Review of the Trustee Ordinance and Related Matters

Consultation Paper

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REVIEW OF THE TRUSTEE ORDINANCE AND RELATED MATTERS

CONSULTATION PAPER

ABOUT THIS DOCUMENT

1. This paper is published by the Financial Services and the Treasury Bureau ("FSTB") of the Hong Kong Special Administrative Region to consult the public on legislative proposals to improve the Trustee Ordinance (Cap. 29) ("TO") and the law relating to trusts.

2. After considering the views and comments on individual subject areas, we aim to publish the consultation conclusions by late 2009 and introduce legislative amendments into LegCo to take forward the reforms in 2010 - 11.

3. A list of questions for consultation is set out for ease of reference after Chapter 6. Please send your comments to us on or before **21 September 2009** by one of the following means:

   By mail to: Division 6
   Financial Services and the Treasury Bureau
   15/F, Queensway Government Offices
   66 Queensway
   Hong Kong

   By fax to: (852) 2869 4195

   By email to: to_review@fstb.gov.hk

4. Any questions about this document may be addressed to Miss Grace KWOK, Principal Assistant Secretary for Financial Services and the Treasury (Financial Services), who can be reached at (852) 2528 6384 (phone), (852) 2869 4195 (fax) or gracekwok@fstb.gov.hk (email).

5. This consultation paper is also available on the FSTB's website http://www.fstb.gov.hk/fsb.

6. Submissions will be received on the basis that we may freely reproduce and publish them, in whole or in part, in any form, and use, adapt or develop any proposal put forward without seeking permission or providing acknowledgment of the party making the proposal.

7. Please note that the names of respondents, their affiliations(s) and comments may be posted on FSTB's website or referred to in other documents we publish. If you do not wish your name or affiliation to be

disclosed, please state so when you make your submission. Any personal data submitted will only be used for purposes which are directly related to consultation purposes under this consultation paper. Such data may be transferred to other Government departments/agencies for the same purposes. For access to or correction of personal data contained in your submission, please contact Miss Grace KWOK (see paragraph 4 above for contact details).

ACKNOWLEDGEMENT

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ABBREVIATIONS

BVI	British Virgin Islands
BVITO	BVI Trustee Ordinance 1961 (Chapter 303)
CITL	Cayman Islands Trusts Law (2007 Revision)
JTL	Trusts (Jersey) Law 1984
NZ	New Zealand
NZTA	NZ Trustee Act 1956
NZTAB	NZ Trustee Amendment Bill
PAO	Perpetuities and Accumulations Ordinance (Chapter 257)
SCLA	Singapore Civil Law Act (Chapter 43)
STA	Singapore Trustees Act (Chapter 337)
TA 1925	UK Trustee Act 1925
TA 2000	UK Trustee Act 2000
TLATA	UK Trusts of Land and Appointment of Trustees Act 1996
TO	Trustee Ordinance (Chapter 29)
UK	United Kingdom

EXECUTIVE SUMMARY

1. The Government is reviewing the trust law regime in Hong Kong, mainly to amend and modernise the TO to provide a better framework for the operation of trusts in Hong Kong, and to gather views on how to improve the trust law regime. Modernising our trust law will strengthen the competitiveness and attractiveness of our trust services industry. It will encourage more local and overseas settlors to choose Hong Kong law as the governing law for their trusts and to administer their trusts in Hong Kong. A modern and user-friendly TO will benefit the settlors, trustees and beneficiaries by providing more clarity and certainty in law. It will also provide all modern powers necessary for the efficient management of trusts.

2. The TO has not been substantially reviewed since its enactment in 1934. Some of its provisions, especially those regarding trustees' powers, are outdated. Other comparable common law jurisdictions, such as the United Kingdom and Singapore, have reformed their trust law in recent years and there are requests from the trust practitioners in Hong Kong for a more updated regime. The Joint Committee on Trust Law Reform (formed by the Hong Kong Trustees' Association and the Society of Trust and Estate Practitioners – Hong Kong Branch) submitted a detailed proposal in August 2007 advocating a comprehensive review of the trust law regime in Hong Kong.[1] In addition to modernising trustees' powers, it also proposed adopting some of the practices which are more popular in off-shore jurisdictions (e.g. permitting non-charitable purpose trusts, introducing statutory rules dealing with forced heirship, etc.).

3. This consultation paper invites the views of interested parties on the following issues:

   (a) trustees' duty and standard of care;
   (b) trustees' powers for performance of their duties;
   (c) trustees' entitlement to remuneration;
   (d) trustees' exemption clauses;
   (e) beneficiaries' right to information;
   (f) beneficiaries' right to remove trustees;

[1] The proposal is available on the website of the Hong Kong Trustees' Association at http://www.hktrustees.com/home.htm

(g) rules against perpetuities and excessive accumulations of income; and

(h) other proposals put forward by the Joint Committee on Trust Law Reform for promoting the use of Hong Kong trust law and the wealth management business, including defining the role of protectors in statutes, providing that a trust will not be invalidated by the reserved powers of settlors, codifying the common law principles on the governing law of trust, providing against forced heirship rules and allowing the creation of non-charitable purpose trusts.

4. In view of the extensive nature of the review and the complexity of the issues, there may be a need to first tackle those issues that are relatively more straight-forward and that have been reviewed in other comparable common law jurisdictions, i.e. the issues set out in paragraph 3(a) to (g) above.

5. In this consultation paper, we propose to:

(a) introduce a trustees' statutory duty of care;

(b) improve and clarify the law relating to short term delegation by a single trustee;

(c) expand the power of trustees' to employ nominees and custodians and to take out insurance;

(d) allow professional trustees to receive remuneration for services to non-charitable trusts;

(e) regulate the exemption clauses of professional trustees who receive remuneration for their services;

(f) provide some basic rules as to beneficiaries' right to information;

(g) provide a mechanism for beneficiaries who are of full age and capacity and absolutely entitled to the trust property to remove a trustee; and

(h) abolish or simplify the rule against perpetuities and abolish the rule against excessive accumulations of income.

6. As for trustees' default power of investment, in view of the recent financial crisis, we consider that the authorised investments allowed under the existing Schedule 2 to the TO amount to reasonably safe harbour limits of investments by trustees and therefore should be kept substantially intact. In this connection, we would also like to hear the views of the public as to whether trustees should be given a wider power to appoint agents who may exercise asset management functions.

7. We have not formed a position in relation to the issues set out in paragraph 3(h) above. We would like to hear the views of all relevant stakeholders before forming a view on how to take them forward.

8. The Government will carefully study the comments received during the consultation before taking a final view on the proposals. Subject to the outcome of the consultation, we plan to introduce legislative amendments into the Legislative Council in 2010-11 to take forward the reforms.

CHAPTER 1

INTRODUCTION

Background

1.1 A trust is the relationship that arises wherever a person (called the trustee) holds property for the benefit of some other persons (who are termed beneficiaries) or for some objects permitted by law, in such a way that the real benefit of the property accrues, not to the trustee, but to the beneficiaries or objects of the trust.[2]

1.2 The trust law regime in Hong Kong is mainly based on the principles derived from rules of equity. They are supplemented by several pieces of legislation, the most important one being the TO.

1.3 Essentially, there are two categories of trust law provisions. The first category comprises "mandatory" rules, i.e. those statutory provisions that cannot be derogated from by the terms of the trust instrument. Examples are the rules against perpetuities and excessive accumulations of income.[3] The second category is "non-mandatory" or "default" provisions which apply to the trust if there is no trust instrument or where the trust instrument is silent on a particular issue. Most provisions in the TO belong to the second category.

1.4 The TO was enacted in 1934, substantially based on the Trustee Act 1925 ("TA 1925") of the United Kingdom ("UK"), to supplement and amend the common law rules relating to trustees. The TO has not been substantially reviewed and amended since its enactment. The powers conferred by the TO on trustees apply to a trust if, and so far only as, a contrary intention is not expressed in the instrument creating the trust.[4]

1.5 In addition, the Perpetuities and Accumulations Ordinance (Cap.257) ("PAO") was enacted in 1970, substantially based on the UK's Perpetuities and Accumulations Act 1964, to amend the common law

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2 See *Snell's Equity (29th ed.)*, p. 89.
3 Discussed in Chapter 5 of this paper.
4 Section 3 of the TO.

rules regarding perpetuities and accumulations of income. The PAO has not been substantially reviewed and amended since its enactment.

Reasons for the Review

1.6 Since the TO has not been substantially reviewed and amended since its enactment, some of the provisions, especially those regarding the powers and duties of trustees, are outdated. Some major common law jurisdictions like the UK, Singapore and New Zealand ("NZ") have recently reviewed and reformed their trust laws to facilitate trust administration and attract more trust businesses (see paragraphs 1.17 – 1.19 below).

1.7 The Hong Kong Trustees' Association and the Society of Trust and Estate Practitioners – Hong Kong Branch formed a Joint Committee on Trust Law Reform ("the Joint Committee") and submitted proposals to the Government in 2007, advocating a comprehensive reform of the trust law in Hong Kong. The Joint Committee believes that a modern, predictable and equitable trust law will attract more trust business for Hong Kong.

1.8 The Government agrees that there is a need to review our trust law regime, particularly the TO. The review began in early 2008. We aim to:

(a) modernise our trust law to facilitate more effective trust administration;
(b) reform the TO for the protection of, and to offer guidance to, settlors, trustees and beneficiaries by prudential default provisions;
(c) clarify issues and uncertainties in the existing law; and
(d) promote the wealth management business in Hong Kong.

1.9 Hong Kong is a major asset management centre in Asia. At the end of 2007, our total combined fund management business amounted to HK$9,631 billion, representing a growth of 56.5% over 2006. Funds sourced from overseas investors consistently accounted for over 60% of the total fund management business. Asset management, which accounted for the largest share of the combined fund management business, amounted to HK$6,511 billion, and recorded an impressive

growth rate of 57.5% in 2007.[5] Most of the assets under management are held in trusts and similar structures.[6] Notwithstanding the recent turbulences in the financial market, the potential for further expansion of Hong Kong's asset management business is substantial. We believe that modernising our trust law will strengthen the competitiveness and attractiveness of our trust services industry, and more trust businesses will facilitate the development of our financial services market and enhance our position as an international financial centre.

Scope and Approach of the Review

1.10 One principal concern of the Government is that no reform should aid or support contravention of any regulatory measures, including fiscal measures and other measures considered necessary by the Financial Action Task Force ("FATF")[7] to prevent or minimize money laundering and the evasion of detection of the proceeds of crime. This consultation paper proceeds on that basis and is subject to the consideration of any further views on this raised in the course of consultation.

1.11 The TO is primarily a default statute. Any new powers to be conferred on trustees will generally remain to be voluntary. They apply generally if and only so far as a contrary intention is not expressed in the trust instrument.

1.12 The review covers the following areas:

(a) trustees' duty and standard of care;
(b) trustees' powers for performance of their duties;
(c) trustees' entitlement to remuneration;
(d) trustees' exemption clauses;
(e) beneficiaries' right to information;
(f) beneficiaries' right to remove trustees;

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[5] Fund Management Activities Survey 2007 conducted by the Securities and Futures Commission ("SFC") and published in July 2008.

[6] A survey of Hong Kong trust and fiduciary sector commissioned by the Hong Kong Trustees' Association and the Society of Trust and Estate Practitioners in 2005-06 estimated that the total assets under administration of the Hong Kong trust and fiduciary industry (including private client activities) were in the region of $2,828 billion at the end of 2004. According to SFC's Fund Management Activities Survey 2004, the total asset management business (including private banking business) amounted to $3,377 billion at the end of 2004. The figures may not be directly comparable. Nevertheless, they indicate that a substantial portion of assets under management are held in trusts and similar structures.

[7] The FATF is an inter-governmental body whose purposes are the development and promotion of national and international policies to combat money laundering and terrorist financing.

(g) rules against perpetuities and excessive accumulations of income; and

(h) other suggestions for promoting the use of Hong Kong trust law and the wealth management business including defining the role of protectors in statutes, providing that a trust will not be invalidated by the reserved powers of settlors, codifying the common law principles on the governing law of trust, providing against forced heirship rules and allowing the creation of non-charitable purpose trusts.

1.13 The Government has formed initial views on how to tackle those issues which are relatively more straight-forward and have been reviewed in other comparable common law jurisdictions such as the UK and Singapore. The proposals regarding those issues are set out in this paper for public comments. Other issues, particularly those listed in paragraph 1.12(h) above, are more complex in nature and are based mainly on the practices of off-shore jurisdictions. Some of the proposed changes, if adopted, may go beyond amending the TO and the PAO and involve introducing a new piece of legislation. The Government would like to hear the views of the public before taking a final view on them.

1.14 Subject to the outcome of the consultation, the Government plans to introduce legislative amendments into the Legislative Council in 2010-11 to take forward the reforms.

1.15 Currently, the registration regime for trust companies is a voluntary one[8]. Nevertheless, trust companies are subject to certain compulsory activity or product based regulatory controls if they engage in certain investment activities or products and the existing system works well.[9] However, in view of the recommendation of the FATF in its recent Mutual Evaluation Report on Hong Kong that providers of trust services should be subject to some anti-money laundering and counter-terrorist financing (AML/CTF) obligations,[10] the Government

[8] Part VIII of TO was not intended to be regulatory. When Part VIII was enacted in the 1930's, the primary objective was not to cure any defect in the common law in the protection of settlors or beneficiaries. Instead, it aimed to create a special class of corporate trustees (in the form of registered trust companies, as against private individual trustees or private trust companies) to act as executors of the will of a deceased or to apply for a grant of administration where the deceased died without a will. Registration was voluntary because registered trust companies were offered at the time as an alternative to private trustees.

[9] For example, the offer of investment products, such as unit trusts, is regulated by the SFC while all Mandatory Provident Fund (MPF) schemes are regulated by the MPF Schemes Authority.

[10] Providers of trust services which are financial institutions are already subject to AML/CTF obligations.

will separately consider the issues concerning the regulatory regime for trust services providers.

1.16 Trusts established under pension schemes are subject to their own systems of regulatory control.[11] The Government will consult the relevant regulatory authorities before deciding whether any reforms on trust law should apply to trusts under their regulation.

Reforms in Other Jurisdictions

1.17 Some major common law jurisdictions have reviewed and reformed their trusts laws in recent years. The UK reformed its Trustee Act in 2000.[12] The reform was mainly concerned with trustees' powers and duties, and introduced a statutory duty of care, a general power of investment, a power to appoint agents, a wider power to insure and a right for trustees to receive remuneration. The UK also introduced the Perpetuities and Accumulations Bill in April 2009 to amend the law relating to the rules against perpetuities and accumulations of income.

1.18 Singapore amended its Trustees Act ("STA") in 2004.[13] In addition to the reforms made by the UK mentioned in paragraph 1.17 above, Singapore also reformed its regulatory regime of trust companies through amendments to the Trust Companies Act in 2005.

1.19 NZ is also reforming its Trustee Act 1956 ("NZTA"). The Trustee Amendment Bill 2007 ("NZTAB") was introduced to the NZ Parliament on 21 September 2007, in light of the recommendations made by the NZ Law Commission in its report entitled "Some Problems in the Law of Trusts" published in April 2002. Proposals include reforming trustees' power to insure and power to appoint agents and dealing with advisory trustees and protectors. The bill is yet to be passed.[14]

1.20 Some offshore jurisdictions, like the BVI, Cayman Islands and Jersey, have made various legislative amendments to their trust law to include concepts which are unconventional to common law jurisdictions. For

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[11] Occupational retirement schemes governed by trusts are subject to the Occupational Retirement Schemes Ordinance (Cap.426) and regulation by the MPF Schemes Authority. MPF schemes are subject to the Mandatory Provident Fund Schemes Ordinance (Cap. 485) and also regulation by the MPF Schemes Authority.

[12] The Trustee Act 2000 ("TA 2000") is available at the following web address: http://www.opsi.gov.uk/Acts/acts2000/ukpga_20000029_en_1.

[13] Singapore statutes are available at http://statutes.agc.gov.sg/.

[14] The Justice and Electoral Committee of the NZ Parliament has produced a report on the bill.

example, allowing non-charitable purpose trusts, providing for the role of protectors or enforcers and enacting rules against forced heirship.[15]

Seeking Comments

1.21 The issues are set out in Chapters 2 to 6 below. To enhance the readability of each subject, we will start with a brief background of the relevant issues and our considerations before presenting the proposed changes and/or questions. Where appropriate, we will make reference to similar provisions in other major common law jurisdictions, such as the UK, Singapore and NZ, as well as some offshore jurisdictions, such as the BVI, Cayman Islands and Jersey. The questions for consultation are set out under different sections in each chapter and a list of all questions for consultation is extracted at the back of the document after Chapter 6.

1.22 We would like to invite comments from all stakeholders, including users, trust practitioners, relevant professional bodies and academics on the proposals. The comments received will help us to ensure that the relevant legislative proposals will suit Hong Kong's particular circumstances.

[15] See discussions in Chapter 6 of this paper for details.

CHAPTER 2

TRUSTEES' DUTY OF CARE, POWERS AND REMUNERATION

2.1 This Chapter considers several closely related issues concerning trustees, namely:

(a) trustees' duty and standard of care;
(b) trustees' general power of investment in default of express provisions in the trust instrument;
(c) trustees' power of delegation;
(d) trustees' power to employ nominees and custodians;
(e) trustees' power to insure; and
(f) professional trustees' entitlement to receive remuneration.

A. Trustees' Duty and Standard of Care

Background

2.2 Trustees are responsible for the administration of the trust. Their powers and duties are many and varied. If trustees fail to carry out their duties, they would be held liable for a breach of trust. This section will examine the law governing trustees' duty and standard of care, and highlight some salient issues for consideration.

2.3 Case law has established that, in the investment of trust funds, appointment of agents and administration of trust property, trustees owe beneficiaries a duty of care and the standard of care expected is that of an ordinary prudent man of business acting in the management of his own affairs.[16] In the selection of investments, the duty of trustees is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide.[17]

2.4 The English courts have further expressed the view that a higher standard should be owed by professional trustees or paid trustees. A professional trustee is expected to exercise the special care and skill that

[16] *Speight v Gaunt* (1883) 9 App Cas 1.
[17] *Re Whiteley* (1886) 33 ChD 347.

it professes to have.[18] It is to be noted that this duty of care under the general law can be excluded or modified by the trust instrument.

2.5 The TO also contains provisions pertaining to the standard of care expected of trustees in the appointment of agents.[19] They are:

(a) firstly, in the execution of their administrative functions, trustees will not be held liable for any loss resulting from the default of their agents if the trustees act "in good faith" in the employment of their agents;

(b) secondly, in respect of trust property outside Hong Kong, trustees may appoint agents to exercise any discretion, trust or power vested in the trustees without being responsible for any loss caused to the trust by reason only of the appointment;

(c) thirdly, trustees may appoint solicitors or bankers as their agents for such purposes as specified in the TO provided that the trustees do not allow any trust assets to remain in the hands or under the control of the solicitors or bankers for a period longer than is reasonably necessary; and

(d) fourthly, trustees are not liable for the acts of any banker, broker, or other person with whom any trust money or securities may be deposited, nor for any loss, unless the loss happens through trustees' "wilful default".

Issues for Consideration

2.6 Several aspects of the existing law governing trustees' duty and standard of care are worthy of consideration. Firstly, will the law serve settlors, trustees and beneficiaries better by elaborating fully the circumstances in which a trustee is made subject to a duty of care, or shall we allow the law to develop on a case by case basis? Secondly, should statute law introduce a standard duty of care and should this standard duty of care take into account the different abilities and knowledge of lay trustees and professional trustees?

2.7 With regard to the existing law, there are concerns that the provisions in the TO regarding the appointment and supervision of agents (as set out

[18] *Bartlett v Barclays Bank Trust Co. Ltd.* [1980] 2 W.L.R. 430.
[19] Sections 25 and 32(1) of the TO.

in paragraph 2.5 above) lack coherence. One may ask whether trustees would be held liable for the acts of the solicitors or bankers who were "employed in good faith" but allowed to take control of trust assets longer than is reasonably necessary. The confusion is further compounded by the concept of "wilful default" used in section 32(1) of the TO,[20] which is different from the standard of "good faith" in section 25(1) of the TO or the standard at common law (see paragraph 2.3).

Reforms in Other Jurisdictions

2.8 In 1999, the UK and Scottish Law Commissions recommended a reform of the UK law governing trustees' powers and duties.[21] The Trustee Act 2000 ("TA 2000"), which implements the recommendations, formulates a new statutory duty of care for trustees and specifies the circumstances in which the statutory duty of care applies. Under the new statutory duty of care, a trustee must "exercise such care and skill as is reasonable in the circumstances", having regard in particular:

(a) to any special knowledge or experience that he has or holds himself out as having, and
(b) if a trustee is acting in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.[22]

2.9 The new statutory duty of care under the TA 2000 applies when trustees are:

(a) investing;
(b) acquiring land;
(c) appointing agents, nominees and custodians;
(d) compounding liabilities;
(e) insuring property;
(f) dealing with matters concerning reversionary interests and valuations[23],

[20] It was ruled by the court that the term "wilful default" is to have the literal meaning of a conscious breach of duty or a reckless performance of a duty. See *Re Vickery* [1931] 1 Ch 572.
[21] Report of the UK Law Commission and the Scottish Law Commission on Trustees' Powers and Duties (1999) (Law Com No.260).
[22] Section 1 of the TA 2000.
[23] For example, when exercising the powers under section 22(1) and (3) of the TA 1925.

subject to any indication in the trust instrument that the new statutory duty of care is not meant to apply.[24]

2.10 According to the Law Commissions' Report, the reforms are not intended to detract in any way from the fundamental common law duties of trustees (e.g. the duty to act in the best interest of the beneficiaries), and the decision whether or not to exercise a discretion remains a matter for the trustees to determine.[25] That decision is not subject to the new duty of care, but once trustees have decided to exercise a discretionary function which is subject to the new duty, the manner in which they exercise it will be measured against the appropriate standard of care.

2.11 Singapore amended their STA in 2004, mainly following the approach in the TA 2000.

Considerations

2.12 As will be explained in the following sections of this Chapter, we propose to give trustees wider default powers to facilitate effective trust administration. To ensure that trustees will exercise those powers properly, we believe that they should be subject to a statutory duty of care, unless it appears from the trust instrument that such duty of care is not meant to apply. A statutory duty of care will provide a clear and accessible statement of the standard of care to be expected from trustees. It can also lay down the respective duties owed by lay trustees and professional trustees. A statutory duty of care will provide more certainty for settlors and trustees and give better protection to beneficiaries.

Proposal

2.13 We propose to introduce a statutory duty of care, similar to the TA 2000 and STA. The proposed standard is that a trustee must exercise such care and skill as is reasonable in the circumstances, having regard to any special knowledge or experience that the trustee has or holds himself out as having, and if the trustee is acting in the course of business or is a professional trustee, having regard to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.

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[24] Paragraph 7 of Schedule 1 to the TA 2000.
[25] Paragraphs 3.11 and 3.12 of the Report.

2.14 We propose that the statutory duty of care should apply to trustees when they are exercising those powers and performing those duties that are commonly exercised and performed in the administration of trusts, including the powers and duties in relation to investment (Section B of this Chapter), delegation (Section C of this Chapter), appointing nominees and custodians (Section D of this Chapter), taking out insurance (Section E of this Chapter), and the powers conferred under sections 16, 24(1) and 24(3) of the TO. The statutory duty will apply no matter the powers and duties are derived from the TO or otherwise.

2.15 However, we propose that this statutory duty of care does not apply if it is excluded by, or inconsistent with, the trust instrument.[26] The proposed statutory duty of care will replace the existing common law duty of care which might otherwise have applied. The proposed statutory duty will be additional to, and will not affect, the other fundamental common law duties of trustees,[27] nor will it affect the exercise of trustees' discretion.

Question 1

(a) Do you agree that a statutory duty of care for trustees should be introduced, unless it is excluded by or inconsistent with the trust instrument?

(b) If your answer to (a) is in the affirmative, do you agree that:

(i) the standard of care should be along the lines of the TA 2000 and the STA?

(ii) the statutory duty of care should apply to the performance of those powers and duties set out in paragraph 2.14?

(iii) the statutory duty of care should replace the existing common law duty of care which might otherwise have applied; and the statutory duty should be additional to, and not affect, the other fundamental common law duties of trustees and the exercise of trustees' discretion?

[26] As in paragraph 7 of Schedule 1 to the TA 2000 and section 3A(2) of the STA.

[27] For example, the duty of good faith, duty to comply with the terms of the trust, duty of impartiality, duty to act in the best interest of the beneficiaries, duty to account and give information, etc.

(c) Further to (b), do you think that the statutory duty of care should apply in other circumstances (other than those mentioned in paragraph 2.14 above); and if so, which circumstances?

B. Trustees' General Power of Investment in Default of Express Provisions in the Trust Instrument

Background

2.16 Trustees' powers of investment are derived either from the TO, or from a trust instrument such as a settlement made during the lifetime of the settlor or a will trust. Trust instruments that are professionally drawn often provide trustees with wide powers of investment, for example, "all the investment powers of a beneficial owner". Express provisions such as this empower the trustees to consider the widest range of investments permissible subject to the general standard of care applicable to trustees. However the general standard provides neither specific nor cautionary guidance.

2.17 In the absence of express provisions in the trust instrument, the TO Second Schedule ("Schedule 2") (copy at ***Annex I*** and further discussed in paragraphs 2.21 - 2.23 below) sets out the range of permissible investments. The trustee may only make investments in the "authorized investments" set out in Schedule 2, unless a successful application is made to the court to obtain wider powers of investment.

2.18 Schedule 2 was reviewed and amended in 1984, 1995 and most recently in 2002. It was considered in the course of these reviews and remains the case that Schedule 2 must be suitably prudential for use not only by comparatively inexperienced trustees, but also serve as an objective, conservative standard for other, perhaps more experienced, trustees on whom wider investment powers may have been conferred by the trust instrument.

2.19 Schedule 2 has a relevance beyond its scope of operation. The purpose of providing a list of investments is to discourage undue risk taking to achieve possibly higher levels of return, to preserve capital values and to provide a steady source of income. Given that wider powers of investment may be provided in the trust instruments or authorized by the court, it was and is considered desirable for Schedule

2 to adopt a sensible, conservative approach to provide reasonable security and reasonable choice without exposure to undue risk.

Considerations

2.20 The worldwide economic and financial crisis has illustrated that a number of sophisticated financial products outstripped the ability of the issuers, vendors and users to manage them.[28] The Government considers that those who owe fiduciary duties are particularly vulnerable to any inability on the part of issuers, vendors and users to understand and value accurately sophisticated financial products. The Government will continue to improve the regulatory framework and enhance investor protection.[29]

2.21 There have been no reported incidents of breaches of trust by trustees, or of complaints by settlors or beneficiaries, regarding the use of Schedule 2. In Schedule 2, three prudential controls have been imposed on the use of derivative products, namely:

(a) the derivatives must be traded on a recognized exchange - this provides a regulated process for buying and selling, clearing, settlement and valuation;

(b) the investment in these derivatives must be for hedging purposes **only** - hedging is defined by reference to reducing the impact on diminution on the trust fund; and

(c) the use of derivatives must be in accordance with the written advice of a corporation licensed to give that advice as to the extent of the risks of diminution in value which is to be hedged and the suitability of the derivative to protect against those risks.

2.22 Schedule 2 contains a wide range of products including shares, debentures, sovereign/government bonds or equivalent, authorized collective investment schemes such as mutual funds, cash deposits with authorized institutions as defined in the Banking Ordinance (Cap. 155), certificates of deposits, and bills of exchange issued or guaranteed by authorized institutions, etc.

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[28] See for example the article by Blankfein, CEO of Goldman Sachs, *Financial Times 9.2.2009* and the remarks by Bernanke, Chairman of the US Federal Reserve Board, on AIG's losses, *Financial Times 4.3.2009*.

[29] The Financial Secretary has announced this as a measure in the Budget for 2009-10.

2.23 The shares must be listed on a recognized stock market or specified stock exchange[30] with a market capitalization of not less than HK$10 billion and which have paid dividends in each of the five preceding years. The debenture category must meet the credit rating specified in the Table to Schedule 2.[31]

2.24 The Government is of the view that the range of permissible investments such as now found in Schedule 2 represent a prudent approach to investment,[32] while providing considerable and diverse investment opportunities for trust funds to meet the reasonable expectations of those with interests in possession (such as life tenants) as well as reversioners (i.e. those whose interests may not fall in until some future time). It is our proposal that investments in the products specified in Schedule 2 will be subject to the statutory duty of care discussed in Section A of this Chapter.

Reforms in Other Jurisdictions

2.25 Some major common law jurisdictions, such as the UK[33], Singapore[34] and NZ[35], and some offshore jurisdictions, such as the BVI[36], have reformed their trust law to provide trustees with what amounts to a general power of investment. All reforms took place before and without the benefit of the experience from the recent financial crisis and consideration of reforms to the regulatory agenda.

2.26 In the UK, trustees' default investment powers and duties have been substantially revised. The TA 2000 gives trustees a general default power of investment so that trustees can make any kind of investment as if they were absolutely entitled to the assets of the trust.[37] In parallel, it introduced various measures which sought to minimize the chance of trustees abusing their default powers of investment. Firstly, in the performance of the statutory default powers and duties of investment, trustees must meet with the standard required by the

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[30] As those two terms are defined under the Securities and Futures Ordinance (Cap. 571).

[31] The Financial Secretary has power to amend Schedule 2 (including the Table) from time to time.

[32] The definition of "debenture" may need to be reviewed to address any concerns that it could include "structured products", and to tie in with the proposals to amend the definition of "debenture" under the Companies Ordinance rewrite exercise.

[33] See sections 3-7 of the TA 2000.

[34] See sections 4-6 of the STA.

[35] See sections 13A-13E of the NZTA.

[36] See section 3 of the British Virgin Islands Trustee Ordinance 1961 ("BVITO").

[37] Section 3(1) of the TA 2000. The Explanatory Notes to the TA 2000 explained in paragraph 22 that it will permit trustees "to invest assets in a way which is expected to produce an income or capital return."

statutory duty of care.[38] Secondly, the TA 2000 restates the "suitability" and "diversification" requirements, previously contained in the Trustee Investments Act 1961,[39] as the standard investment criteria.[40] Under the standard investment criteria, trustees must (a) ensure that investments are suitable to the trust and (b) diversify investments at a level appropriate to the circumstances of the trust.[41]

2.27 The TA 2000 also stipulates that trustees must regularly review the investments of the trust and consider whether they should be varied.[42] Moreover, under section 5 of the TA 2000, trustees are now placed under a new statutory duty to "obtain and consider proper advice about whether, having regard to the standard investment criteria", they should proceed with or vary any investments.[43] The success or otherwise of the UK's approach has not been evaluated more recently in light of the financial crisis.

Proposal

2.28 The authorized investments in Schedule 2, when read with the proposed statutory duty of care (in Section A), appear to amount to reasonably safe harbour limits for investments by trustees (in default of express powers in the trust instrument and orders of the court), while maintaining a sufficiently wide power of investment to maintain the value of capital and returns on capital without taking undue risks. The Government favours retaining Schedule 2 substantially intact in view of the current financial crisis and the concerns that a number of financial products have outstripped the abilities of issuers, vendors and users to manage them. Nevertheless, we are prepared to review Schedule 2 from time to time to keep up with market needs and evolving market circumstances. Trust instruments can continue to provide trustees with wider powers of investment. We would like to hear the views of the public before taking a final view on the matter.

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[38] Section 1 of the TA 2000 and paragraph 1 of Schedule 1 to the TA 2000.

[39] Section 6 of the Trustee Investments Act 1961.

[40] Section 4 of the TA 2000.

[41] Section 4(3) of the TA 2000. According to paragraph 23 of the Explanatory Notes to the TA 2000, "suitability" includes "considerations as to the size and risk of the investment and the need to produce an appropriate balance between income and capital growth to meet the needs of the trust" and "any relevant ethical considerations as to the kind of investments which it is appropriate for the trust to make".

[42] Section 4(2) of the TA 2000. This provision codifies the rule endorsed by *Nestle v National Westminster Bank plc (No.2)* [1993] 1 WLR 1260: "It is common ground that a trustee with a power of investment must undertake periodic reviews of the investments held by the trust. In relation to this trust, that would have meant a review carried out at least annually, and whenever else a reappraisal of the trust portfolio was requested or was otherwise requisite" as per Legatt L.J. at page 1282.

[43] However, this is subject to the exception in section 5(3) where trustees "reasonably conclude" that it is unnecessary or inappropriate to do so in all the circumstances.

Question 2

(a) Do you agree that the Schedule 2 range of authorised investments should be retained? If your answer is no, please give reasons.

(b) If you agree that Schedule 2 should be retained, please let us have your views on whether Schedule 2 should be amended in respect of one or more authorised investments. For example, should any of the following qualification criteria for authorised investments (which are set out in Schedule 2 and explained in paragraphs 2.21 - 2.23 above) be amended:

- **the minimum market capitalization of HK$10 billion for companies;**
- **the minimum 5 year dividend record for companies;**
- **the definition and credit ratings for debentures;**
- **the safeguards for permissible derivatives (for hedging purposes only, traded on a recognized or specified stock or futures exchange, supported by specific written advice from a corporation licensed to give the advice with regard to suitability and potential risks and losses)?**

C. Trustees' Power of Delegation

Background

2.29 Trusteeship is one of personal trust and confidence. Trustees are, therefore, placed under a duty to act personally and not to delegate their dispositive duties[44] or their fiduciary discretions,[45] unless they are authorized to do so. The trust instrument may authorize delegation by the trustees. If the trust instrument does not contain any provisions for delegation or does not provide sufficiently for the power of delegation, trustees could turn to the default powers under the TO. Delegation by individual trustees is possible not only by invoking section 27 of the TO, but also by invoking section 8(3)(a) of the Enduring Powers of Attorney Ordinance (Cap. 501). Both allow trustees to delegate, but subject to

[44] That is to say, their duties to distribute trust property to beneficiaries under the trust.
[45] For example, the decision whether or not to sell or lease trust property.

different conditions. A table comparing the two sets of provisions is set out in ***Annex II***.

Individual Delegation

2.30 Section 27 of the TO recognises that a trustee might be temporarily unable to exercise his powers and duties. While the section empowers a trustee to delegate the exercise of his powers and duties by a power of attorney, it also provides several safeguards, including that:

(a) the delegation must not last for more than 12 months;

(b) the attorney must not be the trustee's sole co-trustee except for a trust corporation;

(c) the trustee must give written notice of creation of the power to each co-trustee and each person entitled to appoint new trustees; and

(d) the trustee remains liable for the acts or defaults of the attorney.

2.31 The main concern regarding this section is the effectiveness of safeguard (b). The original purpose for making this restriction is possibly to ensure that the number of trustees will not be reduced to one against the settlor's wish. However, the provision as it is may not be an effective safeguard because all the trustees may appoint the same attorney or if there are more than 2 trustees, all trustees (except one) delegate to the same co-trustee. There are also concerns about the inconsistencies in the Enduring Powers of Attorney Ordinance (Cap. 501) and the TO regarding trustees' power of delegation.

Reforms in Other Jurisdictions

2.32 Following a report of the UK Law Commission,[46] the UK amended section 25 of the TA 1925, which was equivalent to section 27 of the TO, by the enactment of the Trustee Delegation Act 1999. The amendments include removing the restriction on delegation to the sole co-trustee, save for some specified circumstances.[47]

[46] "The Law of Trusts: Delegation by Individual Trustees" (1994)(Law Com No 220).
[47] See section 7 of Trustee Delegation Act 1999.

2.33 The UK approach was followed by Singapore.[48]

Proposal

2.34 For the protection of beneficiaries, we believe that the restriction on delegation to sole co-trustee under section 27(2) of the TO should be retained. There is, however, a genuine case for concern that the restriction may be ineffective. To address that concern, we propose amending that section to provide an overriding condition that if a trust has more than one trustee, a delegation made under section 27 should not result in having only one attorney or one trustee administering the trust, unless that attorney or trustee is a trust corporation.

2.35 We also propose reviewing the overlapping provisions in the Enduring Powers of Attorney Ordinance (Cap. 501) and the TO to resolve any inconsistencies. One solution is to repeal section 8(3)(a) of the Enduring Powers of Attorney Ordinance (Cap. 501) so that the power of delegation by an individual trustee is entirely governed by the TO.

Question 3

(a) Do you agree that the power of delegation under section 27 of the TO should be retained, subject to an amendment that if a trust has more than 1 trustee, the exercise of the power of delegation should not result in the trust having only 1 attorney or 1 trustee administering the trust, unless that trustee is a trust corporation?

(b) Do you have any views regarding the different conditions upon which an individual trustee may delegate his powers under section 27 of the TO and section 8(3)(a) of the Enduring Powers of Attorney Ordinance (Cap. 501)? Do you agree that the latter should be repealed?

Power to Employ Agents

2.36 According to section 25(1) of the TO, trustees of a trust collectively may employ agents, such as solicitors, bankers and stockbrokers, to carry out administrative functions in relation to properties in Hong

[48] See section 27 of the STA.

Kong and may (by section 25(2)) employ agents to exercise all functions (including fiduciary powers and duties) in relation to properties situated outside Hong Kong.

2.37 The current law on appointing agents has the following characteristics:

(a) first, given that trusteeship may require various professional skills that trustees may not possess, and powers of investment are currently categorised as a fiduciary function and thus non-delegable, a settlor will have to expressly authorise trustees to employ discretionary fund managers in managing trusts with substantial investments on a discretionary portfolio basis;

(b) secondly, section 25(2) of the TO, which empowers trustees to delegate all powers in relation to properties outside Hong Kong, was inherited from a time when communication with overseas agents was a slow process. Advancements in communication technology have made it unnecessary for trustees to delegate fiduciary responsibilities to overseas agents for properties situated abroad.

Reforms in Other Jurisdictions

2.38 The UK and Singapore have reformed their trust law to provide trustees with a general power of appointing agents.[49] There are also legislative proposals along the same direction in NZ.[50]

2.39 Section 11(2) of the TA 2000 provides trustees (other than trustees of a charitable trust) with a power to appoint agents to exercise any or all of their functions except for:

(a) any function to decide whether and in what way assets should be distributed;

(b) any power to decide whether any payment due to be made should be made out of income or capital;

(c) any power to appoint trustees of the trust; and

[49] See sections 11-15 of TA 2000 and sections 41B – 41F of the STA.
[50] See clause 5 of the NZTAB.

(d) any power which permits the trustee to delegate any of their functions or to appoint a person to act as a nominee or custodian.

Trustees' power of delegation in relation to foreign property is repealed[51] as it is not necessary to provide special powers for foreign property.

2.40 It was considered in the UK that trustees' power of appointing agents could not be applied to charitable trusts without some refinement. A distinction was drawn between the generation of income to finance the trust's charitable purposes, and the execution of those purposes. It was considered that the former function could be carried out by agents.[52] Under section 11(3) of the TA 2000, trustees of a charitable trust could appoint agents to carry out the following functions:

(a) any function consisting of carrying out a decision that the trustees have taken;

(b) any function relating to the investment of trust assets;

(c) any function relating to the raising of funds for the trust (otherwise than by means of profits of a trade which is an integral part of carrying out the trust's charitable purpose); and

(d) any other function prescribed by an order made by the Secretary of State.

2.41 The TA 2000 attempts to guard against potential risks posed by the general power of appointing agents, including:

(a) applying the statutory duty of care to the power of appointing agents, whether the power is conferred by the TA 2000 or otherwise;[53]

(b) stating that trustees may not appoint an agent if the terms of appointment permit the agent to appoint a substitute, restrict the liability of the agent or his substitute or permit the agent to act in

[51] Paragraph 23 of Schedule 2 to TA 2000; the repeal is subject to a saving provision for delegations made prior to the repeal, see paragraph 6 of schedule 3 to TA 2000.

[52] Report of the UK Law Commission and The Scottish Law Commission on Trustees' Powers and Duties (1999)(Law Com No.260), paragraphs 4.38 - 4.40.

[53] Paragraph 3 of Schedule 1 to the TA 2000.

circumstances capable of giving rise to a conflict of interest, unless it is reasonably necessary for the trustees to do so;[54]

(c) in respect of the delegation of asset management functions, requiring an agreement in writing and the issue of a policy statement by the trustees to give guidance on how the function is to be exercised;[55]

(d) stating that trustees may only pay agents out of the trust fund a remuneration that is reasonable in the circumstances and may only reimburse agents out of the trust fund for expenses properly incurred;[56] and

(e) imposing a duty on the trustees to review the arrangements under which the agents act and how those arrangements are being put into effect.[57]

Considerations

2.42 There are concerns that giving trustees a general power to appoint agents would derogate from the fiduciary responsibility reposed by the settlor in the trustee, and there are views that a trustee should exercise all his fiduciary functions personally, unless the trust instrument states otherwise. This is particularly important in light of recent experiences in the financial markets and the inability of financial institutions to self-monitor. It must be said that in the absence of a general power of appointing agents, trustees can still seek advice from professional advisors and give these advisors directions to implement decisions taken by the trustees.

2.43 Discretionary fund managers invariably have the benefit of exclusion and limitation clauses in their appointment letters. The ability to appoint a discretionary fund manager would amount to little in practice if trustees were unable to accept such limitation.[58] Hence the TA 2000 allows trustees to accept such limitation if it is reasonably necessary. It is doubtful whether a successful claim can be launched against discretionary fund managers even if they have breached the "policy statements" issued by trustees.

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[54] Section 14(2) and (3) of the TA 2000.
[55] Section 15 of the TA 2000.
[56] Section 32 of the TA 2000.
[57] Section 22 of the TA 2000.
[58] Explanatory Notes to the TA 2000, paragraph 61.

2.44 We would like to hear the views of the public as to whether trustees should be provided with a general power of appointing agents along the lines of the TA 2000, subject to any contrary intention in the trust instruments. Although this power would allow trustees to delegate to persons with professional knowledge and skills, it would also allow trustees to delegate some of their fiduciary responsibilities. We would also like to hear the views of the public as to whether the safeguards set out in the TA 2000 (with examples set out in paragraph 2.41) are sufficient to protect the interests of the beneficiaries.

2.45 Due to the unique nature of charitable trusts, we would like to hear the views of stakeholders as to whether trustees of a charitable trust should be given wider powers to appoint agents along the lines of the TA 2000 (as discussed in paragraph 2.40 above); and if so, what safeguards should be imposed on the exercise of those powers.

Question 4

(a) Do you agree that the TO should be amended to provide trustees with a general power of appointing agents along the lines of the TA 2000, subject to any express contrary intention in the trust instruments?

(b) If your answer to (a) is in the affirmative, do you agree that the safeguards set out in the TA 2000 (as discussed in paragraph 2.41 above) are sufficient to protect the interests of the beneficiaries?

(c) What other safeguards (if any) would you suggest?

(d) If your answer to (a) is in the negative, do you agree that section 25(1) of the TO should be retained and that section 25(2) of the TO be standardised with the approach to section 25(1)?

(e) Do you agree that trustees of charitable trusts should be given wider powers to appoint agents along the lines of the TA 2000 (as discussed in paragraph 2.40 above); and if so, what safeguards would you suggest?

D. Trustees' Power to Employ Nominees and Custodians

Background

2.46 Generally, under common law, a trustee has a duty to take reasonable steps to secure and retain control of trust assets. If there are two or more trustees, the assets should be vested in joint names. There are some exceptions to this rule, including:

(a) the rule is expressly excluded or modified by the trust instrument;

(b) bearer securities must be deposited for safe custody and collection of income with a banker or banking company;[59] and

(c) any documents held by a trustee relating to the trust may be deposited with a banker or banking company or any other company whose business includes the undertaking of the safe custody of documents, subject to any express contrary intention in the trust instrument.[60]

Reforms in Other Jurisdictions

2.47 The UK[61] and Singapore[62] have reformed their trust law to provide trustees with a general power to employ nominees and custodians in relation to such of the trust assets as they determine.[63] The appointment must be made or evidenced in writing.

2.48 There are several safeguards against any potential risk posed by the general power to employ nominees and custodians, including:

(a) applying the statutory duty of care to the exercise of the power to employ nominees and custodians, whether conferred by statute or otherwise;[64]

(b) restricting the choice of nominees and custodians to persons carrying on businesses which consists of or includes acting as

[59] Section 8(2) of the TO.
[60] Section 23 of the TO.
[61] See sections 16-20 of the TA 2000.
[62] See sections 41G-41K of the STA.
[63] But in UK, the power does not extend to settled land within the meaning of the Settled Land Act 1925.
[64] Paragraph 3 of Schedule 1 to the TA 2000.

nominees or custodians, or a body corporate controlled by the trustees;[65] and

(c) imposing a duty on trustees to review the arrangements under which the nominees and custodians act and how those arrangements are being put into effect.[66]

Proposal

2.49 We propose to provide trustees with a general power to employ nominees and custodians along the lines of the TA 2000 and the STA, subject to any contrary intention in the trust instruments. We consider that this power would facilitate trustees to achieve effective trust administration, and the safeguards as set out in paragraph 2.48 are sufficient to protect the interests of the beneficiaries.

Question 5

(a) Do you agree that the TO should be amended to provide trustees with a general power to employ nominees and custodians along the lines of the TA 2000 and the STA, subject to any express contrary intention in the trust instruments?

(b) Do you agree that the safeguards set out in paragraph 2.48 are sufficient to protect the interests of the beneficiaries?

(c) What other safeguards (if any) would you suggest?

E. Trustee's Power to Insure

Background

2.50 Trustees' power to insure trust property may be derived from the trust instruments or the TO. Section 21 of the TO provides trustees with a power to "insure against any loss or damage by fire and typhoon any building or other insurable property to any amount…up to the full value of the building or property, and pay the premiums for such insurance out of the income thereof…".

[65] Section 19 of the TA 2000.
[66] Section 22 of the TA 2000.

2.51 The statutory power to insure is unsatisfactory in the following aspects:

(a) it does not empower trustees to insure any loss or damage by events other than fire and typhoon;

(b) it does not empower trustees to insure up to market value or full replacement value of the property;

(c) it does not apply to bare trustees; and

(d) it only empowers trustees to pay insurance premiums out of the income of trust properties and this will favour capital beneficiaries at the expense of the income beneficiaries.

Reforms in Other Jurisdictions

2.52 The UK has reformed its trust law relating to the power to insure. Section 34(1) of the TA 2000 now empowers trustees to insure any trust property against risks of loss or damage by any event and pay premiums out of the trust funds. This power also applies to bare trustees subject to any contrary direction by the beneficiaries who are absolutely entitled to the property subject to the trust.[67] The statutory duty of care applies to the exercise of the power to insure, whether conferred by TA 1925 or otherwise.[68]

2.53 The UK approach was followed by Singapore[69] and there is a similar legislative proposal in NZ.[70]

Proposal

2.54 We propose to widen trustees' power to insure along the lines of the TA 2000 and the STA, subject to any contrary intention in the trust instruments. We consider that this power will help solve the potential conflict between the lack of power of trustees to insure and their duty to act in the best interests of the beneficiaries, provide better protection to trust property and ensure fairer treatment between capital and income beneficiaries. However, this power to insure does not create any obligation on the part of the trustees to insure. A trustee may elect not to insure if it is prudent for him not to do so in the circumstances.

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[67] Section 19(2) of the TA 1925 as amended by section 34(1) of the TA 2000.
[68] Paragraph 5 of Schedule 1 to the TA 2000.
[69] See section 21 of the STA.
[70] See clause 4 of the NZTAB.

Question 6

Do you agree that section 21 of the TO should be amended to provide trustees with wider powers to insure along the lines of the TA 2000 and the STA, subject to any express contrary intention in the trust instruments?

F. Professional Trustees' Entitlement to Receive Remuneration

Background

2.55 Generally, trustees are not remunerated, because trustees have the duty not to profit from the trusts, and allowing trustees to receive remunerations may give rise to conflicts of their fiduciary duties and personal interests.

2.56 The general prohibition does not apply if the remuneration is authorised:

(a) expressly by the trust instrument;

(b) by legislation, for example, under s.43 of the TO, the court may authorise a corporation which the court has appointed as trustee to charge remuneration;

(c) by the court under its inherent jurisdiction for the interests of the beneficiaries and good administration of the trust; and

(d) by contract between the trustees and all the beneficiaries, if the beneficiaries are of full age and capacity and between them are absolutely entitled to the trust property.

2.57 However, there are increasing concerns that the common law position does not facilitate the employment of professional trustees to undertake the complex task of administering a modern day trust, since no professional trustees could be expected to undertake the administration of a trust for free. "Professional trustees" in this context means trustees who are acting in their professional capacity, which means that they act in the course of a profession or business which consist of or

includes the provision of services in connection with the administration or management of trusts (or a particular aspect of the administration or management of trusts).

Reforms in Other Jurisdictions

2.58 The UK and Singapore have reformed their trust law to give professional trustees a right to receive remuneration.[71] There are different provisions for trustees of non-charitable trusts and trustees of charitable trusts. For non-charitable trusts:

(a) if the trust instrument contains provisions entitling trustees to receive remuneration, trustees acting in a professional capacity or trust corporations[72] are entitled to receive remuneration under the trust instrument even in respect of services that are capable of being provided by lay trustees;[73] and

(b) if no remuneration is provided for in the trust instrument or by any legislation, a trustee acting in a professional capacity (provided that he is not a sole trustee and each other trustee has agreed that he may be remunerated) or a trust corporation is entitled to receive **reasonable** remuneration out of the trust funds for its services, even in respect of services capable of being provided by lay trustees.

2.59 For charitable trusts, if the trust instrument contains a provision that entitles trustees to receive remuneration for their services, a trustee who is acting in a professional capacity (provided that he is not a sole trustee and the majority of the other trustees agree that he could so charge) or a trust corporation could charge for services capable of being provided by lay trustees.[74] If the trust instrument of a charitable trust does not provide for remuneration of trustees, the TA 2000 does not give professional trustees a statutory right to receive reasonable remuneration.[75]

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[71] See sections 28-30, 33 of the TA 2000 and sections 41P-41R of the STA.

[72] "Trust corporation" under the TA 1925 and the TA 2000 means either (a) the Public Trustee or (b) a corporation appointed by the court to be a trustee or acting as a custodian trustee under the Public Trustee Act 1906. See section 29 of the TA 2000 and section 68 of the TA 1925. Under the STA, a trust corporation further includes a trust company licensed under the Singapore Trust Companies Act 2005.

[73] Before the TA 2000, in the absence of an express provision in the trust instrument, a solicitor trustee is not allowed to charge for services not strictly belonging to his professional character e.g. attendances on auctioneers, attendances on paying legacies or debts or attending periodic meetings of trustees. See *Lewin on Trusts* (18th ed.) paragraph 20-152.

[74] Section 28(3) of the TA 2000.

[75] Section 29 of the TA 2000.

2.60 The above provisions are subject to any inconsistent provision in the relevant trust instruments.

Considerations

2.61 Modern trust instruments which are professionally drawn usually contain a charging clause for professional trustees. We consider that, by providing a default charging provision in the TO, settlors will be made aware of the possibility of employing professional trustees and the need to provide for their remuneration. A default charging clause will also enable and encourage a trust to appoint professional trustees who have the necessary skills for the effective administration of the trust.

Proposal

2.62 We propose to provide a statutory charging clause in the TO to enable the remuneration of professional trustees of non-charitable trusts, along the lines of the TA 2000 and the STA, subject to any contrary intention in the trust instruments. As for charitable trusts, we are open as to whether professional trustees should be allowed to charge a reasonable amount for their services in the absence of a charging provision in the trust instruments and what constraints should be imposed if they are allowed to so charge.

Question 7

(a) Do you agree that the TO should be amended to provide for a statutory charging clause for professional trustees of non-charitable trusts, subject to any express contrary intention in the trust instruments, along the lines of the TA 2000 and the STA?

(b) Further to (a), if a trust instrument contains provisions entitling trustees to receive remuneration, do you agree that the TO should be amended to enable a professional trustee of the trust to charge for services that could be provided by lay trustees?

(c) Do you think that professional trustees acting for charitable trusts should be allowed to charge for their services in the absence of a charging provision in the relevant trust instrument; and if the answer is yes, what constraints (if any) should be imposed?

(d) Further to (c) above, if the trust instrument of a charitable trust contains provisions entitling trustees to receive remuneration, do you think that the TO should be amended to enable a professional trustee of the charitable trust to charge for services that could be provided by lay trustees?

G. Others

2.63 We would also like to hear any other views on how the trustees' default administrative powers in Parts II and III of the TO should be changed.

Question 8

Do you have any other suggestions in relation to the default administrative powers of trustees provided in Parts II and III of the TO?

CHAPTER 3

TRUSTEES' EXEMPTION CLAUSES

Background

3.1 It a trustee fails to carry out his duties, it is a breach of trust and beneficiaries have a right to recover their losses from the trustee. It is now common to find wide exemption clauses in professionally drawn trust instruments seeking to exempt trustees from acts or omissions which would normally amount to a breach of trust. It has been established under case law that trustee exemption clauses can validly exempt trustees from liability for all breaches of trust except fraud.[76] In Hong Kong, the use of trustee exemption clauses in some areas is regulated by statute, for example:

(a) under section 26 of the Mandatory Provident Fund Schemes Ordinance (Cap. 485), the governing rules of a registered scheme are void in so far as they purport to exempt or limit the trustee of the scheme from or indemnify that trustee against:
- liability for breach of trust for failure to act honestly;
- liability for breach of trust for an intentional or reckless failure to exercise the degree of care and diligence that is to be reasonably expected of a trustee who is exercising functions in relation to a trust; or
- liability for a fine or penalty imposed by law.

(b) section 75B of the Companies Ordinance (Cap.32) provides that any provision contained in a trust deed for securing an issue of debentures shall be void in so far as it would have the effect of exempting a trustee from or indemnifying him against liability for breach of trust where he fails to show the degree of care and diligence required of him as trustee.

3.2 This Chapter considers whether trustee exemption clauses in general should be regulated statutorily, especially in connection with professional trustees who receive remuneration for their services.

[76] *Armitage v Nurse* [1998] Ch 241.

Other Jurisdictions

3.3 The UK Law Commission has considered whether the use of trustee exemption clauses should be prohibited or regulated statutorily. It concluded in its 2006 report[77] that such exemption clauses might be justified in certain circumstances and suggested adopting a non-statutory approach (namely, relevant professional bodies should promulgate rules of practice requiring their members, when acting as a paid trustee, to take steps to ensure that the settlors are aware of the implications of such clauses if included in the trust instrument).

3.4 Despite its conclusion, the report noted that trustee exemption clauses are commonly included in trust instruments as a matter of routine and form part of a "take-it-or-leave-it package".[78] This tends to leave modern settlors wishing to hire professional trustees with no choice but to accept the exemption clauses.

3.5 The Commission also stated in its report that the law on trustee exemption clauses is considered to be too deferential to trustees (in particular, professional trustees) and that reform is necessary to rectify the imbalance.[79] This position echoes the view taken by Millet LJ in *Armitage v Nurse*[80] that trustee exemption clauses "have gone too far, and that trustees who charge for their services and who, as professional men, would not dream of excluding liability for ordinary professional negligence, should not be able to rely on a trustee exemption clause excluding liability for gross negligence".

3.6 In Dubai and Jersey, there are statutory provisions which limit the effects of trustee exemption clauses. Section 58(10) of the Dubai Trust Law 2005 and section 30(10) of the Trusts (Jersey) Law 1984 ("JTL") state that nothing in the terms of a trust shall relieve, release or exonerate a trustee from liability for breach of trust arising from the trustees' own fraud, wilful misconduct or gross negligence.

Considerations

3.7 Professionals such as solicitors, barristers and accountants are liable for negligence when performing their services. By the same token, professional trustees, if they receive remuneration for their services,

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[77] The UK Law Commission Report on Trustee Exemption Clauses (2006) (Law Com No.301).
[78] Ibid at paragraph 3.20.
[79] Ibid at paragraph 3.8.
[80] [1998] Ch 241 at page 256.

should be expected to achieve a reasonable standard of competence and should be accountable for their conduct.

3.8 Settlors may not be aware of trustee exemption clauses in the trust instruments, let alone comprehend their purpose or effect. A non-statutory approach suggested by the UK Law Commission only addresses the issue of settlors' awareness but not the indiscriminate use of wide exemption clauses by professional trustees.

Proposal

3.9 We do not think that an absolute statutory prohibition on the use of exemption clauses is appropriate as it would deny settlors their power to modify the extent of the liability of trustees.[81] To strike a balance between the rights and interests of settlors, trustees and beneficiaries, we propose that trustee exemption clauses seeking to exempt **professional trustees who receive remuneration for their services** should be subject to statutory control. We propose that (i) lay trustees and (ii) professional trustees who provide their services for free should not be subject to this kind of control.

3.10 As for the method of statutory control, there are several options. The first option is to follow section 26 of the Mandatory Provident Fund Schemes Ordinance (Cap. 485), which does not allow trustees to exempt their liabilities when they are acting dishonestly or when they intentionally or recklessly fail to exercise the degree of care expected, etc. but this is more or less a reflection of the common law position in *Armitage v Nurse*. Another option is to follow section 75B of the Companies Ordinance (Cap. 32), which leaves trustees liable for any kind of neglect or negligence.[82] A further option is to impose procedural safeguards - a trustee exemption clause is only valid if trustees could show that they had taken steps to draw the clause to the attention of the settlor, e.g. the exemption clause is set out in a separate document which the settlor has signed on. This approach preserves settlors' autonomy while making sure that they are aware of the exemption clause.

[81] For a discussion on the infringement of settlor's autonomy, see paragraphs. 3.16-3.23 of the UK Law Commission's Report mentioned in note 77.

[82] See *Lewin on Trusts* (18th ed.), paragraphs 39-124 to 39-125.

3.11 Yet another option is to subject trustee exemption clauses to a reasonableness test similar to the one imposed under the Control of Exemption Clauses Ordinance (Cap. 71).[83]

3.12 No matter which option is to be adopted, we propose that the relevant professional bodies should promulgate a code of practice or best practices in relation to the inclusion of trustee exemption clauses in trust instruments.

Question 9

(a) Do you think that trustee exemption clauses should be regulated statutorily and whether the regulation should apply to all trustees or only professional trustees who receive remuneration for their services?

(b) If the answer to the first part of question (a) is yes, which of the following options do you prefer for regulating trustee exemption clauses:

(i) prohibiting trustees to exclude liability for breach of trust for dishonesty or intentional or reckless failure to exercise the degree of care and diligence that is to be reasonably expected of a trustee along the lines of section 26 of the Mandatory Provident Fund Schemes Ordinance (Cap. 485);

(ii) prohibiting trustees to exclude liability for breach of trust where he fails to show the degree of care and diligence required of him as trustee along the lines of section 75B of the Companies Ordinance (Cap. 32);

(iii) imposing procedural safeguards to ensure that the settlor is aware of the trustee exemption clause;

(iv) subject trustee exemption clauses to a reasonableness test similar to the one imposed under the Control of Exemption Clauses Ordinance (Cap. 71)?

(c) Do you have additional or alternative options for regulating trustee exemption clauses?

[83] Under section 3 of the Control of Exemption Clauses Ordinance (Cap. 71), the requirement of "reasonableness" is satisfied only if the court or arbitrator determines that the term is a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.

CHAPTER 4

BENEFICIARIES' RIGHT TO INFORMATION AND RIGHT TO REMOVE TRUSTEES

A. Beneficiaries' Right to Information

Background

4.1 Under common law, beneficiaries have certain rights to disclosure by trustees of information, accounts and documents relating to the trust. Broadly speaking, there are 2 kinds of rights. The first is the right to be given without demand information about the existence of a trust and their interests under it. The second is the right to seek from trustees on demand access to trust documents, information about the trust and documents relating to the trust.[84]

4.2 In respect of the first kind of right, a trustee has a duty, without demand, to inform a beneficiary who has attained majority and become entitled in possession under the settlement about (i) the existence of the settlement and (ii) the beneficiary's interest under it.[85] It is not entirely clear, however, whether and to what extent the same duty extends to beneficiaries with future interests (particularly contingent or defeasible interests) or discretionary beneficiaries. Views have been expressed that a trustee has a duty to inform all beneficiaries, regardless of the nature of their interest; alternatively there are views that only beneficiaries with a real expectation of benefit need to be informed.

4.3 Regarding the second kind of right to information, the leading case is *Schmidt v Rosewood Trust Ltd.*[86] In that case, the Privy Council made it clear that a beneficiary has a right to seek disclosure of trust documents but that right is best approached as one aspect of the court's inherent jurisdiction to supervise, and where appropriate intervene in, the administration of trusts; a proprietary right is neither sufficient nor necessary to entitle a beneficiary to disclosure of documents and there is no reason to draw a dividing line between the rights of (i) an object of a discretionary trust and (ii) the object of a mere power of a

[84] *Lewin on Trusts* (18th ed.) paragraph. 23-01.
[85] Ibid, paragraph 23-07.
[86] [2003] 2 A.C. 709.

fiduciary character. The Privy Council stated that when there are issues as to personal or commercial confidentiality, the court may have to balance the competing interests of beneficiaries, the trustees and third parties, and disclosure may have to be limited and safeguards may have to be put in place.

4.4 In particular, the disclosure of letters of wishes has been considered in a number of cases including recently the English case of *Breakspear v Ackland*.[87] A letter of wishes is a process for a settlor to communicate to the trustees his non-binding requests to take certain matters into account when the trustees exercise their discretionary powers. A settlor may (if he wishes) express in the letter facts and beliefs about the beneficiaries which might be sensitive or which he is reluctant to include in a document which he wishes the beneficiaries to have a right to inspect. It was decided in *Breakspear v Ackland* that in family discretionary trusts, a letter of wishes is inherently confidential and the disclosure of a letter of wishes is a matter of discretion for the trustees.

4.5 Mr. Justice Briggs, in giving the first instance decision in *Breakspear*, noted that the Australian Courts and a number of leading text book writers have adopted a more liberal approach to beneficiaries' right to information and that:

> "overhanging the whole of this analysis is the question whether…the traditional English recognition of the need to preserve the confidentiality of trustees' decision making has been overtaken by changes in social attitudes, in which notions of openness and accountability are said to have gained prominence at the expense of privacy and confidentiality, in connection with dealings by persons with power to affect the lives, property and legal rights of others."

Other Jurisdictions

4.6 In the UK and Singapore, beneficiaries' right to disclosure of trust information is not codified notwithstanding their trust law reforms. In the United States, the Uniform Trust Code[88] provides that trustees must notify beneficiaries with vested interests who are 25 years of age or

[87] [2008] EWHC 220 (Ch).

[88] A uniform act in the United States is a proposed law drafted by the National Conference of Commissioners on Uniform State Laws, which drafts laws on a variety of subjects and propose them for enactment by each state - uniform acts become laws only to the extent they are enacted into law by state legislatures.

older, of the trust's existence, their right to ask for trustees' reports and the identity of the trustees.[89]

4.7 The Law Institute of British Columbia of Canada has produced a draft bill along with their 2004 report "A Modern Trustee Act for British Columbia".[90] Clause 8 of the draft Bill proposes an additional duty to inform beneficiaries, over and above the common law duty to provide accounts or other trust information requested by beneficiaries. Under that clause, each year a trustee must deliver to every "qualified beneficiary" a report of the trust property that includes a statement of the trust assets and liabilities, a statement of the value of the trust assets, a statement of receipts and their sources and a statement of disbursements and who received them. "Qualified beneficiary" in this context means:

(a) a beneficiary who has a vested beneficial interest in the trust property and is currently entitled to receive a distribution of trust income or capital; or

(b) a beneficiary who has delivered written notice to the trustees that he wishes to receive all notices, reports, etc to which a qualified beneficiary is entitled under the Act.

That clause does not require trustees to disclose information if the disclosure would be detrimental to the best interest of any beneficiary, prejudicial to the trust assets, conflict with any duty owed by trustee as a company director, reveal the reasons for a trustee's exercise of discretion, place an unreasonable administrative burden on the trust or place the trustee in breach of his obligation to maintain confidentiality.

Proposal

4.8 Other than the duty of a trustee to inform a beneficiary who has attained majority and is entitled to possession, the law regarding the rights of beneficiaries to obtain trust information is still actively developing. A balance will have to be struck between the accountability of trustees, the maintenance of confidentiality and the proper administration of the trust. Case law in the UK seems to indicate that it is important to allow trustees and the court a wide discretion in this area so that they could act in the best interest of the beneficiaries. In exercising their

[89] Sections 105(b)(8) and 813 of the Uniform Trust Code.
[90] BCLI Report No.33 published in October 2004.

discretion, the trustees will take into account all relevant factors, including the need for confidentiality.

4.9 In order to provide a degree of certainty and to assist in the development of a principled approach, we are in favour of providing some basic rules for disclosure. We however wish to avoid prematurely codifying all the common law principles in this area. The first option is to follow clause 8 of the proposed Trustee Act of British Columbia. This approach in British Columbia proposes an additional duty, over and above the common law duty, to provide information to beneficiaries who are vested in possession or who makes a request for information. The type of information to be disclosed mainly concerns the trust's assets and liabilities. This duty is subject to any express contrary intention in the trust instrument. Exceptions are provided so that trustees still retain a wide discretion.

4.10 A second option is that trustees should on request be required to inform beneficiaries of their interests in the trust, whether those beneficiaries are vested in interest, in possession or with the right to be considered as discretionary objects, unless exceptional circumstances (similar to those set out in clause 8 of the draft bill prepared by British Columbia mentioned in paragraph 4.7 above) apply. This duty is additional to any common law duty of disclosure and is subject to any express contrary intention in the trust instrument.

Question 10

(a) Do you agree that the TO should provide certain basic rules regarding beneficiaries' right to information?

(b) If your answer to (a) is in the affirmative, do you prefer the first option (which is set out in paragraph 4.9) or the second option (which is set out in paragraph 4.10)?

(c) If you do not agree with those two options but still believe that the TO should provide for beneficiaries' right to information, please set out what you believe the TO should provide, for example, what information should trustees provide to beneficiaries and what class of beneficiaries (e.g. beneficiaries with interests in possession (such as life tenants), beneficiaries vested in interest only (such as reversionary or future entitlements) or beneficiaries with a right to

be considered only (such as discretionary objects)) should be entitled to the information?

B. Beneficiaries' Right to Remove Trustees

Background

4.11 There are no express provisions in the TO giving beneficiaries the right to remove trustees. However, beneficiaries may remove trustees by the following means:

(a) a beneficiary may remove a trustee if he is authorised by the trust instrument to do so;

(b) if all the beneficiaries are of full age and legal capacity and are absolutely entitled to the trust property, they may act together to terminate the trust[91] and set up a new trust (and appointing new trustees) as they wish; or

(c) they may ask the court to exercise its inherent jurisdiction or its power under section 42 of the TO to remove a trustee for the interests of the beneficiaries.

4.12 All of the above methods have their limitations. The first one depends on whether the settlor has provided the beneficiaries with a power to remove trustees. The second one requires the beneficiaries to terminate the trust and re-settle the trust property. The third one depends on the court's discretion. Both the second and third methods may involve considerable costs and time.

Reform in Other Jurisdictions

4.13 In the UK, there is an alternative court-free route for beneficiaries to remove trustees. The UK Trusts of Land and Appointment of Trustees Act 1996 ("TLATA") provides that all the beneficiaries of a trust, who are of full age and capacity and (taken together) are absolutely entitled to the trust property, may, in writing:

[91] *Saunders v Vautier* 1841 Cr. & Ph. 240.

(a) direct a trustee to retire from the trust and/or appoint a new trustee, provided that the trust instrument does not nominate any person for the purpose of appointing new trustees;[92] and

(b) replace a trustee who is incapable of exercising his functions by reason of mental disorder, provided that there is no person who is entitled, willing and able to replace the trustee under section 36(1) of the TA 1925 (equivalent to section 37(1) of the TO).[93]

Proposal

4.14 When the beneficiaries of a trust are dissatisfied with a trustee, it may not be in their best interest to terminate a trust and re-settle the assets or apply to court to replace the trustee due to the time and costs involved. If there is unanimous consent among the beneficiaries of a trust who are absolutely entitled to the trust property, the UK approach provides a simple, time-saving and court-free process to remove the trustee and appoint a new one. We believe it is appropriate to give the beneficiaries a statutory right under the TO to appoint and replace trustees following the UK approach. The new power does not affect the inherent jurisdiction of the court to remove a trustee at the instance of a beneficiary.

Question 11

Do you agree that the beneficiaries of a trust, who are of full age and capacity and are absolutely entitled to the trust property, should be empowered to remove a trustee, along the lines of the TLATA of the UK?

[92] Section 19 of the TLATA.
[93] Section 20 of the TLATA.

CHAPTER 5

PERPETUITIES AND ACCUMULATIONS OF INCOME

A. The Rule Against Perpetuities

Background

5.1 The rule against perpetuities ("RAP") as formulated by English case law is applicable to Hong Kong. In a nutshell, RAP puts a time limit within which trust properties must vest in the beneficiaries. A future estate or interest in any trust property must vest not later than 21 years after the determination of some life in being at the time of the creation of such estate or interest, and if there is any possibility that the interest may vest outside that period, then the interest fails from the time of the purported creation of such estate or interest.[94]

5.2 In 1970, RAP under common law was varied by the PAO, an Ordinance which was modeled on the English Perpetuities and Accumulations Act 1964. Under the PAO, trusts created after 13 March 1970, i.e. the commencement date of the PAO, are subject to a statutory "wait and see" rule such that the creation of a future estate or interest is not invalidated until it becomes apparent that the future estate or interest must vest outside the perpetuity period.[95] For the purposes of the "wait and see" rule, the PAO also prescribes persons who could be used as lives in being.[96] On the other hand, settlors may choose a fixed perpetuity period of not exceeding 80 years.[97] Since the PAO does not have any retrospective effect, trusts created before the commencement of the PAO remain to be governed solely by RAP as formulated by case law.

5.3 However, New Territories land registered in the name of a "Tso" held under Chinese customary trusts, is not subject to RAP.[98]

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[94] For example, a settlor T creates a trust that will confer property on the first of his grandchildren to reach the age of 21. If at the time T created the trust he is a bachelor with no children, the trust will be rendered void because there is no certainty that any grandchild T might have will turn 21 during T's life plus a further period of 21 years.

[95] Section 8(1) of the PAO.

[96] Section 8(4)-(5) of the PAO.

[97] Section 6(1) of the PAO.

[98] *Kan Fat-tat v Kan Yin-tat* [1987] HKLR 516. See also *Tang Kai-chung v Tang Chik-shang* [1970] HKLR 276.

Reasons for RAP

5.4 There were economic and social policies behind RAP. Economically, RAP would help economic growth of the society by ensuring that properties, especially land, would not be tied up in trust longer than is desirable. RAP also prevents trusts from becoming too large, with too many beneficiaries over the generations, and becoming very costly to administer.

5.5 In terms of social policy, RAP maintains a delicate balance between the desires of the present generation to exercise control over their properties and the desires of succeeding generations to control the properties which they are beneficially entitled to.

Considerations

5.6 Today, RAP is thought to be in need of review for four reasons. The first reason lies in the land tenure system of Hong Kong. Unlike other countries where freehold land exists, almost all private land in Hong Kong is leasehold land held from the Government with a fixed lease term, and the lease term for land granted after July 1997 is usually 50 years. In addition, if any private land is required for redevelopment purposes, there are several Ordinances which give a power of resumption or compulsory sale.[99] Accordingly, in Hong Kong, the importance of RAP in ensuring that land would not be tied up for a certain outdated purpose has been reduced.

5.7 Secondly, RAP is complicated and can be difficult to apply in practice. If a fixed perpetuity period is not chosen for a trust, a knowledge of the relevant case law and the effect of the PAO will be required to ascertain whether the relevant disposition would be void because the interest might vest outside the perpetuity period.

5.8 Thirdly, the statutory "wait and see" rule creates uncertainty for trustees administering the trust property, since there are potential beneficiaries whose entitlements to the relevant interests are uncertain, until the end of the "wait and see" period.

5.9 Lastly, RAP may produce a result not expected by settlors, because a non-observance of RAP would render a disposition void from the outset

[99] For example, the Roads (Works, Use and Compensation) Ordinance (Cap.370), the Lands Resumption Ordinance (Cap.124) and the Land (Compulsory Sale for Redevelopment) Ordinance (Cap. 545).

as if it had never been made, resulting in the property being vested in someone whom a settlor had not intended to provide for.

Options

5.10 There are two options for reforming RAP. The first option is to abolish RAP, without retrospective effect, i.e. RAP will stop applying to trusts created after a certain target date. The abolition of RAP will address the problems mentioned in paragraphs 5.7 – 5.9 above.

5.11 On the other hand, some consider that RAP is still valid as one generation should not be allowed to control the devolution of property at the expense of succeeding generations, but the rule should be modernised so that it is simple and easy to apply. Therefore the second option is to introduce one fixed perpetuity period, subject to any shorter period that may be specified in the trust instrument, which applies to all dispositions made after a target date. This approach has been adopted by Singapore[100] and recommended by the UK Law Commission.[101] The concept of "life in being" will no longer be required after that target date (except in respect of trusts created before that target date).

Proposal

5.12 We are in favour of reforming RAP. This could be done by either abolishing the rule altogether or by introducing a fixed perpetuity period. We have an open mind regarding the length of the proposed fixed perpetuity period.

Question 12

(a) Do you agree that RAP should be abolished, without retrospective effect?

(b) If your answer to (a) is negative, do you agree that RAP should be modified by introducing one fixed perpetuity period, similar to that

[100] In Singapore, an overriding fixed perpetuity period of 100 years was introduced. See section 32 of the Singapore Civil Law Act ("SCLA").

[101] In the UK, the Law Commission in its report "The Rules Against Perpetuities and Excessive Accumulations" (1998)(Law Com No 251) recommended introducing one fixed overriding perpetuity period of 125 years (see paragraphs 8.13-8.14 of the report). The Perpetuities and Accumulations Bill implementing the Law Commission's recommendations was introduced to the UK Parliament on 1 April 2009.

adopted by Singapore? How long do you think the new fixed perpetuity period should be (80 years, 100 years, 125 years, 150 years or any other period)?

B. Rule Against Excessive Accumulations of Income

Background

5.13 A trust instrument may direct that the income of the trust be accumulated for a certain period and be distributed only at the end of that period. Under common law, the accumulation period must be confined within the limits established against perpetuities. The common law position was subsequently modified by statute. The PAO now provides that settlors may choose one of the six statutory accumulation periods for which the income of a trust may be accumulated.[102] This statutory restriction is called the rule against excessive accumulations of income ("REA").

5.14 The rule originated from the UK in the nineteenth century.[103] It was intended to prevent a large portion of the nation's wealth from eventually falling into a few hands after a long accumulation period. The rule was also intended to disallow settlors from preventing the enjoyment of the income of the trust property by the beneficiaries.

Considerations

5.15 There are several problems with REA. Firstly, it is complicated. There are six accumulation periods to choose from and there are exceptions to the rule.[104] Secondly, it created uncertainties, one will have to apply to court to determine the relevant accumulation period in the absence of a selection by the settlor. Thirdly, it frustrates the reasonable wish of a settlor to direct longer accumulations for certain beneficiaries who may not be mature enough to make good use of the trust assets at 21.

5.16 Some people are of the view that the initial reasons for enacting REA are still valid so the rule should be retained, but others consider that the

[102] Sections 17-20 of the PAO.
[103] Accumulations Act 1800.
[104] For a discussion of the exceptions, see paragraphs 9.28 - 9.30 of the Law Commission Report mentioned in note 101.

fear that a large amount of wealth will subsequently be accumulated in a few hands so as to upset the economy is unfounded.[105] The UK Law Commission proposed the abolition of REA so that accumulations are only limited by the perpetuity period, which the Commission proposed to set at 125 years.

5.17 Since RAP does not apply to charitable trusts, if REA is also abolished, charities will be able to accumulate its income for a long period of time without applying the income to charitable purposes. The UK Law Commission therefore proposed that for charitable trusts, a direction to accumulate should cease to have effect 21 years after the first day on which the income may be accumulated.[106]

Proposal

5.18 We are of the view that REA is archaic and propose to abolish the rule, following the examples of Singapore[107], NZ[108], the BVI[109], Jersey[110] and UK[111].

5.19 We have an open mind as to whether charitable trusts should be an exception and would like to hear the views of the public on this matter,

Question 13

(a) Do you agree that REA should be abolished? Please give reasons.

(b) If your answer to (a) is yes, will your answer be different if RAP is also abolished so that there will be no control over the period of accumulation?

(c) Do you think that REA should be retained in some form with regard to charitable trusts; and if so, how long should a charitable trust be allowed to accumulate its income?

[105] Ibid, paragraph 9.7.
[106] Ibid paragraph 10.21.
[107] See section 31 of the SCLA.
[108] See section 21 of the NZ Perpetuities Act 1964.
[109] See sections 78 of the BVITO.
[110] See article 15 of the JTL.
[111] See paragraph 10.15 of the Law Commission Report mentioned in note 101 and the Perpetuities and Accumulations Bill introduced in April 2009.

CHAPTER 6

FURTHER PROPOSALS ON PROMOTING THE USE OF HONG KONG TRUST LAW

6.1 This chapter outlines a number of proposals put forward by the Joint Committee for promoting the use of Hong Kong trust law. The proposals are largely based on the experiences of offshore jurisdictions such as the BVI, Cayman Islands and Jersey. We would like to hear the views of all relevant stakeholders before forming a view on how to take them forward. The proposals include:

(a) defining the role of protectors in statutes;
(b) providing that a trust will not be invalidated by the reserved powers of settlors;
(c) codifying the common law principles on the governing law of trusts;
(d) providing that forced heirship rules will not affect the validity of trusts; and
(e) allowing the creation of non-charitable purpose trust.

A. Protectors of Trusts

Background

6.2 A protector is generally created when a settlor wishes to vest in a party powers to control or supervise certain aspects of the administration of the trust. There is currently no statutory definition of "protectors" in Hong Kong. Protectors are commonly found in trusts created under the laws of offshore jurisdictions and are given wide-ranging powers and duties. This section will examine the role and functions of protectors and consider whether we should legislate for protectors.

Role of "Protectors"

6.3 The term "protectors" does not have a universally recognised definition. In this discussion, "protectors" refer by and large to persons (other than trustees) appointed under the terms of a trust instrument, and with whom trustees must formally consult, or in accordance with whose

direction trustees must act. Settlors' choice of candidates for the office of protectors is virtually unlimited and may range from the settlors themselves, settlors' family members or friends, to professional protectors.

6.4 Protectors' powers and duties vary in each case, and can cover a great variety of subjects such as:

(a) appointment or removal of trustees;
(b) approving or vetoing decisions made by trustees over the administration of the trust;
(c) approving or vetoing decisions made by trustees over the distribution of trust properties to beneficiaries;
(d) adding or removing beneficiaries;
(e) enforcement of the trust;
(f) changing the governing law of the trust, and
(g) terminating the trust.

Other Jurisdictions

6.5 British Virgin Islands, Dubai and New Zealand have legislated or proposed legislation on the role of protectors.

6.6 Under the BVITO, a trust instrument may stipulate that the exercise of any power by trustees shall be subject to the previous consent of the settlor or some other person, whether named as protector, nominator, committee or by any other name; and if so provided in the trust instrument, trustees shall not be liable for any loss caused by their actions if the previous consent was given.[112] The Dubai Trust Law contains a similar provision.[113]

6.7 In NZ, under the NZTAB, a protector means a person who, by virtue of the terms of a trust instrument, may give a direction to the trustee that the trustee is obliged to follow and may give consent that permits and enables the trustee to exercise a power. A trustee may apply to the Court for directions if the trustee considers that a direction or refusal to give consent by the protector conflicts with the trust or any law, or exposes the trustee to any liability for any breach of trust.[114]

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[112] BVITO section 86.
[113] Dubai Trust Law section 68.
[114] NZTAB clause 8. See also the amendments proposed by the Judicial and Electoral Committee that examined the Bill.

Considerations

6.8 There are many reasons for appointing protectors, The more common ones are:

(a) protectors are appointed as a precaution against incompetent trustees;

(b) protectors can ensure that the decisions made by trustees would better reflect the intention of the settlors, especially when family members or friends of the settlors are appointed as "protectors";

(c) protectors may act as a bridge between trustees and beneficiaries to ensure that the trust would be administered efficiently and harmoniously; and

(d) protectors with powers to change the governing law of the trust can act as a precaution against the possibility that the governing law of the trust becomes unsuitable for the purposes of the trust.

6.9 While independent protectors may help enhance the administration of the trust, the use of protectors could give rise to issues to be addressed in certain areas. These include:

(a) trustees may feel inhibited about exercising independent judgement if their appointment and/or decisions are subject to the approval or veto of protectors; trustees may also defer to protectors in order to be released from breach of trust;

(b) the use of protectors may provide an opportunity for settlors who aim to retain full equitable ownership of the trust properties to appoint "puppet protectors"; the puppet protectors would only act as the settlor dictates; this will leave the trust open to challenges as being a sham;

(c) it is doubtful whether a settlor's wishes can be effectively reflected by the appointment of friends or relatives belonging to the settlor's generation as these protectors may not survive long after the settlor.

6.10 The following issues also need to be considered:

(a) if protectors were given powers and duties to control trustees, to whom do the protectors owe their duties, and should the duties be fiduciary duties?[115]

(b) should protectors be subject to the same standard and duty of care as trustees? If protectors were held to owe their duties to beneficiaries (and the trust) and that their duties were designated as fiduciary duties, protectors would not be very different from trustees;

(c) regarding protectors' standard of care, should the law distinguish between lay protectors and paid professional ones?

(d) should professional protectors be allowed to have commercial relationships with trustees which may give rise to a conflict of interest?

6.11 We are mindful of the fact that the use of protectors has become popular and would like to seek views from the public on whether the concept of protectors should be incorporated into the TO and, if so, how.

Question 14

Do you think that "protectors" should be statutorily defined in the TO and if so, how should the functions and duties of protectors be defined?

B. Reserved Powers of Settlors and Validity of Trusts

Background

6.12 It is a well established equitable principle that a valid trust requires "three certainties", namely certainty of intention by the settlor to create a trust, certainty of trust property, and certainty of objects.

[115] In *IRC v Schroder* [1983] STC 480, it was ruled that a settlor's powers over the appointment of trustees, whether exercised directly or indirectly through a committee of protectors, were fiduciary powers. In contrast, see *Rawson Trust v Perlman* (1996) 1 BOCM 31, Bahamas SC (25 April 1990). It was held that a protector's power to consent to a resettling of trust funds was not fiduciary as the protector was a beneficiary and the trust settlement expressly allowed him to further his own interests, i.e. the fiduciary duties had been expressly displaced.

6.13 It is generally acceptable for a settlor to reserve to himself some powers to control over the trust property. For example, a settlor may wish to reserve to himself a power to remove and appoint trustees so as to ensure that his wishes will be fully carried out. However, if the settlor reserves to himself excessive powers, the court may consider that there is insufficient certainty as to the settlors' intention to create a trust and may treat the arrangement as a sham.

Considerations

6.14 In Hong Kong, the question of whether a settlor's reserved powers will affect the validity of a trust remains to be governed by case law. We note that there are statutory provisions in Singapore to the effect that a trust will not be invalidated only because the settlor reserves to himself powers of investment or asset management functions.[116] Some offshore jurisdictions like Cayman Islands[117] and Jersey[118] go further by setting out in great detail the powers that can be reserved by settlors that will not affect the validity of a trust. Those powers include the power to amend or revoke the terms of the trust, to pay income or capital of the trust property, to remove trustee or beneficiary, to change the proper law of the trust, etc. There have been suggestions from trust practitioners in Hong Kong that similar provisions will be beneficial for promoting the use of Hong Kong trust law by non-Hong Kong clients.

6.15 While we do not see any particular problem with the current law, we are open to follow Singapore to introduce a statutory provision to the effect that a trust will not be invalidated because the settlor reserves to himself powers of investment or asset management functions. We are also ready to consider expressly allowing the reservation of some additional powers, such as the power to add or remove trustees or protectors, but we are mindful of the fact that allowing the settlor to reserve too many powers may lead to criticisms that a trust established under Hong Kong law is in fact a sham. We will form a final view after hearing the views of the public.

[116] See section 90(5) of the STA.
[117] See section 14(1) of the Cayman Islands Trusts Law (2007 Revision) ("CITL").
[118] See articles 9A of the JTL.

Question 15

(a) Do you agree that a statutory provision should be introduced to the effect that a trust will not be invalidated by reason only of certain reserved powers of settlors?

(b) If the answer to (a) is yes, in your opinion, what kind of reserved powers of settlors should not affect the validity of trusts? Do you agree that we should permit the reservation of those powers stated in paragraph 6.15?

C. Governing Law of Trusts

Background

6.16 When a trust has links with more than one country, for example, the trust assets are situate in one place while the trustees reside in another, questions may arise as to the governing law of the trust.

6.17 The rules regarding the governing law of trusts are mainly found in common law until supplemented by the "Hague Convention on the Law Applicable to Trusts and on their Recognition" ("Hague Convention"). The Hague Convention was incorporated into the laws of Hong Kong by the Recognition of Trusts Ordinance (Cap. 76) in 1990. Article 6 of the Hague Convention provides that a trust shall be governed by the law chosen by the settlor, and Article 7 provides that where no applicable law has been chosen, a trust shall be governed by the law with which it is most closely connected, having particular regard to the place of administration of the trust designated by the settlor, the situs of the trust assets, the place of residence or business of the trustee, and the objects of the trust and the places where they are to be fulfilled.

6.18 The Hague Convention applies to trusts that are created voluntarily and evidenced in writing, and any other trusts of property arising under the law of Hong Kong or by virtue of a judicial decision whether in Hong Kong or elsewhere. If the Hague Convention does not apply, the relevant common law rules will apply.[119]

[119] *Lewin on Trusts* (18th ed.) paragraph 11-57.

6.19 Some offshore jurisdictions such as the BVI[120], Cayman Islands[121] and Jersey[122] have introduced statutory provisions regarding the governing law of trusts. The Joint Committee suggested that there should be statutory provisions in Hong Kong on the governing law of trusts to improve clarity and provide greater certainty.

Considerations

6.20 Since the Hague Convention will apply to most trusts,[123] we do not see any strong need to introduce statutory provisions on the governing law of trusts. Although there are slight differences, the common law position in general is similar to that stipulated in the Hague Convention. The statutory provisions in some offshore jurisdictions (such as BVI and Jersey) on the governing law of trusts are in fact very similar to Articles 6 and 7 of the Hague Convention.

6.21 Nevertheless, we would like to hear comments from the stakeholders before forming a final view.

Question 16

Do you agree that there is no need to codify the common law principles in relation to the governing law of trusts? If you do not agree, please explain the reasons.

D. Forced Heirship

Background

6.22 Forced heirship rights are the rights conferred by the laws of foreign jurisdictions on a testator's heirs irrespective of the provisions of the testator's will. Under forced heirship rules, the heirs will be entitled

120 Sections 80-81 of the BVITO.

121 Sections 89-90 of the CITL allows the selection of the governing law of a trust by the settlor and provides that an express choice of Cayman law is conclusive.

122 See article 4 of the JTL.

123 Some may argue that trusts created by mere declaration of the owner of the assets without a transfer to trustees are not within the Convention. See *Lewin on Trusts* (18th ed.) paragraph 11-63.

under the settlor's personal law[124] to claw back part of the trust assets or to recover money judgments for a similar amount.[125]

6.23 Article 15(c) of the Hague Convention requires the court to give effect to such "succession rights, testate and intestate, especially the indefeasible shares of spouses and relatives" as are "designated by the conflict rules of the forum". Such succession rights do not generally (according to the foreign laws that confer them) invalidate or limit lifetime gifts but at most give rise to monetary claims at the settlor's death.[126] It has been suggested that once movable property is vested in the trustee as trust property, there is nothing in the settlor's estate for the succession law of the settlor's nationality or domicile to claw back.[127] The effect of Article 15(c) could be quite limited as courts will not give effect to forced heirship claims on the death of a settlor unless conflict rules classify the claims as part of the succession law applicable to the settlor's estate.

6.24 The Joint Committee has suggested that there should be statutory provisions to the effect that forced heirship rules will not affect the validity of trusts, or transfers of property into trusts, governed by Hong Kong law. Jurisdictions such as the BVI and the Cayman Islands[128] have legislated to shore up the supremacy of their local trust laws. The BVITO provides that no disposition of property to be held on trust is void by reason that the disposition defeats any rights conferred by foreign law by way of heirship rights.[129] Singapore has also added a provision in its Trustee Act which stipulates that no rule relating to inheritance or succession shall affect the validity of a trust, or the transfer of property to be held on trust, if the person creating the trust or transferring the property had the capacity to do so under Singapore law.[130] Proponents consider that such provisions will provide greater certainty as to the validity of trusts.

Considerations

6.25 As noted in paragraph 6.23 above, we consider that provisions against forced heirship only have fairly limited application in Hong Kong. Nevertheless, we are open to introducing legislative provisions dealing

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124 In many territories this is the law of the settlor's habitual residence or nationality.
125 *Lewin on Trusts (*18th ed.) paragraph 11-89.
126 Ibid, at paragraph 11-92.
127 Ibid.
128 Section 92 of the CITL excluded forced heirship rules.
129 Section 83A of the BVITO
130 See sections 90(1)-(4) of the STA.

with forced heirship if this is considered to be beneficial for promoting the use of Hong Kong trust law.

Question 17

(a) Do you agree that there should be statutory provisions to the effect that forced heirship rules will not affect the validity of trusts or the transfer of property into trusts that are governed by Hong Kong law?

(b) If your answer to (a) is yes, should the provisions follow the Singapore model (i.e. section 90 of the STA), the BVI model (i.e. section 83A of the BVITO) or any other model? Please specify and explain.

E. Non-Charitable Purpose Trusts and Enforcers

Background

6.26 A purpose trust is a trust which permits trust property and its income to be held by trustees and be paid or applied for a certain purpose rather than for specified and ascertainable individuals. Under common law, trusts formed for non-charitable purposes are generally held to be void, with some anomalous exceptions, like the caring of specific animals, the erection of monuments, the maintenance of graves and tombs. The reasons that the courts had given for refusing to uphold a non-charitable purpose trust include (i) uncertainty of the relevant purpose, (ii) non-compliance with RAP and (iii) the absence of ascertained or ascertainable beneficiaries to enforce the trust.

6.27 We note there are views that the historic legal definition of charity is archaic and the law should allow a wider category of purpose trusts which are established for public benefits. It is outside the scope of this paper to propose any reforms on the definitions of charitable purpose or public purpose. The Law Reform Commission of Hong Kong is carrying out a study on the law and regulatory framework relating to charities, and that would probably include clarifying and defining the meaning of charitable purpose. What we are concerned here is mainly whether non-charitable "private" purpose trusts should be allowed.

6.28 In recent years, non-charitable purpose trusts are allowed in some off-shore jurisdictions. They have been used to hold shares in private companies for family businesses and to hold securities for companies to achieve off balance sheet effects.[131] Although many non-charitable purpose trusts are used for legitimate purposes, there are also concerns that some of them might be employed to conceal assets from crime prevention and taxation authorities.[132]

6.29 On the other hand, there are suggestions that non-charitable purpose trusts should be allowed and the fundamental problem of this kind of trust lies only in enforceability, and that could be solved by setting up an enforcement mechanism. Many offshore jurisdictions have legislated for non-charitable purpose trusts and introduced various measures for their enforcement. Those measures vary from place to place but may include:

(a) stating that a non-charitable purpose trust shall not be invalid if it provides for the appointment of an "enforcer" in relation to its non-charitable purposes, and the "enforcer" has a duty to enforce a trust in relation to those non-charitable purposes (e.g. Dubai[133]);

(b) providing that in respect of a "special trust" (where the objects of such trust may be persons or purposes or both), the beneficiaries do not have a right to enforce the trust, instead the trust instrument or the court will appoint an "enforcer" responsible for the enforcement of the trust (e.g. Cayman Islands[134]); and

(c) stipulating that the trust instrument of a purpose trust must appoint a person to enforce the trust and also a "designated person" (a barrister, solicitor or accountant-auditor practicing in the jurisdiction, etc.) to act as trustee: the trustee has a duty to report if there is no enforcer to enforce the trust (e.g. the BVI[135]).

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131 Matthews, Paul. "The new trust: obligations without rights" in A.J. Oakley (ed.) *Trends in Contemporary Trust Law* (Oxford University Press, 1996), pages 18 to 22.

132 Matthews, Paul. "From obligation to property, and back again? The future of the non-charitable purpose trust" in D. Hayton (ed.) *Extending the Boundaries of Trusts and Similar Ring-Fenced Fund*s, pages 232 to 235

133 Section 29 of the Dubai Trusts Law.

134 Sections 96-104 of CITL.

135 Sections 84 and 84A of the BVITO.

Considerations

6.30 We have an open mind on this subject. Our main concern is that non-charitable purpose trusts might be used for illegal or tax evasion purposes. Another of our concerns is that inevitably non-charitable purpose trusts distinguishes trust enforcement from beneficial enjoyment. If the trustee is only accountable to the enforcer, then who is to enforce the enforcer? Since neither the trustee nor the enforcer has a beneficial interest in the trust asset, there is a distinct possibility that the trustee together with the enforcer could commit breaches of trust with no one knowing or having the ability to enforce the trust. The non-charitable purpose trust lacks a person who at the same time has an economic stake in the trust assets and the right of enforcement.

6.31 We are also concerned that enforcers may not be able to fully discharge their enforcement duties unless their authority is coterminous with those of trustees, but the enforcers and the trustees of a trust may not agree on how the trust is to be administered. The powers, duties and liabilities of enforcers, and their authority as against trustees, also need to be carefully considered and defined.

6.32 We would like to hear the views of the public on this subject, especially regarding the limitations or safeguards that could be imposed to address the concerns raised in the previous paragraphs.

<u>Question 18</u>

(a) Having balanced the reasons for and against, do you think that the law should be amended to allow the creation of non-charitable purpose trusts? Please give your reasons.

[*Please answer (b), (c) and (d) if your answer to (a) is in the affirmative.*]

(b) Should any limitations and safeguards be imposed on the use of non-charitable purpose trusts and what should they be?

(c) What measures should be introduced to facilitate the enforcement of non-charitable purpose trusts? For example, do you agree to provide for the role of "enforcers" in Hong Kong law?

(d) If you consider that the concept of "enforcers" should be introduced in Hong Kong, how should the role of "enforcers" be defined? Would you support the approach in Dubai, Cayman Islands or BVI?

LIST OF QUESTIONS FOR CONSULTATION

Question 1

(a) Do you agree that a statutory duty of care for trustees should be introduced, unless it is excluded by or inconsistent with the trust instrument?

(b) If your answer to (a) is in the affirmative, do you agree that:

(i) the standard of care should be along the lines of the TA 2000 and the STA?

(ii) the statutory duty of care should apply to the performance of those powers and duties set out in paragraph 2.14?

(iii) the statutory duty of care should replace the existing common law duty of care which might otherwise have applied; and the statutory duty should be additional to, and not affect, the other fundamental common law duties of trustees and the exercise of trustees' discretion?

(c) Further to (b), do you think that the statutory duty of care should apply in other circumstances (other than those mentioned in paragraph 2.14 above); and if so, which circumstances?

Question 2

(a) Do you agree that the Schedule 2 range of authorised investments should be retained? If your answer is no, please give reasons.

(b) If you agree that Schedule 2 should be retained, please let us have your views on whether Schedule 2 should be amended in respect of one or more authorised investments. For example, should any of the following qualification criteria for authorised investments (which are set out in Schedule 2 and explained in paragraphs 2.21 - 2.23 above) be amended:

- the minimum market capitalization of HK$10 billion for companies;
- the minimum 5 year dividend record for companies;

- the definition and credit ratings for debentures;
- the safeguards for permissible derivatives (for hedging purposes only, traded on a recognized or specified stock or futures exchange, supported by specific written advice from a corporation licensed to give the advice with regard to suitability and potential risks and losses)?

Question 3 (a) Do you agree that the power of delegation under section 27 of the TO should be retained, subject to an amendment that if a trust has more than 1 trustee, the exercise of the power of delegation should not result in the trust having only 1 attorney or 1 trustee administering the trust, unless that trustee is a trust corporation?

(b) Do you have any views regarding the different conditions upon which an individual trustee may delegate his powers under section 27 of the TO and section 8(3)(a) of the Enduring Powers of Attorney Ordinance (Cap. 501)? Do you agree that the latter should be repealed?

Question 4 (a) Do you agree that the TO should be amended to provide trustees with a general power of appointing agents along the lines of the TA 2000, subject to any express contrary intention in the trust instruments?

(b) If your answer to (a) is in the affirmative, do you agree that the safeguards set out in the TA 2000 (as discussed in paragraph 2.41 above) are sufficient to protect the interests of the beneficiaries?

(c) What other safeguards (if any) would you suggest?

(d) If your answer to (a) is in the negative, do you agree that section 25(1) of the TO should be retained and that section 25(2) of the TO be standardised with the approach to section 25(1)?

(e) Do you agree that trustees of charitable trusts should be given wider powers to appoint agents along the lines of the TA 2000 (as discussed in paragraph 2.40 above); and if so, what safeguards would you suggest?

Question 5 (a) Do you agree that the TO should be amended to provide trustees with a general power to employ nominees and custodians along the lines of the TA 2000 and the STA, subject to any express contrary intention in the trust instruments?

(b) Do you agree that the safeguards set out in paragraph 2.48 are sufficient to protect the interests of the beneficiaries?

(c) What other safeguards (if any) would you suggest?

Question 6 Do you agree that section 21 of the TO should be amended to provide trustees with wider powers to insure along the lines of the TA 2000 and the STA, subject to any express contrary intention in the trust instruments?

Question 7 (a) Do you agree that the TO should be amended to provide for a statutory charging clause for professional trustees of non-charitable trusts, subject to any express contrary intention in the trust instruments, along the lines of the TA 2000 and the STA?

(b) Further to (a), if a trust instrument contains provisions entitling trustees to receive remuneration, do you agree that the TO should be amended to enable a professional trustee of the trust to charge for services that could be provided by lay trustees?

(c) Do you think that professional trustees acting for charitable trusts should be allowed to charge for their services in the absence of a charging provision in the relevant trust instrument; and if the answer is yes, what constraints (if any) should be imposed?

(d) Further to (c) above, if the trust instrument of a charitable trust contains provisions entitling trustees to receive remuneration, do you think that the TO should be amended to enable a professional trustee of the charitable trust to charge for services that could be provided by lay trustees?

Question 8 Do you have any other suggestions in relation to the default administrative powers of trustees provided in Parts II and III of the TO?

Question 9 (a) Do you think that trustee exemption clauses should be regulated statutorily and whether the regulation should apply to all trustees or only professional trustees who receive remuneration for their services?

(b) If the answer to the first part of questions (a) is yes, which of the following options do you prefer for regulating trustee exemption clauses:

(i) prohibiting trustees to exclude liability for breach of trust for dishonesty or intentional or reckless failure to exercise the degree of care and diligence that is to be reasonably expected of a trustee along the lines of section 26 of the Mandatory Provident Fund Schemes Ordinance (Cap. 485);

(ii) prohibiting trustees to exclude liability for breach of trust where he fails to show the degree of care and diligence required of him as trustee along the lines of section 75B of the Companies Ordinance (Cap. 32);

(iii) imposing procedural safeguards to ensure that the settlor is aware of the trustee exemption clause;

(iv) subject trustee exemption clauses to a reasonableness test similar to the one imposed under the Control of Exemption Clauses Ordinance (Cap. 71)?

(c) Do you have additional or alternative options for regulating trustee exemption clauses?

Question 10 (a) Do you agree that the TO should provide certain basic rules regarding beneficiaries' right to information?

(b) If your answer to (a) is in the affirmative, do you prefer the first option (which is set out in paragraph 4.9) or the second option (which is set out in paragraph 4.10)?

(c) If you do not agree with those two options but still believe

that the TO should provide for beneficiaries' right to information, please set out what you believe the TO should provide, for example, what information should trustees provide to beneficiaries and what class of beneficiaries (e.g. beneficiaries with interests in possession (such as life tenants), beneficiaries vested in interest only (such as reversionary or future entitlements) or beneficiaries with a right to be considered only (such as discretionary objects)) should be entitled to the information?

Question 11 Do you agree that the beneficiaries of a trust, who are of full age and capacity and are absolutely entitled to the trust property, should be empowered to remove a trustee, along the lines of the TLATA of the UK?

Question 12 (a) Do you agree that RAP should be abolished, without retrospective effect?

(b) If your answer to (a) is negative, do you agree that RAP should be modified by introducing one fixed perpetuity period, similar to that adopted by Singapore? How long do you think the new fixed perpetuity period should be (80 years, 100 years, 125 years, 150 years or any other period)?

Question 13 (a) Do you agree that REA should be abolished? Please give reasons.

(b) If your answer to (a) is yes, will your answer be different if RAP is also abolished so that there will be no control over the period of accumulation?

(c) Do you think that REA should be retained in some form with regard to charitable trusts; and if so, how long should a charitable trust be allowed to accumulate its income?

Question 14 Do you think that "protectors" should be statutorily defined in the TO and if so, how should the functions and duties of protectors be defined?

Question 15 (a) Do you agree that a statutory provision should be introduced to the effect that a trust will not be invalidated by reason only of certain reserved powers of settlors?

(b) If the answer to (a) is yes, in your opinion, what kind of reserved powers of settlors should not affect the validity of trusts? Do you agree that we should permit the reservation of those powers stated in paragraph 6.15?

Question 16 Do you agree that there is no need to codify the common law principles in relation to the governing law of trusts? If you do not agree, please explain the reasons.

Question 17 (a) Do you agree that there should be statutory provision to the effect that forced heirship rules will not affect the validity of trusts or the transfer of property into trusts that are governed by Hong Kong law?

(b) If your answer to (a) is yes, should the provisions follow the Singapore model (i.e. section 90 of the STA), the BVI model (i.e. section 83A of the BVITO) or any other model? Please specify and explain.

Question 18 (a) Having balanced the reasons for and against, do you think that the law should be amended to allow the creation of non-charitable purpose trusts? Please give your reasons.

[*Please answer (b), (c) and (d) if your answer to (a) is in the affirmative.*]

(b) Should any limitations and safeguards be imposed on the use of non-charitable purpose trusts and what should they be?

(c) What measures should be introduced to facilitate the enforcement of non-charitable purpose trusts? For example, do you agree to provide for the role of "enforcers" in Hong Kong law?

(d) If you consider that the concept of "enforcers" should be introduced in Hong Kong, how should the role of "enforcers" be defined? Would you support the approach in Dubai, Cayman Islands or BVI?

ANNEX II

Table comparing the effects of the two sets of provisions authorising trustees to grant powers of attorney

	Section 27 of the Trustee Ordinance (Cap. 29)	**Section 8(3)(a) of the Enduring Powers of Attorney Ordinance (Cap. 501)**
Attorney	No delegation to sole co-trustee, unless trust corporation	No restriction
Notice	To be given to co-trustees and person with power to appoint trustees	Notice not required
Form	No prescribed form	Prescribed form compulsory
Mental incapacity	Grant of power does not survive subsequent mental incapacity of donor	Grant of power survives subsequent mental incapacity of donor
Duration	12 month period	Indefinite unless revoked under section 13
Personal representatives	Section applies to personal representatives	Not expressly mentioned