

Bills Committee on Trust Law (Amendment) Bill 2013

Summary of views submitted by organizations/individuals on the Bill and the Administration's response
(Position as at 17 April 2013)

Organization/individual	Views	Administration's response
Submission from the Joint Committee on Trust Law Reform – a joint committee of The Society of Trust & Estate Practitioners, Hong Kong Branch and The Hong Kong Trustees' Association Ltd	<ul style="list-style-type: none"> - The Bill makes significant improvements to Hong Kong's trust law and thus will help make Hong Kong a more attractive place from which to administer trusts. - New provisions (i) giving statutory effect to clauses in trust deeds which relieve trustees from management and supervisory obligations with respect to underlying companies in certain situations and correspondingly exonerate them from claims in relation to such companies ("anti-Bartlett v Barclays" provisions) and (ii) recognizing the validity of non-charitable purpose trusts ("NCPTs") which comply with requirements of certainty and legality, if added to the Bill, would greatly assist Hong Kong in regaining its place as the region's premier trust administration 	<ul style="list-style-type: none"> - We note the respondent's support for the respective proposals in the Bill. - The proposals concerning "anti-Bartlett v Barclays" provisions and non-charitable purpose trusts constitute a radical departure from the common law. The proposals have not been adopted in major comparable common law jurisdictions including the United Kingdom and Singapore. The implications of the proposals have to be duly assessed and it would not be appropriate to adopt them in the current Bill. We will take these suggestions into consideration in future review of the trust law.

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	<p>jurisdiction.</p> <ul style="list-style-type: none">- The anti-Bartlett v. Barclays provision would give settlors certainty that they can control family companies owned by trusts; this is something particularly in demand in the region where so much business and wealth remains in families. The provision would add certainty by confirming in statute the common law principle that because trustees' duties regarding underlying companies are not core, irreducible duties a trustee owes to beneficiaries, a trustee may be relieved of them by express language in the trust instrument.- NCPTs are unique vehicles because (i) their "purpose" is hardwired into their constitution and enforceable in court by a nominated person and (ii) they are not owned by anyone. This makes them very useful in many legitimate commercial transactions which call for a neutral party to be entrusted to carry out a specific	

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	<p>purpose of the transaction without being controlled by or subject to the claims on persons who would otherwise own such entities.</p> <ul style="list-style-type: none"> - Both the anti-Bartlett v. Barclays provision and NCPTs are in place in many other respectable jurisdictions, are by no means radical in concept or difficult to draft and would give Hong Kong a significant edge over the competition, especially Singapore. 	
Chinese General Chamber of Commerce ("CGCC")	<ul style="list-style-type: none"> - It is hoped that the amendments to be made by the authorities will balance the interests of all parties to a trust and minimize the impact on the trade and investors. - In introducing the amendments, excessive regulation should be avoided in order not to exert undue pressure and constrain on the trade. - "Gross negligence" instead of "reckless act" should be used in the exemption clauses seeking to exempt professional trustees from liability, given that "gross negligence" is a 	<ul style="list-style-type: none"> - The Bill would facilitate the administration of trusts through providing a wider raft of default powers to trustees and would provide for appropriate checks and balances so as to ensure that the powers are exercised properly. - We note the respondent's support for the adoption of "gross negligence" instead of "reckless act" in relation to the statutory control over exemption clauses.

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	<p>concept more familiar to the trade. Complaints about "gross negligence" should be referred to the court for appropriate judgments. Judging from its meaning, it appears that "reckless act" is more applicable to criminal cases in which the concept of "criminal intent" has to be dealt with.</p>	
<p>Hong Kong General Chamber of Commerce</p>	<ul style="list-style-type: none"> - The proposed Trust Law reform does not go far enough and is not ambitious enough. The very cautious and conservative proposals to the Trustee Ordinance will not achieve the purpose of drawing trust business to Hong Kong. - As the concern about Hong Kong may become a tax haven should be addressed with licensing and regulation of the trust industry, and by the tightening of anti-money laundering legislation, it does not justify the very conservative and cautious approach taken by the Government to the trust law reform exercise. 	<ul style="list-style-type: none"> - Hong Kong is a major international financial centre. In the trust law reform, we have benchmarked our trust law against major comparable common law jurisdictions. It is not appropriate to consider adopting offshore practices at this stage. In any case, the relevant offshore practices would raise substantial policy and legal implications which could not be addressed in the context of this Bill. - The proposals concerning reserved powers by settlors and non-charitable purpose trusts constitute a radical departure from the common law. The proposals have not been adopted in major comparable common

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	<ul style="list-style-type: none">- Modernization of Hong Kong's trust law should make reference to the development of offshore jurisdictions in wealth management and trust activities, the evolving migration of capital and wealth globally, the emerging wealth markets and the use of various structures for cross border investment activities.- To position Hong Kong as a leading trust jurisdiction, the following developments are desirable --<ul style="list-style-type: none">(a) Clarity in tax regulation - Hong Kong's tax law should be amended to provide clarity on how trustees and trusts are taxed under the local tax regime. Hong Kong should enact legislation expressly exempting foreign trusts from Hong Kong taxation.(b) Provisions for trust asset protections in connection with the enforcement of overseas judgments - Asset protection provisions should be introduced in the	<p>law jurisdictions. The implications of the proposals have to be duly assessed and it would not be appropriate to adopt them in this Bill. We also take note of the respondent's other suggestions, which fall outside the scope of the Bill. We will take these suggestions into consideration in future review of the trust law.</p>

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	<p>Trustee Ordinance against foreign judgments of forced heirship rules as well as other types of claims on trust assets as a result of foreign court judgments such as divorce settlements, insolvency and creditors' claims. Hong Kong should review provisions that currently mandate that amendments to a Hong Kong trust be taken up solely by Hong Kong courts, and that any Hong Kong trust law issues be addressed exclusively by Hong Kong courts.</p> <p>(c) Settlor's reserved powers - Hong Kong should allow settlors to have greater reserved powers without affecting the validity of their trusts. These powers may include the power to manage the trust investments and the power to control and run a family operating business vested in a trust.</p> <p>(d) Non-charitable purpose trusts - the Administration should act proactively</p>	

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	<p>on proposing legislation allowing for the establishment of non-charitable purpose trusts which have useful legitimate purposes in family planning and financing vehicles structuring.</p> <p>(e) Regulatory regime for trustee companies - Hong Kong should introduce a new mechanism to introduce a regulatory regime for licensed trustee companies to be properly registered.</p> <p>(f) Incorporation of private trust companies - specific legislation should be enacted to allow the incorporation of private trust companies in Hong Kong.</p>	
Chinese Manufacturer's Association of Hong Kong	<p>- The proposals of the Bill to amend the common law provisions and update the existing legislation will provide trustees with greater default powers, put in place adequate checks and balances, and provide for the validity of certain trusts. We</p>	<p>- We note the respondent's support for the Bill.</p> <p>- With regard to the proposed abolition of RAP and REA, we have set out in detail the relevant considerations in LegCo Paper No.</p>

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	<p>support most of the specific recommendations proposed for the three areas mentioned above.</p> <ul style="list-style-type: none"> - The Rule Against Perpetuities and Rule Against Excessive Accumulations of Income have been a long standing practice which are desirable in that they can ensure assets would not be tied up in trust longer than desirable and prevent excessive accumulation and concentration of wealth, which is conducive to the promotion of economic growth. As such, it is suggested that the two rules should be retained, and consideration could be given to using a fixed perpetuity period of 50 years for Hong Kong. 	<p>CB(1)869/12-13(02).</p>
The Law Society of Hong Kong	<ul style="list-style-type: none"> - The review of the trust regime and the Trust Law (Amendment) Bill 2013 are long overdue and modest in scope. The failure to address a number of proposed modifications to current law is a lost opportunity. It is hoped that the Bill is only 	<ul style="list-style-type: none"> - The Administration would continue to take necessary action to maintain Hong Kong's status as a major international asset management and financial centre. It would keep in view the implementation of the proposals in the Bill after its coming

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	<p>a first step to bring Hong Kong's trust legislation closer to that of other comparable common law jurisdictions.</p> <p>- Piecemeal reform of the trust regime is inadequate and the Administration should continue further reform covering various outstanding issues raised in our previous submission. Examples of these issues include the need for clarify in regard to the circumstances in which beneficiaries and others have a right of access to information and an urgent need to legislate for purpose trusts.</p>	<p>into operation and would continue to liaise with the stakeholders on further review of the trust law regime.</p>
The Hong Kong Association of Banks	<p>Comments and/or proposed amendments made to the following existing or newly-added sections --</p> <p><u>Trustee Ordinance</u></p> <p>Sections 3A, 40A(1)(a), 40A(2)(a), 40A(4), 40B(1)(b), 40D(5), 41B(3), 41C(2), 41I(2),</p>	<p>- The views expressed by the Hong Kong Association of Banks are largely technical, seeking clarification on certain provisions, some of which are modelled on UK and Singapore.</p> <p>- Most of their comments had been addressed in our 2012 consultation</p>

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	<p>41I(5) and (6), 41S(1)(a)(ii) and (b)(i), 41T(7)(b), 41V(2)(b), 41W(3) and (4), 41W(3)(b), 41X, 41Y(1)(b)(i), 41Y(2), Second Schedule, paragraph 1(b) of Division 1 of Third Schedule, paragraph 5(a) of Division 3 of Third Schedule, paragraph & 7(a) of Division 5 of Third Schedule.</p> <p><u>Perpetuities and Accumulations Ordinance</u></p> <p>Sections 3(1A)(a), 3A and 3B(3)</p> <p><u>Enduring Powers of Attorney Ordinance</u></p> <p>Section 8(3)(a)</p> <p><i>Note: Members may wish to refer to LC Paper No. CB(1)798/12-13(07) for the details of the comments/proposed amendments.</i></p>	<p>conclusions. We have recapitulated our detailed response to the comments of the Hong Kong Association of Banks in the <u>Annex</u>.</p>
Baker & McKenzie	<p>- Having reviewed the Bill from the perspective of Mandatory Provident Fund schemes, ORSO schemes registered or exempted under the Occupational</p>	<p>- We take note of the respondent's view that there is no particular issue arising from the Bill.</p>

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	<p>Retirement Schemes Ordinance and unit trusts authorized by the Securities and Futures Commission, we found no particular issue arising from the Bill. This is because quite a few of the legislative changes proposed by the Bill are related to giving certain powers to the trustees where the trust instruments do not provide for those powers, which generally do not have material impact on the types of trusts mentioned above as their trust deeds would normally contain fairly comprehensive powers to the trustees such that the trustees need not resort to the statutory powers.</p>	
Zurich Insurance (Hong Kong)	<p><u>Clause 14</u></p> <ul style="list-style-type: none"> - (1) The trustee of a trust may - <ul style="list-style-type: none"> (a) insure any property that is subject to the trust against loss or damage due to any event; and (b) pay the premiums out of the trust funds. 	<ul style="list-style-type: none"> - <u>Clause 14</u>: The Trustee Ordinance (“TO”) does not stipulate any restriction on the kind of insurance, subject to the terms of the instrument creating the trust. - <u>Clause 27</u>: The proposed new section 41X provides that a trust would not be invalidated because of the mere fact that the settlor has kept to himself power of investment or asset management functions.

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	<p>Questions: Does it mean that the trustee will have the power to take out any kind of insurance as long as it is for insuring the loss or damage of trust property?</p> <p><u>Clause 27</u> (new section 41(X))</p> <ul style="list-style-type: none"> - A trust is not invalid only because of the person creating the trust (the settlor) reserving to the settlor any or all powers of investment or asset management functions under the trust. <p>Questions: Will a trust be invalid if a settlor purchases an investment linked insurance? Would that be considered within the "powers of investment"?</p> <p><u>Clause 40</u> (New Third Schedule, Division 4)</p> <ul style="list-style-type: none"> - The statutory duty of care applies to a trustee when - 	<p>For the purchase of insurance policies that goes beyond the scope of such power or functions, the validity of the trust concerned would be subject to the court in light of the totality of facts.</p> <ul style="list-style-type: none"> - <u>Clause 40</u>: A trustee would be in breach of the statutory duty of care in exercising the power (e.g. in the selection of insurance policies) if he fails to exercise the care and skill as is reasonable in the circumstances as stipulated in the proposed new section 3A. Should a trustee breach the statutory duty of care, he is liable to being held to be in breach of trust.

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	<p>(a) exercising the power under section 21 to insure property; or</p> <p>(b) exercising any corresponding power, however conferred.</p> <p>Questions: In what circumstances would a trustee breach the statutory duty of care when insuring the trust property under section 21 (power to insure)? What are the consequences when a trustee breaches the statutory duty of care?</p>	
MR YEUNG Wai-sing, Eastern District Council member	<p>- The proposed amendments of the Bill will improve the trust law of Hong Kong and provide the trust industry of Hong Kong with a set of legislation that is modern, clear and fair to facilitate the further development of Hong Kong into a wealth management centre.</p>	<p>- We note the respondent's support for the Bill.</p>
Mr David GUNSON	<p>- That the "prudent man" rule regarding trustee investments is not adopted is a pity because the new law has instead proposed a common law concept of "reasonableness"</p>	<p><u>Trustees' Power to Invest</u></p> <p>- The retention of the Second Schedule was supported by the majority of respondents in our consultation in 2009. Most respondents</p>

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	<p>which has never had any place in the law on trusts. This will make Hong Kong law out of line with other equity jurisdictions and lead to confusion.</p> <ul style="list-style-type: none"> - The Administration mistakenly believes that a list of authorised investments is better than a "prudent man" rule for small trusts. But a list itself does not make choosing from it prudent and certainly the last six years' experience proves that. <p>The following recommendations are extracted from Mr GUNSON's report prepared for Hong Kong Trustees' Association Ltd in 1994:</p> <p><u>Regulation of trustees</u></p> <ul style="list-style-type: none"> - Subject to review of the law on registration of foreign companies under the Companies Ordinance, there is no compelling need for change in the regulation of persons acting as trustees. <p><u>Investment powers of trustees</u></p>	<p>agreed that adopting the Schedule would better protect beneficiaries against exposure to undue risk, and a statutory list is a helpful guide to lay trustees or settlors when investment power is not dealt with in the trust instrument.</p> <ul style="list-style-type: none"> - The Second Schedule is default in nature and wider investment powers can be provided by a settlor in the trust instrument. - It has been proposed in the Bill to provide trustees with a general power to appoint agents. <p><u>Regulation of Trustees</u></p> <ul style="list-style-type: none"> - We take note of the respondent's view. <p><u>Rules of Equity and miscellaneous provisions</u></p> <ul style="list-style-type: none"> - It has been proposed to abolish the rule against perpetuities and the rule against excessive accumulations of income in the Bill. It has also been proposed to provide trustees with a general power to appoint agents.

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	<ul style="list-style-type: none"> - Legislation should enact the "prudent man" approach to the definition of trustee investments. - Legislation should include various considerations which a trustee may properly take into account when investing, provided that these are not to be treated as exhaustive. Considerations include -- <ul style="list-style-type: none"> (a) safety and investment potential of the holdings of the trust, seen as a whole; (b) whether there is need to diversify the investments held by the trust; (c) whether there is need to maintain the real value of the capital or income of the trust during the period of its operation. - Specific legislation provision should be made -- <ul style="list-style-type: none"> (a) to empower the trustees to take into 	<ul style="list-style-type: none"> - We take note of the respondent's other suggestions, which fall outside the scope of the Bill. The implications of the proposals have to be duly assessed. We will take these suggestions into consideration in future review of the trust law.

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	<p>account the overall balance of the investment portfolio so that particular investments may be regarded as "prudent" if they are an integral part of a total investment strategy which is itself prudent;</p> <p>(b) to abolish the so-called "anti-netting" rule, thereby empowering the court (where a trustee has adopted a total investment strategy which is not prudent) to balance the overall losses and gains when ordering that trustee to make good resulting losses sustained by the trust.</p> <ul style="list-style-type: none"> - Early consideration should be given to the urgent need for reform of the law of income and capital, and the legal problems involved in maintaining the real value of trust capital. - Consideration should be given to whether it is appropriate to extend the trustees' power to delegate investment of the trust fund to a 	

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	<p data-bbox="647 288 864 323">fund manager.</p> <ul data-bbox="600 376 1308 539" style="list-style-type: none">- Trustees should have available a statutory formula empowering them to "contract out" of the standards imposed by the new "prudent man" rule. <p data-bbox="600 592 1285 627"><u>Rules of Equity and miscellaneous provisions</u></p> <ul data-bbox="600 679 1308 1313" style="list-style-type: none">- Rules of little known application in the Hong Kong context can be abolished. The best method to bring about their abolition is to list them out in a "Trustee Amendment Ordinance". These rules could include --<ul data-bbox="647 935 1308 1313" style="list-style-type: none">(a) the rule against possibilities;(b) the rule against accumulations;(c) application of the rule in Saunders v Vautier;(d) the rule presuming a voluntary settlement to be revocable; and	

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	<p>(e) the rule against perpetuities.</p> <ul style="list-style-type: none"> - It is necessary to carefully examine the property and conveyancing statutes to conform them to the above proposed amendments. - The concept of "purpose trust" should not be introduced in Hong Kong since it can in reality undermine a significant body of trust and commercial law in their practical application. The "purpose" trust is too often associated with the need to avoid the law rather than promote it. - Section 25 of the Trustee Ordinance should be amended to permit any trustees to delegate any trusteeship responsibility, save for the trusteeship itself, arising under the trust's administration. - The Trustee Ordinance should be amended that gives the trustees a statutory formula which they must adopt should they (or any other person having the requisite authority) 	

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	choose to cause a change in the proper law of a trust.	

Council Business Division 1
Legislative Council Secretariat
17 April 2013

**For information
on 22 April 2013**

**Bills Committee on
Trust Law (Amendment) Bill 2013**

**Summary of views submitted by organizations/individuals on the Bill
and the Administration's response**

**Annex – Detailed response to comments raised by
the Hong Kong Association of Banks**

Section	Response
Trustee Ordinance (“TO”)	
3A	The statutory duty of care does not affect the legality of anything done prior to the commencement date of the amending Ordinance as per section 4 of the new Fourth Schedule.
40A(1)(a)	The proposal seeks to allow the beneficiaries to appoint and retire trustees in a court-free process under specified circumstances. Our proposal is in line with that in the UK and the relevant restriction seeks to respect the settlor’s intention on the appointment of new trustees.
40A(2)(a)	Under s. 7(2) of the Interpretation and General Clauses Ordinance (Cap. 1), words and expressions in the singular include the plural, as is the case here. Thus, a reference to a trustee here includes more than one trustee. There is no need to clarify the provision in this regard.
40A(4)	The expression “discharged from the trust” in section 40A(4)(a) refers to the discharge of the trustee from further performance of the trust only. If the action undertaken by a trustee has attracted liability before his retirement, he will not be discharged from such liability. The provision would not retrospectively absolve the trustee of any liability which is accrued before his retirement.
40B(1)(b)	The proposal seeks to allow the beneficiaries to appoint

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	and retire trustees in a court-free process under specified circumstances. Our proposal is in line with that in the UK and the relevant restriction seeks to respect the settlor's intention on the appointment of new trustees.
40D(5)	Section 33 of Probate and Administration Ordinance (Cap 10) provides for the removal of personal representative by court. The grant of probate and letters of administration is within the exclusive purview of the court. As such this provision makes it clear that the removal of trustees under the TO is not intended to contradict the exclusive jurisdiction of the court.
41B(3)	Indeed, trustees of non-charitable trusts have wider delegation powers than those of charitable trusts (see proposed section 41B(2) and (3)).
41C(2)	As noted in our 2012 consultation conclusions, this is in line with the UK and Singapore position. The restriction ensures that there is no overlap or inconsistent decisions concerning the performance of the same function conferred on different agents. The restriction also enhances accountability.
41I(2)	This provision restates the existing section 8(3). So far we are not aware of any concerns about the implementation of this existing provision. We therefore do not see strong justification to amend the provision.
41I(5)	The proposed section 41I(5) is only applicable for an appointment under the proposed section 41I(3). Where section 41I(3) is not applicable, section 41I(5) would not be applicable.
41S(1)(a)(ii) and (b)(i)	Given the nature of a charitable trust, the trustees should be required to actively consider whether one of their numbers should be remunerated. Before permitting any trustee to charge for his services, the trustees as a whole would have to consider whether this would be to the advantage of the trust. In the case of a sole individual trustee, as there are no other trustees to scrutinise the remuneration, there is a higher risk of abuse of the statutory charging provision. We therefore consider that section 41S should not be applicable to a sole individual trustee of a charitable trust. Such trustee would have to rely on the express charging

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	provision of the trust instrument for his remuneration. Subsection (2)(b) refers to subsection (1)(b)(iii), which does not cover a sole trustee of a charitable trust.
41T(7)(b)	This is consistent with the position in the UK. It serves to clarify the law that a trust corporation which is a recognised authorized institution may, for the purpose of this section, make any reasonable charges for the provision of such services in the course of, or incidental to, the performance of its functions as a trustee. Services not provided in the course of, or incidental to, the performance of functions as a trustee are not covered by section 41T of TO.
41V(2)(b)	This is consistent with the UK provision. The proposed section 41T deals with the remuneration of trustees, while the proposed section 41V deals with persons other than the trustees. Hence section 41T(7)(b) should not be included in section 41V.
41W(3), (3)(b) and (4)	The use of “gross negligence” was supported by the majority of the respondents in our Consultations. It was considered to be more synonymous with industry practice and familiar to practitioners. Some also considered it inappropriate to base the control on exemption clauses on the criminal concept of “reckless act”. As to the interpretation of “gross negligence”, there are judicial remarks to the effect that gross negligence differs from ordinary negligence in degree or seriousness of the want of due care. Whether the degree of negligence constitutes “gross negligence” would be determined by the court in view of the totality of facts under the common law.
41X	The provision is based on the Singaporean model. Respondents to public consultation expressed general support for the proposal. Allowing the settlor to reserve too many powers might attract criticisms that a trust established under Hong Kong law is a sham or merely a nominee arrangement.
41Y(1)(b)(i)	The provision seeks to enhance Hong Kong’s attractiveness as a trust domicile and attract funds to Hong Kong. Hence it is provided that the provision only applies when the trustees are resident in Hong Kong. Whether an individual is resident in Hong Kong is to be determined on

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	the facts. Staying part of the time outside Hong Kong per se might not necessarily mean that the resident would not be considered ordinarily resident in Hong Kong.
41Y(2)	It is generally accepted in both civil and common law jurisdictions that issues relating to immovables are governed by the law where they are situated. Thus, if the immovable trust property is situated outside Hong Kong, the foreign jurisdiction will be the court of the forum. The Hong Kong provision will have no effect. Therefore there is no need to extend the provision to cover immovables.
Second Schedule	The Second Schedule is intended to provide a benchmark for prudential investments for lay trustees. The investment options allowable under the Second Schedule must therefore not expose inexperienced investors using the Schedule to undue risks. The Second Schedule is default in nature and wider investment powers can be provided by a settlor in the trust instrument.
Third Schedule	The scope of the application of the statutory duty of care is in line with the position in the UK and in Singapore, and has been set out for public consultation in 2009 and 2012. The powers as mentioned by the Association are related to the powers of investment or can potentially have considerable implications on the trust property. Hence they should be covered by the statutory duty. In any case, the statutory duty applies subject to any contrary intention in the trust instrument.
Perpetuities and Accumulations Ordinance (“PAO”)	
3(1A)(a)	Our position is in line with that of UK. As many testators may have executed wills on the basis of the law as it stands, the provision should not retrospectively apply to these wills.
3A	The justifications for the proposed abolition of the RAP and the REA are set out at LegCo Paper No. CB(1)869/12-13(02).
3B(3)	This provision seeks to retain, with modification, the current restriction on the accumulation of income for charitable trusts. Currently, a trust instrument may direct that the income of the trust be accumulated within the life of the settlor (section 17(1) of the PAO), and we consider

	that in this respect there is a need to allow some flexibility to reflect settlor's wish. We therefore propose that a charitable trust should continue to be allowed to accumulate income up to the death of the settlor or one of the settlors without being strictly bound by the restriction of 21 years under subsection (2).
Enduring Powers of Attorney Ordinance ("EPAO")	
8(3)(a)	In the case of a mentally incapacitated trustee, he would not be able to supervise the attorney appointed under an enduring power of attorney. We therefore consider it more appropriate to invoke alternative mechanisms (such as (i) the existing section 37 of the TO on replacing trustees unfit to act or incapable of acting; or (ii) the proposed court-free mechanism to remove trustees in section 40B) to replace an incapacitated trustee. Repealing section 8(3)(a) of the EPAO will also make the TO more self-contained.