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26 May 2017

Mr Anthony CHU
Clerk, Public Accounts Committee
Legislative Council
Legislative Council Complex,
1 Legislative Council Road,
Central,
Hong Kong

Dear Mr Chu,

Public Accounts Committee

**Consideration of Chapter 2 of the Director of Audit's Report No.68
(the Audit Report)**

Monitoring of charitable fund-raising activities

As requested in your letters dated 17 May 2017, I append the requested information below.

The recommendations by the Law Reform Commission (LRC) in its Report on Charities involve the duties of a number of Government bureaux and departments. Since many recommendations in the LRC Report carry significant implications on charities in Hong Kong in terms of their definition and operation, the Government needs to consider the recommendations thoroughly and carefully. Home Affairs Bureau (HAB) has been assigned to co-ordinate inputs from the relevant bureaux and departments in formulating responses to LRC's recommendations for the Government's overall consideration. Such co-ordination efforts have not been confined to collecting views of relevant bureaux and departments at meetings. HAB has also, through various communication channels, co-ordinated bureaux and departments to study the recommendations and explore possible way forward.

Upon release of the LRC Report in December 2013, HAB wrote to relevant bureaux and departments on 20 January 2014 inviting their

consideration of LRC's recommendations. The recommendations of LRC involve the duties of at least 9 bureaux and 9 executive departments. These bureaux and departments, apart from HAB, include -

- (1) 8 bureaux (i.e. Constitutional and Mainland Affairs Bureau, Education Bureau, Environment Bureau, Financial Services and the Treasury Bureau (FSTB), Food and Health Bureau, Labour and Welfare Bureau (LWB), Development Bureau and Security Bureau) and one department (i.e. Efficiency Unit) which HAB consulted in writing in January 2014 (i.e. the 9 bureaux/departments mentioned in para. 6.8(a) of Chapter 2 in the Audit Report);
- (2) another 7 executive departments (i.e. Agriculture, Fisheries and Conservation Department; Companies Registry; Food and Environmental Hygiene Department (FEHD); Home Affairs Department (HAD); Hong Kong Police Force (HKPF); Inland Revenue Department (IRD) and Social Welfare Department (SWD)) which also provided comments to HAB; and
- (3) Office of the Government Chief Information Officer (OGCIO) which is responsible for the operation of the "GovHK" website.

Upon receiving comments from the relevant bureaux and departments, HAB sought clarification on the replies from some of the bureaux and departments. On the basis of the responses from the relevant bureaux and departments, HAB made an initial assessment and considered that the challenges in implementing LRC's recommendations would come mainly from the LRC's three major recommendations, namely providing a statutory definition of "charitable organisations"; establishing and maintaining a register of charitable organisations by a single Government bureau or department; and delegating the same bureau or department to be responsible for co-ordinating the work of regulating charitable organisations and charitable fund-raising activities which are currently under the purview of different bureaux and departments. The major challenges are summarised below:

- (1) Challenges in providing a statutory definition of "charitable organisations" or "charitable purposes"

One of the major recommendations of LRC is that a statutory definition should be provided for "charitable organisations" or "charitable purposes" and such a definition should be extended to cover 14 heads. The Government should also establish a registration system for charitable organisations according to the definition proposed by the LRC.

However, clear objectives and purposes (such as for assessing whether an organisation has met the requirements for tax exemption and for regulating charitable fund-raising activities) are required for providing a statutory definition of “charitable organisations” or “charitable purposes” and for establishing a registration system. In general, it is difficult for the Government to introduce a new piece of legislation to provide merely a definition of “charitable purposes” or require charitable organisation to register, without formulating a clear regulatory framework or enforcement arrangements. Owing to the diversity of these regulatory purposes, it is not easy to provide a definition of “charitable organisations” or “charitable purposes” which is applicable to various regulatory purposes and frameworks. As a matter of fact, it was also found by LRC during its public consultation exercise that no consensus in the community had been reached on whether some of the purposes (e.g. promoting human rights, resolving conflicts or settling disputes) should be considered as charitable purposes. Therefore, the Government has to make a comprehensive assessment on different views expressed in the community when considering a statutory definition for charitable organisations.

- (2) No consensus in the community on establishing and maintaining a register of charitable organisations by a single regulatory authority

Furthermore, as pointed out by LRC in its Report, the findings of the public consultation revealed that no consensus in the community has been reached on the establishment of a single authority (for example, to set up an independent charity commission) and the proposal of making an authority responsible for establishing a registration system, as well as co-ordinating the regulation of charitable organisations. Many charitable organisations even objected the proposal as they worried that the charity commission would be given too much power without proper check-and-balance. They also considered that the administration cost of the commission might be shifted to charitable organisations, thus increasing their financial burden. For the religious sector, they even worried that the registration system would involve scrutiny of religious organisations’ charitable work, which might lead to interference with religious doctrines and activities and undermine the freedom of religion as enshrined in the Basic Law.

In view of the public views, LRC suggested that an independent charity commission should not be set up at this stage, while a register of charitable organisations be established and maintained by a single government department. However, the implementation of the registration system of charitable organisations without setting up

a new independent regulatory authority is a highly complicated issue. We need to consider further whether the worries of charitable organisations over financial burden and religious autonomy can be removed if the registration and regulation matters are handled by a government department or an organisation instead of an independent charity commission. The Government needs to take into consideration the views and feedback of the public and various stakeholders, including various types of charitable organisations.

- (3) A single bureau or department to co-ordinate the current work of bureaux and departments on the regulation of charitable organisations and charitable fund-raising activities

Under the existing Inland Revenue Ordinance (Cap. 112), there have been provisions providing tax exemption for charitable organisations. Moreover, various types of fund-raising activities organised in public places are regulated through a number of permits or licensing systems. LRC recommended that the current work of different bureaux and departments involving the regulation of charitable organisations and charitable fund-raising activities should be delegated to one bureau or department. As a matter of fact, the current legislation, licensing and land allocation work relating to charitable organisations and fund-raising activities, as well as coverage of charitable purposes recommended by the LRC, involve the duties of at least 9 Government bureaux and 9 executive departments¹. Substantial integration work on, among other things, policy co-ordination, resources allocation and even re-organisation will be required for the bureaux and departments to consolidate all the relevant legislation and powers before a single policy bureau or department could be designated to administer and carry out the work.

On 11 August 2015, the HAB convened an inter-departmental meeting with eight other bureaux and departments (including FSTB, LWB, EU, FEHD, HAD, HKPF, IRD and SWD), whose scopes of work under the current legislation and statute involve the monitoring of charitable organisations or charitable fund-raising activities, to discuss the approach to and the framework for regulation as proposed in the LRC Report. Given the complexity of the issue, the bureaux and departments concerned agreed that the Government should consider carefully the feasibility and implications of those recommendations from policy and practical implementation

¹ Relevant bureaux and executive departments include Constitutional and Mainland Affairs Bureau; Education Bureau; Environment Bureau; FSTB; Food and Health Bureau; HAB; LWB; Development Bureau; Security Bureau; Agriculture, Fisheries and Conservation Department; Companies Registry; EU; FEHD; IRD; HAD; HKPF; OGCIO and SWD.

perspectives, as well as responses from relevant stakeholders.

Apart from the above, the relevant bureaux and departments noted that one of the key rationales behind the recommendations made by the LRC was to enhance the transparency of charitable organisations, especially those raising funds from the public, so as to protect the interests of donors. At present, the Government's regulation on some charitable fund-raising activities is incidental to the legislation that controls nuisances committed in public places, gambling and hawking. Therefore, the relevant bureaux and departments agreed that departments currently responsible for issuance of permits or licenses relating to charitable fund-raising activities, i.e. FEHD, HAD and SWD, could consider how to enhance the regulation of charitable fund-raising activities under the existing regime.

After conducting further data collection and research on, among others, the background leading to the introduction of the legislation relating to issuance of permits or licences of charitable fund-raising activities and the present regulatory arrangements for the licensing system, HAB convened another cross-departmental meeting on 4 October 2016 to study with FEHD, HAD and SWD the formulation of short-term viable administrative measures, with a view to enhancing the transparency of charitable fund-raising activities. Our consideration mainly follows the three broad directions below:

- (1) The basic direction for implementing these measures is to enhance the transparency of charitable organisations and charitable fund-raising activities. For example, we are exploring the feasibility of upgrading the functions of the one-stop finder for charitable fund-raising activities currently set up in "GovHK" and enhancing the service of the existing 1823 Government Hotline to facilitate the search by the public for information on approved charitable fund-raising activities.
- (2) To enhance the accountability of charitable fund-raising activities, we will consider measures on safeguarding the right to know of the public, such as to explore the feasibility of uploading financial reports or income statement relating to approved fund-raising activities, or providing relevant hyperlink, upon completion of those activities onto "GovHK" or departmental website for public scrutiny.
- (3) The existing legislation related to charitable fund-raising activities mainly regulates the collection of donation or fund-raising activities involving on-street selling in public places, and fundraising activities through conduction of lottery. Though there is no legislation regulating other form of fund-raising activities, the Reference Guide on Best Practices for Charitable Fund-raising

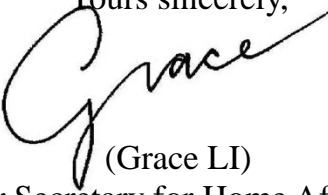
Activities (the Reference Guide) issued by the SWD provides guidance in respect of donors' right, best practices of fund-raising activities and financial accountability of charitable organisations. This general guidance is applicable to various types of fund-raising activities. We are reviewing the Reference Guide and assess if the Guide can be made applicable to more different types of fund-raising activities, including the three types of activities that licences and permits are required, as well as other new modes of fund-raising, such as face-to-face solicitation of regular donations. If the assessment shows that the set of guidance can be applicable, or revised so as to be applicable, to more different types of fund-raising activities, we will encourage charitable organisations to organise activities with reference to the guide while the public may refer to the best practices for fund-raising activities as specified in the guide to assess more easily the performance of charitable organisations in those activities and to have a better understanding of the rights and interests of donors.

The relevant bureaux and departments are exploring along the above three broad directions, including the relevant administrative considerations such as allocation of resources, co-ordination of licensing requirements and legal considerations relating to the disclosure of more information on fund-raising activities. As for enhancing the one-stop finder and the 1823 Government Hotline, EU and OGCIO initially consider that the proposals should be technically feasible. We will convene another co-ordination meeting in June/July to finalise the feasibility of the above measures and the scope of information to be disclosed as well as to further study the technical considerations involved and the detailed operational arrangements.

Moreover, LRC recommended the introduction in Hong Kong legislation along the lines of the English statutory model of the "cy-près doctrine", so as to address the various problems arising from the failure to fulfil, in whole or in part, the original purposes of charitable gifts. This recommendation involves the operational arrangements of charitable organisations under the regulatory framework as proposed by LRC. Therefore, HAB, upon consolidating initial inputs from relevant bureaux and departments about the LRC's proposed regulatory framework, consulted with the Department of Justice (DoJ) the feasibility of this recommendation and its relation with the Secretary for Justice as the protector of charities.

As the legal advice provided by DoJ to other Government bureaux and departments is protected by legal professional privilege, the Government considers that it is inappropriate to disclose the legal advice of DoJ. That said, having discussed with DoJ, we summarise some salient points of the legal advice (see **Annex**) for information of the Public Accounts Committee.

Yours sincerely,

A handwritten signature in black ink that reads "Grace". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

(Grace LI)

for Secretary for Home Affairs

c.c. Director of Social Welfare
Director of Home Affairs
Director of Food and Environmental Hygiene
Director of Lands
Secretary for Financial Services and the Treasury
Director of Audit

**The Law Reform Commission’s Proposal for Introduction of
Legislation on “Cy-près Doctrine”**

Legal Advice provided by the Department of Justice

Summary of Salient Points

The existing “cy-près doctrine” applicable to Hong Kong is based on the common law. When a charitable trust can no longer carry out the purposes for which it was first created, subject to certain conditions, the court may apply the “cy-près doctrine” and order that the property of the charity should be applied for a purpose which is as near as possible to the expressed or original intention of the donor, and the gift will not fail.

2. The Law Reform Commission (LRC) recommended the codification of the application of “cy-près doctrine” and broadening the scope of application of the “cy-près doctrine” in Hong Kong by making reference to the practice in England and Wales so that it could apply in the following three situations even where it was not impossible or impractical to carry out the charitable purpose of the charitable trust:

- (1) where property given for a specific charitable purpose has failed, and the donors are either unknown or have disclaimed their rights to have the property returned;
- (2) where property is given for a specific charitable purpose in response to a solicitation;
- (3) where a charitable body has dissolved.

3. LRC’s recommendation mainly involves the introduction in Hong Kong of legislations along the lines of sections 62 to 66 (in relation to the broadening of the scope of application of the “cy-près doctrine”) and section 263 (in relation to dissolution of charitable organisations) of the English Charities Act 2011. The provisions concerned are at the **Appendix** (in English only).

4. Regarding the broadening of the scope of application of the “cy-près doctrine”, the DoJ considered that it should be legally feasible to introduce the legislation along the lines of section 62 to 66 of the English Charities Act 2011 .

5. Regarding the dissolution of charities, section 263 of the English Charities Act 2011 empowers the Charity Commission in England and Wales to dissolve a charitable body under certain circumstances (e.g. when the purposes of a charitable body are in practice incapable of being achieved). However, as it is not recommended by the LRC to establish a “Charity Commission” in Hong Kong, the Government shall consider which is the executing department or organisation when considering whether or not to introduce the provision.

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.

(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.