THE LAW SOCIETY'S SUBMISSIONS ON THE CONSULTATION PAPER ON REVIEW OF THE TRUSTEE ORDINANCE AND RELATED MATTERS

	Questions	*Law Society's Response*
	General Comments	**Paragraph 4 of the Executive Summary** It is not a good idea to amend the Trustee Ordinance ("*TO*") on a piecemeal basis for a number of reasons: • It causes confusion for potential overseas clients, and a sense that they are dealing with a changing environment. A major objective in reviewing the TO is to promote Hong Kong as a jurisdiction for overseas business, and therefore it is vital to afford certainty, particularly when there are many other jurisdictions to chose from which already have many of the elements which are proposed • It is wasteful of legislative time – legislators have to re-acquaint themselves with the underlying principles more than once • If amendments are desirable, it is not useful to delay them. Thus the matters addressed in questions 14 to 18 should be included in any amendment of the TO.

		<u>Licensed Trustee Companies</u> It is high time that Hong Kong should introduce a regime for licensed trustee companies. For the time being, under the TO, companies can register as trust corporations but only for the limited probate purposes. A new mechanism to allow trust companies to be properly registered in Hong Kong will be welcome. This will promote the use of Hong Kong law as the governing law of the trust deeds and Hong Kong as a trust administration centre.
1(a)	***Do you agree that a statutory duty of care for trustees should be introduced, unless it is excluded by or inconsistent with the trust instrument?***	Yes, we agree that a statutory duty of care should be introduced as this will promote certainty and consistency; and put Hong Kong in a better position to compete with other jurisdictions, such as Singapore, in the minds of potential settlors. However, we have reservations whether the statutory duty of care to be introduced should be subject to express contrary intention in the trust instrument. Our reply to this question will depend on how widely the statutory duty was eventually drafted. As it is only normal to expect that professional trustees will exclude all statutory duty in their professionally drafted standard trust instruments, the statutory duty of care, if it is capable of being excluded, would at the end of the day only fall on non-professional trustees. The law should protect the public and on this basis, we believe there are certain core duties of a trustee which are so fundamental that they should not be subject to exclusion. We would suggest that the proposed statutory duty of care in paragraph 2.13 should apply to all powers and duties of the trustees but just like the company directors' duties, certain specified core duties should not be capable of being excluded.

1(b)	*If your answer to (a) is in the affirmative, do you agree that:* *(i) the standard of care should be along the lines of the TA 2000 and the STA?* *(ii) the statutory duty of care should apply to the performance of those powers and duties set out in paragraph 2.14?* *(iii) the statutory duty of care should replace the existing common law duty of care which might otherwise have applied; and the statutory duty should be additional to, and not affect, the other fundamental common law duties of trustees and the exercise of trustees' discretion?*	Yes, subject to our comments in 1(a). Yes, subject to our comments in 1(a). Yes. The statutory duty of care provides for more clarity and certainty and it would not be helpful to potentially have two competing standards. The common law duty should be preserved in the case that the statutory duty is excluded by the trust instrument.
1(c)	*Further to (b), do you think that the statutory duty of care should apply in other circumstances (other than those mentioned in paragraph 2.14 above); and if so, which circumstances?*	As we have suggested in 1(a), the proposed statutory duty of care in paragraph 2.13 should apply to the exercise and performance of all of the trustee's powers and duties, whether conferred or imposed by the trust instrument or by law, including those set out in paragraph 2.14. The statutory duty of care should generally be subject to exclusion in a trust instrument save for certain core duties. We would suggest that those trustees' powers and duties mentioned in paragraph 2.14 of the Consultation Paper, and additionally the power to agree on the remuneration of agents, nominees and custodians, be classed as core duties.
2(a)	*Do you agree that the Schedule 2 range of authorised investments should be retained? If your answer is no, please give reasons.*	Yes, we agree that Schedule 2 should remain. . We agree with what has been said in paragraph 2.19 of the Consultation Paper, namely, that given that wider powers of investment may be provided in the trust

		instrument or authorized by the court, risks in investments must be contained and so a very conservative approach are called for in Schedule 2 for the protection of beneficiaries
2(b)	*If you agree that Schedule 2 should be retained, please let us have your views on whether Schedule 2 should be amended in respect of one or more authorised investments. For example, should any of the following qualification criteria for authorised investments (which are set out in Schedule 2 and explained in paragraphs 2.21 - 2.23 above) be amended:* • *the minimum market capitalization of HK$10 billion for companies;* • *the minimum 5 year dividend record for companies;* • *the definition and credit ratings for debentures;* • *the safeguards for permissible derivatives (for hedging purposes only, traded on a recognized or specified stock or futures exchange, supported by specific written advice from a corporation licensed to give the advice with regard to suitability and potential risks and losses)?*	We have no specific suggestions to make at this stage However, we believe Schedule 2 should be kept under periodic review (more frequently in times of financial crisis such as the present and recent past) with a view to keeping it generally, and the specified qualification criteria it sets out, up to date and relevant. Whereas S.4(3) of the TO provides that the Financial Secretary may from time to time by order published in the Gazette amend the Second Schedule, we would urge that a mechanism be put in place to enable timely updating of the Schedule to cope with fast moving market trends; and independent professional advice (including from the Monetary Authority) could be sought to assist the Financial Services and the Treasury Bureau.
3(a)	*Do you agree that the power of delegation under section 27 of the TO should be retained, subject to an amendment that if a trust has more than 1 trustee, the exercise of the power of delegation should not result in the trust having only 1 attorney or 1 trustee administering the trust, unless that trustee is a trust corporation?*	No. The UK approach should be followed. Unless the trust instrument provides to the contrary (or requires a minimum of two trustees at any time), delegation to a single trustee should be permitted. If there can be a single trustee there is no logical reason why the trustees' powers cannot be centralized in the hands of only one of them.
3(b)	*Do you have any views regarding the different conditions upon which an individual trustee may delegate his powers under section 27 of the*	The conditions applicable to delegation of powers by an individual trustee should be confined to those in S. 27 of the TO. S. 8(3)(a) of the Enduring Powers of

	TO and section 8(3)(a) of the Enduring Powers of Attorney Ordinance (Cap. 501)? Do you agree that the latter should be repealed?	Attorney Ordinance ("EPOAO") should be repealed. The EPOAO is intended for specific purposes, and is not, of course of general effect. It requires very specific procedures to be undertaken to validate an Enduring Power. It is hard to see why powers should be capable of being dealt with separately by an Enduring Power when they cannot otherwise be dealt with by the trust instrument or general law. In fact it appears to us that the EPOAO may be defective in any event as regards delegation of trustee powers. Although the EPOAO contemplates the exercise of the donor's powers as a trustee, S. 8(2) clearly provides that "an instrument which purports to create an enduring power which does not comply with Ss. (1) cannot take effect as an enduring power". Ss. 8(1)(a) is specific that an enduring power "must not confer on the attorney any authority other than authority to act in relation to the property *of the donor* and *his* financial affairs." Trust assets are clearly not the property of the donor. It seems to us to be highly debatable whether the powers of a trustee are powers which relate to *his* financial affairs. In our view they are not. If this is the case then a power to exercise any of the donor's powers as a trustee is precluded by S. 8(2) from being an enduring power in any event.
4(a)	*Do you agree that the TO should be amended to provide trustees with a general power of appointing agents along the lines of the TA 2000, subject to any express contrary intention in the trust instruments?*	Yes. In regard to discretionary powers of investment, in particular, it is necessary that the trustees be able to delegate fiduciary responsibilities to suitably qualified managers. Investment expertise is by no means universal amongst professional trustee organizations. Moreover, trust companies do not typically invest themselves -

		they appoint asset managers. These asset managers may be related parties, giving rise to concerns about conflict of interest. Delegation to third party managers who have the necessary expertise and independence from the trustee is desirable in the interests of the beneficiaries.
4(b)	*If your answer to (a) is in the affirmative, do you agree that the safeguards set out in the TA 2000 (as discussed in paragraph 2.41 above) are sufficient to protect the interests of the beneficiaries?*	Yes
4(c)	*What other safeguards (if any) would you suggest?*	None. If the objective is to attract business to Hong Kong it is important to balance practicality and safeguarding the interests of the beneficiaries. Provided the statutory standard of care applies, it is not desirable to impose too many hurdles for the trustee to jump. In terms of professional trustees in particular, the compliance costs will inevitably have to be passed on to the end clients, resulting in more expensive trust fees, and a concomitant disincentive to chose Hong Kong law trusts or Hong Kong trustees.
4(d)	*If your answer to (a) is in the negative, do you agree that section 25(1) of the TO should be retained and that section 25(2) of the TO be standardised with the approach to section 25(1)?*	N/A
4(e)	*Do you agree that trustees of charitable trusts should be given wider powers to appoint agents along the lines of the TA 2000 (as discussed in paragraph 2.40 above); and if so, what safeguards would you suggest?*	Yes. we think that charities should be given wide powers to engage agents to gain more income for the charities. No specific additional safeguards are necessary in regard to charitable trustees. A new Charities Ordinance is needed to clarify and consolidate the law relating to Hong Kong charitable trusts and their operation.
5(a)	*Do you agree that the TO should be amended to provide trustees*	Yes.

	with a general power to employ nominees and custodians along the lines of the TA 2000 and the STA, subject to any express contrary intention in the trust instruments?	
5(b)	*Do you agree that the safeguards set out in paragraph 2.48 are sufficient to protect the interests of the beneficiaries?*	Yes.
5(c)	*What other safeguards (if any) would you suggest?*	No suggestion for the moment.
6	*Do you agree that section 21 of the TO should be amended to provide trustees with wider powers to insure along the lines of the TA 2000 and the STA, subject to any express contrary intention in the trust instruments?*	Yes. It should not be a contentious matter to afford trustees the power to take out prudent insurance against a range of risks. In principle it should be up to the trustees to determine whether to pay premiums out of capital or income. However, the question of insurable interest may need to be specifically addressed – as there may not be a potential loss to the trustee in many cases. It should be expressly provided that the trustee, acting in that capacity, has an insurable interest in the trust property. We would also like to see introduced an express power to insure the life of any person in which the trust has an interest. For instance a settlor may establish a trust with a relatively small contribution initially but with the expressed intention of making additional contributions in future out of income as it arises or out of anticipated capital receipts. It is in the interest of the beneficiaries that he does so but in the absence of legislation it seems clear that the trustee itself has no insurable interest, and so irrespective of the relationship between the settlor and the beneficiaries the trustee has no power to insure against the potential loss of expected future benefits. Currently the settlor must take out a policy on his own life and then assign the benefits to the trust, which is an unnecessary device to circumvent the underlying

		principle. A statutory recognition of the trustees' insurable interest in these circumstances would be welcome clarification and an incentive to major insurance companies to adopt Hong Kong trusts. This would benefit those who provide trust services in Hong Kong as well as those who advise on them.
7(a)	*Do you agree that the TO should be amended to provide for a statutory charging clause for professional trustees of non-charitable trusts, subject to any express contrary intention in the trust instruments, along the lines of the TA 2000 and the STA?*	Yes, but **t**he doubt concerning the construction of section 29(2) TA 2000, which is explained in paragraph 58.12 of Underhill and Hayton Law of Trusts and Trustees (17th Edition), should be resolved by making it clear that "once duly authorised thereafter duly authorised". For these purposes, the expression "professional trustees" should include persons exercising particular skill and knowledge, such as solicitors, whether acting in the course of their business or not: i.e. a person who is a solicitor should still be entitled to charge for the provision of his services as trustee even though he is not acting as trustee in the course of his practice. The power to charge should extend to the ability to retain remuneration for acting as directors of corporations underlying the trust.
7(b)	*Further to (a), if a trust instrument contains provisions entitling trustees to receive remuneration, do you agree that the TO should be amended to enable a professional trustee of the trust to charge for services that could be provided by lay trustees?*	Yes. If the intention is to provide protection for the beneficiaries and for proper skill and care to be exercised in the administration of the trust, professionals should not be dis-incentivised by precluding their ability to recover payment for their time. Where an individual trustee wishes to transfer the obligations of trusteeship to a professional trustee (because of complexity, old age or personal reasons) the absence of the ability to charge properly for professional services can prevent the handover of responsibilities – to the detriment of the beneficiaries.

7(c)	*Do you think that professional trustees acting for charitable trusts should be allowed to charge for their services in the absence of a charging provision in the relevant trust instrument; and if the answer is yes, what constraints (if any) should be imposed?*	Yes, on the basis that, particularly in the case of large and substantially valuable charitable trusts, the trustees have high fiduciary duties for which they should be remunerated. Some directors serving on incorporated management committees of government subsidized schools (which are all accorded charitable status) are remunerated. There is therefore precedent for this in Hong Kong. However, this should be with a very guarded approach. We should look at the TA 2000 constraints as a basis and also consider quorum and declaration of interest requirements. There should be a mechanism for the public and independent scrutiny of trustee charges in respect of charitable trusts, which should include an examination of the charges of any agent, especially an in-house agent; preferably with the Court of First Instance being the first port of call in examining fees and charges in these circumstances, or otherwise for the matter to be put to the Secretary of Justice, he being public guardian of charities.
7(d)	*Further to (c) above, if the trust instrument of a charitable trust contains provisions entitling trustees to receive remuneration, do you think that the TO should be amended to enable a professional trustee of the charitable trust to charge for services that could be provided by lay trustees?*	Yes. It is in the interests of a charitable trust that it is run as professionally as possible and frequently the "committed amateur" is an inappropriate choice for trustee. There seems to be no reason in principle why a distinction should be drawn in favour of the amateur. [N.B. It should, however, be noted that the Inland Revenue Department, in their publication "A Tax Guide for Charitable Institutions and Trusts of a Public Character", in paragraph 9(d), state that "the governing instrument of a charity should generally contain ….[a] clause prohibiting members of its governing body (e,g. directors, trustees, etc) from receiving remuneration". The IRD cite no legal authority on the requirement to prohibit payment to directors/trustees etc. It is administratively imposed - if you do not agree, you do not get charitable status. The Government would need to seek an understanding with the IRD if it should decide to go ahead with this proposal.]

8	*Do you have any other suggestions in relation to the default administrative powers of trustees provided in Parts II and III of the TO*	There is no particular justification for the restriction on advancement contained in Section 34(1)(a) of the TO and it is routinely excluded in trust instruments and professionally drawn Wills. It would make more sense for there to be no such restriction, subject to the trust instrument electing otherwise.
9(a)	*Do you think that trustee exemption clauses should be regulated statutorily and whether the regulation should apply to all trustees or only professional trustees who receive remuneration for their services?*	Yes, we believe that trustee exemption clauses should be regulated statutorily. In our view, such regulation should apply to all trustees who receive remuneration for their services, and should be subject to the core duties referred to in regard to Question 1(a) which should not be capable of exclusion. However, certain types of trust should be excluded, viz. trusts where the trustee is already subject to statutory regulation of trustee exemption clauses (e.g. mandatory provident fund schemes) and so-called "commercial trusts" where the settlor is acting in the course of business (e.g. trustees acting in the context of corporate bond issues) where the terms of the trust will generally have been negotiated by sophisticated market professionals and where the trust will frequently have arisen out of contract rather than from the traditional transfer of property by way of gift - see paragraphs C.33 - c.40 of the UK Law Commission Report on Trustee Exemption Clauses (the UK Report). The UK Report concluded that a non-statutory approach should be adopted in the UK but we think that for Hong Kong statutory control is preferable notwithstanding some of the disadvantages associated with statutory control which the UK Report identifies.
9(b)	*If the answer to the first part of questions (a) is yes, which of the following options do you prefer for regulating trustee exemption clauses:*	

	(i) prohibiting trustees to exclude liability for breach of trust for dishonesty or intentional or reckless failure to exercise the degree of care and diligence that is to be reasonably expected of a trustee along the lines of section 26 of the Mandatory Provident Fund Schemes Ordinance (Cap. 485);	We prefer option (i). This has the merit of conforming the standards.
	(ii) prohibiting trustees to exclude liability for breach of trust where he fails to show the degree of care and diligence required of him as trustee along the lines of section 75B of the Companies Ordinance (Cap. 32);	Not preferred. This covers any form of neglect and would be too far reaching.
	(iii) imposing procedural safeguards to ensure that the settlor is aware of the trustee exemption clause;	Not preferred. This is not likely to prove workable in practice. Trusts may be created in a number of ways, and procedural safeguards will not be of general application. For instance, a trust may be created by declaration of trust by the trustee, where the settlor does not participate in the documentary formalities, and it may not be practicable to persuade him to execute a separate document which would be a trust document showing his agreement. In the case of a Will Trust, would the testator be obliged to execute an extra-testamentary instrument and how would this be dealt with in probate? Moreover, if the intention is to attract business from overseas, the formalities may have to take place outside the jurisdiction. Should independent notarization of the consent be obtained? This may not be practicable, or may operate as a disincentive to adopt HK law trusts.
	(iv) subject trustee exemption clauses to a reasonableness test similar to the one imposed under the Control of Exemption Clauses Ordinance (Cap. 71)?	Not preferred. This is fraught with potential difficulties. What may be reasonable for the settlor and trustee may not be reasonable in respect of the beneficiaries (to whom the trustee owes its duties). Moreover it may change over time. A trust relationship is likely to last much longer than a contractual one of the kind to which the Control of Exemption Clauses Ordinance applies.

9(c)	*Do you have additional or alternative options for regulating trustee exemption clauses?*	No.
10(a)	*Do you agree that the TO should provide certain basic rules regarding beneficiaries' right to information?*	Yes. The current state of the law in the light of the *Rosewood Trust* case is very unsatisfactory. Whilst the courts should retain their inherent jurisdiction, it is very desirable in our view that that the TO sets out the fundamental rights of beneficiaries with vested interests to information, and these core rights should not be subject to adverse modification by the trust instrument, as it otherwise becomes impossible for beneficiaries having a legitimate and immediate interest in the trust assets to identify or enforce their rights, and this is a potential vehicle for fraud. However, given that this should not in principle be subject to modification by the trust instrument, these core rights to information should not be more than is absolutely necessary as a matter of public policy to permit those interested to exercise their rights. Beyond this it should be open to the settlor to determine the amount of information to be made available by the trustee and the restrictions on disclosure. There are many instances where settlors quite legitimately do not wish beneficiaries to know of a prospective entitlement. They may feel for instance that children, knowing of a large inheritance, may be disincentivised, or otherwise put at risk of adverse influences.
10(b)	*If your answer to (a) is in the affirmative, do you prefer the first option (which is set out in paragraph 4.9) or the second option (which is set out in paragraph 4.10)?*	Neither. In particular any approach which contemplates an obligation to provide information to any beneficiary who asks for it even in the case of mere discretionary objects is particularly difficult, and would make Hong Kong an unattractive place to base a discretionary trust.

10(c)	*If you do not agree with those two options but still believe that the TO should provide for beneficiaries' right to information, please set out what you believe the TO should provide, for example, what information should trustees provide to beneficiaries and what class of beneficiaries (e.g. beneficiaries with interests in possession (such as life tenants), beneficiaries vested in interest only (such as reversionary or future entitlements) or beneficiaries with a right to be considered only (such as discretionary objects)) should be entitled to the information?*	The nature of the information to be supplied should depend on the position of the individual beneficiary as follows: ***Nature of Interest*** — ***Information entitlement*** Vested interest in possession — • to be informed of his entitlement promptly upon it arising • to be provided with accounts of the trust • to be provided with any other information relating to the assets of the trust which he may request and which it is reasonable for the trustees to produce and for him to receive Contingent Interest — • to be informed of his contingent entitlement, promptly upon it arising and the nature of the contingency Discretionary object — • None, in the absence of an express direction in the trust instrument Protector or Enforcer — • to be provided with accounts of the trust • to be informed of decisions of the trustee relating to any matters
		Binding directions and other documents which the Trustees are obliged by the terms of the trust instrument to act in accordance with should be discloseable as trust documents. Letters of Wishes or other, non-binding, indications of views or preferences given to the trustees, and information concerning the deliberations of the Trustees

		should be expressly protected in the absence of a court order requiring disclosure.
11	*Do you agree that the beneficiaries of a trust, who are of full age and capacity and are absolutely entitled to the trust property, should be empowered to remove a trustee, along the lines of the TLATA of the UK?*	Yes provided the TLATA requirements are followed in full. Specifically (and this is not mentioned in the Consultation Paper) Section 19 of TLATA applies only to the extent that "there is no person nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust". The power should apply only as a default power in the absence of any other person entitled to appoint trustees.
12(a)	*Do you agree that RAP should be abolished, without retrospective effect?*	No. We are not in favour of total abolition of the RAP; rather RAP should be replaced by a new fixed period.
12(b)	*If your answer to (a) is negative, do you agree that RAP should be modified by introducing one fixed perpetuity period, similar to that adopted by Singapore? How long do you think the new fixed perpetuity period should be (80 years, 100 years, 125 years, 150 years or any other period)?*	Yes. The RAP should be modified by introducing one fixed perpetuity period of 150 years and this should be without retrospective effect. Legislation with retrospective effect is a rarity at common law. Although the legislation should be amended without retrospective effect there should be specific provision to permit existing trust assets to be re-settled (if there is power to do so under the existing trust instrument) to extend up to the end of the permitted period without offending against the existing rule.
13(a)	*Do you agree that REA should be abolished? Please give reasons.*	No. REA should not be abolished but the accumulation periods should be the same as RAP to avoid confusion. At present, the length of RAP and REA are different. This has caused a lot of administrative inconvenience.
13(b)	*If your answer to (a) is yes, will your answer be different if RAP is also abolished so that there will be no control over the period of accumulation?*	N/A.

13(c)	*Do you think that REA should be retained in some form with regard to charitable trusts; and if so, how long should a charitable trust be allowed to accumulate its income?*	No. Since charitable trusts in any event are under the control of Secretary for Justice ("SJ"), it appears they should not be subject to REA since SJ will be able to supervise and avoid any abuses. Trustees of charitable trusts are under a duty to further the charitable objects of the trust and must exercise a power to accumulate income with good reason in the context of discharging that duty.
14	*Do you think that "protectors" should be statutorily defined in the TO and if so, how should the functions and duties of protectors be defined?*	No. the use of "protectors" in relation to trusts is very varied and to try to define them and their functions and duties would serve no useful purpose and would unnecessarily limit the discretion of the settlors in designing the trusts to suit their specific purposes. After all, the terms of the trust deed are private agreement. Definition of "appointors" and "protectors" should be left to the draftsmen. .
15(a)	*Do you agree that a statutory provision should be introduced to the effect that a trust will not be invalidated by reason only of certain reserved powers of settlors?*	Yes. This is important to establish the validity of the Trust with adequate certainty and to pre-empt litigation. It assists those selecting Hong Kong as a jurisdiction to do so with confidence knowing that certain core powers will not potentially invalidate the structure. However the extent of the powers which a settlor may reserve to himself should be relatively limited.
15(b)	*If the answer to (a) is yes, in your opinion, what kind of reserved powers of settlors should not affect the validity of trusts? Do you agree that we should permit the reservation of those powers stated in paragraph 6.15?*	Suitable powers would be those which permit the settlor a continuing role in the trust but not those which ultimately infringe on the trustee's decision-making role. These may include the powers: • Of investment/asset management • To appoint or remove trustees

		• To appointment or remove protectors or enforcers • To add, remove or exclude beneficiaries of a discretionary trust • To consent to the exercise of any power of the trustee to wind-up the trust. • To consent to any change of the proper law or forum of administration of the trust If wider powers were reserved by the trust instrument the validity of the trust would be for the court to determine in all the circumstances if the question is raised.
16	*Do you agree that there is no need to codify the common law principles in relation to the governing law of trusts? If you do not agree, please explain the reasons.*	Yes, we agree that there is no need to codify the common-law principles in relation to the governing law of trust.
17(a)	*Do you agree that there should be statutory provision to the effect that forced heirship rules will not affect the validity of trusts or the transfer of property into trusts that are governed by Hong Kong law?*	Yes The Hague Convention does provide directly for such matters, and it does not apply to matters of the formality of creation of the trust or transfer of assets to it. However, as pointed out in paragraph 6.23 it does expressly seek to preserve certain succession rights. Whilst it may be correct to state that courts will not give effect to forced heirship claims" unless conflict rules classify the claims as part of the succession law applicable to the settlor's estate" this is precisely what forced heirship is about. It is unhelpful to rely on the suggestion (in an academic text, not case law, it seems) that there is nothing to claw back once the trust property has vested in the trustee. It is the validity of this vesting which is in point. If a trust is established under Hong Kong law it is an important element of this that there is certainty as to the effectiveness of the trust and that it cannot be set aside for reasons based on principles of foreign law. This otherwise supplants the jurisdiction of the Hong Kong court and makes the validity of the trust uncertain.

		This in turn potentially makes dealings with a Hong Kong trust uncertain.
17(b)	*If your answer to (a) is yes, should the provisions follow the Singapore model (i.e. section 90 of the STA), the BVI model (i.e. section 83A of the BVITO) or any other model? Please specify and explain.*	We prefer the Singapore model as described in paragraph 6.24 of the Consultation Paper.
18(a)	*Having balanced the reasons for and against, do you think that the law should be amended to allow the creation of non-charitable purpose trusts? Please give your reasons.*	Yes. From a user's point of view, we welcome the possibility of having a non-charitable purpose trust. The concept of charity under common law is archaic and private donors should have freedom to decide on the purposes (e.g. benevolent purposes) they wish to support without the need to be confined under the common law to charitable purpose. There should be a wider variety of instruments/vehicles available to enhance more sophisticated planning options. Non-charitable purpose trusts are a useful tool in securitisation transactions and similar "off-balance sheet" financing arrangements, as well as the creation of trust holding structures. Also, they can be used for philanthropic purposes that would not strictly be regarded as charitable. Paragraph 6.28 of the consultation paper provides good examples of the advantages of legislation for the creation of non charitable purpose trusts. . If the objective of the revisions to the trust law is to attract business to Hong Kong then such structures should be made available. They are available in most, if not all of the leading offshore jurisdictions, including OECD "White List" jurisdictions such as Bermuda, Guernsey and Jersey. The expressed concern is that they may be used as a vehicle for "illegal or tax evasion purposes". This could be said equally of companies. In fact, it is possible to establish a company limited by guarantee for any lawful purpose, not limited to

		charitable purposes. There are many effective Know-Your-Client and anti-money laundering controls in place in Hong Kong and elsewhere to identify the illegitimate use of corporate and non-corporate vehicles alike, and the fact that purpose trusts can be used to validly divorce individuals or entities from ultimate beneficial ownership of underlying assets is not of itself a reason not to adopt them. There is a profound difference between facilitating tax evasion and making available modern and sensible structuring opportunities. In introducing non-charitable purpose trusts we would suggest that proper safeguards be imposed to ensure that they may only be used for legitimate reasons and to afford reasonable transparency.
	[Please answer (b), (c) and (d) if your answer to (a) is in the affirmative.]	
18(b)	*Should any limitations and safeguards be imposed on the use of non-charitable purpose trusts and what should they be?*	Yes, there should be limitations and safeguards imposed on the use of non-charitable purpose trusts The following are some suggestions to consider: • the scope of "non-charitable purpose trust" should be clearly defined • the Trustees of a Hong Kong purpose trust should be Hong Kong resident, as this facilitates oversight by the Hong Kong court • the non-charitable purpose trust should be established for lawful and non- tax evasion purposes. • the duration of a non-charitable purpose trust (as in, e.g. Mauritius) be limited to ensure there is a periodic opportunity to review them, but it should be possible to continue them with the consent of the enforcer or the court.
18(c)	*What measures should be introduced to facilitate the enforcement of non-charitable purpose trusts? For example, do you agree to provide for the role of "enforcers" in Hong Kong law?*	Yes, we agree to provide for the role of enforcers in Hong Kong law. There must be a mechanism by which the trusts of purpose trusts can be enforced, and although the courts may retain an inherent jurisdiction to intervene upon the application of any interested person, it is necessary to have someone with

		information rights. Enforcers will be vital in non-charitable purpose trusts.
18(d)	*If you consider that the concept of "enforcers" should be introduced in Hong Kong, how should the role of "enforcers" be defined? Would you support the approach in Dubai, Cayman Islands or BVI?*	The enforcer should have a duty to enforce the trust, and in this respect we would support the Dubai approach as described in paragraph 6.29(a) of the Consultation Paper. The duty of care should be the same as for the trustee. It should be a requirement that an enforcer of a non-charitable purpose trust is appointed under the trust instrument. In the absence of an enforcer the powers of the Trustee should be suspended other than as may be necessary for the preservation of the trust assets. There should be a mechanism to protect the independence of the enforcer, and any successor to the enforcer should not be capable of being appointed in default by the Trustee. In the absence of a successor appointed by the outgoing enforcer or some other mechanism for appointment such as a nominated "Appointor" the appointment should be made by the Court on the application of the Trustee or any person interested.