

THE LAW REFORM COMMISSION OF HONG KONG

REPORT ON CHARITIES

EXECUTIVE SUMMARY

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."

Chapter 1: Introduction

2. 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.

3. The perceived limitations in the current system of oversight of charities were discussed in detail in the Consultation Paper and are outlined briefly in this chapter. 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.

Chapter 2: Recommendations on the definition of charity

4. In the Consultation Paper, the Sub-committee had recommended that there should be a clear statutory definition of what constitutes a charitable purpose.¹

Consultees' responses

5. 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.

Our view

6. We agree with the view expressed in the Consultation Paper that the case for a statutory definition is overwhelming. 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.

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

7. 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.

Categories of charitable purpose

"The prevention or relief of poverty"

8. 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.²

Consultees' responses

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

Our view

10. 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 purpose.

"The advancement of education"

11. In the Consultation Paper, the Sub-committee had recommended that "*the advancement of education*" as one of the heads of charitable purpose.³

Consultees' responses

12. The vast majority of the consultees who responded to this issue supported the inclusion of this head in the statutory definition of charitable purpose.

Our view

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

"The advancement of religion"

14. The Sub-committee had recommended in the Consultation Paper that "*the advancement of religion*" as one of the charitable purpose.⁴

² Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), paras 5.68 and 5.69.

³ Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), paras 5.70 to 5.73.

⁴ Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), paras 5.74 to 5.76.

Consultees' responses

15. The vast majority of the consultees who responded to this head supported its inclusion in the statutory definition.

Our view

16. 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 law⁵ and regarded in the community as charitable. We therefore recommend that this should be a head within the statutory definition of charitable purpose.

"The advancement of health"

17. 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.⁶

Consultees' responses

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

Our view

19. 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"

20. 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 purpose.⁷

Consultees' responses

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

Our view

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

"The advancement of citizenship or community development"

23. The Sub-committee had recommended in the Consultation Paper that "*the advancement of citizenship or community development*" should be one of the heads of charitable purpose included in the definition.⁸

⁵ *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.

⁶ Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), paras 5.77 to 5.79.

⁷ Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), paras 5.80 to 5.82.

⁸ Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), paras 5.83 to 5.85.

Consultees' responses

24. 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 Charities and Trustee Investment (Scotland) Act 2005 ("the Scottish 2005 Act").⁹

Our view

25. 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 arts, culture, heritage or science"

26. The Sub-committee had recommended in the Consultation Paper that *"the advancement of arts, culture, heritage or science"* should be one of the heads of charitable purpose.¹⁰

Consultees' responses

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

Our view

28. 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"

29. 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.

30. 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. 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

⁹ 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."

¹⁰ Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), paras 5.86 to 5.88.

be so designated, with consequential tax implications.

Consultees' responses

31. During the consultation process, a few respondents advocated the inclusion of this head in the statutory definition of charitable purposes.

Our view

32. 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 purpose under the new statutory definition.

"The promotion of religious or racial harmony"

33. Under the existing practice adopted by the Inland Revenue Department (IRD) 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 purpose.¹¹

Consultees' responses

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

Our view

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

"The promotion of equality and diversity"

36. Under the existing practice adopted by the IRD 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.¹²

Consultees' responses

37. There is general support for including this head in the statutory definition of charitable purpose from respondents who responded on this head.

Our view

38. It is clear from the responses that this head should be one of the heads for charitable purpose. We therefore recommend that this head should be included in the statutory definition of charitable purpose.

"The advancement of environmental protection or improvement"

39. Under the existing practice adopted by the IRD in Hong Kong, bodies whose

¹¹ Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), paras 5.113 and 5.114.

¹² Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), paras 5.115 and 5.116.

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 purpose.¹³

Consultees' responses

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

Our view

41. 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"

42. Under the existing practice adopted by the IRD 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 purpose.

Consultees' responses

43. There was general support among respondents who had responded on this head.

Our view

44. We recommend that this head should be included in the statutory definition of charitable purpose.

"The advancement of animal welfare"

45. The Sub-committee had recommended in the Consultation Paper that *"the advancement of animal welfare"* should remain as a charitable purpose under the new statutory definition.¹⁴

Consultees' responses

46. There was general support for including this head in the statutory definition of charitable purpose.

Our view

47. Based on the general support of the respondents, we recommend that this head should be included in the statutory definition of charitable purpose.

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

48. Under the existing practice adopted by the IRD in Hong Kong, bodies whose

¹³ Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), paras 5.117 and 5.118.

¹⁴ Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), paras 5.121 and 5.122.

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.

49. 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.¹⁵

Consultees' responses

50. The majority of the responses agreed to the inclusion of this head in the charitable purpose. However a few respondents expressed the view that it is too abstract and not entirely clear what this head is intended to cover.

Our view

51. We note that the majority view supported this recommended head. 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 therefore recommend that this residual head of "*any other purpose that is of benefit to the community*" should be one of the heads of the statutory definition of charitable purpose.

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

52. 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.¹⁶

Consultees' responses

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

Our view

54. 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*, non-governmental organisations (NGOs), human rights groups and academics.

¹⁵ Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), paras 5.123- 5.128.

¹⁶ Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), paras 5.101 to 5.112.

55. 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.

56. Based on detailed 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 purpose.

The need for a public benefit test?

57. Under the Sub-committee's recommendation, each of the proposed charitable purposes must be for the public benefit.¹⁷ 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.

Consultees' responses

58. 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 purpose.

59. 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, the definition of public benefit can become a matter of some contention.

Our view

60. To facilitate our consideration of this matter, we have studied the examples of other jurisdictions and evaluated the advantages and disadvantages of imposing the public benefit test.

61. 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"

62. 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,

¹⁷ Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at 79-80.

existing charities which fall within these three categories would have to satisfy the public benefit test.

63. 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.¹⁸

64. 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;**
- (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;**

¹⁸

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

(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

65. 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

66. 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.

67. 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.

Our view

68. 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.

69. 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

70. 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.¹⁹

Consultees' responses

Requirement for registration

71. The majority of the consultation respondents supported the Sub-committee's proposal in relation to the requirement of registration.

Lists maintained by the IRD and the Companies Registry

72. For those respondents who were not in support of having a registration system, most were of the view that the IRD 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 IRD, which they felt would defeat the purpose of setting up a registration system.

73. Some respondents, while supporting the requirement for registration, suggested that since the IRD has maintained a record of over 6,000 organisations²⁰ which are granted tax exemption, the simplest way forward would be for the IRD to put together a register of charitable organisations based on the Department's current list.²¹

74. 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

¹⁹ Recommendation 4, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at para 7.37.

²⁰ 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.

²¹ 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.

the framework for co-ordination between different Government departments.

Exemption from registration

75. A number of respondents expressed the view that certain types of charitable organisations, such as religious organisations, small charities and statutory charities should be exempted from registration requirements.

Other suggestions on a registration system

76. The Hong Kong Bar Association took the view that the concept of "*any charitable appeal*" was vague and arguably too broad.²² 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 the public*" should be substituted by "*solicit from the public for the donation of cash or its equivalent*".

Public inspection

77. 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

78. 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.

79. 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.

Public notification

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

Our view and final recommendations

Registration generally

81. 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.

²² 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.

Whether exemption of certain types of charities is appropriate

82. 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 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.²³ 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

83. We also note that there was the suggestion of grandparenting of existing charitable bodies. We agree 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.

84. Based on the circumstances and reasons set out in Chapter 2 of the Report,²⁴ 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

85. 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

86. 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

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

88. Similarly, a large majority of the respondents agreed 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. 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

89. We note, however, that there is some support from the respondents for the IRD and the Companies Registry to establish and maintain a list of registered charities. However, 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

²³ Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at para 7.33.

²⁴ Law Reform Commission of Hong Kong, *Report on Charities* (Dec 2013), at paras 2.220 to 2.222.

system for charities.

90. 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 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

91. 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.

92. To achieve these objectives, the Sub-committee had considered that the monitoring of charities should be based on the principles set out below.²⁵

(1) Compliance with charitable objects

93. 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

²⁵

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

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

94. The Sub-committee had proposed that registered charitable organisations should be required to file an annual activity report to the future charity commission.²⁶ 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.²⁷

Consultees' responses

95. 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.

(3) Disclosure of interests and matters relating to governance

96. 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.²⁸

Consultees' responses

97. 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.

(4) Financial reporting

Filing accounts and statements

98. 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.

The Sub-committee had recommended in the Consultation Paper that:

- (1) Registered charitable organisations with an annual income exceeding

²⁶ Recommendation 5, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 8.18 to 8.20.

²⁷ Same as above.

²⁸ Recommendation 6, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 8.21 to 8.24.

\$500,000 should be required to file an auditors' report and financial statements with the future charity commission.

- (2) Without prejudice to the statutory requirements under the Companies Ordinance (Cap 32), registered charitable organisations with an annual income not exceeding \$500,000 should be required to file financial statements certified by the Board of these charitable organisations with the future charity commission.
- (3) The auditor's report and financial statements submitted by charitable organisations to the future charity commission should be accessible to the public.

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.²⁹

Consultees' responses

99. 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.

Exemption

100. It was expressed by some respondents that small charitable organisations may not have the financial resources to pay for such professional expenses.

101. 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. 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.

Filing of activities report and financial statements annually

102. The majority of the respondents expressing views on recommendation relating to the obligation for filing of activities report and financial statements annually were in support of this proposal.

Contents of the annual report of activities

103. 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

²⁹ Recommendation 7, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 8.25 to 8.29.

- 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.

104. 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

105. The Sub-committee had 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.³⁰

Consultees' responses

106. A majority of the respondents supported this proposal. Those respondents

³⁰ Recommendation 8, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 8.30 to 8.33.

who were not in favour were also generally those who were not in support of the establishment of a charity commission.

The position on financial reporting standards in Hong Kong

107. 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)³¹ 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.³²

(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.³³ 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.³⁴ 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)***

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)³⁵

³¹ 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:

³² <http://www.hkicpa.org.hk/en/standards-and-regulations/standards/financial-reporting/>. 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

³³ <http://www.hkicpa.org.hk/en/standards-and-regulations/standards/financial-reporting/>. "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.

³⁴ See: <http://www.hkicpa.org.hk/en/standards-and-regulations/standards/hkfrs-pe-info-centre/>.

³⁵ 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

and by other entities that meet the eligibility requirements contained in this standard.³⁶

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

Consultees' responses

109. 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.

110. 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 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.

Our view

111. The rationale behind our objective to improve the accountability of charities is threefold. Firstly, charities are granted tax exemption by the IRD. 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.³⁷ 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.

112. 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 IRD 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.

113. 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

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.

³⁶ HKICPA, Small and Medium-sized Entity Financial Reporting Framework and Financial Reporting Standard, revised February 2011.

³⁷ 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 at paras 1.32 to 1.47 of this report.

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

114. Having considered the relevant issues, the views of all our consultees and the experience of overseas experience, 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.

115. 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.

116. 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

117. 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 charities.

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

118. 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 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.³⁸

Consultees' responses

119. 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.

120. 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.

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

121. 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 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.³⁹

122. 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

³⁸ Recommendation 9, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 8.34 to 8.42.

³⁹ Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at para 8.44.

the purpose of an investigation, would be guilty of an offence.⁴⁰

Consultees' responses

123. A vast majority of the respondents expressing views on this recommendation were in support of this proposal.

Enforcement and remedies

124. 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.

125. 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.⁴¹

Consultees' responses

126. 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.

Proposed power to protect properties of charities in extreme cases

127. 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.⁴²

Consultees' responses

128. 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.

Our view

129. We are aware from the responses that there is a strong call from the general

⁴⁰ Recommendation 10, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at para 8.44.

⁴¹ Recommendation 11, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 8.45 to 8.50.

⁴² Recommendation 12, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at para 8.51.

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.

130. 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.

131. 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 IRD, de-registration, or referral of the case to law enforcement agencies. In a case which warrants de-registration of a charitable organisation, the Social Welfare Department, the Office of Licensing Authority (OLA) and any other relevant Government bureau/departments should be notified for record or appropriate follow-up action.

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

132. 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, the Food and Environmental Hygiene 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.⁴³

133. 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 FEHD and the former Television and Entertainment Licensing Authority (now the OLA) in relation to

⁴³

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

authorising charity fundraising activities in public places and those involving lotteries.⁴⁴

Consultees' responses

134. 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.

Our view

135. 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.

136. 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.

137. 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 IRD 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.

138. 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

⁴⁴ Recommendation 13(1) and (2), Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 9.43 and 9.44.

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 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.**

Public access to information relating to charitable fundraising activities

139. 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.⁴⁵

Consultees' responses

140. It was widely expressed by respondents to the Consultation Paper that the transparency of charities 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.

⁴⁵ Recommendation 13(3), Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011).

141. 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.

Our view

142. 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

143. 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).⁴⁶

Consultees' responses

144. A large majority of the respondents who expressed views on this recommendation showed support for it.

Our view

145. 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).

Other types of fundraising activity

146. 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

⁴⁶ Recommendation 14, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 9.45 to 9.48.

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.

147. 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.

Consultees' response

Donations via the internet

148. 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.

149. 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.

150. 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.

Our view

151. 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.

152. 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.

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

153. 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.⁴⁷

Further possible issues for consideration in the future

154. The Sub-committee had recommended in Recommendation 13 of the Consultation Paper that the powers and duties currently exercised by the Social Welfare

⁴⁷ Recommendation 15, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 9.49 to 9.51.

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.

155. 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.⁴⁸

Consultees' responses

156. 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.

157. On the issue of the hiring of elderly persons to solicit donations on the street, a view was expressed 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 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

158. 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.

159. 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.

160. 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

⁴⁸ Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 9.54 to 9.57.

taken to ensure that they will not infringe any existing law regarding discrimination on the grounds of age or disability.

161. 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.

162. 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.**

163. 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

164. 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 bureaux 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.⁴⁹

Consultees' responses

165. 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.

166. Many respondents expressed the view that the relevant authorities should encourage complaints by members of the 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

⁴⁹ Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 3.8 and 3.9.

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.

167. 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

168. 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

169. 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.

170. 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.

Our view

171. In relation to applications for charitable fundraising permits and licences, both the OLA and the Social Welfare Department require applicants to provide audited reports of their specified fundraising events as a condition for approval. 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. The different approving authorities currently appear to be lacking in co-ordination in dealing with applications for charitable fundraising licences and permits.

172. We consider that there should be better co-ordination among different Government bureaus or departments in dealing with matters related to charitable fundraising activities.

173. 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).

174. 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

175. The Sub-committee had recommended in the Consultation Paper :

- (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.⁵⁰

Consultees' responses

176. 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.

Our view

177. 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.

178. 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 Australian Charities and Not-for-profits Commission 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 Singapore⁵¹), we consider that the IRD should maintain a robust role in overseeing the activities of charities for tax-exemption purposes.

179. 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.

⁵⁰ Recommendation 16, Law Reform Commission of Hong Kong Charities Sub-committee, *Consultation Paper on Charities* (June 2011), at paras 10.39 to 10.42.

⁵¹ 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

180. 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.⁵²

181. In line with the English model, the Sub-committee had recommended 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.⁵³

182. 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.⁵⁴

Consultees' responses

183. 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.

Our view

184. 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 application is desirable and should be recommended, and further, that the scope should be in line with the English statutory model.

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 2011⁵⁵) 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:**

⁵² Recommendation 17, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at paras 11.26 and 11.27.

⁵³ Same as above.

⁵⁴ Same as above.

⁵⁵ See Law Reform Commission of Hong Kong, *Report on Charities* (Dec 2013), at paras 8.18 to 8.22.

- (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.

Chapter 9

Recommendations regarding the establishment of a charity commission in Hong Kong

The objectives of the future charity commission

185. 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.⁵⁶

The functions and powers of the future charity commission

186. 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.

187. 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;
- (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.⁵⁷

⁵⁶ Recommendation 18, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at para 12.11.

⁵⁷ Recommendation 19, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at para 12.43.

Appeal mechanism

188. 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.⁵⁸

Consultees' responses with regard to the establishment of a future charity commission

189. 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.⁵⁹

190. 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.

191. 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.

192. As regards the Sub-committee's proposal on the appeal mechanism,⁶⁰ 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.

Our observations in the light of the responses from the public

193. 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

⁵⁸ Recommendation 20, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011), at para 12.44.

⁵⁹ We do note in passing that a large number of comments from different parties were exactly the same in content.

⁶⁰ Recommendation 20, Law Reform Commission of Hong Kong, *Consultation Paper on Charities* (June 2011).

was of major concern, and has obliged us to reconsider the terms of our original proposals under this head.

Our conclusions

194. 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,⁶¹ Ireland⁶² and Scotland⁶³ 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.⁶⁴)

195. 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.

196. 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.

197. 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

⁶¹ 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.

⁶² The Charities Regulatory Authority was established under section 13 of the Irish Charities Act 2009.

⁶³ The Scottish Charity Regulator was established under section 1 of the Charities and Trustee Investment (Scotland) Act 2005.

⁶⁴ 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).

this, alignment of the duty of the commission to register charities and the duty of the IRD 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.

198. 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.

199. 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.

200. Furthermore, we have recommended earlier in this report that there should be a clear statutory definition of what constitutes a charitable purpose.⁶⁵ 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.

⁶⁵

Recommendation 1, Law Reform Commission of Hong Kong, *Report on Charities* (Dec 2013), Chapter 2.