



STEP

STEP HONG KONG LIMITED

RESPONSE TO THE LAW REFORM COMMISSION'S CONSULTATION PAPER ON THE REFORM OF CHARITY LAW IN HONG KONG

GENERAL COMMENT

STEP would like to acknowledge the excellent work of the Law Reform Commission in researching the issues involved in charity law reform and in preparing the Consultation Paper. We consider that the proposals made by the Law Reform Commission are, in general, sound and well thought out. That said, we do, however, consider that in addition to merely reforming charities law in Hong Kong, greater focus should also be placed on advancing the law in this area so as to incorporate into Hong Kong law some of the innovative charitable structures and strategies currently being developed by other jurisdictions and by philanthropists and social entrepreneurs worldwide. We should be seeking to make Hong Kong a jurisdiction of choice for the establishment and operation of charities, not just by Hong Kong donors, but by donors from around the world. Hong Kong is a leading financial centre and has the legal and financial infrastructure to make this possible, as long as our charities law keeps pace with global developments in other modern countries.

Response to Recommendations 1 to 4

These recommendations deal with the definition, the possible legal structures and registration requirements of charities in Hong Kong.

The following are our responses to the specific questions posed:

Question 1

Do you think that there should be a clear statutory definition of what constitutes a charitable purpose?

Yes, there should be a clear statutory definition of what constitutes a charitable purpose. Regardless of the clarity or lack thereof that can be found in existing case law with respect to the various heads of charity, the definition of a charitable purpose by statute is not only beneficial in the sense that it offers certainty to various stakeholders, but also is a statement

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of the types of objectives that a society on the whole deems to be worthy of charitable status, and its corresponding benefits and burdens. The criticism that the use of statutory definitions rather than case law development may result in inflexibility as social circumstances change is adequately answered by the inclusion of a residual head of charity. Further, the possibility of future legislative amendments to broaden the list of heads of charity should not be discounted.

As a general comment, and as discussed in more detail in this response, we think that the Law Reform Commission should also look to the United States for ideas and potential solutions to some of the issues canvassed in the report, not just to the English law based jurisdictions cited in the report.

Question 2

If you have answered “yes” to Question 1, please also answer the following questions:

- (a) Do you think that the statutory definition of what constitutes a charitable purpose that is exclusively charitable should include all the heads of charitable purpose set out in Recommendation 2?**

Yes, the proposed heads of charity do not appear to be controversial. For consistency, however, it may be worthwhile to consider enacting amendments in respect of the Inland Revenue Ordinance and Registered Trustees Incorporation Ordinance to standardize the purposes recognized as charitable across all legislation.

- (b) If not, which head or heads do you think should be deleted from the list? Which should be amended, and how? Are there any other heads which you think should be added to the list of heads of charitable purpose?**

It may be worthwhile to consider whether to grandfather in existing charities, i.e. any organisation that is currently regarded as charitable for HK tax purposes or under other legislation.

One issue that may be clarified legislatively is whether “health” refers only to physical health (which is the restriction under common law), or includes mental health as well. For example, will an organisation to promote public participation in chess be considered to be charitable on the basis that it promotes mental health?

- (c) Do you think that charities falling under any of the heads of charitable purpose must be also for the public benefit?**

The rationale for having a public benefit requirement can be dissected into two parts. The first is that the requirement of a public benefit is so fundamental to the concept of charity that a purpose must benefit the public before it can be considered to be charitable, the second is that before an organisation can claim tax exemption for its income, it must show that it is "worthy" of such tax exemption in that the purposes towards which such income is to be expended benefits the public.

In the latter case, the public that is being considered is likely to be restricted to the tax jurisdiction where the tax exemption is being granted, and this can be (and currently is) addressed through the relevant tax legislation.

In the former, the question can be further dissected into (a) should this requirement apply to charitable purposes that currently have a presumption of public benefit, and (b) how should public benefit be defined.

Historically, purposes for the relief of poverty, the advancement of education and the advancement of religion are prima facie charitable and for the public benefit. However, this presumption of public benefit may no longer hold in the modern context and arguably there should now be an express requirement. The charity commission should however note that the definition of public benefit can become a matter of some contention.

(d) Do you think that "*The advancement of human rights, conflict resolution or reconciliation*" should be included in the statutory list of heads of charitable purpose?

The categories recognized as heads of charity should, ideally, represent the broad consensus among the public as to the purposes which are sufficiently important to be considered for special fiscal as well as regulatory treatment. It is difficult, especially in the case of human rights, to distinguish between political and charitable purposes, especially given how politicalised the concept of "human rights" is. However, this consideration may not apply for conflict resolution or reconciliation. There is growing interest in NGOS that focus their resources primarily on conflict resolution and reconciliation, and which are strictly apolitical. It may therefore be worthwhile to consider having "the advancement of conflict resolution or reconciliation" as a recognized head of charity.

Question 3

Do you think that the various existing legal forms for charities should be reformed?

No. Each charitable organisation should be allowed the flexibility to determine, based on its own circumstances, the most suitable legal form. Restricting organisations to specific legal forms, particularly if the specified legal form is a corporation, may very well increase the cost of maintaining that legal form, and be detrimental to grassroots charitable initiatives.

The only proviso to the above is that we suggest that the Law Reform Commission consider social enterprise organisations. This is a growing area in the United States and in other countries around the world. A legal form being adopted in a number of states of the United States is known as "L3C" status, or low-profit limited liability status. This is a hybrid of a charity and a for-profit business. These kinds of social enterprise organisations are of great interest to philanthropists globally, because they are designed to ensure sustainability and greater leverage of available capital.

Question 4

If you have answered "yes" to Question 3, please also answer the following questions:

- (a) Do you think that the current system of allowing a variety of legal forms of charitable organisations to exist should continue, and if so, what modifications, if any, should be made to it?**
- (b) Alternatively, do you think that a unitary approach of imposing one uniform model of charitable organisation structure should be adopted, and if so, what form should that model take?**

Question 5

Do you agree that all charitable organisations which (a) make any charitable appeal to the public; and / or (b) seek tax exemption should be required to register?

Yes. A charitable organisation that seeks public funding whether directly in the form of an appeal to the public, or indirectly through tax exemption should be subject to regulatory oversight.

Question 6

If you agree that charitable organisations should be registered, but do not agree with the pre-conditions for registration set out in Question 5(a) and (b), please answer the following questions:

- (a) Which pre-condition(s) do you think should not be required, and why? Are there other pre-conditions which you think should be included, and why?**

We suggest that there be an 'opt-in' facility for charitable organisations which do not make any charitable appeal to the public or do not wish to seek any tax exemption (and indeed might not be eligible for the profits tax exemption because of the level of foreign grant making activity) but might nevertheless wish to be regulated. For example, a foreign donor might want to establish a charity in a jurisdiction where he can be confident that the charity will be regulated effectively after his death.

The question arises whether, if a charity withdraws its claim for tax exemption at a later date it will be possible to 'opt-out' from regulation thereafter. The argument against this is that it may still be in possession of funds that were exempted from tax. However it is conceivable if we have the 'opt-in' facility proposed above, that someone might want to 'opt-out' later without having received any interim tax benefits.

- (b) Do you agree that the list of registered charitable organisations should be established and maintained by the future charity commission?**

Yes. It is logical that the regulator be the person who maintains this list.

- (c) Do you agree that this list should be available for public inspection?**

Yes.

- (d) Do you agree that the application process for registration should not be subject to public notification?**

Yes.

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

Generally yes. However, the charity commission should work with other regulatory bodies such as the Companies Registry to ensure that names that have already been used cannot be used for charitable bodies unless the registered owners of these names have consented.

Response to Recommendations 5-8 relating to Trustees' duty to account

Introduction

As with the whole Consultation Paper, the section on trustees and reporting is well-researched, clear and very sensible. There is nothing here with which we disagree. We would, however, suggest that the recommendations are made more detailed in certain cases. This is because the overall aim of the proposals is to improve the governance and transparency of charities in Hong Kong and unless the duties of those ultimately in charge of them are set out in reasonable (though not onerous) detail, there could still be scope for mismanagement.

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

Question 7

Do you think that registered charitable organisations should be required to file an annual activity report to the future charity commission, and if so, should the report be provided in a standard form and should it cover the list of matters set out in Recommendation 5? Are there any matters which you think should be deleted from the list? Are there any matters which should be added?

Registered charities should be required to file an annual activity report with the future charity commission because they typically seek both donations from the public and tax exemption: it is in the interests of donors and taxpayers that they justify this publicly and transparently.

The annual activity report should be in a standard format to ensure all significant issues are covered. It might be appropriate to have two formats, as in Recommendation 7, so that charities with an annual income over HKD500,000 have to complete a fuller report than those earning less. There should be a clear reporting year for each charity and deadlines for reporting. The activity report should be made public.

The items listed for inclusion in Recommendation 5 are the bare minimum.

In the interests of transparency we would suggest adding the following:

- a) Which of the definitions proposed in Recommendation 2 (or other accepted definition) applies to the charity
- b) The objects or rationale of the charity (as well as changes that have occurred or are intended)
- c) Who the directors and trustees are (names, employment and brief biographies) and the actual registered address of the charity (as well as changes to these as stipulated in Recommendation 5)

- d) Any conflicts of interest and personal interests of trustees/ directors (see answer to Q8 below)

The activity report should not, however, be too onerous for smaller organisations staffed purely by volunteers and nor should it require busy staff of, for instance, hospitals and schools, to duplicate work unnecessarily.

The annual activity report could usefully be combined with the publication of financial statements or audited accounts set out in Recommendation 7.

The annual activity report should in no way replace the reporting required of charities which currently have to report to the HK Government for other reasons as in the case of charities which are, for instance, schools, hospitals and registered companies.

If the new regulator is also going to be responsible for administering tax exemption status, then it will be necessary to ensure that the annual activity reporting (whatever the size of charity) provides the information necessary to effectively monitor the requirements for such status. Further the regulator's information powers will need to be as effective as those the IRD have today to enforce the tax laws, in order to determine whether the charity remains eligible for exemption.

This is considered further in relation to question 27 below.

Question 8

Do you think that charity trustees or directors of a registered charity should be under a duty to declare any conflicts of interest and personal interests? (See Recommendation 6.)

The charity trustees and directors should definitely be under a duty to declare any conflicts of interest and personal interests. These should be included in at least the first annual activity report after the appointment of the individual concerned to ensure transparency.

It would be helpful if the future Charity Commission could issue some guidance as to what constitutes a conflict of interest. Some consideration should also be given as to how to handle 'de minimis' matters. For example if a trustee is a small shareholder in a quoted company which has the benefit of a contract with the charity of which he is the trustee.

See below under general comments for further discussion of what duties trustees should have.

Question 9

Response to Recommendation 7 proposes that:

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

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

Recommendation 7 on the annual submission and publication of audited accounts/ financial statements seems entirely reasonable given that charities typically seek both donations from the public and tax exemption.

Possibly charities which had income of over HKD500,000 in the year preceding the year being reported but less than that subsequently should also have to produce audited accounts to explain the drop in income.

In certain jurisdictions, asset size is also considered in determining whether a charity falls into the larger or smaller category. This should also be considered in the interests of transparency.

It might help smaller charities (those with incomes below HKD500,000 per year) as well as potential donors if the required financial statements were in a set format with guidelines for completion.

There should be a clear reporting year for each charity and deadlines for reporting; and the reports should be made public.

The reports should identify and explain funds raised and spent overseas and give some explanation of overseas affiliations and operations.

Question 10

Do you think that for every charity registered with the future charity commission, an activities report and financial statements should be filed with the future charity

commission on an annual basis, and if so, what should be the contents included in the annual report of activities? (See Recommendation 7.)

Yes: this should be a basic requirement given that charities typically seek both donations from the public and tax exemption. These documents should be produced within a certain deadline and made public.

As suggested in the answer to Q7, the annual report of activities should include:

- Which of the proposed definitions apply to the charity
- The objects or rationale of the charity (as well as changes made to these)
- An outline of the charity's structure and operations
- Who the directors and trustees are (names, employment and brief biographies) and the actual registered address of the charity (as well as changes to these as stipulated in Recommendation 5)
- Any conflicts of interest and personal interests of trustees/ directors
- Confirmation by the trustees that the charity has operated in accordance with any code of governance set forth by the proposed Charities Commission or any other branch of the Hong Kong government
- Activities carried out during the year – how the objectives of the charity have been met
- A record of the dates of board meetings and how many trustees attended these
- The audited accounts or the financial statements of the charity according to income level
- *For discussion perhaps: for larger charities -*
 - a) *should auditors match minutes of board meetings to subsequent activity?*
 - b) *should charities whose main purpose is to make donations have an auditable process for proposing, agreeing, making and following up donations?*

Question 11

Do you think that charity trustees or directors of a registered charity should be under a statutory duty to keep proper accounting records of the charity which are sufficient to show and explain all transactions of the charity, and if so, should such records be retained for at least seven years? (See Recommendation 8.)

Yes: again, this is in the interests of the transparency and accountability which may reasonably be expected of a body seeking funding from the public and tax exemption.

General comments

1. The development of a code of governance for charities is suggested in the text of the Consultation Paper (eg para 8.24) but it is not clearly the main subject of a recommendation. Such a code would be of valuable assistance to all those involved with charities or donating to them.

The development of a code of governance should be a clear recommendation.

2. A code of governance could give guidance on the selection of trustees given the importance of appointing people who have the relevant experience and adequate time. Note page 230 para 18 of the Consultation Paper on how Irish law excludes certain categories of people from being trustees.
3. Paras 8.21 and 8.31 of the Consultation Paper, and Recommendations 6 and 8 discuss the duties of trustees to declare conflicts of interest and to maintain proper accounting records.

There is a need, however, for discussion of the broad responsibilities of trustees - and the limits of these.

Recommendations 6 and 8 could usefully be taken further and include a principle of duty of care according to which trustees and directors were obliged to be aware of the main points of law and governance relating to charities and to implement them. These requirements should, however, be reasonable so as not to discourage people from serving as trustees. See page 235 para 32 of the Consultation Paper on the law in Scotland: *'Section 66 of the (Charities and Trustee Investment (Scotland) 2005) Act sets out the general duty of care that charity trustees must follow. Charity trustees are required to act in the interests of the charity and to ensure that the charity acts consistently with its purposes and that they act with a level of care and diligence that is reasonably expected of someone managing another's affairs'*.

4. Given, however, that trustees cannot monitor the daily minutiae of a charity, should responsible officers be designated who are also accountable to the Charities Commission, or would this allow trustees to side-step their responsibilities? (see 8.37 of the Consultation Paper)
5. To what extent should charities registered in Hong Kong be expected to be able to account for expenditure outside the HKSAR (as in the Sichuan earthquake)?
6. The new Charities Commission would have to have adequate resources to provide adequate supervision.

Response to Recommendations 9 – 12 and 16 – 20

These recommendations focus on the regulation of the charity sector in Hong Kong, in particular the establishment of a Charity Commission as regulator, the powers that body is to have including the power to investigate, to deregister charities, to suspend and remove charity trustees.

Question 12

Do you agree that the future Charity Commission should be vested with the power to investigate any alleged mismanagement and misconduct of charitable organisations with regard to its charitable objects? (See recommendation 9)

It is difficult to see how the proposed commission could carry out its functions without an adequate power of investigation. This will only help bolster the credibility of the commission and the transparency of the charities which it investigates. While confidentiality is important, the Charity Commission should, wherever possible, publish a summary of its findings after each investigation. Where the charity concerned is given a clean bill of health, this will preserve the good name of the charity. If, on the other hand, there are shortcomings then it will give the public confidence to see that any inadequacies are being promptly and firmly addressed. There also needs to be a 'gateway' in the legislation so that the regulator can relay details of its findings to law enforcement agencies where this is appropriate, if, for example, evidence of possible criminal activity has been uncovered.

Question 13

If you have answered 'yes' to question 12, do you agree that in the exercise of this power to investigate alleged mismanagement and misconduct of a charitable organisation, the future Charity Commission should have power, in respect of a particular charity under investigation, to investigate the charity's funding, property and activities and to obtain relevant information, including documents, records, books and accounts from the charity? (See recommendation 9.)

These are all necessary ancillary powers to the power of investigation. Any investigation would be entirely toothless without such powers. Even if the exercise of such investigative powers is not itself subject to a right of appeal, they would be subject to judicial review by the Court of First Instance, as they are clearly powers of a public nature subject to the Court's supervisory jurisdiction.

Question 14

Do you agree that during the course of investigations of the type set out in question 13, there should be appropriate safeguards to ensure confidentiality? (See recommendation 9)

See answer to question 12

Question 15

Do you agree that any person who intentionally or recklessly provides false and misleading information to the future Charity Commission or its appointed investigators, or fails to provide the information required for the purposes of investigation, or alters, conceals or destroys a document required for production for the purpose of an investigation, should be guilty of a criminal offence? (See recommendation 10)

Again these are necessary ancillary powers to the power of investigation. It is difficult to see how the regulator's investigations could be effective unless those who are deliberately obstructive are brought to book before the courts.

Question 16

Do you agree that the future Charity Commission should be vested with powers relating to enforcement and remedies in cases of non-compliance by charities with their legal obligations? (See recommendation 11).

Yes, such powers are essential to ensure the effectiveness of the new regulator.

Question 17

If you have answered 'yes' to question 16, do you agree that these powers should include, but not be limited to:

- 1. deregistration of a charity from the Register of Charities;**
- 2. referring criminal offences to appropriate law enforcement agencies;**
- 3. referring possible civil actions to the Secretary for Justice; and**
- 4. powers for the purpose of protection of property of charities**

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

These powers should all be among those granted to the new commission. Consideration should also be given to conferring a power similar to that contained in section 32 of the UK Charities Act 1993. This permits the English Charity Commission to sue on behalf of the charity where the trustees themselves have failed to do so. This has proved a useful power in England where, for example, the continuing trustees of a charity may be slow or unwilling to take action against a trustee or a former trustee who has committed serious breaches of trust such as dishonesty in relation to charity funds. It may prove unduly cumbersome to reserve this power to the Secretary for Justice as proposed in the report. It is also essential that if a charity is deregistered, steps are taken to ensure that any assets remaining are taken over by the commission who can ensure that such assets are properly applied for charitable purposes. This could, if necessary, be achieved by the commission using its proposed cy-près powers (See recommendation 19).

Question 18

Do you think that the future Charity Commission should be vested with the power to protect charities' property in cases of misconduct or mismanagement in their administration? (See recommendation 12).

Yes, such powers should be included. Protection of charitable assets from the dishonesty or other unlawful activities of charity trustees, employees or others is essential for the maintenance of public confidence in this sector.

Question 19

If you have answered 'yes' to question 18, do you agree that this power should include, but not be limited to, the powers to:

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

as listed in recommendation 12? If not, which power should not be included? Which additional powers to protect property of charities, if any, should be given to the future Charity Commission?

Yes, these powers are essential to protect charity property. The power to suspend or remove a trustee or director should be extended to a member of a charity which is a company limited by guarantee. Experience elsewhere has shown that if the director of an incorporated charity is suspended or removed from office, he may still be able to cause difficulties for the charity if he is permitted to continue as a member by, for example, attending and voting at meetings of the membership.

Question 26

Do you agree that existing powers of tax exemption and functions of periodic review of charities for taxation purposes should remain with the Inland Revenue Department? (See recommendation 16(1)).

In order to give effect to the principle of a 'one stop shop' for the regulation of charities, the functions of the Inland Revenue Department in this area should be kept to an absolute minimum.

Question 27

Do you agree that tax exemption should be granted to a charity by the Inland Revenue Department only when the charity has been registered with the future Charity Commission and, subject to the this, there should be no change to the existing law on the taxation of charities in Hong Kong? (See recommendations 16(2) and (3)).

Our initial view was to query why any application for exemption to the Inland Revenue Department, following registration as a charity, should be necessary. Once a charity is registered, it should be exempt from tax by operation of law. What it is needed, is an administrative arrangement to ensure that the Inland Revenue Department is kept up to date with new registrations and de-registrations. If a charity engages in non-charitable activities that jeopardise its eligibility for the tax exemption then it should primarily be a matter for the Charity Commission. The carrying out of non-charitable activities will be likely to amount to a breach of trust as being *ultra vires* its objects. That will be a matter for investigation by the Charity Commission who should pass their findings to the Inland Revenue Department if it is appropriate to do so.

However exemption from Hong Kong taxes is not necessarily an automatic function of being accorded charitable status. It is not necessarily the case that actions that disqualify tax exemption will be *ultra vires* and amount to a breach of trust. In the case of exemption from profits tax for example there are certain additional requirements, including a requirement that the charitable funds are not expended substantially abroad. The IRD will have built up substantial experience in handling this issue, whereas the Charity Commission may not

necessarily be staffed with people with a contentious tax background. We would have some reservations about the Charity Commission taking over responsibility for this without further analysis.

We should also have in mind the fact that foreign authorities might well be interested in the activities of the charities (indeed one of the pressures for regulation of not for profits comes from supra-national bodies for this reason) and make requests for information about the charity under mutual cooperation treaties, tax information exchange agreements or comprehensive double tax treaties. The ramifications of the Charity Commission being the primary regulator and the fact that certain information collection powers lie under the Inland Revenue Ordinance and subordinate legislation will be relevant in this regard.

We also suggest that consideration be given to a “de-linking” of the status of an entity as a not-for-profit or tax exempt entity, from the status of an entity as one that provides tax deductions to donors. The United States recognizes that there are non-profit-making organisations which, while not strictly charitable, are nevertheless in the public interest. Examples are organisations that regulate and provide an educational function for the various professions. These kinds of organisations are typically exempt from income tax in the United States, even though the organisations cannot provide (and do not seek to provide) tax deductions to donors. Exempt status is possible under US law even if the organisation is not one that qualifies as having the ability to offer US tax deductions for donations.

In Hong Kong, on the other hand, because an entity's tax status turns solely on whether or not it is charitable, a number of purely not-for-profit (but not charitable) organisations find themselves in the difficult and anomalous position of having to pay Hong Kong profits tax, when in fact they are not in the business of making money and are operated solely for the benefit of their members or constituent beneficiaries, and not for private inurement. Hong Kong should also permit tax exempt status for organisations that are not-for-profit, even though they are not strictly charitable.

Finally, why not allow Hong Kong donors a deduction for properly appraised works of art, which is how many of the museums in the United States have built their collections?

Question 28

Do you think that the future Charity Commission should collaborate with the Inland Revenue Department as far as possible, particularly by the provision of relevant charities' accounts information, to facilitate the Inland Revenue Department's functions in assessing charities for tax where appropriate? (See recommendation 16.4)

Yes, see previous answer.

Question 29

Do you agree that the administration should ensure that sufficient resources are allocated to the Inland Revenue Department to carry out the function of reviewing annual accounts submitted by charities to the future Charity Commission? (See recommendation 16(5)).

Yes, they should be adequately resourced for any residuary functions they have following the enactment of the new legislation required to give effect to the report.

Question 30

Do you think that legislation should be introduced in Hong Kong along the lines of the English statutory model of the cy-près doctrine (comprised in provisions of the English Charities Act 1993, as amended in 2006), so as to provide a statutory basis for the cy-près doctrine in Hong Kong and to broaden the scope of its application? (See recommendation 17)

Yes, such a provision is undoubtedly desirable.

Question 31

If you have answered 'yes' to question 30, do you agree that in line with the English model, the cy-près doctrine should be broadened in Hong Kong so that it may apply to situations listed in recommendation 17, even where it is not impossible or impractical to carry out the charitable purpose of the charitable trust? (See recommendation 17)

Yes the doctrine should be so broadened. The Commission will need a broad discretion to give effect to the doctrine in situations where the purpose of the original gift is neither impossible nor strictly impractical. If the cy-près doctrine is administered too narrowly or in an over technical way, there is a danger of charitable gifts failing. This is undesirable if the donor or testator clearly intended his gift to be applied for charitable purposes. An overly strict application of the doctrine might encourage the next of kin or residuary beneficiaries to claim the assets representing the failed charitable gift.

It is also suggested that the new Charity Commission should have the power to bring in an administrative scheme for a charity similar to the power available to the English Charity Commission under section 16 of the Charities Act 1993. This power is useful where a charity's constitution is out of date or needs reforming for other reasons. At present this power only resides in the Court in Hong Kong and is hardly ever used. The best solution would be for the Court of First Instance and the Charity Commission to have concurrent jurisdiction in this area.

Question 32

Do you agree that the future Charity Commission should be empowered by statute to administer the application of the cy-près doctrine in particular cases? (See recommendation 17)

Yes, but not to the exclusion of the Court's inherent jurisdiction in this area. In most of these cases, it will be appropriate for the Charity Commission to decide on the application but there may occasionally be cases within the instances cited in the report which will be appropriate for the Court to decide. This will be particularly so if the next of kin or residuary beneficiaries are claiming an interest in the relevant assets.

Question 33

Do you think that a Charity Commission should be set up as a sole regulatory body for charities in Hong Kong? (See recommendation 18)

Yes, this is the only effective way to regulate the sector. It is also likely to be more cost effective because of a reduction in duplication.

Question 34

If you have answered 'yes' to question 33, do you agree to the objectives of the future Charity Commission set out in recommendation 18? If not, what objectives do you think should not be included in the list? Are there other objectives which you think should be added to the list?

These principles are entirely appropriate. However, it will be important for the Commission to bear in mind that sanctions such as the removal of a charity trustee for inappropriate conduct can have severe reputational repercussions for the person affected. The Commission once established should have a proper system of internal administrative review before decisions such as this or to deregister a charity are put into effect. This review mechanism should afford those likely to be adversely affected by such a proposed decision the fullest opportunity to make representations before the decision is taken. Such a procedure will also hopefully have the effect of reducing the number of appeals coming before the Court of First Instance.

Question 35

Do you agree that the future Charity Commission should have the functions and powers set out in recommendation 19? If not, which functions and powers should not be included in the list? Which additional functions and powers, if any, should be given to the future Charity Commission?

Yes, including the powers referred to in our answer to question 25.

Question 36

Do you agree that a charitable organisation or person aggrieved by a decision of the future Charity Commission, either:

1. **in its refusal to register an organisation as a charitable organisation;**
2. **in the exercise of its powers relating to enforcement and remedies due to non-compliance of charities with their legal obligations; or**
3. **in the application of the cy-près doctrine**

should have the right to appeal to the Court of First Instance? (See recommendation 20).

Yes. These decisions are serious matters for the organisations and individuals affected. The Court of First Instance is the appropriate body to hear such appeals. However, in view of the fact that many in the charity sector, whether trustees or organisations, may not have the resources to pay for legal representation, consideration should be given to extending the legal aid scheme to such appeals in appropriate circumstances. On a slightly different point STEP is pleased to note there appear to be no plans to charge for the services to be provided by the proposed Charity Commission, for example in connection with registration.

Question 37

Do you think that appeals relating to applications for fund raising permits and licences should be handled by the Administrative Appeals Board or by a new administrative appeal system set up for the purpose? (See paragraph 12.45).

These matters are not appropriate for the court of First Instance and should therefore be heard either by the Administrative Appeals Board or a new administrative appeal system set up for the purpose.

Response to Recommendations 13 to 15 on the regulation of fundraising activities

Current law

Currently, there is no one government body that is responsible for the regulation and monitoring of fundraising activities. If a charity or non-charity entity wishes to raise funds through fundraising activities, it has to obtain permission from the relevant Government authority. For example:

- Charitable fundraising activity held in a public place such as flag day or “general charitable fundraising activity in a public place” – the charity needs to obtain a “public subscription permit” from the Social Welfare Department.
- Non-charitable fundraising activity held in a public place – the organisation will need to obtain a permit from the Home Affairs Bureau.
- Selling things on the streets – the charity may be subject to the Hawker Regulation and may need to apply to the Food and Environmental Hygiene Department for a temporary hawker licence.
- Lottery – the charity will need to obtain licence from the Commission for Television and Entertainment Licensing (TELA) under s22(1)(a)(i) of the Gambling Ordinance (Cap. 148).

Both TELA and SWD require applicants to provide audited accounts of the specified fundraising events as a condition for approval to ensure that fund is used properly. The SWD, HK Institute of Certified Public Accounts and Independent Commission Against Corruption have issued guidelines on charitable fundraising activities but these are only voluntary guidelines.

There are some fundraising activities that are not subject to monitoring by any Government authority. These are activities such as charity auctions, charity balls, concerts, dinners, walks, film premiers, shows in the mass media, requests for charity donations by mail and advertisements or charity phone-in arrangements. There are no obligations on the organisers of these activities to account for the money raised and how the money is used.

Question 20

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

Recommendation 13(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.

Yes, there should be a “one-stop shop”. At the moment, different bodies are responsible for different fundraising activities so this could be confusing and challenging for people wanting to organise fundraising activities, especially for those who lack fundraising experience or non-charitable organisations wanting to organise a one-off fundraising event for the benefit of a particular charity or charitable cause. It is estimated that approximately 80% of charities in HK are small to medium sized.

It is also often unclear which government body the entity should go to in order to obtain information about fundraising activities and how they obtain the necessary permission. Having a “one-stop shop” will make it easier for a charity to obtain the necessary permit/licence for fundraising and this would hopefully encourage both charitable and non-charitable entities to organise fundraising events. It should also hopefully help reduce the time required to obtain the necessary approval for the fundraising activity.

The “one-stop shop” should also be responsible for ensuring that the funds raised are used properly because there is currently a lack of accountability especially where the activity is one that is not consent from any Government bodies such as charity balls and walks. There is no way of ensuring that the funds raised from these activities are actually used for charitable purposes.

Question 21

If you have answered “yes” to Question 20, please also answer the following questions:

- (a) **Do you think this “one-stop shop” service should be provided by the future charity commission, and that the commission should be vested with the powers and duties currently exercised by the Social Welfare Department, the Food and Environmental Hygiene Department and the Television and Entertainment Licensing Authority in relation to authorising charity fundraising activities in public places and those involving lotteries?**

Recommendation 13(2) – this “one-stop shop” service should be provided by the future charity commission which should be vested with the powers and duties currently exercised by the Social Welfare Department, the Food and Environmental Hygiene Department and the Television and Entertainment Licensing Authority in relation charity fundraising activities in public places and those involving lotteries.

Yes, the “one-stop shop” should be provided by the future charity commission because there should be the one body which is basically responsible for everything relating to charities, including the governance, accountability and transparency of charities.

In theory, yes, the commission should be vested with these powers and duties so that it can grant the necessary permits and licences to the charities organising fundraising activities and hold the charities accountable for the funds raised. However, from a practical perspective, requiring the commission to take on the role of granting permits/licences may be difficult as they may not have the necessary “technical” knowledge needed to determine whether or not the permit/licence should be issued. So perhaps another option would be for the commission to take on a support/liaison role where they work with the relevant Government departments to obtain the necessary permit/licence for the charity instead of taking on the permit/licence granting role.

- (b) **Do you think that the future charity commission should be responsible for enabling public access to information on fundraising activities and for providing an enquiry response service to the public?**

Recommendation 13(3) – the future charity commission should be responsible for enabling public access to information relating to fundraising activities and for providing an enquiry response service to the public.

The future charity commission should be responsible. As mentioned above, it is sometimes difficult to find out which government body is responsible and obtain information on what an entity needs to do if it wishes to organise a fundraising event. It makes sense for the commission to be responsible for this if it is the body that will be responsible for granting licences/permits and monitoring the use of funds.

The issue of whether the future charity commission should also be responsible for rating the charities should be considered. A rating system is another way of providing the public with information about a charity.

Question 22

How, and to what extent, do you think solicitation of donations via the internet should be regulated in order to minimise the risk of abuse, while at the same time not unduly inhibiting the work of *bona fide* charities?

Solicitation of donations via the internet should be regulated but as noted in paragraph 9.46, it is difficult to regulate internet collection where the individual or organisation has no physical presence in HK. It is proposed in paragraph 9.47 that where it is a charity registered in HK

then it should be required to display its registration number of its website and raising public awareness through campaign.

There should also be codes/guidelines setting out what charities who solicit donations via the internet should and should not do. If there is a rating system then the commission could have a separate list setting out non-HK registered charities as a way of letting the public the standard of the charity.

Question 23

Do you agree that for all forms of charitable fundraising activities, the registration number of any charitable organisation involved in those activities should be prominently displayed on any related documents, or displayed on any means through which appeals for charitable donations are made (such as solicitation leaflets)?

Recommendation 14 – 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).

Yes, the registration number should be prominently displayed. This will reassure people making donations that the charity soliciting for donation is an actual charity.

Question 24

Do you agree that the future charity commission should carry out initiatives listed in Recommendation 15 to promote good practice by professional fundraisers and, if not, which initiatives should not be included? Are there other initiatives which you think should be added to the list?

Recommendation 15 – in relation to professional fundraisers, we recommend that:

- (1) the future charity commission should develop and issue non-statutory codes of good practice to regulate the activities of professional fundraisers;***
- (2) the future charity commission should consider the feasibility of requiring professional fundraisers to register with it;***
- (3) the future charity commission should encourage as a matter of good practice among professional fundraisers or commercial participators (including, but not limited to) –***
 - (a) the making of solicitation statements (such as those used under the system in England and Wales) by professional fundraisers;***
 - (b) disclosure of their remuneration to the future charity commission and the public;***

(c) disclosure to the future charity commission of any prior written agreement between them and charities; and

(4) the future charity commission should review the position and issue guidelines concerning the hiring of elderly persons to solicit donations on the street.

The future charity commission should carry out initiatives to promote good practice by professional fundraisers especially if they are being paid. There should be some form of code of good practice to ensure that professional fundraisers and what they do have to meet a certain standard. This will also give people who hire professional fundraisers confidence about what the professional fundraisers do.

They should also be required to register with the commission so that the public can check to see whether the professional fundraiser is valid one.

Certain information such as remuneration should be made available because, as pointed out in paragraph 9.50, donors may not realise that the fundraiser is actually being paid.

Question 25

Do you think 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?

The future charity commission should have some form of express power to sanction organisations for non-compliance. The question is then how much power the commission should have to deal with the non-compliance. For example, if the offence is a relatively minor non-compliance such as late filing of accounts then the commission can impose a fine and for more serious offences then the commission should have the power to strike off the charity or revoke its tax exemption status. If there is a rating system then the commission can downgrade the charity's rating if it is non-compliant. Where there are criminal activities involved then perhaps this should be passed to the police to be dealt with.

The commission should also provide the public with information about non-compliant charities so that the public knows which charities are non-compliant.

28 October 2011