust's objective a political object, Slade J accepted that the Elizabethan preamble¹⁰⁷ was broad enough to capture trusts that sought to relieve human suffering and distress and that Amnesty International's trust was "*a trust established for good compassionate purposes*" which, subject to satisfaction of the requirement of public benefit, could be charitable under English common law. This position taken in *McGovern* supports the proposition that there is nothing intrinsically non-charitable in the promotion of human rights.¹⁰⁸

2.175 Alternatively, the advancement of human rights has also been recognized as a charitable purpose by analogy with "*mental and moral improvement of man*", a heading which has long been held to fall within the spirit and intent of the Elizabethan preamble.¹⁰⁹ The Charity Commission of England and Wales, in a guidance issued on the promotion of human rights, was of the opinion that "*given that respect for human rights is widely regarded as a moral imperative, the well-established charitable purpose of promoting the moral or spiritual welfare and improvement of the community provides a sufficient (but not the only) analogy for treating the promotion of human rights generally as charitable.*"¹¹⁰

2.176 The Charity Commission of England and Wales also recognized that there is an obvious public benefit in promoting human rights, including a tangible benefit for individuals whose rights are secured and a wider benefit to the whole community that arises from our perception that the fundamental rights of all members of the community are being protected. On the other hand, the Charity Commission of England and Wales stipulates that in order to achieve a degree of certainty in the expression of objects that is necessary for

106 [1982] Ch 321 at 336, 337.

107 The Charitable Uses Act, also known as the Statute of Elizabeth I, came into force in England in 1601 and introduced the legal concept of 'charitable purposes'.

108 See Breen, O. B., "Too political to be charitable? The Charities Act 2008 and the future of human rights organisations in Ireland", (2012) Public Law, Apr, 268-287.

109 See *Re South Place Ethical Society* [1980] 1 W.L.R. 1565. See also, G. Moffatt, "Charity, Politics and the Human Rights Act 1998: Much Ado about Nothing?" (2002) 13 Kings College Law Journal 1, 13.

110 The Charity Commission of England and Wales, *Review of the Charity Register: The Promotion of Human Rights*, (Jan 2005).

charitable status, an organisation seeking to establish itself as a charity to promote human rights must identify the code or codes of human rights which it seeks to promote.¹¹¹

(3) *The nexus between human rights and social issues*

2.177 Thirdly, the realm of human rights is far-reaching and is intrinsic to the livelihood of individuals and communities. Indeed, most of the accepted charitable purposes, such as the advancement of citizenship and community development, are inseparable from the tenants of human rights. Concepts underpinning human rights, such as equality and non-discrimination, civil and political rights and increasingly, social and economic rights, are often the source of guidance for a charity's mission in various areas. This may be more so for charities striving for equal treatment and resources on behalf of minority or marginalized groups. As such, the civil society has a vital role to play in the advancement of human rights and the promotion of social justice.

2.178 Akin to the advancement of human rights, the generally accepted charitable purposes, including but not limited to the prevention of poverty and the advancement of environment protection, are inseparable from government policies and laws. Although different jurisdictions allow various degrees of policy advocacy and lobbying to be carried out by charities, it would seem unreasonable to exclude the advancement of human rights from the list of charitable purposes merely by reason of its proximity with policy advocacy.

2.179 Another important consideration is the requirement that an organisation must be established for purposes exclusively charitable in order to be considered a charity. The exclusivity requirement is currently adopted by the Inland Revenue Department¹¹² and the likely retention of this requirement is evident in the Sub-committee's recommendation, in line with other jurisdictions.¹¹³ As expressed with great anxiety by a number of respondents, if the future definition of charity does not include the advancement of human rights, severe constraints will be placed on the operation and development of charitable organisations, as it would prevent them from taking purposes of promoting human rights nature as their mission. It would be undesirable if charities should need to "*sidestep*" human rights issues even if the latter are closely connected with their charitable objectives.

(4) *A legal pariah among commonwealth jurisdictions*

2.180 Fourthly, it is apparent that the inclusion of "*the advancement of human rights*" as a charitable purpose is the norm rather than the exception among the common law jurisdictions from which Hong Kong frequently draws

111 Same as above.

112 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*". See Inland Revenue Department, Departmental Interpretation and Practice Notes, No 37 (Revised) Concessionary Deductions: Section 26 C: Approved Charitable Donations (Sept 2006); Law Reform Commission of Hong Kong, Consultation Paper on Charities (June 2011), para 5.28.

113 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), para 5.44 and p.79.

reference in its legal reforms. Whilst it is true that the political and social contexts of the jurisdictions studied below are vastly different, the omission may render Hong Kong a legal pariah amongst jurisdictions with generally liberal regimes.

2.181 In devising a suitable definition of charities for Hong Kong, the Sub-Committee was of the view that the legislations in England and Wales and Scotland in particular, provide useful references given their shared legal heritage with Hong Kong. Given the proposed heads of charitable purposes are largely identical to their counterparts under England and Wales and Scotland's respective Acts, and given that both England and Wales and Scotland have included the "*advancement of human rights, conflict resolution or reconciliation*" as a distinct head of charitable purpose,¹¹⁴ it is difficult to justify a departure from the two legislative frameworks with respect to this single category of the advancement of human rights in the absence of a clear, distinguishable argument in the Hong Kong context.

2.182 Apart from England and Wales and Scotland, the "*promotion or advocacy of human rights and democracy*" is listed in South Africa as a "*public benefit activity*" under Part I of the Ninth Schedule to the Income Tax Act, 1962.¹¹⁵

2.183 In Canada, the Charities Directorate of the Canada Revenue Agency ("CRA") recognizes that upholding human rights can be a charitable purpose in and of itself under the fourth head of *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] A.C. 531 (H.L.).¹¹⁶ The CRA also provides guidance on how activities to uphold human rights may be conducted, either with other charitable purposes or otherwise.¹¹⁷

2.184 In Australia, promoting or protecting human rights is one of the charitable purposes under section 12 of the Charities Act 2013 which is recently enacted in June 2013. The Act will commence on 1 January 2014.

2.185 In contrast, the Irish legislation makes no reference to the advancement of human rights as a "*purpose that is of benefit to the community*" in section 11 of the Irish Charities Act 2009, although "*the advancement of conflict resolution or reconciliation*" is included. The legislative history of the 2009 Act, including the exclusion of the advancement of human rights category in a consultation paper issued in 2003 and throughout the two-year passage of the relevant bill in the Houses of the Oireachtas, indicated a lack of normative reasoning and possibly a political

114 See section 3(1)(h) of the Charities Act 2011 for England and Wales, see Section 7(2)(j) of the Charities and Trustee Investment (Scotland) Act 2005 for Scotland.

115 In South Africa, preferential tax treatment is granted to non-profit organisations which are established as "*public benefit organisations*" as defined under section 30 of the Income Tax Act 1962. The sole or principal object of the organisation must be to carry one or more of the public benefit activities listed in the Ninth Schedule to the Act or which have been subsequently determined as such by the Minister of Finance.

116 Canada Revenue Agency, *Guidance: Upholding Human Rights and Charitable Registration* (CG-001) (May 2010), available at: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cqd/hmn-rghs-eng.html>.

117 Same as above.

motive for the Irish Government's steadfast refusal to add a specific reference to human rights to the charitable purposes list despite fervent efforts by the civil society for its inclusion.¹¹⁸

(b) Arguments against the inclusion

(1) Political purposes

2.186 An oft-cited argument in the refusal to grant charitable status to human rights organisations is that the advancement of human rights closely aligns with political purposes, which are categorically prohibited by English common law as laid down by the House of Lords in *Bowman v Secular Society Ltd*¹¹⁹ and more recently held in *McGovern v Attorney General*.¹²⁰

2.187 Although there is indeed a close connection between the promotion of human rights and activities in the political realm, most often in the form of policy advocacy and campaigning for certain legislation and policies, this argument of construing political activities (broadly defined) of human rights organisations as political objects runs the risk of blurring the distinction between charitable purposes and the means employed by charities.

(2) Inclusion in other heads of charitable purposes

2.188 Another plausible argument against the inclusion of the advancement of human rights as a charitable purpose is that the residual head of "*any other purpose that is of benefit to the community*" would allow sufficient flexibility to enable the scope of charitable purpose to adjust to meet the social and economic needs, including organisations with a mission to promote human rights. Hence even without the category in question being included as a separate head, human rights organisations would not necessarily be barred from being charities as long as it can show that its purpose is of benefit to the community.

2.189 Balancing the pros and cons set out above, we find it obvious that the arguments for the inclusion of this head outweigh those against its inclusion. We will now proceed with the consideration of the remaining aspects of this head.

118 See Breen (2012), note 10, where the parliamentary debates to the Charities Bill 2007 are discussed, including the emergence of that fact that it was the Cabinet and not the Attorney General which dictated the exclusion of human rights in the list of charitable purposes, and that the Cabinet gave deference to the Office of the Revenue Commissioners' previous treatment of human rights organisations based on a rough reference to *McGovern v Attorney General*, [1982] Ch 321 at 336, 337.

119 [1917] AC 406 (HL).

120 [1982] Ch 321 at 336, 337.

"Conflict resolution and reconciliation"

2.190 The head "*conflict resolution and reconciliation*" is included as a charitable purpose in England and Wales as well as in Scotland. In comparison with the Charities Act 2011 in England and Wales, the Sub-committee opined that the Scottish approach of separating "*the advancement of human rights, conflict resolution or reconciliation*" with the other heads of the promotion of "*religious or racial harmony*", and "*the promotion of equality and diversity*" is a better approach.¹²¹

2.191 As to the scope of "*conflict resolution and reconciliation*", the Charity Commission of England and Wales has indicated it to include charities concerned with the promotion of restorative justice and other forms of conflict resolution or reconciliation, charities concerned with the resolution of national or international conflicts and mediation charities.¹²²

2.192 In the case of Concordis International Trust, the Charity Commissioners of England and Wales (the predecessor of the Charity Commission) considered an application for charitable status by an organisation with objects which included the promotion of national and international conflict resolution and reconciliation. The Commissioners concluded that the promotion of conflict resolution in a national or international context was capable of being a charitable purpose for the public benefit.¹²³ In its decision, the Commissioners noted that under common law, international friendship or understanding was not held as charitable. However, the Commissioners distinguished such a purpose from conflict resolution, the latter being intended to address and relieve the consequences of struggle or war between groups or nations, rather than the promotion of a closer and more sympathetic understanding between two nations.¹²⁴

2.193 Similarly, in Scotland, the Office of the Scottish Charity Regulator expressed that the head under section 7(2)(j) includes the resolution of international conflicts and relieving the suffering, poverty and distress arising through conflict on a national or international scale by identifying the causes of the conflict and seeking to resolve such a conflict. The promotion of restorative justice and mediation or reconciliation between persons, organisations, authorities or groups may also fall within this purpose.¹²⁵

121 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), para 5.101; see section 7(2) of the Charities and Trustee Investment (Scotland) Act 2005 and section 3(1)(h) of the Charities Act 2011 in England and Wales.

122 See: <http://www.charitycommission.gov.uk/detailed-guidance/charitable-purposes-and-public-benefit/guidance-on-charitable-purposes/the-advancement-of-human-rights-conflict-resolution/>.

123 Charity Commission of England and Wales, *Application for Registration of Concordis International Trust* (23 July 2004), available at: <http://www.charitycommission.gov.uk/media/100901/concordisdecision.pdf>.

124 See section 6.1 of the decision.

125 Office of the Scottish Charity Regulator, *Meeting the Charity Test: Guidance for applicants and for existing charities*, at 8; see: http://www.oscr.org.uk/media/32303/meeting_the_charity_test_full_guidance.pdf.

2.194 In addition to England and Wales and Scotland, it is common for "*conflict resolution and reconciliation*" to be statutorily defined as charitable purpose across the jurisdictions studied. Under section 3(11)(e) of the Irish Charities Act 2003 "*the advancement of conflict resolution or reconciliation*" is included as a "*purpose that is of benefit to the community*". Likewise, South Africa has listed "*conflict resolution, the promotion of reconciliation, mutual respect and tolerance between the various peoples of South Africa*" as one of the public benefit activities under the Welfare and Humanitarian section in Part 1 of the Ninth Schedule to the Income Tax Act, 1962.

2.195 In New Zealand, while "*conflict resolution and reconciliation*" is not set out as one of the four charitable purposes under section 5(1) of the Charities Act 2005, it is arguably included as "*another matter beneficial to the community*".

2.196 For the case of Australia, "*the purpose of promoting reconciliation, mutual respect and tolerance between groups of individuals that are in Australia*" is one of the charitable heads in the Charities Bill 2013.¹²⁶

2.197 Based on the above analysis, and considering the strong arguments expressed by the respondents, we recommend that the head "*the advancement of human rights, conflict resolution or reconciliation*" should be included in the statutory definition of charitable purposes.

The need for a public benefit test?

2.198 Under the Sub-committee's recommendation, each of the proposed charitable purposes must be for the public benefit.¹²⁷ 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.

2.199 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.¹²⁸ The purpose must be also "*for the public benefit*". At common law, this is presumed until the contrary is proven 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.)¹²⁹

126 The Charities Bill 2013 and the Charities (Consequential Amendments and Transitional Provisions) Bill 2013 introduce a definition of charity and charitable purpose for the purposes of all Australian Commonwealth legislation; see Clause 12(1)(f) of the Charities Bill 2013.

127 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), p78-79.

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

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

2.200 For purposes falling within Lord Macnaghten's fourth head (i.e., 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.*"¹³⁰ In order to satisfy the "*public benefit*" test, a charitable purpose must have two distinct elements : "*(1) the purpose must have an identifiable benefit; and (2) the benefit of the purpose must be available to a sufficient section of the public.*"¹³¹

2.201 According to section 8(2) of the Scottish 2005 Act, the considerations in relation to "*public benefit*" include how any benefit gained or likely to be gained by members of the body or any other persons, and 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."¹³² In other words, coming within the statutory list of charitable purposes is a necessary but not a sufficient condition for charitable status.

Consultees' view

2.202 The majority of respondents expressing views on the requirement of public benefit agreed that this requirement should be imposed on all the heads of the statutory definition for charitable purposes. One respondent considered that this explicit parallel requirement would provide a better safeguard to the recognition of charities. It was considered that imposing such burden of proof on the bodies should not generally be regarded as a difficult evidentiary exercise for them. Meanwhile the requirement allows contrary evidence to be adduced in an appropriate case by other interested parties that although the purpose concerned *prima facie* falls under one of the specified heads as being a charitable purpose, the execution of that purpose would be detrimental to the community to the extent that the status of a charity should not be accorded to the body concerned. There was also the suggestion that the term "*public benefit*" should be interpreted in a broader sense such that a purpose such as the promotion of the well-being of mankind is also for the public benefit.

2.203 While the majority respondents expressed support for the inclusion of this head, some respondents raised concern about the removal of the presumption of public benefit for the relief of poverty, the advancement of education and the advancement of religion. It was thought that although this presumption of public benefit may no longer hold in the modern context and arguably there should be an express requirement, the definition of public benefit can become a matter of some contention. There was the view that while the introduction of a statutory "*public benefit*" test for all categories of

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

131 *Halsbury's Laws of England*, Vol 8 (2010 5th ed), at para 6.

132 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), para 5.65.

charity could incidentally make clear whether for each category the public to be benefitted must be the Hong Kong public or can include objects outside Hong Kong, there does not appear to be any strong public support for a change in the existing position which follows the common law position.

2.204 Among some of the minority views expressing disagreement with the inclusion of this public benefit test, it was considered that although this was well intended by the Sub-committee, defining the standards and the tests for public benefit can be a very complicated task. The level of complexity is illustrated by the extensive guidelines for individual categories of charitable organisations drawn up by the Charity Commission of England and Wales. It was argued that these guidelines have generated a lot of confusion and misunderstanding from the charitable organisations and the public at large. It was considered by the respondent that if such a clause were to be added to the charity law in Hong Kong, it will immediately give rise to uncertainty in the charitable status of many organisations. Among them are the many nonprofit schools (especially the direct subsidy schools and private schools). To ascertain the public benefit status of certain religious groups can become extremely politically sensitive, and may lead to claims of infringement of religious freedom. In short, the respondent considered that one should not underestimate the substantive social impact of making "*public benefit*" part of the new legislation.

2.205 There was also the view expressed that since the presumption of public benefit has existed for a very long time and has not created any negative impact, it should not be removed rashly. Such abolition may have the effect of subjecting charities to tighter regulation in terms of the number of people serving the charities, fees charged and cost effectiveness. It was therefore suggested that the presumption of public benefit for the relief of poverty, the advancement of education and the advancement of religion should remain.

2.206 Apart from the above opinions expressed, there was also the suggestion that the presumption should apply to heads (1) to (12) of the charitable purposes listed in the Consultation Paper, and the public benefit requirement should only apply to head (13), ie, "*any other purpose that is of benefit to the community*".

Our view

2.207 To facilitate our consideration of this matter, we have studied the examples of other jurisdictions. Akin to England and Wales, Scotland has removed the common law presumption of public benefit for the traditional three heads of charitable purpose under the *Pemsel* case. Pursuant to section 8(1) of the Charities and Trustee Investment (Scotland) Act 2005, no purpose can be presumed to be for the public benefit. Section 8(2) lists out the factors which must be considered when determining whether a body provides for "*public benefit*", including the benefit likely to be gained by members or other

persons, the disbenefit incurred or likely to be incurred by the public, as well as whether a benefit is unduly restrictive.

2.208 In Australia, the presumption that the advancement of religion is for the public benefit still exists. On 29 May 2013, the Australian government introduced legislation into the Parliament for a statutory definition of charity. Under this Charities Bill 2013, each purpose of a charitable entity must be for the public benefit and the purpose is directed to a benefit that is available to members of the general public or a sufficient section of the general public.¹³³ Clause 7 of the Bill provides for the presumption of public benefit in respect of a number of purposes.¹³⁴

2.209 The presumption of public benefit has been retained in Ireland under an inclusive framework pursuant to section 3(4) of the Irish Charities Act 2009. Religious purposes will only be disqualified from charitable status if any benefit is clearly outweighed by demonstrated harm to the public. It is observed that the determination is still based on objective evidence. However, direct evidence demonstrating public benefit from specific religious purposes is not required.

2.210 Besides considering the examples of other jurisdictions, we set out below the advantages and disadvantages of imposing the public benefit test.

Advantages of imposing the requirement "for the public benefit"

2.211 A respondent has argued that, from a liberal perspective, charity law is a means by which the state demonstrates its commitment to the value of individual autonomy by endorsing and facilitating purposes that produce autonomy-enhancing collective goods. Thus the state is justified in not promoting religious beliefs and practices that are likely to undermine the conditions for autonomy unless there are strong grounds other than autonomy enhancement for this.¹³⁵

133 Clause 6(1) of the Australian Charities Bill 2013; see also The Parliament of the Commonwealth of Australia, House of Representatives, *Charities Bill 2013, Charities (Consequential Amendments and Transitional Provisions) Bill 2013 - Explanatory Memorandum*.

134 Clause 7 -
"In the absence of evidence to the contrary, a purpose that an entity is presumed to satisfy the requirements of paragraphs 6(1)(a) and (b) (purposes for the public benefit), if the purpose is any of the following purposes:
(a) the purpose of preventing and relieving sickness, disease or human suffering;
(b) the purpose of advancing education;
(c) the purpose of relieving the poverty, distress or disadvantage of individuals or families;
(d) the purpose of caring for and supporting:
(i) the aged; or
(ii) individuals with disabilities;
(e) the purpose of advancing religion."

135 Matthew Harding, "What is the point of Charity Law?" (Paper presented at Private and Public Law – Intersections in Law and Method Conference, The University of Queensland, 21 July 2011), cited in Pauline Ridge, "Religious Charitable Status and Public Benefit in Australia", 35 *Melb. U. L. Rev.* 1071.

2.212 Given the strong link between fiscal benefits and charitable status, exempted purposes such as the advancement of religion should be perceived to convey some benefit to society that outweighs the forgone revenue.¹³⁶ Hence the requirement of proof of a public benefit would enhance public confidence in the charitable sector and public support for the granting of tax concession to charities.

2.213 A related justification would be the strong public sentiment that taxpayers should not be required to support other people's religious beliefs and practices, or to support beliefs and values that are offensive to those of other taxpayers, through the taxation system.¹³⁷

Disadvantages of removing the presumption of public benefit

2.214 A counter-argument to the above fiscal policy argument is that the mere receipt of fiscal benefits does not provide an unequivocal justification for a public benefit test in relation to charitable status. In fact many individuals and groups receive fiscal privileges without being required to comply with regulatory standards, nor are they subject to public norms of beliefs or conduct.¹³⁸

2.215 In opposition to the removal of the common law presumption, it is observed that the public benefit test is a powerful regulatory mechanism and serves as a means for the state to filter out and deny charitable status to religious groups whose purposes conflict with the state's interests.¹³⁹

2.216 Moreover, the need for a public benefit test would act as an incentive for organisations, such as a religious group, to fashion its purposes to meet the legal definition of charity so as to enjoy the fiscal benefits. This may be true for new religious organisations in particular.¹⁴⁰

2.217 Another prevalent argument in support of the retention of the common law presumption is the increase in compliance costs and administrative costs for charities, which traditionally rely heavily on the services of volunteers and seek to minimize their costs.¹⁴¹

136 See Evelyn Brody and John Tyler, "Respecting Foundation and Charity Autonomy: How Public is Private Philanthropy?" (2010) 85 Chicago-Kent Law Review 571, as cited in Pauline Ridge, "Religious Charitable Status and Public Benefit in Australia", 35 Melb. U. L. Rev. 1071.

137 Federal commissioner of Taxation v World Investments Ltd (2008) 236 CLR 204.

138 Brian Lucas and Anne Robinson, "Religion as a Head of Charity" in Myles McGregor-Lowndes and Kerry O'Halloran (eds), *Modernising Charity Law: Recent Developments and Future Directions* (Edward Elgar, 2010) 187, as cited in Pauline Ridge, "Religious Charitable Status and Public Benefit in Australia", 35 Melb. U. L. Rev. 1071.

139 See Pauline Ridge, "Religious Charitable Status and Public Benefit in Australia", 35 Melb. U. L. Rev. 1071.

140 An example in England and Wales would be the Druid Network's application for registration as a charity. In its constitution, Druid Network had originally described itself as a "*mystical religious tradition*" with "*deeper mysteries and practices*". However, it had amended its constitution after the Charity Commission of England and Wales inquiry to state that there are "*no occult, secret or hidden practices within Druid Network*" and that their teachings are open to all. See Druid Network, Charity Commission Decision, September 21, 2010.

141 See Pauline Ridge, "Religious Charitable Status and Public Benefit in Australia", 35 Melb. U. L. Rev. 1071.

2.218 Further to the consideration of the pros and cons set out above, a recent English case shed some light on our consideration of the matter. The case of *The Independent Schools Council v The Charity Commission and others* ("the *Independent Schools Council* case")¹⁴² highlights the controversial issues that may arise regarding the "*public benefit*" requirement in the statutory definition of charitable purposes. This case consists of two separate but closely related sets of proceedings. Both cases concern the effect of the public benefit requirement contained in the Charities Act 2006 on UK independent schools which charge fees. This case highlighted the following -

- (1) The inclusion of the "*public benefit*" requirement for the first, second and third categories of charitable purposes (namely in "*prevention of poverty*", "*advancement of religion*" and "*advancement of education*") may give rise to uncertainty among some existing charitable organisations as to whether their charitable objects may be for the public benefit. It is likely that some charitable organisations will fail to satisfy the statutory definition of charitable purpose and therefore no longer be recognised as a charity. Based on the common law, the public benefit element is presumed, or considered '*prima facie*' for the public benefit (as used in the wording adopted by the court in the *Independent Schools Council* case). Some organisations such as private schools may need to show that its objectives are for public benefit instead of for private benefit because of the "*public benefit requirement*".

142 [2011] UKUT 421 (TCC); In England and Wales, there is no definition of what amounts to "*public benefit*" beyond the statement in section 4(3) of the Charities Act 2011 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.*" The Charity Commission is required by section 17 of the Act to issue guidance on the operation of the public benefit requirement, and must carry out public consultation before it does so. Guidance in this area which the Charity Commission has issued includes "*Charities and Public Benefit - the Charity Commission's General Guidance on Public Benefit*" issued in January 2008, and "*Public Benefit and Fee-Charging*" and "*The Advancement of Education for the Public Benefit*", both issued in December 2008 ("the Guidance"). The first set of proceedings of this case ("the JR Application") is an application by the Independent Schools Council ("the ISC") for judicial review seeking an order quashing parts of the Guidance issued by the Charity Commission. The claimant alleged that the Guidance included errors of law in respect of the public benefit requirement as applied to charities which charged fees for their charitable activities and in particular as applied to independent schools. The second set of proceedings ("the Reference") is a reference by the Attorney General pursuant to certain sections of the Charities Act 1993 ("the 1993 Act"), as amended by the 2006 Act, to refer certain questions of charity law to the Tribunal for a determination. The JR Application and the Reference have been case-managed together and came before the Royal Courts of Justice to be dealt with in a single hearing. The central issues concerned constitutional matters and operational matters. The first of those issues was about what the governing instrument of a school (where such an instrument exists at all) needs to provide in order for the school to be capable of being a charity. The second issue was about what a school actually needs to do to be seen as operating for the public benefit. What was stated in the Decision about the public benefit requirement is confined to the context of education charities and it was not sought for the court to deal with the public benefit requirement across all the heads of charity, although its analysis of the principles and the case may have wider implications.

- (2) There is a dilemma as to whether there should be clear definition of "*public benefit*". In the case of England and Wales, the term is not defined by statute. Instead, the Charity Commission has issued extensive guidelines as to what this requirement means. However, the guidance was being challenged judicially and quite successfully in respect of some provisions, for erring in law in the *Independent Schools Council* case. It is also likely that there will be further challenges in the court as to the validity of these guidances. This illustrates the fact that there are potential problems in leaving the practical operation of the requirements to the Charity Commission, or any other relevant authority. It will also be confusing and uncertain to leave the interpretation of the term undefined.
- (3) There may be a political dimension to the consideration of whether an organisation is for public benefit. This is especially so when the charitable status of some existing charitable organisations, such as religious bodies, private schools or even private hospitals (which falls within the fourth category of charitable purposes) are at stake.

2.219 In consideration of the views of the respondents, the pros and cons and overseas experience, we are of the view that all charities should be treated equally and subject to the same requirements. We therefore consider that the recommended heads of charitable purpose should be also for the public benefit.

"Grandparenting"

2.220 Having considered that all charities should be treated equally and subject to the same requirements, we note the concern raised by some respondents with regard to the abolition of the presumption of public benefit under common law in respect of charitable purposes for the "*prevention or relief of poverty*", "*advancement of education*" and "*advancement of religion*". As a consequence of the abolition of such presumption in law, existing charities which fall within these three categories would have to satisfy the public benefit test. International schools in Hong Kong, for example, may be affected by this requirement to satisfy the public benefit test. Religious bodies would also need to satisfy the public benefit test when, under common law, their purpose is presumed to be charitable. We are aware that some existing charities, which rely on charitable donations, may have doubt cast over their charitable status if they are subject to the requirements of the public benefit test. Legal challenges may arise if existing tax exempted charities suddenly find themselves unable to satisfy the public benefit test under the proposed system.

2.221 In other jurisdictions, such as Scotland, a public benefit test is applicable to each of the charitable purposes defined in the Charities and Trust Investment (Scotland) Act 2005. Charities which existed prior to 2005 were

"grandparented" onto the Scottish Charity Regulator. These charities however remain subject to review and monitoring by the Office of the Scottish Charity Regulator in the same way as other newly registered charities under the Act.¹⁴³

2.222 We believe that a "grandparenting" policy would provide security and comfort for existing charities, so that they may plan ahead in case of any changes to the present system, thus reducing the possibility of legal challenges especially at the initial stage of implementation of the new changes. We therefore consider that existing charities which are currently exempt from tax under section 88 of the Inland Revenue Ordinance (Cap 112) should be "grandparented" into the reformed system, should the new regime be put in place.

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;**
- (2) The advancement of education;**
- (3) The advancement of religion;**
- (4) The advancement of health;**
- (5) The saving of lives;**
- (6) The advancement of citizenship or community development, which includes**
 - (i) rural or urban regeneration, and**
 - (ii) the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities;**
- (7) The advancement of arts, culture, heritage or science;**
- (8) The advancement of human rights, conflict resolution or reconciliation;**
- (9) The promotion of religious or racial harmony;**
- (10) The promotion of equality and diversity;**

143 Turcan Connell, Guide to the Charities and Trustee Investment (Scotland) Act 2005, at 4.

- (11) The advancement of environmental protection or improvement;**
- (12) The relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;**
- (13) The advancement of animal welfare;**
- (14) Any other purpose that is of benefit to the community.**

We further recommend that all the above recommended heads of charitable purpose must be also for the public benefit.

Chapter 3

Recommendation on the legal structures of charities

3.1 In Chapter 6 of the Consultation Paper, the Sub-committee had set out in detail the current position regarding the legal structure of charities, both in Hong Kong and in overseas jurisdictions, and consider possible options for reform. We will first set out below the current situation in Hong Kong and the Sub-committee's proposals. Then we will consider the consultees' responses and then make the final recommendation.

Current situation in Hong Kong

Types of charitable organisation structure

3.2 As discussed briefly in Chapter 2 of the Consultation Paper, 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.

3.3 According to the Inland Revenue Department statistics, in March 2013, the distribution of charities across these various legal forms was as follows:

Form	No. of Organisations
Corporation	5,651
Society	796
Trust	428
Others ¹	717
Total	7,592

¹ According to statistics of the Inland Revenue Department, the forms of charities classified as "Others" comprise mostly incorporated management committees 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

3.4 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

3.5 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).

3.6 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* (LexisNexis 2012), at para 115.147.

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).

3.7 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.

3.8 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.

3.9 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.

3.10 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 office hours at the Societies Office.

3.11 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

3.12 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.

3.13 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

3.14 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

3.15 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

3.16 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/fstb/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* (LexisNexis 2011), 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, *Review of the Trustee Ordinance and Related Matters: Consultation Paper* (Jun 2009), 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.

3.17 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

3.18 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.

3.19 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) anybody 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.

3.20 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* (LexisNexis 2011), at para 335.409.

A company incorporated under the Companies Ordinance (Cap 32)

3.21 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

3.22 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.

3.23 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

3.24 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* (LexisNexis 2012), at para 95.008.

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

A body corporate incorporated overseas

3.25 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

3.26 It is essential that a charity be established by a written governing instrument. As noted in the Consultation Paper, 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.

The Sub-committee's proposals in the Consultation Paper and our final recommendation on the legal forms of charitable organisation

3.27 The Sub-committee had considered certain options in the Consultation Paper regarding the legal form that charitable organisations should adopt. Views from the public were invited on whether, and to what extent, the various existing legal forms for charities should be reformed. In particular, the Sub-committee had invited 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.

Consultees' responses

3.28 In the consultation, a majority of the respondents did not consider that the various existing legal forms for charities should be reformed. The principal reason was that any change would cause major disruptions in the

operation of charities and would result in cost incurred for those charities which do not exist in the required legal form. Some respondents considered that there were no substantial benefits in imposing a single legal form on all charities in Hong Kong. They expressed the view that, as in England and Wales, charities should be allowed to exist in the legal forms which best suit their needs. Furthermore, it would be difficult to decide on which single form is the most desirable one for charities, and converting from one legal form to another would be expensive and burdensome for existing charities. Respondents who did not think that reform of the legal form was necessary considered that allowing existing legal forms to continue to be valid structures for establishing charities would give the same sort of flexibility as allowing people setting up businesses in Hong Kong. Each charitable organisation should be given the flexibility to determine, based on its own circumstances, the most suitable legal form. Restricting organisations to specific legal forms, particularly if the specified form is a corporation, would very well increase the cost of maintaining that legal structure, and be detrimental to grassroots charitable initiatives.

3.29 It was also expressed by a respondent that so long as there are sufficient periodic reporting and accounting requirements imposed upon charitable bodies, no particular or unitary legal form appears to be necessary. As the unitary model in the UK is still at its infancy with any advantage in real terms and/or practical problems encountered yet to be fully assessed, it may be better for Hong Kong to adopt a wait-and-see approach before considering whether to follow suit. A few respondents considered that the legal form of companies limited by guarantee is preferred, although other existing forms and structures, like societies and trust, should still be available as choices.

3.30 While the majority of the respondents considered that the existing legal forms should continue without change, the Law Society of Hong Kong strongly advocated that unincorporated societies and associations are not appropriate forms for charities and that existing charities formed in this way should be required to convert into proper legal entities. It was considered that many people running such charities as well as those doing business with them are unaware of the many legal problems involved, particularly regarding issues of personal liability and lack of legal capacity. It was considered that this is an excellent opportunity to introduce comprehensive reform and require those existing charities which lack legal capacity to convert into a proper legal entity and be subject to supervision by the proposed charity commission if it converts into a charitable incorporated organisation (CIO) or by the Companies Registry and the proposed charity commission if it converts into a company limited by guarantee. Any perceived regulatory, administrative and legal cost burdens can be overcome if helpful precedents and guidance notes to help form and operate such entities are made available free on the website of the proposed charity commission as they are in England and Wales.

3.31 The Law Society also proposed that a reasonable period of time (say 3 to 5 years) be granted to existing charities formed as unincorporated societies and associations to convert into CIOs or companies limited by guarantee. Although all charities should have the same legal form, it was

believed that certain types of entity should definitely be allowed to continue in their existing form and effectively be grandfathered into any new scheme. These would include companies limited by guarantee (the current most prevalent form), trusts and companies formed by statute.

Our view

3.32 Having considered the view of the respondents on this issue, we feel that there is a general consensus that the existing legal structures of charity should continue for the purpose of flexibility, avoidance of disruption and cost saving. However we find the reasons for change put forward by the Law Society both reasonable and convincing. We believe that there are indeed some legal forms such as company limited by guarantee, more desirable than other legal forms, for the compelling reason that they are subject to more stringent regulation and afford greater transparency to the public. In order to work towards greater transparency and accountability among charities, but at the same time to avoid causing disruption to the current system, a possible way to proceed would be for the Government and the legal professional bodies to encourage organisations, particularly when they are first established, to adopt company limited by guarantee as a preferred legal form of charities.

3.33 As for the suggestion of converting existing legal form to CIO, we believe that the time is not yet ripe for doing so, as the system in England and Wales is still at its infancy. However, in the course of time, we do believe that this would be an option well worth considering since it combines the benefit of an incorporated company and the burden of registration with the Companies Registry.

3.34 Considering the majority views of the respondents and the reasoning put forward by them, we recommend that the current system of allowing a variety of legal forms of charitable organisations to exist should continue.

Recommendation 3

We recommend that the current system of allowing a variety of legal forms of charitable organisations to exist should continue.

Chapter 4

Recommendations on registration of charities

4.1 In this chapter, we set out our recommendations regarding the introduction of a registration system for charities in Hong Kong.

Current situation in Hong Kong

Lack of a formal register of charities

4.2 As the Sub-committee had observed in the Consultation Paper,¹ 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 which is representing itself as a charity is in fact a charity.

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

4.3 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 (and thus obtained tax exempt status) for the purposes of section 88 of the Inland Revenue Ordinance (Cap 112).² This list is available online at the Inland Revenue Department homepage³ and runs at present to over 900 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.

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

1 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), Chapter 7, at para 7.2 *et seq.*

2 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).

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

(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
31.3.2011	6,788
31.3.2012	7,194
31.3.2013	7,592

4.5 It is evident from this that over the past few 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

4.6 As we saw from the statistics on forms of charities set out in the previous chapter, the majority of tax-exempt charities in Hong Kong which are recognised by the Inland Revenue Department are established as companies limited by guarantee.⁴ 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.⁵

4.7 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.

4 See the table showing the different forms of charities in Hong Kong at para 3.3, above.

5 <http://www.icris.cr.gov.hk/csci/>.

4.8 The Societies Ordinance (Cap 151) provides a notification system for the establishment of societies in Hong Kong and prohibits 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 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.⁶

4.9 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.⁷

(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.⁸

6 See the table showing the different forms of tax-exempt charities in Hong Kong at para 4.4 above.

7 http://www.hab.gov.hk/en/access_to_information/list_of_available_information/listpub.htm.

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

(iii) Chinese permanent cemeteries –

There is a list of Chinese Permanent Cemeteries which contains the names of these cemeteries and their statements of accounts. This information is available for public inspection at the reception counter of the Home Affairs Bureau.

4.10 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.⁹ This list is accessible to the public on the Education Bureau homepage.¹⁰ Also, the University Grants Committee has uploaded on its homepage a current list of the approved grants for University Grants Committee-funded institutions.¹¹

4.11 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.¹²

4.12 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.¹³ 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

4.13 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

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

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

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

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

13 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/>.

respective organisations issued with public subscription permit.¹⁴ 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 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.

4.14 In relation to the granting of lottery licences, the Office of Licensing Authority under the Home Affairs Department (OLA) maintains a list of organisations granted with lottery licences for a specified lottery period. The list contains the names and licence numbers of the relevant organisations and the period in which the lotteries are to take place.¹⁵ The OLA also keeps a separate list in respect of the income and expenditure statements relating to lottery events available for public inspection within one year from the receipt of the information from the organisations.¹⁶ Both lists are available on the internet and the information they contain is time-limited.

4.15 Both charitable and non-charitable organisations are required to apply for temporary hawkker licences from the Food and Environmental Hygiene Department (FEHD) in connection with on-street selling activities. The temporary hawkker 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 hawkker 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.¹⁷

Registration systems for charities in other jurisdictions

4.16 The Sub-committee had examined the registration system of a number of jurisdictions in Chapter 7 and Annex 3 of the Consultation Paper. The Sub-committee had 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 30 of the English

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

15 http://www.hadla.gov.hk/el/en/forms/approved_lottery_activities.html.

16 http://www.hadla.gov.hk/el/filemanager/common/docs/forms/HAD-Lottery_GR_f_eng.pdf.

17 http://www.fehd.gov.hk/english/pleasant_environment/hawker/fundraising.html.

Charities Act 2011, every charity must be registered in the register of charities unless they are "*exempted charities*", "*excepted charities*" or small charities.¹⁸

4.17 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.

4.18 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.

4.19 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.¹⁹

The Sub-committee's deliberations

4.20 In the Consultation Paper, the Sub-committee had observed that the number of charities recognised for tax exemption purposes in Hong Kong has been steadily increasing. It was also noted that there was no comprehensive system for registration of charitable organisations here and no

18 See repealed section 3A of the English Charities Act 1993; Further information on these types of charities can be found in Annex 3 of the Consultation Paper.

19 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.

Government authority with overall responsibility to maintain such a register. Those lists of charities which 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 has given rise to growing concern, given both the large number of organisations involved and the enormous amounts of money collected.

4.21 The Sub-committee also referred to the systems of registration for charitable organisations that apply in a number of overseas jurisdictions, such as England and Wales, Ireland, Scotland and New Zealand. The Sub-committee had considered that there was 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.

4.22 The Sub-committee had considered in detail the issue of whether exemption from registration should be granted for some charitable institutions, especially small charities. However, there was 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, the Sub-committee had considered 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 would ensure that almost all charitable organisations would be subject to the same regulatory and monitoring system and accountability requirements. They would also enjoy the same tax benefits and public recognition of their charitable status.

4.23 The Sub-committee had also considered that there should not be any difference in the registration procedure between charities with *"an overseas element"* and local charities.

The Sub-committee's proposals in the Consultation Paper and our final recommendations on registration of charities

4.24 In the Consultation Paper, the Sub-committee had recommended that all charitable organisations which make any charitable appeal to the public and/or seek tax exemption should be subject to the requirement of registration. The Sub-committee had recommended that the list of registered charitable organisations should be established and maintained by a future charity commission and that this list should be available for public inspection. The Sub-committee had also recommended that the application process for registration should not be subject to public notification. The Sub-committee had further recommended 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.²⁰

Consultees' responses

Requirement for registration

4.25 The majority of the consultation respondents supported the Sub-committee's proposal in relation to the requirement of registration, with a number agreeing that such a registration system would protect the public by enabling potential donors to ascertain whether organisations seeking donations were in fact charities. It was also noted that registration would facilitate monitoring of charities by a future charity commission. One respondent considered that, without seriously affecting the current operations of charities, it was imperative that the accountability and transparency of charities should be enhanced, and that registration of charities was a useful means to serve this purpose and should be put in place as soon as possible.

4.26 A respondent from the business sector expressed full support for the objectives of enhancing accountability and transparency for charities, especially those charities which rely on public funding. The respondent believed that this could be best achieved by the introduction of a system of registration, reporting and public availability of information combined with co-ordinated supervision and approval of fundraising activities. It was also considered that in terms of regulation, a clear distinction needed to be made between private charities and foundations and those which depended on public fundraising. It was felt that only the latter, but not the former, should be subject to public accountability or transparency.

4.27 A respondent suggested that in order to avoid duplicating other monitoring or funding mechanisms of the Government, the registration and disclosure systems for charities must be clear and straightforward. This would spare charitable organisations from an increase in administrative costs due to the need to account to different agencies.

Lists maintained by the Inland Revenue Department and the Companies Registry

4.28 For those respondents who were not in support of having a registration system, most were of the view that the Inland Revenue Department already maintains the largest list of charities in Hong Kong. As members of the public currently have easy access to this list to find out if an organisation is charitable or not, these respondents considered that the proposed registration system would only create one more list of registered charitable organisations which may differ from the list maintained by the Inland Revenue Department, which they felt would defeat the purpose of setting up a registration system.

20 Recommendation 4, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at para 7.37.

4.29 Some respondents, while supporting the requirement for registration, suggested that since the Inland Revenue Department has maintained a record of over 6,000 organisations²¹ which are granted tax exemption, the simplest way forward would be for the Inland Revenue Department to put together a register of charitable organisations based on the Department's current list.²² Only charitable organisations with a registration number would be allowed to conduct any public fundraising activities.

4.30 Another respondent considered that as the records of the Inland Revenue Department are not normally accessible to the public, the Companies Registry was possibly the more logical department for maintaining a register of charities that would be open to the public. The respondent considered that the Companies Registry was also best placed to determine the use of particular names of charities.

4.31 A few respondents considered that registration and tax exemption authorisation should come under the responsibility of the same Government bureau in order to achieve the purpose of having a one-stop shop for charity registration and guidance, and that it would be necessary to revisit Section 88 of the Inland Revenue Ordinance to establish the framework for co-ordination between different Government departments.

Exemption from registration

4.32 A number of respondents expressed the view that certain types of charitable organisations should be exempted from registration requirements.

4.33 *Religious organisations.* A respondent from the religious sector suggested that *"religions and religious bodies established from time immemorial and which have already been incorporated by virtue of an Ordinance should have their particular legal status recognized 'as is' and they should be enlisted into the directory or list automatically without undergoing any further process of application, registration and scrutinization."*²³

4.34 Another respondent also from the religious sector mentioned that *"in addition to solicitation of donations from the public for the public benefit,"* many religious organisations *"would receive private donations from members who, being dedicated to volunteer service for the church, consecrate to God in*

21 As at 31 March 2011, 31 March 2012 and 31 March 2013, the number of charities granted tax exemption were 6,788, 7,194 and 7,592 respectively.

22 Under this proposal, there would be a registration number for each registered charitable organisation, and such number would be required to be prominently displayed on any related documents, or displayed on any means through which appeals for charitable donations were made, such as solicitation leaflets; see Recommendation 14, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 9.45 to 9.48.

23 The Sub-committee had recommended in Recommendation 4 that charitable organisations which make any charitable appeal to the public and /or seek tax exemption should be subject to registration. In other words, those charitable organisations not seeking donation from the public **and** not seeking tax exemption will not be required to register. Those charitable organisation satisfying either of these requirements will be subject to registration.

compliance with the biblical doctrine. As this income is considerably different from the funds raised in public in essence, they should not be confused with one another." While it was agreed by the respondent that transparency has to be maintained in the application of the funds raised in public to enable public monitoring, the use of the donations contributed by members of the church should be only subject to internal supervision. The reason given by the respondent was that outsiders have no knowledge of the ideals behind the financial management of a church and the priorities in the use of funds.

4.35 *Smaller charities.* Some respondents were concerned about the impact of mandatory registration on smaller charities, particularly very small charities/self-help groups that had no staff or administrative support. It was suggested that in order to save administrative costs, very small charities with annual incomes below a certain threshold should be exempted from registration, similar to the system in England and Wales. Other respondents expressing similar concerns suggested that an alternative would be to set up a small charity register with simplified registration processes for the purpose of small charities.

4.36 *Statutory charities.* There were suggestions by a few respondents that certain charitable organisations which are presently administered under a statutory scheme should be granted exemption from registration.

A grace period for registration

4.37 A respondent which is a charitable organisation expressed the view that no exemptions from registration should be granted, however, existing charities should be subject to a grace period for compliance with any new requirements for registration. It was also suggested that there should be mechanisms to prevent the future registration authority from using the registration system as a tool to curtail the operation, or delay the establishment of any charitable organisation.

Other suggestions on a registration system

4.38 A respondent suggested the setting up of a two-tier system for registration.²⁴ Under which, registered charities would be able to use the word "*Charity*" in their name (as, in other contexts, terms such as "*Doctor*" or "*Limited*", are used), while unregistered or non-registrable organisations serving good purposes would still be allowed to appeal to the public for donations subject to fundraising permits being obtained. The respondent

24 As compared with the system 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. See Annex 2, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at para 25; Annex 3, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 34 to 39.

proposed that such organisations could only label themselves as, say, "*altruistic organisations*", and they would not be granted tax exemption.

4.39 Another respondent suggested that there should be an exit mechanism for voluntary de-registration of charities (for example, arising from dissolution or cessation of existence or operation). It was suggested that there should be a system to see that such charities would be wound up properly and any remaining funds applied for legitimate purposes, such as to prompt or require the trustees or directors concerned to apply for suitable cy-près schemes, or for the charitable funds to be passed on to other charitable organisations.²⁵

4.40 A concern raised by a respondent was that he was uncertain from the wording of Recommendation 4 of the Consultation Paper²⁶ as to whether the Sub-committee intended to prohibit bodies which are not registered as charities from making public appeals. It was felt that while only organisations which are registered charities should be permitted to undertake street, or door-to-door, collections, there seemed no reason to prohibit public appeals for non-charitable purposes by other organisations, provided they do not purport to be registered charities.²⁷

4.41 The Hong Kong Bar Association took the view that the concept of "*any charitable appeal*" was vague and arguably too broad.²⁸ For example, it would on its face cover an appeal for volunteers to participate in an overseas aid relief mission. The Association felt that in such a case, there would be little scope for abuse and no necessity for regulation. The Association considered that amongst the various possible forms of charitable appeal to the public, the solicitation of funds was the most easily susceptible to abuse by a charitable organisation and hence was in need of monitoring and supervision. On this basis, the Association proposed that the formula set out in Recommendation 4 of the Consultation Paper, "*make any charitable appeal to*

25 Recommendation 17 and Chapter 11, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 11.11 to 11.14.

26 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."

27 Recommendation 4 of the Consultation Paper provides 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...."

28 No reference is made in the recommendation regarding non-charitable organisations.
The Sub-committee recommended in Recommendation 4 that charitable organisations which make any charitable appeal to the public and/or seek tax exemption should be subject to registration. In other words, those charitable organisations not seeking donation from the public and not seeking tax exemption will not be required to register.

the public" should be substituted by *"solicit from the public for the donation of cash or its equivalent"*.

4.42 A respondent from the medical sector expressed the opinion that existing charitable organisations which have already been granted and enjoy tax exemption status by the Inland Revenue Department should be grandparented. It was suggested that such grandparenting could save the need for existing charitable bodies to submit fresh applications for registration and help alleviate the workload of the new commission.²⁹

Public inspection

4.43 The vast majority of respondents in support of a registration system were in favour of having the list of registered charitable organisations open for inspection.

Use of names of charitable bodies

4.44 The respondents who supported registration agreed, in general, that it should be left to the future charity commission to determine on a case by case basis the question as to whether the use of particular names of charitable bodies would be allowed or disallowed.

4.45 Those respondents not in support of the proposal that the charity commission should determine the use of particular names of charitable bodies considered that the future charity commission should publish guidelines setting out the circumstances in which the registration of particular names would be disallowed, for example, names which already appear on the charity register and names which may give the public the impression that the named entities are associated with any Government department. Similarly, a few respondents considered that the future commission should be able to determine the use of particular names, but on the basis of clearly stated principles, and not on a case by case basis. Details of the registration requirements and the circumstances as to when registration may be allowed or refused should be explicitly clear, as should the criteria for allowing or not allowing the use of particular names by a charity.

4.46 Another respondent suggested that the future charity commission should work with other regulatory bodies such as the Companies Registry to ensure that names that have already been used cannot be used for charitable bodies unless the registered owners of these names have so consented.

Public notification

4.47 The majority of the respondents supported the proposal that the application process for registration should not be subject to public notification.

29 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 7.31 to 7.33.

4.48 A respondent in favour of having the application process for registration subject to public notification considered that the background of some applicants might be known by certain members of the public and some of these applicants may have undesirable track records. Since an organisation, once registered, will be able to appeal to the public for donations until any abuse comes to light, public notification may be important to enable the future charity commission to receive other information to consider in processing an application for registration.

Our view and final recommendations

Registration generally

4.49 It is evident that the majority of the respondents were in favour of having a system of registration for charities and that charitable organisations which are granted tax exemption status and carry on charitable fundraising activities should be registered.

4.50 We note that there was a misconception among a few respondents who were in favour of maintaining the present "*registration*" system undertaken by the Inland Revenue Department. We should clarify that, as noted in our Consultation Paper,³⁰ there is no formal, established registration system for charitable organisations in Hong Kong and no Government authority has overall responsibility in this area. 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).³¹ As explained earlier, such a list is not a comprehensive and conclusive list of all the charities in Hong Kong and it is not compulsory for charities to have their names placed on this list.

4.51 We would also like to clarify that it is not our intention to prohibit bodies which are not registered as charities from making public appeals. Our intention is to ensure that all *charitable* organisations which seek charitable donations from the public and/or seek tax exemption from the Inland Revenue Department under section 88 of the Inland Revenue Ordinance (Cap 112) should be subject to the requirement of registration.

Whether exemption of certain types of charities is appropriate

4.52 We have noted the views expressed by some respondents concerning a possible exemption from registration for small charities and religious charitable organisations. We have carefully considered the

30 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 3.3, 3.8, 7.2, 10.2 and 12.2.

31 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).

comments made by these respondents and we have come to the conclusion that no exemption from registration should be granted to any type of charitable organisations, irrespective of their size and their nature, except those which do not claim tax exemption **and** do not make any public charitable appeals.³² This would avoid confusion to the public about the legitimate charitable status of these organisations and avoid possible abuses. In the interest of the public, 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.

"Grandparenting" arrangements

4.53 We also note that there was the suggestion of grandparenting of existing charitable bodies. We agree with the respondent that this has the advantage of alleviating the workload of the registration authority. This is particularly relevant at the initial implementation stage when a new registration system is set up.

4.54 Based on the circumstances and reasons set out in Chapter 2,³³ we consider that existing charities should be "*grandparented*" into the reformed system should the new regime be put in place.

Terms used in the recommendation

4.55 We accept the view of the Hong Kong Bar Association that the term, "*any charitable appeal*" set out in Recommendation 4 of the Consultation Paper can be improved to avoid possible vagueness and uncertainty. Hence, we recommend that all charitable organisations which: (i) solicit from the public for the donation of cash or its equivalent; and/or (ii) have sought tax exemption, should be subject to the requirement of registration.

Public inspection

4.56 We take note and share the view with the vast majority of the respondents who were in favour of the proposal that the list of registered charitable organisations should be made available for public inspection for greater transparency and accountability.

Public notification

4.57 We also observe that a large majority of the respondents agreed that the application process for registration should not be subject to public notification.

4.58 Similarly, a large majority of the respondents agreed that the matter relating to allowing or disallowing the use of particular names of

32 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at para 7.33.

33 At paras 2.220 to 2.222 of this report.

charitable bodies should be left to the future charity commission to determine, on a case by case basis. We note that several respondents, however, were in favour of determining the names of charitable bodies based on clearly stated principles. We consider that while there are advantages in having clearly stated principles in respect of the use of names of charitable bodies, we share the view of the majority of the respondents who considered that this should be a matter left to the registration authority.

Which public authority to maintain the register

4.59 As for the question of which authority should establish and maintain the list of registered charities, we consider that it is a matter closely linked with the question of whether or not a charity commission should be established for Hong Kong. The discussion of this issue is set out in Chapter 9 of this report.

4.60 We note, however, that there is some support from the respondents for the Inland Revenue Department and the Companies Registry to establish and maintain a list of registered charities. Obviously, the Inland Revenue Department has a current role in determining whether an organisation is a charity according to the common law in order to grant tax exemption under section 88 of the Inland Revenue Ordinance (Cap 112) and it keeps a list of such charities granted with tax exemption. Furthermore, we note that the Inland Revenue Department has the expertise to determine whether an organisation is established for charitable purposes according to common law.

4.61 There is a suggestion that the Companies Registry should take up the role of establishing and maintaining the list of registered charities. We note that the list of charities currently maintained by the Companies Registry is restricted to companies registered with it as locally or overseas incorporated companies. Though this legal form constitutes more than 74% of the charities in Hong Kong,³⁴ the list maintained by the Companies Registry is less comprehensive than the list of tax exempted charities currently maintained by the Inland Revenue Department. In the light of this, we consider that it should be a matter for the Administration to determine which Government bureau/department should take up the role of administering a registration system for charities.

4.62 In line with our final recommendations in Chapter 9 regarding whether or not to establish a charity commission, we recommend that the list of registered charitable organisations should be established and maintained by a

34 According to statistics of the Inland Revenue Department as at March 2013, the distribution of tax-exempt charities across various legal forms was as follows:

<u>Form</u>	<u>No. of Organisations</u>
Corporation	5,651
Society	796
Trust	428
Others	717
Total	7,592

The list of charities exempt from tax is available on the Inland Revenue Department Homepage.

Government bureau/department to be determined by the Administration 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 also recommend that the the matter relating to allowing or disallowing the use of particular names of charitable bodies should be left to the relevant Government bureau/department to determine, on a case by case basis.

Recommendation 4

We recommend that all charitable organisations which:

- (1) solicit from the public for the donation of cash or its equivalent; and/or**
- 2) have sought 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 a Government bureau/department to be determined by the Administration 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 also recommend that the matter relating to allowing or disallowing the use of particular names of charitable bodies should be left to the relevant Government bureau/department to determine, on a case by case basis.

Chapter 5

Recommendations on the framework for governance, accounting and reporting by charities

5.1 In this chapter, we examine the various issues relating to the management and governance of charities as well as the relevant accounting and reporting requirements. We then put forward our final recommendations in this area, having regard to the responses we received from the public during our consultation.

Current situation in Hong Kong

5.2 As discussed in previous chapters, and earlier in the Consultation Paper,¹ there is no single piece of legislation in Hong Kong 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 Office of Licensing Authority under the Home Affairs Department (OLA). 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

5.3 At present, tax-exempt charitable organisations recognised by the Inland Revenue Department are subject to review from time to time. 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.

¹ Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 3.2, 3.3 and 12.2.

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

5.4 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

5.5 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.² 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.³ 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.⁴

Home Affairs Bureau requirements

5.6 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.⁵ The Bureau also has an 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 Affairs Incorporated⁶ and management of the properties of The Secretary for

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

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

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

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

6 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

Home Affairs Incorporated. The Trust Funds and Temples Joint Secretariat provides administrative support for the Chinese Temples Committee and a number of trust funds.⁷ 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

5.7 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.⁸

5.8 The management committee of a school is required to sign a Service Agreement with the Government under certain situations.⁹ The schools concerned are required to submit a School Development Plan¹⁰ to the Bureau which will be used as a yardstick to assess the performance of the

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.

7 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).

8 <http://www.edb.gov.hk/en/sch-admin/sch-management-committee/about-sch-management-committee/index.html>.

9 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/en/sch-admin/sch-management-committee/about-sch-management-committee/index.html>.

10 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.

school during the term of the first School Management Committee Service Agreement or Incorporated Management Committee Service Agreement.¹¹

Department of Health requirements

5.9 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).¹² 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.

5.10 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.

5.11 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 the 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.¹³

11 <http://www.edb.gov.hk/en/sch-admin/sch-management-committee/about-sch-management-committee/index.html>.

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

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

The Sub-committee's proposals in the Consultation Paper and our final recommendations on the framework for governance, accounting and reporting by charities

5.12 In the course of its deliberations, the Sub-committee had examined the systems for regulating and monitoring charities in a number of jurisdictions.¹⁴ Broadly speaking, the approach is for the 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.

5.13 Based on the Sub-committee's study of the reporting and monitoring mechanisms in overseas jurisdictions, it was concluded 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. It was observed that 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.

5.14 To achieve these objectives, the Sub-committee had considered that the monitoring of charities should be based on the principles set out below.¹⁵

(1) *Compliance with charitable objects*

5.15 The Sub-committee had proposed 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 of 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*

5.16 The Sub-committee had proposed 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.

14 For the detailed analysis of these overseas systems for regulating and monitoring charities, see Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at Annex 4.

15 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 8.18 to 8.20.

5.17 The future charity commission should be empowered to take appropriate and proportionate measures to investigate and enforce compliance with these requirements.

5.18 The Sub-committee had proposed that registered charitable organisations should be required to file an annual activity report to the future charity commission.¹⁶ 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.¹⁷

Consultees' responses

5.19 The majority of the respondents agreed that registered charitable organisations should be required to file an annual activity report in a standard form. It was considered that this would facilitate supervision of the operation of charities, urge them to provide charitable services conscientiously, and enable the public to understand the operation and performance of various charities.

5.20 A respondent stated that the annual activity report should not be too onerous for smaller organisations which may be staffed only by volunteers. It was also felt that the annual activity report should not replace the reporting requirement of charities, for instance, schools, hospitals and registered companies which currently have to report to the respective Government authorities.

5.21 It was suggested by a respondent that if the new regulator was also responsible for administering tax exemption status, then it would be necessary to ensure that the annual activity reporting by charities, of whatever size, should provide the information necessary for effective monitoring of their charitable status. Further, the regulator's powers should be as effective as those of the Inland Revenue Department for enforcing the tax law in order to determine whether a charity remained eligible for exemption.

5.22 There was a suggestion by a respondent that the standard form should cover any loan expenditure and overseas donation or transfer; further, any overseas donation or transfer by a charity should not exceed 5% of its charitable income for that year. The respondent also proposed that a charity should be prohibited from lending money to any person or organisation, or

16 Recommendation 5, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 8.18 to 8.20.

17 Same as above.

using its assets to provide a guarantee or security for any person or organisation, with the exception of a mortgage created by the charity to secure the money it borrowed from banks to purchase properties for self-use.

5.23 As for the minority view of the respondents who disagreed with the recommendation, they generally considered that not every charitable organisation had the capacity and resources to prepare an annual activity report. Some considered that much of the information required was already publicly available in the Companies Registry¹⁸ and such information would have been provided already to the Inland Revenue Department when it conducts its periodic review for the purpose of ascertaining whether a charity is still eligible for tax exemption.

5.24 A respondent from the education sector stated that by virtue of existing legislation such as the Education Ordinance, some charities were already held accountable to Government bodies, and so should not be required to duplicate existing reporting and accountability functions. It was stated that to impose a further burden of accountability would only result in additional administrative costs to such charities without adding any benefit to the public.

(3) Disclosure of interests and matters relating to governance

5.25 The Sub-committee had considered 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.¹⁹ 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.

5.26 Furthermore, it was observed by the Sub-committee that charity trustees or directors are under a fiduciary duty to exercise their powers for the purposes for which they are 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.²⁰ Charitable trustees or directors should be subject to a duty to declare any conflicts of interest.

18 Only companies limited by shares or guarantee registered under the Companies Ordinance (Cap 32) are required to submit their audited accounts to the Companies Registry on an annual basis. According to statistics of the Inland Revenue Department as at March 2013, 5,651 out of 7,592 tax-exempt charities were corporations.

19 See Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 8.21 to 8.24.

20 Jean Warburton, *Tudor on Charities* (Sweet & Maxwell 2003, 9th ed) at 282.

5.27 The Sub-committee had proposed that the future charity commission should be empowered to conduct investigations of problematic charities. If misconduct or mismanagement was 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.

5.28 The Sub-committee had recommended in the Consultation Paper that charity trustees or directors of a registered charity should be under a duty to declare any conflicts of interest and personal interests.²¹

Consultees' responses

5.29 The vast majority of the responses agreed that there should be a declaration of interests system among charity trustees or directors of a charity in order to enhance transparency.

5.30 There was a suggestion that Recommendation 6 in the Consultation Paper should be strengthened to also require directors, management members, or trustees, having a conflict of interest not to influence, vote or otherwise participate in the decision-making process with regard to transactions between them and the charitable organisations, for example, in awarding contracts by the charitable organisations to them.

5.31 There was a suggestion from a respondent to explore the desirability of imposing a duty on personal representatives of the estate of any deceased to report to the future charity commission the existence of charitable bequests or trusts created in wills, so that the shortcomings of the present situation, namely, the lack of any prompt official notice and monitoring in the administration of estates involving charitable elements, could be addressed.

(4) *Financial reporting*

Filing accounts and statements

5.32 From the study of overseas jurisdictions, the Sub-committee had noted that nearly all of the monitoring authorities require charitable organisations to submit an annual financial return after the end of their financial year.²² The Sub-committee had noted that in some jurisdictions, such as England and Wales, different filing requirements were imposed according to a charity's gross income and the aggregate value of its assets.

21 Recommendation 6, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 8.21 to 8.24.

22 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 8.25 to 8.29. A table summarising the legal requirements for the filing of annual financial reports with the charities monitoring authorities in overseas jurisdictions was set out at Annex 5 of the Consultation Paper.

5.33 While the Sub-committee had appreciated the advantages in applying different thresholds to charities depending on their size, the Sub-committee was 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 was to be first established. The Sub-committee was also concerned about some small charitable organisations that may be affected by the filing requirements. It was noted 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. The Sub-committee had considered that small charities should not be overburdened with the administrative requirements of preparing and filing audited accounts. The Sub-committee had also considered that an annual income of \$500,000 was an appropriate threshold to determine whether an organisation was financially capable of hiring full-time staff for the purpose of complying with the more stringent filing requirements.

5.34 Taking into account the financial and resource implications for charities in meeting filing requirements, the Sub-committee had recommended in the Consultation Paper 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. The Sub-committee had proposed 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.²³

5.35 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, the Sub-committee had considered 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.

5.36 The Sub-committee had recommended in the Consultation Paper 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

23 Recommendation 7, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 8.25 to 8.29.

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.

The Sub-committee had also invited 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.²⁴

Consultees' responses

5.37 The majority of the responses expressing views on this recommendation were in support of the recommendation relating to the filing requirements for the purpose of enhancing transparency and accountability. Some agreed to the recommendation subject to views relating to the threshold of \$500,000.

5.38 The Law Society strongly agreed that there was a need for charities to increase their transparency, particularly from the point of view of donors and stakeholders. However, it was considered that this should be done in such a way as not to make it more difficult for charities to raise funds in an effective manner. The Society recognised that there were a number of ways this could be done through a charity's financial accounts and making them more accessible to the public but that it would be difficult to get a consensus within the community and amongst those involved in running charities about the extent to which this could or should be done. According to the Society, charities should be required to prepare financial accounts in accordance with generally accepted accounting principles and that trustees or directors of a registered charity should be under a statutory duty to keep proper accounting records. In order to help smaller charities to comply with these requirements, the future charity commission should issue detailed guidelines about the preparation of accounts.

5.39 On balance, the Law Society considered it appropriate for charities over a certain size to be required to have their accounts audited. The Law Society raised the question as to how the proposed threshold of \$500,000 would be applied to charities with irregular activities/income, for example, income which may exceed \$500,000 one year and fall below it in the next. It was suggested that a possible solution would be for the threshold to be applied to the average of the preceding three years' income. Further,

24 Same as above.

there could be a dual test of income over \$500,000 and/or assets over a certain sum.

5.40 A respondent considered that the threshold recommended by the Sub-committee was on the low side compared with that in England and Wales. It was considered that a figure nearer \$3 million would be comparable to that in England and Wales, but initially a lesser figure of, say, \$1.5 million may be prudent. It was further suggested that to ensure that an organisation did not oscillate between the two regimes, the requirements could include some provisions that once an organisation has crossed the threshold, it should be required to file accounts for a further two years even if its income again drops below the threshold.

Exemption

5.41 It was expressed by some respondents that small charitable organisations may not have the financial resources to pay for such professional expenses. A respondent suggested that the Government should consider exempting organisations with *annual expenditures* under \$500,000 from audit requirements and allow their financial reports approved by the organisation's Board of Directors. Another respondent considered that the threshold for annual expenditure should be set at \$1 million.

5.42 Some respondents from the religious sector considered that there should be an exemption for offerings to Christian churches, since it was considered that offerings came from the congregation of the Church and the Church only owed a duty to the congregation of the Church, not to the general public. Therefore, the financial statements submitted to the Government, if any, need not be disclosed to the public, although disclosure to the church congregation may be acceptable. It was further suggested that as some charitable organisations may have many financially independent member churches, preparation of consolidated accounts would not be practical due to the complex structure of such organisations and would involve a huge amount of administrative time and costs. It was considered that religions and religious bodies established from time immemorial should be left alone and should be given the liberty to govern themselves in accordance with their own established internal governance systems and structures. Revenues and expenditures for the maintenance and development of the religions and religious institutes should be exempted from being accounted for and exempted from reporting to the Government or its agent(s).

5.43 A respondent which is a public body considered that since some statutory bodies were already subject to various filing and reporting requirement imposed by different Government departments, such as the Social Welfare Department and the Food, Health and Welfare Bureau, a new set of filing requirements would become a burden for the operation of these charities. It was suggested that heavily regulated statutory bodies should be granted special exemption for filing or reporting requirements in order to avoid duplicating efforts of reporting and imposing extra administrative burden.

Filing of activities report and financial statements annually

5.44 The majority of the respondents expressing views on this aspect of the recommendation were in favour of the filing of an activities report and financial statements by registered charities with the future charity commission on an annual basis.

Contents of the annual report of activities

5.45 The Law Society considered that in all cases, the financial statements prepared for charitable organisations should be required to include disclosure about certain key financial indicators. It was suggested that the following financial information should be included and highlighted for the sake of transparency:

- i) the amount of income for the year;
- ii) the percentage of the charitable organisation's income utilised on administrative expenses; and
- iii) the amount of grants or donations made by the charity in each year.

The Law Society believed that transparency should be increased from the point of view of donors and all stakeholders without in any way making it more difficult for charities to raise funds in an effective manner.

5.46 Assuming the key financial indicators and other relevant ratios were included in the annual activity report and that the report was made available to the public, the Law Society expressed some reservations as to whether charities should be required also to make their financial statements accessible to the public. This concern derived from a view that information on the financial reserves of some charities may have a deterrence effect on donations (for example, the public may think such institutions are 'wealthy', without fully understanding the reality that future provisions for certain capital commitments had to be made). To the extent that accounts were made public, it might mean that certain charitable organisations would need to include further notes or explanations to justify its financial position to members of the public.

5.47 Some respondents expressed views on the content to be included in the annual report of activities. Suggested heads of information included:

- The objects or rationale of the charity as well as changes made to these.
- An outline of the charity's structure and operations.

- The main activities carried out to fulfill the charitable objects of the charity, and a brief description and explanation as to how or why such activities could fulfill the charitable objects.
- All subsidiaries (if any) of the charity and the nature of the business of each subsidiary.
- All related parties with whom the charity has business transactions. (It was suggested that the term “*related parties*” should be in line with the definition of related party or related party transaction under the accounting policies and standards adopted by the charity to prepare its financial statements.) Regarding the disclosure of business transactions, such transactions might be narrowed down to those exceeding a specified amount or a specified percentage of the charity’s annual income.
- Major heads of revenue, for example, donations, proceeds generated from trading or service activities (including social enterprise), investment returns and interest income, with approximate percentage under each head.
- Major heads of expenses, for example, rent, employees’ remuneration, service fees charged by contractors and expenditure on each charitable project, with approximate percentage under each head.
- Any conflicts of interest and personal interests of trustees or directors.
- Confirmation by the trustees that the charity has operated in accordance with any code of governance set forth by the future charity commission or any other relevant Government authorities.
- A record of the dates of board meetings and the number of directors or trustees attending these meetings.
- An account of their reserves policy, investment policy, risk management and asset portfolio.

Maintaining accounting records

5.48 In the Consultation Paper, the Sub-committee had considered the law on charities in a number of overseas jurisdictions, and many of these, 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.²⁵

5.49 On the basis of these overseas models, the Sub-committee had considered that charity trustees or directors of a charity should be required to ensure that accounting records 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.

5.50 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, the Sub-committee had 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.²⁶

5.51 To ensure consistency with the requirement under the Companies Ordinance, the Sub-committee had considered that seven years was an appropriate period for the retention of accounting records by charities. The Sub-committee had therefore recommended 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, and that such records should be retained for at least seven years.²⁷

Consultees' responses

5.52 A majority of the respondents supported this proposal. Those respondents who were not in favour were also generally those who were not in support of the establishment of a charity commission. Some of these respondents were concerned about the proposed structure and power of the charity commission. It was also considered by some respondents that it was sufficient that the Inland Revenue Department already has the role of taking follow-up action against problematic charities during reviews conducted from time to time.

25 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at Annex 4.

26 This is not where the action is brought by a beneficiary under a trust in a case of fraud: see section 20, Limitation Ordinance (Cap 347).

27 Recommendation 8, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 8.30 to 8.33.

The position on financial reporting standards in Hong Kong

5.53 In Hong Kong, there are no set financial reporting standards for charities. Financial reporting in general adopts one of the following three frameworks:

(a) ***Hong Kong Financial Reporting Standards (HKFRSs)***

The HKFRSs is a set of standards issued by the Hong Kong Institute of Certified Public Accountants (HKICPA)²⁸ which specifies the measurement and disclosure requirements (amongst other matters) for transactions and events that are important in general purpose financial statements. It is intended that the appropriate application of HKFRSs, with additional disclosure when necessary, will enable financial statements to give, in accountancy terms, a "true and fair view" of a body's financial activities and financial position.²⁹

(b) ***Hong Kong Financial Reporting Standard for Private Entities (HKFRS for PE)***

The HKFRS for PE is a standard which was issued by the HKICPA on 30 April 2010 as a financial reporting option for private entities.³⁰ The HKICPA's objective in issuing the standard was to ease the reporting burden of private entities by relieving them of the requirement to apply full HKFRSs.³¹ Although private entities are eligible to adopt HKFRS for PE, it is not mandatory for them to do so.

(c) ***Small and Medium-sized Entity Financial Reporting Framework (SME-FRF) and Financial Reporting Standard (SME-FRS)***

28 Pursuant to section 18A of the Professional Accountants Ordinance (Cap 50), the Council of the HKICPA may, in relation to the practice of accountancy, issue or specify any standards of accounting practice required to be observed, maintained or otherwise applied by members of HKICPA. The Council has the responsibility to approve the Hong Kong Financial Reporting Standards (HKFRSs) and related documents, such as the *Framework for the Preparation and Presentation of Financial Statements*, exposure drafts, and other discussion documents: see HKICPA, *Hong Kong Financial Reporting Standard for Private Entities*, Feb 2011. See also: <http://www.hkicpa.org.hk/en/standards-and-regulations/standards/financial-reporting/>.

29 The HKFRSs includes all Hong Kong Financial Reporting Standards, Hong Kong Accounting Standards and Interpretations approved by the Council of the HKICPA and currently in issue. It also sets out the relationship between HKFRSs and the International Financial Reporting Standards (IFRSs) and the scope and authority of the Accounting Guidelines and Accounting Bulletins issued by the HKICPA: see HKICPA, Preface to Hong Kong Financial Reporting Standards, Sept 2010. See also HKICPA, *Hong Kong Financial Reporting Standard for Private Entities*, Feb 2011; and <http://www.hkicpa.org.hk/en/standards-and-regulations/standards/financial-reporting/>.

30 "Private entities" are defined in section 1 of HKFRS for Private Entities as entities that:

- (i) do not have public accountability; and
- (ii) publish general purpose financial statements for external users. (Examples of external users include owners who are not involved in managing the business, existing and potential creditors, and credit rating agencies: see HKICPA, *Hong Kong Financial Reporting Standard for Private Entities*, Feb 2011.

31 See: <http://www.hkicpa.org.hk/en/standards-and-regulations/standards/hkfrs-pe-info-centre/>.

The SME-FRF sets out the conceptual basis and qualifying criteria for the preparation of financial statements in accordance with the SME-FRS. This standard may be applied by Hong Kong incorporated companies eligible for claiming relief under section 141D of the Companies Ordinance (Cap 32)³² and by other entities that meet the eligibility requirements contained in this standard.³³

5.54 Because there are optional elements within these financial reporting frameworks, comparability between different accounting reports is not always achievable.

The position in other jurisdictions

England and Wales

5.55 The Financial Reporting Council (FRC) is an independent regulator with the stated aim of promoting high quality corporate reporting and governance in the UK.³⁴ Its remit includes publishing codes and standards for companies, auditors, actuaries and accountants to adopt in corporate reporting, and it also contributes to the international debate on the future of the audit market.³⁵ In 1990, the Accounting Standards Board (ASB) was established under the FRC. Its duty included issuing accounting standards primarily applicable to general purpose company financial statements (though in particular industries or sectors, further guidance might be required in order to implement accounting standards effectively).³⁶

32 This relates to the power of shareholders of certain private companies to waive compliance with requirements as to accounts. Section 141D of the Companies Ordinance provides that a private company (other than a company which is a member of a corporate group and certain companies specifically excluded) may prepare simplified accounts and simplified directors' reports in respect of one financial year at a time. Division 2 of Part 9 of the Companies Ordinance (Ord 28 of 2012) deals with the new reporting exemption of companies. Under the new section 359, a company will fall within the reporting exemption for a financial year if it is qualified as a small private company or small guarantee company for the financial year. Under the new section 363, a company is a small guarantee company if it is formed and registered under the Ordinance and satisfies the condition set out in the new section 1(5) of Schedule 3 (total annual revenue must be not more than HK\$25 million). A group of small guarantee companies (total annual revenue must be not more than HK\$25 million) as described in the new section 366 of Ord 28 of 2012 is also qualified for simplified reporting. The new Companies Ordinance is scheduled to take effect in early 2014.

33 HKICPA, Small and Medium-sized Entity Financial Reporting Framework and Financial Reporting Standard, revised February 2011.

34 <http://www.frc.org.uk/Our-Work.aspx>.

35 Same as above.

36 See Charity Commission of England and Wales, Statement by the Accounting Standards Board on the SORP, *Accounting and Reporting by Charities: Statement of Recommended Practice*, revised 2005. From 1 August 1990 until 1 July 2012, all UK accounting standards were issued by the Accounting Standards Board (ASB). All accounting standards developed and issued by the ASB were known as Financial Reporting Standards (FRSs). From 2 July 2012, the FRC Board assumed responsibility for setting accounting standards, see: <http://www.icaew.com/en/library/subject-gateways/accounting-standards/knowledge-guide-to-uk-accounting-standards>.

5.56 In July 2012, reforms were carried out to enable the FRC to operate as a unified regulatory body with enhanced independence. As part of these reforms, the Codes and Standards Committee was established to advise the FRC Board on maintaining an effective framework of financial reporting codes and standards for the UK. Also under the reforms, the ASB was replaced by the Accounting Council, which assumed an advisory role in relation to the Codes and Standards Committee and the FRC Board. The accounting standards previously set by the ASB became the responsibility of the FRC Board with effect from 2 July 2012.³⁷

5.57 In the charity sector, the Charity Commission was recognised by the ASB, before the recent reform, as an authority for the purposes of developing and issuing Statements of Recommended Practice (SORPs) on accounting and reporting. Such SORPs were to follow the ASB's code of practice which set out the procedures to be followed in the development of SORPs.³⁸ Accordingly, the accounting recommendations of the SORP for charities are based on the most recent Financial Reporting Standards issued by the ASB³⁹ and were developed in conjunction with the Charities Statements of Recommended Practice Committee. This is an advisory committee made up of charity finance directors, charity auditors, academics, charity advisers and charity regulators.⁴⁰ As explained by the Charity Commission, the purpose of the SORP is to provide "*a framework to enable charities to explain what they aim to do, how they go about it and what they achieve. It does so in a way that pulls together narrative and financial reporting, into a coherent package focused on activities undertaken.*"⁴¹ In terms of the scope of this SORP, its accounting recommendations apply to all charities in the UK that prepare accounts on the accruals basis.⁴² The aim is to give a true and fair view of a charity's financial activities and financial position regardless of the charity's size, constitution or complexity.⁴³

37 See: <http://www.icaew.com/en/library/subject-gateways/accounting-standards/knowledge-guide-to-uk-accounting-standards>.

38 Charity Commission of England and Wales, Statement by the Accounting Standards Board on the SORP, *Accounting and Reporting by Charities: Statement of Recommended Practice*, revised 2005.

39 In December 2004 the Accounting Standards Board issued five new accounting standards (FRS 22 to FRS 26) as part of its strategy for convergence with International Financial Reporting Standards; see Charity Commission of England and Wales, Statement by the Accounting Standards Board on the SORP, *Accounting and Reporting by Charities: Statement of Recommended Practice*, revised 2005, at Appendix 2.

40 Charity Commission of England and Wales, Statement by the Accounting Standards Board on the SORP, *Accounting and Reporting by Charities: Statement of Recommended Practice*, revised 2005, at iii.

41 Charity Commission of England and Wales, Statement by the Accounting Standards Board on the SORP, *Accounting and Reporting by Charities: Statement of Recommended Practice*, revised 2005, at iii.

42 That is, all charity companies and non-company charities with a gross income of over £250,000. As stated in the *Accounting and Reporting by Charities: Statement of Recommended Practice*, at iv, "*Every registered charity is expected to produce an annual report and accounts that explains where your money came from and what you did with it. However, the SORP only applies if your charity reports its income and expenditure on the basis of when the activity happens, rather than when you receive and spend the cash. The income and expenditure basis is called accruals based accounting.*"

43 Charity Commission of England and Wales, Statement by the Accounting Standards Board on the SORP, *Accounting and Reporting by Charities: Statement of Recommended Practice*, revised 2005, at para 3.

5.58 The Charity Commission has published a guidance note known as *CC15b - Charity Reporting and Accounting: The essentials*. This provides an overall summary of the reporting and accounting framework for charities and is intended to help charities to apply the SORP.⁴⁴ According to CC15b, the framework for accounting by charities sets out different requirements for different sizes and types of charities. Charity accounts may be prepared either on the receipts and payments basis⁴⁵ or on the accruals basis.⁴⁶ Which of these is needed will depend on the income of the charity and whether or not it has been set up as a company.⁴⁷

New Zealand

5.59 In New Zealand, most non-profit organisations ("not-for-profits") are not required to meet any particular standard of financial reporting.⁴⁸

5.60 In March 2012, the External Reporting Board (XRB)⁴⁹ proposed an Accounting Standards Framework which will be applied to entities that are statutorily required to prepare financial reports in accordance with generally accepted accounting practice.⁵⁰ The XRB proposes that the new Accounting Standards Framework will consist of a two-sector, four-tier structure with different accounting standards applying to each tier.⁵¹ The two sectors are

44 See: <http://www.charitycommission.gov.uk/Publications/cc15b.aspx>.

45 According to CC15b, this is the simpler of the two methods of preparation and may be adopted where a non-company charity has a gross income of £250,000 or less during the year. It consists of an account summarising all money received and paid out by the charity in the financial year, and a statement giving details of its assets and liabilities at the end of the year. Charitable companies are not allowed by company law to adopt this method. See Charity Commission of England and Wales, *CC15b - Charity Reporting and Accounting: The essentials*, March 2012, at para B; <http://www.charitycommission.gov.uk/Publications/cc15b.aspx>.

46 According to CC15b, these accounts contain a balance sheet, a statement of financial activities and explanatory notes, and are required in accountancy terms to show a "true and fair view". Charities which must prepare their accounts on the accruals basis in accordance with the SORP include all charity companies and non-company charities with a gross income of over £250,000. See Charity Commission of England and Wales, *CC15b - Charity Reporting and Accounting: The essentials*, March 2012, at para B; <http://www.charitycommission.gov.uk/Publications/cc15b.aspx>.

47 See above. See also: <http://www.charitycommission.gov.uk/Publications/cc15b.aspx>.

48 New Zealand External Reporting Board (XRB), *Proposals for the New Zealand Accounting Standards Framework*, March 2012, section 1.3.

49 A statutory body established under section 22 of the New Zealand Financial Reporting Act 1993 to developing and implementing an overall strategy for financial reporting standards and auditing and assurance standards; preparing and issuing accounting standards; preparing and issuing auditing and assurance standards, including the professional and ethical standards that will govern the professional conduct of auditors; and liaising with national and international organisations. See section 24 of the New Zealand Financial Reporting Act 1993 and http://www.xrb.govt.nz/Site/about_us/default.aspx.

50 Under section 34A of the New Zealand Financial Reporting Act 1993, the XRB is required to prepare and submit to the Minister for approval under section 34C of the Act, a draft strategy for establishing different tiers of financial reporting in respect of different classes of relevant entities. The Board must, after the strategy is approved by the Minister, take reasonable steps to implement the strategy.

51 Four different levels of reporting, known as 'Tiers', have been proposed:
See: <http://www.charities.govt.nz/news/information-sheets/proposed-new-financial-reporting-standards/>. They are:

- Tier 1 - expenses in the financial year over \$30 million.
- Tier 2 - expenses in the financial year between \$2 million and \$30 million.
- Tier 3 - expenses in the financial year under \$2 million and using accrual accounting.

those relating to for-profit entities⁵² and public benefit entities (PBEs).⁵³ The proposed Accounting Standards Framework includes definitions for the various tier criteria. It also defines the accounting standards that will apply to each tier.⁵⁴ In future, not-for-profits entities (including charities, which will fall into the PBEs sector) will be required to complete their annual financial reports to a specified standard.⁵⁵

5.61 The proposed Accounting Standards Framework has been developed through an extensive development and consultation process that began in early 2009. The XRB proposes that the new Accounting Standards Framework should be implemented in stages by sector over a three-year period.⁵⁶

Consultees' responses

5.62 We note that despite the wide range of views expressed on the numerous issues set out in the Consultation Paper, one clear message emerged from the responses – the need for greater transparency and accountability of Hong Kong charities in order to build stronger public trust and confidence in the sector.

5.63 With respect to the production of financial statements, the general view among respondents was that imposing reporting requirements and making these financial statements publicly available would be extremely important in boosting public confidence. It was considered by some respondents that in order to prevent possible abuses, proper and consistent regulation is required and the maintenance of good accounting standards is

Tier 4 - payments under \$40,000 and allowed by law to use cash accounting.

If no other reporting requirements apply to them, charities with annual expenses over \$30 million will be required to complete reports to the Tier 1 standard.

If no other reporting requirements apply to them, charities with annual expenses between \$2 million and \$30 million will be required to comply with their choice of either the Tier 1 or Tier 2 standard.

52 New Zealand External Reporting Board, *Proposals for the New Zealand Accounting Standards Framework*, March 2012, at para 31. The XRB proposes that the definition of for-profit entities to be as follows: "Any reporting entity that is not a public benefit entity". A PBE is to be defined as: "A reporting entity whose primary objective is to provide goods or services for community or social benefit and where any equity has been provided with a view to supporting that primary objective rather than for a financial return to equity holders" : see New Zealand External Reporting Board, *Proposals for the New Zealand Accounting Standards Framework*, March 2012, at para 31. As the XRB envisages some of the accounting standards requirements may only apply to PBEs belonging to the public sector or only apply to PBEs belonging to the not-for-profit sector, it has defined these two sectors. Public Sector PBEs is to be defined as "A reporting entity that is a public entity as defined by the Public Audit Act 2001 and which is a PBE, and all Offices of Parliament." Not-for-profit PBEs is to be defined as "Any reporting entity that is a PBE and is not a public sector PBE". See New Zealand External Reporting Board, *Proposals for the New Zealand Accounting Standards Framework*, March 2012, at para 32.

53 See above.

54 New Zealand External Reporting Board, *Proposals for the New Zealand Accounting Standards Framework*, March 2012, at 6.

55 New Zealand Internal Affairs, Proposed new financial reporting standards for not-for-profits: how will they affect registered charities?, February 2013.

56 New Zealand External Reporting Board, *Proposals for the New Zealand Accounting Standards Framework*, March 2012, at 6.

essential. Views were expressed by some respondents that the type of financial statements to be prepared by charities should be more clearly specified than at present and that those financial statements subject to audit should be prepared to the standards required to satisfy an auditor on a true and fair view on the accruals basis, and subject to Hong Kong accounting standards generally.

5.64 A respondent from the social welfare sector advocated the unifying of the accounting standards and report formats for charitable organisations. A number of respondents observed that at present it was difficult for charitable organisations to meet disclosure requirements because different Government departments have different accounting standards. They believed that the Administration should work with professional bodies to design a uniform set of accounting standards for charities and a reporting format which is simple, easy to understand and can accurately reflect the actual situation of a charity. It was felt that this would decrease charitable organisations' disclosure costs and make it more convenient for the public to scrutinise charities' financial activities.

5.65 Several respondents, including some charitable organisations, expressed the view that when the time comes to consider the technicalities of reform, the relevant authority should liaise closely with the accounting profession, the Inland Revenue Department and non-profit organisations of various types and sizes on the issue of how to streamline the relevant disclosure procedures. It was also noted that during this process, special consideration should be given to the limited resources of non-subsided charities, so that they will be able to do what is required of them without an added administrative burden. It was also suggested that a separate general purpose financial statement with a specific set of accounting standards should be designed for the sector, to ensure greater clarity. In order not to impose financial hardship on non-subsided charities, it was suggested that such accounting standards should not impose ceilings for administrative and fundraising costs.

5.66 A religious body expressed the view that it was necessary for the Administration to take measures to ensure that the requirements specific to charities are distinctive from those applicable to business establishments. The respondent observed that the generally accepted accounting principles currently adopted by the HKICPA were developed for the regulation of business establishments, which are required, among other obligations, to prepare consolidated accounts and conduct re-evaluation of their properties on an annual basis. The respondent considered that these requirements are not suitable for charities, and further, that they would serve no purpose other than to add to a charity's operating costs in such a way that donations made by the public could not be used effectively for the public benefit.

Our view

5.67 The rationale behind our objective to improve the accountability of charities is threefold. Firstly, charities are granted tax exemption by the Inland Revenue Department. Secondly, they appeal to the public for donations. Thirdly, as a result of their tax exempt status under section 88 of the Inland Revenue Ordinance (Cap 112), they are entitled to privileges granted by the Government in different kinds of applications.⁵⁷ In light of this, we believe it is reasonable to require these organisations to be accountable for their activities. It is also apparent that there is a public expectation that they should increase their public accountability and transparency in their governance. We therefore make a number of recommendations relating to the improvement of the governance of charities later in this chapter. With regard to the suggestions by some respondents on the possibility of exempting certain charitable organisations from the filing requirements, we consider that all charitable organisations which solicit from the public for the donation of cash or its equivalent, and/or have sought tax exemption from the Inland Revenue Department under section 88 of the Inland Revenue Ordinance (Cap 112), should be subject to the requirement of registration without any exemption. By virtue of their charitable status, all such charities should be subject to the same treatment in terms of financial reporting standards and filing requirements, as recommended later in this chapter.

5.68 We note that there is currently no financial reporting standard for charities in Hong Kong and significant support was expressed during our consultation for such a reporting standard to be introduced. We are aware that a variety of benefits might be achieved by setting such a financial reporting standard for charities.

- (1) A common financial reporting standard will promote greater transparency, as it will necessarily require greater disclosure of the amount of income, how this is used and the administrative costs of individual charities. This will enable the public to make an informed choice when making charitable donations.
- (2) It would have the effect of enhancing the comparability between charities which will facilitate the public in scrutinising the financial activities of different charities.
- (3) Different Government departments adopting standardised accounting requirements will lead to greater certainty for charities in terms of disclosure, and should minimise the administrative costs for charities in satisfying different Government departments' accounting requirements.

57 Privileges associated with being a charitable body include tax, exemption from some statutory registration requirements, and rule against perpetuities; see Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 2.8 to 2.21; also paras 1.32 to 1.47 of this report.

5.69 At the same time, we note that there are the following possible disadvantages in imposing a common accounting standard among charities, some of which were raised by respondents in the consultation.

- (1) More administrative costs may be incurred, due to the greater degree of disclosure required. This could be especially burdensome for small charities.
- (2) It would take time for charities to adapt to the new accounting requirements.
- (3) From the relevant charity authority's point of view, adopting standardised accounting requirements will require choosing between different options in order to determine which one is most suitable for charities. The new requirements will need to be tested over time and may need to be modified and adjusted in the future.

5.70 We note that in some other jurisdictions, the relevant authority has developed and published a financial guidance note for charities in the form of a Statement of Recommended Practice (SORP). As discussed earlier, the SORP in the UK was published by the Charity Commission in the form of a recommended practice and is based on financial reporting standards currently in use in the UK.⁵⁸

5.71 Having considered the relevant issues and the views of all our consultees, we consider that a statement of recommended practice should be adopted by charities in Hong Kong so that the financial statements prepared by charities can achieve appropriate levels of transparency and comparability.

5.72 We recommend that the Administration should work with the relevant professional accounting body/bodies in Hong Kong to formulate such a financial reporting standard.

Recommendation 5

We recommend that a specifically formulated financial reporting standard should be adopted for charities in Hong Kong.

We recommend that the Administration should work with the professional accounting body/bodies to formulate this standard.

⁵⁸ While not developed or issued by the Accounting Standards Board (ASB) or the current Financial Reporting Council (FRC), the SORP was endorsed by the ASB, which acknowledged that the process of its development was in line with the ASB's principles: see discussion above.

5.73 We discussed earlier in this chapter that registered charitable organisations should satisfy different filing requirements for their accounts and financial statements depending on their annual income. We consider that a similar criteria set out in this earlier discussion should be adopted in determining the filing requirements for charitable organisations making charitable fundraising licence or permit applications. Based on the rationale for greater accountability mentioned earlier, it would be reasonable to require these organisations to be accountable for their activities and there is a public expectation that they should increase their public accountability and transparency in their governance. For these reasons, we consider that the Government bureaus/departments involved in the approval of fundraising activities should act as gatekeepers to avoid fraudulent and illegal fundraising.

Recommendation 6

We recommend that the following filing requirement should be imposed by Government bureaus/departments on charitable organisations in their applications for charitable fundraising licences or permits:

- (1) Charitable organisations with an annual income exceeding \$500,000 should be required to file an auditors' report and financial statements.**
- (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.**

Disclosure of information by charities

5.74 We observe that in overseas jurisdictions, such as Australia, Canada and New Zealand, certain information about registered charities is made available to the public. We believe that this is an effective way of ensuring greater accountability and transparency among charities. In Hong Kong, there may be possible concern for the need to protect private data of charities in the event of imposing mandatory disclosure requirements on charities. No doubt in the course of enacting specific provisions relating to mandatory public disclosure, the importance of public access to such information has to be weighed against the importance of the protection of the private data of the charities. We believe that there are significant advantages in pursuing the option of imposing a mandatory requirement on the charities regarding the disclosure of information to this approach, including those set out below.

- (1) Greater transparency and accountability among tax-exempt charities, as well as greater public accessibility to information.

(This is an obvious result if information, such as financial statements and reports about charities, could be made available to the public. Members of the public would be better informed about the operation of tax-exempt charities and would therefore be able to make appropriate and informed decisions regarding the making of charitable donations.)

- (2) Enhancement of greater public trust and confidence in tax-exempt charities.

(Tax-exempt charities which disclose their information will gain greater public trust and confidence. This should be a positive re-inforcement for tax-exempt charities to enhance their transparency and accountability.)

Recommendation 7

We recommend that the Administration should ensure that tax-exempt charities make information about their operations available to the public by publishing certain documents, such as their financial statements and activities' reports, on their websites.

(5) *Powers of investigation*

5.75 The Sub-committee had considered that the ability of the future charity commission to investigate and check abuses was crucial to building and maintaining public confidence.

5.76 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 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.

5.77 When a charity's assets, reputation, services or beneficiaries have been harmed or are at risk of abuse or damage, the stated aim of the Charity Commission in England and Wales is to stop the abuse or damage and put the charity back on a proper footing for the future. The Commission's work involves identifying and investigating causes of misconduct or

mismanagement in the administration of charities and resolving the problems that it finds.⁵⁹

5.78 The Charity Commission has issued a guideline entitled, *CC46 - Statutory inquiries into charities: guidance for charities and their advisers*, which seeks to provide guidance to help charities and their advisers 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, and resolving issues of concern. Details of the form an inquiry takes and the legal powers involved are set out in section D of CC 46. According to section D1 of CC 46, "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."

5.79 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. The criteria the Commission considers when deciding to open an inquiry in any case are set out in the Risk Framework Application Document at section G3.⁶⁰

5.80 The Commission's guideline CC 46 lists a number of higher risk issues that may be dealt with under a statutory inquiry. These examples include:

- "• *significant financial loss to a charity;*
- *serious harm to beneficiaries and, in particular, vulnerable beneficiaries;*
- *misuse of a charity for terrorist purposes (including charity links with or support for terrorism, financial or otherwise, connections to proscribed organisations or misuse of a charity to foster criminal extremism);*
- *serious criminality and/ or illegal activity within or involving a charity (including fraud and money laundering);*
- *charities set up for an illegal or improper purpose;*
- *charities deliberately being used for significant private advantage;*
- *where a charity's independence is seriously called into question;*

59 The Charity Commission for England and Wales, *CC46 - Statutory inquiries into charities: guidance for charities and their advisers*, available at: <http://www.charitycommission.gov.uk/detailed-guidance/protecting-your-charity/statutory-inquiries-into-charities-guidance-for-charities-and-their-advisers-cc46/>.

60 The Charity Commission for England and Wales, *CC46 - Statutory inquiries into charities: guidance for charities and their advisers*, at C2, available at: http://www.charitycommission.gov.uk/Our_regulatory_activity/Our_approach/app_risk_framework.aspx.

- *other significant non-compliance, breaches of trust or abuse that otherwise impact significantly on public trust and confidence in a charity and charities generally.*"⁶¹

5.81 In Scotland, the Office of the Scottish Charity Regulator is vested with similar wide power to make inquiries and investigate charitable organisations.

5.82 While it is essential for the future charity commission to be empowered to investigate and check into alleged abuses within charities, the Sub-committee had considered in its Consultation Paper 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.⁶² The Sub-committee had considered also that it was 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.

5.83 The Sub-committee had noted that in England and Wales, the Charity Commission took a cautious approach towards the disclosure of information relating to charities being investigated. 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.⁶³

5.84 In line with the approach adopted in the United Kingdom models, the Sub-committee had considered that it was 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. The Sub-committee had also considered that appropriate safeguards were needed to ensure the confidentiality of such investigations in the light of their sensitivity and the need to protect the credibility of charities.

5.85 The Sub-committee had recommended 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

61 Same as above.

62 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at para 8.40.

63 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>.

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.⁶⁴

Consultees' responses

5.86 The number of respondents in favour of these recommendations was similar to the number not in favour. The majority of the respondents against the proposals also objected to the establishment of a charity commission.

5.87 Some respondents who expressed support for the powers of the future charity commission to investigate alleged mismanagement and misconduct of charitable organisations with regard to their charitable objects, expressed concern about a lack of clarity in what constituted “*mismanagement and misconduct*.” It was suggested that a clear definition was needed in order to avoid excessive or abusive power being granted to the commission. Some respondents from the religious sector felt that the proposed power would pose an unnecessary threat to the independent operation and governance of charities.

5.88 As regards the recommendation of ensuring appropriate safeguards to ensure confidentiality during the course of investigations, a huge majority of the respondents were in support of the proposal. A suggestion was made that confidentiality should be maintained at the stage of any preliminary investigation. Once it is decided that a full investigation should be conducted, it is in the interest of the public that the charitable organisation concerned should be put on an open list to allow the public to make an informed choice whether to donate to that particular organisation. There was also the view that although, to certain extent, there is a need to ensure confidentiality during the course of an investigation, it is necessary for the investigation committee to disclose their findings to the public, because such irregularities almost always involve public interest. A respondent expressed the view that charities need to be protected from malicious accusations. It was observed that the mere fact that an inquiry is being made in respect of charity would likely cause damage to a charity's reputation even if the inquiry subsequently finds that there is no wrong-doing on the part of the charity.

(6) Providing false or misleading information to be an offence

5.89 To buttress the power of investigation of the future charity commission where it has been exercised, the Sub-committee had recommended in the Consultation Paper that any person who intentionally or

64 Recommendation 9, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 8.34 to 8.42.

recklessly provided 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, the Sub-committee had proposed that this offence should be statutory. This would provide an appropriate deterrence in the case of persons under investigation for any misconduct or maladministration in relation to charities.⁶⁵

5.90 The Sub-committee had recommended that any person who intentionally or recklessly provided false or misleading information to the future charity commission or its appointed investigators, or failed to provide the information required for the purpose of investigation, or altered, concealed or destroyed any document required for production for the purpose of an investigation, would be guilty of an offence.⁶⁶

Consultees' responses

5.91 A vast majority of the respondents expressing views on this recommendation were in support of this proposal. The Law Society considered that it would give "*teeth*" to the future charity commission. A respondent raised a concern about the difficulty of proving the *mens rea* or the mental element of the offence mentioned in the recommendation. The reason was that the "*mastermind*" behind the crime who might seek personal advantage may shift the blame to others by various means, such as replacing the existing staff and board of directors so that it would be difficult for investigators to establish the alleged offence.

Enforcement and remedies

5.92 Monitoring charities through proper enforcement procedures and remedial action will ensure charities meet their legal obligations and operate in accordance with their proper purposes. A charity regulation authority should be empowered to take appropriate and proportionate measures to investigate and enforce compliance with specified requirements. Based on the experience of overseas jurisdictions, the Sub-committee had noted in the Consultation Paper 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 were stated in the Consultation Paper as possible approaches to the issues of enforcement and remedies.⁶⁷

65 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at para 8.44.

66 Recommendation 10, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at para 8.44.

67 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at para 8.45.

(1) *Removal of charitable status*

5.93 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*

5.94 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*

5.95 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*

Proposed powers relating to enforcement and remedies

5.96 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.

5.97 The Sub-committee had considered 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 of the Consultation Paper, should be vested in the future charity commission.

5.98 The Sub-committee had recommended 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.

5.99 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.⁶⁸

Consultees' responses

5.100 The majority of the respondents were in favour of the proposal. Those not in favour were also not in support of the establishment of a charity commission. Some respondents expressed the view that some Government departments have already undertaken these proposed duties and the public can refer any suspected cases to the law enforcement agencies or the Social Welfare Department for follow-up. It was felt that instead of vesting powers on the future charity commission, the Social Welfare Department and the Inland Revenue Department should be further empowered to play a greater role in monitoring. This would avoid overlapping of monitory roles among different authorities.

5.101 The Law Society expressed concern about the future charity commission being vested with both the power of investigation and enforcement. It was considered important that there should be a clear separation of the regulatory powers of investigation and enforcement. The Society recommended that further consideration should be given to the establishment of a separate tribunal which could have powers similar to that of the Board of Review.⁶⁹ Such a tribunal should be able to disagree with the future charity commission and vacate any decision made by the Commission and substitute its own. The Society felt that it was important to provide a cheap and informal system to resolve disputes, and where a charity was unhappy with a decision by the tribunal, it could always seek judicial review to overturn the decision.⁷⁰

68 Recommendation 11, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 8.45 to 8.50.

69 The Board of Review is an independent statutory body constituted under section 65 of the Inland Revenue Ordinance (Cap 112) to determine tax appeals. Any person may lodge an appeal to the Board if he has validly objected to an assessment by the Commissioner of Inland Revenue but with whom the Commissioner in considering the objection has failed to agree, or he has been assessed to additional tax under section 82A of the Ordinance; available at <http://www.info.gov.hk/bor/eng/info.htm>; see also section 66 and 82B of the Ordinance.

70 Recommendation 20, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at para 12.44.

Proposed power to protect properties of charities in extreme cases

5.102 The Sub-committee had considered that the power of the future charity commission to protect the property of charities in cases of misconduct or mismanagement should include various others powers. As these powers would be exercised only in extreme cases (where, for example, a charity's trustees were suspected of engaging in illegal activities involving charitable trust properties), the Sub-committee had considered that the vesting of these powers in the future charity commission would be appropriate and necessary for the better protection of the public.

5.103 The Sub-committee had recommended that the future charity commission should be vested with the power to protect the 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.⁷¹

Consultees' responses

5.104 The majority of the respondents expressing views on this recommendation were in support of the proposal. It was thought that these powers were necessary and reasonable to protect the property of charities. It was mentioned by a respondent that experience elsewhere had shown that if the director of an incorporated charity was suspended or removed from office, he may still be able to cause difficulties for the charity if he is permitted to continue as a member by, for example, attending and voting at meetings of the membership. It was suggested that the power to suspend or remove a trustee or director should be extended to a member of a charity which is a company limited by guarantee.

5.105 The Law Society considered that the future charity commission should also be provided with the following powers:

- (a) the power to remove members of a charity organised as a company limited by guarantee; and

⁷¹ Recommendation 12, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at para 8.51.

- (b) the power to protect property in cases of misconduct or mismanagement by the charity's administrators. This power should not include the power to appoint receivers for good order or management of the property, as such appointments should be left with the Court because where there is a deep split within the organisation there is often deadlock. The Society also pointed out that unincorporated bodies have no power to make such appointments.

Our view

5.106 We are aware from the responses that there is a strong call from the general public for greater transparency and accountability in the charity sector. There was also a general wish that the public should have enhanced access to information relating to charities.

5.107 We appreciate all the valuable suggestions and comments made by the respondents, especially those who have conscientiously gone into detail regarding possible solutions to likely problems arising from implementation of the recommendations in the Consultation Paper. We are certain that these responses and suggestions would serve as a useful future reference point for the Administration in the setting up of a framework for governance, accounting and reporting by charities.

5.108 We have earlier made a number of recommendations relating to measures which could enhance the transparency and accountability of charitable organisations. We consider it important that the Administration should designate a Government bureau/department to take up the responsibility in relation to enforcement action to ensure compliance by charitable organisations. Non-compliance with any of the requirements recommended earlier in this chapter should result in consequences such as refusal of applications or future applications for fundraising licences or permits, revocation of existing fundraising licences or permits, loss of tax exemption granted by the Inland Revenue Department, de-registration, or referral of the case to law enforcement agencies. In a case which warrants de-registration of a charitable organisation, we note that the Inland Revenue Department, the Social Welfare Department, the OLA and any other relevant Government bureau/departments, should be notified for record or appropriate follow-up action.

5.109 In our view, the recommendations made by the Sub-committee in Chapter 8 of the Consultation Paper hinge very much on the establishment of a charity commission which will implement the various powers proposed in the Consultation Paper. We have therefore deferred setting out any further recommendations regarding the issues covered in this chapter until we consider the issue of the establishment of a charity commission in a later part of this report.

Recommendation 8

We recommend that the Administration should designate a Government bureau or department to be responsible for enforcement action in cases of non-compliance with the filing and disclosure requirements that we recommend should apply to charitable organisations.

Chapter 6

Recommendations on the regulation of charitable fundraising activities

6.1 In this chapter, we examine the current position on the monitoring of charitable fundraising in Hong Kong and the perceived problems in this area. We set out a range of recommendations which we consider could be adopted to make immediate and significant improvements to the way in which charitable fundraising is regulated.

Current situation in Hong Kong

The extent of statutory regulation of charitable fundraising activities

6.2 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 with fundraising activities include the Social Welfare Department, the Home Affairs Bureau, the Food and Environmental Hygiene Department (FEHD) and the Office of Licensing Authority (OLA).¹ The various requirements for these authorisations are discussed later in this chapter.

6.3 A permit or licence is not required, however, in respect of other types of charity activities which involve appeals to the public without collection of donations in public places, such as: charity auctions; balls; concerts; dinners; walks; film premieres; shows in the mass media; requests for donations by mail and advertisements; face-to-face charitable fundraising to solicit pledges from donors for regular donations; or fundraising through phone-in arrangements, social media (such as text messages, facebook and twitter), email or other electronic means. 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.² It has been

1 With effect from 1 April 2012, the Office of the Licensing Authority of Home Affairs Department took over the function of the former Television and Entertainment Licensing Authority in relation to entertainment licensing under the Miscellaneous Licences Ordinance (Cap 114), the Gambling Ordinance (Cap 148) and the Amusement Game Centres Ordinance (Cap 435); see <http://www.hadla.gov.hk/el>.

2 Office of the Ombudsman, *Investigation Report: Monitoring of Charitable Fund Raising Activities* (Feb 2003), at para 3.1.

observed that the use of these proceeds is therefore *"not subject to any Government monitoring or public scrutiny."*³

Regulation of fundraising activities by the Social Welfare Department and the Home Affairs Bureau

6.4 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. The second is where it involves the sale of lottery tickets.

Charitable fundraising in a public place

6.5 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."

6.6 *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

3 Same as above.

management authority of the venues concerned has been granted for the activity.

6.7 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.⁴

6.8 The Social Welfare Department's document, *Explanatory Notes on application for Public Subscription Permit*,⁵ 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 (8) in the *Explanatory Notes* states that:

"Within 90 days of the last event day approved in the Permit, the Permittee shall cause the money received from the public subscription, less any expenses incurred, to be applied or to be credited to the bank account, for the purpose for which the Permit is issued."

6.9 A further requirement is that an audited report of the fundraising activity must be published by one of the options specified by the Department within 90 days of the last event day approved in the permit. The audited report must indicate the amount of net proceeds collected and how and for what purpose these have been used.⁶ For flag days, as well as other general fundraising activities where the monies are to be spent outside Hong Kong, the audited report for flag days should be published in one Chinese and one English local newspaper within 90 days of the last event day approved in the

4 The application form with explanatory notes and notes of eligibility criteria are available on the SWD website at:

(for flag days)

http://www.swd.gov.hk/doc/Control_of_Char/FD%20eligibility%20criteria%2020121107e.pdf.

(for general charitable fundraising activities)

http://www.swd.gov.hk/doc/Control_of_Char/PSP%20criteria%2020120119_1e.pdf.

5 <http://www.swd.gov.hk/en/index/>.

6 Condition (12) of the *Explanatory Notes on Application for Public Subscription Permit*:

"Where the monies donated are to be spent in Hong Kong, the Permittee shall publish the audited report by one of the following options within 90 days of the last event day approved in the Permit:

(i) on the organisation's own website which allows free access by the general public;

(ii) in the organisation's Annual Report;

(iii) in the organisation's newsletter; or

(iv) in the organisation's special circular to its members.

For option (i), the Permittee shall notify the Director of Social Welfare of the link (with print-screen image of the website), submit a downloaded hard copy within 90 days of the last event day approved in the Permit, keep the audited report on its website for at least six months continuously and retain hard copies for public inspection upon request. For options (ii), (iii) and (iv) above, the Permittee shall forward a copy of the publication to the Director of Social Welfare within 90 days of the last event day approved in the Permit and shall make the publication available to the public upon request." See:

http://www.swd.gov.hk/doc/Control_of_Char/PSP%20Application%20Form%20and%20Explanatory%20Notes%2020120712_1.pdf.

permit, and copies of such newspaper cuttings should be forwarded to the Department at the same time.⁷

6.10 *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.⁸ 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.

Regulation of fundraising activities by the Food and Environmental Hygiene Department

6.11 Another regulatory measure that applies to charitable fundraising activities carried out in public places is the need to apply in advance to the FEHD for a temporary hawker licence for on-street selling activities. Upon receipt of an application for a temporary hawker licence, the FEHD 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.⁹ Once granted, the temporary hawker 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 Hawker Regulation (Cap 132AI). The relevant Government departments may

7 Condition (13) of the *Explanatory Notes on Application for Public Subscription Permit*:
"*Where the monies donated are to be spent outside Hong Kong, the audited report in Chinese shall be published in at least one local Chinese language newspaper and the audited report in English shall be published in at least one local English language newspaper within 90 days of the last event day approved in the Permit and copies of the said newspaper cuttings shall be forwarded to the Director of Social Welfare at the same time.*

For such fund-raising events with gross income not exceeding HK\$50,000, the Permittee is given the following options, apart from publishing on local newspapers, to publish the audited report in English and Chinese within 90 days of the last event day approved in the Permit:

- (i) *on the organisation's own websites (English website for the audited report in English and Chinese website for the audited report in Chinese) which allow free access of the general public;*
- (ii) *in the organisation's Annual Report;*
- (iii) *in the organisation's newsletter; or*
- (iv) *in the organisation's special circular to its member.*

For option (i), the Permittee shall notify the Director of Social Welfare of the links (with print-screen images of the websites) and submit a downloaded hard copy within 90 days of the last event day approved in the Permit, keep the audited report on its website for at least six months continuously and shall also retain hard copies for public inspection upon request. For options (ii), (iii) and (iv) above, the Permittee shall forward a copy of the publication to the Director of Social Welfare within 90 days of the last event day approved in the Permit and shall make the publication available to the public upon request." See:

http://www.swd.gov.hk/doc/Control_of_Char/PSP%20Application%20Form%20and%20Explanatory%20Notes%2020120712_1.pdf.

8 See: section 113C(2) of the Criminal Procedure Ordinance (Cap 221).

9 <http://www.fehd.gov.hk/english/news/details/23-10-2009-2200.html>.

also impose further conditions to regulate the fundraising activities of the organisation.

Regulation of charitable fundraising activities by the Office of the Licensing Authority

6.12 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 OLA under the Home Affairs Department. Under section 22(1)(a)(i) of the Gambling Ordinance (Cap 148),

"The public officer appointed by the Secretary for Home Affairs 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 public officer appointed by the Secretary for Home Affairs;..."*

6.13 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.

6.14 Section 2 of the Gambling Ordinance (Cap 148) defines "lottery" to include:

- "(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;"

6.15 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 public officer appointed by the Secretary for Home Affairs may impose. One of the conditions for granting a lottery licence is that upon completion of the lottery event, each lottery organiser must prepare an income and expenditure statement and obtain a written report reviewed by a certified public accountant. Such documents should be forwarded to the public officer appointed by the Secretary for Home Affairs, ie, the OLA, for the purpose of, among other things, enabling the copies to be made available for public inspection in such manner, and for such period, as the public officer thinks fit. These documents will be kept at the OLA for a period of one year upon receipt from the organiser. A list of documents available for public inspection is posted in the OLA's homepage.¹⁰ In addition to submitting the relevant documents to the public officer, additional conditions may be imposed by the public officer if a case so warrants.¹¹

6.16 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 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."

6.17 In cases of a condition of the licence is contravened, section 22(4) of the Ordinance also provides that the lottery licence may be cancelled at any time by the public officer appointed by the Secretary for Home Affairs, i.e. the OLA, regardless of whether any person has been convicted of an offence under section 22(6) of the Ordinance or he considers that public interest so requires.

¹⁰ <http://www.hadla.gov.hk/el>.

¹¹ Office of Licensing Authority, Home Affairs Department, "Reference Guide on Organisation of Lottery Activities", July 2013, at 8-10. Available at: http://www.hadla.gov.hk/el/filemanager/common/docs/forms/HAD-Lottery_GR_f_eng.pdf.

Regulation of fundraising activities by the Lands Department

6.18 It has become common in recent years for charitable organisations to set up booths or counters in public places for the solicitation of pledges from donors to make regular donations to charitable organisations. Applications can be made in writing by these charitable organisations to the Lands Department for temporary occupation of unleased land on payment of a prescribed fee.¹² The applicant is required to submit proof that it is a charitable organisation granted with tax exemption status under section 88 of the Inland Revenue Ordinance (Cap 112). An application may be approved subject to certain conditions specified by the Lands Department. These conditions may include, for example: a requirement for the applicant to minimise obstruction to the public, or not to cause any obstruction to road users at all times during the occupation periods; a restriction on the floor area of the counter to be set up at the specified location under the application; or a requirement not to carry out any commercial activity or advertising during the event. We note that since the major consideration of the Lands Department is whether the occupation of the booths or counters would cause any obstruction to road users during the occupation period, background information relating to the applicants may not be a concern of the Department. Furthermore, such charitable organisations may not need to obtain public subscription permits from the Social Welfare Department since these activities are neither flag days nor general charitable fundraising activities.

The development of voluntary guidelines on charitable fundraising

6.19 To supplement these limited statutory measures which regulate charitable 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

6.20 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 1998,¹³ 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."¹⁴ Specific topics covered by the Guidance Note include that:

12 See: sections 5 and 6 of Land (Miscellaneous Provisions) Ordinance (Cap 28) and Regulation 2 of the Land (Miscellaneous Provision) Regulations (Cap 28A).

13 Available on the SWD website at: http://www.swd.gov.hk/doc/Control_of_Char/gnifc_e.pdf.

14 Same as above, at para 1.

- 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.

6.21 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 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."*

6.22 The second set of guidance issued by the Social Welfare Department is the *Reference Guide on Best Practices for Charitable Fundraising Activities*¹⁵ 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 responsibly the funds that donors entrust to them, and to reporting their financial affairs accurately and completely."

6.23 The explanatory Leaflet¹⁶ 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 fund-raising 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.*
- *Donors' requests to remain anonymous will be respected.*

B. Fund-raising Practices

- *Fund-raising 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.*

15 Available on the SWD website at:
http://www.swd.gov.hk/doc/Control_of_Char/Booklet%2020100603e.pdf.

16 http://www.swd.gov.hk/doc/Control_of_Char/Leaflet%2020100603e2.PDF.

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.*
- *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 fund-raising programme will be reviewed regularly by the governing board."*

Guidelines issued by the Hong Kong Institute of Certified Public Accountants

6.24 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 1999¹⁷ 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 2007,¹⁸ both of which were aimed primarily at accounting practitioners.

Guidelines issued by the Independent Commission Against Corruption

6.25 In October 2009, the Independent Commission Against Corruption published (ICAC) its *Best Practice Checklist: Management of Charities and Fundraising Activities*.¹⁹ 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.*"²⁰

6.26 The Commissioner noted that the ICAC recommends in the practice guidelines, "*practical measures to help these organisations minimize*

17 Available on the HKICPA's website at:
http://app1.hkicpa.org.hk/ebook/HKSA_Members_Handbook_Master/volumeIII/pn850.pdf.

18 Available on the HKICPA website at:
http://app1.hkicpa.org.hk/professionaltechnical/assurance/rm/GCFA_0711.pdf.

19 Available on the ICAC website at:
http://www.icac.org.hk/filemanager/en/Content_1031/fund_raising.pdf.

20 See Press Release, "ICAC launches guidelines to enhance governance and transparency in fund-raising" (6 October 2009).

such risks through strengthening internal controls."²¹ These include that charitable organisations should adopt:

- proper budgeting
- good record-keeping
- regular auditing of accounts
- capping of administrative expenses
- safe-keeping of donations, and
- publicising audited accounts of fundraising activities.²²

6.27 In order to promote the use of these best practice guidelines, it is intended that the Social Welfare Department, the former Television Entertainment Licensing Authority (now the OLA) and the Inland Revenue Department will help distribute copies of the ICAC guidelines to charitable bodies upon their application for permits, exemptions or licences.²³

Monitoring of charitable fundraising activities in other jurisdictions

6.28 The Sub-committee had set out in Annex 6 of the Consultation Paper a detailed review of the systems for regulating charitable 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. The Sub-committee had found the examples of the systems in England and Ireland particularly instructive and we summarise these below. The Sub-committee had noted 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

6.29 In England and Wales, the statutory requirements governing public charitable 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

21 Same as above.

22 Same as above.

23 Same as above.

guidance notes: *CC8 – Internal Financial Controls for Charities*²⁴ and *CC20 – Charities and Fundraising*.²⁵

6.30 For charitable 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.²⁶) 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 1998.²⁷

6.31 For charity funds sent to charities by post, charity trustees are advised in CC8²⁸ 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.

6.32 Where fundraising is conducted by means of public collections, CC8 advises²⁹ 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.

6.33 With regard to fundraising and sponsored events, CC8 states³⁰ 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.

6.34 For society lotteries, CC20 states³¹ 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

24 <http://www.charity-commission.gov.uk/publications/cc8.aspx>.

25 <http://www.charity-commission.gov.uk/publications/cc20.aspx>, at section A1.

26 <http://www.mpsonline.org.uk/tps/>.

27 <http://www.charity-commission.gov.uk/publications/cc20.aspx>, at section E4.

28 <http://www.charity-commission.gov.uk/publications/cc8.aspx>, at section C1.

29 Same as above.

30 <http://www.charity-commission.gov.uk/publications/cc8.aspx>, at section C2.

31 <http://www.charity-commission.gov.uk/publications/cc20.aspx>, at section E5.

sales from previous lotteries in the same year. Sale of lottery tickets below these thresholds would only require registration with the local authority.

6.35 Where a charity engages the services of a *"professional fund-raiser"* or a *"commercial participator"*³² in a fundraising activity, CC20 provides³³ 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.³⁴

Ireland

6.36 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.³⁵

6.37 The main areas of impact of the 2009 Act on the previous system of fundraising controls appear to be that:³⁶

"Both cash and non-cash (i.e. direct debits, standing orders etc) charitable fundraising from the public will require permits from

32 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'."

33 <http://www.charity-commission.gov.uk/publications/cc20.aspx>, at section E7.

34 Same as above.

35 <http://www.pobail.ie/en/CharitiesRegulation/PRIN%20FEATTHECHARITIESACT09.pdf>, at 1, para 1.

36 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."*

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."*³⁷

6.38 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;"

6.39 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 charitable fundraising activity.

6.40 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.³⁸ This document, which was drawn up by charity fundraising practitioners and donors,³⁹ "complements and builds 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

37 http://www.wheel.ie/sites/default/files/Charities_Act_2009_Factsheet.pdf, at para 2.3.

38 See Irish Charities Tax Research Ltd, *Statement Of Guiding Principles For Fundraising: Draft Proposals* (Feb 2008) at: <http://www.ictr.ie/files/R2.%20Guiding%20Principles%20of%20Fundraising%20-%20Feb%202008.pdf>.

39 Same as above, at 9.

*overarching principles and guidance about how fundraising should be approached and organised.*⁴⁰

The Sub-committee's proposals in the Consultation Paper and our final recommendations on the regulation of charitable fundraising activities

6.41 As seen earlier in this chapter, regulation of charitable 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, the FEHD or the OLA (ie, charitable fundraising not carried out in a public place or involving lotteries⁴¹ or solicitation of a pledge for regular charitable donations), there seems to be no mechanism through which the Government or the public can effectively monitor how the monies raised are spent.

6.42 The Sub-committee had identified in the Consultation Paper the following key limitations of the existing measures to regulate charitable fundraising.⁴²

- 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 the Social Welfare Department and the OLA), each with varying procedures and requirements, in order to be granted permission.
- While Social Welfare Department and the OLA endeavour responsibly to carry out what checks they can, neither the Social Welfare Department nor the OLA appear to impose a "*fit and proper*" test on applicant organisations to ensure that they are persons of integrity. (Only in the case of a flag day application 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 charitable fundraising activities and there is no centralised information point or hotline where the public can make enquiries about charitable fundraising activities carried on in public.

40 Same as above.

41 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.

42 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at para 9.41.

- While some broad guidelines and best practice manuals on charitable 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 charitable 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 the OLA 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 Social Welfare Department 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.

6.43 In the course of the Sub-committee's deliberations, it had endeavoured to formulate proposals to directly address the perceived weaknesses in the current system of regulating charitable fundraising in Hong Kong. The guiding principle of the Sub-committee had been that such activities should be conducted in future in a more transparent and accountable manner. Nonetheless, the Sub-committee was also highly conscious that any future regulatory measures should be no more than is necessary to improve the system, as it would not wish to see or introduce 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, the Sub-committee had believed overall a relatively light-handed approach in this area was appropriate.

6.44 In the Consultation Paper, the Sub-committee had considered 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. The Sub-committee had also noted the potential for confusion which may arise from the differing requirements and procedures of the various Government departments which have responsibilities in this area.⁴³

43 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at para 9.43.

6.45 After careful deliberation of different possible options for reform, the Sub-committee had concluded in the Consultation Paper that the regulatory functions in relation to charitable fundraising activities which are currently performed by Social Welfare Department, FEHD and the OLA should be transferred to the future charity commission, which the Sub-committee had recommended in the Consultation Paper should be established.⁴⁴

6.46 The Sub-committee had recommended in the Consultation Paper 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; and
- (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 former Television and Entertainment Licensing Authority (now the OLA) in relation to authorising charity fundraising activities in public places and those involving lotteries.⁴⁵

Consultees' responses

6.47 The majority of the respondents who expressed views on this recommendation were in favour of having a sole regulatory body to process and grant all permits and licences necessary for charitable fundraising and to monitor the use of the funds raised. A large number of respondents considered that there was a need to improve the regulation of public charitable fundraising activities in order to stamp out improper practices. It was also considered that there should be consistent regulation and accountability requirements for charitable fundraising activities. Those not in favour of the Sub-committee's proposal generally also did not support the establishment of a charity commission.

6.48 One respondent expressed the view that it was often unclear which Government body the entity should go to in order to obtain information about charitable fundraising activities and how to obtain the necessary permission. Commenting also on whether there should be a sole regulatory body to process and grant all permits and licences necessary for charitable fundraising, and to monitor the use of funds raised by such activities, the respondent felt that having a 'one-stop shop' would make it easier for a charity to obtain the necessary permit/licence for charitable fundraising and would hopefully encourage organisations to organise charitable fundraising events.

44 Recommendation 18, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011).

45 Recommendation 13(1) and (2), Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 9.43 and 9.44.

It would also help reduce the time required to obtain the necessary approval for these activities.

6.49 A respondent from the social welfare sector suggested that the application processes for charitable fundraising permits/licences should be unified. The respondent considered that since the Social Welfare Department has a system that is relatively more comprehensive than those of other departments (including the requirement for audited accounts), it should be given the legal powers and appropriate resources to co-ordinate the processing and approval of permits and licences required to carry out charitable fundraising activities. At the same time, it was hoped that the Department could specify a detailed service pledge for issuing licences and that there should be a process for express approval in the event of urgent and unforeseen circumstances. Many other respondents also considered that charitable fundraising activities should be co-ordinated and overseen by the Social Welfare Department.

6.50 There were also numerous responses expressing the view that charitable organisations should be required to disclose their accounts and make them available for public inspection in order to enhance transparency. While the vast majority of respondents expressed the need for greater transparency in the governance of charities and the reporting of activities and financial status, there were some views expressed against the existing requirements to submit reports to various Government departments, since it was felt that the need to satisfy their varying requirements were too time-consuming and has imposed unnecessary pressure on charities.

Our view

6.51 As mentioned in the Consultation Paper, the existing limited regulation of charitable fundraising activities in Hong Kong is a matter of public concern. A particular issue is the lack of transparency as to how charity donations collected from the public are being used, and to what extent they are used for their intended charitable purposes. We also note the potential confusion arising from the different requirements and application procedures of the various Government departments which have responsibilities in relation to charitable fundraising.

6.52 Based on the guiding principle that charitable fundraising activities should be conducted in future in a more transparent and accountable manner, we consider that the administrative procedures for processing any kind of charitable fundraising activities should be improved by practicable administrative means. In particular, we consider that there should be a standardised application form setting out some common basic requirements for approval in respect of different types of charitable fundraising licence or permit applications. The benefits of having such a standardised application form for charitable fundraising activities are set out below.

- i) It would facilitate charitable organisations in their applications for charitable fundraising permits and licences. A simplified and streamlined procedure will greatly enhance the administrative convenience of charities.
- ii) Transparency and accountability of charities will be generally improved and enhanced when certain application conditions, such as disclosure of accounts, become standardised requirements.
- iii) Standardised requirements for public inspection of disclosed information will improve public access and scrutiny.
- iv) A co-ordinated effort by different Government departments in handling application forms for charitable fundraising permits and licences will ensure that a common policy will be adopted in the regulation of charitable fundraising activities, which will be in the interests of the public.

6.53 We consider that such standardised permit conditions should include the requirement for disclosure of the use of funds collected and the charity's accounts for the most recent accounting year, and the requirement for making such information available for public inspection. We consider that public scrutiny is an effective monitor against impropriety in fundraising activities. In order to achieve this purpose, information about daily approved public fundraising activities should be easily accessible by the public at an information portal. We welcome the recent launching of the one-stop information portal under the GovHK website. This would allow the public to easily access information relating to on-going charitable fundraising activities and to check on their legality. We suggest that the existing functions of the information portal under the GovHK website be enhanced by making such information disclosed by charities in their applications for charitable fundraising licences or permits available for public inspection. We consider that the rationale for such requirements is threefold. Firstly, charities are granted tax exemption by the Inland Revenue Department under section 88 of the Inland Revenue Ordinance (Cap 112). Secondly, they are appealing to the public for donations and the public should be properly protected. Thirdly, as a result of their tax-exempt status under section 88 of the Ordinance, charities are entitled to the privileges granted by the Government in different kinds of application. As a result, it would be reasonable to require these organisations to be accountable for their activities and there is a public expectation that they should increase their public accountability and transparency in their governance. The relevant Government departments should in turn act as gatekeepers by taking appropriate measures to avoid fraudulent and illegal charitable fundraising. As different Government departments may impose different conditions for approval of fundraising activities, such non-standard conditions should be set out as "*other requirements*" in the standard application form.

Recommendation 9

We recommend that:

- (1) a standardised application form setting out some common basic requirements should be adopted for approval in respect of different types of charitable fundraising licence or permit applications;**
- (2) such standardised permit conditions would include the requirements for:**
 - (a) the disclosure of:**
 - (i) the charity's background (including but not limited to its composition, objectives and work profile);**
 - (ii) the organisation's activities;**
 - (iii) the objective of the charitable fundraising;**
 - (iv) the use of the funds collected; and**
 - (v) the charity's accounts for the most recent accounting year; and**
 - (b) to enhance the existing function of the information portal under the GovHK website by making the information on charitable fundraising activities mentioned in (a)(i)-(v) above available for public inspection.**
- (3) Any conditions for approval of charitable fundraising activities imposed by other Government bureaus/departments which differ from the standard requirements (for example, in relation to the disclosure of accounts) should be set out as "other requirements" in the standard form.**

Public access to information relating to charitable fundraising activities

6.54 As discussed above, charitable organisations have to seek permission from the Social Welfare Department for individual charitable fundraising activities in public places. The 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). For the list of charitable fundraising activities in public places issued with such permits, the Department's website provides a hyperlink to the GovHK website, which is regularly uploaded with detailed information, including times and locations of fundraising activities.

6.55 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 public subscription permits.⁴⁶ This list is available on the internet and is maintained and archived on the Social Welfare Department website.

6.56 In relation to the granting of lottery licences, the OLA maintains a list of organisations granted with lottery licences for a specified lottery period. The list contains the names and licence numbers of the relevant organisations and the period in which the lotteries are to take place.⁴⁷ The OLA also keeps a separate list in respect of the income and expenditure statements relating to lottery events available for public inspection within one year from the receipt of the information from the organisations.⁴⁸ Both lists are available on the internet and the information they contain is time-limited.

6.57 Both charitable and non-charitable organisations are required to apply for temporary hawkers licences from the FEHD in connection with on-street selling activities. The Department maintains a list of the organisations issued with temporary hawkers licences for fundraising purposes. The list specifies the districts in which such fundraising activities will take place, the name of the organisations, the approved period of activity, the approved time of activity and the main commodities for sale.⁴⁹

6.58 In July 2012, the Office of the Government Chief Information Officer launched a one-stop portal under the GovHK website to provide the public with free access to detailed information⁵⁰ on all charitable fundraising activities approved by the Social Welfare Department, the Home Affairs Department and the FEHD.⁵¹

6.59 In 2001, the 1823 Call Centre was set up by the Government to improve the efficiency and accessibility of its call handling services to the public. The Call Centre now provides a 24 hour, one-stop service to answer enquiries related to 21 Government departments, including the Social Welfare Department, the FEHD and the Leisure and Cultural Services Department. Where enquiries relate to departments not covered by 1823, the Call Centre will provide the relevant contact information to the enquirer. Another function of the Call Centre is to receive complaints about any area of Government

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

47 http://www.hadla.gov.hk/el/en/forms/approved_lottery_activities.html.

48 http://www.hadla.gov.hk/el/filemanager/common/docs/forms/HAD-Lottery_GR_f_eng.pdf.

49 http://www.fehd.gov.hk/english/pleasant_environment/hawker/fundraising.html.

50 For example, the names of relevant organisations and the date/time/venue of the fundraising events.

51 <http://www.gov.hk/fundraising>.

services and provide recording and tracking of such complaints to help ensure that they are acted on properly. We note that in 2012, more than 3 million calls were received by the Call Centre.⁵²

6.60 The Sub-committee had recommended in the consultation paper that 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.⁵³

Consultees' responses

6.61 It was widely expressed by respondents to the Consultation Paper that charities' transparency should be enhanced, particularly in relation to allowing public access to information relating to fundraising activities. There were also suggestions by a number of respondents from the religious sector that there should be concerted inter-departmental management to disseminate more information on approved charitable fundraising activities so as to prevent illegal fundraising on the streets.

6.62 A number of respondents felt that one of the major problems with the existing system was a lack of channels for the public to obtain information on the use of funds raised for charitable purposes and to inspect relevant charities' accounts. It was suggested by some respondents that the Government should create a single website for this purpose to enable public inspection. It was suggested that this information could include disclosure of charities' annual financial statements, the way their revenues were used (to be disclosed on a regular basis), fundraising applications submitted, the amount of funds raised and plans on how these funds were to be applied, etc. It was also considered that this could help in advancing public education.

6.63 One respondent referred to the practice of the Companies Registry which publicly discloses by way of an online database the charters of all charitable organisations which are granted tax exemption under section 88 of the Inland Revenue Ordinance (Cap 112) and which are registered with it as companies limited by shares or guarantee.⁵⁴ The database information also includes reports of these organisations' annual general meetings, annual reports and financial reports. Public access to such information would enable members of the public to decide whether donations should be made to a particular organisation, while also facilitating monitoring by the media.

52 <http://www.1823.gov.hk/eng/based/aboutus.aspx>.

53 Recommendation 13(3), Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011).

54 Companies which are limited by shares or guarantee registered under the Companies Ordinance (Cap 32) are required to submit their audited accounts to the Companies Registry on an annual basis. The audited accounts of these charities registered under the Companies Ordinance are accessible to the public upon payment of a fee of \$23 as set out in the Eighth Schedule to the Companies Ordinance.

Our view

6.64 We consider it important that the public should be able to make enquiries and complaints in cases of doubt or impropriety of such activities. For this reason, we consider that the work currently undertaken by the 1823 Call Centre should be further enhanced to assume such a responsibility. Alternatively, a new hotline should be set up by the Administration for this purpose.

Recommendation 10

We recommend that the function of the Government's existing 1823 Call Centre, being a centralised hotline, should be enhanced, or a new telephone hotline should be set up, for answering public enquiries and receiving complaints in relation to charitable fundraising activities.

Display of a charity's registration number

6.65 The Sub-committee had also recommended in the Consultation Paper 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).⁵⁵

Consultees' responses

6.66 A large majority of the respondents who expressed views on this recommendation showed support for it.

Our view

6.67 In light of the clear support from the respondents, 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).

55 Recommendation 14, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), paras 9.45 to 9.48.

Other types of fundraising activity

6.68 In the Consultation Paper, the Sub-committee had not proposed legislation to regulate other types of fundraising activity, such as charitable balls and concerts, or solicitation letters and solicitations through electronic means such as the internet and SMS from individuals or charities. The Sub-committee had considered, however, that for all charitable fundraising activities, whether in the public domain or otherwise, the fundraising body concerned should be required to display prominently its charity registration number in the course of carrying out its fundraising activities. There should also be a requirement that the charity display its registration number on its website or on any material soliciting donations.

6.69 There was in recent years 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.⁵⁶ Concern was expressed that the charity continued to solicit contributions via its website after the conviction. In view of that case, there were calls for this avenue of collection to be regulated. The Sub-committee had considered that 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 receiving the donations has no physical presence in Hong Kong.

6.70 One measure which the Sub-committee had believed 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, the Sub-committee had thought that would offer the public some assurance of the legitimacy of the particular charity when donating online. The Sub-committee had envisaged that members of the public would be able to check the validity of the charity's registration via the future charity commission.

6.71 Solicitation of donations *via* the internet or through other electronic means is an expanding and fast-changing area of charitable giving. In the Consultation Paper, the Sub-committee had welcomed 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.

⁵⁶ 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*.

Consultees' response

Donations via the internet

6.72 A number of respondents expressed views in relation to the solicitation of donation *via* the internet and some considered that the Government should put online charitable fundraising under control in order to stamp out improper and illegal activities intended to deceive the public.

6.73 Several respondents perceived difficulties in having practical means of regulating the solicitation of donations through the internet, particularly where such fundraising is conducted by non-Hong Kong charities. It was considered that the most practical way to minimise any abuse was through raising public awareness of the issue and requiring the prominent display of the charity status of an organisation and its registration number on the website of the charity concerned.

6.74 One of the technical obstacles involved in regulating these online charitable fundraising activities is the issue of extraterritoriality, which would present difficulties in framing and enforcing any such legislation and regulation in this area. One respondent expressed concern about the possible deterrence effect on multinational charitable bodies to operate in Hong Kong in case of over-regulatory measures to monitor and control online charitable fundraising. It was therefore considered useful to share experiences with other jurisdictions to work out ways to overcome these challenges before making any hasty changes. A respondent expressed the view that no regulation should be imposed as it will only lead to greater and more complicated control and management problems.

6.75 The Law Society was of the view that public fundraising *via* the useful internet route should be regulated in the same manner as fundraising in the public to the extent possible, and it should be apparent from the website as to whether the organisation is a registered charity. The following suggestions were made by respondents on the possible ways to regulate charitable fundraising *via* the internet.

- A charity registered in Hong Kong should be required to display on its webpage soliciting for charitable donations: (1) its registration number; (2) its history of establishment and service targets and the number of service recipients; (3) the name, photograph, nationality, usual place of abode, academic qualifications, profession and work experience of its founders and directors and their record of convictions or prosecutions in Hong Kong or abroad for the past 10 years; (4) its approval number for conducting charitable fundraising in Hong Kong; (5) and the monthly statements or monthly amounts of donations received through internet solicitation for three consecutive years.
- A hyperlink should be provided on the enquiry page of the official website of the future charity commission for the public to gain

easy access to information about a particular charitable organisation soliciting online charitable donations.

- The charity should be required to file with the future charity commission a copy of the statement intended to be posted on the internet for solicitation of donations and it should be filed not later than a certain period before the solicitation for donations starts and such information should be made accessible to the public.
- Monthly reports of income (donations received from the public *via* the internet) and expenditure should be made available to the public, and receipts should be issued to donors through an automated online system.
- Charities should be required to maintain separate bank accounts for different types of fundraising activities. There should also be a separate account for monies raised for recurrent expenditure and long-term charitable work.
- Charitable donations obtained *via* the internet should be first paid into the account of the future charity commission before the donations are transferred to the charity concerned after verification.
- Codes or guidelines setting out the 'dos' and 'don'ts' for charities soliciting donations *via* the internet should be published.
- A column on public education should be provided on the official website of the future charity commission to remind the public of the pitfalls inherent in the solicitation of donations *via* the internet. The web portal of the commission should offer public education to remind the public of the fundraising traps and pitfalls.
- The Government Chief Information Officer and the Privacy Commissioner for Personal Data should be appointed as members of the future charity commission and to entrust them with the task of monitoring the operation of online fundraising and making recommendations in this regard. They should aim at reducing the risks of unauthorized use of personal particulars of the donors and information pertaining to their accounts.

Our view

6.76 We are grateful for the constructive views expressed by respondents who made a number of suggestions on this area of charitable giving. We believe that in terms of charitable fundraising, the public should be protected irrespective of the means or form in which it is carried out. We agree, however, with some respondents who referred to the technical difficulties of enforcing regulatory measures on the solicitation of donations *via*

the internet, especially the issues related to extraterritoriality and non-Hong Kong charities. Notwithstanding this obstacle, we consider that something ought to be done in the interests of the public, to ensure that this expanding and fast-growing area of charitable fundraising activities is within effective control. We consider that any registered charity in Hong Kong should be required to display its registration number on its webpage which appeals for charitable donations. Furthermore, we consider that the same requirement should be imposed on charitable organisations involved in the activities of conducting face-to-face solicitation for pledges from donors for regular donations. Their registration number should be prominently displayed on any documents through which such solicitations for regular charitable donations are made and in booths or counters set up for such purpose. Coupled with a campaign to raise public awareness of these new measures by the Administration, we think that the public would be offered some assurance of the legitimacy of the particular charity when donating online. (Our recommendation regarding public education will be dealt with later in this chapter.)

Recommendation 11

We recommend that:

- (1) 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);**
- (2) for charitable fundraising activities *via* the internet or other electronic means, the registration number of any charitable organisation involved in the activities should be prominently displayed on the webpage or message transmitted by electronic means through which appeals for charitable donations are made; and**
- (3) for charitable fundraising activities involving face-to-face solicitation of pledges from donors for regular donations, the registration number of any charitable organisation involved in the activities should be prominently displayed on any related documents through which solicitation for regular charitable donations are made and in booths or counters set up for such purpose.**

Professional fundraisers

6.77 The Sub-committee was aware that there had been a substantial growth in the use of professional fundraisers in recent years and the Sub-committee had considered that the extent to which their activities should be regulated is an important issue. It was noted 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 was of the view that the future charity commission should develop codes of practice along these lines. The Sub-committee had also proposed that the future charity commission should consider the feasibility of requiring professional fundraisers to register with the commission.

6.78 The Sub-committee had noted that one reason for reviewing the position of professional fundraisers in Hong Kong was that 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 had believed that there was a need for greater disclosure to the future charity commission and the public about the remuneration of professional fundraisers. The Sub-committee had also considered 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, is also a good practice which should be encouraged.

6.79 The Sub-committee was 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, the Sub-committee had proposed that the future charity commission should review the matter and issue appropriate guidelines.

6.80 In relation to professional fundraisers, the Sub-committee had recommended 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.⁵⁷

Ad hoc fundraising

6.81 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. In light of this, the Sub-committee had considered whether a special mechanism was required for these *ad hoc* fundraising efforts. The Sub-committee had noted 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.

6.82 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 had considered in the Consultation Paper that similar administrative measures should be adopted in future. The Sub-committee had also considered that the details of these arrangements should be a matter for the future charity commission to determine.⁵⁸

Further possible issues for consideration in the future

6.83 One area on which the Sub-committee had not formulated any provisional proposals was whether there should be further legal sanctions introduced for non-compliance with regulatory measures over charitable fundraising activities.

6.84 As 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

57 Recommendation 15, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 9.49 to 9.51.

58 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 9.52 and 9.53.

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.

6.85 The Sub-committee had recommended in Recommendation 13 of the Consultation Paper that the powers and duties currently exercised by the Social Welfare Department, the FEHD and the former Television and Entertainment Licensing Authority (now the OLA) in relation to authorising charitable fundraising activities in public places and those involving lotteries should be vested with the future charity commission. The Sub-committee was 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 had not considered that the future charity commission should be responsible for prosecuting non-complying organisations. However, concerns had been raised by members of the Sub-committee as to what administrative sanctions the future charity commission may be able to impose when a charity's non-compliance related to a breach of requirements laid down in guidelines or codes of conduct issued by the charity commission. The Sub-committee had not developed any firm views on this in the Consultation Paper.

6.86 The Sub-committee had sought 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.⁵⁹

Consultees' responses

6.87 In the consultation, respondents expressed general support for the issuing of non-statutory codes of good practice to provide guidance on the activities of professional fundraisers. One respondent expressed the view that there should be some form of code of good practice to ensure that the performance of professional fundraisers should meet a certain standard. This would also serve the purpose of giving confidence to those charities which hire professional fundraisers as to how professional fundraisers should perform.

6.88 One respondent considered that good practice should be promoted by the Government and by professional bodies through education of social workers, lawyers, certified public accountants and so on. The view was also expressed that social welfare organisations and associations should take the lead in developing codes of good practice, while the proposed future charity commission itself might develop guidelines in parallel for distribution territory-wide to the social service agencies and organisations.

59 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 9.54 to 9.57.

6.89 On the issue of the hiring of elderly persons to solicit donations on the street, there was a view that special attention should be paid to the safety and fitness of the elderly persons. It was also felt that guidelines should be issued to prevent elderly persons, the disadvantaged and persons with disabilities from being exploited as a 'ready source of income' by either organisations conducting charitable fundraising activities or professional fundraisers. Furthermore, there was a suggestion by a Government department that, subject to consideration of the law prohibiting discrimination on the basis of disability, disabled persons should be included within the guidelines to be issued concerning the recruiting of people to solicit donations on the street.

Our view

6.90 We note that there is general support from the public regarding the development of non-statutory codes of good practice for professional fundraisers. We consider that non-statutory codes of good practice would have a positive effect on the maintenance of standards and discipline among charities.

6.91 Having deliberated on the issue, we consider that instead of imposing a set of mandatory codes of practice, charitable organisations should be encouraged to work with institutions/organisations, such as the Independent Commission Against Corruption or the Hong Kong Council of Social Service, to facilitate good practice and to improve the co-operation between charitable organisations and the Government. Such institutions/organisations should promote good practice and develop suitable non-statutory guidelines by drawing reference to the existing guidelines or codes of best practice of Government departments.

6.92 Aspects of good practice should include the issuing of guidelines relating to: the protection and respect of donors' rights and privacy; the contracting of the services of professional fundraisers; and the recruitment of elderly persons, the disadvantaged and persons with disabilities. In formulating these guidelines, we note that due care must be taken to ensure that they will not infringe any existing law regarding discrimination on the grounds of age or disability.

6.93 In order to enhance the accountability of certain types of charitable fundraising activities which are currently not under the monitoring system, we consider that non-statutory code should be in place to govern the performance of face-to-face charitable fundraising, such as those done by soliciting a pledge from donors to make regular donations.

6.94 Furthermore, we consider that such good practice guidelines should be issued by a co-ordinating Government bureau or department.

Recommendation 12

We recommend that:

- (1) charitable organisations should be encouraged to work with institutions/organisations to facilitate good practice and to improve co-operation between charitable organisations and the Government; and**
- (2) good practice guidelines should be issued by a co-ordinating Government bureau or department in relation to: (a) the protection and respect of donors' rights and privacy; (b) the contracting of services of professional fundraisers; and (c) the recruitment of elderly, the disadvantaged and disabled persons in soliciting donations on the street.**

6.95 A variety of views were expressed by respondents on a number of aspects relating to charitable fundraising. We set out below some salient issues, the responses received and our views.

Public education

6.96 At present, there is no Government bureau or department taking a lead responsibility in relation to public education on charities. Furthermore, there is no co-ordinated effort by different Government bureaus or departments to publicise information regarding charitable fundraising activities. This is mostly due to the fact that there is a lack of a coherent system for the registration of charities, as pointed out in the Consultation Paper.⁶⁰

6.97 The Inland Revenue Department, as we have noted earlier, 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 false sense of security that there has been a thorough investigation and continuous monitoring of the work of those organisations which have obtained tax exempt status and therefore there is a *"a cloak of respectability and the semblance of official sanction not intended by the Inland Revenue Ordinance."*⁶¹

6.98 As stated earlier in this paper, as at March 2013, there were 7,592 tax-exempt charities in Hong Kong and 5,651 of these were corporations.

60 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 3.8 and 3.9.

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

This constitutes more than 74% of the total number of tax-exempt charities.⁶² As most of the charitable organisations in Hong Kong are companies limited by guarantee, they are required as a matter of course to comply with all the statutory disclosure requirements of the Companies Ordinance (Cap 32). As a result, the audited accounts of these charities registered under the Companies Ordinance are accessible to the public upon payment of a fee as set out in the Eighth Schedule to the Companies Ordinance. Any member of the public may make a detailed search of the audited accounts of charities registered under the Companies Ordinance to find out their financial activities and status before making a decision on their charitable donation. However, this method for accessing information about charities may not be commonly known to the public.

Consultees' responses

6.99 In the consultation, there were suggestions by a number of respondents that the Government should take up a primary role in educating the public on how to be wise donors. It was also suggested that in order to be more effective, there was a need for a central body, such as the Social Welfare Department, to co-ordinate the various stakeholders and to formulate a public education strategy so that the public can access background information on all charitable voluntary organisations. Furthermore, it was suggested by a respondent that the Government should step up efforts to curb illegal public fundraising activities, such as by widely publicising fraudulent cases to raise public awareness.

6.100 We note the view expressed by one of the respondents, that, *"it is incumbent on the Government to step up publicity efforts to encourage charities to exercise self-discipline and foster a spirit of accountability towards donors through proactive communication with them."* At the same time, it was considered important to relay the message to donors that, *"donations should be made out of their own free will and should be withheld in cases where they have no knowledge of, or no confidence in, a particular organisation which solicits donations."*

6.101 It was also suggested that the Administration should publish pamphlets containing self-explanatory guidelines on how to make applications to the appropriate authorities in order to promote understanding of the procedures among the applicants. Many respondents expressed the view that the relevant authorities should encourage complaints by members of the

62 According to statistics of the Inland Revenue Department as at March 2013, the distribution of tax-exempt charities across various legal forms was as follows:

<u>Form</u>	<u>No. of Organisations</u>
Corporation	5,651
Society	796
Trust	428
Others	717
Total	7,592

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.

public on illegal organisations or irregular fundraising activities and deal with such cases seriously in order to protect the public and make a direct impact on those "*black sheep*". At the same time, it was felt that more education should be provided to the public to make them better able to tell whether the charitable fundraising activities to which they are considering donating are authorised, and to make the public more capable of deciding which fundraising organisations deserve their support.

6.102 As set out earlier in this chapter, there were also views expressed on the importance of the Administration in raising public awareness of the risks involved in online charitable donations.

Our view

6.103 We consider that public scrutiny is an effective monitor against the impropriety of fundraising activities. We also consider it important that the Government should take on a leading role through public education, such as by broadcasting an Announcement of Public Interest (API) to enhance public awareness of charitable organisations and their operations, as well as the rights and duties of donors. As mentioned earlier, there are certain types of charitable fundraising activities not subject to monitoring under the existing system. We consider that this situation is undesirable and should be dealt with by way of public education. We therefore consider that the Government, through the co-ordinated efforts of different bureaus or departments, should carry out public education on matters that the public should be aware of in relation to charitable fundraising activities, including those activities not falling under the current monitoring system, such as online charitable fundraising. This will enable the public to make a judicious choice in making charitable donations.

Recommendation 13

We recommend that the Administration, through the co-ordinated efforts of Government bureaus and departments, should engage in more public education on how to become a smart donor and on matters relating to charitable fundraising activities. Such efforts should be synchronised among these Government bureaus and departments.

Co-ordinated effort by Government bureaus or departments

Consultees' responses

6.104 A large number of responses to the consultation expressed the view that the regulation of charitable fundraising activities should be

strengthened, especially those activities which involve the solicitation of donations on the street.

6.105 Many respondents agreed that there should be controls over the veracity of charitable fundraising activities and the use of funds raised. It was felt that the Government must strengthen the current administrative measures and bolster the powers of different departments responsible for granting charitable fundraising licences. This would help to fight illegal fundraising activities and mitigate public worries.

6.106 One respondent proposed that the duplication of effort between Government departments over the issue of public fundraising by charities, such as the issuing of guidelines by both the ICAC and the Social Welfare Department, should be minimised in future for better use of public resources and to create a clearer situation for compliance by charities.

6.107 A respondent stressed the importance of mutual co-operation and the flow of information among Government departments and suggested that there should be a study on establishing a 'one-stop' mechanism to co-ordinate and centralise the existing mechanisms in the various departments for dealing with applications relating to fundraising activities and the monitoring of these activities. It was suggested that the Home Affairs Department, for example, might serve as the centralised body for registration and supervision. It was considered that the oversight mechanism for public fundraising activities could be modelled on the Social Welfare Department's mechanism for regulating flag selling activities. Some NGO respondents expressed the view that charitable fundraising work should be co-ordinated and overseen by the Social Welfare Department. There was a suggestion that since the Social Welfare Department's system was already relatively more comprehensive than those of other departments, it should be equipped with additional legal powers and appropriate resources to co-ordinate the processing and approval of permits and licences required to carry out public fundraising activities.

Our view

6.108 As explained earlier, both the OLA and the Social Welfare Department require applicants for permits and licences to provide audited reports of their specified fundraising events as a condition for approval. 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 reports for the fundraising activities to the Social Welfare Department within 90 days of the last event day approved in the permit. For flag days as well as other charitable public fundraising activities where monies donated are to be spent outside Hong Kong, the audited report should be published in at least one local Chinese Language newspaper and one local English newspaper within 90 days of the last event day approved in the permit, and copies of the newspaper cuttings should be forwarded to the Director of Social Welfare at the same time. The FEHD issues temporary hawker licences for on-street selling activities subject

to certain licensing conditions. The Lands Department approves applications by charities, subject to conditions imposed, for temporary occupation of unleased land to set up booths or counters in public place for the solicitation of pledge from donors to make regular donation.

6.109 The different approving authorities currently appear to be lacking in co-ordination in dealing with applications for charitable fundraising licences and permits.

6.110 We consider that there should be better co-ordination among different Government bureaus or departments in dealing with matters related to charitable fundraising activities. Enhanced co-ordination will have the following advantages -

(1) *Enhanced effectiveness of the charities' monitoring system*

Better co-ordination among different Government bureaus or departments would facilitate greater effectiveness in monitoring and regulating charitable organisations. This would lead to greater public trust and confidence in charities.

(2) *Centralised policy*

This would ensure the adoption of a centralised policy on charities which would have the benefit of greater consistency in the practice of charitable organisations on charitable 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*

This would facilitate 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*

This 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*

This would reduce the administrative costs for the Government.

We therefore suggest that the Administration should set up a platform of co-ordination in dealing with applications for charitable fundraising licences among the different departments responsible for the licensing of charitable fundraising activities (including approval for temporary occupation of unleased land).

Recommendation 14

We recommend that the Administration should set up a platform of co-ordination in dealing with applications for charitable fundraising licences among the different departments responsible for the licensing of charitable fundraising activities (including approval for temporary occupation of unleased land).

6.111 In order to carry out the relevant work more effectively and expeditiously, we are of the view that the Government departments involved in the licensing of charitable fundraising activities should be given more resources to carry out their monitoring responsibilities, including the responsibility to ensure that the standardised charitable fundraising permit conditions are undertaken, and to handle enquiries and complaints received through the hotline recommended earlier in this chapter.

Recommendation 15

We recommend that more resources should be allocated to Government departments involved in the licensing of charitable fundraising activities in order to enhance their role in relation to the monitoring of charitable fundraising activities, including the responsibility to ensure that the standardised fundraising permit conditions are undertaken, and to handle enquiries and complaints received through the proposed enquiries hotline.

Chapter 7

Recommendations on charities and tax

7.1 In this chapter, we review the special taxation position of charitable organisations in Hong Kong and set out our recommendation on the extent to which any reform should be made.

Current situation in Hong Kong

7.2 As mentioned earlier in this report,¹ an entity may be granted tax exemption in Hong Kong if it is accepted by the Inland Revenue Department (IRD) as a "*charitable institution*" or "*trust of a public character*" under section 88 of the Inland Revenue Ordinance (Cap 112). The IRD maintains a list of charities in Hong Kong which have successfully applied for tax exempt status. However, as we have seen earlier in this report, the IRD is not responsible for registering charities, or for monitoring their conduct. According to the statistics of IRD, 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
31.3.2011	6,788
31.3.2012	7,194
31.3.2013	7,592

7.3 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 IRD will from

1 Para 2.27 of this report.

time to time call for accounts, annual reports or other documents for the purpose of conducting a review of a tax exempt organisation so as to ensure that the organisation is still charitable and its activities are compatible with its objects.

Tax exemptions for charitable organisations

7.4 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).² The definition of charitable purposes was discussed in Chapter 2 of this report. 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.*"³

7.5 In practice, the IRD looks to the common law to determine whether an organisation can be accepted as being established for charitable purposes,⁴ in particular to Lord Macnaghten's four principal divisions of charitable purpose set out in *Income Tax Special Purposes Commissioners v Pemsel*.⁵ Further, the organisation must have been established for exclusively charitable purposes.⁶

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

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

4 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.

5 [1891] AC 531 (HL).

6 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."*

7.7 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."*

7.8 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.

7.9 The application of the proviso to section 88 of the Ordinance has been considered recently by the Inland Revenue Board of Review⁸ and the Court of First Instance⁹ 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.

7.10 The case turned on the application of the proviso to section 88 and whether the profit to the Church generated from a land development

7 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.

8 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.

9 *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.

7.11 An appeal has been lodged to the Court of Appeal and is scheduled to be heard in October 2013.

Tax deductions for charitable donations

7.12 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.¹⁰ The table below sets out figures provided by the IRD 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
2009/10	3.82	4.95	8.77

¹⁰ 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%.*"

<i>Year of Assessment</i>	<i>Profits Tax (\$ billion)</i>	<i>Salaries Tax (\$ billion)</i>	<i>Total (\$ billion)</i>
2010/11	3.73	5.50	9.23
2011/12	3.69	5.76	9.45

7.13 The IRD has made available to the public the interpretation and practice notes¹¹ that it applies in determining whether particular donations are considered *"approved charitable donations"* for tax deduction purposes. 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."*¹²

Filing of accounts and reports

7.14 At present, the tax exemption status of a charity is subject to review from time to time by the IRD. As noted earlier, an entity may be granted tax exemption in Hong Kong if it is accepted by the IRD as a *"charitable institution"* or *"trust of a public character"* under section 88 of the Inland Revenue Ordinance (Cap 112). The IRD maintains a list of charities in Hong Kong which have successfully applied for tax-exempt status.

7.15 The IRD is responsible only for the tax exemption aspects of charitable organisations. It is not responsible for registering charities or for monitoring their conduct. There is also no requirement under the Inland Revenue Ordinance for charitable organisations to submit annual reports or accounts in order to report on their finances.¹³ Instead, the IRD will from time to time call for accounts, annual reports or other documents for the purpose of conducting a 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.¹⁴ It is also the responsibility of the tax-exempt charities to notify the IRD of changes in circumstances which may have a bearing on their exemption status.

7.16 The IRD conducts reviews on tax-exempt charities as and when it considers necessary and such reviews are conducted at least once every four years. In the course of a review, questionnaires are sent to the organisations for completion and return within one month. They are also required to file financial statements and reports on activities they have conducted. For this purpose, a charity which exists in the form of an

11 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.

12 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.

13 There are, however, annual requirements for the filing of reports and accounts under the Companies Ordinance (Cap 32) in respect of those charities which are registered as companies limited by shares or guarantee under the Ordinance.

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

incorporated company under the Companies Ordinance (Cap 32) would need to submit audited accounts to the IRD, while charities existing in the form of societies or unincorporated associations are required only to submit copies of self-certified accounts. The IRD examines the questionnaire replies and financial statements to ensure that the objects of the organisations are still charitable and their activities are compatible with their objects.

7.17 Clarification will be sought if, for example, a tax exempt charity is found to have engaged in activities which appear to be at variance with the charitable objects stated in its governing instrument. The IRD will then go over the further information received and take a decision as to whether the tax-exemption status should continue or be withdrawn. Before withdrawing an organisation's tax exemption status, the IRD will usually ask the charity, should it wish to maintain its exemption status, for explanations. It may also ask it 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 IRD 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 requirements within the stipulated period, the IRD would then withdraw its tax exemption status immediately. Similar action is taken against those charities which have given no reply to the review or have ceased operation.

7.18 The decision of the IRD to withdraw a charity's tax-exempt status is taken pursuant to the Inland Revenue Ordinance (Cap 112) for the purposes of revenue protection. An affected charity has the right to apply to the court for a judicial review of the IRD's withdrawal of its tax exemption status. The charity could also dispute the tax assessments made by the IRD through the statutory objection and appeal procedures under the Ordinance.

7.19 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

7.20 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.¹⁵

7.21 As part of the Sub-committee's deliberations on the powers and duties which should reside with the future charity commission for Hong Kong, one of the issues that had been considered was the extent to which its role

15 The Sub-committee presented in its Consultation Paper a detailed analysis of the law relating to charities and taxation in a number of these overseas jurisdictions. See Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at Annex 7.

should interface with that of the IRD for the purposes of assessing the tax exemption status of charities.¹⁶ Reviewing the position overseas, the Sub-committee had focused on the charity commissions, or similar bodies, in England, Scotland, Ireland and New Zealand, and had also studied the 'division of labour' between their respective charity commissions and taxation authorities in handling tax exemptions for charities. According to the findings of the Sub-committee, there is generally 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.¹⁷

The Sub-committee's proposals in the Consultation Paper and our final recommendation on the taxation of charities in Hong Kong

7.22 In the Consultation Paper, the Sub-committee had carefully considered whether any change should be made to the taxation position of charities in Hong Kong.¹⁸ The Sub-committee had also reviewed whether, in the event of the future charity commission being established, the existing tax exemption powers and functions of the IRD in periodic review of charities should be transferred to the future charity commission.

7.23 After deliberating on these issues, the Sub-committee had concluded in its Consultation Paper that, while applications for recognition of charitable status should be made to the future charity commission, the existing tax exemption powers and periodic review of charities for taxation purposes should remain with the IRD. The Sub-committee had 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.

7.24 The Sub-committee had noted the example of useful administrative collaboration, however, between the charity commission and the tax authority in New Zealand. The Sub-committee was of the view that the future charity commission, by the provision of relevant charities' accounts information to the IRD, should facilitate as far as possible the periodic review by the IRD of a charity's entitlement to continued tax exemption. In particular, the future charity commission should report suspicious cases of possible abuse to the IRD for investigation.

7.25 In the Consultation Paper, the Sub-committee had stressed the importance of sufficient resources being allocated to the IRD to carry out the function of reviewing the accounts of charities to ensure that their income is

16 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at para 10.19.

17 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 10.18 to 10.38.

18 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 10.39 to 10.42.

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.

7.26 The Sub-committee had recommended :

- (1) that existing powers of tax exemption and functions of periodic review of charities for taxation purposes should remain with the IRD;
- (2) tax exemption may be granted to a charity by the IRD 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 IRD 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 IRD to carry out the function of reviewing annual accounts submitted by charities to the future charity commission.¹⁹

Consultees' responses

7.27 The majority of the respondents who expressed views on this recommendation were in support of the proposal. Many responses acknowledged the need for the IRD to carry out the function of reviewing annual accounts. It was considered that the IRD should be able to review accounts and ask questions for the purposes of determining whether, for example, the activities of a charity fitted within its objects, or whether it might be trading outside the scope of what would be permitted under its tax-exempt status.

7.28 There was also a suggestion by respondents that the IRD should carry out reviews on the charitable status of charities more frequently for the better monitoring of the accounts of charities and their operations related to charitable activities.

19 Recommendation 16, Law Reform Commission of Hong Kong Charities Sub-committee, *Consultation Paper on Charities* (June 2011), at paras 10.39 to 10.42.

Our view

7.29 In the course of finalising our conclusions in this area, we have also studied the position in some overseas jurisdictions which do not have a centralised regulatory body for charities (or which does not have one until recently). We observe that in jurisdictions where no centralised regulatory body, such as a charity commission, it is usual for the taxation authority to be responsible for considering the eligibility of charities for exemption from income tax.

Australia

7.30 In Australia, for example, until recently, charitable institutions and charitable funds could be exempt from income tax under the Income Tax Assessment Act 1997 if they were endorsed by the Australian Taxation Office (ATO) as income tax-exempt charities. From 1 July 2012, however, the newly established Australian Charities and Not-for-profits Commission (ACNC) is now responsible on behalf of all Commonwealth agencies for determining the legal status of entities seeking charitable, public benevolent institution and not-for-profit (NFP) benefits. The ACNC therefore will be a 'one-stop shop' regulator for the sector at the Commonwealth level.²⁰ Under the new regime, the ACNC will also be responsible for regulating governance requirements of registered entities. This means that the ACNC will take over the governance responsibilities exercised by the Australian Securities and Investments Commission (ASIC) in respect of not-for-profit companies limited by guarantee, as well as the governance responsibilities for other charities regulated at a Commonwealth level. Arrangements will be in place for entities that are required to make changes as a result of the new law, and for the transfer of information between the ACNC and ASIC and the ATO.²¹

7.31 Under the new regime, the ATO will continue to carry out its duty to review endorsed charities (ie, endorsed as income tax-exempt charities) to help establish whether they are entitled to endorsement. The ATO may request charities to provide information and documents that are relevant to their entitlement to endorsement. Charities are given at least 28 days to provide the required information and documents, and failure to comply may lead to endorsement being revoked and to prosecution.²² At the same time, the ATO recommends charities to carry out a yearly self-review of its entitlement to endorsement to enjoy tax concessions. It is the responsibility of the charity to notify the ATO of any major change in their structure or operation. Failure to do so may result in loss of entitlement to endorsement and may result in prosecution.²³

20 Existing charities already endorsed by the ATO as exempt from income tax will be transitioned into the new regime and will not need to re-register with the ACNC to be a charity. The ATO will accept the ACNC's registration of charitable status, but will retain responsibility for determining eligibility to access Commonwealth tax concessions which are subject to special conditions: see Australian Treasury's Not-for-Profit Reform fact sheet, *The ACNC Exposure Draft Transitional Issues*, 9 Dec 2011.

21 Same as above.

22 Same as above.

23 Australian Taxation Office, *Endorsement to access charity tax concessions*, 19 March 2012.

7.32 The Australian Business Register²⁴ displays on its website details of charities that have been endorsed to enjoy charity tax concessions. These details include the type of charity (for example, whether it is a charitable fund, charitable institution, public benevolent institution or health promotion charity), the type of charity tax concession 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.

Canada

7.33 In Canada, the Canada Revenue Agency (CRA) is seen as the primary regulator of charities. Organisations apply to the CRA for registration as charities and, if approved, are then subject to audit and enforcement activity by the Agency's Charities Directorate.²⁵ 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 to meet the other requirements of the Canadian federal Income Tax Act. Under section 188.1(6) of the Act, any registered charity that fails to file information returns for a taxation year is liable to a penalty equal to CAD\$500.

7.34 A registered charity in Canada 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 of the CRA updated on changes to the organisation. These include changes to its address, directors, legal or operating name, purposes, activities and structure. 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.

7.35 If a registered charity does not meet its obligations under the Canadian federal Income Tax 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. Also, it will no longer be able to 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.²⁶

7.36 At present, without a registration system for charities, the IRD serves a useful role of ensuring that tax exemption is granted only to

24 The Australian Business Register (ABR) is maintained by the Registrar of the ABR, who is also the Commissioner of Taxation of the Australian Taxation Office. The ABR is an extensive database of identity information provided by businesses when they register for an Australian business number (ABN). It is a secure website allowing access to register, view or update information 24 hours a day, seven days a week. See section 28 of A New Tax System (Australian Business Number) Act 1999 and <http://www.ato.gov.au/Tax-professionals/TP/The-Australian-Business-Register/>.

25 B Wyatt, "Overview from Canada", presented at the *Modernising Charity Law Conference*, held in Brisbane, from 16 to 18 April 2009.

26 Canada Revenue Agency, *Registering a Charity for Income Tax Purposes*, Rev 2012.

institutions or trusts of a public character within the scope of section 88 of the Inland Revenue Ordinance (Cap 112). However, in our view, the only way to ensure that charities granted tax-exempt status will carry out activities compatible with their expressed objects is to conduct reviews, as mentioned earlier.

7.37 While we will discuss in a later part of this report the issue concerning the establishment of a charity commission, we consider that the role of the IRD with respect to reviewing the accounts of tax-exempt charities is important to ensure that only charities which carry out activities in compliance with their objects should continue to be granted tax-exempt status. We note the examples of Australia, prior to its transition into a new regime with the ACNC as a 'one-stop' regulator, and Canada, where, as in Hong Kong, the taxation authorities are responsible for considering the eligibility of organisations for exemption from income tax. While Hong Kong does not yet have the benefit of a centralised regulatory body for charities (such as those established in England and Wales, Scotland and Singapore²⁷), we consider that the IRD should maintain a robust role in overseeing the activities of charities for tax-exemption purposes.

7.38 We believe that the IRD fulfils a highly important function, underpinning to a large extent the confidence of the public in the charity sector. We recommend that the IRD should continue to review the accounts of individual charities on a more frequent basis, should circumstances so warrant. We believe that this administrative measure, which could be implemented relatively quickly, would promote greater accountability among charities and improve their governance.

Recommendation 16

We recommend that the Inland Revenue Department should conduct more frequent reviews of the accounts of individual tax-exempt charities as and when necessary, to ascertain whether the activities of these charities are compatible with their charitable objects.

We also recommend that more resources should be allocated to the Inland Revenue Department to enable it to conduct these more frequent reviews.

27 Law Reform Commission of Hong Kong Charities Sub-committee, *Consultation Paper on Charities* (June 2011), at Chapter 12.

Chapter 8

Recommendations on the *cy-près* doctrine

8.1 In this chapter, we set out our deliberations and final recommendation on the law relating to the variation and dissolution of charities, focusing in particular on the "*cy-près doctrine*".¹

The situation in Hong Kong regarding the *cy-près* doctrine, resulting trusts and dissolution of charities

8.2 As we observed in Chapter 11 of the Consultation Paper, 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

8.3 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.

8.4 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

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.

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

8.5 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.

8.6 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

8.7 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

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 Cl & F 908, 8 ER 983.

7 (1844) 10 Cl & F 908, 8 ER 983, at 983 to 984. (Slaves were "redeemed" by being purchased and then set free.)

8 (1844) 10 Cl & F 908, 8 ER 983, at 983 to 984.

9 *Ironmongers' Company v AG* (1844) 10 Cl & F 908, 8 ER 983, at 987.

10 [1921] 1 Ch 655.

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.

8.8 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 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

8.9 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

8.10 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

8.11 The method through which a charitable organisation in Hong Kong may be dissolved depends on the type of legal structure that the charitable organisation comprises.

8.12 Mentioned earlier in this report, 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

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* (2012 LexisNexis Hong Kong), at para 400.104 and 400.105.

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.*"

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.

8.13 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.)

8.14 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

8.15 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. The Sub-committee had 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, the Sub-committee had considered the English model, which is analysed in detail below, to be a particularly useful model for Hong Kong.

8.16 An analysis of each of the jurisdictions that the Sub-committee had considered under this head was presented in Annex 8 of the Consultation Paper.

England and Wales

8.17 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

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.

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, which was amended by the Charities Act 2006 by the addition of new sections 14A and 14B.¹⁶ With the replacement of most of the earlier Charities Act by the Charities Act 2011 (2011 Act), the provisions on the occasions for applying the *cy-près* doctrine are in section 62 of the 2011 Act.¹⁷

8.18 The occasions on which the *cy-près* doctrine can apply to trust property in England and Wales are now provided in section 62(1) of the 2011 Act. Under this new section 62(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 62(1) of the 2011 Act states:

- "(1) *Subject to subsection (3), 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 are—*
- (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,*
 - (b) *where the original purposes provide a use for part only of the property available by virtue of the gift,*
 - (c) *where—*
 - (i) *the property available by virtue of the gift, and*
 - (ii) *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,*
 - (d) *where the original purposes were laid down by reference to—*
 - (i) *an area which then was but has since ceased to be a unit for some other purpose, or*
 - (ii) *a class of persons or an area which has for any reason since ceased to be suitable, regard being had to the appropriate*

¹⁶ Jean Warburton, *Tudor on Charities* (Sweet & Maxwell 2003, 9th ed), at 435 to 436.

¹⁷ The Charities Act 2011 came into effect on 14 March 2012. The 2011 Act is intended to make the law easier to understand by replacing most provisions of the Charities Acts 1992, 1993 and 2006 and all of the Recreational Charities Act 1958 with one single Act but no change is made to the law; see: http://www.charity-commission.gov.uk/About_us/Regulation/charbill.aspx.

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,*
 - (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."*

8.19 Section 62(1) of the 2011 Act refers to the *"original purposes"* of a charitable gift. This term is defined in section 62(4) of the 2011 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 62(1) of the 2011 Act is defined in section 62(2) of the 2011 Act in the following terms:

- "(2) In subsection (1) '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 time of the proposed alteration of the original purposes."*

8.20 It is noted in the *Operational Guidance on Application of Property Cy-près*, issued by the Charity Commission for England and Wales¹⁸ 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 62(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:

18 The Charity Commission of England and Wales, *Operational Guidance on Application of Property Cy-près*, OG2 A1, 14 March 2012, at para 1.2; available at: <http://ogs.charitycommission.gov.uk/g002a001.aspx>.

- *s.62(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.62(1)(c), where a charity is proposing to amalgamate with another charity with similar objects; the question of 'failure' is irrelevant; or*
- *s.62(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). ..."*

8.21 Under the 2011 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 unidentifiable or have disclaimed their rights to have the property returned. In these circumstances, sections 63 and 64 of the 2011 Act provide that the *cy-près* doctrine applies. These sections state:

"63(1) Property given for specific charitable purposes which fail is applicable cy-près as if given for charitable purposes generally, if 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 ended,*

cannot be identified or cannot be found, or

(b) to a donor who has executed a disclaimer in the prescribed form of the 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 are not liable to any person in respect of the property if no claim by that person to be interested in it is received by them before the end of the period mentioned in subsection (1)(a)(ii).

(3) Where property is applied cy-près by virtue of this section, all the donor's interest in it is treated as having been relinquished when the gift was made.

(4) 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 section 64 (donors treated as unidentifiable)—

- (a) *the scheme must specify the total amount of that property,*
 - (b) *the donor of any part of that amount is entitled, on making a claim within the time limit, 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 the scheme's date in connection with claims relating to the donor's gift, and*
 - (c) *the scheme may include directions as to the provision to be made for meeting any claims made in accordance with paragraph (b).*
- (5) *For the purposes of subsection (4)(b)—*
- (a) *a claim is made within the time limit only if it is made no later than 6 months after the date on which the scheme is made, and*
 - (b) *'the scheme's date' means the date on which the scheme is made.*
- (6) *Subsection (7) applies if—*
- (a) *any sum is, in accordance with any directions included in the scheme under subsection (4)(c), set aside for meeting claims made in accordance with subsection (4)(b), but*
 - (b) *the aggregate amount of any such claims actually made exceeds the relevant amount;*
- 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) *If the Commission so directs, each of the donors in question is entitled only to such proportion of the relevant amount as the amount of the donor's claim bears to the aggregate amount referred to in subsection (6)(b).*
- 64(1) *For the purposes of section 63 property is conclusively presumed (without any advertisement or inquiry) to belong to donors who cannot be identified, in so far as it consists of—*
- (a) *the proceeds of cash collections made—*
 - (i) *by means of collecting boxes, or*
 - (ii) *by other means not adapted for distinguishing one gift from another, or*
 - (b) *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.*

- (2) *The court or the Commission may by order direct that property not falling within subsection (1) is for the purposes of section 63 to be treated (without any advertisement or inquiry) as belonging to donors who cannot be identified if it appears to the court or the Commission—*
 - (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."*

8.22 Section 65 of the 2011 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 65(8) of the 2011 Act. Sections 65 and 66 provide:

- "65(1) *This section applies to property given—*
 - (a) *for specific charitable purposes, and*
 - (b) *in response to a solicitation within subsection (2).*
- (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, the donor wishes to be given the opportunity by the trustees holding the property 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) apply if—*
 - (a) *a person has given property as mentioned in subsection (1),*
 - (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 the donor wishes to request the return of the property (or a sum equal to its value), and*
 - (c) *if within the prescribed period the donor makes such a request, returning the property (or such a sum) to the donor.*
 - (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 63(1) applies to the property as if it belonged to a donor within section 63(1)(b) (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),*
 - (b) *the specific charitable purposes fail, and*
 - (c) *the donor has not made a relevant declaration,**section 63(1) similarly applies to the property as if it belonged to a donor within section 63(1)(b).*
 - (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—*
 - (i) *solicitations that are accompanied by statements within subsection (2)(b), and*
 - (ii) *solicitations that are not so accompanied,**a person giving property as a result of the appeal is to be presumed, unless the contrary is proved, to have responded to the former solicitations and not the latter.*
- 66(1) *For the purposes of sections 63 and 65, charitable purposes are to be treated as failing if 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.*
- (2) *In sections 63 to 65 and this section—*
 - (a) *references to a donor include persons claiming through or under the original donor, and*
 - (b) *references to property given include the property*

for the time being representing the property originally given or property derived from it.

- (3) *Subsection (2) applies except in so far as the context otherwise requires.*
- (4) *In sections 63 and 65 'prescribed' means prescribed by regulations made by the Commission.*
- (5) *Any such regulations are to be published by the Commission in such manner as it thinks fit.*
- (6) *Any such regulations may, as respects the advertisements which are to be published for the purposes of section 63(1)(a), make provision as to the form and content of such advertisements as well as the manner in which they are to be published."*

8.23 The English statutory model makes specific provision for the dissolution of a charitable incorporated body. Section 263(1) of the 2011 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 the body has no assets or does not operate,*
- (b) that the relevant charity has ceased to exist,*
- (c) that the institution previously constituting, or treated by the Commission as constituting, the relevant 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—*
 - (i) have been achieved so far as is possible, or*
 - (ii) are in practice incapable of being achieved."*

8.24 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.

8.25 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 263(3) and (4) of the 2011 Act:

- "(3) Subject to subsection (4), an order made under this section with respect to an incorporated body has the effect of vesting in the charity 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 Commission so directs in the order—

- (a) all or any specified part of that property, instead of vesting in the charity trustees of the relevant charity, vests in—*
 - (i) a specified person as trustee for, or nominee of, that charity, or*
 - (ii) such persons (other than the charity 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 are to be transferred to—*
 - (i) the charity trustees of that charity, or*
 - (ii) any such person or persons as is or are mentioned in paragraph (a)(i) or (ii).*

For this purpose 'specified' means specified by the Commission in the order."

The Sub-committee's proposals in the Consultation Paper and our final recommendation on the variation of charities

8.26 In the Consultation Paper, the Sub-committee had noted that cases in Hong Kong requiring the application of the *cy-près* doctrine appeared to be relatively rare, but that the conditions which must be met under the common law before the doctrine could be utilised were extremely strict. The Sub-committee was concerned that this could lead to situations where funds raised for a charitable purpose could not be used, ultimately, for that purpose, and so must be returned to the donors, however logistically difficult that may be.¹⁹

8.27 Having reviewed overseas developments, where several jurisdictions had moved towards a statutory basis for the doctrine and a broadening of the situations where it may be applied, the Sub-committee had come to the view that a similar approach should be adopted in Hong Kong. Of the overseas models the Sub-committee had considered, the Sub-committee had found the legislative approach implemented in England and Wales to be particularly useful.

¹⁹ Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 11.26 and 11.27.

8.28 The Sub-committee had recommended 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 2011), so as to provide a statutory basis for the doctrine in Hong Kong and to broaden the scope of its application.²⁰

8.29 In line with the English model, the Sub-committee had recommended²¹ that the *cy-près* doctrine should be broadened in Hong Kong so that it could apply in the following situations even where it was 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.

8.30 The Sub-committee had also recommended that the future charity commission should be empowered by statute to administer the application of the *cy-près* doctrine in particular cases.²²

Consultees' responses

8.31 The vast majority of the respondents commenting on this proposal were in support of the Sub-committee's recommendation to codify and broaden the circumstances in which the *cy-près* doctrine could be applied. They also agreed that the *cy-près* doctrine should be broadened to become in line with the English statutory model. It was believed by many respondents that this could effectively solve the problems which arise when a charitable gift fails because the original purposes of such gift, in whole or in part, cannot be carried out. Some respondents suggested that a set of transparent procedures, application standards and an appeal mechanism should be established for the application of the *cy-près* doctrine.

Our view

8.32 We consider it clear from the view of the respondents that the codification of the *cy-près* doctrine and the broadening of the scope of its

20 Recommendation 17, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 11.26 and 11.27.

21 Recommendation 17, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 11.26 and 11.27.

22 Recommendation 17, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 11.26 and 11.27.

application is desirable and should be recommended, and further, that the scope should be in line with the English statutory model.

8.33 As for the part of the recommendation by the Sub-committee in relation to empowering the future charity commission to administer the application of the *cy-près* doctrine in particular cases, it is apparent that this would depend on the setting up of a charity commission, which issue will be discussed in the next chapter.

Recommendation 17

We recommend:

- (1) the introduction in Hong Kong of legislation along the lines of the English statutory model of the *cy-près* doctrine (comprised in sections 62 to 66 of the English Charities Act 2011²³) so as to provide a statutory basis for the doctrine in Hong Kong and to broaden the scope of its application;**
- (2) in line with the English model, 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:**
 - (a) 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;**
 - (b) where property is given for a specific charitable purpose in response to a solicitation; or**
 - (c) where a charitable body has dissolved.**

23 See paras 8.18 to 8.22 above.

Chapter 9

Recommendations regarding the establishment of a charity commission in Hong Kong

9.1 In this chapter, we set out our deliberations on the issue of the setting up of a charity commission to regulate charitable organisations in Hong Kong in the light of the responses we received from the public on consultation. We then put forward our final views in this area.

Need for a 'one-stop shop'?

9.2 As the Sub-committee had observed in the Consultation Paper and earlier in this report, there are a number of shortcomings in the existing system of regulating charities.¹ 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.

9.3 In the Consultation Paper, the Sub-committee had considered that there was a need for, as far as possible, a 'one-stop shop' which can serve as a centralised body to take over the functions of the various Government authorities responsible for monitoring charitable organisations and their fundraising activities. The Sub-committee had noted 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

¹ Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 3.2 to 3.16.

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.

9.4 The Sub-committee had proposed in the Consultation Paper 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.

9.5 While it was envisaged that charity organisations would be expected to abide by the requirements laid down by the future charity commission, the Sub-committee had considered it 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

9.6 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 included in Annex 9 of the Consultation Paper.

England and Wales

9.7 In England and Wales, the functions and duties of the Charity Commission are set out in the Charities Act 2011.² These functions and duties cover:

- "1. *Determining whether institutions are or are not charities.*
2. *Encouraging and facilitating the better administration of charities.*
3. *Identifying and investigating apparent misconduct or mismanagement in the administration of charities and taking remedial or protective action in connection with misconduct or mismanagement in the administration of charities.*
4. *Determining whether public collections certificates should be issued, and remain in force, in respect of public charitable collections....*"³

9.8 Under section 14 of the Act, the Commission has the objectives to increase public trust and confidence in charities, to promote awareness and understanding of the operation of the public benefit requirement, to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities, to promote the effective use of charitable resources and to enhance the accountability of charities to donors, beneficiaries and the general public.

Ireland

9.9 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;

2 The Charities Act 2011 came into effect on 14 March 2012. The 2011 Act is intended to make the law easier to understand by replacing most provisions of the Charities Acts 1992, 1993 and 2006 and all of the Recreational Charities Act 1958 with one single Act, but no change is made to the law; see: http://www.charity-commission.gov.uk/About_us/Regulation/charbill.aspx.

3 Section 15(1), Charities Act 2011.

- (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;
- (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

9.10 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.

The Sub-committee's proposals in the Consultation Paper and our final recommendations on the establishment of a charity commission

The objectives of the future charity commission

9.11 The Sub-committee's preliminary recommendations on the establishment of a charity commission for Hong Kong were set out in Chapter 12 of the Consultation Paper. The Sub-committee had considered 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 various objectives. The Sub-committee had recommended 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.⁴

The interplay between the role of the future charity commission and the Secretary for Justice as protector of charities

9.12 In the course of the Sub-committee's deliberations, it had 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.

4 Recommendation 18, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at para 12.11.

9.13 Since 1 July 1997, the rights⁵ which were previously enjoyed by Hong Kong's then Attorney General⁶ 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.

9.14 In England, while the Charity Commission plays an important statutory role in the supervision and control over charities, the Attorney 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.⁷

9.15 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.⁸ 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.⁹

9.16 Having considered the example in England and Wales, the Sub-committee had considered 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 should 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 was considered in the Consultation Paper 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, the Sub-committee was of the view that 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.¹⁰

5 Except for those rights which are inconsistent with the Basic Law: see section 5, Legal Officers Ordinance (Cap 87).

6 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.

7 *Halsbury's Laws of England*, Vol 8 (2010 5th ed), at paras 583 and 599.

8 Section 113 and 114, Charities Act 2011: see same as above, at para 234.

9 *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.

10 Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 2.12 to 12.16.

The general characteristics of the future charity commission

9.17 Taking into account the overseas experience with respect to charity regulatory bodies, the Sub-committee had observed in the Consultation Paper that the future charity commission should have the general characteristics set out below.

(1) Proportionate power

9.18 Since the future charity commission would have a duty to ensure that charitable organisations comply with their legal obligations, a variety of powers should be vested in the commission.

9.19 The Sub-committee had emphasised 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, the Sub-committee had considered 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

9.20 The Sub-committee had considered 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. The Sub-committee had proposed that such an appeal could be made to the Court of First Instance.

(3) Transparency

9.21 In setting up an effective system of regulation and monitoring of charities, the Sub-committee had considered that 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

9.22 In the Consultation Paper, the Sub-committee had recommended 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.

9.23 In order to achieve its objectives, the Sub-committee had considered that the future charity commission should be equipped with the functions and powers set out below.

(1) *Maintaining and administering the register of charities*

9.24 The Sub-committee had proposed that one of the major functions of the future charity commission would 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. The Sub-committee had further proposed 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.

9.25 Charitable organisations which have their charitable status approved and registered by the charity commission may apply to the Inland Revenue Department for tax exemption.

9.26 In the course of considering the powers of the future charity commission to register charities, the Sub-committee had 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. The Sub-committee had noted that this might apply, for example, in rare cases where there was reasonable evidence to suggest that, even though the application on its face complied with the charity test, those applying to establish the charity had an underlying intention to make use of it for other non-charitable purposes.¹¹

9.27 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.¹² These conditions are that the OSCR considers that the applicant for registration has an 'objectionable name'¹³ or the application falls within the scope of regulations made under the Act for this purpose.¹⁴ 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

11 See Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at para 12.26.

12 See section 5, Charities and Trustee Investment (Scotland) Act 2005.

13 For the purposes of section 10, Charities and Trustee Investment (Scotland) Act 2005.

14 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."

included under section 15(1) of the Charities Act 2011, while the Commission's role in maintaining "*an accurate and up-to-date register of charities*" is stated to be within the scope of its fifth general function.¹⁵ 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.¹⁶ However, whether this incidental power may be exercised, for example, to refuse charity registration in any particular case, is unclear.

9.28 The Sub-committee had considered in the Consultation Paper that one of the advantages of the future charity commission having a residual power to refuse the granting of an application for registration was that it would allow flexibility in dealing with applications. Such a residual power would need to be clearly defined (for 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 was, as proposed, that applicants aggrieved by a decision of the future charity commission could appeal to the Court of First Instance against the decision.

9.29 The Sub-committee had noted that a disadvantage of the future charity commission having such a residual power to refuse registration even where the charity test appeared to have been satisfied, was that it may create uncertainty in the law and raise the possibility of a lack of transparency in the functioning of the future charity commission. It might also be regarded as unnecessary if the future charity commission were to have the power to de-register charities in, for example, cases of impropriety.

9.30 On balance, however, the Sub-committee had considered 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*

9.31 The Sub-committee had proposed in the Consultation Paper that the future charity commission would be the regulator responsible for monitoring charitable organisations to ensure their compliance with their legal obligations. This would include the need for charities to comply with certain filing requirements imposed by the future charity commission.

9.32 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 that charities should file returns with the commission on any change of charitable objects.

9.33 While charitable organisations need to abide by the requirements laid down by the charity commission, the Sub-committee had considered that

15 Section 15(4), Charities Act 2011.

16 Under section 20(1) of the Charities Act 2011, the Commission is given power to deal with matters relating to the performance of its functions and general duties. Section 20(1) states: "*The Commission may do anything which is calculated to facilitate, or is conducive or incidental to, the performance of any of its functions or general duties.*"

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

9.34 The Sub-committee had considered that 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 Sub-committee had proposed that 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 Office of Licensing Authority.

9.35 It was proposed that 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.

9.36 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

9.37 As proposed by the Sub-committee in the Consultation 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

9.38 The Sub-committee had observed in the Consultation Paper that it considered that the ability of the future charity commission to investigate and check abuses was crucial to promoting good governance among charities and building and maintaining public confidence. As a result, the Sub-committee had proposed in Recommendation 9 of the Consultation Paper that the commission should be vested with the power to investigate any mismanagement and misconduct by charitable organisations.

9.39 It was proposed that in any case where a report was 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.

9.40 As part of its powers to investigate mismanagement or misconduct of charitable organisations, the Sub-committee had proposed in the Consultation Paper that 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.

9.41 In order to enable effective exercise of the powers of the future charity commission and the appointed investigators, the Sub-committee had considered 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, would be guilty of an offence.

(6) *Enforcement and remedies*

9.42 The Sub-committee had proposed in the Consultation Paper 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 with their charitable objectives.

(7) *Application of the cy-près doctrine*

9.43 In Chapter 11 of the Consultation Paper, the Sub-committee had proposed that legislation should be introduced to broaden the application of the *cy-près* doctrine in Hong Kong. (We also make a recommendation along these lines in Chapter 8 of this report.) The Sub-committee had considered 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 the Consultation Paper.¹⁷ The Sub-committee had recommended 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;

17 Recommendation 17, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011).

- (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.¹⁸

Appeal mechanism

9.44 To balance the vesting of these powers in the future charity commission and to ensure fairness, the Sub-committee had observed in the Consultation Paper that it had considered 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. The Sub-committee had considered 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*. The Sub-committee had also considered that the right of appeal should extend to a decision of the commission to refuse to register an organisation as a charitable organisation. The Sub-committee had considered that appeals in such cases should be made to the Court of First Instance. The Sub-committee had recommended 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;

would have the right to appeal to the Court of First Instance.¹⁹

9.45 In respect of appeals relating to applications for fundraising permits and licences, the Sub-committee had considered that such appeals should be handled by the Administrative Appeals Board or by a new administrative appeal system set up for the purpose.

18 Recommendation 19, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at para 12.43.

19 Recommendation 20, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at para 12.44.

Consultees' responses with regard to the establishment of a future charity commission

9.46 We received a large number of responses in relation to these recommendations. The majority of the respondents did not support Recommendations 18 and 19 of the Consultation Paper concerning the setting up of a sole regulatory body for charities and vesting it with the various functions and powers.²⁰

9.47 We note that despite the fact that the number of responses not in support of the recommendation greatly out-numbered those in support of the proposals, the majority of the respondents agreed that it is important for charities to be more transparent and accountable to the community. There is also a consensus that there is a need to safeguard the rights of donors.

9.48 In view of the diverse nature of the comments received, we summarise below the feedback objecting to the proposals regarding the setting up of a charity commission -

(1) Organisation and structure of the proposed charity commission

Some respondents expressed the view that since they were uncertain about the organisation and structure of the future charity commission, they were hesitant about giving support for these proposals, especially when public revenue was involved and the benefit deriving from the establishment of the commission was unknown.

(2) Excessive power and lack of checks and balances

Some respondents expressed concern about a lack of checks and balances in relation to the wide-ranging and widely-embracing proposed powers of the charity commission. It was considered that the proposed investigative and punitive powers to be vested with the charity commission are immensely important and could seriously interfere with the operations of charities and hamper the healthy development of the charity sector. There were concerns that the proposed commission might abuse its power when neither checks and balances, nor clear monitoring guidelines, had yet been established.

(3) Administrative cost to the Government

As administration funding would inevitably be needed for the establishment of a charity commission, and tasking it with the powers of investigation into mismanagement of charities brought worry to some respondents that the resultant financial burden would eventually be shifted to the charity sector.

20 We do note in passing that a large number of comments from different parties were exactly the same in content.

Some respondents expressed doubt as to the cost-effectiveness of the establishment of a separate body to regulate charitable organisations. It was proposed by these respondents that the Government should instead strengthen the existing laws and regulations relating to both the Social Welfare Department and the Inland Revenue Department, so as to equip these Government bodies with sufficient statutory powers to perform functions of registration of charitable organisations and scrutiny of all fundraising activities. Also, it was considered that the Government should enforce the relevant laws through the Independent Commission Against Corruption (ICAC) and the Hong Kong Police with regard to prosecuting any illegal and fraudulent cases.

(4) Administrative burden on charities

A respondent expressed the view that the establishment of a new commission would only increase the workload of charities in, for example, having to prepare more reports which overlapped with their annual reports of a similar nature. The respondent observed that the impact on smaller organisations would be particularly great.

(5) Duplication of effort

Some respondents considered that there would be overlap in the work and areas of responsibility between Government bureaus/departments and the proposed charity commission. An example given was that schools and educational institutions are already governed and supervised by the Education Bureau and they are accountable directly to the Education Bureau. It was felt that there should not be another reporting line imposed on these institutions.

(6) Interference with the autonomy

Some respondents from the religious sector objected to the recommendations because they considered that the establishment of a charity commission to supervise and scrutinise the charity work and activities of a religious body may lead to an interference with religious doctrines and activities and would contravene Article 141 of the Basic Law of HKSAR.²¹

21

Article 141 states:

"The Government of the Hong Kong Special Administrative Region shall not restrict the freedom of religious belief, interfere in the internal affairs of religious organisations or restrict religious activities which do not contravene the laws of the Region."

(7) Other alternatives

It was considered by a number of respondents that there might be better alternatives than establishing the charity commission to achieve the stated objectives and to enable charities to move forward and grow stronger to serve the community. It was suggested, for example, that the reporting system by charities under the current regime should be strengthened. It was also suggested that public education could be strengthened to allow the public to learn more about charities and philanthropy in order to make wise donations. It was believed that these would be positive ways to tackle the donation accountability problem. It was considered by these respondents that enhancement of accountability and transparency among charities should be achieved by means of the current system as far as possible, through non-governmental voluntary mechanisms and media coverage, so as to redress the situation where people could not distinguish genuine public fundraising activities from scams in the absence of regulation.

Instead of setting up a charity commission, some respondents believed that a 'one-stop' oversight mechanism would suffice which regulates all of the procedures, ranging from approving applications submitted by charities to registration and filing of financial reports.

A respondent from the academic field considered that if the purpose of regulating charities was just to let donors know whether the donations were used for the purposes for which the donations were made, it would be sufficient to merely set up a databank to allow charities to disclose their information. In this way, donors could hold the charitable organisations accountable or decide whether their support for a particular charity should continue or not. Therefore, the respondent considered that it was not necessary to set up a charity commission and even if such a body was put in place, it should be responsible only for registration of charitable organisations and management of the databank mentioned above, because, in the respondent's view, the aim of regulating charitable organisations should be achieved through monitoring of these organisations by the donors themselves.

(8) No change needed

Some respondents expressed the opinion that since there was no major problem with charities in Hong Kong so far, there was no need to make any change to the existing monitoring system. It was considered that the current system, including the ICAC, enforcement agencies and various government subvention

bodies, already has appropriate laws and enforcement powers to regulate the behaviour of charitable organisations.

In considering whether the new regulatory body would be more suitable than the Inland Revenue Department as a charity watchdog, a respondent considered that in the absence of evidence of widespread misconduct and mismanagement of charitable organisations, the proposed extent of regulation by a charity commission might be excessive.

9.49 Despite the large number of respondents expressing opposition to the proposal of setting up a charity commission, there was a significant minority of respondents in support of the recommendation. Some of the benefits identified by these respondents are as follows -

(1) Independent entity

As there would be inevitable loss in tax income as a result of tax exemptions granted to charitable bodies, it was considered by a respondent that there would be potential conflict for a Government department to be vested with the power to determine and approve the charitable status of an organisation. It was felt that it would be better for an independent entity rather than a Government body, such as a charity commission, to determine the charitable status of an organisation.

(2) Reputational benefits

The registration of a charity with a charity commission would give the charity certain reputational benefits. This would have a positive effect on its ability to carry out charitable fundraising.

(3) Build up public confidence

Where charities are subject to registration with and regulation by a charity commission, the charities' affairs would be open to public scrutiny. This could help to maintain public confidence in registered charities. Positive regulation means that there would be a mechanism for dealing with charities that are not operating constitutionally, and in extreme cases, infringements of regulatory requirements could trigger the charity commission to instigate enquiries into a charity's activities. It was observed that this would enable the uncovering of problematic activities at an early stage.

(4) Greater independence of the charity sector

It was observed that in the case of England and Wales, section 13(4) of the Charities Act 2011 provides that *"in the exercise of its functions the Commission is not subject to the direction or*

control of any Minister of the Crown or of another government department". It was commented that this helps to reinforce the independence of the charity sector from the Government. The proposed charity commission could operate along the lines of the Charity Commission in England and Wales in order to ensure the independence of the charity sector in Hong Kong.

(5) Assistance on operation of charities

A charity commission could make orders, for example, to approve schemes to amend the objects of charities, approve the merger of charities as well as provide guidance on issues arising for charities on a more day-to-day basis. It was felt that this would greatly improve the operation of charities.

(6) Informal platform to resolve queries

A respondent noted that many charities are administered by non-legal persons and have limited resources for paying professional fees. If a charity needs guidance on certain issues, a charity commission could provide a less formal platform for the charity to resolve such queries. A charity commission could allow charities to obtain assistance in its administration and governance in a more accessible way. The existence of a charity commission would also help to relieve the burden of the judicial system if matters that would otherwise be referred to the courts could be dealt with by a charity commission.

Composition of the charity commission

9.50 A few respondents, while in support of the setting up of a charity commission, considered that the various objectives of the commission would only be met if the commission itself is perceived to be independent and authoritative and itself enjoys public confidence. Furthermore, it was commented that there must be checks and balances to ensure the charity commission would not act arbitrarily and would not abuse its powers.

9.51 A few respondents gave some suggestions on the composition of the charity commission. They considered that the commission should comprise the following three categories of members:

- (i) Government officials;
- (ii) representatives from professional sectors and delegates which include the legal sector, accounting sector, social welfare sector and commercial sector, and elected members of the Legislative Council; and
- (iii) representatives of charities.

9.52 It was proposed by a respondent that the representatives of charities, which would be elected from candidates appointed by charities, should not be less than 40% of the total membership of the commission. There was also the view that its members must come from charitable organisations of different backgrounds and sizes, and they must be chosen by registered charities through an open selection marked by fairness, openness, and transparency, so as to boost the representativeness and legitimacy of the commission.

9.53 A respondent in support of the establishment of a charity commission as part of a simplified 'one-stop shop' process pointed out that the charities commission and the commissioner should not present a barrier for organisations to become charities. As the creation and start-up of any charity is not an easy process, and requires time and money, it was suggested that the charity commission should provide the opportunity for new charities to gain a foothold in society. It was also considered that the appointment of the commissioner should not be a patronage appointment by the Government. It was felt strongly that the commission should have some form of independence of the political and administrative structure of Hong Kong.

Appeal mechanism

9.54 As regards the Sub-committee's proposal on the appeal mechanism,²² a majority of the respondents did not support the proposal, mainly because they were not in support of the setting up of charity commission. For those who were supportive of the proposal regarding the establishment of a charity commission, they considered that an appeal mechanism would enhance public confidence in the regulatory framework. It was believed that Hong Kong needs a good regime to preserve its vibrant culture of giving. One respondent expressed the view that there should be provisions that all persons aggrieved, affected or interested should have the right to challenge the act or decision of the charity commission or to seek redress to the High Court with the right of appeal to the Court of Final Appeal.

9.55 It was considered that there should be provisions that trustees, directors or officers of a charitable organisation may apply to the High Court for relief of acts, omissions, misconduct committed without fraudulent intent or recklessness or in circumstances the Court may consider excusable.

9.56 Some respondents were worried that the high costs involved in an appeal to the Court of First Instance would be beyond the means of some charities, especially small and medium-sized ones.

9.57 A few respondents expressed the view that instead of appealing to the court, it should be possible to appeal to a tribunal or a board set up for receiving and reviewing complaints.

22 Recommendation 20, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011).

Our observations in the light of the responses from the public

9.58 As we have noted above, a large number of responses were received in relation to our recommendations on the setting up of a sole regulatory body for charities, and the great majority of these (made up primarily of existing charities) were against the recommendations. The minority of respondents in support were comprised of a wide range of organisations, including charities, professional bodies, public organisations, academics and individual members of the public. Although there was common ground among respondents that greater accountability and transparency is of vital importance to nurture the development of philanthropy in Hong Kong, we must acknowledge that the clear lack of consensus in the community on the issue of the setting up of a future charity commission was of major concern, and has obliged us to reconsider the terms of our original proposals under this head.

9.59 Our comments in relation to some of the issues raised by respondents are set out below.

Organisation and structure of a proposed charity commission

9.60 As observed earlier, there were a number of responses from the public expressing concern about the composition of the proposed charity commission. The various issues raised related to its membership, who would appoint its members, how independent it would be from the Government and its proposed internal accountability mechanism. These were issues which were not discussed by the Sub-committee in the Consultation Paper. Therefore, in the process of considering the feedback from the respondents, we studied the position on these matters in overseas jurisdictions which have charity commissions or similar bodies, as well as some statutory commissions in Hong Kong. The relevant information we have gathered on these bodies is set out at Annexes 2 and 3 of this report. In light of the experience in the overseas jurisdictions reviewed, we note that there are certain key points which are relevant to the establishment and composition of a charity commission or other centralised regulatory authority:

- (1) the number of members to be appointed, including the chairman;
- (2) the person appointing the chairman and members;
- (3) the term of office for each appointment and maximum aggregate period of office upon reappointment;
- (4) qualifications required for appointment, such as representative(s) from the judiciary, legal profession, accounting sector, social welfare sector, the Government, the general public and so on;
- (5) the manner of accountability of the commission; for example, any annual reporting requirement, to whom the annual reports and

accounts should be submitted and whether there should be open meetings;

- (6) the degree of independence from the Government, such as whether or not the commission and its members should be regarded as servants or agents of the government; and
- (7) special requirements for the chairman and members, such as disclosure of conflict of interests and confidentiality requirements.

Duplication of effort

9.61 In relation to the comments about the duplication of effort, we consider that, contrary to what has been suggested by some respondents, one of the major advantages of having a centralised authority is to reduce the duplication of work among different Government bureaux or departments. Any overlapping of responsibilities should be avoided to enable streamlined application procedures by charities in the charitable fundraising and accountability system.

Fears of interference with autonomy

9.62 We note the opinion expressed by some respondents from the religious sector about the possibility of infringement of Article 141 of the Basic Law in the event of a charity commission being established. We do not propose to go into detailed discussion about this issue. However, we feel that some of the major objectives of having a charity commission are to enhance the transparency and accountability of charities (including religious bodies which are also charities) and to promote good governance. These objectives, which are aimed at protecting public interest, should not be a cause for concern as possible interference of the autonomy of religious bodies.

Suggestion that no change needed

9.63 We also note the argument put forward by some respondents regarding the inappropriateness of setting up a centralised regulatory authority because at the present time there appears to be no major problem among charities in Hong Kong. Based on the detailed study by the Sub-committee in the Consultation Paper and this report, we feel that it is undesirable for Hong Kong to lack a centralised regulatory authority for charities by continuing to rely solely on the efforts of different Government bureaux or departments to regulate and monitor charities. We cannot stress more the importance of having an appropriate and effective monitory system for charities in order to ensure their smooth and proper operation. We believe that this is an effective way to prevent serious acts of misconduct and mismanagement that would, in such eventualities, tarnish the name and reputation of charities in Hong Kong. It would not only hamper the development of the charity sector, but also render futile the altruistic deeds of philanthropists.

Our conclusions

9.64 We believe that having a good and sustainable monitoring system for charities is vital for the healthy growth of the charity sector. We have observed from the detailed study by the Sub-committee in the Consultation Paper and in this report that many jurisdictions have set up charity commissions as monitoring authorities, and we note the successful experience in those jurisdictions which have had charity commissions established for some time. However, while considering the various options for our recommendations under this head, it has become apparent that the conditions are not favourable at the present time for the setting up of a charity commission in Hong Kong. (We also observe that, in terms of the experience of overseas jurisdictions, Australia,²³ Ireland²⁴ and Scotland²⁵ have developed their centralised regulatory authorities only in recent years, so the success of, or any problems related to, these models remains to be seen.²⁶)

9.65 Given the feedback from the public during our consultation, and the many concerns expressed by stakeholders, we consider that it would be prudent for us to recommend that a charity commission should not be set up at this time due to the apparent lack of general consensus among the public on this issue. We believe that the community needs more time to discuss the concept of a charity commission, particularly in light of the polarised views generated from the consultation exercise.

9.66 We note also that in light of the inevitable major changes involved in aligning different bureaus and departments, it would hardly be a turnkey project should the Administration push ahead with the setting up of a charity commission at this stage. We believe that the following concerns in particular have to be addressed before Hong Kong is sufficiently well placed to establish a charity commission:

- (1) administrative alignment between different bureaus and departments;
- (2) consideration of the resource implications for the setting up of a charity commission, both from the perspective of the Government and the charity sector; and
- (3) further consideration of appropriate checks and balances on the powers of a charity commission.

23 The Australian Charities and Not-for-profits Commission Act 2012 provides for the establishment of the Australian Charities and Not-for-profits Commission. See : http://www.acnc.gov.au/ACNC/About_ACNC/ACNC_leg/ACNC/Legal/ACNC_leg.aspx?hkey=b3d40228-24a5-41d2-8873-cb577d565182.

24 The Charities Regulatory Authority was established under section 13 of the Irish Charities Act 2009.

25 The Scottish Charity Regulator was established under section 1 of the Charities and Trustee Investment (Scotland) Act 2005.

26 For example, prior to the establishment of the Australian Charities and Non-for-profits Commission in December 2012, the last major charity reform at the Commonwealth level in Australia had taken place almost a decade before (ie, the Extension of Charitable Purposes Act 2004, relating to the definition of charitable purposes).

9.67 Given the many benefits already mentioned in the Consultation Paper and earlier in this report, and the examples of other jurisdictions, we believe that it should be a long term goal that a charity commission or a centralised regulatory authority for charities should be established for Hong Kong. We consider that the scope of the future charity commission's responsibilities should include:

- (1) the regulation of charities and monitoring their compliance;
- (2) maintaining and administering the register of charities, and, as an adjunct to this, alignment of the duty of the commission to register charities and the duty of the Inland Revenue Department to grant tax exemption;
- (3) the handling of public enquiries and complaints;
- (4) enhancing philanthropy by arranging relevant publicity programmes and public education; and
- (5) issuing guidelines and practice notes for stakeholders.

9.68 In the interim period, we feel that our objectives could be best achieved by the implementation of the expedient administrative measures we have recommended in the earlier chapters of this report, as these measures would improve the transparency and accountability of charities and thus provide better safeguards to the public.

9.69 We suggest that the Administration should keep the matter of the establishment of a future charity commission under consideration, and that there should be a review of the implementation of the various measures recommended in this report to assess their impact and effects.

9.70 Furthermore, we have recommended earlier in this report that there should be a clear statutory definition of what constitutes a charitable purpose.²⁷ We consider that the implementation of this proposal would bring about greater certainty, and facilitate better understanding and application of the law of charities in Hong Kong.

Recommendation 18

We recommend that a charity commission should not be set up at this stage, but it should be a long term goal for the Administration to set up a charity commission or a centralised regulatory authority upon review of the impact and effect of the implementation of the recommendations made in this Report.

27 Recommendation 1, Chapter 2 of this Report.

Summary of recommendations

Recommendation 1

(Statutory definition)

We recommend that there should be a clear statutory definition of what constitutes a charitable purpose. (paras 2.47-2.48)

Recommendation 2

(Categories of charitable purpose)

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;
- (2) The advancement of education;
- (3) The advancement of religion;
- (4) The advancement of health;
- (5) The saving of lives;
- (6) The advancement of citizenship or community development, which includes
 - (i) rural or urban regeneration, and
 - (ii) the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities;
- (7) The advancement of arts, culture, heritage or science;
- (8) The advancement of human rights, conflict resolution or reconciliation;
- (9) The promotion of religious or racial harmony;
- (10) The promotion of equality and diversity;
- (11) The advancement of environmental protection or improvement;
- (12) The relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;

- (13) The advancement of animal welfare;
- (14) Any other purpose that is of benefit to the community.

We further recommend that all the above recommended heads of charitable purpose must be also for the public benefit. (paras 2.207-2.222)

Recommendation 3

(Legal forms of charitable organisations)

We recommend that the current system of allowing a variety of legal forms of charitable organisations to exist should continue. (paras 3.32-3.34)

Recommendation 4

(Registration of charitable organisations)

We recommend that all charitable organisations which:

- (1) solicit from the public for the donation of cash or its equivalent; and/or
- (2) have sought 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 a Government bureau/department to be determined by the Administration 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 also recommend that the matter relating to allowing or disallowing the use of particular names of charitable bodies should be left to the relevant Government bureau/department to determine, on a case by case basis. (paras 4.49-4.62)

Recommendation 5

(Financial reporting standard)

We recommend that a specifically formulated financial reporting standard should be adopted for charities in Hong Kong.

We recommend that the Administration should work with the professional accounting body/bodies to formulate this standard. (paras 5.67-5.72)

Recommendation 6

(Filing requirements)

We recommend that the following filing requirement should be imposed by Government bureaus/departments on charitable organisations in their applications for charitable fundraising licences or permits:

- (1) Charitable organisations with an annual income exceeding \$500,000 should be required to file an auditors' report and financial statements.
- (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. (para 5.73)

Recommendation 7

(Information available to the public)

We recommend that the Administration should ensure that tax-exempt charities make information about their operations available to the public by publishing certain documents, such as their financial statements and activities' reports, on their websites. (para 5.74)

Recommendation 8

(Enforcement action for non-compliance with filing and disclosure requirements)

We recommend that the Administration should designate a Government bureau or department to be responsible for enforcement action in cases of non-compliance with the filing and disclosure requirements that we recommend should apply to charitable organisations. (paras 5.106-5.109)

Recommendation 9

(Standardised application form and conditions)

We recommend that:

- (1) a standardised application form setting out some common basic

requirements should be adopted for approval in respect of different types of charitable fundraising licence or permit applications;

- (2) such standardised permit conditions would include the requirements for:
 - (a) the disclosure of:
 - (i) the charity's background (including but not limited to its composition, objectives and work profile);
 - (ii) the organisation's activities;
 - (iii) the objective of the charitable fundraising;
 - (iv) the use of the funds collected; and
 - (v) the charity's accounts for the most recent accounting year; and
 - (b) to enhance the existing function of the information portal under the GovHK website by making the information on charitable fundraising activities mentioned in (a)(i)-(v) above available for public inspection.
- (3) Any conditions for approval of charitable fundraising activities imposed by other Government bureaux/departments which differ from the standard requirements (for example, in relation to the disclosure of accounts) should be set out as "*other requirements*" in the standard form. (paras 6.51-6.53)

Recommendation 10

(Centralised hotline)

We recommend that the function of the Government's existing 1823 Call Centre, being a centralised hotline, should be enhanced, or a new telephone hotline should be set up, for answering public enquiries and receiving complaints in relation to charitable fundraising activities. (para 6.64)

Recommendation 11

(Display of registration number)

We recommend that:

- (1) 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);

- (2) for charitable fundraising activities *via* the internet or other electronic means, the registration number of any charitable organisation involved in the activities should be prominently displayed on the webpage or message transmitted by electronic means through which appeals for charitable donations are made; and
- (3) for charitable fundraising activities involving face-to-face solicitation of pledges from donors for regular donations, the registration number of any charitable organisation involved in the activities should be prominently displayed on any related documents through which solicitation for regular charitable donations are made and in booths or counters set up for such purpose. (para 6.76)

Recommendation 12

(Facilitation of good practice)

We recommend that:

- (1) charitable organisations should be encouraged to work with institutions/organisations to facilitate good practice and to improve co-operation between charitable organisations and the Government; and
- (2) good practice guidelines should be issued by a co-ordinating Government bureau or department in relation to: (a) the protection and respect of donors' rights and privacy; (b) the contracting of services of professional fundraisers; and (c) the recruitment of elderly, the disadvantaged and disabled persons in soliciting donations on the street. (paras 6.90-6.94)

Recommendation 13

(Public education)

We recommend that the Administration, through the co-ordinated efforts of Government bureaus and departments, should engage in more public education on how to become a smart donor and on matters relating to charitable fundraising activities. Such efforts should be synchronised among these Government bureaus and departments. (para 6.103)

Recommendation 14

(Setting up a platform of co-ordination)

We recommend that the Administration should set up a platform of co-ordination in dealing with applications for charitable fundraising licences among the different departments responsible for the licensing of charitable fundraising activities (including approval for temporary occupation of unleased land). (paras 6.108-6.110)

Recommendation 15

(Allocation of more resources)

We recommend that more resources should be allocated to Government departments involved in the licensing of charitable fundraising activities in order to enhance their role in relation to the monitoring of charitable fundraising activities, including the responsibility to ensure that the standardised fundraising permit conditions are undertaken, and to handle enquiries and complaints received through the proposed enquiries hotline. (para 6.111)

Recommendation 16

(More frequent reviews by the Inland Revenue Department)

We recommend that the Inland Revenue Department should conduct more frequent reviews of the accounts of individual tax-exempt charities as and when necessary, to ascertain whether the activities of these charities are compatible with their charitable objects.

We also recommend that more resources should be allocated to the Inland Revenue Department to enable it to conduct these more frequent reviews. (paras 7.29-7.38)

Recommendation 17

(Cy-près doctrine)

We recommend:

- (1) the introduction in Hong Kong of legislation along the lines of the English statutory model of the *cy-près* doctrine (comprised in sections 62 to 66 of the English Charities Act 2011) so as to provide a statutory basis for the doctrine in Hong Kong and to broaden the scope of its application;

- (2) in line with the English model, 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:
- (a) 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;
 - (b) where property is given for a specific charitable purpose in response to a solicitation; or
 - (c) where a charitable body has dissolved. (paras 8.32-8.33)

Recommendation 18

(Our conclusion on the setting up of a charity commission)

We recommend that a charity commission should not be set up at this stage, but it should be a long term goal for the Administration to set up a charity commission or a centralised regulatory authority upon review of the impact and effect of the implementation of the recommendations made in this Report. (paras 9.64-9.70)

**List of those who responded
to the consultation paper**

Charity & related Organisations

1. Against Child Abuse Ltd.
2. Agency for Volunteer Service
3. AIDS Concern
4. Alice Ho Miu Ling Nethersole Charity Foundation
5. Alliance for Patients' Mutual Help Organisations
6. Amnesty International Hong Kong Section Human Rights Education Charitable Trust
7. Association for the Advancement of Feminism
8. Association of Women with Disabilities Hong Kong
9. Blessing Club Limited
10. The Boys' & Girls' Clubs Association of Hong Kong
11. Breakthrough
12. Canossian Missions
13. Caritas - Hong Kong
14. The Catholic Diocese of Hong Kong
15. The Child Development Centre at Matilda
16. The Chinese Rhenish Church Hong Kong Synod
17. Christian & Missionary Alliance Church Union H.K. Ltd.
18. Christian & Missionary Alliance Church Union H.K. Ltd. C & M A Social Services
19. The Christian The Faith Hope Love Church
20. Christians for Hong Kong Society
21. The Church of Christ in China, Cheung Chau Church
22. The Church of Christ in China, Chuen Yan Church
23. The Church of Christ in China, Chuen Yuen Church
24. The Church of Christ in China, Hong Kong Chi To Church
25. The Church of Christ in China, Hong Kong Council
26. The Church of Christ in China, Kei Wan Church
27. The Church of Christ in China, Kwai Chung Chuen Yuen Church
28. The Church of Christ in China, Kwong Fuk Church Limited
29. The Church of Christ in China, Mui Wo Church
30. The Church of Christ in China, Shing Kwong Church
31. The Church of Christ in China, Tai Po Church Fu Shin Mission
32. The Church of Christ in China, Tin King Church
33. The Church of Christ in China, Tsing Yi Chuen Yuen Church
34. The Church of Christ in China, Yuen Long Church Limited
35. The Church of Christ in China, Tai Po Church Ltd.
36. The Church of Living Grace (Cheung Sha Wan Church)
37. Civic Exchange
38. Climate Group (Hong Kong) Limited
39. Clothing Industry Training Authority

40. CWM/Nethersole Fund
41. ELCHK Social Service Head Office - Corporate Communication Division
42. Evangelical Church of All Blessings
43. Evangelical Free Church of China Yan Fook Church
44. Far East Broadcasting Company Ltd.
45. Fellowship of Evangelical Students (HK)
46. Fountain of Grace Foundation Limited
47. Fu Hong Society
48. Green Power
49. Green Sense
50. Greeners Action
51. Greenpeace East Asia
52. The Hong Kong Asthma Society
53. Hong Kong Blind Union
54. Hong Kong Campus Crusade for Christ Ltd.
55. Hong Kong Cancer Fund
56. Hong Kong Catholic Commission for Labour Affairs
57. Hong Kong Christian Council
58. Hong Kong Christian Service
59. The Hong Kong Council of Social Service
60. Hong Kong Family Welfare Society
61. Hong Kong Federation of Women's Centres
62. The Hong Kong Federation of Youth Groups
63. Hong Kong Neuro-muscular Disease Association
64. Hong Kong Red Cross
65. Hong Kong Sheng Kung Hui Welfare Council
66. The Hong Kong Society for the Blind
67. Hong Kong Society for the Protection of Children
68. Hong Kong St. John Ambulance
69. Hong Kong Unison
70. Hong Kong University of Science and Technology
71. Hong Kong Women Christian Council
72. Hong Kong Women Development Association
73. Hong Kong Women Workers' Association
74. The ICAEW Foundation in Hong Kong
75. The Independent Schools Foundation Academy
76. Justice & Peace Commission of the Hong Kong Catholic Diocese
77. Logos Ministries Ltd.
78. The Mental Health Association of Hong Kong
79. The Methodist Church, Hong Kong
80. North Point Alliance Church
81. OMF Hong Kong
82. Oxfam Hong Kong
83. The Parents' association of pre-school handicapped children
84. Pentecostal Church of Hong Kong
85. Po Leung Kuk
86. Pok Oi Hospital
87. Rehabilitation Alliance Hong Kong
88. Senior Citizen Home Safety Association
89. Shun Hing Education and Charity Fund Ltd.

90. Society for Community Organisation
91. The Society for Truth and Light
92. Society of St Vincent de Paul Central Council of Hong Kong
93. Sowers Action
94. Tsung Tsin Mission of Hong Kong
95. Tung Wah Group of Hospitals
96. Wing Kwong So-Care Company Limited
97. World Vision Hong Kong
98. WWF - Hong Kong
99. Yan Chai Hospital
100. YMCA of Hong Kong
101. Yuen Yuen Institute

Government & related Organisations

102. Companies Registry
103. Department of Justice, Civil Division
104. Department of Justice, Legal Policy Division
105. Education Bureau
106. Food and Environmental Hygiene Department
107. Hong Kong Police Force
108. Hospital Authority
109. Inland Revenue Department
110. Judiciary
111. Legal Aid Department
112. Hong Kong Office of the Privacy Commissioner for Personal Data
113. Social Welfare Department
114. Social Workers Registration Board

Other Organisations

115. Alliance Construction Materials Limited
116. Arup Group Limited
117. Asian Human Rights Commission
118. Business and Professionals Federation of Hong Kong
119. Business Environment Council Limited
120. Cannon Trustees Limited
121. CCM Christian Mission Ltd
122. CLP Power Hong Kong Limited
123. Concern Group of Small Welfare Agencies
124. Concord Mutual-Aid Club Alliance
125. COSCO Pacific Limited
126. CTU Education Foundation
127. Dow Chemical Pacific Limited
128. Ecopoint Limited
129. Fook Tin Technologies Limited
130. Fuji Xerox (Hong Kong) Limited
131. Gammon Construction Limited
132. The Girls' Brigade Hong Kong
133. Golden Power Manufacturing Limited

134. The Great Eagle Development and Project Management Limited
135. Great Eastern Healthcare Limited
136. Green Mobility Innovations Limited
137. Greenlife Corporation Limited
138. Hang Seng Bank Limited
139. Herbert Smith
140. The Hong Kong and China Gas Limited (Towngas)
141. Hong Kong Bar Association
142. Hong Kong Church Renewal Movement Ltd.
143. Hong Kong Confederation of Trade Unions
144. Hong Kong Electric Company Limited
145. Hong Kong Federation of Electrical and Mechanical Contractors Limited
146. Hong Kong General Chamber of Social Enterprises Limited
147. Hong Kong Human Rights Monitor
148. Hong Kong Policy Viewers
149. Hong Kong Social Workers Association
150. Hong Kong Social Workers' General Union
151. Hong Kong Trustees' Association Ltd.
152. iDonate
153. Jardine Engineering Corporation Limited
154. Kowloon Motor Bus Co. (1933) Ltd. (KMB)
155. Law Society of Hong Kong
156. Mitsubishi Electric Ryoden Air-conditioning & Visual Information Systems (Hong Kong) Ltd
157. Modern Terminals Limited
158. Non Labelling Association
159. Office of Hon Cheung Kwok Che, Legislative Councillor
160. Rotary International District 3450
161. Schneider Electric (Hong Kong)
162. Shell Hong Kong Limited
163. Society for the Prevention of Cruelty to Animals (HK)
164. STEP Hong Kong Limited
165. Sun Hung Kai Properties Limited
166. Swire Properties Limited
167. TCOG Concern Group
168. Tongzhi Community Joint Meeting
169. TPIZ Resources Limited
170. Wheelock & Co Limited
171. Wing Kwong Pentecostal Holiness Church Limited

Individuals

172. A discontented person
173. A group of concerned citizens
174. A member of the Public
175. A member of the Public (signature illegible)
176. Bacon-Shone John
177. Baig Raees Begum
178. Bradshaw Dan
179. Mr Chan

- 180. Chan Cheung-ming Alfred
- 181. Chan Clement
- 182. Chan Kin Lai (Rev.)
- 183. Chan Matthew
- 184. Chan Sang Hing
- 185. Chan Wai Kam
- 186. Chang Chun Wa (Rev.)
- 187. Cheng Wai Him
- 188. Cheung Allen
- 189. Cheung Iris
- 190. Cheung Luko
- 191. Ching Wai-keung
- 192. Chiu Chun Hon
- 193. Choi Yat Sing
- 194. Chong Yiu Kwong
- 195. Chow Roland
- 196. Chu Siu Man
- 197. Chu Teresa
- 198. Chun Angela
- 199. Chung Ping Lam
- 200. Crawley W.A.T.
- 201. Fan Nic
- 202. Fok Yuen Hung
- 203. Fong KM Nellie
- 204. Fung Ho Lup
- 205. Gallagher Steven
- 206. Gladys
- 207. Gunson David
- 208. HK Citizen
- 209. Ho Suk Ching
- 210. Hsiao Wen Hu Mark
- 211. Ip Tsz Yeung
- 212. Kung Wai Sum
- 213. Kwong Gordon
- 214. Lam Ching Han
- 215. Lau Carolyn and Swetnam Marcus
- 216. Lau Ho Wing
- 217. Lau Yau Lin
- 218. Law M Y
- 219. Lee WY Eliza and Liu K Helen
- 220. Lee Rebecca, Ho Lusina and Chan Joseph
- 221. Lee Tai Ying
- 222. Leung Anita
- 223. Leung Mei Ying
- 224. Li George
- 225. Lo Man Yin
- 226. Lo Pui Yin
- 227. Lo Tat Hung
- 228. Lutz Hans
- 229. Mak Tak-wai

- 230. Moore Marion
- 231. Siu Chor-kee
- 232. So Chi Hong Jeffrey
- 233. Tai Benny
- 234. Tang W Brian
- 235. Tang Stephen
- 236. Tik Kwok Fat
- 237. Tong Wing Chi
- 238. Tsang Man Yiu
- 239. Tse Sai Kit
- 240. Tso Hung Fai
- 241. Tsui Chung Man
- 242. Water
- 243. Wingfield Ian
- 244. Ms Wong
- 245. Wong Chan
- 246. Wong fan-foung Jackson
- 247. Woodhead Geoffrey
- 248. XU Ying
- 249. Yau Ying King Yan
- 250. Yip Yuk Sau
- 251. Yue Wai Sin
- 252. Yuen Connie
- 253. Yuen HP Patrick
- 254. Yuen YK Terence
- 255. Zhou Jin Josie

Anonymous

- 256. Anonymous 1
- 257. Anonymous 2
- 258. Anonymous 3
- 259. Anonymous 4
- 260. Anonymous 5
- 261. Anonymous 6
- 262. Anonymous 7
- 263. Anonymous 8
- 264. Anonymous 9

Composition and internal regulation of overseas charity commissions: implications for a possible future commission for Hong Kong

England and Wales

1. The Charity Commission for England and Wales is set up under section 1A of the Charities Act 1993.¹ It is provided that in section 13(3) of the Charities Act 2011 (2011 Act) that the functions of the Commission shall be performed on behalf of the Crown. Under section 13(4) of the 2011 Act, the Commission shall not be subject to the direction or control of any Minister of the Crown or other government department in the exercise of its functions. However it does not include the exercise of any administrative controls over the Commission's expenditure by the Treasury.²

2. *Membership.* Schedule 1 to the 2011 Act provides for the composition of the Commission which includes its membership, term of appointment and remuneration. Paragraph 1(1) of Schedule 1 provides that the Commission shall consist of a chairman and at least 4, but not more than 8, other members.

3. The Board of the Commission comprising non-executive members is responsible for the strategy and future direction of the Commission. The Senior Management Team is delegated by the Board to make decisions involving the day-to-day operation. This group is chaired by the chief executive and includes the directors and key senior staff. The directors implement the programmes and policies arising from the Board's decisions. Each director is supported by committees comprising senior staff together with representatives of other key parts of the organisation.³

4. *Appointment of members.* Under paragraph 1(1) of Schedule 1, the chair and members of the Commission are appointed by the Minister. Paragraph 1(2) and (3) further provides -

"(2) *The Minister shall exercise the power in sub-paragraph (1) so as to secure that -*

(a) *the knowledge and experience of the members of the Commission (taken together) includes knowledge and experience of the matters mentioned in sub-paragraph (3),*

1 Section 13(1) of the Charities Act 2011 provides for the continuation of the Charity Commission for England and Wales as a body corporate.

2 Section 13(5), Charities Act 2011.

3 http://www.charity-commission.gov.uk/About_us/About_the_Commission/Our_Board/index.aspx.

- (b) *at least two members have a 7 year general qualification within the meaning of section 71 of the Courts and Legal Services Act 1990⁴, and*
 - (c) *at least one member*
 - (i) *knows about conditions in Wales, and*
 - (ii) *has been appointed following consultation with the Welsh Ministers.*
- (3) *The matters are -*
- (a) *the law relating to charities,*
 - (b) *charity accounts and the financing of charities, and*
 - (c) *the operation and regulation of the charities of different sizes and descriptions.*
- (4) *In sub-paragraph (2)(c) "member" does not include the person appointed to chair the Commission."*

5. Paragraph 3 of Schedule 1 provides that an appointment of a person to hold office as a member of the Commission shall be for a term not exceeding 3 years. A member of the Commission may not hold office for more than 10 years in total.

6. The Chief Executive and the other staff are appointed by the Commission under paragraph 5 of Schedule 1 and the terms and conditions of service under such appointment are determined by the Commission with the approval of the Minister for the Civil Service.⁵

7. *Accountability.* In terms of accountability of the Commission, paragraph 11 of Schedule 1 provides -

"As soon as practicable after the end of each financial year the Commission must publish a report on -

- (a) *the discharge of its functions,*
- (b) *the extent to which, in its opinion, its objectives (see section 14)⁶ have been met,*

4 Under section 71(3)(c) of the Courts and Legal Services Act 1990, a person has a "*general qualification*" if he has a right of audience in relation to any class of proceedings in any part of the Senior Courts, or all proceedings in county courts or magistrates' courts.

5 Schedule 1 of the Charities Act 2011.

6 Section 14

The Commission has the following objectives—

- 1. The public confidence objective
The public confidence objective is to increase public trust and confidence in charities.
- 2. The public benefit objective
The public benefit objective is to promote awareness and understanding of the

(c) *the performance of its general duties (see section 16),⁷*
and

(d) *the management of its affairs,*

during that year."

8. Under paragraph 12 of Schedule 1, the Commission must hold a public meeting ("the annual meeting") for the purpose of enabling the report to be considered. The annual meeting is held within the period of 3 months beginning with the day on which the report is published.

9. As an open and accountable organisation, the Board of the Commission holds open board meetings for anyone to attend to find out first-hand about how it makes operational and policy decisions about its work.⁸

Ireland

10. 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.

-
3. operation of the public benefit requirement.
The compliance objective
The compliance objective is to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities.
4. The charitable resources objective
The charitable resources objective is to promote the effective use of charitable resources.
5. The accountability objective
The accountability objective is to enhance the accountability of charities to donors, beneficiaries and the general public.
- 7 Section 16
The Commission has the following general duties—
1. So far as is reasonably practicable the Commission must, in performing its functions, act in a way—
(a) which is compatible with its objectives, and
(b) which it considers most appropriate for the purpose of meeting those objectives.
2. So far as is reasonably practicable the Commission must, in performing its functions, act in a way which is compatible with the encouragement of—
(a) all forms of charitable giving, and
(b) voluntary participation in charity work.
3. In performing its functions the Commission must have regard to the need to use its resources in the most efficient, effective and economic way.
4. 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).
5. In performing its functions the Commission must, in appropriate cases, have regard to the desirability of facilitating innovation by or on behalf of charities.
6. In managing its affairs the Commission must have regard to such generally accepted principles of good corporate governance as it is reasonable to regard as applicable to it.
- 8 [http://www.charity-commission.gov.uk/About us/About the Commission/Our Board index.aspx](http://www.charity-commission.gov.uk/About_us/About_the_Commission/Our_Board_index.aspx).

11. *Membership.* Under paragraph 2(1) of Schedule 1, it is stated that the Authority shall consist of not less than 9 and not greater than 20 members, and not less than 3 out of these 20 members shall be persons who are holding or formerly held judicial office in the Superior Courts, or are barristers or solicitors of not less than 10 years standing.

12. Under paragraph 2(6) to 2(8) of Schedule 1 -

"(6) A member of the Authority shall hold office for such period, not exceeding 5 years from the date of his or her appointment, as the Minister shall determine.

(7) Subject to subparagraph (8), a member of the Authority whose term of office expires by the efflux of time shall be eligible for reappointment to the Authority.

(8) A person who is reappointed to the Authority in accordance with subparagraph (7) shall not hold office for periods the aggregate of which exceeds 10 years."

13. Paragraph 3(3) of Schedule 1 provides for the case where a member of the authority may cease to be qualified or hold office in the following circumstances -

"(a) is adjudicated bankrupt,

(b) makes a composition or arrangement with creditors,

(c) is sentenced by a court of competent jurisdiction to a term of imprisonment,

(d) is convicted of any indictable offence in relation to a company,

(e) is convicted of any indictable offence in relation to a charitable organisation or charitable trust,

(f) is convicted of an offence involving fraud or dishonesty, whether in connection with a company or not, or

(g) is the subject of an order under section 160 of the Companies Act 1990.⁹"

⁹ Section 160 of the Companies Act 1990 provides -

"(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

14. There are however cases where a member of the Authority, a member of a committee or the chief executive may cease to be a member of the Authority if he is nominated as a member of Seanad Éireann (the Irish Senate), elected as a member of either House of the Oireachtas (the Irish Parliament)¹⁰ or to be a representative in the European Parliament, or regarded pursuant to Part XIII of the Second Schedule to the European Parliament Elections Act 1997 as having been elected to that Parliament.

15. Paragraphs 9 and 10 of Schedule 1 deal with the requirement of disclosure of interest of members or staff members of the Authority. Paragraph 11 provides for the requirement not to disclose confidential information obtained by him as a member, staff member or committee member.

16. *Appointment of members.* Paragraph 2(2) to 2(5) of Schedule 1 provides for details of appointment of members –

- "(2) The members of the Authority shall be appointed by the Minister, with the approval of the Government.*
- (3) The chairperson of the Authority shall be appointed by the Minister from among the members of the Authority.*
- (4) The Minister shall, in so far as is practicable, endeavour to ensure that among the members of the Authority there is an equitable balance between men and women.*

-
- 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.*
- (2) Where the court is satisfied in any proceedings or as a result of an application under this section that—
- (a) a person has been guilty, while a promoter, officer, auditor, receiver, liquidator or examiner of a company, of any fraud in relation to the company, its members or creditors; or*
 - (b) a person has been guilty, while a promoter, officer, auditor, receiver, liquidator or examiner of a company, of any breach of his duty as such promoter, officer, auditor, receiver, liquidator or examiner; or*
 - (c) a declaration has been granted under section 297A of the Principal Act (inserted by section 138 of this Act) in respect of a person; or*
 - (d) the conduct of any person as promoter, officer, auditor, receiver, liquidator or examiner of a company, makes him unfit to be concerned in the management of a company; or*
 - (e) in consequence of a report of inspectors appointed by the court or the Minister under the Companies Acts, the conduct of any person makes him unfit to be concerned in the management of a company; or*
 - (f) a person has been persistently in default in relation to the relevant requirements;*

the court may, of its own motion, or as a result of the application, make a disqualification order against such a person for such period as it sees fit.

...

10 The Oireachtas consists of the President and two Houses, Dáil Éireann (House of Representatives) and Seanad Éireann (Senate); at: <http://www.oireachtas.ie/parliament/oireachtasbusiness/billslegislation/>.

- (5) *The Minister shall, in appointing the members of the Authority, ensure that among those members there are persons who have knowledge of, and expertise in relation to—*
- (a) *the law relating to charities,*
 - (b) *the keeping of accounts by, and the funding of, charitable organisations, and*
 - (c) *the management of charitable organisations."*

17. Paragraph 6 of Schedule 1 provides that the Authority may establish a committee (consisting in whole or in part) of persons who are members of the Authority to assist and advise it in relation to the performance of its functions.

18. Under paragraph 6(2) of Schedule 1, the Authority shall in appointing members of a committee –

- "(a) have regard to the range of qualifications and experience necessary for the proper and effective discharge of the functions of the committee,*
- (b) have regard to the desirability of there being such balance between men and women on the committee as is appropriate."*

19. *Accountability.* In terms of accountability of the Authority, whenever required in writing to do so by the Committee of Dáil Éireann (the House of Representatives) established under the Standing Orders of Dáil Éireann to examine and report to Dáil Éireann on the appropriation accounts and reports of the Comptroller and Auditor General, the chief executive is required under section 22(1) of the Act to give evidence to that Committee in relation to –

- "(a) the regularity and propriety of the transactions recorded or required to be recorded in any book or other record of account subject to audit by the Comptroller and Auditor General that the Authority is required by this Act to prepare,*
- (b) the economy and efficiency of the Authority in the use of its resources,*
- (c) the systems, procedures and practices employed by the Authority for the purpose of evaluating the effectiveness of its operations, and*
- (d) any matter affecting the Authority referred to in a special report of the Comptroller and Auditor General under section 11(2) of the Comptroller and Auditor General (Amendment) Act 1993, or in any other report of the*

Comptroller and Auditor General (in so far as it relates to a matter specified in paragraph (a), (b) or (c)) that is laid before Dáil Éireann."

20. Section 22(2) provides –

"In the performance of his or her duties under this section, the chief executive shall not question or express an opinion on the merits of any policy of the Government or a Minister of the Government or on the merits of the objectives of such a policy."

21. Section 23 of the Act provides for the accountability of the chief executive to other Oireachtas Committees. The chief executive is required to attend before a Committee appointed by either House of the Oireachtas or jointly by both Houses of the Oireachtas (the National Parliament) (other than the Committee referred to in section 22 or the Committee on Members' Interests of Dáil Éireann or the Committee on Members' Interests of Seanad Éireann (the Senate)) or a subcommittee of such a Committee to give account for the general administration of the Authority at the written request of a Committee. However, under section 23(3), the chief executive shall not be required to give account before a Committee for any matter which is or has been or may at a future time be the subject of proceedings before a court or Tribunal in the State.

22. Under section 23(4) and (5) –

"(4) Where the chief executive is of the opinion that a matter in respect of which he or she is requested to give an account before a Committee is a matter to which subsection (3) applies, he or she shall inform the Committee of that opinion and the reasons for the opinion and, unless the information is conveyed to the Committee at a time when the chief executive is before it, the information shall be so conveyed in writing.

(5) Where the chief executive has informed a Committee of his or her opinion in accordance with subsection (4) and the Committee does not withdraw the request referred to in subsection (2) in so far as it relates to a matter the subject of that opinion—

(a) the chief executive may, not later than 21 days after being informed by the Committee of its decision not to do so, apply to the High Court in a summary manner for determination of the question whether the matter is one to which subsection (3) applies, or

(b) the Chairperson of the Committee may, on behalf of the Committee, make such an application,

and the High Court shall determine the matter."

23. Section 23(8) provides –

"In the performance of his or her duties under this section, the chief executive shall not question or express an opinion on the merits of any policy of the Government or a Minister of the Government or on the merits of the objectives of such a policy."

24. The relevant provisions mentioned above have not yet been implemented to date.

New Zealand

25. The New Zealand Charities Commission is established under section 8 of the New Zealand Charities Act 2005. Under section 9(1) of the Act, the Commission is a Crown entity for the purposes of section 7 of the Crown Entities Act 2004.¹¹

26. *Membership.* Section 11 of the Act provides for the membership of the Commission. The Commission consists of no more than 7, and no fewer than 5 members. Members of the Commission are the board for the purposes of the Crown Entities Act 2004.

27. *Appointment of members.* Members of the Commission, including the chairperson, are appointed by the Minister. At present, the Charities Commission is governed by a board appointed by the Minister for the Community and Voluntary Sector.

28. *Accountability.* Being an Autonomous Crown Entity (ACE) under the Crown Entities Act 2004, the Commission is an organisation that is independent of the government but it must "*have regard*" for government policy when directed by the responsible Minister.¹²

29. In terms of accountability, the Commission is required to hold at least one annual meeting in each year with the representatives of charitable entities. Under section 12(3) of the Charities Act 2005, the Minister or representatives of the Minister, or both must attend at least one annual meeting in each year in which a meeting is held. It is set out in section 12(6) and (7) as follows -

11 Crown entity means an entity within one of the 5 categories set out in section 7 of the Crown Entities Act 2004. These 5 categories are statutory entities, Crown entity companies, Crown entity subsidiaries, school boards of trustee and tertiary education institutions. The Charity Commission is an autonomous Crown entities belonging to the category of statutory entities and is listed in Part 2 of Schedule 1 to the Crown Entities Act 2004.

12 <http://charities.govt.nz/about/board>.

- "(6) At each annual meeting, the Commission must -*
- (a) report on the operation of the Commission during the preceding financial year; and*
 - (b) table the financial statements of the Commission for that year; and*
 - (c) report on any matters that the Commission has knowledge of that may significantly affect the charitable sector in the current financial year; and*
 - (d) give a reasonable opportunity for persons who attend the meeting to—*
 - (i) ask questions concerning the operation of the Commission during the preceding financial year; and*
 - (ii) make submissions to the Commission concerning the operation of the Commission during the preceding financial year; and*
 - (iii) ask questions concerning the matters referred to in paragraph (c) and to make submissions to the Commission concerning those matters.*

Nothing in subsection (6) requires the Commission to disclose any information if disclosure of that information would involve a breach of confidence, of trust, of contract, of any enactment, or of any other rule of law."

Scotland

30. Section 1 of the Charities and Trustee Investment (Scotland) Act 2005 provides for the setting up of an office to be known as the Office of the Scottish Charity Regulator ("OSCR").

31. *Membership.* Schedule 1 to the Act sets out the composition of the Scottish Charity Regulator and the delegation of powers. Paragraph 1 of Schedule 1 provides as follows:

"The Scottish Charity Regulator (in this schedule referred to as 'the Regulator') is to consist of such number of members (but not fewer than 4) as the Scottish Ministers think fit.

...

An individual is disqualified from appointment as, and from being, a member of the Regulator if the individual is—

- (a) a member of the Scottish Parliament,*

- (b) *a member of the House of Commons,*
- (c) *a member of the European Parliament,*
- (d) *an office-holder in the Scottish Administration,*
- (e) *an individual of such other description as may be prescribed by order by the Scottish Ministers."*

32. *Appointment of members.* Under paragraph 1(2) of Schedule 1 to the Act, it is for the Scottish Ministers to appoint members from amongst those persons appearing to them to have knowledge and skills relevant to the functions of OSCR.

33. Under paragraph 3(1) of Schedule 1, the Scottish Ministers must appoint one of the members of the Regulator to chair the Regulator, and another of those members to act as deputy to that member.

34. Under paragraph 4 of Schedule 1, the regulator must appoint a chief executive, and may appoint such other employees as it considers appropriate. The terms and conditions of the chief executive and any other employees, and the number of any other employees are subject to the approval of the Scottish Ministers.

35. *Accountability.* The Scottish Government Ministers have ultimate responsibility for policy in relation to charity legislation and third sector policy. The Commission has a Framework Agreement with the Scottish Government which establishes its relationship and provides the overarching framework for policy and corporate engagement within which the two organisations operate. The Commission works closely with the Scottish Government's Charity Law Team, which has responsibility for implementing charity legislation.¹³

Singapore

36. *Membership.* Following the recommendations of the Inter-Ministry Committee (IMC) on the Regulation of Charities and Institutions of a Public Character (IPC) in March 2006, the office of the Commissioner of Charities was transferred from the Inland Revenue Authority of Singapore to the Ministry of Community Development, Youth and Sports on 1 September 2006.¹⁴

37. There are 5 Sector Administrators to assist the Commissioner of Charities to oversee the charities and IPC in their sectors. They are as follows:

13 <http://www.oscr.org.uk/about-oscr/oscr-management/>.
 14 <http://www.charities.gov.sg/charity/html/AboutUs.html>.

- Ministry of Education - Education
- Ministry of Health - Health
- Ministry of Information, Communications and the Arts - Arts and Heritage
- People's Association - Community
- Singapore Sports Council - Sports

38. Charities and IPCs with charitable objectives related to religion, social and welfare services, environmental protection or improvement, animal welfare, or which do not fall neatly under the above sectors are under the office of the Commissioner of Charities.¹⁵

39. Under section 4A(2) of the Singapore Charities Act, the Chairman and other members of the Charity Council are appointed for such duration and on such terms and conditions as the Minister may determine. At present the Council comprises 15 members, including the Chairman. Ten members are from the people sector, chosen for their expertise in accountancy, corporate governance, entrepreneurship and law. They are also involved in volunteer and charity work in varied fields, such as arts and heritage, community, education, health and social services.¹⁶

40. *Appointment of members.* Section 3 of the Singapore Charities Act provides for the appointment of Commissioner of Charities. It is stated -

"(1) The Minister may appoint -

- (a) an officer to be known as the Commissioner of Charities who shall have such functions as are conferred on him by this Act; and*
- (b) a Deputy Commissioner and such Assistant Commissioners of Charities or such other officers as he may think necessary to assist the Commissioner in the proper discharge of his functions."*

Section 3(2) provides for the delegation of powers by the Commissioner to the Deputy Commission of Charities and section 3(3) provides for the delegation to the Assistant Commission in writing.

41. *Accountability.* A Charity Council which comprises representatives from the people sector was set up under section 4A of the Act to promote good governance and self-regulation in the charity sector. 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

¹⁵ <http://www.charities.gov.sg/charity/charity/viewAboutUs.do>.

¹⁶ http://www.charities.gov.sg/charity/council/abtus_charity.html.

the Commissioner in relation to the regulation of charities, and the promotion of self-regulation and good governance standards in the charity sector.

South Africa

42. Under section 4 of the Nonprofit Organisations Act, a Directorate for Nonprofit Organisations is established within a national department.

43. *Membership.* The NPO Directorate, as a public office, holds information about registered NPOs for the public to access. It is currently established within the Department of Social Development.¹⁷

44. *Appointment of members.* Under section 8 of the Act, the Minister must designate an employee of the national department as the Director of Nonprofit Organisations to be in charge of the Directorate and to perform the other functions conferred on the director. The Minister may also appoint under section 10(1) any advisory or technical committee in order to achieve the objects of the Act.

45. Section 10(3) provides -

"When appointing an advisory or technical committee, the Minister must determine

(a) the composition, functions, and working procedures of such committee;

(b) in consultation with the Minister of Finance, the terms, conditions, remuneration and allowance applicable to its members; and

(c) any other matter relating to such committee."

46. Under section 9 of the Act, the Minister appoints persons so as to maintain a panel of arbitrator consisting of at least seven persons, and one of the members is designated as the chairperson.

47. *Accountability.* Under section 7 of the Act, the Minister is required to table a written narrative and financial report on the activities of the Directorate for the previous financial year in Parliament within six months after the end of each financial year.

17 <http://www.dsd.gov.za/npo/>.

Position in Hong Kong

48. The composition, method of appointment of the chairman and members and the accountability of some of the statutory commissions established in Hong Kong, such as the Equal Opportunities Commission, Independent Commission Against Corruption, Securities and Futures Commission and Office of the Privacy Commissioner for Personal Data have been examined and a table which is at the Annex 3 of this Report. It is observed that each of these commissions has different numbers of members. All of the chairpersons and members of the commissions included in the table are appointed by the Chief Executive and are accountable to different government officials.

Matters for considerations

49. Following our examination of the position in other jurisdictions and the position in Hong Kong, we notice the following -

- (1) In terms of the composition of the commissions, the number of members in the commissions varies greatly, ranging from four to eight members in England and Wales and to as many as nine to 20 in Ireland. There does not seem to be any regular pattern in the number of members in the commissions.

Similarly in Hong Kong, there is no pattern in relation to the number of members in the different types of commissions. For example, in the case of Equal Opportunities Commission, it consists of a chairperson and between four to 16 members. In the Personal Data (Privacy) Advisory Committee, there are four to eight members apart from the chairman.

- (2) Some jurisdictions impose a restriction on the term of appointment of a person to hold office. England and Wales provides for the term of a Commission member to not exceed three years, and upon reappointment, not more than 10 years in total. In Ireland, the term of office of a member of the Charities Regulatory Authority does not exceed five years, and upon reappointment, the aggregate period does not exceed 10 years.

In the case of Hong Kong, there are no specific legislative requirements regarding the terms of office within the various commissions.

- (3) In all of the overseas jurisdictions examined, the minister is responsible for the appointment of the chairman and members of the commission. In Hong Kong, the Chief Executive appoints the chairman and members of all of the commissions examined. In the case of the Mandatory Provident Fund Schemes Authority, the Chief Executive is required to consult the organisation prior

to the appointment of its members.

- (4) It is commonly found in some jurisdictions that there are qualification requirements for the members being appointed. For instance, in England and Wales, members of the commission appointed by the minister must possess knowledge and experience relating to i) charity law; ii) charity accounts and financing of charities; and iii) operation and regulation of charities of different sizes and description. Furthermore, at least two of the members must have a seven year general qualification within the meaning of section 71 of the Courts and Legal Services Act 1990¹⁸ and at least one member must know about conditions in Wales and be appointed after consulting the Welsh Ministers.

Expertise and experience are similarly required in the case of Ireland. Members of the Charities Regulatory Authority appointed by the Minister must have knowledge and experience in relation to the law of charities, keeping of accounts by charitable organisations and funding and management of charitable organisations. Besides, not less than three members of the Authority should hold or have formerly held judicial office in the Superior Courts, or are barristers or solicitors of not less than 10 years standing.

There are also legislative provisions in Ireland which provide for circumstances, such as adjudicated bankruptcy or conviction for an indictable offence, leading to disqualification of membership. Requirements of disclosure of interests and non-disclosure of confidential information by members are also set out in the legislation.

In the case of Scotland, the Scottish Ministers are required to appoint persons as members who appear to them to have knowledge and skills relevant to the functions of the OSCR.

- (5) In terms of accountability, different jurisdictions adopt varying degree of accountability requirements. It is a commonly adopted requirement in the commissions of some jurisdictions, such as England and Wales, Ireland and South Africa, to publish an annual report on the performance of their functions and duties during that year. In some jurisdictions, such as England and Wales and New Zealand, the relevant commission is required under its legislation to hold an annual meeting for consideration of the report. In the former case, the meeting is held as a public meeting to ensure accountability and openness.

18 Under section 71(3)(c) of the Courts and Legal Services Act 1990, a person has a "*general qualification*" if he has a right of audience in relation to any class of proceedings in any part of the Senior Courts, or all proceedings in county courts or magistrates' courts.

In some jurisdictions, such as Ireland, a detailed statutory accountability requirement is imposed on the chief executive of the Charities Regulatory Authority for the giving of evidence to the Committee of Dáil Éireann in relation to its accounts, use of resources and its operation. The chief executive is also required to attend before Oireachtas Committees appointed by the House of the Oireachtas.

Scotland does not impose specific statutory accountability requirements. Instead, the OSCR is generally accountable to the Government Ministers which have ultimate policy responsibility in relation to the charity sector.

In the case of Singapore, the Commissioner is part of the Singapore Government and is accountable to the Minister of Community Development, Youth and Sports. A separate non-governmental body, the Charity Council, comprising representatives from the community sector, would provide advice to the Commissioner on questions in connection with the administration of the Charities Act and the Commissioner's objectives and functions. The Council can also make recommendations to the Commission in relation to the regulation of charities, promotion of self-regulation and good governance standards in the charity sector.

In Hong Kong, there are statutory requirements for all of the commissions examined to provide proper accounts and financial statements to the Chief Executive (in the case of ICAC), the Chief Secretary (in the case of Equal Opportunity Commission and Office of the Privacy Commissioner for Personal Data) or Financial Secretary (in the case of Securities and Future Commission and Mandatory Provident Fund Schemes Authority). Except for the Mandatory Provident Fund Schemes Authority, there are statutory requirements for these commissions to table the reports on activities, statements of accounts and auditor's reports on the statement submitted to the Chief Executive or principal officers in the Legislative Council.

(6) Independence

It is worth noting that the commissions established in other jurisdictions have different degrees of independence from the government. At one end of the spectrum, some commissions are part of the government, such as the commissions in Singapore and South Africa. They are therefore not independent from the government. At the other end of the spectrum, some commissions, such as in England and Wales, do have a large degree of independence. In fact, it is specifically provided in the legislation that the commission shall not be subject to the direction or control of any minister of the Crown or

other government department in the exercise of its functions, except for administrative controls over the Commission's expenditure by the Treasury.

In between these two ends of the spectrum are cases like Ireland, New Zealand and Scotland. In Ireland, there are specific legislative provisions stating that the chief executive shall not question or express an opinion on the merits of any policy of the government or a government minister or the merits of the objectives of such a policy. In New Zealand, the New Zealand Charities Commission is an Autonomous Crown Entity which means that though it is independent of the government, it must however 'have regard' for government policy when directed by the government minister. In Scotland, the OSCR and the government has a Framework Agreement in establishing an overarching framework for policy and corporate engagement within which they operate and the OSCR also works closely with the Scottish Government's Charity Law Team.

In Hong Kong, it is specifically provided in the legislation relating to some commissions (such as the Equal Opportunity Commission or Office of the Privacy Commissioner for Personal Data) that they are not regarded as servants or agents of the Government or as enjoying any status, immunity or privilege of the Government.

**Table showing appointment of chairman and members and
composition of some statutory bodies**

Name of statutory organisation	Function	Composition	Method of appointment of chairman and members	Other remarks
1. Equal Opportunities Commission	The Equal Opportunities Commission is the statutory body which is responsible for implementing and administering the provisions of the Sex Discrimination Ordinance (Cap 480), the Family Status Discrimination Ordinance (Cap 527), the Disability Discrimination Ordinance (Cap 487) and the Race Discrimination Ordinance (Cap 602) in Hong Kong. It is an independent body, publicly funded by the Government.	The Commission consists of - (a) a Chairperson; and (b) not less than 4 or more than 16 other members Each being an individual who is not a public officer (section 63(3) of Cap 480).	The Chief Executive (section 63(3) of Cap 480).	<ul style="list-style-type: none"> • The Commission shall not be regarded as a servant or agent of the Government or as enjoying any status, immunity or privilege of the Government (section 63(7) of Cap 480). • The Commission shall cause proper accounts to be kept of all its financial transactions (para 18(1) to Schedule 6 of Cap 480). • The Commission shall after the expiry of a financial year, prepare a statement of the accounts of the Commission, which statement shall include an income and expenditure account and a balance sheet (para 18(2) to Schedule

Name of statutory organisation	Function	Composition	Method of appointment of chairman and members	Other remarks
				<p>6 of Cap 480).</p> <ul style="list-style-type: none"> • The Commission shall appoint an auditor who shall audit the accounts required and the statement of accounts and shall submit a report on the statement to the Commission (para 18(3) to Schedule 6 of Cap 480). • The Commission shall, not later than 9 months after the expiry of a financial year (or such further period as the Chief Secretary for Administration allows), furnish - <ul style="list-style-type: none"> (a) a report on the activities of the Commission during that year including a general survey of developments, in respect of matters falling within the scope of the Commission's functions; (b) a copy of the statement of

Name of statutory organisation	Function	Composition	Method of appointment of chairman and members	Other remarks
				<p>accounts; and</p> <p>(c) the auditor's report on the statement, to the Chief Secretary for Administration who shall table them in the Legislative Council (para 18(4) to Schedule 6 of Cap 480).</p> <ul style="list-style-type: none"> The Director of Audit may, in respect of any financial year, conduct an examination into the economy, efficiency and effectiveness with which the Commission has expended its resources in performing its functions and exercising its powers (para 19(1) of Schedule 6 of Cap 480).
2. Independent Commission Against Corruption	<p>Some of the major duties of the Commissioner include -</p> <p>(a) to receive and consider complaints alleging corrupt practices and investigate those complaints as he considers practicable;</p> <p>(b) to investigate-</p> <p>(i) any alleged or</p>	<p>The Commission consists of a Commissioner, a Deputy Commissioner and such other officers as the Chief Executive thinks necessary to assist the Commissioner in the performance of his functions (sections 3, 6 and 8).</p>	<p>The Chief Executive (section 5 of Cap 204).</p>	<ul style="list-style-type: none"> In each financial year, before a date appointed by the Chief Executive, the Commissioner shall forward to the Chief Executive, estimates of the expenditure of the Commission for the next financial year for his approval. The estimates shall be in such form

Name of statutory organisation	Function	Composition	Method of appointment of chairman and members	Other remarks
	<p>suspected offence under the Independent Commission Against Corruption Ordinance (Cap 204), the Prevention of Bribery Ordinance (Cap 201) and the Elections (Corrupt and Illegal Conduct) Ordinance (Cap 554);</p> <p>(ii) any alleged or suspected offence of blackmail committed by a prescribed officer by or through the misuse of his office;</p> <p>(iii) any alleged or suspected conspiracy to commit an offence under the Prevention of Bribery Ordinance (Cap 201) and the Elections (Corrupt and Illegal Conduct) Ordinance (Cap 554); and</p>			<p>and contain such information as the Chief Executive may require (section 14 of Cap 204).</p> <ul style="list-style-type: none"> • The Commissioner shall maintain proper accounts of such expenditure by the Commission as the Chief Executive may require (section 15(1) of Cap 204). • After the end of each financial year, the Commissioner shall prepare a statement of accounts during the previous financial year (section 15(2) of Cap 204). • The Director of Audit shall at any time be entitled to have access to all accounts maintained under section 15(1) and he may require such information and explanation as he thinks fit (section 16(1) of Cap 204).

Name of statutory organisation	Function	Composition	Method of appointment of chairman and members	Other remarks
	<p>(iv) any alleged or suspected conspiracy (by 2 or more persons including a prescribed officer) to commit an offence of blackmail by or through the misuse of the office of that prescribed officer;</p> <p>(c) to investigate any conduct of a prescribed officer which, in the opinion of the Commissioner is connected with or conducive to corrupt practices and to report thereon to the Chief Executive;</p> <p>(d) to examine the practices and procedures of Government departments and public bodies, in order to facilitate the discovery of corrupt practices and to secure the revision of methods of work or procedures which, in the opinion of the Commissioner, may be conducive to corrupt</p>			<ul style="list-style-type: none"> • The Director of Audit shall audit the statement of accounts prepared and report to the Chief Executive (section 16(2) of Cap 204). • The Commissioner shall, on or before 31 March in each year, or by such later date as the Chief Executive may allow, submit to the Chief Executive a report on the activities of the Commission in the previous year (section 17(1) of Cap 204). • The Chief Executive shall table the report in the Legislative Council (section 17(2) of Cap 204).

Name of statutory organisation	Function	Composition	Method of appointment of chairman and members	Other remarks
	<p>practices; and</p> <p>(e) to educate the public against the evil of corruption.</p> <p>(section 12 of the Independent Commission Against Corruption (Cap 204))</p>			
3. Securities and Futures Commission	<p>Some of the major functions of the Securities and Futures Commission provided under Securities and Futures Ordinance (Cap 571) are -</p> <p>(a) to take such steps as it considers appropriate to maintain and promote the fairness, efficiency, competitiveness, transparency and orderliness of the securities and futures industry;</p> <p>(b) to supervise, monitor and regulate the activities carried on by recognized exchange companies, recognized clearing houses, recognized exchange controllers or recognized investor</p>	<p>The Commission consists of a chairman, a chief executive officer and such number of other executive directors and non-executive directors as is determined by the Chief Executive. The number of members of the Commission shall not be less than 8. The number of non-executive directors of the Commission shall exceed the number of executive directors of the Commission. (paragraph 1 of Schedule 2 to the Securities and Futures Ordinance (Cap 571)).</p>	<p>The Chief Executive (para 1 of Schedule 2 to Cap 571).</p>	<ul style="list-style-type: none"> • The Commission shall, when required by the Financial Secretary, furnish to the Financial Secretary such information as he specifies on the principles, practice and policy it is pursuing or adopting, or proposes to pursue or adopt, in furthering any of its regulatory objectives or performing any of its functions, and the reasons (section 12 of Cap 571). • The Commission shall, not later than 31 December in each financial year of the Commission, submit to the Chief Executive for his approval estimates

Name of statutory organisation	Function	Composition	Method of appointment of chairman and members	Other remarks
	<p>compensation companies, or by persons carrying on activities regulated by the Commission under any of the relevant provisions, other than registered institutions;</p> <p>(c) to promote and develop an appropriate degree of self-regulation in the securities and futures industry;</p> <p>(d) to promote, encourage and enforce the proper conduct, competence and integrity of persons carrying on activities regulated by the Commission in the conduct of such activities;</p> <p>(e) to encourage the provision of sound, balanced and informed advice regarding transactions or activities related to financial products;</p> <p>(f) to promote understanding by the public of the securities and futures industry and</p>			<p>of its income and expenditure for the next financial year (section 13(2) of Cap 571).</p> <ul style="list-style-type: none"> • The Financial Secretary shall table the estimates as approved in the Legislative Council (section 13(3) of Cap 571). • The Commission shall keep proper accounts and records of its transactions. The Commission shall after the end of each financial year of the Commission, prepare financial statements (section 15(1) and (2) of Cap 571). • The Commission shall after the end of each financial year of the Commission, prepare a report on its activities during the financial year and send a copy of the report to the Financial Secretary who shall table it in the Legislative Council (section 15(3) of

Name of statutory organisation	Function	Composition	Method of appointment of chairman and members	Other remarks
	<p>of the benefits, risks and liabilities associated with investing in financial products;</p> <p>(g) to encourage the public to appreciate the relative benefits of investing in financial products through persons carrying on activities regulated by the Commission;</p> <p>(h) to promote understanding by the public of the importance of making informed decisions regarding transactions or activities related to financial products and of taking responsibility;</p> <p>(i) to secure an appropriate degree of protection for members of the public investing in or holding financial products, having regard to their degree of understanding and expertise in respect of investing in or holding financial products;</p> <p>(j) to promote, encourage and enforce -</p>			Cap 571).

Name of statutory organisation	Function	Composition	Method of appointment of chairman and members	Other remarks
	<p>(i) the adoption of appropriate internal controls and risk management systems by persons carrying on activities regulated by the Commission; and</p> <p>(ii) the adoption of appropriate internal controls and risk management systems by registered institutions in the conduct of activities regulated by the Commission;</p> <p>(k) to suppress illegal, dishonourable and improper practices in the securities and futures industry; and</p> <p>(l) to recommend reforms of the law relating to the securities and futures industry.</p>			
4. Mandatory Provident Fund Schemes Authority	Some of the major functions of the Mandatory Provident Fund Schemes Authority are-	<ul style="list-style-type: none"> The Authority consists of not fewer than 10 directors appointed by the Chief Executive. 	<p>The Chief Executive (section 6A(1) of Cap 485). In the case of appointment of members of the Mandatory Provident Fund</p>	<ul style="list-style-type: none"> After the end of each financial year of the Authority, the Authority must prepare a report as to -

Name of statutory organisation	Function	Composition	Method of appointment of chairman and members	Other remarks
	<p>(a) to be responsible for ensuring compliance with Mandatory Provident Fund Schemes Ordinance (Cap 485);</p> <p>(b) to register provident fund schemes as registered schemes;</p> <p>(c) to approve qualified persons to be approved trustees of registered schemes;</p> <p>(d) to regulate the affairs and activities of approved trustees and to ensure as far as reasonably practicable that those trustees administer the registered schemes for which they are responsible in a prudent manner;</p> <p>(e) to make rules or guidelines for the payment of mandatory contributions and for the administration of registered schemes with respect to those contributions;</p>	<ul style="list-style-type: none"> • Of the directors - <ul style="list-style-type: none"> (a) not fewer than 4 are to be executive directors; and (b) the remainder are to be non-executive directors. • Of the non-executive directors- <ul style="list-style-type: none"> (a) at least one but no more than 2 are to be persons who, in the opinion of the Chief Executive, represent the interests of participating employers; and (b) at least one but no more than 2 are to be persons who, in the opinion of the Chief Executive, represent the interests of relevant employees. • In appointing the directors, the Chief Executive must ensure that – 	<p>Schemes Advisory Committee, the Chief Executive must consult the Authority before appointment.</p>	<p>(a) the operation of the Ordinance during that year; and</p> <p>(b) the activities of the Authority during that year (section 61(1) of Cap 485).</p> <ul style="list-style-type: none"> • After preparing such a report, the Authority must deliver the report to the Financial Secretary, together with- <ul style="list-style-type: none"> (a) the financial statements of the Authority for the financial year to which the report relates; and (b) the report of the Authority's auditor on those statements (section 61(2) of Cap 485). • The Financial Secretary may publish the documents delivered in such manner as the Financial Secretary thinks fit (section 61(3) of Cap 485).

Name of statutory organisation	Function	Composition	Method of appointment of chairman and members	Other remarks
	<p>(f) to consider and propose reforms of the law relating to occupational retirement schemes or provident fund schemes; and</p> <p>(g) to promote and encourage the development of the retirement scheme industry in Hong Kong, including the adoption of a high standard of conduct and sound prudent business practices by trustees and other service providers.</p>	<p>(a) a majority of the directors are non-executive directors; and</p> <p>(b) the number of persons appointed to represent the interests of relevant employees is equal to the number of persons appointed to represent the interests of participating employers.</p> <p>(section 6A(1) to (4) of the Mandatory Provident Fund Scheme Ordinance (Cap 485)).</p> <ul style="list-style-type: none"> A board called the "Mandatory Provident Fund Schemes Advisory Committee" "強制性公積金計劃諮詢委員會" is established under section 6R of Cap 485. <p>This Committee consists of-</p> <p>(a) an executive director of the</p>		<ul style="list-style-type: none"> The Authority must, before the end of each financial year of the Authority, prepare a corporate plan for its next financial year (section 6J(1) of Cap 485). A corporate plan must specify - <ul style="list-style-type: none"> (a) the objectives of the Authority's activities for the financial year concerned; and (b) the nature and scope of the activities to be undertaken in order to achieve those objectives; and (c) a budget of the estimated expenditure for achieving those objectives (section 6J(2) of Cap 485). Before completing the preparation of a corporate plan, the Authority must submit a draft plan for approval by the Financial

Name of statutory organisation	Function	Composition	Method of appointment of chairman and members	Other remarks
		<p>Authority designated by the Authority; and</p> <p>(b) no fewer than 9, and no more than 11, other members appointed by the Chief Executive.</p> <ul style="list-style-type: none"> • The Chief Executive is to appoint one of the members of the Advisory Committee to be its chairperson and another of its members to be its deputy chairperson. • In such appointment, the Chief Executive must ensure that included among those persons are - <ul style="list-style-type: none"> (a) one or more persons who, in the Chief Executive's opinion, have knowledge of, or experience in, investments and financial management; and (b) one or more persons who, in the Chief Executive's 		<p>Secretary and must take into account any comments made by the Financial Secretary on the draft (section 6J(3) of Cap 485).</p> <ul style="list-style-type: none"> • The Financial Secretary may publish the corporate plan delivered by the Authority in such manner as the Financial Secretary thinks appropriate (section 6J(5) of Cap 485). • The Authority may, whenever it considers necessary, provide the Financial Secretary with a report as to any improvements that it considers to be necessary for the effective or efficient operation of the Authority (section 6K(1) of Cap 485). • The Financial Secretary may, from time to time, request the Authority to provide the Financial Secretary with a report as to-

Name of statutory organisation	Function	Composition	Method of appointment of chairman and members	Other remarks
		<p>opinion, have knowledge of, or experience in, the conduct of retirement benefit schemes; and</p> <p>(c) one or more persons who, in the Chief Executive's opinion, represent the interests of participating employers; and</p> <p>(d) one or more persons who, in the Chief Executive's opinion, represent the interests of relevant employees, and that the number of persons appointed to represent the interests of relevant employees is equal to the number of persons appointed to represent the interests of participating employers.</p> <ul style="list-style-type: none"> The Chief Executive must consult with the Authority before appointing the members 		<p>(a) the operation of the Ordinance; or</p> <p>(b) the activities of the Authority (section 6K(2) of Cap 485).</p> <ul style="list-style-type: none"> The Authority must keep accounting records correctly and explain its financial transactions and financial position so that - <ul style="list-style-type: none"> (a) true and fair financial statements can be prepared from time to time; and (b) those statements can be conveniently and properly audited (section 6N(1) of Cap 485). The Authority must ensure that the financial statements comply with any accounting standards notified to the Authority in writing by the Financial Secretary (section 6N(3) of Cap 485).

Name of statutory organisation	Function	Composition	Method of appointment of chairman and members	Other remarks
		(section 6R of Cap 485).		<ul style="list-style-type: none"> • Not later than 6 months after the end of each financial year of the Authority, or such longer period as the Financial Secretary approves in writing, the Authority must submit the financial statements prepared for the financial year to the Authority's auditor for auditing (section 6P(1) and (2) of Cap 485). • The Authority may invest money held in the MPFA Administration Account in any manner in which trust funds may be lawfully invested or in any other manner approved by the Financial Secretary (section 6Q of Cap 485).
5. Office of the Privacy Commissioner for Personal Data	Some of the major functions of the Privacy Commissioner for Personal Data are - (a) to monitor and supervise compliance with the provisions of Personal Data (Privacy)	The Personal Data (Privacy) Advisory Committee is established under section 11 of Cap 486. The Committee consists of - (a) the Commissioner, who	The Chief Executive (Section 5(3) of Cap 486).	The Commissioner is not regarded as a servant or agent of the Government or as enjoying any status, immunity or privilege of the Government (section 5(8) and (9) of Cap 486).

Name of statutory organisation	Function	Composition	Method of appointment of chairman and members	Other remarks
	<p>Ordinance (Cap 486);</p> <p>(b) to promote and assist bodies representing data users to prepare codes of practice for guidance in complying with the provisions of the Ordinance, in particular the data protection principles;</p> <p>(c) to promote awareness and understanding of, and compliance with, the provisions of the Ordinance, in particular the data protection principles;</p> <p>(d) to examine any proposed legislation that the Commissioner considers may affect the privacy of individuals in relation to personal data and report the results of the examination to the person proposing the legislation;</p> <p>(e) to carry out inspections, including inspections of any personal data systems used by data users which are departments of the</p>	<p>shall be the chairman; and</p> <p>(b) not less than 4 or more than 8 other persons, appointed by the Secretary for Constitutional and Mainland Affairs, of whom -</p> <p>(i) not less than 1 shall have no less than 5 years' experience in the processing of data; and</p> <p>(ii) not more than 1 shall be a public officer.</p> <p>The members of the Committee appointed under subsection (2)(b) shall hold office for such period and upon such terms as the Secretary for Constitutional and Mainland Affairs specifies in their respective appointments or from time to time (section 11(1) to (3) of Cap 486.)</p>		<ul style="list-style-type: none"> • The Commissioner shall cause proper accounts to be kept of all his financial transactions (para 4 of Schedule 2 of Cap 486). • The Commissioner shall after the expiry of a financial year, prepare a statement of the accounts of the Commissioner, which statement shall include in income and expenditure account and a balance sheet (para 4(2) of Schedule 2 of Cap 486). • The Commissioner shall appoint an auditor who shall audit the accounts and the statement of accounts and shall submit a report on the statement to the Commissioner (para 4(3) of Schedule 2 of Cap 486). • The Commissioner shall in any case not later than 9 months after the expiry of a financial year (or such further period

Name of statutory organisation	Function	Composition	Method of appointment of chairman and members	Other remarks
	<p>Government or statutory corporations;</p> <p>(f) for the better performance of his other functions, undertake research into, and monitor developments in, the processing of data and computer technology in order to take account of any likely adverse effects such developments may have on the privacy of individuals in relation to personal data; and</p> <p>(g) to liaise and co-operate with any person in any place outside Hong Kong-</p> <p>(i) performing in that place any functions which, in the opinion of the Commissioner, are similar to any of the Commissioner's functions under this Ordinance; and</p> <p>(ii) in respect of matters of mutual interest concerning the privacy of</p>			<p>as the Chief Secretary for Administration allows), furnish -</p> <p>(a) a report on the activities of the Commissioner during that year including a general survey of developments, during that year, in respect of matters falling within the scope of the Commissioner's functions;</p> <p>(b) a copy of the statement of accounts; and</p> <p>(c) the auditor's report on the statement,</p> <p>to the Chief Secretary for Administration who shall table them in the Legislative Council (para 4(4) of Schedule 2 to Cap 486).</p> <ul style="list-style-type: none"> • The Director of Audit may, in respect of any financial year, conduct an examination into the economy, efficiency and

Name of statutory organisation	Function	Composition	Method of appointment of chairman and members	Other remarks
	individuals in relation to personal data.			<p>effectiveness with which the Commissioner has expended his resources in performing his functions and exercising his powers (para 5(1) of Schedule 2 to Cap 486).</p> <ul style="list-style-type: none"> • The Director of Audit may report to the President of the Legislative Council the results of an examination conducted by him (para 5(4) of Schedule 2 of Cap 486).