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民政事務局

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### 政府帳目委員會

#### 《審計署署長第六十八號報告書》（《審計報告書》）

#### 審議第 2 章：監察慈善籌款活動

根據 秘書處於 2017 年 5 月 17 日來函的要求，現提供資料如下－

法律改革委員會（法改會）在《慈善組織》報告書內提出的建議，涉及多個政府決策局和部門（局署）的職責。鑑於法改會報告書內多項建議對香港慈善機構的定義和運作均會構成重大影響，政府必須詳細和審慎考慮有關建議。民政事務局獲指派協調各相關局署的意見，以供政府整體考慮如何回應法改會提出的建議。有關協調工作不止於透過會議收集各相關局署的意見；民政事務局亦有透過不同的溝通渠道，協調各局署研究有關建議和可行的應對方法。

在法改會於 2013 年 12 月發表報告書後，民政事務局隨即於 2014 年 1 月 20 日去函相關局署，邀請他們考慮法改會的建議。法改會的建議涉及至少 9 個決策局和 9 個執行部門的職責。相關局署除了民政事務局外，還包括－

- (1) 民政事務局於 2014 年 1 月去函諮詢的 8 個決策局（政制及內地事務局、教育局、環境局、財經事務及庫務局、食物及衛生局、勞工及福利局、發展局和保安局）和 1 個部門（效率促進組）（即《審計報告書》第 2 章第 6.8(a)段提及的 9 個決策局／部門）；
- (2) 向民政事務局提出意見的另外 7 個執行部門（漁農自然護理署、公司註冊處、食物環境衛生署（食環署）、民政事務總署、香港警務處、稅務局和社會福利署（社署））；以及
- (3) 負責「香港政府一站通」網站運作的政府資訊科技總監辦公室。

民政事務局在收到各相關局署的意見後，曾與部分局署澄清回覆內容。根據有關局署提供的意見，民政事務局初步評估認為推行法改會建議所面對的困難主要來自法改會的三大建議，包括為慈善機構訂立法定定義，由單一決策局或部門設立和備存慈善機構註冊名單，以及由該決策局或部門統籌負責現時分屬不同局署涉及規管慈善機構和慈善籌款活動的工作。主要困難歸納如下：

- (1) 難以就慈善機構或慈善宗旨訂立法定定義

法改會其中一項重要建議，是應就慈善機構或慈善宗旨訂立法定定義，而該定義應擴闊至涵蓋 14 個宗旨。政府亦應按法改會建議的慈善機構定義，設立慈善組織註冊制度。

然而，訂立慈善機構或慈善宗旨的法定定義和設立註冊制度，需要有明確宗旨和目的（例如評核有關機構是否符合豁免繳稅的要求、規管慈善籌款活動）；一般來說，若訂立新法例，政府較難單提供慈善宗旨定義或要求慈善機構註冊，而沒有清晰的規管框架和執法安排。而正因為存有不同的規管目的，訂立可適用於各種規管目的和框架的慈善機構或慈善宗旨的定義絕非易事。事實上，法改會在諮詢公眾過程中，亦發現社會對部分宗旨（例如促進人權、衝突的解決或和解）是否屬慈善性質並沒有普遍共識。因此，政府在考慮制訂慈善組織的法定定義時，需要更全面評估社會上的不同意見。

(2) 社會對由單一規管機構設立和備存慈善機構註冊名單未有共識

另一方面，正如法改會在報告中指出，公眾諮詢顯示社會在成立單一機構（例如成立獨立的慈善事務委員會）並設立註冊制度，以至負責統籌規管慈善機構的建議上未有共識，不少慈善機構更反對這項建議，除了憂慮慈善事務委員會權力過大及缺乏制衡外，亦認為日後委員會的行政開支或會轉嫁慈善機構，加重機構的財政負擔；宗教界更擔心註冊制度涉及審查宗教團體的慈善工作，或會干預宗教教義和活動，影響《基本法》所保障的宗教自由。

基於公眾意見，法改會建議不應在現階段設立獨立的慈善事務委員會；但建議慈善機構註冊名單應由單一政府部門設立和備存。然而，在沒有新設獨立規管機構的情況下，如何由現在政府部門落實推行慈善機構註冊，是一個非常複雜的課題。由某一政府部門或機構，代替獨立的慈善事務委員會處理註冊和規管，能否釋除慈善機構在財政負擔，以至宗教自主方面的疑慮，須要進一步思考。政府要考慮市民和眾多持份者，包括同類型慈善機構的意見和反應。

事實上，現時在《稅務條例》（第 112 章）下已有為慈善機構提供豁免繳稅的條款，並已透過多項許可證或牌照制度規管在公眾地方進行的各類籌款活動。與其多設立一個慈善機構規管制度，更有效的方法應是在現行制度下加強各自職能，以提高慈善機構和慈善籌款活動的透明度。

(3) 由單一決策局或部門統籌現時各局署有關規管慈善機構和慈善籌款活動的工作

現時在《稅務條例》（第 112 章）下已有為慈善機構提供豁免繳稅的條款，並已透過多項許可證或牌照制度規管在公眾地方進行的各類籌款活動。法改會建議現時分屬不同局署涉及規管慈善機構和慈善籌款活動的工作，應交由一個決策局或部門負責。事實上，現時與慈善機構和籌款活動相關的法例、發牌、撥地等工作，以至法改會建議涵蓋的慈善宗旨涉及最少 9 個政府決策局和 9 個執行部門的職責<sup>1</sup>，有關工作亦涉及不同的規管目的。要整合這些法例和權力然後交由某一個決策局或部門管理和執行，將牽涉大量政策協調、資源甚至架構重組等整合工作。

<sup>1</sup> 相關決策局和執行部門包括政制及內地事務局、教育局、環境局、財經事務及庫務局、食物及衛生局、民政事務局、勞工及福利局、發展局、保安局、漁農自然護理署、公司註冊處、效率促進組、食物環境衛生署、稅務局、民政事務總署、香港警務處、政府資訊科技總監辦公室和社會福利署。

民政事務局於 2015 年 8 月 11 日召開跨部門會議，與另外 8 個在現行法例法規下工作範圍與監察慈善機構或慈善籌款活動有關的局署（包括財經事務及庫務局、勞工及福利局、效率促進組、食環署、民政事務總署、香港警務處、稅務局和社署），就報告書建議的規管方向和框架作討論。由於事情複雜，有關局署均認為政府應該從政策和實際執行角度審慎考慮有關建議的可行性和影響，並顧及相關各方的反應。

另一方面，有關局署亦備悉法改會提出有關建議背後的一項主要理據，是希望藉以提高慈善團體（特別是向公眾籌募捐款的慈善團體）的透明度，以保障捐款人的利益；而現時政府藉着為監管公眾地方干犯妨擾罪、賭博和販賣而制定的法例，亦附帶規管部分慈善籌款活動。因此，有關局署同意現時負責發出與慈善籌款活動相關許可證或牌照的部門（即食環署、民政事務總署和社署），可探討在現有制度下，如何加強為慈善目的而進行籌款活動的規管。

民政事務局做了一些資料搜集和研究工作（包括與慈善籌款許可證或牌照相關的法例訂立背景、現時簽發許可證或牌照制度和規管安排等）後，於 2016 年 10 月 4 日召開另一次跨部門會議，與食環署、民政事務總署和社署共同研究制訂短期可行的行政措施，以提高慈善籌款活動的透明度。我們主要循三大方向考慮－

- (1) 推行這些措施的基本方向，是提高慈善機構和慈善籌款活動的透明度。例如我們正探討優化現設於「香港政府一站通」下的一站式慈善籌款活動搜尋網站和強化現時 1823 政府熱線的服務，便利市民搜尋獲批准的慈善籌款活動的相關資料。
- (2) 為提高慈善籌款活動的問責程度，我們會考慮進一步加強保障公眾知情權的措施，例如探討在獲批准的慈善籌款活動完成後，把籌款活動的財務報表或收支結算表上載至「香港政府一站通」網站或在部門網站提供相關連結，方便公眾監察。
- (3) 現行與慈善籌款活動有關的法例，主要規管在公眾地方舉行涉及收集捐款或街頭販賣的籌款活動，以及獎券籌款活動。雖然沒有法例規管其他籌款活動，但現時社署發出的《慈善籌款活動最佳安排參考指引》（《參考指引》），當中已有就捐款人的權利，籌款活動的運作和慈善機構的財務責任等提供一般指引，而這些指引適用於不同種類的籌款活動。我們正檢視該《參考指引》，研究能否使之適用於更多不同種類的慈善籌款活動，包括三種須領有許可證或牌照的慈善籌款活動，以至其他新興籌款模式，例如當面要求捐款者設定定期捐款指示等。如有關研究顯示這套指引可適用或修訂至適用於更多不同種類的籌款活動，我們會鼓勵慈善機構按慈善籌

款活動的最佳安排舉辦活動，市民根據這些最佳安排的指引，可以更容易衡量慈善機構舉辦籌款活動的表現，更清楚捐款者的權益。

有關局署正就上述三大方向探討，當中包括資源調配等行政考慮、協調相關牌照要求、以至公開更多與慈善籌款活動有關的財務資料或涉及的法理考慮。至於優化一站式搜尋網站和 1823 政府熱線方面，效率促進組和政府資訊科技辦公室則初步認為技術上應該可行。我們會於 6/7 月召開另一次協調會議，確定有關措施可行性和可公開的資料範圍，並進一步探討當中涉及的技术考慮和具體操作安排。

另外，法改會亦建議引入與英格蘭「近似原則」法定模式相類的法例，以解決慈善饋贈因原來用途整體或部分無法落實而致落空時所產生的各種問題。這建議涉及在法改會建議規管框架下慈善機構的具體運作安排。因此，民政事務局在整理收集到各相關部門有關法改會建議規管框架的初步意見後，即著手諮詢律政司這建議的可行性，以至與律政司作為慈善事業守護者角色之間的關係。

由於律政司向各政府部門提供的法律意見都受法律專業保密權保障，政府認為公開律政司的法律意見並不恰當。儘管如此，在經與律政司磋商後，我們歸納該份法律意見的要點於**附件**，供政府帳目委員會參考。

民政事務局局長

(李慧婷



代行)

2017 年 5 月 26 日

副本送：

社會福利署署長  
民政事務總署署長  
食物環境衛生署署長  
地政總署署長  
財經事務及庫務局局長  
審計署署長

## 法律改革委員會有關引入「近似原則」法例的建議

### 律政司的法律意見

#### 要點

香港現時所適用的「近似原則」源於普通法，在慈善信託不可能落實當初設立的宗旨時，法庭在符合某些條件下，可應用「近似原則」，頒令容許有關慈善機構的財產可應用於與捐贈者表明或原來意願盡量近似的宗旨，令饋贈不致落空。

2. 法改會建議參照英格蘭和威爾斯的做法，將「近似原則」的應用編纂為法例，並建議擴闊「近似原則」在香港的適用範圍，即在落實慈善信託的慈善宗旨並非不可能或不切實可行的情況下，「近似原則」可適用於以下三種情況：

- (1) 為特定的慈善宗旨而捐出的財產未能用於該項宗旨，而捐贈者又身分不明或已放棄收回財產的權利；
- (2) 財產是應募捐而為特定的慈善宗旨而捐出；或
- (3) 慈善團體已解散。

3. 法改會的建議，主要涉及在香港引入與英格蘭《2011年慈善法令》第62至66條（有關擴闊「近似原則」的適用範圍）和第263條（有關解散慈善團體）相類的法例。有關條文見**附錄**（只有英文版）。

4. 在擴闊「近似原則」的適用範圍方面，律政司認為引入與英格蘭《2011年慈善法令》第62至66條相類的法例在法律上理應可行。

5. 在有關解散慈善團體方面，英格蘭《2011年慈善法令》第263條賦權當地的「慈善事務委員會」可在特定情況下（例如無法執行某慈善機構的宗旨）解散慈善機構。然而，由於法改會建議暫不應在香港成立「慈善事務委員會」，政府在考慮是否引入有關條文時，須考慮具體執行部門或機關。

**Charities Act 2011- Sections 62 to 66**

**62 Occasions for applying property cy-près**

(1) Subject to subsection (3), the circumstances in which the original purposes of a charitable gift can be altered to allow the property given or part of it to be applied cy-près are--

- (a) where the original purposes, in whole or in part--
  - (i) have been as far as may be fulfilled, or
  - (ii) cannot be carried out, or not according to the directions given and to the spirit of the gift,
- (b) where the original purposes provide a use for part only of the property available by virtue of the gift,
- (c) where--
  - (i) the property available by virtue of the gift, and
  - (ii) other property applicable for similar purposes,

can be more effectively used in conjunction, and to that end can suitably, regard being had to the appropriate considerations, be made applicable to common purposes,

- (d) where the original purposes were laid down by reference to--
  - (i) an area which then was but has since ceased to be a unit for some other purpose, or
  - (ii) a class of persons or an area which has for any reason since ceased to be suitable, regard being had to the appropriate considerations, or to be practical in administering the gift, or
- (e) where the original purposes, in whole or in part, have, since they were laid down--
  - (i) been adequately provided for by other means,
  - (ii) ceased, as being useless or harmful to the community or for other reasons, to be in law charitable, or
  - (iii) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the gift, regard being had to the appropriate considerations.

(2) In subsection (1) "the appropriate considerations" means--

- (a) (on the one hand) the spirit of the gift concerned, and
- (b) (on the other) the social and economic circumstances prevailing at the time of the proposed alteration of the original purposes.

(3) Subsection (1) does not affect the conditions which must be satisfied in order that property given for charitable purposes may be applied cy-près except in so far as those conditions require a failure of the original purposes.

**\* 委員會秘書附註：本文件只備英文本。**

- (4) References in subsections (1) to (3) to the original purposes of a gift are to be read, where the application of the property given has been altered or regulated by a scheme or otherwise, as referring to the purposes for which the property is for the time being applicable.
- (5) The court may by scheme made under the court's jurisdiction with respect to charities, in any case where the purposes for which the property is held are laid down by reference to any such area as is mentioned in column 1 in Schedule 4, provide for enlarging the area to any such area as is mentioned in column 2 in the same entry in that Schedule.
- (6) Subsection (5) does not affect the power to make schemes in circumstances falling within subsection (1).

### **63 Application cy-près: donor unknown or disclaiming**

- (1) Property given for specific charitable purposes which fail is applicable cy-près as if given for charitable purposes generally, if it belongs--
- (a) to a donor who after--
    - (i) the prescribed advertisements and inquiries have been published and made, and
    - (ii) the prescribed period beginning with the publication of those advertisements has ended,cannot be identified or cannot be found, or
  - (b) to a donor who has executed a disclaimer in the prescribed form of the right to have the property returned.
- (2) Where the prescribed advertisements and inquiries have been published and made by or on behalf of trustees with respect to any such property, the trustees are not liable to any person in respect of the property if no claim by that person to be interested in it is received by them before the end of the period mentioned in subsection (1)(a)(ii).
- (3) Where property is applied cy-près by virtue of this section, all the donor's interest in it is treated as having been relinquished when the gift was made.
- (4) But where property is so applied as belonging to donors who cannot be identified or cannot be found, and is not so applied by virtue of section 64 (donors treated as unidentifiable)--
- (a) the scheme must specify the total amount of that property,
  - (b) the donor of any part of that amount is entitled, on making a claim within the time limit, to recover from the charity for which the property is applied a sum equal to that part, less any expenses properly incurred by the charity trustees after the scheme's date in connection with claims relating to the donor's gift, and
  - (c) the scheme may include directions as to the provision to be made for meeting any claims made in accordance with paragraph (b).



- (5) For the purposes of subsection (4)(b)--
- (a) a claim is made within the time limit only if it is made no later than 6 months after the date on which the scheme is made, and
  - (b) "the scheme's date" means the date on which the scheme is made.
- (6) Subsection (7) applies if--
- (a) any sum is, in accordance with any directions included in the scheme under subsection (4)(c), set aside for meeting claims made in accordance with subsection (4)(b), but
  - (b) the aggregate amount of any such claims actually made exceeds the relevant amount;
- and for this purpose "the relevant amount" means the amount of the sum so set aside after deduction of any expenses properly incurred by the charity trustees in connection with claims relating to the donors' gifts.
- (7) If the Commission so directs, each of the donors in question is entitled only to such proportion of the relevant amount as the amount of the donor's claim bears to the aggregate amount referred to in subsection (6)(b).

#### **64 Donors treated as unidentifiable**

- (1) For the purposes of section 63 property is conclusively presumed (without any advertisement or inquiry) to belong to donors who cannot be identified, in so far as it consists of--
- (a) the proceeds of cash collections made--
    - (i) by means of collecting boxes, or
    - (ii) by other means not adapted for distinguishing one gift from another, or
  - (b) the proceeds of any lottery, competition, entertainment, sale or similar money-raising activity, after allowing for property given to provide prizes or articles for sale or otherwise to enable the activity to be undertaken.
- (2) The court or the Commission may by order direct that property not falling within subsection (1) is for the purposes of section 63 to be treated (without any advertisement or inquiry) as belonging to donors who cannot be identified if it appears to the court or the Commission--
- (a) that it would be unreasonable, having regard to the amounts likely to be returned to the donors, to incur expense with a view to returning the property, or
  - (b) that it would be unreasonable, having regard to the nature, circumstances and amounts of the gifts, and to the lapse of time since the gifts were made, for the donors to expect the property to be returned.

## **65 Donors treated as disclaiming**

- (1) This section applies to property given--
    - (a) for specific charitable purposes, and
    - (b) in response to a solicitation within subsection (2).
  - (2) A solicitation is within this subsection if--
    - (a) it is made for specific charitable purposes, and
    - (b) it is accompanied by a statement to the effect that property given in response to it will, in the event of those purposes failing, be applicable cy-près as if given for charitable purposes generally, unless the donor makes a relevant declaration at the time of making the gift.
  - (3) A relevant declaration is a declaration in writing by the donor to the effect that, in the event of the specific charitable purposes failing, the donor wishes to be given the opportunity by the trustees holding the property to request the return of the property in question (or a sum equal to its value at the time of the making of the gift).
  - (4) Subsections (5) and (6) apply if--
    - (a) a person has given property as mentioned in subsection (1),
    - (b) the specific charitable purposes fail, and
    - (c) the donor has made a relevant declaration.
  - (5) The trustees holding the property must take the prescribed steps for the purpose of--
    - (a) informing the donor of the failure of the purposes,
    - (b) enquiring whether the donor wishes to request the return of the property (or a sum equal to its value), and
    - (c) if within the prescribed period the donor makes such a request, returning the property (or such a sum) to the donor.
  - (6) If those trustees have taken all appropriate prescribed steps but--
    - (a) they have failed to find the donor, or
    - (b) the donor does not within the prescribed period request the return of the property (or a sum equal to its value),
- section 63(1) applies to the property as if it belonged to a donor within section 63(1)(b) (application of property where donor has disclaimed right to return of property).
- (7) If--
    - (a) a person has given property as mentioned in subsection (1),
    - (b) the specific charitable purposes fail, and
    - (c) the donor has not made a relevant declaration,

section 63(1) similarly applies to the property as if it belonged to a donor within section 63(1)(b).

- (8) For the purposes of this section--
- (a) "solicitation" means a solicitation made in any manner and however communicated to the persons to whom it is addressed,
  - (b) it is irrelevant whether any consideration is or is to be given in return for the property in question, and
  - (c) where any appeal consists of--
    - (i) solicitations that are accompanied by statements within subsection (2)(b), and
    - (ii) solicitations that are not so accompanied,
- a person giving property as a result of the appeal is to be presumed, unless the contrary is proved, to have responded to the former solicitations and not the latter.

#### **66 Unknown and disclaiming donors: supplementary**

- (1) For the purposes of sections 63 and 65, charitable purposes are to be treated as failing if any difficulty in applying property to those purposes makes that property or the part not applicable cy-près available to be returned to the donors.
- (2) In sections 63 to 65 and this section--
- (a) references to a donor include persons claiming through or under the original donor, and
  - (b) references to property given include the property for the time being representing the property originally given or property derived from it.
- (3) Subsection (2) applies except in so far as the context otherwise requires.
- (4) In sections 63 and 65 "prescribed" means prescribed by regulations made by the Commission.
- (5) Any such regulations are to be published by the Commission in such manner as it thinks fit.
- (6) Any such regulations may, as respects the advertisements which are to be published for the purposes of section 63(1)(a), make provision as to the form and content of such advertisements as well as the manner in which they are to be published.

#### **69 Commission's concurrent jurisdiction with High Court for certain purposes**

- (1) The Commission may by order exercise the same jurisdiction and powers as are exercisable by the High Court in charity proceedings for the following purposes--
- (a) establishing a scheme for the administration of a charity;

- (b) appointing, discharging or removing a charity trustee or trustee for a charity, or removing an officer or employee;
  - (c) vesting or transferring property, or requiring or entitling any person to call for or make any transfer of property or any payment.
- (2) Subsection (1) is subject to the provisions of this Act.
- (3) If the court directs a scheme for the administration of a charity to be established--
- (a) the court may by order refer the matter to the Commission for it to prepare or settle a scheme in accordance with such directions (if any) as the court sees fit to give, and
  - (b) any such order may provide for the scheme to be put into effect by order of the Commission as if prepared under subsection (1) and without any further order of the court.

### **263 Dissolution of incorporated body**

- (1) The Commission may of its own motion make an order dissolving an incorporated body from such date as is specified in the order, if the Commission is satisfied--
- (a) that the body has no assets or does not operate,
  - (b) that the relevant charity has ceased to exist,
  - (c) that the institution previously constituting, or treated by the Commission as constituting, the relevant charity has ceased to be, or (as the case may be) was not at the time of the body's incorporation, a charity, or
  - (d) that the purposes of the relevant charity--
    - (i) have been achieved so far as is possible, or
    - (ii) are in practice incapable of being achieved.
- (2) The Commission may make an order dissolving an incorporated body from such date as is specified in the order, if the Commission is satisfied, on the application of the charity trustees of the relevant charity, that it would be in the interests of the charity for the body to be dissolved.
- (3) Subject to subsection (4), an order made under this section with respect to an incorporated body has the effect of vesting in the charity trustees of the relevant charity, in trust for that charity, all property for the time being vested--
- (a) in the body, or
  - (b) in any other person (apart from the official custodian),
- in trust for that charity.
- (4) If the Commission so directs in the order--
- (a) all or any specified part of that property, instead of vesting in the charity trustees of the relevant charity, vests in--
    - (i) a specified person as trustee for, or nominee of, that charity, or

- (ii) such persons (other than the charity trustees of the relevant charity) as may be specified;
- (b) any specified investments, or any specified class or description of investments, held by any person in trust for the relevant charity are to be transferred to--
  - (i) the charity trustees of that charity, or
  - (ii) any such person or persons as is or are mentioned in paragraph (a)(i) or (ii).

For this purpose "specified" means specified by the Commission in the order.

- (5) Where an order to which this subsection applies is made with respect to an incorporated body--
  - (a) any rights or liabilities of the body become rights or liabilities of the charity trustees of the relevant charity, and
  - (b) any legal proceedings that might have been continued or commenced by or against the body may be continued or commenced by or against those trustees.
- (6) Subsection (5) applies to any order under this section by virtue of which--
  - (a) any property vested as mentioned in subsection (3) is vested--
    - (i) in the charity trustees of the relevant charity, or
    - (ii) in any person as trustee for, or nominee of, that charity, or
  - (b) any investments held by any person in trust for the relevant charity are required to be transferred--
    - (i) to the charity trustees of that charity, or
    - (ii) to any person as trustee for, or nominee of, that charity.