For discussion
on 3 December 2012

The Legislative Council
Panel on Financial Affairs

Proposed Legislation on Trust Law Reform

PURPOSE

The Administration is finalizing the draft Trust Law (Amendment) Bill which seeks to reform the trust law regime in Hong Kong. This paper updates Members on the outcome of the public consultation on the detailed legislative proposals on trust law reform and our proposed way forward.

BACKGROUND

2. The current trust law regime in Hong Kong is largely based on the principles derived from rules of equity supplemented by several pieces of legislation, including the Trustee Ordinance (Cap. 29) ("TO") enacted in 1935 and the Perpetuities and Accumulations Ordinance (Cap. 257) ("PAO") enacted in 1970. Both the TO and the PAO have not been substantially reviewed since their enactment. Some of their provisions are outdated and cannot meet the need of present-day trusts.

3. By comparison, some major common law jurisdictions like the United Kingdom ("UK") and Singapore have recently reformed their trust laws. The trust industry in Hong Kong, represented by the Joint Committee on Trust Law Reform, submitted a detailed proposal to the Administration in August 2007 advocating a comprehensive review of our trust law regime.

4. The Administration agrees that there is a need to review our trust law. Drawing reference from other comparable common law jurisdictions, we formulated a set of proposed changes to the TO and the PAO for public consultation in 2009. The proposals seek to clarify trustees' duties and powers, better protect beneficiaries' interests and modernize the trust law.

Respondents indicated general support for the reform exercise.

PUBLIC CONSULTATION

5. Based on the feedback in the 2009 consultation exercise, we prepared detailed legislative proposals and launched a two-month public consultation on the proposals on 22 March 2012. We specifically sought views from the stakeholders including the Joint Committee on Trust Law Reform, relevant professional bodies and practitioners, trust service providers, chambers of commerce, financial services regulators, major charitable organisations and academics. We also briefed the Legislative Council ("LegCo") Panel on Financial Affairs on the consultation on 2 April 2012. Details of the legislative proposals are set out in LegCo Papers No. CB(1)1397/11-12(01) and CB(1)1411/11-12(03), which were circulated to Members on 23 March 2012 and 27 March 2012 respectively.

6. The consultation was completed on 21 May 2012 and we have received 23 submissions. Respondents in general supported the reform proposals. Some considered the proposals pivotal to enhancing the competitiveness of the trust industry and bolstering Hong Kong's status as an international asset management centre. Some believed that, by elucidating the rules governing the respective rights and duties of parties to a trust, the reformed regime would provide a more robust legal framework to facilitate more effective operation of present-day trusts.

7. We have carefully considered all the comments received during the consultation and have refined the detailed legislative proposals where appropriate. We will also refine the draft provisions in the Amendment Bill taking into account specific comments from some respondents. Details are set out in the consultation conclusions published on 23 November 2012 (see Annex).

SUMMARY OF PROPOSALS

8. The major proposals that we intend to incorporate in the draft Amendment Bill are summarised below –

(a) Statutory duty of care: We propose to introduce a default provision on statutory duty of care, i.e. subject to contrary intention in the trust instrument, the statutory duty would replace the common law duty for trustees exercising certain prescribed functions. The proposed statutory duty of care would apply to trusts created both before and after the commencement of the Amendment Bill, but would not affect the legality or validity of anything done before its commencement. Having considered the views of the respondents, we will provide in the Amendment Bill a mechanism for trusts created before its commencement whereby the statutory duty could be excluded by a subsequent deed to be executed by the settlor or the beneficiaries, so as to avoid an anomaly that exclusion of the proposed statutory duty is permissible only for trusts created after the commencement of the Amendment Bill;

(b) Power to delegate: We propose to amend section 27(2) of the TO to the effect that, if a trust has more than one trustee, the exercise of the power of delegation should not result in having only one attorney or one trustee administering the trust. We also propose to repeal section 8(3)(a) of Enduring Power of Attorney Ordinance, so that the power of delegation by an individual trustee is entirely governed by the TO;

(c) Power to appoint agents: We propose to provide trustees with a default power to appoint agents so as to enable them to effectively administer a trust. The scope of delegable functions for charitable and non-charitable trusts will be different;

(d) Power to appoint nominees and custodians: We propose to provide trustees with a default power to appoint nominees and custodians so as to enable them to effectively administer a trust;

(e) Safeguards in relation to appointment of agents, nominees and custodians: We propose to provide for certain safeguards in

relation to the appointment of agents, nominees and custodians. There will be requirements and restrictions which are applicable to trustees exercising the proposed default power. There will also be a duty for trustees to review the performance of the agents, nominees and custodians, which is applicable subject to any inconsistent terms in the trust instrument. The review should be carried out as frequently as the circumstances may reasonably require;

(f) Power to insure: We propose to amend section 21 of the TO to expand the scope of a trustee's default power to insure the trust property against loss or damage, covering any event and up to market value of the property;

(g) Professional trustee's entitlement to receive remuneration: We propose to introduce statutory provisions for professional trustee's entitlement to receive remuneration. For remuneration under the trust instrument, a professional trustee (except a sole individual trustee of a charitable trust) may, subject to inconsistent terms in the trust instruments, receive payment in respect of services provided even if the services are capable of being provided by a lay trustee. For remuneration other than under the trust instrument, a professional trustee (except a sole individual trustee) may, under specific circumstances, receive reasonable remuneration out of the trust funds for services provided;

(h) Professional trustee's exemption clause: We propose to impose statutory control on trustee's exemption clause. Taking into account the comments received, our inclination is that, if the clause seeks to exonerate remunerated professional trustees from liability for breach of trust arising from the trustee's own fraud, wilful misconduct or gross negligence, the clause would be invalid;

(i) Beneficiaries' rights to remove trustees: We propose to provide for a court-free process for the appointment and retirement of trustees on beneficiaries' directions, subject to contrary intention in the trust instrument and certain conditions being met. Among the conditions, it is required that there must be a trust corporation or at

least two persons to act as trustees after a trustee has retired at the direction of the beneficiaries;

(j) Validity of certain trusts: We propose to introduce a provision to the effect that a trust is not invalid by reason only of the settlor reserving to himself powers of investment or asset management functions. The provision will apply to trusts created both before and after the commencement of the Amendment Bill, but would not revive any trust which has already been held invalid by the court;

(k) Abolition of the Rule against Perpetuities ("RAP") and the Rule against Excessive Accumulations of Income ("REA"): We propose to abolish RAP for all trusts and REA for non-charitable trusts. For charitable trusts, a direction to accumulate should, subject to limited exceptions, cease to have effect 21 years after the first day on which the income may be accumulated;

(l) Provisions against forced heirship rules: We propose to introduce provisions against forced heirship rules. In essence, no rule relating to inheritance or succession will affect the validity of transfer of movable assets by a settlor during his lifetime into a trust expressed to be governed by Hong Kong law; and

(m) Fine-tuning the scope of authorised investment: We propose to relax the market capitalization and dividend requirements for shares in which trustees have the default power to invest.

WAY FORWARD

9. The Administration will finalise the draft Amendment Bill to incorporate the legislative proposals summarised in paragraph 8 above, with a view to introducing the Bill into the LegCo in the 2012-13 legislative session.

Financial Services and the Treasury Bureau
November 2012

Annex

Consultation on Detailed Legislative Proposals on Trust Law Reform

Consultation Conclusions

BACKGROUND

On 22 March 2012, the Financial Services and the Treasury Bureau ("FSTB") launched a public consultation on the detailed legislative proposals on trust law reform. The reform proposals seek to amend the Trustee Ordinance ("TO") (Cap. 29) and the Perpetuities and Accumulations Ordinance ("PAO") (Cap. 257). They were largely based on the consultation conclusions on the review of the TO and related matters issued in February 2010. We specifically sought views from the concerned stakeholders including the Joint Committee on Trust Law Reform, relevant professional bodies and practitioners, trust service providers, chambers of commerce, financial services regulators, major charitable organisations and academics. To invite views from the general public, we issued a press release and posted the consultation document onto FSTB's website. We also briefed the Legislative Council Panel on Financial Affairs on the consultation at its meeting on 2 April 2012.

OUTCOME OF CONSULTATION

2. The consultation period ended on 21 May 2012 and 23 submissions have been received. A list of the respondents is at Appendix A. Their full submissions are available at the FSTB's website.[1]

3. Respondents in general supported the reform proposals. Some respondents considered the proposals pivotal to raising the competitiveness of the trust industry and bolstering Hong Kong's status as an international asset management centre. Some believed that, by elucidating the rules governing the respective rights and duties of parties

[1] Available at http://www.fstb.gov.hk/fsb.

to a trust, the reformed regime would provide a more robust legal framework to facilitate more effective operation of present-day trusts.

4. We are encouraged by the general support from the respondents. We believe that the proposed reform package will go a long way in providing a modernised regime to cater for the needs of present-day trusts. It also presents the common denominators derived from extensive consultations and engagements conducted previously. That said, we will continue to closely monitor overseas developments and keep under review the need for further updating of our trust law.

5. A summary of the major issues identified by respondents with our corresponding responses is set out in Appendix B. As for other textual and technical comments raised by respondents, our responses are set out in Appendix C.

SUMMARY OF PROPOSALS

6. Taking into account the views and comments of the respondents, we have refined our package of key legislative proposals as appropriate. The revised proposals are summarised below –

(a) Statutory duty of care: We propose to introduce a default provision on statutory duty of care, i.e. subject to contrary intention in the trust instrument, the statutory duty would replace the common law duty for trustees exercising certain prescribed functions. The proposed statutory duty of care would apply to trusts created both before and after the commencement of the Amendment Bill. Having considered the views of the respondents, for trusts created before the commencement of the Amendment Bill, we will provide a mechanism for the statutory duty to be excluded by a subsequent deed;

(b) Power to delegate: We propose to amend section 27(2) of the TO to the effect that, if a trust has more than one trustee, the exercise of the power of delegation should not result in having only one attorney or one trustee administering the trust. We also propose

to repeal section 8(3)(a) of the Enduring Power of Attorney Ordinance (Cap. 501), so that the power of delegation by an individual trustee is entirely governed by the TO;

(c) Power to appoint agents: We propose to provide trustees with a default power to appoint agents, with different scope of delegable functions for charitable and non-charitable trusts. In view of the comments received, we will remove the original proposal of restricting the appointment of a beneficiary as an agent;

(d) Power to appoint nominees and custodians: We propose to provide trustees with a default power to appoint nominees and custodians. Taking into account the respondents' comments, we propose to amend section 41J (which restricts the choice of custodians to those carrying on a business as custodians or bodies corporate controlled by the trustees) to the effect that the conditions under section 41J only apply if the trustees exercise the default power to appoint custodians for the safe custody of the trust assets or the title documents relating to the assets;

(e) Safeguards in relation to appointment of agents, nominees and custodians: We propose to provide for certain safeguards in relation to the appointment of agents, nominees and custodians. There will be requirements and restrictions which are applicable to trustees exercising the proposed default power. There will also be a duty for trustees to review the performance of the agents, nominees and custodians, which is applicable subject to any inconsistent terms in the trust instrument. The review should be carried out as frequently as the circumstances may reasonably require;

(f) Power to insure: We propose to amend section 21 of the TO to expand the scope of a trustee's default power to insure the trust property against loss or damage, covering any event and up to the market value of the property. The premium may be paid out of the trust funds;

(g) Professional trustee's entitlement to receive remuneration: We propose to introduce statutory provisions for professional trustee's entitlement to receive remuneration. For remuneration under the trust instrument, a professional trustee (except a sole individual trustee of a charitable trust) may, subject to inconsistent terms in the trust instruments, receive payment in respect of services provided even if the services are capable of being provided by a lay trustee. For remuneration other than under the trust instrument, a professional trustee (except a sole individual trustee) may, under specific circumstances, receive reasonable remuneration out of the trust funds for services provided;

(h) Professional trustee's exemption clause: We propose to impose statutory control on trustee's exemption clause. Taking into account the comments received, our inclination is that, if the clause seeks to exonerate remunerated professional trustees from liability for breach of trust arising from the trustee's own fraud, wilful misconduct or gross negligence, the term would be invalid;

(i) Beneficiaries' rights to remove trustees: We propose to provide for a court-free process for the appointment and retirement of trustees on beneficiaries' directions, subject to contrary intention in the trust instrument and certain conditions being met. Among the conditions, it is required that there must be a trust corporation or at least two persons to act as trustees after a trustee has retired at the direction of the beneficiaries;

(j) Validity of certain trusts: We propose to introduce a provision to the effect that a trust is not invalid by reason only of the settlor reserving to himself powers of investment or asset management functions. The provision will apply to trusts created both before and after the commencement of the Amendment Bill, but would not revive any trust which has already been held invalid by the court;

(k) Abolition of the rule against perpetuities ("RAP") and the rule against excessive accumulations of income ("REA"): We propose to abolish RAP for all trusts and REA for non-charitable trusts. For charitable trusts, a direction to accumulate income should, subject to limited exceptions, cease to have effect 21 years after the first day on which the income may be accumulated;

(l) Provisions against forced heirship rules: In response to the comments received, we propose to introduce provisions against forced heirship rules. No rule relating to inheritance or succession shall affect the validity of transfer of movable assets by a settlor during his lifetime into a trust expressed to be governed by Hong Kong law; and

(m) Fine-tuning the scope of authorised investment: We propose to relax the market capitalisation and dividend requirements for shares in which trustees have the default power to invest (see item III.3 of Appendix B for details).

WAY FORWARD

7. The Administration will finalise the Amendment Bill in light of the outcome of the consultation, incorporating the key legislative proposals summarised in paragraph 6 above, with a view to introducing the Amendment Bill into the Legislative Council in the 2012-13 legislative session.

Financial Services and the Treasury Bureau
November 2012

Appendix A

Respondents

1. Association of Chartered Certified Accountants (ACCA)
2. Baker & McKenzie
3. Bank of Communications Trustee Limited
4. Bank of China International-Prudential Trustee Limited
5. Clifford Chance
6. Computershare Hong Kong Trustees Limited
7. Consumer Council
8. David Gunson
9. DBS Trustee (Hong Kong) Limited
10. Hong Kong Bar Association
11. Joint Committee on Trust Law Reform
12. Law Reform Commission of Hong Kong
13. Linklaters
14. Mandatory Provident Fund Schemes Authority
15. Search (Investment) Group
16. Sun Life Trustee Company Limited
17. The Chinese General Chamber of Commerce
18. The Chinese Manufacturers' Association of Hong Kong
19. The Hong Kong Association of Restricted License Banks and Deposit-taking Companies
20. The Hong Kong Association of Banks
21. The Hong Kong Federation of Insurers
22. The Hong Kong Society of Financial Analysts
23. The Law Society of Hong Kong

Appendix B

Administration's Response to Respondents' Views and Comments on Consultation on Detailed Legislative Proposals on Trust Law Reform

Consultation Proposals	Respondents' Views and Comments	Administration's Response
I. Amendments to the Trustee Ordinance ("TO") (Cap. 29)		
1. General	- A few respondents would like to see a more extensive reform to bring TO in line with current practice in offshore jurisdictions.	- The policy intention of the reform is to bring Hong Kong's trust law on a par with comparable common law jurisdictions, notably the UK and Singapore. Adopting offshore practice would have substantial policy and legal implications that require very careful consideration. We also note that there is no reported consensus internationally on the practice in offshore jurisdictions.
2. Statutory duty of care (proposed section 3A) - We proposed introducing a statutory duty of care for trustees, i.e. 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 profession, 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.	- The majority of the respondents supported the proposal to introduce a statutory duty of care.	- We welcome respondents' support for the proposal.
	- A few respondents proposed that the statutory duty of care should be mandatory.	- We do not consider it appropriate to make the proposed statutory duty of care mandatory. Same as many other provisions in the TO, the proposed statutory duty of care is a default provision, i.e. it will not apply when a contrary intention is expressed in the trust instrument. As noted in the 2009 consultation conclusions, settlors should be given greater flexibility to reflect their intention in the trust instrument. In this regard, it is worth noting that the similar statutory duty of care imposed under UK and Singapore legislation is not mandatory either.
- The proposed statutory duty of care would apply to trusts created both before and after the commencement of the Amendment Bill, but would not affect the legality or validity of anything done	- Some respondents enquired whether the statutory duty of care would in effect replace, or be in addition to, the common law duty, and suggested reflecting the intention in the provision.	- The statutory duty of care would replace the common law duty of care when the trustees exercise the powers listed in the proposed Schedule 3. We will review the need for improved clarity in the drafting.

Consultation Proposals	Respondents' Views and Comments	Administration's Response
before its commencement. It does not apply where a trust instrument indicates that the statutory duty of care is not meant to apply. The proposed statutory duty of care would apply to trustees when they are carrying out certain prescribed functions as set out in Schedule 3, including exercising the power of investment; appointing agents, nominees and custodians; taking out insurance; etc.	- Whilst acknowledging that the proposed statutory duty of care would only apply to acts after the commencement of the Amendment Bill, some respondents pointed out that the proposed provision might have effect on the trustee of a trust constituted before the commencement of the Amendment Bill if the trust instrument is silent on the trustee's duty of care. They noted that, in the case of trusts created after the commencement of the Amendment Bill, the draft provision provides for an exclusion of the statutory duty of care through the trust instrument. They therefore referred to the proposed section 40D and suggested providing for a similar option for trusts created before the commencement of the Amendment Bill to be excluded from the proposed statutory duty of care through variation of the trust, provided that the settlor is still alive or if all the beneficiaries who are of full age and capacity and absolutely entitled to the property agree with the exclusion of such duty.	- There is no such mechanism under the UK or Singapore legislation. However, we acknowledge that the existing proposal creates an anomaly in that exclusion of the statutory duty is permissible only for trusts created after the commencement of the Amendment Bill. There is no compelling policy justification for this disparity. We will therefore consider introducing an opt-out mechanism for trusts established before the commencement of the Amendment Bill, as suggested by some respondents. This will require a deed excluding the statutory duty to be executed by a living settlor or the beneficiaries under specified conditions.
3. Power to Delegate (proposed sections 27(1A), (2A), (9) and amendments to sections 27(1) & (2) of the TO and section 8(3)(a) of the Enduring Power of Attorney Ordinance ("EPAO") (Cap. 501)) - Section 27 of the TO recognises that a trustee might be temporarily unable to exercise his powers and discretions. To better protect the interests of beneficiaries from excessive delegation under section 27 of TO, we proposed amending section 27(2) to provide that, if a trust has more than one trustee, the exercise of the power of delegation should not result in the trust having only one attorney or one trustee	- A few respondents considered that since section 27(1) of the TO allows a sole trustee to delegate its power to a third party, a joint trustee should also be allowed to delegate his power to his co-trustee. They therefore did not agree with the restriction that such delegation should not result in the trust having only one attorney or one trustee.	- Although a sole trustee is allowed to delegate his power to a third party under the existing section 27(1), in the case of a trust having more than one trustee, we should follow the settlor's intention of appointing multiple trustees to a trust. In other words, if trustees are appointed by the settlor to administer a trust jointly, such trustees should not delegate his power to his co-trustee which in effect will result in only one trustee administering the trust. Therefore we will retain the proposal to amend section 27(2) of the TO to the effect that if a trust has more than one trustee, the exercise of the power of delegation should not result in only one attorney or one trustee administering the trust, unless that trustee is a trust corporation.

Consultation Proposals	Respondents' Views and Comments	Administration's Response
administering the trust, unless that trustee is a trust corporation. Moreover, we proposed repealing section 8(3)(a) of the EPAO so that the power of delegation by trustee is entirely governed by the TO.	- There was a suggestion that the duties of the donee delegated with trustee's powers should be clarified. As the TO does not expressly require the donee to exercise the same duty of care as the trustee while section 27(5) of the TO holds the trustee liable for acts or defaults of the donee in the same manner as if they were the acts or defaults of the trustee, it may seem onerous to a trustee.	- The common law position is not entirely clear as to whether the donee will be subject to the same duty of care of a trustee in exercising his power. In any event, section 27(5) is an existing provision in the current TO and holding the trustee liable for acts or defaults of the donee is reflective of the current legal position. The liability imposed on trustees could also serve as a safeguard to ensure that trustees would exercise due care in delegating to a donee.
	- One respondent took the view that there is a case for retaining section 8(3)(a) of the EPAO because the EPAO addresses a particular situation, i.e. the ability for an individual to appoint an attorney which would have effect after the individual has become mentally incapacitated. Removing section 8(3)(a) of the EPAO would make it impossible for trustee to delegate its power under such particular circumstance.	- 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.
4. Power to appoint agents (proposed sections 41A, 41B, 41C, 41D, 41E) - We proposed providing trustees, other than those of a charitable trust, a default power to appoint agents, except in relation to: (a) a function relating to distribution of trust assets; (b) a power to decide whether a payment is to be made out of income or capital; (c) a power to appoint a person to be a trustee; and (d) a power to delegate their	- The majority of respondents supported the proposals.	- Noted.
	- A few respondents sought clarification on the interaction between the existing section 3 of the TO and the proposed provisions, noting that the proposed section 41B(2) purports to set out the functions that are not delegable to an agent, whilst the proposed sections 41E(2) and (3) purport to limit a trustee's power of appointing an agent. In their view, these proposed provisions taken together appear to be restricting a trustee's power rather than conferring one. They were also concerned	- The proposed provisions on the general power of trustees to appoint agents, nominees and custodians are default powers. They will only apply if such powers are not set out in the trust instruments. In other words, if the trust instrument has provided trustees with a power to appoint agents, by virtue of section 3 of the TO, the proposed sections 41B and 41E will not apply.

Consultation Proposals	Respondents' Views and Comments	Administration's Response
functions or to appoint nominees or custodians. - For trustees of charitable trusts, we proposed that agents should be allowed to carry out functions of generating income to finance a charitable trust's purposes, but not the execution of those purposes.	that section 3 of the TO may not apply, i.e. even if a trust instrument has provided for a power to appoint agents, such power will still be limited by the proposed sections 41B(2), 41E(2) or (3). - Two respondents expressed doubts on the rationale of including the proposed section 41C(3) which prohibits a trustee from appointing a beneficiary to be an agent even if the beneficiary is also one of the trustees. In particular, they considered that in appropriate circumstances, trustees should be entitled to delegate authority over property, such as investment powers, to those directly interested in it, i.e. the beneficiaries.	- We have carefully reviewed the respondents' concern and arguments about the proposed section 41C(3). We recognize that in some circumstances there may be a need to appoint a beneficiary as an agent. There are already a number of proposed measures in place to safeguard beneficiaries' interests in the appointment of agents. For example, certain appointment terms are not allowed unless reasonably necessary; the proposed statutory duty of care applies to the appointment of agents when invoking the relevant default statutory power; and the trustees have an obligation to review the agency arrangement. - We have also researched further into section 12 of the UK Trustee Act 2000, the origin of the proposed section 41C(3). According to the Explanatory Notes to the Trustee Act, the UK provision was made to prevent the circumvention of the restrictions on delegation by trustees of land to beneficiaries under section 9 of the UK Trusts of Land and Appointment of Trustees Act 1996. There is nothing equivalent to section 9 of the UK Trusts of Land and Appointment of Trustees Act in the laws of Hong Kong. - In view of the above, we will remove the proposed section 41C(3).

Consultation Proposals	Respondents' Views and Comments	Administration's Response
	- There was concern that the objective standard of "reasonably necessary" used in the proposed section 41E(2) – as the precondition to adopt certain restricted terms when appointing agents – might bring uncertainty to trustees.	- The proposed prohibition of certain appointment terms unless the use of which is reasonably necessary serves a useful purpose. The appointment terms concerned confer wide powers or discretions on the part of the agents, including the power to further appoint a substitute, permission for the agent's act to give rise to conflict of interest, and restricting the agent's liability. These terms should not be allowed lightly in case they may operate to the detriment of the beneficiaries in certain circumstances. The proposed section 41E(2) strikes a fine balance. On one hand, it provides some limited flexibility for the trustees to include those terms in the appointment of an agent when no better alternative is available. On the other hand, by including the condition "reasonably necessary", it provides some checks and balances on the use of these appointment terms.
5. Trustee's power to appoint nominees and custodians (proposed sections 41G, 41H, 41I and 41K) - We proposed providing trustees with a general power to appoint nominees and custodians, and making it clear that if trustees retain or invest in bearer securities, they must appoint a custodian for the securities, unless the trust instrument or any enactment permits the trustees to retain the securities without appointing a custodian, or the trustee is a sole trustee and is a trust corporation, or the trust has a custodian trustee.	- All respondents supported the proposal to give a wider power to trustees to appoint nominees and custodians.	- Noted.
	- A few respondents commented that the scope of definition of "custodian" under the proposed section 41H(2) is unduly broad and may catch people who happen to be in possession of some documents or records but are not intended to be custodians.	- Under common law, in the absence of express power in the trust instrument or any statutory provision, trustees cannot place any trust documents in the custody of a custodian. We do not propose to change the scope of "custodian" under the proposed section 41H(2) as the scope is in line with position under the common law. However, taking into account the respondents' comments, we propose to amend the proposed section 41J (which restricts the choice of custodians to those carrying on a business

Consultation Proposals	Respondents' Views and Comments	Administration's Response
		as custodians or body corporate controlled by the trustees) to the effect that the conditions under section 41J only apply if the trustees exercise the default power to appoint custodians for the safe custody of the trust assets or the title documents relating to the assets.
6. Safeguards in relation to appointment of agents, nominees and custodians (proposed sections 41C, 41D, 41E, 41F, 41J, 41K, 41L, 41M, 41N, 41O and 41P) - To ensure that the beneficiaries' interests would not be undermined as a result of the delegation of some of the trustees' duties to an agent, nominee or custodian, we proposed a number of safeguards, namely – (a) applying the statutory duty of care to the appointment of agents, nominees and custodians; (b) imposing restrictions on the authorisation and exercise of asset management functions by an agent; (c) restricting the choice of nominees and custodians; and (d) imposing a duty on the trustee to review arrangements under which the agents, nominees and custodians act.	- A few respondents sought clarification as to whether the proposed section 41F on the special restrictions relating to asset management is intended to only apply if a trustee invokes the default power to appoint an agent under the proposed section 41B.	- Our policy intent is that the restrictions pertaining to asset management only apply when the trustee invokes the default power under the proposed section 41B to appoint an agent. In other words, if a trustee exercises the power to appoint an agent to carry out asset management function pursuant to the trust instrument, the statutory restrictions will not apply. We will review the drafting to better reflect this intent.
	- A few respondents suggested setting a minimum review period for the appointment of agents, nominees and custodians in the proposed sections 41M and 41N.	- We do not propose to impose a minimum review period for the appointment of agents, etc. Given the disparate nature and operations of trusts, different circumstances might require different review periods. A statutory review period would unavoidably involve an arbitrary element that would not cater for the specific circumstances of each trust arrangement. Indeed, it would be the trustee's job to decide how frequent the arrangements should be reviewed. - We however note the suggestion by a respondent that the review by the trustee should be carried out as frequently as the circumstances may reasonably require according to the nature of the duties or

Consultation Proposals	Respondents' Views and Comments	Administration's Response
		transactions undertaken by the agent, nominee or custodian. The proposal has the merits of avoiding the open-endedness of the current wording whilst preserving the necessary flexibility. We will revise the proposed sections 41M and 41N to include this test of reasonableness.
7. Trustee's power to insure (section 21) - We proposed giving trustees wider powers to insure. Trustees will be empowered to insure any trust property against risk of loss or damage by any event and pay the premiums out of the trust funds. The current restriction of insuring up to the full value of the property will be removed, so that the property can be insured up to its market value or full replacement value.	- Respondents welcomed the proposal as it will afford greater protection to the trust properties.	- We will amend section 21 of the TO as proposed in Annex F of the consultation document.
8. Professional trustee's entitlement to receive remuneration (proposed sections 41Q, 41R, 41S, 41T, 41U and 41V) - We proposed that professional trustees should be provided with a right to receive remuneration for services rendered, subject to reasonable safeguards, so as to facilitate the employment of professional trustees to undertake the complex task of administering present-day trusts.	- One respondent opined that it was not necessary to distinguish the remuneration policy for trustees of charitable trusts and those of non-charitable trusts in view of the future enactment of charity law in Hong Kong.	- We see the need to distinguish between charitable and non-charitable trusts because of their different nature. We consider it imperative for the remuneration of trustees of charitable trusts to be subject to closer scrutiny, rather than treating trustees of charitable and non-charitable trusts alike in this respect. We believe our proposal would not compromise the discussion of the proposed charity law.
- For charitable trusts, where the trust instrument contains a charging clause entitling a professional trustee to receive remuneration, he may receive remuneration, subject to the conditions that he is not the sole trustee and that he	- One respondent took the view that a trustee's entitlement to remuneration should be decided among parties to a trust and it was not necessary to include in the TO provisions regarding trustees' remuneration.	- We agree that remuneration is something to be decided by parties to a trust, if the trust instrument so provides. Therefore, the proposed provision regarding remuneration is a default provision. It is

Consultation Proposals	Respondents' Views and Comments	Administration's Response
has obtained the agreement of the majority of other trustees that he could so charge. Where the trust instrument is silent on remuneration, a professional trustee of a charitable trust may also receive reasonable remuneration if he is not the sole trustee of the trust and each of the other trustees have agreed in writing that he may so be remunerated.		necessary because, as explained in our 2009 consultation conclusions, under the common law, for trusts whose instruments are silent on remuneration policy the trustees would be automatically barred from any remuneration.
9. Statutory control on trustee's exemption clauses (proposed section 41W) - We proposed imposing statutory control on certain trustee exemption clauses that seek to exempt remunerated professional trustees from liability. In gist, the terms of a trust must not (i) relieve, release or exonerate a trustee from liability for breach of trust arising from the trustee's own fraud, wilful misconduct or reckless act (including reckless omission); or (ii) grant the trustee any indemnity against the trust property in respect of the liability. The formulation is based on the relevant statutory provisions of Jersey and Guernsey except that "gross negligence" (as used in the legislations in these two jurisdictions) was proposed to be replaced by "reckless act". In this regard, we invited views on whether the original formulation of "gross negligence" should be used, and if so, whether the term should be defined in the statute or be interpreted by the court on a case-by-case basis.	- Respondents in general supported the introduction of a statutory control on exemption clauses.	- Noted.
	- There were concerns as to how the proposed control provision would interact with the control provisions in other enactment or codes applicable to trusts.	- It is our policy intention that the proposed section 41W would not affect the operation of provisions in other enactment or administrative codes governing trustee's exemption clauses in trust instruments. We will consider how best to reflect this in the Amendment Bill.
	- One respondent suggested imposing the statutory control on all trustees.	- Given the mandatory nature of the provision, we are of the view that it is more appropriate to confine its application to remunerated professional trustees.
	- A few respondents objected to the proposal on the grounds that common law, market forces and self-regulation have already afforded sufficient controls over trustee's limitation of liability and that the proposal if implemented might lead to an increase in indemnity insurance premiums. The imposition of statutory control of trustee's exemption clause would put Hong Kong in a disadvantaged position vis-à-vis other comparable common law jurisdictions which do not put in place similar statutory control. One respondent suggested that exemption clauses be subject to a	- Whilst market practices and self-regulation or some other alternative tests could afford some protection, the proposed statutory control could provide clearer guidance on the extent to which trustees can be absolved from liability and better protect the interest of beneficiaries.

Consultation Proposals	Respondents' Views and Comments	Administration's Response
	test of reasonableness in the proposed provision.	
	- On the wording of the provision, the majority of those who commented did not support the substitution of "reckless act" for "gross negligence". Some of them believed that it is not appropriate to base the exemption on the concept of "recklessness" which is derived from criminal law. Some others took the view that the introduction of "reckless act" would present considerable difficulties for trustees to comply with. Some respondents preferred "gross negligence" to "reckless act" on the grounds that the former is more synonymous with the prevailing market practice whereby professional trustees seek to limit liability to gross negligence, fraud and wilful misconduct. Replacing "gross negligence" with "reckless act" in the statutory control would amount to a relaxation of the standard currently adopted by the industry and is less stringent than the Jersey and Guernsey standards. There was also a view that there is significant overlap between "fraud" and "reckless act", and it is unclear what kind of "reckless act" would fall outside the "fraud" category.	- We note the general preference for using "gross negligence" instead of "reckless act". The arguments advanced by respondents are pertinent. As such we are inclined to accept their proposal and adopt "gross negligence" in the draft provision.
	- Respondents were split as to whether the term "gross negligence" should be defined. Some respondents supported defining the term for better clarity and certainty, while some preferred the term to be defined by the court through evolution of common law.	- We note that when the term "gross negligence" is adopted in other Hong Kong legislation, it is not defined. We agree to some respondents' views that it would be more appropriate to leave the definition of the term to the development of case law.
10. Beneficiaries' rights to remove trustees (proposed sections 40A, 40B, 40C and 40D) - We proposed providing in the TO for a court-free process for the appointment and retirement of trustees on beneficiaries' directions. The preconditions for exercising such power are that all the	- A few respondents took the view that beneficiaries should not be given the right to remove trustees by way of a court-free process out of concerns that trustees might act only according to the wishes of the beneficiaries, which may be contrary to the intention of the settlor. They considered it more appropriate to follow status quo and allow beneficiaries to remove trustees	- The proposal is intended to provide beneficiaries with a streamlined, court-free mechanism to remove trustees. This would avoid the need to resort to court procedures which in some cases could be burdensome. The proposed sections 40A and 40B do not apply if the disposition creating the trust

Consultation Proposals	Respondents' Views and Comments	Administration's Response
beneficiaries under the trust should be of full age and legal capacity, and are absolutely entitled to the trust property.	through the court process.	provides that these sections do not apply to the trust (see proposed section 40D(1)). On a related note, we will modify the proposed section 40D(1), with reference to the proposed section 41L(3), to the effect that the proposed sections 40A and 40B will not apply when such an application is inconsistent with the terms of the instrument creating the trust, or when such application is inconsistent with any enactment. - We are also of the view that the proposed sections, which put in place rather stringent hurdles for their invocation, have already provided adequate safeguards for the protection of the retiring trustee's interests. Under the proposed provisions, a trustee can only be removed with the consent of all the beneficiaries of full age and capacity and absolutely entitled to the trust property. Where no person is to be appointed following the retirement, it is necessary to obtain the consent of the continuing trustees. One of the proposed sections also expressly provides for appropriate arrangements for the protection of the rights of the retiring trustee in connection with the trust.
	- Some respondents questioned the rationale for requiring at least two continuing trustees to perform the trust before a trustee could make a deed declaring his retirement under the proposed section 40A(3).	- The proposed provisions impose a requirement on trusts to have at least 2 trustees or a single trust corporation as the trustee after the retirement of the trustee(s) concerned. This is consistent with the requirement under the existing section 40 of the TO which governs voluntary retirement of trustees, and would provide checks and balances for the trust after the retirement.

Consultation Proposals	Respondents' Views and Comments	Administration's Response
11. Validity of certain trusts (proposed section 41X) - We proposed introducing a statutory provision to the effect that a trust is not invalid by reason only of the settlor reserving to himself powers of investment or asset management functions. We also proposed to provide in the law that, where an investment power or asset management function has been reserved by the settlor, a trustee who has acted in accordance with the exercise of the power is exempted from liability for breach of trust.	- Most respondents supported the proposal.	- Noted.
	- There were diverging views on how far the settlor could reserve his power. Some respondents considered that the proposal was not wide enough to cover situations where the settlor reserved to himself a wide raft of powers. On the other hand, one respondent opined that the settlor should only be able to reserve to himself powers relating to the adding or removing of trustees, protectors or beneficiaries or the power of investment.	- We note the opinions on the scope of powers to be reserved for the settlor. However, as commented in paragraph 6.15 of the 2009 consultation paper, we should be wary of the fact that 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. As such, we are of the view that the proposed scope of powers is appropriate.
	- Some respondents enquired if the application of the proposed section 41X could be extended to existing trusts, in light of the proposed section 41X(3) which stipulates that the proposed section does not affect the legality or validity of anything done before the commencement date of the Amendment Bill.	- We would review the drafting to make it clear that the proposed section 41X will apply to trusts created both before and after the commencement of the Amendment Bill, but would not revive any trust which has already been held invalid by the court.
II. Amendments to the Perpetuities and Accumulations Ordinance (Cap. 257) to abolish the Rule Against Perpetuities (RAP) and the Rule Against Excessive Accumulations of Income (REA)		
- We proposed abolishing the RAP and REA (except for charitable trust) in respect of trust instruments taking effect on or after commencement of the Amendment Bill. After their abolition, a trust may generally continue in existence for an unlimited period unless the terms of the instrument creating the trust provide for the contrary. - The abolition of REA will not apply to charitable trusts. We proposed to provide that for charitable trusts, except for limited	- A few respondents maintained that the rules were useful to prevent a trust from operating perpetually or from accumulating income for too long.	- As noted in our 2009 consultation conclusions, the proposal received overwhelming support from respondents. Having carefully reviewed the comments we received during the current round of consultation, we do not see convincing arguments to overturn the earlier conclusion to abolish RAP and REA rules.

Consultation Proposals	Respondents' Views and Comments	Administration's Response
exceptions, a direction to accumulate income will cease to have effect 21 years after the first day on which the income may be accumulated.		
III. Related Issues		
1. Beneficiaries' right to information - We indicated that we concur with the conclusion of a consultancy study that there are no imminent or compelling reasons to introduce legislation on beneficiaries' right to information in Hong Kong, and that we would monitor the evolution of the common law and overseas practices in this area and keep under review the need and appropriateness of introducing any pertinent statutory requirement.	- Most respondents agreed with our proposed approach. However, one respondent considered that legislation on beneficiaries' right to information can provide more certainty about the extent to which information has to be disclosed by the trustees.	- We note the respondents' general support for our proposal. We shall continue to monitor overseas experience and keep the matter under review.
2. Provisions against forced heirship rules - In the 2009 consultation conclusions, we indicated our intention to introduce provisions against forced heirship rules based on the Singapore model. We also recognised a need, in our recent consultation paper, to conduct further study on the subject in order to further study the viability of the proposal.	- The adoption of such provisions is supported by some respondents who considered this a useful addition to the law that brings our trust law regime in line with international practice.	- We have commissioned a consultancy study on the possibility of introducing provisions against forced heirship rules in Hong Kong. The study concludes that such a statutory change could help reassure potential settlors that their Hong Kong lifetime trusts will be protected from forced heirship rules. It is expected that this in turn can help enhance Hong Kong's attractiveness as a domicile for trusts and further promote Hong Kong's asset management business. - In light of comments from respondents and the study findings, we will include a new provision against forced heirship rules with reference to section 90 of

Consultation Proposals	Respondents' Views and Comments	Administration's Response
		the Singapore Trustees Act. Specifically, we will provide that no rule relating to inheritance or succession (such as forced heirship rules) shall affect the validity of a lifetime transfer of movable assets into a new or existing trust expressed to be governed by Hong Kong law.
3. Power of Investment - Whilst the vast majority of the respondents to the 2009 consultation supported the retention of the Second Schedule to the TO, some proposed certain amendments to the Second Schedule.	- Some respondents reiterated the suggestion to amend the Second Schedule. We have earlier received feedback from the trust industry that the scope of authorised investments should be expanded. In particular for shares, they considered that the restrictions regarding market capitalisation (not less than HK$10 billion) and dividend (cash dividend paid in five preceding years) should be relaxed. They also proposed some other initiatives to further expand the scope, including lowering the rating requirements for debt securities, expanding the scope to cover newly listed shares, etc.	- 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. - Nevertheless, after considering the industry's view, we consider that there is room to expand the scope of authorised investments with regard to shares. In consultation with relevant regulators, we propose to relax the requirements regarding shares as follows:- (a) lowering the market capitalization requirement from HK$10 billion to say HK$5 billion; and (b) the current 5-year dividend requirement can be relaxed to a dividend requirement in 3 of the previous 5 years. Dividends in forms other than cash dividends can be accepted for the purposes of satisfying the dividend requirement. - We will continue to keep the Second Schedule under review in light of market development.

Appendix C

Administration's Response to Respondents' Technical Comments on Consultation on Detailed Legislative Proposals on Trust Law Reform

Proposed Section No.[1]	Respondents' Comments	Administration's Response
I. Trustee Ordinance ("TO")		
Statutory Duty of Care		
Section 3A (Statutory duty of care)	It seems unclear as to what would constitute "appears" in subsection (3).	The wording is in line with that of the UK Trustee Act 2000 and Singapore Trustee Act. It covers cases where the trust instrument expressly or impliedly carves out the statutory duty of care.
Third Schedule (Application of statutory duty of care)	The statutory duty of care should not apply to the powers under sections 11(1)-(5), 12, 16 and 24(1) or (3) given their technical nature.	The scope of the application of the statutory duty of care is in line with the position in the UK and in Singapore. The powers as mentioned by the respondent 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.
	Regarding the power of investment, the wordings should be expressly construed as such that trustees shall take into account all factors relevant to the assessment of the economic potential of the investment. This helps to avoid a narrow interpretation of the trustees' power to invest for short-term financial returns at the expense of longer-term capital growth.	The proposed statutory duty of care requires a trustee "to exercise such care and skill as is reasonable in the circumstances" (section 3A(1)). The wording is wide enough to enable the court to decide whether it is appropriate for a trustee to have taken into account a particular factor and whether the trustee has discharged his statutory duty.
Power to delegate		
Section 27 (Power to delegate trusts)	The limitation under subsection (2A) should only be applicable when the trustee exercises the statutory power.	The limitation under subsection (2A) would only apply if a trustee exercises the default power under section 27.

[1] As they appear in the consultation document.

Proposed Section No.[1]	Respondents' Comments	Administration's Response
Power to appoint agents, nominees and custodians		
Section 41B (Power to appoint agents)	There is no compelling argument for trustees of a charitable trust to have wider powers in delegation than those of non-charitable trusts.	Indeed, trustees of non-charitable trusts have wider delegation powers than those of charitable trusts (see proposed section 41B(2) and (3)).
	Confirmation is sought as to whether "charitable trusts" only pertain to those registered under section 88 of Inland Revenue Ordinance ("IRO") and, if not, a more comprehensive definition is preferred.	Under the common law, for a trust to be considered a "charity", it must have objects which are exclusively charitable. The scope of charitable purposes is decided by case law. Section 88 does not deal with the registration of charities but only provides tax exemption under the IRO for charitable trusts of a public character. Furthermore, there is no information on those charitable trusts which have not applied for exemption under section 88. Hence, the fact that a trust has not obtained tax exemption under section 88 of the IRO does not necessarily mean that it is not a charitable trust under the common law. As to whether there should be a more comprehensive definition regarding charity under Hong Kong laws, the issue is outside the scope of the current exercise and should be considered with other issues concerning the regulation of charities.
Sections 41B (Power to appoint agents) and 41H (Power to appoint custdians)	Clarification is sought as to - ➢ whether MPF trustees who are ineligible to act as custodians under the applicable legislation still have the power to appoint custodians or sub-custodians to hold securities within and outside Hong Kong; and ➢ whether MPF trustees shall have the power to appoint agents (such as MPF scheme administrators) to distribute any accrued benefits from capital / income of the trusts.	The power to appoint agents and custodians only applies to a trustee if a contrary intention is not expressed in the instrument creating the trust or other enactment (e.g. Mandatory Provident Fund Schemes Ordinance), and has effect subject to the terms of the instrument or the relevant enactment.
	It is suggested defining "custodian trustee".	The term "custodian trustee" in the general law is sufficiently clear and it is preferable for the court to adopt the definition in common law as it is understood by practitioners.

Proposed Section No.[1]	Respondents' Comments	Administration's Response
Section 41C (Persons who may act as agents)	It is queried why a trustee may not authorise two (or more) persons to exercise the same function unless the persons are to exercise the function jointly.	This is in line with the UK and Singapore position. The restriction allows trustees to ensure that there is no overlap or inconsistent decisions concerning the performance of the same function conferred on different agents. The restriction also enhances accountability.
Section 41E (Terms of agency)	It is suggested inserting "under section 41B" after "The trustees may not", if section 41E only applies where appointment is made under the relevant empowering provision in the TO.	The intention is to apply the restriction when the trustees exercise the statutory power to appoint agents. We will consider the need to modify the drafting to better reflect the intention.
Section 41F (Special restrictions relating to asset management)	Clarification is sought as to whether the restrictions under section 41F only apply when the trustees exercise the statutory power to appoint an agent.	The intention is to apply the restrictions under section 41F when the trustees exercise the statutory power to appoint agents. We will consider the need to modify the drafting to better reflect the intention.
	It is queried why section 41F does not contain any requirement for the agent to possess the necessary qualification, licence or experience in the jurisdiction concerned to carry out such functions.	There are already reasonable safeguards in the draft Bill regarding the appointment of agents to exercise the trustees' asset management functions. Apart from the statutory duty of care which the trustees may need to exercise in the appointment, the trustees must also provide the agent with a policy statement, and the agent must secure compliance with the policy statement under section 41F. The agent's performance would also be subject to review by the trustees. It would be more appropriate to leave it to the trustees to consider whether it is necessary to appoint an agent who possesses certain qualification, licence or experience in the light of the nature of assets, management functions required, the terms of such appointment, cost consideration, etc.
Section 41I (investment in bearer securities)	If a trust instrument provides that investments must be retained or made "in the name of trustee", it should amount to an express prohibition on trustees making investments in bearer form.	The relevant proposed provision (section 41I(2)) 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.

Proposed Section No.[1]	Respondents' Comments	Administration's Response
Sections 41M (Review of agent), 41N (Review of nominees and custodians) and 41O (Liability of agents, nominees and custodians)	If a trust instrument simply gives the trustees the power to appoint and remove an agent, nominee or custodian but does not touch on all aspects purported to be covered by sections 41M, 41N and 41O, clarification is sought as to whether a trustee will be considered in breach of any of these sections if it does not discharge the duties under these proposed sections.	Sections 41M, 41N and 41O will apply unless the application is inconsistent with the terms of the instrument creating the trust or an enactment. If these sections apply and a trustee does not discharge the duties under these sections, he will be in breach of such sections.
Section 41O (Liability of agents, nominees and custodians)	Section 41O(2) provides that where a trustee has agreed to a term under which the agent, nominee or custodian is permitted to appoint a substitute, the trustee is not liable for any act or default of the substitute if the trustee has discharged the statutory duty of care applicable to the trustee. The exoneration under this section should be extended to a delegate of an agent, nominee or custodian.	Our policy is that the draft provision should exonerate the trustee from any act or default of the delegates of an agent, nominee or custodian. We will review the drafting of the relevant provisions.
Trustee's power to insure		
Section 21 (Power to insure)	The powers under section 21 should be made subject to any contrary intention in the trust instrument.	The power is subject to any contrary intention in the trust instrument – see section 3(2).

Proposed Section No.[1]	Respondents' Comments	Administration's Response
Remuneration		
Section 41S (Remuneration of professional trustees under instrument creating the trust)	Clarification is sought as to why, in the case of a charitable trust, a sole trustee is treated differently from where there is more than one trustee under subsection (1)(b)(iii). The wording "only to the extent that" under subsection (2)(b) should be extended to cover where the trustee is a sole trustee.	Given the nature of a charitable trust, the trustees should be required to actively consider whether one of their number 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 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.
Section 41T (Remuneration of professional trustees other than under instrument creating the trust)	Clarification is sought as to why a sole trustee is treated differently from where there is more than one trustee under subsection (1)(b)(ii). Subsection (2) should be extended to cover where the trustee is a sole trustee.	Section 41T provides for remuneration of trustee where the trustee's entitlement to remuneration is not provided by the trust instrument or other enactment. As a matter of principle, in the absence of an express charging clause, trustees should actively consider whether one of their number 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 41T should not be applicable to a sole individual trustee. Accordingly subsection (2) should not be extended to cover a sole trustee.

Proposed Section No.[1]	Respondents' Comments	Administration's Response
Section 41V (Remuneration and expenses of agents, nominees and custodians)	"Subject to any inconsistent provision made in the instrument creating the trust" should be added to the beginning of the subsections (2) and (3).	It is already the case. Subsections (2) and (3) concern powers of the trustees, and therefore are subject to contrary intention in the trust instrument (see section 3(2)).
Statutory control on trustee's exemption clauses		
Section 41W (Professional trustee is not exempted from liability for breach of trust)	It is reasonable and consistent with market practice to modify the subsection to: "(2) The terms of a trust must not – (b) grant the trustee any indemnity against the trust property in respect of any liability arising from the trustee's own fraud, wilful misconduct or reckless act"	In both subsections (2) and (3), the liability in paragraph (b) refers to the liability for breach of trust arising from the trustee's own fraud, wilful misconduct or reckless act as mentioned in paragraph (a). We consider that the drafting is clear. Apart from the proposal to adopt "gross negligence" instead of "reckless acts" (see paragraph 6(h) of the consultation conclusions and item I.9 of Appendix B), we consider that no change to the existing draft is necessary.
	It is suggested that the liability referred to in subsections (2)(b) and (3)(b) is for breach of trust arising from the trustee's own "fraud, wilful misconduct or reckless act".	
Beneficiaries' rights to remove trustees		
Section 40A (Appointment and retirement of trustees)	The drafting of subsection (2) is cumbersome. It should simply state that a beneficiary *suis juris* and who is absolutely entitled to the trust property can remove a trustee or appoint a new trustee.	Our position is in line with that in the UK. We do not consider that a beneficiary *suis juris* and who is absolutely entitled to the trust property should be given an absolute power to remove and appoint trustees. Under the proposed section 40A, a retiring trustee can only make a deed declaring his retirement if the conditions under section 40A(3) have been met. Those conditions are designed to ensure that there would be proper arrangement in place for the remaining/succeeding trustees to administer the trust, and that reasonable arrangements have been made for the protection of any rights of the retiring trustee.

Proposed Section No.[1]	Respondents' Comments	Administration's Response
Section 40B (Appointment of substitute for incapacitated trustee)	The drafting of subsection (2) is cumbersome. A beneficiary *suis juris* and who is absolutely entitled to the trust property should be given direct power to appoint a substitute for an incapacitated trustee.	Our position is in line with that in the UK. The attorney or the committee of the estate mentioned in the proposed section 40B(2)(a) and (b) respectively would perform the functions of the trustee after the trustee becomes mentally incapacitated. The current provision envisages that the attorney and the committee of the estate, after receiving the beneficiaries' direction, will discharge their duties by application to the court and then appoint a new trustee as specified in the direction.
Section 40D (Application of sections 40A and 40B)	It is questioned if there is any reason for using "disposition" instead of "instrument".	We note the comment and will consider replacing "disposition" with "instrument" for consistency with other provisions.
	It should be made clear whether sections 40A, 40B, 40C and 40D apply only where all beneficiaries and settlors are individuals.	Sections 40A and 40B should be exercisable by individuals as well as corporate beneficiaries. A deed under section 40D(2) should also be executable by individuals as well as corporate settlors. We will review the drafting of the relevant provisions.
II. Perpetuities and Accumulations Ordinance ("PAO")		
Section 21 (Restriction on accumulation for charitable trusts)	The reference in subsection (2)(a) to where a settlor is an individual or corporation seems to suggest that the provision will not apply to other classes of settlor.	The intention is that the provision should apply to all settlors and we would delete subsection (2)(a).
	It is unjustifiable for the statutory period to be circumvented by a trust instrument which specifies that the duty or power to accumulate income would only cease to have effect on the death of the settlor or one of the settlors.	Section 21 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 (3).

Proposed Section No.[1]	Respondents' Comments	Administration's Response
	Clarification is sought as to whether the income referred to in subsection (6) concerns that arises after the end of the permitted accumulation period or that accrued during the accumulation period.	The income referred to in subsection (6) concerns the income which arises after the 21-year period.