

COMMENTS BY THE HONG KONG BAR ASSOCIATION
ON THE LAW REFORM COMMISSION
CHARITIES SUB-COMMITTEE CONSULTATION PAPER

I. INTRODUCTION

1. The Hong Kong Bar Association (“**HKBA**”) was invited to comment on the Consultation Paper issued in June 2011 by the Charities Sub-Committee (“**the Sub-Committee**”) of the Law Reform Commission of Hong Kong (“**LRC**”).
2. The HKBA is broadly in agreement with Sub-Committee’s conclusion that there is a general need to reform the existing state of the law on charities in Hong Kong.
3. However, the HKBA is of the view that, in considering how the law is to be reformed, several issues merit particular attention. The HKBA’s views on these are set out below. For convenience, the issues have been divided into those relevant to (a) the *definition* of charities and (b) the *supervision* of charities by a Charity Commission under a statutory framework proposed to be put in place.

II. DEFINITION OF CHARITIES

Charitable Purpose

4. As pointed out by the Sub-Committee, whether or not an organisation in Hong

Kong is given legal recognition as a charity is at present governed by the common law. In order to qualify as a “charity” in the legal sense, the objects of the organisation must be “exclusively charitable” and must fall within the criteria set out in Lord Macnaghten’s dictum in Income Tax Special Purposes Commissioners v Pemsel [1891] AC 531 (at 583).

5. Lord Macnaghten’s list of “four principal divisions” of charitable purposes was in turn derived from the preamble to the Charitable Uses Act 1601 in England (also known as the Statute of Charitable Uses or the Statute of Elizabeth I).
6. The Sub-Committee recommended that, as part of the reform of Hong Kong’s charities law, a statutory definition of what constitutes charitable purposes should be introduced.
7. The Sub-Committee further recommended a statutory list consisting of 13 proposed heads of charitable purposes. Subject to the comments in paragraph 12 below, the proposed heads appear to accord generally with modern social perceptions of what amounts to such worthy objects as to deserve being conferred with the advantages enjoyed by charities.
8. Whilst some of the purposes included under the proposed heads have already been recognised as charitable at common law, some of them have not, such as (6), (7), (8) and (9). There is clearly a need to provide statutory underpinning if legal recognition is to be given to new categories of charities.
9. To avoid the confusion of having different legal bases for different charitable

purposes, the Sub-Committee has recommended that those purposes which are already recognised as charitable at common law should be codified and included also in the statutory list.

10. However, whilst there is merit in having a uniform statutory definition for charities, it is important not to overlook that some of the worthy objects sought to be included in the statutory definition (e.g., “the advancement of citizenship or community development” and “the advancement of human rights, conflict resolution or reconciliation”) are not “charitable” in any conventional and accepted sense of the word (i.e., pious causes); and the policy considerations relevant to a proper delimitation of the scope of these new worthy objects (e.g., in the application of the “public benefit” test) are not necessarily the same as those applicable to the established categories of charitable objects. Unless care is taken to preserve the status quo for the established categories of charities, there is a risk that codification would have the unintended consequence of changing the law in such a way as to narrow or restrict those purposes currently recognised as charitable at common law.

11. The HKBA therefore suggests that a “proviso” should be included in the statutory definition to the effect that an object recognised at common law as “charitable” shall not cease to be so by reason of the introduction of a statutory definition.

12. As to the particular heads of charitable purposes proposed by the Sub-Committee, the HKBA would like to make the following observations:

(1) The concept of “the advancement of citizenship or community development”

would on first impression seem somewhat nebulous. Having read the explanation of the Sub-Committee at §§5.83 and 5.84, the HKBA is satisfied that this concept can be included as a charitable purpose but it would be necessary to have an equivalent of s.7(3)(b) of the Scottish 2005 Act to clarify its scope.

- (2) The HKBA has considered the proposed head “the advancement of human rights, conflict resolution or reconciliation” and takes the view that “the advancement of human rights” can probably be covered by substituting the current head (9) on the list with “the protection of equality, diversity and social justice”. As for “conflict resolution or reconciliation”, the HKBA takes the view that not all kinds of conflict resolution or reconciliation should be accorded charitable status. For instance, whilst the prevention of armed conflict in Africa is clearly a worthy cause which deserves legal recognition, it is difficult to see how the promotion of domestic arbitration or mediation could be put on the same plane.

Public Benefit Test

13. The HKBA has no objection in principle to the Sub-Committee’s recommendation (under Recommendation 2) that all the heads of charitable purposes in the statutory list should be subject to a “public benefit test”, inasmuch as the common law already insists on a measure of public benefit before charitable status is conferred.

14. However, the HKBA has serious reservations regarding the proposal of removing

the so-called “common law presumption” that Lord Macnaghten’s first three heads of charitable purposes (i.e. the relief of poverty, the advancement of education, and the advancement of religion) are for the public benefit.

15. To begin with, it is misleading to suggest that “public benefit” (as understood in charity law) was ever “presumed”. What the case law shows is that an organisation with the purposes of relieving poverty, advancing education or religion is *prima facie* charitable (because those purposes are assumed to be beneficial to society as a whole) but for policy reasons (mainly fiscally driven) legal charitable status is withheld in those cases where the class of persons capable of directly benefiting from the work of the organisation does not amount to a sufficiently wide section of the public.

16. In this connexion, it is pertinent to note that the introduction of the “public benefit test” under the 2006 English Charities Act is generally understood to have been specifically designed to target the status of independent schools (against which the Labour Party has a long-standing antipathy); and the subsequent use of the “public benefit test” by the Charity Commission to force the fee-paying schools to demonstrate that those cannot afford the fees can still have access to the education provided by them has not only been politically controversial but has been strongly criticised at least by one academic writer who argues persuasively that it amounted to an unwarranted perversion of the existing law¹.

17. Having regard to the English experience, the HKBA is of the view that in drawing

¹ Mary Synge, “Poverty: An Essential Element in Charity After All?” (2011) 70 CLJ 649.

up an appropriate “public benefit test” for Hong Kong, there is a particular need to treat with caution the proposal of removing the so-called “common law presumption”, as that is an aspect of the English law reform which arguably owed more to the political ideology of the Labour Administration than to the objective needs of a modern legal regime for giving legal recognition to charities. Moreover, inasmuch as the measures adopted in England were deemed to be necessary to counter the perceived abuse of exploiting charitable status for fiscal advantages, given the comparably much more favourable fiscal regime in Hong Kong (and hence less incentive for exploiting charitable status for fiscal advantages), it must not be assumed that an identical approach to that adopted in England would be suitable for Hong Kong.

18. The HKBA fails to see any justification for abandoning the existing common law approach which lays down both a flexible and proportionate scheme for ascertaining the requisite degree of public benefit appropriate to the established categories of charities which gives due recognition to the nature and type of charitable object in question. For instance, the test for what constitutes a sufficiently wide “section of the public” is less onerous in the case of charities which are for the relief of poverty: see, for example, Dingle v Turner [1972] AC 601.

19. The HKBA views the proposal of removing the so-called “common law presumption” would result in a fundamental change in the existing law that should not pass under the guise of codification. The HKBA further considers that the flexibility of the public benefit requirement at common law ought to be preserved. The HKBA would therefore recommend that a non-exhaustive list of factors could

be laid down in a statute for a future Charity Commission to take into account in determining whether the public benefit test is satisfied in a particular case.

20. The aforesaid list could include such factors as the nature and object of the organisation applying for registration of its charitable status. This would enable the Charity Commission to apply the public benefit test flexibly on a case-by-case basis, setting a threshold that is commensurate with the nature and object of the organisation concerned.

III. SUPERVISION OF CHARITIES

Requirement of Registration

21. The Sub-Committee recommended that an organisation should be required to apply for registration of charitable status if it is to engage in one or both of the following:

- (1) make any charitable appeal to the public;
- (2) seek tax exemption.

22. The HKBA is of the view that the concept of “any charitable appeal” is vague and arguably too broad. For instance, it would on the face of it cover an appeal for volunteers to participate in an overseas aid relief mission, in respect of which the HKBA sees little scope for abuse and no necessity for regulation. Amongst the various possible forms of charitable appeal to the public, it is the solicitation of funds that is most easily susceptible to abuse by a charitable organisation, and

hence in need of monitoring and supervision.

23. In the premises, it is proposed that the current formula, “make any charitable appeal to the public”, could be substituted by “solicit from the public for the donation of cash or its equivalent”.

The Charity Commission

24. As can be seen from the Sub-Committee’s recommendations, the future Charity Commission will assume a substantial role in the supervision of charities, including determining their application for registration, monitoring their compliance with legal obligations, investigating into misconduct or maladministration, etc.

25. The HKBA is of the view that, whilst the functions and powers proposed by the Sub-Committee under Recommendation 19 are necessary to enable the Charity Commission to play a meaningful supervisory role, some of them (in particular items (6), (7) and (8)) are extensive and potentially intrusive powers. And as the English experience with regard to the removal of the so-called “common law presumption” shows, the stance taken by the Commission on a particular issue can prove to be highly politically controversial.

26. In the premises, it is of critical importance for there to be institutional mechanisms to safeguard the independence of the Charity Commission, prevent possible abuses of power and ensure the transparency of its operations.

27. The above issues are not currently addressed by the Sub-Committee in the Consultation Paper, but the HKBA should nevertheless put down a marker that greater attention needs to be given to the institutional design and the constitution of the future Charity Commission (if any).
28. It may be useful for comparison purposes to take into account the governance framework of the UK Charity Commission.² At present, the UK Charity Commission comprises seven members, including the Chair. It is a non-Ministerial Government Department, independent from Ministerial influence or control over its day-to-day operations and decision-making, and is required to report on its performance to the Parliament annually. Members of the Commission are appointed through an open recruitment process in accordance with public appointment procedures, for their generic governance competencies, and for their specialist knowledge, skills and experience relevant to the Commission's activities and the context within which it operates. Members of the Commission are collectively accountable.
29. In our view, it is imperative that details regarding the membership (including the mechanism of appointment of members) of the proposed Charity Commission in Hong Kong and matters relating to its accountability be put forward by the Sub-Committee for further discussion in the public arena.³

² Details are available online at

[http://www.charity-commission.gov.uk/About us/About the Commission/govframe.aspx](http://www.charity-commission.gov.uk/About%20us/About%20the%20Commission/govframe.aspx).

³ Such details should at least be comparable to those available on the UK Charity Commission webpage, mentioned above. Of course, the governance framework of the UK Charity Commission cannot be simply transplanted to Hong Kong, given the differences in political structures, and it will have to be adapted to cater for local circumstances.

30. As a starting point, the HKBA proposes that the Charity Commission should be a body that is institutionally separated from the Government. It should be tenured by members with no affiliations with the Government. Further, it should be required to publish on a regular basis reports about its work and operations to the public.

Dated the 5th day of December, 2011.

HONG KONG BAR ASSOCIATION