



LRC CONSULTATION PAPER ON CHARITIES LAW SOCIETY'S SUBMISSIONS

The Law Society has reviewed the Law Reform Commission's Consultation Paper on Charities (Consultation Paper) and has the following comments on the recommendations:

Definition of Charity – Chapter 5

Q1. Do you think that there should be a clear statutory definition of what constitutes a charitable purpose?

Law Society's response

1. We agree with the recommendation that there should be a clear statutory definition of what constitutes a charitable purpose. At present, Hong Kong adopts the common law position on charities developed under *Lord Macnaghten's* dictum in the case of *Income Tax Special Purposes Commissioners v. Pemsel* (1891) (*Pemsel*); this position is outdated as there are only four narrow heads namely:

- relief of poverty;
- advancement of education;
- advancement of religion;
- and other purposes beneficial to the community not falling under any of the 3 proceeding heads

2. The adoption of a clear statutory definition to recognise the wider scope of charitable purposes will enhance development of charities in general thereby encouraging the general public to participate more in charitable activities.

Q2. If you have answered “yes” to Question 1, please also answer the following questions:

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

- (b) If not, which head or heads do you think should be deleted from the list? Which should be amended, and how? Are there any other heads which you think should be added to the list of heads of charitable purpose?
- (c) Do you think that charities falling under any of the heads of charitable purpose must be also for the public benefit?
- (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?

Law Society’s response:

1. We note the heads of charitable purposes set out in Recommendation 2 (at para 5.128) are identical to the charitable purposes under Section 2(2) of the English 2006 Charities Act (Charities Act) *except* for the following:-

- (g) “*the advancement of amateur sport*”;
- (h) “*the advancement of human rights, conflict resolution or reconciliation*”; and
- (l) “*promotion of efficiency of the armed forces of the Crown, or of the efficiency of the police, fire and rescue services or ambulance services*”.

2. The Law Society fully understands the rationale for excluding sub paragraph (l) above but does not accept the exclusion of amateur sport and the advancement of human rights as charitable purposes:

(a) Amateur Sports

We query the commentary in the Consultation Paper because “some organisations not previously considered as charities may become eligible to be so designated”. This is an inadequate explanation to exclude this charitable purpose which is well recognised. The Charity Commission in England (ECC) has issued Guidance on the advancement of amateur sport which has been cited in footnote 79 of the Consultation Paper. Clearly, well drafted guidelines can establish the parameters of this charitable purpose. If there are concerns over gambling in some “sports” these concerns can be addressed by other means e.g. trading and profit element

The advancement of ‘human rights, conflict resolution and reconciliation’

(b) Human Rights

The Sub-committee notes the proposition that the advancement of human rights can well be charitable and there is a need to distinguish charitable from political purposes and is seeking views on whether this particular category should be included in the statutory definition.

We note *Amnesty International* has been registered as a charity in Hong Kong since 23 June 1993. It is listed on the Inland Revenue Department’s (IRD) website as a “*Human Rights Education Charitable Trust*”. If the promotion of human rights is to be included in the statutory definition the legislation will have to be tightly drafted in order to ensure the promotion of human rights falls within the accepted charitable purpose under the education head.

The ECC's website is very impressive as it provides a huge amount of information presented in a user-friendly format. Any future Charities Commission in Hong Kong (HKCC) should provide a similar service, particularly well-drafted guidelines to address the problem of organisations which promote political activities under the guise of charities promoting human rights.

The existing rights of charities engaged in the promotion of human rights are bound by Article 148 of the Basic Law which emphasises the principles of “*non-subordination, non-interference and mutual respect*” between the HKSAR and its counterparts on the Mainland.

(c) “Conflict Resolution or reconciliation”

The Government and the Judiciary have been promoting the benefits of mediation as a viable alternative to litigation before the courts. The Consultation Paper has failed to address at all why the provision of pro bono mediation and other forms of conflict resolution should not be recognised as a charitable purpose; obviously commercial providers of mediation services should not be entitled to apply for charitable status. The promotion of settlement and reconciliation also has obvious public benefit.

(d) Public Benefit

The Law Society accepts that charities falling under any of the heads of the charitable purpose must also be for the public benefit. In relation to the advancement of “the arts, heritage, culture or science” we note most “art galleries” in Hong Kong have been set up for profit and as such should not qualify for charitable status; commercial art galleries should be specifically excluded and clear guidelines should be provided to clarify entitlement to charitable status under this head.¹ This is in line with the approach in the Charities Act. We note this issue is linked to matters discussed in Chapter 10 and the exemption provided by Section 88 of the Inland Revenue Ordinance (IRO).

3. In our view Recommendation 2 should include the heads of amateur sports and the promotion of human rights conflict resolution or reconciliation.

Legal structures of charities – Chapter 6

- Q3.** Do you think that the various existing legal forms for charities should be reformed?

Law Society's response:

1. Yes. All charities should be proper legal entities with separate legal personality from that of their founders or members or committee members and have the legal capacity to enter into contracts, employ staff, own property and sue or be sued. We do not propose that all charities have the same legal form and believe that certain types of entity should definitely be allowed to continue in their existing form and effectively be grandfathered

¹ http://www.charity-commission.gov.uk/Start_up_a_charity/Do_I_need_to_register/CIOs/default.aspx

into any new scheme. These would include companies limited by guarantee (the current most prevalent form), trusts and companies formed by statute.

2. However, we strongly believe that unincorporated societies and associations are not an appropriate form for charities and that existing charities formed in this way should be required to convert into proper legal entities. We feel that many of the persons 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.
3. We note the Charities Act provides for a new legal structure for charities - Charitable Incorporated Organisations (“CIO’s”) (see Paragraph 4.10 (e) of the Consultation Paper) which helps small or medium sized charities which employ staff and enter into contracts. There are many small and medium sized charities and social enterprises in Hong Kong which would benefit from the introduction of an entity similar to the CIO or from converting into companies limited by guarantee.
4. 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 HKCC if it converts into a CIO or the Companies Registry and the HKCC if it converts into a company limited by guarantee. Any perceived regulatory, administrative and legal cost burdens can be overcome if helpful precedents and guidance notes to help form and operate such entities are made available free on the website of the HKCC as they are in England and Wales.
5. We also propose that a reasonable period of time (say 3 to 5 years) be granted to existing charities formed as unincorporated societies and associations to convert into CIOs or companies limited by guarantee.

Q4. If you have answered “yes” to Question 3, please also answer the following questions:

- (a) Do you think that the current system of allowing a variety of legal forms of charitable organisations to exist should continue, and if so, what modifications, if any, should be made to it?
- (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?

Law Society’s response:

Please see our response to Question 3 above

Registration of charities – Chapter 7

- Q5.** Do you agree that all charitable organisations which:
- (a) make any charitable appeal to the public; and/or
 - (b) seek tax exemption
- should be required to register?

Law Society's response:

Yes.

- Q6.** If you agree that charitable organisations should be registered, but do not agree with the pre-conditions for registration set out in Question 5(a) and (b), please answer the following questions:
- (a) which pre-condition(s) do you think should not be required, and why? Are there other pre-conditions which you think should be included, and why?
 - (b) Do you agree that the list of registered charitable organisations should be established and maintained by the future charity commission?
 - (c) Do you agree that this list should be available for public inspection?
 - (d) Do you agree that the application process for registration should not be subject to public notification?
 - (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?

Law Society's response:

See our answer to Question 3 above.

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

- Q7.** Do you think that registered charitable organisations should be required to file an annual activity report to the future charity commission, and if so, should the report be provided in a standard form and should it cover the list of matters set out in Recommendation 5? Are there any matters which you think should be deleted from the list? Are there any matters which should be added?

Law Society's response:

1. We agree with the list of matters set out in Recommendation 5 to be included in the annual activity statement that all registered charitable organisations should file. Further, it would be useful for the annual activity report to also include (and highlight) key financial indicators, namely:-

- The amount of income for the year;
- The percentage of the charitable organisation's income utilised on administration expense.
- The amount of grants or donations made by the charity in each year.
- The amount of capital held by the charity and a brief summary of reasons why such capital is being held rather than being utilized in accordance with the relevant charitable objects of such charity.

2. To this end, there needs to be an agreed definition of what is included/ excluded from "administration expenses".

Q8. Do you think that charity trustees or directors of a registered charity should be under a duty to declare any conflicts of interest and personal interests?

Law Society's response:

We agree with Recommendation 6.

Q9. 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?

Law Society's response:

1. The Law Society strongly agrees that there is a need for Charities to increase their transparency, particularly from the point of donors and stakeholders. However, we believe that this should be done in such a way as not to make it more difficult for charities to raise funds in an effective manner.
2. We recognize that there are a number of ways this can be done through a charity's financial accounts and making them more accessible to the public but that it will be difficult to get a consensus within the community and amongst those involved in running charities about the extent to which this can or should be done.
3. Charities should be required to prepare financial accounts in accordance with generally accepted accounting principles and as set out below in the response to Question 11; we believe trustees or directors of a registered charity should be under a statutory duty to keep proper accounting records. The HKCC can issue detailed guidelines to help smaller charities to comply.
4. On balance, we consider it appropriate for charities over a certain size be required to have their accounts audited. On the one hand, we note that many charitable organisations are already required to prepare audited accounts, or would want to have their accounts audited, and there are benefits in having an independent, external party to review the financial records of a charity. However, a statutory requirement that charities provide audited accounts will create an additional compliance cost, and may achieve little to 'identify' problem charities. Indeed, an auditor's sign-off may give a false sense as to the legitimacy of the charity.
5. Smaller charities could be required to file financial statements certified by the board, instead of audited accounts, with the future HKCC.
6. We question how the proposed threshold of \$500,000 will be applied to charities with irregular activities/income e.g. income may exceed \$500,000 one year, and fall below it in the next year. A possible solution is that the threshold should be applied to the average of the preceding 3 years' income. Further, there could be a dual test of income over \$500,000 and/or assets over a certain sum.
7. In all cases we think that the financial statements prepared for charitable organisations should be required to include disclosure about certain key financial indicators. In particular, they should include (and highlight) the following four pieces of financial information for the sake of transparency:
 - The amount of income for the year;
 - The percentage of the charitable organisation's income utilised on administration expense.
 - The amount of grants or donations made by the charity in each year.
 - To increase transparency 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.

8. These are the same indicators that we have recommended in the response to Question 7 to be included in the annual activity report.
9. Assuming the key financial indicators and other relevant ratios are included in the annual activity report and that report is made available to the public, we have some reservations as to whether charities should be required to make their financial statements accessible to the public. There is a view that information on the financial reserves of some charities may actually deter fund raising e.g. the public may think such institutions are 'wealthy', without fully understanding the reality that future provisions for certain capital commitments have to be made. To the extent that accounts are made public, it may mean that certain charitable organisations will need to include further notes or explanations to justify its financial position to all members of the public.

Q10. Do you think that for every charity registered with the future charity commission, an activities report and financial statements should be filed with the future charity commission on an annual basis, and if so, what should be the contents included in the annual report of activities?

Law Society's response:

1. We have stated our views in relation to financial statements in response to question 9 above i.e. charities should be required to prepare accounts and keep records, but not necessarily be required to audit and file the accounts.
2. Activities report: as stated annual filing may be unnecessarily onerous, particularly for smaller charities and charities with ad hoc or irregular activities. The Commission may consider bi-annual filing, or random checks and filing only upon request.

Q11. Do you think that charity trustees or directors of a registered charity should be under a statutory duty to keep proper accounting records of the charity which are sufficient to show and explain all transactions of the charity, and if so, should such records be retained for at least seven years?

Law Society's response:

Yes.

Q12. Do you agree that the future charity commission should be vested with the power to investigate any alleged mismanagement and misconduct of charitable organisations with regard to its charitable objects?

Law Society's response:

Yes.

Q13. If you have answered “yes” to Question 12, do you agree that in the exercise of this power to investigate alleged mismanagement and misconduct of a charitable organisation, the future charity commission should have power, in respect of a particular charity under investigation, to investigate the charity's funding, property and activities and to obtain relevant information, including documents, records, books and accounts from the charity?

Law Society's response:

Yes.

Q14. Do you agree that during the course of investigations of the type set out in Question 13, there should be appropriate safeguards to ensure confidentiality?

Law Society's response:

Yes.

Q15. Do you agree that any person who intentionally or recklessly provides false or misleading information to the future charity commission or its appointed investigators, or fails to provide the information required for the purpose of investigation, or alters, conceals or destroys any document required for production for the purpose of an investigation, should be guilty of a criminal offence?

Law Society's response:

Yes, it is important to give the future HKCC ‘teeth’ and its governance is of crucial importance. We recommend public representation on the HKCC. See also our comments to Question 33 below.

Q16. Do you agree that the future charity commission should be vested with powers relating to enforcement and remedies in cases of non-compliance by charities with their legal obligations?

Law Society's response:

1. We have concerns that the HKCC should investigate and be vested with powers of enforcement. It is important for there to be a clear separation of the regulatory powers of investigation and enforcement powers.
2. We recommend further consideration be given to the establishment of a separate Tribunal which could have powers similar to that of the Board of Review – it can disagree with the

HKCC and vacate any decision and substitute its own. It is important to provide a cheap and informal system to resolve disputes and where a charity is unhappy with the decision by the Tribunal it can always seek judicial review to overturn the decision.

Q17. If you have answered “yes” to Question 16, do you agree that these powers should include, but not be limited to:

- "(1) de-registration of a charity from the register of charities;*
- (2) referring criminal offences to appropriate law enforcement agencies;*
- (3) referring possible civil actions to the Secretary for Justice; and*
- (4) powers for the purpose of protection of property of charities"*

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

Law Society’s response:

Please see our answer to Question 16.

Q18. Do you think that the future charity commission should be vested with the power to protect charities' property in cases of misconduct or mismanagement in their administration?

Law Society’s response:

Yes.

Q19. If you have answered “yes” to Question 18, do you agree that this power should include, but not be limited to, the powers to:

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

as listed in Recommendation 12? If not, which powers should not be included? Which additional powers to protect property of charities, if any, should be given to the future charity commission?

Law Society's response:

1. The HKCC could also be provided with the following powers:
 - (a) remove members of a charity organised as a company limited by guarantee.
 - (b) be vested with power to protect property in cases of misconduct or mismanagement by the charity's administrators. This should not include the power to appoint receivers for good order/management of the property as such appointments should be left with the Court because where there is a deep split within the organisation there is often deadlock. It should be noted that unincorporated bodies have no power to make such appointments.
2. We note that at common law, and as in Hong Kong before 1997, the Attorney General was the protector of charities and often had to appear in charity cases. The Secretary for Justice continues to exercise this traditional function so it would be appropriate for the Secretary to delegate this function (with all its powers) to the new HKCC.

Regulation of fundraising activities – Chapter 9

Q20. Do you think that there should be a sole regulatory body (a "one-stop shop") to process and grant all permits and licences necessary for charitable fundraising, and to monitor the use of funds raised by such activities?

Law Society's response:

Yes. We strongly agree.

Q21. If you have answered "yes" to Question 20, please also answer the following questions:

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

Law Society's response:

Yes. The powers and duties currently exercised by the Leisure and Cultural Services Department should also be included.

- (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?

Law Society's response:

Yes.

- Q22.** How, and to what extent, do you think solicitation of donations via the internet should be regulated in order to minimise the risk of abuse, while at the same time not unduly inhibiting the work of *bona fide* charities? (See paragraph 9.48.)

Law Society's response:

Public fundraising via the internet should be regulated in the same manner as fundraising in public to the extent possible, and it should be apparent from the website as to whether the organisation is registered with the future HKCC.

- Q23.** Do you agree that for all forms of charitable fundraising activities, the registration number of any charitable organisation involved in those activities should be prominently displayed on any related documents, or displayed on any means through which appeals for charitable donations are made (such as solicitation leaflets)?

Law Society's response:

Yes. The registration number of the charity (under the proposed regime) should be prominently displayed on the materials used in its public fundraising activities.

- Q24.** Do you agree that the future charity commission should carry out the 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?

Law Society's response:

Yes.

We do not have any initiatives to add to the list.

Q25. Do you think that there should be an express power given to the future charity commission to sanction organisations for non-compliance with the terms laid down in codes of conduct issued by the commission? (See paragraph 9.57.)

Law Society's response:

See our answer to Question 16.

Charities and tax – Chapter 10

Q26. Do you agree that existing powers of tax exemption and functions of periodic review of charities for taxation purposes should remain with the Inland Revenue Department?

Law Society's response:

1. Yes but there definitely needs to be a much more streamlined approval process given that it currently often takes 6 to 12 months or longer to obtain approval from the IRD of the Memorandum and Articles of Association (M&A)/constitution of a new charity or even of proposed alterations to the M&A/constitution of an existing charity.
2. One of the current duties of the IRD is to decide whether a proposed new charity is deemed to be charitable for tax purposes. If the Charity Commission is going to determine whether a proposed charity is charitable, as part of the registration process, hopefully, the IRD is going to be able to perform its role at the approval stage in a much more timely manner. Perhaps, time limits should be imposed on the IRD to approve or reject a charity once it has been registered with the HKCC. Similar time limits should also be considered where amendments to the M&A/constitution of an existing charity have been approved by the HKCC also need to be approved by the IRD.
3. Another suggestion might be to allow the IRD a sufficient though modest period of time within which to object to the tax exempt status of a newly registered charity, failing which at the expiry of that period of time the tax exemption is granted. A similar procedure could be adapted to apply to amendments to a registered charity's constitution. Additionally, the reasons for which the IRD could object to a registered charity being awarded tax exempt status should be clearly set forth.

Q27. Do you agree that tax exemption should be granted to a charity by the Inland Revenue Department only when the charity has been registered with the future charity commission and, subject to this, there should be no change to the existing law on the taxation of charities in Hong Kong?

Law Society's response:

1. We agree that tax exemption should only be granted to a charity once it has been registered with the HKCC but we strongly believe there should not be any changes to the current laws on the taxation of charities. The opportunity should be taken to make a number of improvements and clarifications, including:
2. The IRD needs to have clear laws and regulations to deal with charities which carry on business by specifically recognising and providing a clear framework for social enterprises. At the moment, there is much confusion and lack of consistency in dealing with social enterprises for taxation and other purposes and new legislation clearly needs to be introduced.
3. There is also a lack of consistency in the treatment of non-cash donations. While the current laws and guidelines are reasonably clear, there is much inconsistency in their application. For example, funds raised at a charitable auction should arguably be subject to a tax deduction in the same way as a cash donation. If a person pays \$5,000 for a product or service worth \$1,000, surely he should be able to claim a tax donation for the \$4,000 difference between the monetary value of the product or service and the amount paid. Similarly, the individual or corporation donating the product or service to the charity for sale at auction should be entitled to a tax deduction equivalent to the monetary value thereof. This would significantly enhance the fund-raising abilities of charities without significantly adversely affecting other tax payers. It would also avoid the current situation where some charities give a tax receipt in such circumstances while others are more careful in complying with the laws and guidelines.
4. We recommend deletion of the requirement that profits of a trade or business carried on by a charity be taxable if expended substantially outside Hong Kong. This creates problems for the charity to determine and account for its trading receipts and Hong Kong expenditures. There is no reasonable basis on which to discriminate between donations to a charity and its trading profits, so the symmetry argument is unsustainable because there is no similar rule that monies donated to a charity by the Hong Kong community must be expended in Hong Kong in order for those donations to be tax deductible. Being privileged to live in such a successful, developed economy, Hong Kong society has the responsibility to promote charitable works amongst those in need, whether inside or outside Hong Kong.
5. We propose deletion of (a) and (b) of Section 88 IRO requiring that a trade or business be exercised in the course of actually carrying out the objects of a charity or that it be done by persons for whom the charity is established. If a charity can earn trading profits, it is providing value to Hong Kong people (its customers) so does not have to seek donations from the public or government support. Moreover, eliminating these subparagraphs would avoid litigation, since it's very difficult to interpret and apply subsections (a) and (b) of Section 88 [see, for example, *Sheng Kung Hui v CIR*, (2010) HKRC 90 – 224]. In the alternative, Section 88 should be amended to precisely identify a small subset of trade or business activities which would not qualify as tax exempt if carried on by any charity (an example may be property development).
6. The IRO should be amended to clarify that donations can be deducted irrespective of whether the donations are spent in or out of Hong Kong. Similarly, the IRO should be amended to permit the tax exempt profits of a trade or business carried on by a charity in Hong Kong to be spent inside or outside of Hong Kong.

Q28. Do you think that the future charity commission should collaborate with the Inland Revenue Department as far as possible, particularly by the provision of relevant charities' accounts information, to facilitate the Inland Revenue Department's functions in assessing charities for tax where appropriate?

Law Society's response:

Yes we agree that there should be collaboration but that this should not be unnecessarily intrusive or lead to significant delays in obtaining approvals. If the new charities law requires registered charities to submit an annual return / activity report and produce and file annual accounts with the HKCC, the IRD should be given them by the HKCC or be empowered to demand them from registered charities.

Q29. Do you agree that the Administration should ensure that sufficient resources are allocated to the Inland Revenue Department to carry out the function of reviewing annual accounts submitted by charities to the future charity commission?

Law Society's response:

Yes there should definitely be sufficient resources allocated to the IRD to carry out the function of reviewing annual accounts as well as to perform its other functions regarding charities such as approving new charities and amendments to the M&A/constitution of existing charities in a much more timely manner than at present.

The cy-près doctrine – Chapter 11

Q30. Do you think that legislation should be introduced in Hong Kong along the lines of the English statutory model of the *cy-près* doctrine (comprised in provisions of the English Charities Act 1993, as amended in 2006), so as to provide a statutory basis for the *cy-près* doctrine in Hong Kong and to broaden the scope of its application?

Law Society's response:

Yes.

Legislation should be introduced to provide a statutory basis for the *cy-près* doctrine in Hong Kong and to broaden the scope of its application, notwithstanding the Court of Hong Kong has jurisdiction on disposing the assets in cases where the stated charitable purpose is impossible or impractical to be effectuated. The HKCC should circulate Guidelines on the *cy-près* doctrine which should be flexible rather than narrowly defined otherwise its work will be hampered.

- Q31.** If you have answered “yes” to Question 30, do you agree that in line with the English model, the *cy-près* doctrine should be broadened in Hong Kong so that it may apply in the situations listed in Recommendation 17, even where it is not impossible or impractical to carry out the charitable purpose of the charitable trust?

Law Society’s response:

1. We agree.
2. The English model requires the HKCC to have regard to three matters when making a *cy-près* scheme:
 - (a) the spirit of the original gift;
 - (b) the desirability of securing that the property is applied for charitable purposes which are close to the original purposes;
 - (c) the need for the relevant charity to have purposes which are suitable and effective in the light of current social and economic circumstance.

These considerations can guide the HKCC in circumstances where the *cy-près* doctrine needs to be applied – in situations where it is not impossible or impractical to carry out the charitable purposes of the charitable trust.

- Q32.** Do you agree that the future charity commission should be empowered by statute to administer the application of the *cy-près* doctrine in particular cases?

Law Society’s response:

1. We agree.
2. The procedure should be streamlined. The HKCC should be the first port of call in applying the *cy-près* doctrine, subject to the statutory safeguards in applying the doctrine by the Commission and subject further to the jurisdiction of the Court to review and overrule the HKCC’s decisions when it deems it necessary.

Establishment of a charity commission for Hong Kong – Chapter 12

- Q33.** Do you think that a charity commission should be set up as a sole regulatory body for charities in Hong Kong?

Law Society’s response:

Yes. We note there is an assumption in the consultation that a Charity Commission will be established. We note any decision on assignment of the policy bureau to liaise with the HKCC will be very important given the scope of responsibilities.

Q34. If you have answered “yes” to Question 33, do you agree to the objectives of the future charity commission set out in Recommendation 18? If not, what objectives do you think should not be included in the list? Are there other objectives which you think should be added to the list?

Law Society’s response:

Yes.

Q35. Do you agree that the future charity commission should have the functions and powers set out at 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?

Law Society’s response:

1. We agree with the proposed functions and powers as set out in Recommendation 19. The future HKCC should also have the following functions and powers:
 - (a) the function of approving any proposed amendments to the M&A/constitution of existing charities.
 - (b) it should have a helpful, user-friendly web site with similar useful information including pro forma objects clauses and M&As/constitutions similar to the web site of the ECC.
 - (c) We recommend the inclusion of a “fit and proper test” which would require founders / board members / trustees of a charity to adhere to some minimum standards of conduct; i.e. - persons convicted of serious criminal offences or offences involving breaches of trust should not hold charitable office. Similarly, persons convicted of crimes against children should not be entitled to hold such positions in children’s charities.

Q36. Do you agree that a charitable organisation or person aggrieved by a decision of the future charity commission, either:

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

should have the right to appeal to the Court of First Instance?

Law Society's response:

1. We consider it useful to have simplified procedures in place to handle disputes and therefore a Tribunal should be established. A specialist Tribunal would reduce legal costs for the charities and also could deal with applications efficiently. The Commissioner of the HKCC could also be given powers to assist upon invitation.
2. It would be appropriate to exclude any disputes involving real property, constructive trusts or the winding up/dissolution of a charity as such applications should be heard by the Court of First Instance.

Q37. Do you think that appeals relating to applications for fundraising permits and licences should be handled by the Administrative Appeals Board or by a new administrative appeal system set up for the purpose?

Law Society's response:

While we do not have strong views on this, we marginally prefer a new specially constituted administrative appeal system to be established as part of the HKCC, as we believe this would be more efficient. On the other hand, if appeals are left to the Administrative Appeals Board, it should be given adequate resources to cope with this additional burden.

It is clear the existing system requires a significant overhaul and it will take some time before legislation can be introduced therefore we recommend the Administration Government should consider introducing some interim measures on reporting requirements of charities in order to increase transparency.

The Law Society of Hong Kong

15 November 2011

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