

# Comments on LRC Consultation Paper: Charities

## – From Oxfam Hong Kong

### General comments

We believe the Consultation Paper represents an informed and broad discussion of the issues related to charity regulation in Hong Kong.

The stated objectives of the review are welcomed [1.21] and we think the major recommendations are broadly acceptable.

We support moves to make existing registration of charities clearer and more consistent, provided it is done in a way which:

1. Does not **reduce the independence, diversity and vibrancy** of civil participation in Hong Kong society
2. All measures be proportionate and do not **add additional administrative reporting duties** to charities without removing an equivalent weight of old ones
3. Leads to **better understanding by the public** of how charities operate, and reduces popular misconceptions about issues such as administrative costs, the need for professional management, fundraising costs etc.
4. Ensures that a Charity Commission with authority over charities is constituted in a way which ensures it is **impartial, competent and independent**.

We have some concern that the Consultation Paper does not note the role of the regulatory authority in raising public understanding of charitable activities, especially common misunderstandings around legitimate fundraising costs, administrative expenses and professional staff salaries. The frequency of reference to issues of fundraising in the report [Chapter 9 and elsewhere] rather than, say, the importance of effective pursuit and achievement of charitable purposes, does not inspire confidence that public education about charitable activity has been given due consideration.

Since a 'questionnaire' format is not the most effective presentation for expressing our views over complex sets of regulatory proposals, we will not respond exactly according to the list of questions posed in the Consultation Paper, although we will reference most of the questions into some of our answers.

### The need for new laws, regulations & statutory bodies

Regarding the rationale for new regulation, it does not seem that the claim of growing public concern over the regulation of charities is fully justified in the Consultation Paper –

by relying on a few newspaper articles [1.11]. We do not believe this is a sufficient measure of views on the issue, especially if this concern is measured against a range of other pressing public concerns and government priorities. Over the past few years, there were few significant problems that have beset the sector given the number of organizations and diversity of activity. That said, it is good to be pre-emptive rather than reactive. In handling public concerns, the government has a dual duty to ensure the public is better informed, educated and reassured about the causes behind their concerns, while thinking carefully about whether there is a legitimate case for new laws, regulations and public bodies.

## **Definitions of charitable purposes and activities**

**[Q1]** We believe statutory definitions may be a useful guide for both charities and the administration, but they alone will not bring accountability of the sector and cannot be used alone. First, the Consultation Paper has said that all existing charities may continue, so there will need to be a period of slotting existing charities into the new definitions. Second, there is always the catchall category at the bottom of the list stating: ‘any other purpose which is of benefit to the community’ [Recommendation 2]. Third, if the statutory definitions enabled a watertight measure of whether an organization deserved charitable status or not, then the case for a Charity Commission would be greatly diminished.

**[Q2a].** We believe the full list of charitable purposes is valid.

**[Q2c].** The concept of Public Benefit would need more definition and nuancing if there is an authority ruling on this. We agree that charities should not just benefit an exclusive, wealthy, or closed group in society. But at the same time, benefit for a specific group within society can be of public benefit, such as charities serving people with disabilities, migrant workers or ethnic minorities. Public benefit should also include international charities directing their services outside Hong Kong and therefore not directly benefitting the public of Hong Kong.

### **Human Rights**

**[Q2b, Q2d]** It is clear to us that many organizations involving in conflict resolution and human rights groups exist as legitimate charities, alongside environmental, poverty and other charities. These organizations, according to LRC’s proposal that all charities currently operating in Hong Kong should be able to continue [5.50], must not be deprived of the charitable status under the new law.

We note that LRC has already recognized 13 categories of charitable purposes, but is seeking public views on one covering “the advancement of human rights, conflict resolution or reconciliation” [5.112]. It is not clear to us why this is the only criterion that is singled out for consultation. The doubt that LRC displays on this category of charitable purpose in fact may be inconsistent with its views expressed elsewhere in the Consultation Document: that it ‘has no difficulty with the proposition that the advancement of human rights can well be charitable.’ [5.112] and that all charities currently operating in Hong Kong should be able to continue [5.50]. The LRC should clarify the reasons behind its decision to single out one category, to avoid suspicion in

the charity sector and among the broader community on the underlying motivation behind the proposed changes to charity law. In addition, if one function of an NGO is to save lives, then conflict resolution is certainly part of that. For a current example, to help stop the famine and to save lives in Somalia, Oxfam calls for a peaceful resolution of conflict in the country.

## **Political Activity**

**[Q1, Q2]** LRC claims that the issue of whether 'Advancement of human rights, conflict resolution or reconciliation' should be included in the statutory definition of charitable purpose warrants special attention because of the difficulty in distinguishing charitable from political purposes. As the issue of political purpose is potentially applicable to all charities in a variety of charitable sectors, it seems inappropriate that the elaboration on charities and political activity is almost entirely within the section 'Advancement of human rights, conflict resolution or reconciliation' in a chapter discussing which purposes should be eligible for charitable status [5.101 onwards] - this can be seen as blurring the issue of whether HR groups are charitable and the broader issue of political activity by charities.

In the ensuing discussion on the boundary between political activity and pursuit of objectives, the report does not mention the environmental movement, which would be highly relevant reference on this subject. In working to save the environment, many green groups work largely around 'advocating or opposing change in the law, policy and administrative practice.' [5.25] We hope it is not the intention of LRC to say that green groups campaigning and lobbying politicians for say tougher penalties on toxic waste spills are not charities. Organizations working on disability issues are also indisputably part of the charity sector, yet are constantly lobbying for changes in laws, policies and regulations in pursuit of its mission to make facilities more suited to the disabled. Pointing to a classic example, as the entire anti-slavery movement centred on 'advocating a change in the law' [5.25], William Wilberforce would be disqualified from the charitable tax free status; but if the anti-slavery movement had instead proposed the public 'sponsor a slave with a monthly donation', then clearly it would have qualified as a charity in Hong Kong.

As for Oxfam, we adopt a multidimensional approach to fighting poverty, which involves development programmes, advocacy and development education, and humanitarian response. Advocacy and campaign is therefore an essential part of work, to achieve our purpose of poverty alleviation. In our advocacy work, we campaign on trade laws, climate change negotiations, and such issues as legislation to introduce minimum wage in Hong Kong and enable the supply of cheaper anti-retroviral drugs to HIV/AIDS patients in poor countries. In this we do public education on the issue, and also accredited participants in international and national conferences on these issues, in order to directly lobby politicians and international negotiators. We consider all such work a vital part of our charitable purpose on poverty reduction, and it is totally unacceptable if this is considered as "political activities" falling outside the work of a charity.

Has the LRC picked the wrong heart?

On the UK Charity Commission guidance of ‘Campaigning and Political Activities by Charities’ the LRC says that ‘At the heart of the guideline is the principle that an organisation cannot be charitable if the purposes of objects of the organization itself are political.’ [5.106] In terms the importance of the debate in Hong Kong and our responsibility to build a well-informed public, we would rather say that at the heart of the guideline is the clear statement, in the first of the document’s ‘Key Points’ that: “Campaigning and political activity can be legitimate and valuable activities for charities to undertake.” [Charity Commission. CC9, B1.]

To quote again the UK Charity Commission: “The experience of charities means that it is right that they should have a strong and assertive voice. Often they speak for those who are powerless, and cannot make their case themselves. Sometimes charities confront extreme social injustice, which they will want to tackle head-on. The work that charities do, and the major role they play in public life, is something they should be proud of.”

In HK society, charities play this important role. They are whistle-blowers, weather vanes, and a strong channel for otherwise voiceless people to express their views and campaign for fairness and equality in Hong Kong society. As the UK Charity Commission notes, an essential part of this role is the freedom and independence to be critical of the public sector and the business sector.

If powers proposed for the Charity Commission go beyond determination of charitable status, and include powers to remove managers, demand a seat on the board, to determine when a charity is ‘unlawful’ [8.36] then whole range of questions need to be answered about how the Charity Commission will be constituted, the ways of working and the independence of the Charity Commission, its protection from political interference, and any potential conflict of interest of its members regarding other dimensions of their public and commercial life. The Consultation Paper takes pains to discuss the issue of political purposes by charities, but an equal if not more important discussion needs to be had on ways to ensure that the proposed Charity Commission itself is constituted in a way that avoids political interference. Our views on the proposed Charity Commission are detailed in subsequent sections.

## **Registration, filing and review requirements**

**[Q3, Q4a, Q4b]** We have no objection to the proposal that the existing diversity of legal forms (Company limited by guarantee, Foundation, Association, Society etc.) continue. However, with a newly established Charity Commission registering all charities, we would ask if there would be a commensurate reduction in the filing requirements with other parts of the HK government related to the various legal forms of Charities (Companies Registry, Home Affairs, Inland Revenue, SWD etc.) [7.33]. We would hope that the new registration requirements for the Charity Commission are not simply added on top of the current requirements for the various legal forms of charitable organizations.

**[Q5]** We also accept that there should be no exemptions from the proposed Charity Commission registration, subject to a grace period for all NGOs to prepare for the implementation of the new laws. As an international charity, Oxfam would agree that the same laws should apply to us as with any other charitable body in Hong Kong [7.36]. There however should be mechanisms preventing the authorities to use the registration system as a tool to curtail the operation, or delay the establishment, of any NGO. Separately, we seek clarification on whether major trusts, e.g. the HK Jockey Club Charities Trust, would be subject to these laws. If not, LRC should offer a view as to why the risks associated with standards of fundraising, administration, accountability, transparency and charitable nature of disbursement of funds associated with all other charities are of no concern with regard to a charity of such nature.

**[Q7]** We can agree in principle on a standard format for reporting. But the threshold should depend on the complexity of information reporting required and should perhaps be set after this is established.

**[Q8]** On recommendation 6, we would agree on declaration of interests for trustees. This is possibly also relevant for senior management.

**[Q9]** The contention that a charity with income exceeding \$500,000 is capable of 'hiring full time staff for the purpose of complying with the more stringent filing requirements' [8.26] would need further explanation and more thought. Much charity income is restricted or tied to specific projects or agreed work and cannot be used for core administration such as preparing government returns.

We note that both the UK Charity Commission and the UK Companies House have in recent years added additional forms of charity or near-charity registration. Companies House has designed 'Community Interest Company' as a suitable vehicle for registering social enterprises. Given the debate on social enterprise in HK, and HK government measures to promote these hybrid business-charities, would it not be useful to at least take account of this issue in a Consultation Paper examining forms of registration of charities in Hong Kong?

**[Q10]** There seems very little difference with information provision requirement of a charity registered with the Company Registry and those proposed for the Charity Commission. We have some doubt if the list of reporting requirements would really do much to improve "transparency, openness and accountability" of Charities beyond what is already achieved by, for example, Company Registry filing requirements [8.28, Recommendation 5]

**[Q10]** A register of charities generally contains fairly basic statutory information and as such is only a check of legal legitimacy and financial compliance, particularly as the reporting requirements have to be light enough for very small charities. As such, it is unrealistic to expect that the register would indicate much about "accountability with respect to their charitable activities . . ." or be sufficiently detailed that "the work carried out by these organizations can be easily promoted to the public." Organizations can still tick the right boxes when it comes to registration. With the exception of financial information, it would be the checking role of the Charity Commission which would protect the public from 'fraudulent and deceitful acts' by registered charities, not the information supplied as part of that registration [7.23].

[Q11] We would agree, and understand this differs little from filing requirements of a Company Limited by Guarantee

## **Roles and powers of the proposed Charity**

### **Commission**

[Q12-Q19] With regard to the powers and roles proposed in recommendations 9-13 for the Charity Commission, we have a number of reservations. In relation to Recommendation 9, we consider it significant to define clearly what constitutes “mismanagement“. We note that the term is generally defined with a number of examples provided in the guidelines issued by the UK Charity Commission. Guidelines and definitions like these are essential to avoid excessive power being vested in the Commission, to prevent the interpretation becoming subjective, poorly-informed or partial.

We have reservations over the proposed powers of the Charity Commission to appoint, suspend or remove directors. Such power is a direct intervention in the operation of the charities and such degree of intervention is difficult to justify, and we believe proposed roles of the Charity Commission and existing laws are sufficient.

Regarding the authority of the future charity commission to 'de-register' a charity, much depends on how the commission is going to interpret the charity laws in future, especially the legal definition of a charity. A case in point is the New Zealand Charities Commission's interpretation of the law regarding a charity's engagement in advocacy, which, according to the Commission, is a 'non-charitable purpose'. This resulted in the de-registration of NZ's National Council of Women despite its publicly acclaimed and recognised work for the betterment for women, children and families in NZ. Disputing NCW's claim that its political advocacy is a means to promote the progress for women, the Commission ruled that NCW advocated for changes in the law or the policy/decisions of the NZ Government. It is worth noting that the de-registration ruling was made despite the fact that NCW has been in NZ for 115 years, and Greenpeace NZ is still appealing to the Court of Appeal regarding a similar ruling. To date more than 120 charities, for one reason or another, have had their registration applications declined or have been deregistered by the NZ Charities Commission. Given these legal precedents, it is not surprising that the legal power bestowed on the future registration/regulatory body for charities is a major cause of concern for some charities and activists in HK.

With the significant powers proposed, the way in which the Charity Commission is going to be constituted in order to remain impartial and independent becomes the critical issue. The stated aim of the Consultation, we are reminded, is to preserve the independence of the charity sector [1.21]. Instead of a Commission that is solely appointed by the Government, there should be some democratic element to ensure its accountability and representation of the charity sector.

[Q20, Q21] We are not sufficiently knowledgeable of the various logistics and ‘need to know’ of other relevant government departments regarding fundraising activities in public areas under their jurisdictions to fully respond to this question. We think the government

would be best equipped to work out the feasibility of a 'one stop shop' for fundraising permits. Our main concern would be that the resulting changes would not add new restrictions or burdens on charity fundraising, or leading to bureaucracy which makes the application of permits and licenses lengthy, thereby reducing their income. Measures should also be put in place to ensure big establishment charities, such as the Community Chest, do not dominate public bodies making decisions on allocating restricted opportunities for fundraising. In the past, there have been cases of such establishment charities being disproportionately privileged in activities such as flag days which are actually far more beneficial for smaller charities.

Currently, duplication of efforts between Government departments over the issue of public fundraising by charities is noted, e.g. guidelines issued by ICAC and Social Welfare Departments, and should be minimized in future, for better use of public resources and clearer situation for compliance by charities.

**[Q22].** Agree that charity number should be displayed. Beyond that, given the transborder nature of websites, the best government (and legitimate charities) can do is to try and educate the public to make more informed decisions about online donations and better equip them to spot rogue charities.

**[Q23]** We agree with the requirement of displaying the registration number for all forms of charitable fundraising activities - this works in other jurisdictions and would work for Hong Kong.

**[Q24]** Recommendation 15 on codes for professional fundraisers and the use of professional fundraisers. The term 'professional fundraisers' is not defined in the document, and we assume that they refer to contracted agents (ie PR companies or Face-to-face fundraising agents) but not the staff of a charity. Otherwise, it will infringe the data privacy on 'disclosure of remuneration' (salary) of individual staff. Moreover, there should not be one standard for sub-contracting by charities, and a different ethical or conceptual standard for use of sub-contracting by government or by business. The same underlying ethical and legal principles should apply. Once again, we would want to ensure that any more detailed proposals would not add new restrictions or burdens on charity fundraising, negatively affecting their opportunities to raise income.

**[Q25, Q35].** On the proposed role of the Charity Commission. The proposed role of the Charity Commission includes ruling on fundraising codes, determination of charitable status, monitoring of conduct among other proposed functions and powers. There is some danger of Charity Commission playing the role of the legislature, the police and the courts. These roles need separating and we believe there are lessons from other jurisdictions on this.

If the Charity Commission is invested with this authority, as with the powers proposed in Q12-Q19 above, the most critical issue becomes the way in which the Charity Commission is going to be constituted in order to remain impartial and independent.

If it is agreed there is a role for the Charity Commission in advising charities, and in educating the public, this should be included in the list of proposed functions. For the development of the charitable sector in Hong Kong, the Charity Commission should play also an empowering role to support the charities, instead of being only a rule-imposing body.

Any guidelines issued by the proposed Charity Commission in this area should be subject of due process, involving meaningful consultation with those who will be affected by any resulting changes in current practices.

**[Q26, Q27]** The most expert body in Hong Kong in determining charitable status (we would hope) would be the proposed Charity Commission. If the Charity Commission granted charitable status to an organization, on what grounds would the IRD be able to refuse tax exemption? It would make sense that while the IRD may administer tax exemption, the granting of charitable status by the Charity Commission would make the granting of tax exemption more or less automatic.

**[Q28, Q29]** We think it would be important to clarify the division of roles between the proposed Charity Commission and IRD regarding filing of documents and review of status, and as we have stated throughout our response, we would oppose mechanisms that increased the administrative burden on charities, such as double reporting requirements and double reviews.

We would therefore want to know how the IRD review of charities for taxation purposes would differ materially from the Charity Commission reviews of charities for compliance with legal obligations, conduct, administration, appropriate governance and good practice etc. Both would surely involve financial information and accounts.

We would think the only criterion for IRD to assess an organization's continued eligibility for tax free status is to ensure that the organization's activities continue to be charitable. This is exactly what the Charity Commission is also tasked with determining and monitoring. Thus, the future Charity Commission should collaborate with IRD and various regulatory bodies for ease of reporting (especially for small charities), and not on the basis of the convenience of the various government departments.

**[Q30-32]** We have no objection to the Cy-pres approach. It might be useful to have figures on the number of relevant cases in recent years in Hong Kong in order to assess the detail and complexity and the necessary time we all spend discussing the mechanisms necessary for preparing for such eventualities in future.

**[Q33]** We are not sure what "sole regulatory body" means. We welcome measures that would promote transparency of the charity sector while reducing administrative burden. If charities are able to take a variety for legal forms [see Q3&4], which require registration with differing government departments, and are still subject to filing and review by the IRD as to their tax-exempt status, it would appear that the Charity Commission naturally will not be the sole regulator of charities in Hong Kong. There will be the question on the relationship between the Charity Commission and other relevant government departments.

We repeat our underlying principle, which is that we believe a variety of legal forms benefits civil society in Hong Kong by providing choice and diversity. However, with the establishment of the Charity Commission, we would want to see a redistribution of filing and review mechanisms between the registration body, the IRD and the Charity Commission to ensure that the administrative burden on charities does not increase.



**[Q34]** Objectives for the future Charity Commission could perhaps contain reference to enabling charities to better achieve their charitable purposes and thereby benefit society in HK and around the world. The current objectives are rather administrative and fail to emphasise that enabling charities to do a quality job is an admirable role.

“Maintaining the sector’s independence and autonomy” is noted in the heading of the section on the aims of the Consultation Paper, and again in the text [1.25], but we note it does not appear in the final list of objectives for the regulation of charities. [Recommendation 18].

It would be desirable to include in the objectives about improving public understanding as well as increasing public trust and confidence in charities.

**[Q35]** See Q25 above.

**[Q36]** We agree that oversight of the proposed Charity Commission, and the legal right of independent review of their decisions is important. But equally important is the agreed procedure for creation and composition of the Charity Commission itself to ensure professional competence, independence and impartiality.

**[Q37]** Appeals process is necessary, and this should be independent and objective. Whether handling of appeal by the Administrative Appeals Board is an acceptable arrangement depends on the caseload, the waiting and processing time, and expertise available to hear the cases.