



## CONSULTATION ON REGULATION OF CROWDFUNDING ACTIVITIES THE LAW SOCIETY'S SUBMISSIONS

The Financial Services and the Treasury Bureau (“FSTB”) issued a consultation paper on “Regulation of Crowdfunding Activities” on 19 December 2022 (“**Consultation Paper**”). In response, the Law Society provides the following submissions. Paragraph numbers in this submission refer to the paragraphs in the Consultation Paper.

### Synopsis

1. The Consultation Paper provides a helpful introduction to the laws/regulations which currently apply to crowdfunding; and identifies a number of issues with the current regulation of crowdfunding activities.
2. The existing legal provisions for financial activities within the remit of financial (and other) regulators are already sufficient. If a piece of new legislation on crowdfunding is to be put in place, it should be made clear that the new legislation would not infringe on or prejudice any existing provisions (including exemptions). However, some crowdfunding activities do not fall within any existing regulatory regime and there is a sound argument for addressing those aspects which are not currently covered.
3. As for crowdfunding for non-financial activities, (a) it can be said that the existing framework is not user-friendly, as one needs to navigate through different pieces of legislation for different fundraising activities. One may inadvertently and/or easily miss out a provision of a particular legislation; and (b) understandably the existing framework, which was put in place before the enactment of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong SAR (“National Security Law”) has not, sufficiently or otherwise, embraced any national security concerns. The regulatory framework for crowdfunding for non-financial activities should therefore be updated to address these concerns.

4. That said, some of the proposals put forward in the Consultation Paper are not practical. Some of the proposals are excessive if they are of general application. In particular, (a) the proposal for all crowdfunding activities to require prior approval; (b) the proposed requirement to use a designated Hong Kong bank account; and (c) in relation to jurisdictional issues. Each of these issues is addressed below.
5. In addition, there are good reasons for certain activities to be exempt from approval requirements. Charities in particular would require careful deliberation.
6. Accordingly, there is a need to search for a balanced approach, which is not yet fully apparent from the present Consultation Paper.

### **Background to Crowdfunding**

7. Crowdfunding has become a common and popular means of raising funds from a wide pool of persons for purposes ranging from large and small-scale investments (e.g., business start-ups and peer-to-peer lending) to personal projects (e.g., educational costs and vanity projects) to charitable causes (e.g. poverty relief). Crowdfunding is usually, but not exclusively, conducted through the internet.
8. The Consultation Paper characterises crowdfunding activities as activities *“conducted by an individual, a group or an organisation for openly appealing to a large number of individuals or organisations to each contribute usually a small amount of money for a specific fundraising purpose, so that the fundraiser may have sufficient funding to carry out a project, a business or meet the needs in respect of that purpose.”* (paragraph 1.4)
9. The Consultation Paper also notes that *“[depending] on the specific purpose of individual crowdfunding activities, some fund contributors may expect to receive certain benefits or returns upon the successful completion of a crowdfunding activity, while some may not expect any personal returns as they support the purpose of the activity and care only about the pursuit of that purpose.”* (paragraph 1.4)
10. Given the small scale of most crowdfunding activities, crowdfunding is a low-cost, efficient and quick way to raise funds. A regulatory regime which detracts from these qualities contradicts Hong Kong’s established laissez-faire economic principles and will stifle small-scale personal and charitable donation projects to the detriment of the Hong Kong people (as well as people elsewhere in China or overseas).

## **Different regulations appropriate for different types of crowdfunding activities**

11. For the purposes of discussing the proposed regulatory requirements, crowdfunding activities can be divided between:
  - (a) those which provide a meaningful economic return or where the principal purpose of the crowdfunding activity is to generate an economic return commensurate with the money being sourced (“**financial return crowdfunding**”); and
  - (b) those where the primary purpose is something other than to provide economic returns to the providers of the money being sourced (“**community crowdfunding**”).
12. We consider that the distinction between (a) “financial return crowdfunding” and (b) “community crowdfunding” is fundamentally important. It provides a pragmatic basis for distinguishing between those crowdfunding activities (which should not be subject to licensing or approval requirements) and those which should. Such should be taken into consideration in the further consideration of the regime and any legislation to be put forward for the regulation of crowdfunding.

## **Existing regulatory framework applicable to crowdfunding**

13. Hong Kong’s existing legal framework regulates some (but not all) crowdfunding activities in various ways:
  - (a) some persons engaging in crowdfunding activities will require licencing (e.g., as providers of “automated trading services” or other categories of licensed intermediaries under the Securities and Futures Ordinance (Cap 571) or as “money brokers” under the Banking Ordinance (Cap 155));
  - (b) some crowdfunding activities may require registration of the offer itself (e.g., under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) or the Securities and Futures Ordinance);
  - (c) some providers of funds to crowdfunding activities may fall within the definition of “money lenders” under the Money Lenders Ordinance (Cap 163); and
  - (d) crowdfunding activities are to a certain extent subject to various laws against, inter alia, fraudulent and deceptive conduct (e.g., under the Crimes Ordinance (Cap. 200)) as well as anti-money laundering laws (e.g., the Organized and Serious Crimes Ordinance (Cap 455)).

14. It is pertinent to note that, relevant to 13(d) above, there are supervisory aspects implicit in those laws in relation to money laundering, elections, fraud, theft, acts and activities endangering national security, or inciting, aiding, abetting any such offences. Those aspects have not been explored, sufficiently or otherwise, in the Consultation Paper (paragraph 1.9). For example, (a) a concern over funds being applied for a different purpose could be covered by the laws relating to false accounting, deception, fraud, theft, etc.; (b) if more than one person is involved in planning a crime, conspiracy offences will apply.
15. Given that the aim of the consultation is to supplement the existing law/legislation “*where it is needed*”, it would be helpful if the paper were to set out some examples of those activities which are not, or not adequately, covered as criminal offences by existing law and which thereby the FSTB asks that a new regime be set up and legislation be enacted. As the matter now stands, there is an omission in the paper on the discussion of those matters which, when carried out, would evade the existing law covering the offences.
16. In our view, many of the issues raised by crowdfunding have become somewhat muddled in the paper because they are not segregated for the purpose of discussion.

### **Proposed Crowdfunding Affairs Office**

17. As explained in the Consultation Paper, there is an array of legal requirements, administered by various government agencies (paragraph 1.6; see also other parts of the paper). The array is confusing.
18. It would be useful to have a system for the regulation of crowdfunding activities to ensure that the organisers provide transparent accounts and records. For one thing, the undisclosed fees charged by commercial platforms have also been criticised in recent times and might be included in the deliberation<sup>1</sup>.

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<sup>1</sup> For example, in the UK there were commentaries on crowdfunding : “anxieties started to be expressed in the media and by parliamentarians about the possibility of fraudulent activity (Chris Baynes, Independent: ‘Manchester attack: JustGiving suspends withdrawals from more than 200 fundraising pages over fraud fears’, 2017), lack of oversight of the purpose, destination of funds collected, and the need for accessible and clear information about how the platforms operate and the fees they charge.” The *Mail Online* reported, for example, that JustGiving took more than 6 per cent from almost every donation made and £20 million annually from fundraisers (Paul Bentley and Tom Kelly, Daily Mail ‘Website that rakes off £20million a year from your charity donations: JustGiving is branded “JustTaking” after using funds to pay its staff up to £200,000 a year’, 2017) and specifically criticized that site for taking more than £25,000 in fees from money donated for the Grenfell Tower victims (Larissa Brown, Daily Mail: ‘Fundraising website JustGiving is criticised for taking £25,000 in fees from donations for Grenfell Tower victims’, 2017; Matt Dathen, The Sun: ‘JUST FOR VICTIMS MP bids to stop JustGiving charity site profiting from terror attacks by taking five per cent of all donations’, 2018). Although commercial platforms charge to cover their costs and to have funds to invest in their platforms, there were worries that public trust and confidence in donating specifically via fundraising platforms and more generally could be adversely influenced by these concerns.

19. We would accordingly agree that it would be helpful to have a Crowdfunding Affairs Office (“CAO”) to oversee the transparency and accountability of fundraising activities which are not already regulated under (or exempt from) another existing regulatory regime and to provide clear procedures to those involved in various types of crowdfunding activities (paragraph 2.1).
20. Under the proposal, a person conducting a crowdfunding activity that raises funds from individuals or entities of Hong Kong, or individuals or entities located in Hong Kong, would be required to apply to the CAO for regulatory approval in advance (paragraphs 2.2 and 2.5). The requirement for CAO approval would extend to both financial return crowdfunding and community crowdfunding (paragraph 2.2). We are of the view that prior approval should not be required for either (a) financial return crowdfunding activities by regulated persons; or (b) community crowdfunding. However, we support the requirement for financial return crowdfunding which is conducted by persons not licensed (or exempt) under an existing regulatory regime (such as Money Lenders Ordinance) (or equivalent overseas regimes) to be subject to prior approval.
21. For crowdfunding activities already subject to the regulation under existing legislation, the CAO should make appropriate arrangements to segregate duties and to streamline work process and exemption arrangements. If an application falls within the scope of community donation-based crowdfunding (including direct donation, lottery sales or fundraising activities involving sale of goods) and involves only an offline activity conducted in public place, the CAO may refer the application to, for example, the Social Welfare Department, the Home and Youth Affairs Bureau, the Food and Environmental Hygiene Department or the Home Affairs Department for processing in accordance with the relevant provisions under the Summary Offences Ordinance (Cap. 228), the Hawker Regulation (Cap. 132AI), the Gambling Ordinance (Cap. 148), etc (paragraph 2.8).
22. In addition to CAO approval requirements, the Consultation Paper proposes to introduce accountability requirements for people conducting crowdfunding activities backed by consequences for persons conducting illegal crowdfunding activities or failing to comply with mandated accountability requirements. We support this proposal.
23. We support the proposal to improve transparency and accountability for both financial return crowdfunding and community crowdfunding activities in principle but have reservations about some of the specifics, in particular the requirement to use a “designated Hong Kong bank account”.
24. On the establishment of CAO, we further say that

- (a) apart from the general scope of powers which have been outlined in the Consultation Paper, there is a need to explore precisely and to what extent the CAO needs to have additional powers, in addition to those which already exists with other departments. As noted in paragraph 1.8 of the paper, the main deficiency is that the regulatory measures do not apply to fundraising activities conducted in non-public places, save for lotteries;
- (b) it is not clear from the Paper as to where the CAO would be positioned in the Government's hierarchy. It seems that the CAO might be set up as a division of the Police Force, given that the functions and law enforcement powers of CAO could be similar to those of the Joint Financial Intelligence Unit or the National Security Department or the registration of societies under the Societies Ordinance. Whether or not the above is correct should be clarified; and
- (c) in any event, there should be regular review and monitoring on the governance and the financing of the CAO. It would not be desirable, for example, to have an employee of the CAO essentially doubling up on function with an employee of one of the government departments (as alluded to in the preceding paragraph). As a matter of prudence, the CAO may (to an extent) take over other departments' functions, in order to avoid creating another layer of bureaucracy.

25. Notably, the Paper is silent on the following issues which should be addressed:

- (a) would decisions of the CAO be published?
- (b) is there to be an appeal process specified?

### **Preventing Illegal Activity – One size fits all?**

- 26. The issue of control of donation-based fundraising is alluded to in paragraph 1.14 of the Consultation Paper.
- 27. Nevertheless, there needs to be balance – a calibration of control, offences, and penalties, for different crowdfunding scenarios. Different crowdfunding purposes produce funds which are quite different entities. For example, crowdfunding may be arranged for a simple charity, or for a political candidacy, a civic purpose, or for a business. Different natures require different approaches in accounting and administration, and the contributors have different expectations.
- 28. It has been suggested that full details of the persons conducting fund-raising activity should be provided (paragraph 1.17). There should also be full and accurate information of the projects' purpose, and the use of funds. We acknowledge the rationales of the above proposal, but we have reservations as to

whether a simple charitable and well-intentioned fund need to be subject to the same set of regulations or penalties which apply to large-sized funds. To these simple and small funds, those requirements and penalties could be draconian, disproportionate and intrusive.

29. Breaches of regulatory controls need not be saddled with excessive or heavy penalties as a matter of course. Breaches of regulations are normally offences of strict liability; but on many occasions, they need to be met only with a fine. One would not anticipate a system imposing heavy criminal sentences for these breaches of regulatory matters (for example, a failure to renew a business registration licence).
30. In contrast, a heavy penalty for breach of a regulatory matter may generally make sense in the case, for example, of an attempt to defraud people (but in these cases, the matter is already covered by criminal law), or to create a threat to national security (also covered by National Security Law and existing criminal law). There may be some matters where the regulatory requirements may need to be stringent, but the uneasiness we have over the Consultation Paper is that it proposes the imposition of excessive penalties for *all* fundraising activities, the vast majority of which do not and should not cause concern to the FSTB.
31. Hence, we have reservations with the idea in the Consultation Paper that creates regulatory controls (such as registration/accreditation) with *any* breach, even trivial/regulatory, and subjects the parties to severe criminal penalties when, it is claimed that the operation of the crowdfunding is “illegal” by reason of breaches. A “one-size-fit-all” approach is not appropriate.

## **Contributors**

32. Some of the requirements of the proposal such as the need to obtain and maintain details of all contributors, may appear highly intrusive to members of the public. It may be counterproductive to raising funds for charities to require people to provide personal details. It would also contradict the principles of the Personal Data (Privacy) Ordinance, Cap 486. In addition, charities are not subject to any such requirement and, in our view, should not be covered by regulations affecting crowdfunding activities. Many people do not wish to disclose their personal information. For example, they could fear data leaks/hacking, and loss of privacy. There is no rationalisation in the Consultation Paper of the need for *all* crowdfunding platforms to mandate disclosure. This requirement should only be applied in circumstances where it is proved to be necessary. Bearing in mind that the paper emphasizes the need to *facilitate* crowdfunding for lawful purposes, any proposals that have the effect of *stifling* crowdfunding through excessive requirements run contrary to the stated policy objective and/may put donors off entirely.

33. Given current prosecution cases<sup>2</sup>, these proposals may be perceived by some to be aimed at “political” fundraising. As such, there may be a public perception that the purpose of the collection of donor information is gravitated towards national security concerns. On this, it is relevant to note that the proposal to obtain donors’ information should be designed only for an isolated and a specific purpose (i.e. for donations made to a fundraiser, who is considered potentially a threat to national security). As the matter now stands, the proposal tramples on the whole crowdfunding garden, to get at that isolated and rare weed.
34. The issue of requiring donors to give information about themselves (paragraph 2.17) needs a fuller deliberation. This requirement could be revised to be applicable only to limited types of crowdfunding. For example, it should only apply to donations over a certain amount for some purposes (e.g. political purposes), or to impose a limiting requirements in the case of a fund which has a low cap on size, or to exempt a small contribution amount. There is in fact a recognition that there may be more or less risk in different examples of crowdfunding (paragraph 2.11). There should also be a limit on how long the person(s) raising the funds must retain this information (e.g. 6 or 12 months)
35. We note a proposal in the paper i.e. “*it is proposed subjecting individuals making fund contributions to unlawful crowdfunding activities to criminal liability*” (footnote no. 7 on page 21 of the paper). If there is to be criminal liability for contributors, the contributors must first be made aware of the unlawful purpose. They must have the *mens rea*. It would be an astonishing legal novelty to enact a law that a person making a donation for what they perceived as a genuine charitable cause is prosecuted because of different intentions of the fundraiser.

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<sup>2</sup> See the blog of the Secretary for Financial Services & the Treasury of 17 December 2022. In the blog, the Secretary Mr. Chris Hui said the following (our own English translation):

Keep Up with the Times; Regulation of Crowdfunding

*“In the past, criminals used crowdfunding to seek personal gain through deception, resulting in innocent citizens’ loss. There are also groups using crowdfunding to support behaviour that endanger public safety or even national security. For example, after the ‘612 Humanitarian Relief Fund’ (which used crowdfunding to support allegedly illegal activities) was prosecuted by the police, the ‘Alliance for True Democracy Limited’ (which provided accounts services for the ‘612 Humanitarian Relief Fund’) ceased operation afterwards. The name of the non-functioning company has been struck off from the Companies Register and it was dissolved last month.*

*We need to plan well in advance. We need to establish a sound mechanism for legal and proper crowdfunding activities, so that there can be rules and guidance to follow. At the same time, it can also prevent illegal funds from being used to plan activities which endanger public and national security, or to support illegal activities.”*

The full text of the blog in Chinese can be found in: <https://www.fstb.gov.hk/en/blog/blog171222.htm>.

36. The requirement for knowledge is important and criminal liability in connection thereto should be well-defined. It (a) might be appropriate to have criminal offence on contributions *knowingly* made to a fundraising for terrorism, or (b) fundraising for a purpose which threatens national security. In each case, the degree of knowledge of the contributor is essential in establishing the offence. Apart from these two examples, if the FSTB has in mind other circumstances that attract criminality, the FSTB should clearly explain and set out those.

## Law Enforcement Powers

37. In addition to the existing laws that only target activities jeopardising national security, the FSTB suggests providing law enforcement agencies with specific powers to deal with crimes related to community crowdfunding activities (paragraph 2.29). These powers include

- (a) *“empowering the Police to request the financial institutions receiving and transferring funds to provide fund records of the crowdfunding activities, and information of their clients in circumstances not limiting to suspicion of any person having committed an indictable offence”* (paragraph 2.29(a));

Our comment: it is not understood what is meant by the words “not limiting to suspicion of” in the above. The proposed application of the above should precisely be set out.

- (b) *“obtaining relevant authorisation (such as the written consent of the Secretary for Security) to temporarily detain any property (including digital currency and non-fungible tokens) arising from unlawful crowdfunding activities within a specified period (such as 90 days)”* (paragraph 2.29(d))

Our comment: presumably the wording above should be “for a specified period” (not “within a specified period”).

- (c) *“when any online crowdfunding platform is found obviously involving in any unlawful activities, [the law enforcement agencies can] request the local host service provider or network service provider to take restrictive actions against the platform in question, and prohibit anyone from accessing it.”* (paragraph 2.30).

Our comment: the above seems to mean a power is given to law enforcement agents if they consider that there is an *obvious* involvement of unlawful activity. There should be judicial supervision of whether the

law enforcement agencies are right or wrong, in respect of their views on the above.

Similarly, in relation to the proposal that “*that law enforcement agencies be given the statutory power to confiscate funds related to unlawful crowdfunding activities*” (paragraph 2.30), the power of confiscation as proposed should be subject to judicial supervision.

38. We agree that some of the proposed powers suggested for CAO and enforcement authorities are relevant and suitable in the case of fraud, or serious offences such as terrorism or threat to the national security. However, for general community crowdfunding activities, the FSTB should have no need to call upon these powers. Consideration should be given to differentiate situations when the powers as suggested would be relevant to crowdfunding, from those instances where they would not. Moreover, where there is a dispute or challenge, it should be made clear that those law enforcement powers are subject to judicial decision.

### **Protection of Investors**

39. We oppose the introduction of regulations which:
- (a) affect activities falling within an existing regulatory safe harbour (e.g., public offer exemptions under the Securities and Futures Ordinance, the Companies (Winding Up and Miscellaneous Provisions) Ordinance or the Money Lenders Ordinance);
  - (b) require additional licensing for products or services already (i) licensed or authorised under an existing regulatory regime (e.g., offers made pursuant to offering documents registered under the Securities and Futures Ordinance or the Companies (Winding Up and Miscellaneous Provisions) Ordinance); or (ii) a solicited by an entity or person regulated under an existing regulatory regime (either in Hong Kong or overseas); or
  - (c) impose costs and burdens on both financial return crowdfunding and community crowdfunding progress which would render them impractical or uneconomic or would delay their offering.
40. As regards financial return crowdfunding not falling within the above exemptions, we consider that it would be appropriate to have a blanket exemption for crowdfunding activities similar to that adopted under the United States Jumpstart Our Business Startups Act (JOBS Act) allowing companies to raise a maximum of US\$1.0 million every 12 months without needing to register. In Hong Kong, we believe that a threshold of HKD 8,000,000 every 24 months would be appropriate. Alternatively, the UK disclosure-based approach provides a pragmatic compromise between the desirability of not stifling legitimate and

worthwhile crowdfunding activities and addressing potential misfeasance on the part of persons conducting such activities.

41. We also consider that it would be contrary to the interests of Hong Kong and the Hong Kong public if any form of licensing or registration are to be required for persons conducting community crowdfunding, as the costs and time delay in obtaining a license or registration would outweigh any intended benefit. As examples, many smaller individually initiated annual Christmas fundraising appeals for poverty relief and time-critical disaster relief appeals would be adversely affected (if not eliminated) by imposing a largely unnecessary regulatory burden (due to the cost and delay in obtaining CAO approval).
42. However, crowdfunding activities (including community crowdfunding activities) which do not require registration or licensing, should still be subject to laws requiring transparency and accountability on the part of the person(s) conducting those activities including record keeping requirements and prohibitions against fraudulent and deceptive conduct and application of anti-money laundering laws (see the paragraphs above). The CAO could be granted power to order that criminal or fraudulent crowdfunding activities be suspended.

#### **No requirement to open or close a designated a Hong Kong bank account**

43. The paper proposes that, “[*as*] crowdfunding necessarily involves the pooling and transfer of funds, [*the FSTB*] propose that it should be a requirement for funds collected in this way in Hong Kong to be paid into a designated account with a local bank” (paragraph 2.24). We have reservations on this proposal.
44. Arising from concerns about anti-money laundering and other related requirements, opening a Hong Kong bank account has become a cumbersome and time-consuming process. This is especially true where the applicant is neither a Hong Kong resident individual in employment nor a business with a valid business registration certificate. In these cases, it can often take months to open a bank account. The time, costs and difficulty of opening a bank account for the purpose will often overwhelm the benefits of the project. It is therefore entirely impracticable to impose a requirement for crowdfunding proceeds to be deposited into a designated Hong Kong bank account. Imposing such a requirement will pointlessly prohibit many legitimate and worthwhile crowdfunding projects.
45. In addition, requiring the use of any designated bank account also ignores the use of many current payment methods such as Paypal, Western Union etc. and would, practically speaking, prohibit Hong Kong persons from participating in many legitimate and worthwhile overseas-led crowdfunding endeavours. To address anti-money laundering concerns, we are of the view that payment from a

licensed bank (or overseas equivalent) is sufficient and a sensible compromise alongside the accountability requirements.

### **Additional exemptions**

46. The Consultation Paper proposes that the following activities would be exempt from the new crowdfunding regime:
- (a) fundraising activities which amount to “regulated activities” as defined in the Securities and Futures Ordinance (paragraph 2.3);
  - (b) deposit-taking and lending activities conducted by banks (paragraph 2.4);
  - (c) (with some qualification) the making or offering to make loans by a person licensed under the Money Lenders Ordinance (paragraph 2.4);
  - (d) crowdfunding activities which are “different in nature” from the activities which are “intended to be subject to enhanced regulation” (a phrase which is not defined in the Consultation Paper) including:
    - (i) calls that religious bodies make to their followers for donations on religious grounds, such as the calls for making regular donations and contributing to restive activities held on the ground of religious doctrines;
    - (ii) activities that recognised associations solicit funds from members, with a view to promoting the welfare and needs of respective members;
    - (iii) buying and selling of goods or services readily available in the market, even though the buying and selling may be conducted online and may involve recruiting people to buy as a group; and
    - (iv) commercial activities on online media and the like that involve income from subscriptions or online rewards. (paragraph 2.10).
47. In addition to the proposed exemptions for registration mentioned in the Consultation Paper (see above), we take the view that there should be complete exemptions for registration for crowdfunding activities limited to closely connected groups of persons including but not limited to:
- (a) the exemption similar to that adopted under the United States Jumpstart Our Business Startups Act (JOBS Act) (see above);

- (b) personal projects (e.g., funding of medical procedures, book launch, business project etc.);
- (c) employees of the same employer (or group of related companies) and their families etc.;
- (d) members of societies registered under the Societies Ordinance, Cap 151 (or equivalent overseas) and their families etc.;
- (e) alumni of educational institutions and their families etc.;
- (f) charities (which should be subject to a separate regulatory regime, see below);
- (g) crowdfunding activities which have already been regulated under an overseas regulatory regime.

### **Extra-territorial and jurisdictional issues**

48. Community crowdfunding activities conducted from offshore should benefit from the same safe harbours as Hong Kong based community crowdfunding. Any regulatory enactment which is likely to result in the exclusion of Hong Kong-domiciled persons from participating is adverse to charitable and other legitimate and worthwhile initiatives. For companies, this problem already exists where Hong Kong-domiciled investors who have invested in companies listed on overseas stock exchanges are routinely excluded from rights issues and placements because of mistaken concerns that the offer may require disproportionately expensive registration in Hong Kong.
49. On the other hand, there is a substantial risk that requiring approval of crowdfunding through the CAO would drive the undesirable activities offshore (primarily to other APAC financial centres) where, as with the deluge of scam and junk phone calls and texts Hong Kong residents are subjected to, the Government and regulatory authorities in Hong Kong would generally be unable in addressing. Legitimate activities within Hong Kong would be stifled – while doing little to address the concerns raised in the Consultation Paper.
50. For law enforcement purposes, the Consultation Paper in paragraph 2.2 proposes that an application for registration must be made before crowdfunding activities and that this proposed requirement will apply to an activity that raises funds from Hong Kong individuals either in Hong Kong, or as we understand it, outside Hong Kong. The paper defines the above crowdfunding activity to an activity that, *“in respect of the publicity used or the actual operation, appeals publicly for funds from any Hong Kong permanent residents, or individuals*

*located in Hong Kong; or any body corporates incorporated or registered in Hong Kong, or located in Hong Kong; or any organisations having place of business in Hong Kong or located in Hong Kong, regardless of whether they are body corporates, for a declared purpose, whether or not the crowdfunding activity is conducted in Hong Kong.”* (paragraph 2.2, emphasis supplied).

51. We find it difficult to see how the above could apply to e.g., a charity overseas, raising funds from a Hong Kong person who happens to be overseas. It is on the other hand not clear what is added by the words “*for a declared purpose*” in the above.
52. It appears that the FSTB is putting forward a concept of application outside the jurisdiction, but there is no discussion as to how that could practically apply, either with regard to enforcement, or to cases where there is conflict of laws and the activity is legal in the other jurisdiction.
53. According to the proposal “*[the] crowdfunding activity may be publicised offline (e.g. by distributing leaflets or making announcements on newspaper) or online (e.g. by using a crowdfunding platform, social media or a bulk sending function to publish an electronic message). The location of publicizing such activities can be any places, including Hong Kong or other places; and with declared purposes that are related to Hong Kong or not, including charitable causes, or for other purposes with or without returns in any form*” (ibid). If the proposal is intended to apply “*whether or not a crowdfunding activity is conducted in Hong Kong*” (paragraph 2.2), there needs to be an explanation on practically how the proposal would be applied. “Publication” of the crowdfunding can be anywhere, and the purposes may similarly be related to any place, not Hong Kong. On the other hand, the words “*with declared purposes*” in the above are not clear.
54. It is difficult to see how a prohibition order issued by a court of Hong Kong might be used against a crowdfunding activity taking place in a different jurisdiction. It would be helpful to have thoughts from the FSTB on this issue, by references to any examples as to what the FSTB has in mind of the activities, and of how those could be regulated in practical terms.
55. There are also problems with paragraph 2.5 of the Consultation Paper, which states that for crowdfunding projects falling under the CAO’s purview, if a fundraiser intends to publicise a crowdfunding activity that raises funds from individuals or entities of Hong Kong, or individuals or entities located in Hong Kong, he must make an application to the CAO and must submit certain stipulated information. The paper has not explained how a person raising funds overseas, and is given some funds by a Hong Kong individual, knows that he is required to make an application in Hong Kong.

56. It is also not clear from the paper as to how an obligation to obtain the information in paragraph 2.14 could be enforced. (Paragraph 2.14 provides, *inter alia*, that “*fundraisers whose applications are approved should be obliged to obtain information on the identities of persons donating funds from any crowdfunding platforms, financial institutions or payment service providers they cooperate with. Such information should be retained for a specified period and, where there is a need to do so, made available to the CAO or law enforcement agencies, who should be empowered to require it from the fundraisers*”.)
57. The above proposals seem to make sense only if at the very least the fundraising is publicised in Hong Kong, but that is the opposite of the stated policy objective which says that “[the] location of publicizing such activities can be any places, including Hong Kong or other places; and with declared purposes that are related to Hong Kong or not, including charitable causes, or for other purposes with or without returns in any form” (paragraph 2.2).
58. We do not see how paragraph 2.19, with regard to registration, could apply to any crowdfunding carried on overseas, as set out in paragraph 2.2, when the crowdfunder overseas can simply ignore Hong Kong legislation, though theoretically subject to the system (paragraph 2.19).
59. We suggest a segregation between applicability of a proposal to entities in Hong Kong, and crowdfunding in Hong Kong, published in Hong Kong, as distinct from those overseas, because otherwise certain concepts embraced in the proposal may not, easily or practically, be applied to the latter. To avoid confusion there could be two distinct parts to legislation, if there are proposals for application to persons overseas, publishing overseas, or activity overseas.

## **Charities**

60. The consultation makes little reference to charities. Mostly, it covers crowdfunding in the context of financial services and law enforcement against abuses.
61. Crowdfunding is an important tool for charities to raise funds. While many of the proposals in the Consultation Paper can be applied conveniently to charities, many do not and would make the procedures unnecessarily cumbersome or even prohibitive for many charities.
62. We consider that charities should be considered separately from the proposals (including one off community crowdfunding projects).
63. In the absence of a separate and detailed discussion on crowdfunding for charities, we have (for now) the following general comments:

- (a) We recommend that crowdfunding activities for charities should be regulated by one single central body which, in carrying out its regulatory powers, may consult the relevant government departments such as the Social Welfare Department. The central regulator could be the Charities Commission, which was proposed in 2011 by the Law Reform Commission of Hong Kong (“LRC”) in its consultation paper titled *Review On Charities Regime In Hong Kong*.

We have in November 2011 made a submission<sup>3</sup>, to respond to the above LRC consultation paper. In the answers to one of the questions raised by the LRC in the then consultation, we said we agreed to the recommendation that the 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 answer to Q12). On the issue of setting up a Charities Commission, we consider that this is even more important than it was in 2011, given those views and incidents set out in the Consultation Paper. Some form of dedicated charities regulator is needed.

If further reference is needed, the regulation in Australia and other countries should be drawn.

- (b) We recommend that a simpler procedure be adopted for crowdfunding by those entities having a “S.88 certificate” under the Inland Revenue Ordinance. They have already been “vetted” in terms of purposes and governance and do not require further “vetting” except where special circumstances so warrant.

64. We have previously advocated various reforms for the charities regime in Hong Kong<sup>4</sup>, in particular to the definition of “charitable purposes” which would have accorded more fully with life in the 21<sup>st</sup> Century. In our views, crowdfunding is not going to be a useful tool for charities in Hong Kong unless the issues that we have propounded in the above submission are to be revisited and thoroughly considered.

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<sup>3</sup> See [https://www.hklawsoc.org.hk/-/media/HKLS/pub\\_e/news/submissions/20111116a.pdf?rev=bef1f602d8c84620bab1ae7babcf47ff&hash=369BE4A3682CDCBA70347077AEAC9507](https://www.hklawsoc.org.hk/-/media/HKLS/pub_e/news/submissions/20111116a.pdf?rev=bef1f602d8c84620bab1ae7babcf47ff&hash=369BE4A3682CDCBA70347077AEAC9507)

<sup>4</sup> See note 3 above.

## Summary of views

65. We set out below a summary of our views.

	<b>Licensing of person making offer</b>	<b>Registration of offer</b>	<b>Licensing of person providing funds</b>	<b>Accountability of person making offer</b>
<b>Financial return crowdfunding</b>	No	Only if by a person not regulated under another regulatory regime	No	Yes
<b>Community Crowdfunding</b>	No	No	No	Yes
<b>Providers of platforms for crowdfunding</b>	Yes, unless already licensed or exempt under other regulatory regime	No, but should ensure compliance with offer restrictions by users of the platform	No	Yes
<b>Overseas crowdfunding</b>	No	No	No	Yes

## Conclusions

66. We welcome the proposal to improve existing the regulatory framework which has the effects of (a) preventing illegal activities, and (b) protecting unsophisticated investors and donors against the use of false or misleading information or fraud. In particular, we support the proposed requirements for transparency and accountability.

67. Furthermore:

- (a) statutory accountability for those conducting crowdfunding activities is timely. Requiring persons who raise money through crowdfunding to prepare and maintain proper records and to account for donors would be desirable;

- (b) existing regulations dealing with issues of fraud, deceptive conduct or money laundering in many areas already cover crowdfunding activities. This existing legislative framework however is confusing and not user-friendly to the public or to the law enforcement agencies. There is a need to review and to consider whether a new and an updated legislation is required; and
  - (c) the above is relevant for national security offences, which are novel to the current regulatory framework.
68. With the above in-principle endorsement, it is important to bear in mind that there should be a carefully-balanced approach in the oversight of crowdfunding, as for one thing the licencing of persons conducting crowdfunding or registration of offers has already been addressed within the framework of existing legislation (for example, the Securities and Futures Ordinance). Insofar as small personal, community or charitable projects are concerned, we say very strongly that there should be no requirement for licensing or registration – in these cases the cost or delay involved would be entirely disproportionate to the concerns being addressed. Also, this idea would be impractical for urgent projects (e.g. disaster relief) and disproportionate for small personal projects (e.g. individually initiated Christmas appeals). A one-size-fits-all approach would become an overindulgence and could render legitimate and worthwhile projects unfeasible.

**The Law Society of Hong Kong**

**14 March 2023**