

**Public Consultation on
Review of the Trustee Ordinance and Related Matters**

Compendium of Responses

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Background

The trust law regime in Hong Kong is mainly based on the principles derived from rules of equity. They are supplemented by several pieces of legislation, the most important one being the Trustee Ordinance (Cap. 29) (“TO”).

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

In addition, the Perpetuities and Accumulations Ordinance (Cap. 257) (“PAO”) was enacted in 1970, substantially based on the UK’s Perpetuities and Accumulations Act 1964, to amend the common law rules regarding perpetuities and accumulations of income. The PAO has not been substantially reviewed and amended since its enactment.

Since the TO has not been substantially reviewed and amended since its enactment, some of the provisions, especially those regarding the powers and duties of trustees, are outdated. Some major common law jurisdictions like the United Kingdom, Singapore and New Zealand have recently reviewed and reformed their trust laws to facilitate trust administration and attract more trust businesses

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

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

Consultation

The public consultation was conducted from 22 June to 21 September 2009 to seek comments and views on the reform proposals. During the consultation period, we conducted a consultation forum on 29 July 2009 and attended several meetings/forums of other interested organisations.

We have received 36 pieces of written submissions in total. This document integrates all comments we have received during the consultation period.

General Comments

Deputation	Comments
Asiaciti Trust Hong Kong Limited	<p>It is important to remember that this is a Trustee Ordinance (TO), and not a Beneficiary Ordinance. It is Hong Kong Trustees and Hong Kong Trust Companies which sell the concept or the brand known as “Hong Kong” (HK). It is HK Trustees and HK Trust companies which employ HK citizens in this industry and the TO should be for the regulation of the HK “industry” and for attracting new trust business opportunities to Hong Kong. The TO should be designed to make HK the jurisdiction of choice for professionals in the trust industry in or outside of HK. The more trust business that is attracted to HK means more HK jobs for HK people in the trust industry.</p> <p>It is not beneficiaries who demand to use HK as a jurisdiction for their trusts.</p> <p>Settlors of trusts rely on their HK advisors, HK trustees, and lawyers et al. Thus the focus of the new TO should be to provide clarity and protection for Trustees as to their duties, and if they are fulfilling their duties, and the provide clarity to other parties, even including beneficiaries on their rights. However the TO should not focus extensively on a full and complete and detailed list of Beneficiaries’ rights since Beneficiaries are not the persons involved in setting up the trust. Beneficiaries do not have any legal input or decision-making authority in the decisions which go into setting up a trust in HK. It would be better for the HK court system to determine the rights of beneficiaries.</p> <p>The new TO should not try to “meet” the standards of other jurisdictions. Our existing TO dates back to 1934. We should not be looking only at Singapore to “meet” Singapore’s Trust Act (STA). We need to make our new TO different and better. We need to differentiate HK from Singapore. If we only attempt to meet the existing STA, then we will have done a disservice to make HK better or different from Singapore. Simply meeting Singapore does not make HK better. It actually shows that we in HK are not creative and that we are “following the pack” instead of “leading the pack”. HK should lead the pack. HK should not follow the pack. And since the STA is several years old already, why would Hong Kong want to copy something which is old?</p> <p>Singapore based its STA in 2004, along the lines of the UK Trustee Act (TA) in 2000. So why would HK want to copy an ordinance – the TA, which is already 9 years old?</p> <p>Singapore is not our only competitor. NZ and BVI are big competitors. The UK and Jersey are losing ground in the trust industry. Because of events in the OECD, both UK and Jersey as jurisdictions are no longer as popular as they once were</p>

	<p>with settlers and settlors’ legal counsel looking to set up trusts. We in HK should look for inspiration from NZ and BVI and Caymans more than “just looking solely” at Singapore, UK and Jersey.</p>
<p>Baker & McKenzie</p>	<p>In general, we are most supportive of the changes proposed in Chapters 2, 3, 4 and 5 of the Consultation Paper. We are also supportive of many of the proposals discussed in Chapter 6.</p> <p>That as it is, we note the overall objective of modernizing the TO is to strengthen the competitiveness and attractiveness of Hong Kong’s trust services industry; to encourage more people to choose Hong Kong law as the governing law for the trust and to administer their trust in Hong Kong.</p> <p>To this end, we are of the view that the objective of attracting trust businesses to Hong Kong is not achieved by simply amending the TO. Choice of law is influenced by the certainty of the legal system. In our view, it is important also for Hong Kong’s tax law to be amended to provide clarity on how trustees and trusts are taxed under the Hong Kong’s tax regime. At the moment, the tax law is far from clear, and this creates uncertainty to trustees contemplating setting up trusts or operations in Hong Kong.</p> <p>Part B</p> <p>Whilst we are most supportive of the proposals to update the TO, we note the tax law is a limitation in the Hong Kong legal system that the Government should also consider in the context of reforms to attract trust businesses to Hong Kong.</p> <p><i>Inland Revenue Ordinance (“IRO”)</i></p> <p>The primary taxing provision under the IRO is section 14. Section 14 imposes profits tax on “every person carrying on a trade, profession or business in Hong Kong in respect of his assessable profits arising in or derived from Hong Kong for that year from such trade, profession or business...”.</p> <p>When one seeks to apply this provision to the income of a trust, all sorts of issues arise.</p> <p><i>1. It is unclear who should be taxed on trust income.</i></p> <p>First, under the IRO, tax applies to a “person”. Person is defined in section 2 of the IRO to include a “trustee”. Therefore the intention of the legislation is to tax trustees, and not the trust as a separate entity. This contrasts with the position of say, a partnership, that is deemed to be a “person” for tax purposes, but the partners are the ones with liability to pay tax on the</p>

partnership profits.

However, the primary taxing provision in the IRO, section 14, only taxes a person in respect of “his” profits. Based on strict interpretation of the legislation, the trustee should not be taxed in respect of trust income because such income is not “his” profits. Income of the trust belongs to the beneficiaries. Whilst the conventional view in Hong Kong is to assume that trustees are taxable on trust income, this position is not explicit in the IRO and has not been confirmed by the courts.

Other countries may seek to tax a beneficiary on trust income. In Hong Kong, if one was to take the beneficiary as the “person” taxable on “his” profits; the relevant question will be whether the beneficiary is himself carrying on a business of investing in trust interests for profit. This is because the scheduler system of taxation in Hong Kong does not seek to tax all income, and profits tax applies only to profits from carrying on trade, profession or business. In any event, absent deeming rules, profits would only arise for a beneficiary when there is a distribution from the trust.

Hong Kong tax law desperately needs to be amended to make certain who has, or may have, the liability to profits tax under a trust arrangement.

2. The “carrying on business” test discourages trustees from coming to Hong Kong or administering trusts in Hong Kong.

As stated above, section 14 only seeks to tax the person carrying on a business in Hong Kong. So, other things being equal, if a trustee has a choice as to whether to use Hong Kong or another jurisdiction, he may, rightly, choose a mode of operation where he would clearly not subject himself to tax. Indeed, when a settlor is choosing a trustee, the settlor may also choose a trustee located in a place that would not expose me trust fund to taxation.

The uncertainty as to liability is exacerbated where trustees delegate, appoint agents, or when trusts reserve investment powers to the settlor. In those situations, trustees need to constantly evaluate whether they are carrying on business in Hong Kong through an “agent” for tax law purposes, creating a primary tax liability for the trustees themselves.

Of course the test for tax purposes is not the same as that for governing law. A trust could be governed by Hong Kong law while the trustee sits offshore and administers the trust from outside of Hong Kong (without delegating to or appointing any agents in Hong Kong), such that the trustee is not carrying on business in Hong Kong for tax purposes. This way, the trust can benefit from use of Hong Kong law, without being exposed to Hong Kong tax. This, however, will not create commerce or employment in Hong Kong, contrary to the policy rationale for amending the TO.

3. The IRO provides piecemeal tax exemptions/or income from trusts

The shortcomings of the IRO has not been a focus point because of various exemptions that exist. However, the exemptions are narrow and piecemeal.

Section 26A (1A) of the IRO excludes certain income and profits received by or accrued to authorized collective investment schemes. However, this exemption only benefits regulated widely held funds, including those set up as trusts. While widely held unit trusts and REITS may be explicitly exempted, private equity funds, hedge funds and private wealth management trusts are, by design, excluded from the tax exemption under section 26A.

The funds management industry in Hong Kong lobbied and in 2006, sections 20AB, AC, AD and AE were introduced. Known as the “offshore funds exemption”, these provisions exclude profits from “specified transactions” of non-residents (including non-resident trustees) from Hong Kong tax. However for trustees of a trust estate to be considered as non-resident, the central management and control of the trust estate must be exercised outside of Hong Kong. If a Hong Kong resident ultimately has direct or indirect interest in 30 or more in the value of the trust estate, or if a Hong Kong resident might reasonably be expected to be able to control the activities of the trust estate or the application of the trust fund, deeming provisions will attribute the trust's income back to the Hong Kong person for tax purposes, even if no distribution has been made. If the trust derives income from non-specified transactions carried on in Hong Kong (other than transactions incidental to the specified transactions), the exemption will not apply and tax will be payable on all trust income sourced in Hong Kong. “Specified transaction” is exhaustively defined to include six categories; by design me exemption excludes transactions involving shares in private company. The transactions must also be carried out through or arranged by an Securities and Futures Ordinance licensed intermediary.

At the end of the day, the offshore funds exemption is fairly narrow. If a Hong Kong settlor seeks to set up a trust, he cannot rely on this exemption. If a non-resident seeks to set up a trust, they will need to restrict the types of investments of the trusts to the six categories in order to ensure that the exemption applies. Parties will also need to grapple with the concept of “the central management and control of me trust estate”, which is not the same as the central management and control of the trustee company, and the concept is not defined by legislation or Hong Kong case law. Compared with the position of Singapore and New Zealand, the offshore funds exemption is clearly inferior.

In short, the tax law in Hong Kong needs to be reviewed to clarify:

- whether the intention is to tax trustees on trust income;
- how to determine which trustees or trusts are caught. Will it be those with trustees based in Hong Kong? Those who

delegate trust functions to agents in Hong Kong? Those who undertake trust administration in Hong Kong?

- assuming that trustees in Hong Kong can be taxed on trust income, whether broader exemptions for classes of trust income is required in order to attract trusts to Hong Kong.

Overseas Position

We do not seek to undertake an exhaustive comparison of taxation of trusts as part of this submission. Instead we make the following general observations to provide an overview about the competitiveness of Hong Kong's tax system.

Offshore financial centres such as the Cayman Islands, Jersey and the BVI clearly do not impose income tax. Therefore there is no additional tax burden for the trust even if the trustee or trust assets are in the jurisdictions. This, we believe, is one of the simplifying factors that would bring trust businesses to those offshore financial centres.

Of the comparable jurisdictions which levy tax on income, they tend to have clear rules to determine residency of trusts and thereupon the tax treatment of trust income. The English rules turn on the residence of the settlors, beneficiaries and trustees to determine if each has a liability to tax. Singapore and New Zealand, in particular, have tax rules that explicitly supports the amendments to their trust laws to attract offshore trusts to be administered in those jurisdictions.

The Singapore system taxes either the beneficiary or the trustee on trust income. Exemptions for collective investment funds exist similar to Hong Kong. Further, the government provides exemption for an extensive range of income of foreign trusts. The list is continually reviewed and increased; and is much broader than the six categories in Hong Kong's offshore funds exemption. A foreign trust is defined as trusts where none of the settlor or beneficiary is Singapore tax resident. There is a separate concession under Singapore tax law for trustees to be taxed at a reduced rate on their trust fee income. These rules are the Singapore government's policy measures to promote Singapore as the location to administer trusts for foreigners.

New Zealand tax law is also clear in including trusts as taxable entities; with the liability of tax falling on the trustees or the beneficiaries. The tax treatment depends on the residence of the settlor and the nature of trust assets. A trust where the settlor is not a New Zealand resident is considered a foreign trust. A foreign trust is exempt from New Zealand income tax on its non-New Zealand sourced income; regardless of whether the trustee is resident in New Zealand or not. Again, these rules also promote New Zealand as the location to administer trusts for foreigners.

All things being equal, one would expect settlors and beneficiaries to choose a trust jurisdiction without an extra level of

	<p>taxation. Even for jurisdictions with income tax, like Hong Kong, United Kingdom, Singapore and New Zealand, it is essential to have clear rules to set out who is taxable and who is not, and what income is taxable and what is not. The uncertainty existing under the Hong Kong IRO is, we fear, a disincentive for settlors and trustees to consider using Hong Kong law trusts and administering the trusts from Hong Kong.</p> <p>A review of the tax law should be undertaken to augment the review of the TO.</p>
Butterfield Private Office (HK) Limited	<p>There can be no doubt that this review and reform of the Trustee Ordinance is long overdue. In particular since the abolition of Estate Duty in Hong Kong.</p> <p>Presently, Hong Kong trustees are placed in a position of considerable disadvantage to many of its competitor jurisdictions who have contemporised their trust laws in recent years.</p> <p>Furthermore, it appears that there is a very real need to consider in detail and execute change over a very short time span, not letting this process of change drag on for years. I say this as international interest in Hong Kong as a trust centre is increasing rapidly because Hong Kong is not a tax haven and subject to the kind of attacks that are being mounted by the OECD, US, EU and others. In addition Hong Kong has the protection of Beijing which made it very clear at the G20 conference that they would take a very dim view if the above-mentioned sought in any way to penalise Hong Kong.</p> <p>While I agree that such changes as can be made at once (the simpler issues) should be made, I hope that this will not mean that the more complex reforms will be long delayed.</p> <p>Taking into account that Legco takes far too long to consider issues of this kind, I do not believe that it will be sensible to attempt to introduce a new Trustee Ordinance at this stage.</p> <p>I would strongly advise that the essential changes that must be made, be fed to Legco in small easily digestible packages, but with the longer term objective that, once all the changes have been passed, these should be contained in a new Trustee Ordinance which would certainly provide much greater clarity.</p> <p>Any attempt to introduce the changes agreed in the form of a new Trustee Ordinance would take much longer and leave Hong Kong disadvantaged for much longer.</p> <p>In addition to the changes in the Trustee Ordinance which are proposed, I would suggest that thought should be given to the amendment of both Trust and Company legislation, to enable Hong Kong to be considered as a centre for the established of Private Trust Companies, which are increasingly the choice of wealthy families. Also Hong Kong should not forget that</p>

	<p>with trust business being attracted to Hong Kong, banking and investment business is likely to flow as well. So the importance of the reform of trust law in Hong Kong is not confined to the establishment of trusts and related fiduciary structures.</p> <p>In terms of capitalising on the proposed changes, it could be very sensible to seek to get an appropriate slot at the STEP conference in Hong Kong in October 2010. Certainly, a target to complete the changes agreed should be achieved if possible by that date to give Hong Kong maximum impact internationally.</p>
Consumer Council	<p>We recognize that a review of the Trustee Ordinance and related matters may strengthen the competitiveness and attractiveness of Hong Kong trust services industry. However, as the Review does not have direct implication on general consumer interests, we do not propose to offer any view on this matter.</p>
David Gunson	<p>More generally, I firmly believe that when it comes to the law on trustee investment, the rule of a “prudent man of business”, being the international standard, is best for Hong Kong. It is not fully canvassed in the Consultation Document but is extensively covered in my 1994 paper. I analysed the assumption you have made that restricting investment to a legal list of permitted investments will make trustee investing more secure. This assumption is faulty for the reasons set out in my 1994 paper. Please contact me if you wish to discuss this aspect of my paper. I also think that you have put forward too extreme and alternative standard: that as if the trustee were absolute owner. By definition, a trustee is never an absolute owner so it is a contradiction of the very concept. The rule of a “prudent man of business” has been found to be workable and seems to lead to better returns than any other rule so far.</p> <p>I should add that the FS’s powers in s.4 of the Trustee Ordinance allow him only to add to or subtract from Schedule 2 and grants no power to impose duties on trustees as was done when derivatives were added. It makes no sense to define trustee duties when investing in derivatives but remain silent when investing elsewhere. For these reasons, the duties clauses in Schedule 2 are clearly <i>ultra vires</i> the FS and therefore, invalid. The point would not arise under “prudent man” rule.</p> <p>One additional topic unmentioned in the Consultation Document is the urgent need for reform of the law on income and capital. I have referred to this in my 1994 paper and given examples. A classic statement of the position is the question of to whom does income belong after an income beneficiary dies. The usual answer – those next in succession – is wrong. If the income is for the period current at the date of death of the income beneficiary (say, a dividend of profits earned the previous year) the income belongs to the estate of the income beneficiary. I have seen many examples of income clauses being incorrectly handled by professional trustees in Hong Kong in ignorance of the law on income and capital, leading to</p>

	many millions being incorrectly distributed to beneficiaries, in some cases to the entire exclusion of those legally entitled, especially where they inherit through an income beneficiary.
GFC Trustees (Hong Kong) Limited	Our Chairman Mr. Peter H.Y. Wong is a member of the Joint Committee on Trust Law Reform (JCTLR) and we are in agreement with the Response which JCTLR has submitted dated 23 rd September 2009. We are with the majority opinion in that submission.
International Tax Planning Association	I am writing to let you know the ITPA shall not be making a response to the Consultation Paper.
Joint Committee on Trust Law Reform	<p>The excellent Consultation Paper on proposed Trust Law reform for Hong Kong issued by FSTB reflects many of the detailed proposals put forward by the Joint Committee on Trust Law Reform (“JCTLR”).</p> <p>Whilst the responses to the questions posed in the Consultation Paper set out below (“the Responses”) reflect the majority view of HKTA and STEP-HK, there were dissenting minority views expressed to JCTLR, both at an open forum (“the Forum”) held to obtain views on proposed Responses (which representatives of FSTB attended) and expressed in writing to JCTLR.</p> <p>The Responses set out the background and considerations put by JCTLR to HKTA and STEP-HK with regard to each question raised. With each Response, minority views are also recorded.</p> <p>There is overall acceptance that the main purpose of the proposed reform is to help Hong Kong become the world’s premier trust jurisdiction and thus attract quality trust business into Hong Kong with all the resulting advantages. The JCTLR consultation process has given rise to an interesting debate which has revealed the following broad principles:-</p> <ul style="list-style-type: none"> • Hong Kong should at least do more to reform its Trust Law than its main competitor, Singapore. • Nevertheless, there is merit in simplicity. Too many options can confuse potential users of the jurisdiction who might therefore go elsewhere. • However the virtue of simplicity has its own drawbacks. If Hong Kong does not, say, offer specific provisions validating trusts with reserved powers to a Settlor, then, where there is such a requirement, the work will, as now, go to, say Cayman, Jersey or Singapore. • The interests of Settlers and Trustees are paramount in considering the necessary attractions of change but these

	<p>interests must be balanced with the legitimate interests of Beneficiaries if we are to have an attractive and robust jurisdiction.</p> <ul style="list-style-type: none"> • It will be easier and more efficacious to frame the changes in a new Trust Law rather than seek to amend the Trustees' Ordinance. The latter may provide a clumsy and difficult result. <p>Against the framework of these broad principles we present the following commentary and Responses.</p>
Law Debenture Trust (Asia) Limited	<p>As a general response we are firmly of the view that any legislation that seeks to deal with all types of trust in the same manner should be considered very carefully. Clearly points that may be pertinent to private settlements may be inappropriate in the context of the operation of trusts in the international capital markets and vice versa.</p> <p>As a matter of practice, bond trusts operate in virtually the same way under Hong Kong law as under English law and the certainty that this provides to investors is important Given the importance of bond issues to Hong Kong as an international financial centre, it would be highly unfortunate if the arrangers of bond issues were to elect to issue under English law instead because of any potential disquiet arising from changes in applicable law in Hong Kong.</p>
Linklaters, Hong Kong (on behalf of Bank of New York Mellon, Deutsche Bank and The HongKong and Shanghai Banking Corporation Limited)	<p>The Trustees generally do not have any objection to the proposals set out in the Consultation Paper. In keeping with the desire to promote Hong Kong as a competitive and attractive hub for trust services, the Trustees agree that it is important for the Trustee Ordinance to provide a useful default legal framework for the operation of trusts in Hong Kong which is clear and provides certainty for trustees, settlors and beneficiaries alike.</p> <p>In the context of capital market transactions, the Trustees believe, however, that any reforms should take account of two important principles. First, the statutory framework in Hong Kong should not displace established practices which currently conform to international standards and conventions and which allow the Trustees (which are all associated with globally active trustee businesses) to conduct their Hong Kong trustee business consistently with their global businesses. Second, in relation to professional trustees acting in commercial transactions, it is important that the legislation does not override the express agreement of the parties as set out in detailed and often highly negotiated trust instruments.</p>
Michael Shane Kelly	<p>Having supplied my answers to your questions I should add I do not endorse a strategy that has Hong Kong seen as a competitor to any of the other jurisdictions other than Jersey (which has a long and eminent history in the law of trusts). I do not believe our long term interests are served by overly accommodating the interests of trust jurisdiction shoppers.</p> <p>Finally, while not wishing to denigrate the interests of certain 'professional' parties involved in this industry I would be</p>

	<p>deeply aggrieved if any law was introduced to require membership or accreditation with any such body for people acting in the role of trustee or being a director of a corporate trustee, registered under the TO or otherwise.</p>
<p>Nicholas Pirie</p>	<p>Having been a member of the Bar in practice for over 30 years in Hong Kong, the Trustee Ordinance has been out of date for most of my years of practice. It needs structural adaptation to ensure that Hong Kong continues to be the major Private Trust Provider in Asia. This status brings in huge invisible earnings into Hong Kong, and it is entirely appropriate that the law should be updated to continue to keep Hong Kong ahead of its rivals. This fact coupled with the fact that Hong Kong's legal system is unparalleled in Asia, should ensure, that Trustees services from Hong Kong, should be in continued demand through the 21st Century. In the Ordinance there should be clear categories of private trusts, trusts that comply with mandated provisions, and trust companies, and appropriate tax status accorded to Hong Kong resident trusts and classed as such.</p> <p>With the abolition of Estate Duty in Hong Kong, and more people wishing to retire and settle their assets within the Hong Kong Jurisdiction, there is an increasing demand for private trusts in Hong Kong now, particularly for individuals who have HK \$50 million plus to settle either directly or by means of will trusts.</p> <p>However the tax status of some of these trusts which are based in Hong Kong and have trust assets here is not clear. Hong Kong is currently a low tax regime, and will continue to be so. Thus other countries with higher tax regimes will continue to look at Hong Kong based trustees with a skeptical eye and thus robust independence for trustees is a must and clear tax residence status accorded.</p> <p>Likewise, with the current interest in regulation of fiduciaries, Hong Kong trustees and trust companies must better regulate themselves, or have more stringent rules imposed on them. There is no test for who can set up and manage trust companies. Thus one finds in Hong Kong a "struck off solicitor" administering trust schemes and assets, even though he was struck off for taking trust funds, and giving no account to the court for such. He was committed to prison, but is still setting up trusts and running trust companies. So perhaps a "fit and proper person test" should be adopted, as the criterion for a trustee and a director of a trust company.</p> <p>Thus Ordinance should provide for certain standards and voluntary codes of practice to supplement statutory regulation, as are being considered for ORSO and MPF Providers currently.</p> <p>The law in my view must continue to encourage prudent supervision by the trustee, as against the overbearing wishes of the settlor (in whatever guise) or those of the protector. For otherwise there is not much point in the law recognizing an entity</p>

	<p>which has the advantages of a private trust, as opposed to a limited company. In my view Jersey, BVI and some other jurisdictions have gone too far in allowing settlors and Protectors to override trustees.</p> <p>Currently I am aware of cases in which a Settlor or a Protector in another jurisdiction has asked trustees of a Hong Kong based trust to purchase accumulators or Lehman Brothers’ minibonds. On the face of it, the trustees are liable to the residual beneficiaries, as opposed to the settlor, for the total losses thus incurred. The indemnity which the settlor or the protector may have provided, may be worthless. Thus the trustees are liable to replace the lost assets and in many cases are uninsured, or are in effect mere volunteers now faced with substantial losses.</p> <p>Likewise, it is a common situation where a settlor wishes to move the domicile and governing law of a trust, because he has found another jurisdiction which is more lax in its regulation of trustees, to enable the trustees to allow less than prudent investments.</p> <p>Commonly in cases of Pension or Provident Fund Trusts, there are expressed wishes of controlling shareholders in companies which hold these trusts for their employees, to attempt to purchase the companies’ shares with the pension funds, to bolster the share price. Also individual beneficiaries may be given and take share options and want to transfer those into their pension or PF. Again, the law and trustees should be encouraged not to give into these pressures, to retain the integrity of the trust and its assets.</p> <p>I would suggest we adopt a “Table A” for Opt in and Opt out provisions.</p>
<p>ONC Lawyers, Hong Kong China</p>	<p>The captioned review is part of the Government’s efforts in making Hong Kong a regional wealth management centre. Trust is an indispensable (and probably the most creative) tool in the art of wealth management. Given that our laws relating to trust are implacably outdated and exceedingly rigid to serve the needs of advanced financial planners around the globe, this review is timely and necessary.</p> <p>We submit that by making HK a regional wealth management centre, the Government should not aim only at attracting to HK international fiduciary service providers and trust experts (and hopefully trust business) but also, to promote the use of HK trust (ie trust using HK laws as the governing law and choosing HK as the forum for disputes resolution) amongst international financial planners.</p> <p>If we succeed, the local trust industry, together with other related local fiduciary, corporate and professional service providing industries, will create jobs and career opportunities for our citizens and further strengthen HK as an international</p>

financial centre. For the avoidance of doubt, this exercise must NOT be narrow-mindedly focused on competition with Singapore.

In light of the aforesaid and in order to achieve the said goals, this review must be dynamic, audacious and with foresight.

Further comments

We submit that in order to enhance HK trust's competitiveness in the global wealth management arena, we need to deal with section 60 of the Conveyancing and Property Ordinance ("CPO"), Cap 219. We will support our submission by an illustration to be followed by legal analysis.

2.1 Illustration

- A. Sam was and is at all material time a businessman.
- B. Sam has three children and his youngest child, Ben, is mentally retarded and can't take care of himself.
- C. In 1989 when Ben was 4, Sam settled certain property in a trust for the benefit of his family to the exclusion of himself.
- D. At the time when the trust was set up, Sam was cash rich and was not indebted to anybody, not even to banks.
- E. Yet being in the business long enough, Sam knew that there are ups and downs in life and considering the need to provide for his family (especially Ben) no matter what, he set up the said trust.
- F. In 2009, Sam became a bankrupt because he lost all his assets in the financial tsunami in 2008.
- G. Fortunately, the trust he set up 20 years ago is still up and running and is capable of providing for his family to the exclusion of himself.
- H. Now one of Sam's major creditors, Cat, learnt about the said trust.
- I. After taking legal advice, Cat instigated legal proceedings against the trustee of the trust, claiming that the disposition of the property 20 years ago should be avoided because Sam had voluntarily settled such property in the said trust

with intent to defraud his creditors and that Cat, being Sam's creditor, is being prejudiced and is therefore seeking remedy from court by invoking section 60 of CPO.

2.2 Section 60(1) provides that "...every disposition of property made...with intent to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced."

2.3 At first, it might appear to a layman that Cat is quite unlikely to succeed and that her court action, if it is to succeed eventually, would be too unfair to Sam and his family.

2.4 Yet let's consider some of the legal propositions that run from a line of authorities in relation to the construction of section 60 (ie its equivalent in various jurisdictions including England, Hong Kong, Australia and New Zealand*):

2.4.1 The phrase "intent to defraud creditors" in the context of section 60 means an intent to prejudice the present or future creditors by creating or increasing their risks of non-recovery.

2.4.2 The existence of such an intent is a question of fact. The court, however, is entitled to draw inference in this fact-finding process.

2.4.3 Where the court is satisfied that the disposition would have, or would likely have, the effect of subtracting from the debtor's assets which, but for the disposition, would have been available to the present or future creditors (in other words, creating or increasing the creditors' risk of non-recovery), the court ought readily to draw an inference that there was an "intent to defraud creditors".

2.4.4 The court would readily draw an inference of “intent to defraud creditors” where there is a voluntary disposition for no consideration.

2.4.5 The court is not prevented from finding an “intent to defraud creditors” simply because such “intent” was not the sole intent behind the disposition.

* The cases supporting the propositions above: *Freeman v. Pope* (1870) 5 Ch App 538; *Crossly v. Elworthy* (1871) 12 LR Eq 158; *Jenkyn v. Vaughan* 3 Drew 419; *Mackay v. Douglas* (1872) 14 LR Eq 106; *Ex parte Russell* (1882) 19 ChD 588; *Re Ridler* (1882) 22 ChD 74; *Re National Funds Assurance Company* (1878) 10 ChD 118; *Eichholz’s Trustee v. Eichholz* [1959] 1 Ch 708; *Lloyds Bank v. Marcan* [1973] 1 WLR 1387; *Skink Ltd v. Comtowell Ltd* [1994] 2 HKC 286 (CA); *Cannane v. J Cannane Pty Ltd* (1998) 192 CLR 557; *PT Garuda Indonesia Ltd v. Grellman* (1992) 107 ALR 199; *Langdon v. Gruber* [2001] NSWSC 276; *Houvardas v. Zaravinos* (2003) 202 ALR 535; *Regal Castings Ltd v. Lightbody* [2009] 2 NZLR 433; *Julius Harper Ltd v. FW Hagedon & Sons Ltd* [1989] 2 NZLR 471.

2.5 Applying the propositions to our illustration, we could envisage:

2.5.1 The Court would accept that there is legal basis to support Cat’s claim and that section 60 is legitimately invoked.

2.5.2 Even though Cat is a future creditor who didn’t have any relations with Sam at the time when the trust was set up, this fact won’t help Sam.

2.5.3 Even though Sam might, subjectively speaking, not have the intent to defraud his creditors (as he had no creditors at all when he set up the trust) and that he would give evidence in court to such effect, the fact that the disposition of the property had been voluntary and that the subtraction of the settled property as a matter of fact created or increased Cat’s risk

	<p>of non-recovery, would entitle the court to find an “intent to defraud” on Sam’s part.</p> <p>2.5.4 Even though there is very good reason to believe that at least one of Sam’s reasons for setting up the trust must have been the financial provision for Ben, his retarded son, the court would still not be prevented from inferring also the presence of an “intent to defraud”, in which case Cat’s claim will succeed as the “intent to defraud” need not be the sole intent behind the setting up of the trust.</p> <p>2.5.5 In short, it is possible (and probable) that a future creditor can successfully challenge the validity of a trust set up 20 years ago when the settlor at that time had no creditors whatsoever and had a very good reason for setting it up. This conclusion, from any settlor’s point of view, is far from satisfactory.</p>
Respondent A	<p>Hong Kong needs to amend its trustee regulatory framework to provide the following in order to be competitive in the global trust services market:</p> <ol style="list-style-type: none"> 1. ensure trustees are held to a high level of standard of care while trustees cannot opt out of; 2. provide flexible structures such as private trust companies and propose trusts allowing limited scope for families to manage their own assets; and 3. clarify the taxation of trusts. We are seeing significant trust administration and trust asset management work lost to other jurisdictions because of the lack of certainty of Hong Kong’s tax laws dealing with trusts.
The British Chamber of Commerce in Hong Kong	<p>By way of introduction, we believe that the level of trustee activity in Hong Kong is very high. In fact we believe Hong Kong is the main trust centre in Asia, although this assertion is mainly supported by anecdotal evidence and perceived activity rates as there are no comprehensive statistics available. Hong Kong individuals, private Hong Kong companies and Registered Hong Kong Trustee companies all act as trustees, in Hong Kong. This is a healthy and natural requirement in any major financial centre.</p> <p>We would not wish to see many of these activities curtailed in Hong Kong. Indeed we believe we do not need many of the provisions introduced, for example, recently into Singapore trust law, as these were aimed at improving the Trustee activities relating to the Private Banking sector. Since that is only a specific sector and it should not dominate the whole.</p>

Everyone in Hong Kong is probably the beneficiary of one or more trusts, in many cases without realising that a trust arrangement is involved; ranging from MPF or ORSO scheme members, to being a beneficiary under a Will.

In Hong Kong we do also see a number of overseas trustees operating without necessarily being correctly registered in Hong Kong under part XI of the Hong Kong Companies Ordinance. We would like to see the playing field levelled in this regard as in many of these cases these trustees are not contributing their fair share of Profits Tax revenues. Trusts under Cayman, Jersey, BVI, New Zealand and other laws are regularly executed in Hong Kong, especially in the Private Banking sector without any regulation or registration in Hong Kong. As it currently stands therefore, none of the proposed amendments to the Hong Kong Trustee Ordinance would impact on those activities; and indeed one might argue that offshore trustees have become active in Hong Kong because the Hong Kong Trustee Ordinance did not give the necessary framework to encourage them to use Hong Kong trust law.

Going forward, we do believe there should be at least a registration framework, if not an actual licensing framework, so that all companies acting as a trustee in Hong Kong, whether using Hong Kong trust law or another trust law can be identified. The individuals or corporations behind them should be identified; possibly in conjunction with some “fit and proper” person criteria, especially if trustee services are being provided for fees, and for charitable trusts, where no trustee fees may be levied.

As Hong Kong has transitioned from its original free port status to a major international financial centre, its laws and practices have needed amending accordingly. When the Trustee Ordinance was first enacted in 1934, the only direct tax in existence was Estate Duty. When the Inland Revenue Ordinance came into effect in 1949, the total population in Hong Kong was about 400,000 people. Trust tax returns were not thought necessary then, and do not exist in Hong Kong to this day; although most major jurisdictions (i.e. the UK and the US) typically have annual tax returns filed for trusts resident in those jurisdictions. We believe there is thus now significant merit in requiring Hong Kong trusts with professional/paid trustees to submit annual accounts and Hong Kong tax returns, even if only to confirm their tax free status (unless they have a source of profits, property income or an employment in HK at the trust level). A system for obtaining a tax or identity number (not a Business Registration number) for each such Hong Kong trust should be considered. This would do much to improve transparency, and should help to dispel the misconception that substantial Hong Kong (or overseas) taxes are being evaded through these structures simply because there is no simple reporting mechanism in place for them in Hong Kong. Additionally this would help ensure that any new style of trusts introduced in Hong Kong (i.e. non charitable purpose trusts) could be monitored.

	A review of the provision of trustee services in Hong Kong, and of the Trustee Ordinance is very welcome; and long overdue.
The Chinese Manufacturers' Association of Hong Kong	<p>「檢討《受託人條例》及相關課題諮詢文件」在參考英國、新加坡等海外普通法司法管轄區近年信託法改革的基礎上，提出多項將香港信託制度完善化和現代化的建議。本會認為有關改革方向正確，有助於增強香港信託服務業的競爭力和吸引力，推動香港成為亞洲主要資產管理中心；本會亦對諮詢文件中提出的大部分建議表示支持(本會對具體事項的意見，詳見附件)。</p> <p>本會贊成適當擴大受託人的預設權力，以便更有效地管理信託。例如，可參照《2000年受託人法》以及新加坡《受託人法》的方向，賦予受託人委任代理人 and 聘用代名人、保管人的一般權利，擴大受託人購買保險的權力；以及訂立法定收費條款，允許非慈善及慈善信託的專業受託人均可為其提供的服務，包括可以由非專業受託人提供的服務收取費用。</p> <p>另一方面，為更好地平衡受託人的權力與責任，確保受託人適當地行使權力並履行職責，本會贊成引入有關受託人的法定謹慎責任，並且明確規定不得因為受託人行使轉委權而導致出現只有一個受權人或受託人的情況。此外，本會亦認為應保留特准投資項目的規定和資格準則，以便為受託人在投資時設立合理的「安全港」；同時，本港亦應以法例管制專業受託人的免責條款，以確保受託人以較高標準履行職責並為其行為負責。</p> <p>為增加對受益人的保障，本會贊成透過修例改善受益人的知情權，並賦予其撤換受託人的權利。本會亦認為反財產恆繼規則和反收益過度累積規則有其可取之處，宜繼續予以保留；但可考慮以50年作為固定的財產恆繼期。</p> <p>此外，本會對諮詢文件中有關推廣使用香港信託法的幾項建議持開放態度。本會支持在《受託人條例》中界定「監察人」的定義以及訂立反強制繼承權條文，亦贊成允許財產授予人保留一些適當的權利以及在有足夠保障措施的前提下，准許設立非善性質用的信託。本會亦建議繼續延用《海牙公約》作為判定管限信託法律的依據。</p>
The Hong Kong Association of Restricted Licence Banks and Deposit-taking Companies	I would like to let you know that our Association members have not commented on the review as it seems that few, if any, among them are engaged in the relevant lines of business.

The Hong Kong Federation of Insurers	After consulting our member companies, we advise that we do not have any comments on the subject matter.
The Institute of Accountants in Management	We always would see that Hong Kong, as part of China, is an international city of businesses capable of provision of opportunities to the people of Hong Kong and as an example to other cities of China. The industry of trust is a unique business in China. It is for sure that this industry should be given an environment for growth in Hong Kong, within proper legal framework so as to attract foreign capital into Hong Kong and to provide employment opportunities to persons of right caliber in Hong Kong.
The Law Society of Hong Kong	<p><u>Paragraph 4 of the Executive Summary</u></p> <p>It is not a good idea to amend the Trustee Ordinance (“TO”) on a piecemeal basis for a number of reasons:</p> <ul style="list-style-type: none"> • It causes confusion for potential overseas clients, and a sense that they are dealing with a changing environment. A major objective in reviewing the TO is to promote Hong Kong as a jurisdiction for overseas business, and therefore it is vital to afford certainty, particularly when there are many other jurisdictions to chose from which already have many of the elements which are proposed. • It is wasteful of legislative time- legislators have to re-acquaint themselves with the underlying principles more than once. • If amendments are desirable, it is not useful to delay them. <p>Thus the matters addressed in questions 14 to 18 should be included in any amendment of the TO.</p> <p><u>Licensed Trustee Companies</u></p> <p>It is high time that Hong Kong should introduce a regime for licensed trustee companies. For the time being, under the TO, companies can register as trust corporations but only for the limited probate purposes. A new mechanism to allow trust companies to be properly registered in Hong Kong will be welcome. This will promote the use of Hong Kong law as the</p>

	governing law of the trust deeds and Hong Kong as a trust administration centre.
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Compendium of Responses

Question 1

<p>(a) Do you agree that a statutory duty of care for trustees should be introduced, unless it is excluded by or inconsistent with the trust instrument?</p> <p>(b) If your answer to (a) is in the affirmative, do you agree that:</p> <p>(i) the standard of care should be along the lines of the TA 2000 and the STA?</p> <p>(ii) the statutory duty of care should apply to the performance of those powers and duties set out in paragraph 2.14?</p> <p>(iii) the statutory duty of care should replace the existing common law duty of care which might otherwise have applied; and the statutory duty should be additional to, and not affect, the other fundamental common law duties of trustees and the exercise of trustees' discretion?</p> <p>(c) Further to (b), do you think that the statutory duty of care should apply in other circumstances (other than those mentioned in paragraph 2.14 above); and if so, which circumstances?</p>	
Asiaciti Trust Hong Kong Limited	<p>I agree that there should be a statutory duty of care. But I think it should be codified only in order to clarify ambiguities, not to try to cover every common law duty.</p> <p>The statutory duty of care should not be along lines of TA and STA. We should draft ours differently by looking also at BVI, Caymans, and NZ law as well as TA and STA, BUT not just copy TA and STA which are now old. We need to come up with something unique that makes HK stand out as being different.</p>
Baker & McKenzie	We agree that statutory duty of care for trustees should be introduced. We agree with the proposal set out in paragraphs 2.13 to 2.15 of the Consultation Paper.
Bank of Communications Trustee Limited	<p>(a) We agree that a statutory duty of care for trustees be introduced, unless it is excluded by or inconsistent with the trust instrument. This helps to make it certain that the trustees, in particular those not so formally established trusts such as the resulting trusts, the constructive trusts and even some testamentary trusts created under the simple provisions of the wills of the deceased persons, owe the duty.</p> <p>(b)(i) We agree.</p> <p>(b)(ii) We agree.</p> <p>(b)(iii) We agree.</p> <p>(c) We propose to add the circumstances of (i) handing over or applying the benefits of the trusts to the proper persons</p>

	and (ii) keeping proper records of the trusts. These two circumstances are very fundamental for the beneficiaries to ensure that the trusts are properly administered and their interest are adequately protected. Under common law when a trustee has wrongdoing in circumstance (i), the trustee's liability even cannot be exonerated
Butterfield Private Office (HK) Limited	(a) Yes. (b)(i) Yes. (b)(ii) Yes. (b)(iii) Yes. (c) No.
David Gunson	(a) Yes. (b)(i) Yes. (b)(ii) Yes. (b)(iii) Yes. (c) No.
Hong Kong Institute of Certified Public Accountants	(a) In principle the Institute supports the introduction of a statutory duty of care for trustees. (b)(i) The standard should be along the lines of the standard in the UK Trustee Act 2000 ("TA") referred to in paragraph 2.8 of the consultation paper. (b)(ii) We agree. (b)(iii) We would agree that the statutory duty should replace the common law duty of care, which might otherwise have applied. It should be made clear that, in circumstances where the statutory duty does not apply, e.g., because it is excluded by, or inconsistent with the trust Instrument, and the common law duty would currently apply, the common law duty will continue to apply in future. (c) No further comment.
James J Bertram	(a) Yes. (b)(i) Yes. (b)(ii) Yes.

	<p>(b)(iii) Yes.</p> <p>(c) The statutory duty of care should, save to the extent excluded by or inconsistent with the trust instrument, apply to the exercise and performance of all of the trustee’s powers and duties whether conferred or imposed by the trust instrument or by law, including those set out in paragraph 2.14. In the case of paid trustees, any exclusion or limitation or inconsistency in the trust instrument should be subject to the same regulation as is applicable to exclusion clauses - see Question 9 below.</p>
<p>Joint Committee on Trust Law Reform</p>	<p>2.1 It is proposed that a new statutory duty of care be adopted under which a trustee must “exercise such due care and skill as is reasonable in the circumstances” having regard in particular:</p> <ul style="list-style-type: none"> (a) To any special knowledge or experience that he has or holds himself out as having; and (b) If a Trustee is acting in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession. <p>2.2 The new statutory duty of care is proposed to apply when trustees are exercising their powers in matters such as:</p> <ul style="list-style-type: none"> (a) investing; (b) acquiring land; (c) appointing agents, nominees and custodians; (d) compounding liabilities; (e) insuring property; (f) dealing with matters concerning reversionary interests and valuations subject to any indication in the trust instrument that the new statutory duty of care is not meant to apply. <p>2.3 Whilst the statutory duty of care is expressed in broad terms i.e. “as is reasonable in the circumstances” its distinguishing feature from the common law duty is that it is clearly specified that professional Trustees and those holding themselves out as such have a higher duty of care than lay persons or volunteers. This incorporates the way the courts are moving to accommodate the increasing trend, in England and across the world, for modern trustees to be professionals rather than lay persons.</p>

2.4 The powers subject to the duty of care listed above are uncontroversial. It will be possible in the trust instrument, to “contract out” of the statutory duty. The duty will be additional to and will not affect other fundamental common law duties of Trustees, nor will it affect whether or not to exercise a discretion but rather than the manner in which it must be exercised once the decision to exercise it has been taken.

2.5 The most controversial issue is the combined effect of the statutory duty of care with the Trustees’ investment powers which is dealt with in the following section of this Response.

(a) The majority agrees but see minority views below.

(b)(i) Yes.

(b)(ii) Yes.

(b)(iii) Yes.

(c) No.

Reasons:

2.7 Those who favour the answers set out above would say that a statutory duty of care, even though widely expressed as is proposed, adds certainty to the jurisdiction, which is good for Settlers, Trustees and Beneficiaries. Particularly important is the recognition that professional Trustees or those who hold themselves out as such have a higher standard of care than lays or volunteers. They would say that it is right to allow Settlers and Trustees to adopt a lesser standard than the statutory duty, or indeed, a higher standard. Where a lower standard is adopted (more later on this in the section dealing with exculpation clauses) it will be a clear departure from the statutory standard which would be the benchmark for professional Trustees in Hong Kong. Settlers and Trustees would need to have good reasons to adopt a lesser standard.

2.8 The powers and duties described in 2.14 of the Consultation Paper and, in particular the investing power, are the most important. A majority view is that the statutory duty should replace the existing common law duty as to do otherwise would complicate rather than clarify matters. However, other strongly expressed views are set out in paragraphs 2.9 and 2.10. The majority may say that the duty should be additional to other fundamental common law duties of Trustees particularly in relation to the exercise of Trustees’ discretion because the circumstances in which discretions may or may not be exercised

	<p>is incalculable and it is unwise to attempt to codify all of them. These amendments would bring us into line with the United Kingdom and Singapore.</p> <p>2.9 An alternative view, held by a minority, is that a statutory duty of care, which provides a higher standard for professional (paid) Trustees than lay Trustees, will not find favor with professional Trustees, who will simply not accept trusts with that standard. Such a standard is therefore not in the best interests of Hong Kong since it will detract from business.</p> <p>2.10 The counter argument to that expressed in 2.9 above is that, for Settlers, such a standard is attractive. The Singapore experience is that most Trustees accept the higher statutory duty of care. To do otherwise hardly reflects well upon them. Some specifically use the fact that they do not contract out of the statutory duty as a marketing tool. Therefore the statutory duty of care is a good selling point for a jurisdiction.</p>
Law Debenture Trust (Asia) Limited	<p>(a) We disagree. Your paper makes reference to the wish to emulate the Trustee Act 2000 in terms of a statutory duty of care. In the UK the standard practice is always to exclude the operation of Section 1 of the Act, thereby reverting to the standard position of the trustee as being liable only in the case of negligence, willful default or fraud and which position would arise as a matter of common law in any event were it not stipulated in the trust instrument. Accordingly, in practice, the statutory duty of care never arises.</p> <p>(b)(i) Not applicable in view of the above.</p> <p>(b)(ii) If the statutory duty of care were to apply to only certain defined powers and duties of a trustee, the duty of care applying to any remaining powers and duties would revert to the common law position, thereby leading to the unwelcome uncertainty that would derive from having differing duties of care applying in the same trust instrument.</p> <p>(b)(iii) The proposed statutory duty of care refers to the “exercise of such care and skill as is reasonable in the circumstances, having regard in particular....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”. Given that “reasonableness” is a subjective rather than an objective test, we are of the view that the greater certainty deriving from the common-law based position of liability for trustees would be more welcome to all investors and other participants in the capital markets.</p> <p>(c) In practice, tracking UK practice in relation to Section 1 of the Trustee Act, the opt-out provision proposed would always be followed so as to continue with accepted standard practice in the capital markets.</p>

<p>Linklaters, Hong Kong (on behalf of Bank of New York Mellon, Deutsche Bank and The Hongkong and Shanghai Banking Corporation Limited)</p>	<p>(a) We have no objection to the introduction of a statutory duty of care for trustees along the lines of the Trustee Act 2000 (“TA”) so long as such duty can be excluded or modified by the trust instrument as is common practice in England following the introduction of the TA. The general view in England is that the precise scope of this statutory duty is uncertain and professional trustees prefer to exclude it in favour of the established common law duty with which they are more familiar.</p> <p>(b)(i) We have no objection to the introduction of a statutory duty of care along the lines of the TA - see paragraph 1(a) above.</p> <p>It is unclear whether a claim for breach of the new duty of care is a claim for breach of statutory duty or a claim for breach of trust. This is important as different considerations apply to each type of claim. Claims for breach of statutory duty, for example, are subject to the tortious limitations of remoteness and causation.</p> <p>It is unclear who may enforce the new statutory duty. Could it, for example, be enforced by a settlor or a creditor of the trustees if he suffered a loss through a breach of it?</p> <p>As a result of these uncertainties, professional trustees may seek to exclude the statutory duty.</p> <p>(b)(ii) We note that the new duty only applies to the exercise of specified powers, not to the decision whether or not to exercise them in the first place. It seems that the duty does not apply where one fails to exercise the relevant powers. Please clarify whether this is the case.</p> <p>(b)(iii) We have no objection to the replacement of the existing common law duty of care in any case where the statutory duty of care applies so as to avoid two potentially different standards from applying to trustees in respect of the same duty. We assume that where the statutory duty of care is excluded, the common law duty of care would apply. As noted above, given the uncertainty as to the precise scope of the statutory duty of care proposed to be introduced, we prefer to exclude the statutory duty of care in favour of relying on the more established benchmark offered by the common law duty of care.</p> <p>As regards exercise of trustee's discretion, please see our response in paragraph 1(b)(ii) above.</p> <p>(c) We do not propose that the statutory duty of care apply in other circumstances.</p>
<p>Michael Shan Kelly</p>	<p>(a) Yes.</p> <p>(b)(i) Yes.</p>

	<p>(b)(ii) Yes.</p> <p>(b)(iii) Yes.</p> <p>(c) The proposal seems to cover all relevant areas.</p>
Nicholas Pirie	<p>In practice with the larger trusts most of the operations and powers are in fact delegated, either to managers or agents for specific functions, or committees of trustees who take professional advice. I would heartily recommend the suggestions adopted with reference to the English Trustee Act set out under Para 2.5, as this is now consonant with the duties of fiduciaries generally. A coherent single test for ordinary trustees to “exercise such care and skill as is reasonable in the circumstances, having regard to any special knowledge or experience that the trustee has or holds himself out as having, and if the trustee is acting in the course of business or is a professional trustee, having regard to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.”</p> <p>I would recommend that future trust instruments actually specify whether they adopt this standard of care, rather in the same way that Table A to the Companies Ordinance should apply save otherwise provided for. This should avoid debate as to what is or what is not inconsistent with this duty of care. In other words it should be mandated or otherwise.</p>
ONC Lawyers, Hong Kong China	<p>(a) Yes. The main reason for our answers to Question 1 is to give certainty to the jurisdiction. Yet providing a certain and standard duty of care for professionals must be balanced against the freedom of choice of settlors and lay trustees.</p> <p>(b)(i) Yes.</p> <p>(b)(ii) Yes.</p> <p>(b)(iii) Yes.</p> <p>(c) No.</p>
Respondent A	<p>(a) Yes, but only to the extent that the standard of such statutory duty of care is higher than the standard of the common law duty of care.</p> <p>(b)(i) Not necessarily – as indicated above, such standard should be higher than the standard of the common law duty of care and cannot be opted out of by the trustees.</p> <p>(b)(ii) It can, provided that the standard is higher than that imposed by the common law and that such duties cannot be opted out of by the trustees.</p> <p>(b)(iii) The statutory duty of care should be additional to, and not reduce, the common law duties of trustees and the</p>

	<p>exercise of trustees' discretion.</p> <p>(c) The statutory duty of care should apply in purpose trusts cases such as those established for the purposes of investments, holding company shares including shares in private trust companies and sale of property.</p>
Respondent B	<p>(a) Yes.</p> <p>(b)(i) Yes.</p> <p>(b)(ii) Yes.</p> <p>(b)(iii) Yes.</p> <p>(c) No.</p>
Respondent C	<p>We do not have any views are we believe professionally drafted trust instruments would adequately deal with the issues raised.</p>
Respondent D	<p>(a) Yes, provided that introduction of the statutory duty of care is accompanied by provisions to differentiate between professional trustees and lay trustees who provide services for free; as a higher standard should be imposed for the former.</p> <p>(b)(i) The standard of care should not be higher than that expected under common law.</p> <p>(b)(ii) Same as (b)(i) above.</p> <p>(b)(iii) Yes, subject to the proviso in (a) above, the statutory duty of care should replace the existing common law duty of care; and should not affect, the other fundamental common law duties of trustees and the exercise of trustees' discretion.</p> <p>(c) Subject to (a) above, the statutory duty of care should have general application in all circumstances, save and except when it is excluded by, or inconsistent with, the trust instrument.</p>
The Arab Chamber of Commerce & Industry	<p>(a) Yes.</p> <p>(b)(i) Yes.</p> <p>(b)(ii) Yes.</p> <p>(b)(iii) Yes.</p> <p>(c) No.</p>

The Association of Chartered Certified Accountants, Hong Kong	(a) ACCA Hong Kong considers that the trustee should at any time owe a duty of care to beneficiaries no matter how the trust instrument states. As such, we agree to the introduction of a statutory duty of care. And we consider that this statutory provision will apply to all circumstances irrespective of what the trust instrument dictates.
The British Chamber of Commerce in Hong Kong	<p>(a) Yes, we believe that a statutory duty of care for any corporate trustee operating in Hong Kong, whether Hong Kong or overseas incorporated should be introduced. A single statutory test, similar to the table A concept for Hong Kong companies could be introduced i.e. “trustees should exercise such skill and care as is reasonable in the circumstances, having regard to any special knowledge or experience which the trustee holds himself out as having. If the trustee is acting in the course of business or is a professional trustee, having regard to any special knowledge or experience that is reasonable to expect of a person acting in the course of that kind or business or profession.” The trust deed can alter this provision, if so drafted.</p> <p>(b)(i) Yes.</p> <p>(b)(ii) Yes.</p> <p>(b)(iii) Yes.</p> <p>(c) N/A.</p>
The Chinese Manufacturers’ Association of Hong Kong	<p>(a) 贊成訂立受託人的法定謹慎責任。</p> <p>(b)(i) 贊成。</p> <p>(b)(ii) 贊成。</p> <p>(b)(iii) 贊成。</p> <p>(c) 無其他建議。</p>
The Hong Kong Association of Banks	(a) We think it is appropriate that a statutory duty of care; for trustees should be introduced and we think it is appropriate to enable the trust instrument to partially or wholly exclude this duty. In line with this, we note that the Consultation Paper does not discuss how the duty of care should be applied to trust instruments which have already been executed and if it is the policy intention that a trust instrument can vary or exclude the duty of care, then in relation to trust instruments which have already been executed it should be the case that the duty of care should not be applied because the statutory duty was not in contemplation of the time when the trust instrument was executed and it would be problematic now for the duty of care to be excluded. We therefore think that the statutory duty

	<p>should apply to trust instruments executed after the new legislation comes into effect unless it is excluded or inconsistent with the trust instrument. A similar issue applies to other proposals in the Consultation Paper but these are less problematic as they apply more to rights of trustees rather than obligations of trustees. We do not repeat the comment when it arises but consider that general consideration needs to be given to application of recommendations in relation to trust instruments which have already been executed.</p> <p>(b)(i) We believe that the statutory duty of care should be along the lines suggested in the UK Trustee Act 2000 in that it is tailored to the knowledge of the trustee or the fact that he is a professional trustee.</p> <p>(b)(ii) We agree that a case is clearly made out for the duty of care applying to powers of investment, delegation, appointment of nominees and custodians and taking out of insurance. We note, however, that the Consultation Paper proposes that the duty of care be extended to the powers contained in sections 16, 24(1) and 24(3) of the Trustee Ordinance although there is no discussion regarding these powers and the appropriateness or otherwise for the statutory duty of care to apply to them. The powers themselves are somewhat technical and although we note that the UK Trustee Act 2000 applies the duty of care to these powers under the equivalent legislation in the UK, we suggest for the time being unless a clear case can be made for applying the duty of care to these powers, that duty of care should be limited to investment, delegation, appointing nominees and custodians and taking out insurance.</p> <p>(b)(iii) Clearly the duty of care should replace the existing common law duty of care and insofar as the new statutory duty of care overlaps with any other common law or statutory duties, then compliance with the new statutory duty of care should be deemed to amount to compliance with any other overlapping statutory or common law duties. Clearly, trustees should not be required to have parallel duties of care imposed upon them. The statutory duty of care and compliance with it should be sufficient.</p> <p>(c) We think that this is something which should be reviewed once the legislation has been in place for some time to see what the experience is with regard to compliance with the new statutory duty of care.</p>
The Hong Kong Bar Association	The subject matter of the above proposals/queries has been addressed by the recommendations of the relevant overseas law reform bodies (principle the Law Commission in the UK) and subsequently implemented through legislation. To this extent, they are uncontroversial. Given that the existing trust law in Hong Kong has been largely based on the law in the UK, the Bar believes that, save for one point to be discussed below, the examples set by the UK on the relevant subject matter can be followed.
The Hong Kong	(a) Yes.

Society of Financial Analysts	(b)(i) Yes. (b)(ii) Yes. (b)(iii) Yes. (c) No.
The Institute of Accountants in Management	In order to provide confidence to foreign investors and settlors in the trust industry in Hong Kong, it is necessary to provide a statutory duty of care for trustees. The Institute agrees to have the standard of care along the lines of the Trustee Ordinance 2000 and the Singapore Trustee Act so that the legal standard of care for trustees will be along good international standard. Further, this standard of care for trustees should not be lower than the common law standard. In other words, the statutory standard of care for trustees should be in addition to the common law standard.
The Law Society of Hong Kong	<p>(a) Yes, we agree that a statutory duty of care should be introduced as this will promote certainty and consistency; and put Hong Kong in a better position to compete with other jurisdictions, such as Singapore, in the minds of potential settlors.</p> <p>However, we have reservations whether the statutory duty of care to be introduced should be subject to express contrary intention in the trust instrument. Our reply to this question will depend on how widely the statutory duty was eventually drafted.</p> <p>As it is only normal to expect that professional trustees will exclude all statutory duty in their professionally drafted standard trust instruments, the statutory duty of care, if it is capable of being excluded, would at the end of the day only fall on non-professional trustees.</p> <p>The law should protect the public and on this basis, we believe there are certain core duties of a trustee which are so fundamental that they should not be subject to exclusion.</p> <p>We would suggest that the proposed statutory duty of care in paragraph 2.13 should apply to all powers and duties of the trustees but just like the company directors' duties, certain specified core duties should not be capable of being excluded</p> <p>(b)(i) Yes, subject to our comments in 1(a). (b)(ii) Yes, subject to our comments in 1(a). (b)(iii) Yes. The statutory duty of care provides for more clarity and certainty and it would not be helpful to potentially have two competing standards.</p>

	<p>The common law duty should be preserved in the case that the statutory duty is excluded by the trust instrument.</p> <p>(c) As we have suggested in 1(a), the proposed statutory duty of care in paragraph 2.13 should apply to the exercise and performance of all of the trustee’s powers and duties, whether conferred or imposed by the trust instrument or by law, including those set out in paragraph 2.14.</p> <p>The statutory duty of care should generally be subject to exclusion in a trust instrument save for certain core duties. We should suggest that those trustees’ powers and duties mentioned in paragraph 2.14 of the Consultation Paper, and additionally the power to agree on the remuneration of agents, nominees and custodians, be classed as core duties.</p>
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Question 2

<p>(a) Do you agree that the Schedule 2 range of authorised investments should be retained? If your answer is no, please give reasons.</p> <p>(b) If you agree that Schedule 2 should be retained, please let us have your views on whether Schedule 2 should be amended in respect of one or more authorised investments. For example, should any of the following qualification criteria for authorised investments (which are set out in Schedule 2 and explained in paragraphs 2.21 - 2.23 above) be amended:</p> <ul style="list-style-type: none"> ● the minimum market capitalization of HK\$10 billion for companies; ● the minimum 5 year dividend record for companies; ● the definition and credit ratings for debentures; ● the safeguards for permissible derivatives (for hedging purposes only, traded on a recognized or specified stock or futures exchange, supported by specific written advice from a corporation licensed to give the advice with regard to suitability and potential risks and losses)? 	
<p>Asiaciti Trust Hong Kong Limited</p>	<p>Trustees General Power of Investment in Default of Express Provisions in the Trust Instrument</p> <p>2.11 Reference is made in the HKTA paper written by the Joint Committee on Trust Law Reform (JCTLR) about Modern Portfolio Theory (MPT). Does this presuppose that trustees will know or should know what MPT is and how to use it? Usually it is the professional investment advisor (IA) who will know or should know about MPT and recommend it to the trustee. If we introduce a term such as MPT into the new TO, then a plaintiff's counsel will raise the issue in a court hearing against a trustee, inferring that it is the obligation of trustees to understand MPT since it had been mentioned in the new TO.</p> <p>This obligation being put into the new TO for trustees to understand MPT is wrong. Trustees do not understand investments. They are not investment professionals. For that reason, Trustees appoint IA's to handle investments, diversification and risk. It should not be incumbent upon trustees to understand the nuances of MPT. I studied this in 1978 at Georgetown University where I did my undergraduate degree but I can only recall bits and pieces of it. I am sure trustee professionals will not understand MPT. If we include too high a standard for trustees to follow, then trustees will have a greater liability than the IA.</p> <p>[What is the point of hiring IA's to handle investment, diversification and risk, if the trustee can be sued and the trustee cannot sue the IA?] The trustee might as well just handle the investments by themselves if they are not protected by statute under the new TO.</p>

2.12. Trustees are not IA's. They appoint IA's to manage the functions for which trustees are not professionally qualified. When an individual investor signs up with an IA, there are forms and waivers which the individual investor must sign. These forms many times require that any disputes be resolved through arbitration or a hearing, but they do not allow actions to be brought in an open court before a judge. We need to rethink whether a beneficiary should be able to take a trustee to court and sue re: an investment, when a trustee may not have the ability to turn around and go after the IA who gave the advice or managed the investment. In other words, the trustee should not be any less protected than the IA. I am concerned that no one may have looked at the types of forms which are required to be signed between investors (professional or otherwise), and IA's (fund managers, private banks, financial planners, stock brokers, etc).

For instance, in the USA, every individual or corporate investor signs away many rights when they open up an investment account with any IA. Investors agree to take disagreements to an arbitration panel, and they cannot take an IA to a court of law. Similar provisions and documentation exists in HK.

And yet, if the new TO grants too much power to beneficiaries, the beneficiaries could effectively go to court, sue a trustee for bad investment advice. The trustee will have received the advice from the IA, yet the IA is protected from lawsuits brought by the trustee. So in effect, we in HK through the new TO need to give the trustees the same protection as the IA already have in HK.

Re Schedule 2. I think it is wrong to include this as a standard for professional trustees. The inclusion of this schedule is simply a reaction to the financial events of 2007-08. The schedule has not been well thought out as I will explain in my reasons below:

For example, the instructions imply that only profitable and listed companies with minimum capital of HKD 10 billion which have paid a consistent dividend for the immediate prior 5 years be considered as permitted equity investments.

The suggested inclusion of Schedule 2 in the TO brings out several questions for debate:

RE: Equities

What is the reason for using HKD 10 Billion?

5 years and not 3 or 4 years?

What are the consistent dividend criteria? HKD 0.01/share? ; 1/2% return? Paid once a year? 4 times a year?

What if the dividend is paid in year 1, not paid in year 2 but paid in year 3, 4, and 5? Is a trustee not permitted to invest until after year 7?

A trustee could then follow such a schedule and in the month following the first investment if the company loses money, and/or in the process, drops below the minimum capital level, or declines to pay a dividend, does this require that the trustee “liquidate or disinvest” from the investment position?

Schedule 2 does not indicate but if it only suggests when to “make” an investment and does not suggest when to “disinvest”, then is this prudent? Is this Schedule 2 opening up the trustee to a policy of following the new TO but not necessarily following how a prudent man would invest, either a professional or otherwise? If Schedule 2 is to be followed on “investments”, then does it not follow logically that there needs to be a Schedule 2 for “disinvestments”?

If there is a Schedule 2 for investments and disinvestments, then a beneficiary, if able to sue a trustee, would be able to bring an action if Schedule 2 was not followed for investments or disinvestments. This idea of including Schedule 2 is not well thought out. It is meant to help a trustee, but it actually makes it worse for a trustee to follow Schedule 2 because it restricts investments and forces disinvestments.

The best option would be not to include Schedule 2.

The second best option would be to allow trustees under the statue, to opt out of Schedule 2 at the time the trust is drawn up.

A bad investment policy will not made bad investments change and become better investments.

Re: Debentures: Do the credit ratings act as the only guide if Schedule 2 is adopted? Is a trustee able to invest in debentures of listed companies which: 1) have less than the minimum capital
2) are not profitable
3) miss a dividend payment under the equities section of Schedule 2?

Again Schedule 2 does not seem well thought out. It seems possible that beneficiaries can sue a trustee because there is too much ambiguity in Schedule 2. There is not sufficient protection for trustees who are following the advice of their professional IA's.

Re: Derivatives/Hedging. These sophisticated and toxic investments to both professional and non professional investors seem to be outside of the range of discussion for a TO but it would seem as if the Settlor should give guidance in the Trust Deed.

Personally I am not a fan of derivatives, (having been in corporate and private banking for over 21 years before joining the trust industry) because most investors do not understand them, especially in a trust situation, but I am not clear on what is the best way forward in addressing this type of investment.

If we are going to address equities and bonds then these need to have a very in-depth analysis of what should be acceptable and not acceptable. Trading derivatives on a recognized exchange does not make a derivative any less toxic if the underlying risk is not understood. We have seen where derivatives became worthless in the US markets because the market collapsed. It did not matter that there was a market at one time for the trading of derivatives. The market collapsed.

A second question is: What constitutes a recognized exchange? The majority of derivative trades are not carried on in a regulated market. The trades are done between dealers. What constitutes a regulated market? This question needs to be addressed if the new TO is going to include Schedule 2.

For all of these reasons:

	<p>-Investment vs. disinvestment -Debentures quality not along same investment guidelines as equity investments. -Derivatives are not understood by individuals making the laws or trustees.</p> <p>I think Schedule 2 is a bad idea and it should not be included in the new TO.</p> <p>If the FSTB decides to include the Schedule 2, then Schedule 2 as it is presently written needs more research to be done so as to be written differently and the new TO should permit trustees to opt-out.</p> <p>Reference is made in the HKTA paper written by the Joint Committee on Trust Law Reform (JCTLR) on Trustees Power of Delegation / Background and Considerations item 2.18</p> <p>Trust Corporation I am not sure why we use the term “corporation” here. Should we define the term? Do we mean a trustee or a trust company?</p>
<p>Baker & McKenzie</p>	<p>In relation to the authorised investments set out in Schedule 2 of the TO, we note the tension between the general power of investment of the trustee, the duty to diversify, and the limited list of authorized investments under Schedule 2.</p> <p>In our view, it may be appropriate to continue to have a statutory list of authorized investments, so long as trust instruments can ‘opt out’ of it by providing for different investment powers. Under modern portfolio theory of investments, in the absence of a confined list of authorized investments, the trustee, faced with the duty to diversify, may in fact be required to invest in certain riskier assets as part of its portfolio. One would wish to exclude that to preserve trust assets in certain situations.</p> <p>In particular, we view there is a role to have a limited list of authorized investments which by default will govern the more “informal” or “unsophisticated” trust arrangements; e.g., trusts for personal estate that family members are required to maintain. On the other hand, we also note that it is very common industry practice to have trust instruments with very detailed and elaborate provisions for dealing with the trustee's power of investments. In that sense, our view is that the more sophisticated users of trusts will be able to exclude the application of the Schedule 2; and they should be allowed to do so</p>

	under the TO.
Bank of Communications Trustee Limited	<p>(a) We agree. It appears to us that under s.91 of the current Trustee Ordinance, a trust company may invest its own funds only according to Schedule 2. We believe that the purpose of such a restriction is to ensure the financial stability of the trust companies so that the trusts they administer will avoid the risk which may otherwise result from their financial failure.</p> <p>(b) Schedule 2 creates a difficulty for the Hong Kong trust companies to establish wholly-owned subsidiaries overseas to meet the special needs, for example for tax planning purpose, of their trust clients because only listed shares can be invested in. With this drawback, the local trust companies may lose business to the overseas competitors especially those who are incorporated in the tax havens. Moreover, the Hong Kong trust companies, subject to this restriction, cannot arrange special purpose subsidiary as firewall to provide services to those clients requiring complicated trust structure or with trusts arrangements that expose the trustees to unclear or more stringent liabilities or business risks. We propose Schedule 2 be amended so that Hong Kong trust companies shall be able to form wholly-owned subsidiaries anywhere, perhaps with restriction to certain level, say investment in those subsidiaries shall not exceed 25 of their capital and reserves.</p> <p>Regarding the other limitations in Schedule 2, our comments are as below:</p> <ul style="list-style-type: none"> • minimum market capitalization of HK\$10 billion for companies - the recent financial tsunami proves that the size of a company does not mean a guarantee of its stability. Nevertheless, we believe that retention of this requirement would ensure the trust funds only be invested in the shares of those companies that have higher liquidity level in the market. This in turn would help the trustees to avoid the difficulty in realizing the trust's investment that they otherwise would have if the trust funds were invested in the smaller capitalized companies. • the minimum 5 year dividend record for companies - we suggest that this requirement be removed. We recall that in 1980s, a blue chip property company with over I billion shares in issue in a difficult time had to announce a dividend of HK\$0.01 solely because of this requirement so that the trustees could continue to hold its shares for the trusts. This is disturbing to that listed company, the bankers and the trustees. It is unreasonable that the trustees have to give up shares in a company that may have good business prospect just because of its temporary suspension of dividend payment. Companies have many good reasons to suspend declaration of dividend, for example, to build up cash for merger and acquisition or reducing borrowings in order to strengthen their balance sheets. In fact, if a

	<p>trustee has to balance between the interests of the life tenants and the reversioners, the trustee could simply invest the trust funds partly in bank deposits or bonds and partly in shares in companies.</p> <ul style="list-style-type: none"> • the definition and credit ratings for debentures - no comment • the safeguards for permissible derivatives - no comment
Butterfield Private Office (HK) Limited	<p>(a) Yes provided that it is amended to provide a more international and contemporary benchmark, and provided that it is reviewed at least once every 5 years. In addition I do not believe that such changes as are made are reactionary. For example, to draw the content of Schedule 2 in a form which reacts to the recent collapse in financial markets would be an error and unnecessarily restrictive.</p> <p>(b) The minimum market capitalisation of HK\$ 10 billion for companies is too high. As evidenced by recent events, the size of a company does not necessarily mean that it is more secure than a company capitalised at a lesser amount. On the contrary, size appears to increase risk. I would prefer to see this at HK\$ 1 billion.</p> <p>I do not believe that the 5 year dividend record is relevant. Technological companies, in particular in their earlier years, rarely pay dividends and, as will be seen with some of the banks after the recent crisis, non payment of dividends for a period has arisen.</p> <p>I agree that there should be a credit rating standard but I wonder what will be the most effective. As we have seen in the recent crisis, in respect of many structured products, the ratings given by the established agencies have been found to be worthless.</p> <p>Very great care must be taken to ensure that the standard set is contemporary. For example will Moodies and S&P survive their sins of the last decade or will a new and more effective rating system or agency arise.</p> <p>I do not think that the safeguards for permissible derivatives should be changed.</p> <p>Re Sch 2 item 3. This should be expanded to include any collective investment scheme, unit trust or mutual fund which is authorised by the relevant authority in any other reputable and equivalent jurisdiction.</p>
David Gunson	(a) No.
Hong Kong Institute of Certified Public Accountants	<p>(a) In principle we would favour retaining the Schedule 2 range of authorized investments.</p> <p>(b) In the light of the impact of the financial crisis on, for example, short-term corporate profitability and dividends, we would suggest that some revision to the dividend record may need to be considered, such as that the five-year dividend record need not apply to each of the five years immediately preceding the investment but might instead apply to, say,</p>

	<p>five of the six or seven years immediately preceding the Investment.</p> <p>(c) The qualification criteria apply only on entering into an investment, although it may be that after certain time, even a short period, following an investment decision, a particular security or other investment would no longer be able to meet the entry criteria. Consideration should be given, therefore, to clarifying that trustees are expected to monitor the performance of investments periodically and, if a particular security or other investment falls significantly short of the entry criteria for an extended period, trustees who rely on Schedule 2 should consider the need to disinvest where this is practical.</p>
James J Bertram	<p>(a) Yes.</p> <p>(b) I have no specific suggestions to make save to say that I agree with what is said in paragraph 2.19, namely that, given that wider powers of investment may be provided in the trust instrument or may be authorized by the court, it is desirable that Schedule 2 should adopt a sensible, conservative approach to provide reasonable security and reasonable choice without exposure to undue risk. The Schedule should be kept under periodic review (more frequently in times of financial crisis such as the present) with a view to keeping it generally, and the specified qualification criteria it sets out, up to date and relevant. Independent professional advice (including from the Monetary Authority) could be sought to assist the FSTB.</p>
Joint Committee on Trust Law Reform	<p>2.11 The Consultation Paper provides a good background to this. Taken with the statutory duty of care proposed above, this means that a Trustee's duty of care of investing will vary according to whether the Trustees are professionals or not. This is how it should be. The old common law imposed upon Trustees the same duty of care in investments as a man of "ordinary prudence" had but qualified by the fact that they were investing other people's money. Trustees therefore had a responsibility to avoid hazardous investments even if they were authorized by the Trust. This test was set when most Trustees were lay Trustees. The standard reflected this, as did the statutory investment powers, which gave the "everyman Trustee" a bag of safe tricks to protect him and the Beneficiaries.</p> <p>2.12 The 1960's saw, in England and elsewhere, more comprehensive inheritance and capital gain taxes together with a shift in wealth concentration from landed estates to more financial assets. This led to a much wider use of discretionary trusts established both in, and outside, England and with it the much more common appointment of professional Trustees. At the same time a vastly more sophisticated and globalized financial world began to emerge.</p> <p>2.13 Professional Trustees were inclined to seek wide investment powers in trust investments thus freeing themselves from</p>

statutory lists of appropriate investments. The courts, in recognizing this changing landscape, did two things. They have become increasingly less forgiving in applying the common law duty of care to Trustee conduct in investments and they came to expect Trustees with wide investment powers to adopt the modern portfolio theory to their investment portfolios, i.e. to diversify and to not look at individual investments in isolation but as part of an overall portfolio of investments. The prudent investor rule overlaid with the modern portfolio theory was deemed suitable for the sophisticated professional trustee with an unlimited bag of investment options at his disposal.

2.14 The principal issue here is whether a wide power of investment (i.e. not restricted to a list as is currently the default case in Hong Kong and as is proposed to be retained) goes hand in hand with a higher duty of care. Put another way, is there a problem with applying a more stringent test or standard of care to a trustee who has limited default investment powers such as in Schedule 2 of the TO? By imposing a higher standard where the choice of investments is restricted, is a Trustee required, unfairly, to construct a modern portfolio out of a limited and static list of investments?

2.15 For reasons discussed below we do not think this is problematic and we therefore support the proposal. However we recognize the legitimacy of the opposing views and the content of paragraphs 2.9 and 2.10 reflect these.

(a) Yes.

(b) We will be happy to suggest the form and content of an amended schedule. We suggest that the Schedule be amended by regulation thus making it easier to amend.

Reasons:

2.17 We think that the range of authorized investments ought to be retained as a default position for the reasons expressed in the Consultation Paper i.e., that they present a safe harbor for situations where Settlers either deliberately choose to restrict the investment power of the Trustee or that becomes the default situation because it is not dealt with in the trust deed. Given the nature of the proposed statutory duty of care we do not see this as a problem. If a settlor wants to restrict a professional Trustee to the Schedule 2 range of authorized investments, the Trustee could, if he feels strongly, seek to contract out of, or at least qualify, his statutory duty of care via the trust deed. It is submitted that even if a professional

	<p>Trustee did not alter the statutory duty of care in the deed, the definition is sufficiently flexible to take into account, in judging the conduct of a Trustee, the “circumstance” that the range of investments was restricted. The duty of care of a lay Trustee would in any event be less than that of a professional Trustee and a restricted list of authorized investments would again be a “circumstance” to be taken into account in judging the applicable standard of care.</p> <p>2.18 A restricted default list reinforces the starting position that Trustees, by nature of their office, ought to be conservative in their choice of investments. However, this assumes that a Trustee is more likely to suffer fewer losses in the longer term if his investment choices are restricted to those within a carefully considered list.</p> <p>2.19 Given recent events some will undoubtedly argue that the current list would not have, in fact, offered a safe harbour and thus such lists serve no good purpose at all.</p> <p>2.20 Some feel that, even with the common law standard of care and bearing in mind what is said in paragraph 2.19, Settlers and their Beneficiaries have a “safe harbor” given to them without the need for Schedule 2.</p>
Law Debenture Trust (Asia) Limited	<p>(a) We agree.</p> <p>(b) We see no need for amendments.</p>
Linklaters, Hong Kong (on behalf of Bank of New York Mellon, Deutsche Bank and The Hongkong and Shanghai Banking Corporation Limited)	<p>(a) We have no objection to the retention of Schedule 2 range of authorized investments given that professional trustees generally set out their investment powers expressly in the trust instrument and provided that express investment powers are in addition to and is not limited by the restrictions in Schedule 2. Please clarify that Schedule 2 does not limit the general power of investment of the trustee set out in the trust instrument. If Schedule 2 limits the investment powers of the trustee to those as specified in Schedule 2, then trustees should be free to exclude the application of Schedule 2 and provide for their investment powers expressly in the trust instrument without regard to the limitations of Schedule 2.</p> <p>(b) Given that professional trustees set out their investment powers expressly in the trust instrument, we do not comment on the scope of the authorized investments in Schedule 2.</p>
Michael Shan Kelly	<p>(a) Yes.</p> <p>(b) I think all of the criteria need to be specifically considered further and in general relaxed. In the worst of times (usually</p>

	<p><i>post factum</i> as we currently experience), returns may all but disappear and the Trustees are obliged to look elsewhere for returns. Trustees cannot avoid taking risks but can avoid unknown and unacceptable risks. Policing Trustees investment decisions by statutory limitations will not always protect object nor serve them.</p>
<p>Nicholas Pirie</p>	<p>It is patently obvious that the current economic and financial crisis has illustrated that sophisticated financial products have outstripped the ability of the vendors and users to manage and understand them sufficiently. Further many of the sophisticated aspects of these products were either lost in translation, or not translated at all. With the decline in the use of language in Hong Kong, in a number of cases I am involved with today, it is clear that the sellers of these derivatives, could not understand them. For example the in house sales literature says “describe them as being similar to bank deposits”, when in fact an equity linked derivative, or credit default swop with another bank, is not in fact a bank deposit.</p> <p>Further the cases show, that statements issued by banks, financial institutions and others are not only grossly misleading, but in themselves unwittingly near fraudulent. Obviously consonant with the government’s desire to improve fiduciary duties by the issues and vendors of such products, must be a higher duty of care by the trustee to understand the nature and potential liability attached to these sophisticated products. Continued enhancement of investor protection must include, beneficiary protection also.</p> <p>As to Paragraph 2.21 there are as yet unreported cases where trustees have been asked to purchase assets in breach of trust at the request of settlors and protectors coming through the system. These are where they have requested purchase of accumulators, and de-accumulators, and losses have arisen. In some of these cases the trust assets have been wiped out, and the question arises whether to the trustees are then liable to make up the losses. These have yet to come through the legal system.</p> <p>There are other cases where trustees have engaged commercial banks to invest in trusts in the US offering mutual and other funds, such as the Madoff Trusts, and there have been total losses there.</p> <p>Hence I agree that Schedule 2 investments ought to be the mandated list, save where otherwise specified. The trustee who steps outside this list does so at his own peril, unless he has an investment clause, and in some cases the written consent of the beneficiaries, to do otherwise.</p> <p>It is particularly important that we consider mandatory diversification of asset class, and a suitable phrase in Cantonese is used to ensure that trustee companies and their staff understand the concept. Recently I had one bank trustee client ask me what “diversified” means, as the staff did not understand the concept, and that is why they had placed all the funds in one Madoff trust, as the returns were good, instead of placing them in “diversified funds”.</p>

	Further, it would be useful if the trustees were required to ask for fact sheets relating to Schedule 2 Asset Classes and at least 6 monthly returns on them. This would be for their own protection and are currently available for professional trustees and managers of Pensions. Perhaps a standard form could be developed to go with Schedule 2 Assets to enable ordinary trustees to see what should be in the list with examples.
ONC Lawyers, Hong Kong China	<p>(a) Yes. So long as the parties to a trust arrangement can contract out of the default statutory list of investment, a list could be helpful to lay trustees and those situations when the investment powers of the trustee have not be properly considered.</p> <p>(b) No comment. This is a very hard question and we don't have any suggestion as we are not experts in investment. Nonetheless, we submit that the list should be reviewed at regular intervals by people best qualified for the job and that amendments, if any, should be legalized by way of subsidiary legislations.</p>
Po Leung Kuk	We agree that the Schedule 2 range of authorized investments should be retained. However, we consider that Schedule 2 should be amended in respect of the 5 year dividend requirement. In today's share market, there are certain sizable PRC companies that are good for investment but their dividend record may not meet this 5 year track record requirement (e.g. China Life Insurance). In this regard, we propose to amend the 5 year requirement to 3 years so that more valuable companies will be available for investment purpose.
Respondent A	<p>(a) Schedule 2 should be abolished. The trustees should be given a general power of investments similar to the amendment to the TA2000. Neither the Government nor anybody, for that matter, is in a position to determine what investments should be permitted or allowed and it is difficult for trustees to ensure the criteria as specific as those set out in Schedule 2 are met at all times. As can be seen in the recent financial crisis, meeting particular criteria may not guarantee financial security.</p> <p>(b) As indicated above, these permitted investments categories are too narrow. If a limit is necessary, it can be determined based on general principles, such as preservation of capital.</p>
Respondent B	<p>(a) Yes.</p> <p>(b) The following qualification criteria for authorised investments (which are set out in Schedule 2 and explained in paragraphs 2.21-2.23) should be amended:</p> <ul style="list-style-type: none"> ● the minimum 5 year dividend record for companies ● the definition and credit ratings for debentures

	Professional investment advice should be obtained in light of recent market conditions. If retained there should also be a regular review.
Respondent C	We do not have any views are we believe professionally drafted trust instruments would adequately deal with the issues raised.
Respondent D	(a) Yes, the Schedule 2 range of authorized investments should be retained. (b) In view of the current financial crisis, the qualifications criteria for authorized investments provided under Schedule 2 amount to reasonably safe harbour limits for investments by trustees. Thus, there should not be any amendment.
The Arab Chamber of Commerce & Industry	(a) No, if investment by trustees is covered by a statutory duty of care most trustees will be obliged to seek professional investment advice. In this case a schedule of permitted investments such as that contained in Schedule 2 will be irrelevant and probably detract from returns and risk reaction strategies available to beneficiaries. We also consider trusts that are not pension funds should be managed along the same lines as pension funds. (b) If Schedule 2 is retained, it should be amended as follows, <ul style="list-style-type: none"> • the minimum market capitalization ofHK\$10 billion for companies; Use a net asset value test at the time of purchasing the company’s shares, based on an average of (say) 2 years, which would be a more useful indicator of worth than equity market capitalization. • the minimum 5 year dividend record for companies; In our view 2 consecutive years would be sufficient • the definition and credit ratings for debentures; The definition should be widened to include all investment grade’ securities • the safeguards for permissible derivatives (for hedging purposes only, traded on a recognized or specified stock or futures exchange, supported by specific written advice from a corporation licensed to give the advice with regard to suitability and potential risks and losses)? No change. <p>Other Comments</p> <p>The restriction on investment in Hong Kong authorized unit trusts is too narrow and should be amended to include</p>

	<p>overseas funds. Since other Ordinances refer to the TO, for example the Credit Unions Ordinance. Schedule 2 ought specifically to take into account the requirements of entities regulated by these ordinances for example credit unions.</p>
<p>The Association of Chartered Certified Accountants, Hong Kong</p>	<p>(a) To provide the trustees with more certainty where no criterion is stated in the trust instrument, we agree that Schedule 2 range of authorized investments should be retained.</p> <p>(b) ACCA Hong Kong believes that the principle of prudence should be followed for the trustees' selection of investments. However, we consider that some of the criteria set out in the current Schedule 2 are not practical in view of the current market situation, such as the first criterion which requires a minimum market capitalization of HK\$10 billion. We believe that a minimum market capitalization of above HK\$5 billion is a comparatively realistic and reasonable threshold for appropriate investments by the trustees.</p> <p>For the second criterion regarding dividend record, ACCA Hong Kong agrees to the general principle of prudence, and that income generation from investments should be reasonably expected. However, we consider that a minimum 5 year dividend record for companies too strict and rigid. We propose that a dividend record of 3 out of the immediate preceding 5 years from the date of investment instead.</p> <p>Regarding these qualification criteria, ACCA Hong Kong would also like to raise a concern that the absolute figures stated in Schedule 2 make the conditions inflexible to cater for market changes. Hence, it is important for a more frequent review of these criteria especially when the market fluctuates.</p> <p>On the other hand, it appears that there is no guideline on how the trustees should react when the criteria could not be met subsequent to the investment being made. We consider that guideline for divestment is of the same importance to ensure clarity for the trustees.</p>
<p>The British Chamber of Commerce in Hong Kong</p>	<p>(a) Yes, a Schedule 2 range of authorized investments should be retained; in practice most Trust Deeds will exclude the application of these provisions, but they should form the standard basis for the approach to investments, unless amended.</p> <p>(b) These criteria can be amended. In particular the minimum market capitalization should be reduced and the dividend track record deleted. Credit ratings should be upgraded and derivative and foreign currency hedging can be allowed - the permissible levels can be further discussed.</p>
<p>The Chinese Manufacturers' Association of Hong</p>	<p>(a) 贊成保留附表2所列明的特准投資項目;以便為受託人的投資訂定合理的安全港界限,同時亦讓受託人得以維持充分廣泛的投資權力。</p>

Kong	(b) 有關適用於特准投資項目的資格準則無需修訂。
The Hong Kong Association of Banks	<p>(a) We agree that Schedule 2 can be retained for trusts which do not provide the trustee with general power of investment in the trust instrument. However, it should not be served as a standard for those trustees who have been conferred with general power of investment.</p> <p>(b) As Schedule 2 is applicable to those trusts without pow.sr of general investment granted to the trustee, no amendment is proposed so as to maintain a more conservative approach to and prudential controls on investment.</p>
The Hong Kong Bar Association	The one exception to the Bar's support of following the UK experience is that relating to widening of trustees' default powers of investment ¹¹ . The Bar notes that the Consultation Paper has recommended retaining the present Schedule 2 (subject to review from time to time), and has not recommended following the UK example of providing for a wide default power. The Bar supports the approach in the Consultation Paper for the reasons given therein. After all, one is here dealing with a default power. If the settler, having positively addressed his mind to the matter, wishes the trustee to have more wide ranging investments or power to make more ambitious or hazardous investments, there is nothing to prevent him from doing so in the trust instrument.
The Hong Kong Society of Financial Analysts	<p>(a) Authorized investments should be retained as a general guideline to achieve basic investors protections. However, given the investment world is evolving, there is not a readily "one rule fits all". As a result, the authorized investments should be seen as the initial framework subjected to final agreements signed between trustees and beneficiaries according to their customized needs. If the final agreements do not include the authorized investments section, Schedule 2 applies. By doing that, the industry could retain certain consistency while allowing the flexibility to fit these customized needs.</p> <p>(b) N/A based on Question 2(a).</p>
The Institute of Accountants in Management	With the experience of the financial turmoil, the Institute is of the view that the scope of authorized investments should be scrutinized. In particular, derivatives should be excluded from authorized investments for two main reasons. First, trustees should bear a heavy duty to preserve the value of the trust assets. Secondly and most importantly, with the benefit of the experience of the financial turmoil, it is now known that the financial sectors or specifically, the investment bankers, whether under proper official licenses or otherwise, are capable of developing new products of financial derivatives at a speed that any legal measures or enactments to stop the sale of such derivatives to the public including the trustees, appear to be too slow and useless. In the financial world, there are lots of investments for trustees, such as shares of listed companies, debentures, government bonds and landed properties. Derivatives are only one of the various options of the trustees.

<p>The Law Society of Hong Kong</p>	<p>(a) Yes, we agree that Schedule 2 should remain.</p> <p>We agree that what has been said in paragraph 2.19 of the Consultation Paper, namely, that given that wider powers of investment may be provided in the trust instrument or authorized by the court, risks in investments must be contained and so a very conservative approach are called for in Schedule 2 for the protection of beneficiaries.</p> <p>(b) We have no specific suggestions to make at this stage.</p> <p>However, we believe Schedule 2 should be kept under periodic review (more frequently in times of financial crisis such as the present and recent past) with a view to keeping it generally, and the specified qualification criteria it sets out, up to date and relevant.</p> <p>Whereas S.4(3) of the TO provides that the Financial Secretary may from time to time by order published in the Gazette amend the Second Schedule, we would urge that a mechanism be put in place to enable timely updating of the Schedule to cope with fast moving market trends; and independent professional advice (including from the Monetary Authority) could be sought to assist the Financial Services and the Treasury Bureau.</p>
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Question 3

<p>(a) Do you agree that the power of delegation under section 27 of the TO should be retained, subject to an amendment that if a trust has more than 1 trustee, the exercise of the power of delegation should not result in the trust having only 1 attorney or 1 trustee administering the trust, unless that trustee is a trust corporation?</p> <p>(b) Do you have any views regarding the different conditions upon which an individual trustee may delegate his powers under section 27 of the TO and section 8(3)(a) of the Enduring Powers of Attorney Ordinance (Cap. 501)? Do you agree that the latter should be repealed?</p>	
Baker & McKenzie	We agree that the power of delegation and the power to employ agents, nominees and custodians by trustee should be amended in the manner proposed in the Consultation Paper.
Bank of Communications Trustee Limited	(a) We agree. (b) We agree.
Butterfield Private Office (HK) Limited	(a) Yes. (b) I agree that Sect 8(3)(a) of the Enduring Powers of Attorney Ordinance should be repealed but have no other specific views regarding the different conditions upon which an individual trustee may delegate his powers under Sect 27 of the TO and Section 8(3)(a) of the Enduring Powers of Attorney Ordinance.
David Gunson	(a) Yes. (b) Yes.
Hong Kong Institute of Certified Public Accountants	(a) We agree that the power of delegation under section 27 of the Trustee Ordinance (“TO”) should be retained subject to the proposed amendment, (b) While, in principle, it would be sensible to review overlapping provisions of the TO and Enduring Powers of Attorney Ordinance (EPAO) and resolve any inconsistencies, it should also be recognized that the respective provisions do not necessarily serve the same purposes in all circumstances. For example, while under the TO, the grant of power of attorney does not survive the subsequent mental incapacity of the donor, under the EPAO, one of the reasons for granting an enduring power of attorney may be precisely because of the anticipated mental incapacity of the donor.
James J Bertram	(a) I prefer the UK approach to the whole issue of delegation by trustees so as to make it clear that in general terms, in the absence of any wider power conferred by the trust instrument, only administrative or managerial functions concerning

	<p>the trustees' running of the trust in the best interests of the beneficiaries are to be delegable. Subject to this, I have no objection to the proposal for the amendment to section 27 of the TO.</p> <p>(b) I agree that the conditions applicable to a delegation of powers by an individual trustee should be confined to those in section 27 and the overlap with section 8(3)(a) should be removed.</p>
Joint Committee on Trust Law Reform	<p>2.21 The Consultation Paper deals with these issues clearly. We regard them as relatively uncontroversial. We agree with the sentiment in the Consultation Paper that for the protection of beneficiaries, the power of delegation to a sole co-trustee under section 27(2) of the TO should be retained but subject to the overriding condition that if a trust has more than one trustee, a delegation made under section 27 should not result in having only one attorney or trustee administering the trust unless that attorney or trustee is a trust corporation.</p> <p>(a) Yes.</p> <p>(b) We think these issues should be dealt with separately as they address quite different circumstances of delegation.</p>
Law Debenture Trust (Asia) Limited	<p>(a) We would always wish the issue of delegation to be addressed in the trust instrument but agree that section 27 is a useful default position.</p> <p>(b) We have no view on this.</p>
Linklaters, Hong Kong (on behalf of Bank of New York Mellon, Deutsche Bank and The Hongkong and Shanghai Banking Corporation Limited)	<p>(a) We have no objection to the proposal as we understand the power of delegation provided in the Trustee Ordinance applies by default only if the trust instrument does not contain any provisions for delegation or otherwise does not provide for such powers sufficiently. Please clarify that s.27 of the TO does not apply where the delegation is pursuant to an express power of delegation under the trust instrument (whether by power of attorney or otherwise) and that it does not preclude or limit any express powers of delegation contained in the trust instrument. In addition, we note that s.27(5) of the Trustee Ordinance provides that the donor of a power of attorney given under s. 27 shall be liable for acts or defaults of the donee as if they were the donor's own acts or defaults. This wording suggests that this provision applies if the delegate was appointed under a power of attorney given under that section only. Please clarify it does not affect the ability to limit liability for acts or defaults of delegates where the delegate is appointed under express powers given under the trust instrument.</p> <p>(b) We do not express any view on this question.</p>

Michael Shan Kelly	(a) Yes. (b) Given the likely different objectives of the ‘settlor’ and the ‘donor’ being served by the trust or enduring power of attorney I consider the statutory presence of both a positive and I do not agree with a proposal to repeal Cap 501.
Nicholas Pirie	Different powers should be given to different classes of trustees. Secondly the administration should not underrate the use of Powers of Attorney in Hong Kong. They are used far more widely here than in UK, and elsewhere. They started to be used first in Hong Kong in NT conveyance to circumvent the “small house policy” and are now used extensively to get over the two trustees rule. With people moving in and out Hong Kong and travelling extensively. I agree with the suggestion that a restriction should be placed on Section 27 in the manner suggested and repeal Section 8 (3) (a) of Cap. 501
ONC Lawyers, Hong Kong China	(a) No comment. (b) No comment.
Respondent A	(a) Yes, the power of delegation under section 27 of the TO should be retained. Whether or not there is an amendment, the exercise of the power of delegation should be subject to the common law duty of care. (b) The delegation should still be subject to the common law duty of care.
Respondent B	(a) Yes. (b) These are two different issues which should be considered separately. Would support the repeal of section 8(3)(a) of the Enduring Powers of Attorney Ordinance so that the power of delegation by an individual Trustee is entirely governed by the Trust Ordinance.
Respondent C	We do not have any views are we believe professionally drafted trust instruments would adequately deal with the issues raised.
Respondent D	(a) Yes. (b) Agree section 8(3)(a) of the Enduring Powers of Attorney Ordinance (Cap.501) should be repealed so that power of delegation by individual trustee is entirely governed by TO.
The Arab Chamber of Commerce & Industry	(a) Yes. (b) No view.
The Association of	We agree.

Chartered Certified Accountants, Hong Kong	
The British Chamber of Commerce in Hong Kong	(a) Yes, these powers should be retained but amended as suggested in the consultation. (b) Individual trustees, and trustees of charitable trusts, should have a general power of appointing agents.
The Chinese Manufacturers' Association of Hong Kong	(a) 贊成。 (b) 贊成廢除《持久授權書條例》(第501章)第8(3)(a)條，使轉委權完全受《受託人條例》管限，消除不同法規條文之間的不一致性。
The Hong Kong Association of Banks	(a) We believe that as pointed out in the Consultation Paper section 27 contains a lacuna which the proposal seeks to remedy and so -this is a proposal which should be supported. (b) We do not think that the conditions upon which individual trustees may delegate their powers on section 27 of the Trustee Ordinance need to be changed. As regards the proposal to repeal section 8(3)(a) of the Enduring Powers of Attorney Ordinance, we disagree with this proposal. The Enduring Powers of Attorney Ordinance deals with a specific need in relation to the creation of powers of attorney which will endure beyond the mental incapacity of the donor. If this section is repealed, it will reduce the effectiveness of enduring powers of attorney and in any event the Enduring Powers of Attorney Ordinance does contain protections in the form of the various formalities required for execution of an enduring power of attorney, the standard form to be used, the requirement for a medical practitioner's and lawyer's certificate and statutory protections in the forms of sections 9 (Registration) and 11 (Powers of the Court for Revocation).
The Hong Kong Bar Association	The subject matter of the above proposals/queries has been addressed by the recommendations of the relevant overseas law reform bodies (principle the Law Commission in the UK) and subsequently implemented through legislation. To this extent, they are uncontroversial. Given that the existing trust law in Hong Kong has been largely based on the law in the UK, the Bar believes that, save for one point to be discussed below, the examples set by the UK on the relevant subject matter can be followed.
The Hong Kong Society of Financial	(a) Yes. (b) No.

Analysts	
The Law Society of Hong Kong	<p>(a) No. The UK approach should be followed. Unless the trust instrument provides to the contrary (or requires a minimum of two trustees at any time), delegation to a single trustee should be permitted. If there can be a single trustee there is no logical reason why the trustee's powers cannot be centralized in the hands of only one of them.</p> <p>(b) The conditions applicable to delegation of powers by an individual trustee should be confined to those in S.27 of the TO. S. 8(3)(a) of the Enduring Powers of Attorney Ordinance ("EPOAO") should be repealed.</p> <p>The EPOAO is intended for specific purposes, and is not, of course of general effect. It requires very specific procedures to be undertaken to validate an Enduring Power. It is hard to see why powers should be capable of being dealt with separately by an Enduring Power when they cannot otherwise be dealt with by the trust instrument or general law.</p> <p>In fact it appears to us that the EPOAO may be defective in any event as regards delegation of trustee powers. Although the EPOAO contemplates the exercise of the donor's powers as a trustee, S.8(2) clearly provides that "an instrument which purports to create an enduring power which does not comply with Ss. (1) cannot take effect as an enduring power". Ss.8(1)(a) is specific that an enduring power "must not confer on the attorney any authority other than authority to act in relation to the property of the donor and his financial affairs."</p> <p>Trust assets are clearly not the property of the donor.</p> <p>It seems to us to be highly debatable whether the powers of a trustee are power which relate to his financial affairs. In our view they are not.</p> <p>If this is the case then a power to exercise any of the donor's powers as a trustee is precluded by S. 8(2) from being an enduring power in any event.</p>

Question 4

<p>(a) Do you agree that the TO should be amended to provide trustees with a general power of appointing agents along the lines of the TA 2000, subject to any express contrary intention in the trust instruments?</p> <p>(b) If your answer to (a) is in the affirmative, do you agree that the safeguards set out in the TA 2000 (as discussed in paragraph 2.41 above) are sufficient to protect the interests of the beneficiaries?</p> <p>(c) What other safeguards (if any) would you suggest?</p> <p>(d) If your answer to (a) is in the negative, do you agree that section 25(1) of the TO should be retained and that section 25(2) of the TO be standardised with the approach to section 25(1)?</p> <p>(e) Do you agree that trustees of charitable trusts should be given wider powers to appoint agents along the lines of the TA 2000 (as discussed in paragraph 2.40 above); and if so, what safeguards would you suggest?</p>	
Asiaciti Trust Hong Kong Limited	I mentioned before that I am concerned that beneficiaries might be given too much power to sue trustees re investments and the trustees are not able to sue or go back to the IA's. I'd like to see some more research done on the protection afforded IA's by the IA's account opening documentation so that the IA's cannot be protected more than the trustees when beneficiaries sue. This would require a discussion with the Investment Industry's regulators in HK or possibly legal advisors to the Investment industry.
Baker & McKenzie	We agree that the power of delegation and the power to employ agents, nominees and custodians by trustee should be amended in the manner proposed in the Consultation Paper.
Bank of Communications Trustee Limited	<p>(a) We agree except that in addition to "any function to decide whether and in what way assets should be distributed" as in paragraph 2.39 as an exception for the purpose of delegation, the agent should not be delegated the power of varying the class or definition of beneficiaries of the trust.</p> <p>(b) We agree.</p> <p>(c) No suggestion for other safeguards.</p> <p>(d) –</p> <p>(e) We agree in particular in relation to the investment management of the funds of the charitable trusts. Charitable trusts are set up for the benefits of the general public and therefore, there should be adequate measures to protect the trust funds. As safeguards, we suggest that for those charitable trusts of substantial sizes, say, HK\$50million or above, qualified custodians and investment managers should be appointed subject to contrary intention in the trust instruments. Those qualification requirements as imposed by the Mandatory Provident Fund Scheme Ordinance could be an ideal</p>

	reference. The suggested safeguards may be first be applied to those charitable trusts that are recognized for tax exemption under the Inland Revenue Ordinance.
Butterfield Private Office (HK) Limited	(a) Yes. (b) Yes. (c) None. (d) Yes. (e) No.
David Gunson	(a) Yes. (b) Yes. (c) No protector over-rider. (d) Please refer to my 1994 paper. (e) No- Charities should under a separate law.
Hong Kong Institute of Certified Public Accountants	(a) We are not convinced of the need or appropriateness of giving trustees a general power to of appointing agents. However, consideration could be given to specifying particular functions or responsibilities in relation to which trustees may appoint agents, which could include most functions or responsibilities other than fiduciary responsibilities. (b) - (d) See our response to (a) above. (c) We would agree with the introduction of provisions like those In the TA 2000 for the appointment of agents by trustees of charitable trusts, subject to safeguards similar to those in the TA 2009, as referred to in paragraph 2.41 of the consultation paper.
James J Bertram	(a) Yes. (b) Yes. (c) None. (d) N/A. (e) Yes, with the same or similar safeguards as apply to trustees generally under TA 2000.
Joint Committee on	2.23 The Consultation deals with these issues well. The UK and Singapore have provided Trustees with a general power of

Trust Law Reform	<p>appointing agents but with a limitation on that power with respect to specific Trustee functions. Importantly, the UK TA 2000 attempts to guard against potential risks imposed by a general power of appointing agents by applying the statutory duty of care to that power, restricting the agent to appoint a substitute requiring agreements in writing in case of delegation of asset management functions, paying agents only reasonable remuneration and requiring Trustees to review the arrangements under which agents act and how those arrangements are being put into effect.</p> <p>2.24 We do not see any material difference of this approach with respect to Charitable Trusts. It should be remembered that these are default powers and restrictions which can in the appropriate cases be dealt with, or contracted out or/ in a carefully drawn instrument.</p> <p>(a) Yes. (b) Yes. (c) None. (d) Not applicable. (e) We think that Trustees of Charitable Trusts should be given the same powers to appoint agents along the lines of the TA 2000 as Trusts for non-charitable Beneficiaries and that the safeguards referred to in paragraph 2.20 are adequate for Charitable Trusts.</p>
Law Debenture Trust (Asia) Limited	<p>(a) We agree that this is a helpful default position.</p> <p>This is another example of where what may be necessary in a capital markets transaction is very different from what might be desirable under a private trust or investment trust. A bond trust instrument would deal with the ability to appoint agents and the manner of doing so explicitly in circumstances where it was necessary to be able to execute the trust and, for example, the issuer or trust assets were located in a different jurisdiction.</p> <p>We have no views on the remaining questions.</p>
Linklaters, Hong Kong (on behalf of Bank of New York Mellon, Deutsche	<p>(a) We have no objection to an amendment to the general power of appointing agents along the lines of the TA given that such provisions can be excluded or modified in the trust instrument as is common practice for professional trustees in England following the introduction of TA.</p> <p>However, due to the wording of section 14(1), it is not clear that the restrictions in section 14(2) only apply where the</p>

<p>Bank and The Hongkong and Shanghai Banking Corporation Limited)</p>	<p>appointment of an agent is done pursuant to the TA power to appoint agents as distinct from express powers under the trust instrument. For example, section 12(1) applies to “the persons whom the trustees may under section 11 authorize to exercise functions as their agent” and therefore would not in terms apply where the trustees authorize such agents under express powers. The reason why such amendment is required to section 14 is because, for example, market practice is such that, e.g., professional trustees would often enter into investment management agreements which contain a limitation of liability clause or allowing certain circumstances which may give rise to potential conflicts of interests to exist. It is therefore necessary for professional trustees to exclude the application of this restriction by way of express terms of the trust instrument. An amendment to bring section 14 in line with the language in section 12 would help to resolve this issue. Please note that the equivalent provision in section 20 of the TA (applying to nominees and custodians) only applies to nominees and custodians appointed under the statutory powers and not under express powers such as those under the trust instrument</p> <p>Please refer to our response in paragraph 3(a). Please clarify that where the new statutory power of appointing agents is expressly excluded, it does not affect or limit the appointment of agents under express powers in the trust instrument, the terms of such appointment, or the ability to limit liability for acts or defaults of agents appointed under express powers given under the trust instrument.</p> <p>(b) We do not express any view on these questions. (c) We do not express any view on these questions. (d) We do not express any view on these questions. (e) We do not express any view on these questions.</p>
<p>Michael Shan Kelly</p>	<p>(a) Yes. (b) Yes. (c) None. (d) N/A. (e) Yes with safeguards identified in TA2000.</p>
<p>Nicholas Pirie</p>	<p>A trustee should retain the overall fiduciary duties in managing the trust assets, unless the trust instrument states otherwise. However, that said the suggested amendments following TA 2000 would improve the situation, save where the contrary is expressed in the trust instrument. Large charitable trusts have to act through agents, and appoint boards of managers, or</p>

	nominees to companies limited by guarantee in the modern setting. So most charitable trusts do delegate. Some large ones even have CEOs. I would have the powers to delegate put in one section, and not peppered through the amended Ordinance as in the UK Act.
ONC Lawyers, Hong Kong China	(a) Yes. (b) Yes. (c) No. (d) N/A. (e) No. We see no necessity in allowing charitable trusts a wider power to appoint agents.
Respondent A	(a) The exercise of power of appointing agents (e.g. the act of selecting the agents itself) should be subject to the common law duty of care and the trustee should not be able to opt out of these duties even by express provisions in the trust instruments. (b) Yes, but subject to comments under Question 4(a) above. (c) If the powers are subject to the common law duty as indicated above, than no additional safeguard are necessary.
Respondent B	(a) Yes. (b) Yes. (c) None. (d) – (e) Trustees of Charitable Trusts should be given the same powers to appoint gents in accordance with TA2000 and that the safeguards set out in 2.41 are sufficient.
Respondent C	We do not have any views are we believe professionally drafted trust instruments would adequately deal with the issues raised.
Respondent D	(a) No, not necessary and not desirable to provide trustee with a general power to appoint agents because it might derogate from the fiduciary responsibility reposed by the settlor in the trustee. (b) Not applicable. (c) Trustee not exonerated from his duty of care.

	<p>(d) Yes, advancements in communication technology have made it unnecessary for trustees to delegate fiduciary responsibilities to overseas agents for properties situate abroad. Thus, section 25(2) should be standardized with the approach to section 25(1).</p> <p>(e) No, not necessary. Such power should be governed by the trust instrument.</p>
The Arab Chamber of Commerce & Industry	<p>(a) Yes.</p> <p>(b) Yes.</p> <p>(c) None.</p> <p>(d) NA.</p> <p>(e) Yes.</p>
The Association of Chartered Certified Accountants, Hong Kong	We agree.
The British Chamber of Commerce in Hong Kong	<p>(a) Agreed.</p> <p>(b) Yes.</p> <p>(c) Nothing additional.</p> <p>(d) N/A.</p> <p>(e) Agreed.</p>
The Chinese Manufacturers' Association of Hong Kong	<p>(a) 贊成賦予受託人委任代理人的一般權力。</p> <p>(b) 同意；《2000年受託人法》的保障已足以保障受益人的權益。</p> <p>(c) 無其他建議。</p> <p>(d) 不適用。</p> <p>(e) 贊成給予慈善信託的受託人在委任代理人方面有更廣泛的權力。</p>
The Hong Kong Association of	(a) We agree that trustees should be provided with a general power of delegation and that it should be enhanced in the manner suggested in the Consultation Paper and we also agree that it should be subject to any express intention in the

Banks	<p>trust instrument.</p> <p>(b) We agree that the conditions summarized in paragraphs 2.41 (a), (c) and (e) are appropriate although the main protection is that contained in paragraph 2.41 (a) i.e. applying the statutory duty of care to the delegation. As regards the protection suggested in paragraph 2.41(b) which restricts the appointment of an agent when the agent can appoint a substitute, restrict the liability of the agent or permit the agent to act in circumstances giving rise to a conflict of interest “unless it is reasonably necessary for the trustee to do so”, this carve out is potentially problematic and it may be difficult for trustees to make a decision as to whether any particular proposal comes within the exception. Perhaps an improvement would be to amend the exception to include when the particular proposal is in accordance with market practice. Paragraph 2.41(d) has similar problems in that it refers to reasonable remuneration and expenses properly incurred. Likewise, it might be difficult for trustees to make this determination and quite possibly it might be an improvement if the benchmark was market practice.</p> <p>(c) The condition under paragraph 2.41 (c) should be elaborated to restrict the choice to persons carrying on a business which consists of asset management services.</p> <p>(d) Not applicable.</p> <p>(e) There appears to be no compelling arguments as to why trustees of charitable trusts need wider powers than trustees of non-charitable trustees.</p>
The Hong Kong Bar Association	<p>The subject matter of the above proposals/queries has been addressed by the recommendations of the relevant overseas law reform bodies (principle the Law Commission in the UK) and subsequently implemented through legislation. To this extent, they are uncontroversial. Given that the existing trust law in Hong Kong has been largely based on the law in the UK, the Bar believes that, save for one point to be discussed below, the examples set by the UK on the relevant subject matter can be followed.</p>
The Hong Kong Society of Financial Analysts	<p>(a) Yes.</p> <p>(b) Yes.</p> <p>(c) None.</p> <p>(d) –</p> <p>(e) Yes, UK TA 2000 approach seems fine.</p>
The Institute of	<p>With the complexity of the business world, financial sectors and usefulness of expertise, the Institute subscribes to the</p>

Accountants in Management	proposal of engagement of agents and nominees for the good of trust administration, subject to the contrary intention in the trust instruments.
The Law Society of Hong Kong	<p>(a) Yes. In regard to discretionary powers of investment, in particular, it is necessary that the trustees be able to delegate fiduciary responsibilities to suitably qualified managers.</p> <p>Investment expertise is by no means universal amongst professional trustee organizations. Moreover, trust companies do not typically invest themselves – they appoint asset managers. These asset managers may be related parties, giving rise to concerns about conflict of interest. Delegation to third party managers who have the necessary expertise and independence from trustee is desirable in the interests of the beneficiaries.</p> <p>(b) Yes.</p> <p>(c) None. If the objective is to attract business to Hong Kong it is important to balance practicality and safeguarding the interests of the beneficiaries. Provided the statutory standard of care applies, it is not desirable to impose too many hurdles for the trustee to jump. In terms of professional trustees in particular, the compliance costs will inevitably have to be passed on to the end clients, resulting in more expensive trust fees, and a concomitant disincentive to chose Hong Kong law trusts or Hong Kong trustees.</p> <p>(d) N/A.</p> <p>(e) Yes. We think that charities should be given wide powers to engage agents to again more income for the charities.</p> <p>No specific additional safeguards are necessary in regard to charitable trustees. A new Charities Ordinance is needed to clarify and consolidate the law relating to Hong Kong charitable trusts and their operation.</p>

Question 5

<p>(a) Do you agree that the TO should be amended to provide trustees with a general power to employ nominees and custodians along the lines of the TA 2000 and the STA, subject to any express contrary intention in the trust instruments?</p> <p>(b) Do you agree that the safeguards set out in paragraph 2.48 are sufficient to protect the interests of the beneficiaries?</p> <p>(c) What other safeguards (if any) would you suggest?</p>	
Baker & McKenzie	We agree that the power of delegation and the power to employ agents, nominees and custodians by trustee should be amended in the manner proposed in the Consultation Paper.
Bank of Communications Trustee Limited	<p>(a) We agree. In fact, some foreign countries, such as Japan, restrict export of physical certificate of shares in their listed companies out of the countries. This means that a custodian or nominee in those countries must be appointed if a trust has investment there.</p> <p>(b) We agree.</p> <p>(c) No suggestion for other safeguards.</p>
Butterfield Private Office (HK) Limited	<p>(a) Yes.</p> <p>(b) Yes.</p> <p>(c) None.</p>
David Gunson	<p>(a) Yes.</p> <p>(b) Yes, but they will not stop mad off feeder fund clones – see Defender Ltd. Example attached and the extraordinary disclosures on P.11.</p>
Hong Kong Institute of Certified Public Accountants	<p>(a) We agree that the TO should be amended to give trustees a general power to appoint nominees and custodians for specific purposes.</p> <p>(b) The safeguards referred to in paragraph 2.48 should stipulated in the TO.</p> <p>(c) Other safeguards referred to in paragraph 2.41, in relation to the appointment of agents by a trustee under the TA 2009, should also be considered where relevant in relation to the appointment of nominees and custodians.</p>
James J Bertram	<p>(a) Yes.</p> <p>(b) Yes.</p>

	(c) None.
Joint Committee on Trust Law Reform	<p>2.26 We refer to paragraph 2.46 to 2.49 of the Consultation Paper. This is uncontroversial and for the reasons expressed in the Consultation Paper, we support the proposal.</p> <p>(a) Yes. (b) Yes. (c) None.</p>
Law Debenture Trust (Asia) Limited	<p>(a) We agree.</p> <p>(b) See earlier comments in relation to a statutory duty of care. The requirements should be set out in the trust instrument for investors in a bond to see rather than them having implied notice of a statutory requirement.</p>
Linklaters, Hong Kong (on behalf of Bank of New York Mellon, Deutsche Bank and The Hongkong and Shanghai Banking Corporation Limited)	<p>(a) Our comments in paragraph 4(a) apply equally to the provisions giving trustees a general power to employ nominees and custodian along the lines of the TA.</p> <p>(b) Given our view set out in paragraph 5(a), we do not express any view on these questions.</p> <p>(c) Given our view set out in paragraph 5(a), we do not express any view on these questions.</p>
Michael Shan Kelly	<p>(a) Yes. (b) Yes. (c) None.</p>
Nicholas Pirie	<p>The law here is hopelessly out of date. Most shares are held in Hong Kong through nominees. There is no physical scrip in circulation, as they are held electronically and just adjusted on the central clearing house computer.</p> <p>Obviously the law needs to be changed, and most pension funds, and provident funds appoint custodians for holding such</p>

	<p>physical scrip as there is, and Unit Trust Certificates, especially if there are large numbers of them. There should be no problem provided the nominees are companies providing such services.</p> <p>The proposal to amend our law along the lines of the TA 2000 and the Singapore Act should be followed.</p>
ONC Lawyers, Hong Kong China	<p>(a) Yes.</p> <p>(b) Yes.</p> <p>(c) None.</p>
Respondent A	<p>(a) Similar to comments to Question 4 above, the exercise of the power to employ nominees and custodians (e.g. the act of selecting nominees and custodians itself) should be subject to the common law duty of care and the trustees should not be allowed to opt out of such duties even by express provisions in the trust instruments.</p>
Respondent B	<p>(a) Yes.</p> <p>(b) Yes.</p> <p>(c) None.</p>
Respondent C	<p>We do not have any views are we believe professionally drafted trust instruments would adequately deal with the issues raised.</p>
Respondent D	<p>(a) Yes, introduction of a general power to employ nominees and custodians could facilitate trustees to achieve effective administration.</p> <p>(b) Yes, the proposed safeguards along the lines of TA 2000 appear sufficient to protect the interests of the beneficiaries.</p> <p>(c) Nil. The proposed safeguards are sufficient.</p>
The Arab Chamber of Commerce & Industry	<p>(a) Yes.</p> <p>(b) Yes.</p> <p>(c) None.</p>
The Association of Chartered Certified Accountants, Hong Kong	<p>We agree.</p>

The British Chamber of Commerce in Hong Kong	(a) Agreed. (b) Yes. (c) N/A. (d) Agreed.
The Chinese Manufacturers' Association of Hong Kong	(a) 贊成賦予受託人聘用代名人和保管人的一般權力。 (b) 同意；第2.48段所述的保障措施已足以保障受益人的權益。 (c) 無其他建議。
The Hong Kong Association of Banks	(a) This proposal reflects modern practice whereby investments are normally held by trustees and custodians and we believe that the proposal should be supported. (b) We agree that the safeguards proposed in paragraph. 2.48 are appropriate. (c) We think the consideration ought to be given to restricting fees and restrictions on liability on the part of nominees and custodians to be in accordance with market practice.
The Hong Kong Bar Association	The subject matter of the above proposals/queries has been addressed by the recommendations of the relevant overseas law reform bodies (principally the Law Commission in the UK) and subsequently implemented through legislation. To this extent, they are uncontroversial. Given that the existing trust law in Hong Kong has been largely based on the law in the UK, the Bar believes that, save for one point to be discussed below, the examples set by the UK on the relevant subject matter can be followed.
The Hong Kong Society of Financial Analysts	(a) Yes. (b) Yes. (c) None.
The Institute of Accountants in Management	With the complexity of the business world, financial sectors and usefulness of expertise, the Institute subscribes to the proposal of engagement of agents and nominees for the good of trust administration, subject to the contrary intention in the trust instruments.
The Law Society of Hong Kong	(a) Yes. (b) Yes.

	(c) No suggestion for the moment.
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Question 6

Do you agree that section 21 of the TO should be amended to provide trustees with wider powers to insure along the lines of the TA 2000 and the STA, subject to any express contrary intention in the trust instruments?	
Baker & McKenzie	In relation to question 6, we are particularly supportive of the proposed amendment to the trustee's power to insure, which we are of the view is very much required.
Bank of Communications Trustee Limited	We agree. We hope the new statutory powers will include the powers for the trustees to insure against third party liabilities if buildings are included in the trust assets, the key man insurance if a trust owns a private business, and directors and officers liabilities if a trustee or its employees are required to act as the directors of the private companies owned by a trust.
Butterfield Private Office (HK) Limited	Yes.
David Gunson	Yes.
Hong Kong Institute of Certified Public Accountants	We agree that the TO should amended to provide trustees with a wider power to insure along the lines of the TA 2009.
James J Bertram	Yes.
Joint Committee on Trust Law Reform	Yes. 2.28 We refer to paragraphs 2.50 to 2.54 of the Consultation Paper. This is uncontroversial and we agree with the proposals in the Consultation Paper for the reasons set out therein. This is a long overdue technical deficiency in the law and we agree with the proposals to fix it.
Law Debenture Trust (Asia) Limited	We agree.
Linklaters, Hong Kong (on behalf of Bank of New York Mellon, Deutsche Bank and The	We agree that section 21 of the TO should be amended to provide trustees with wider powers to insure along the lines of the TA.

Hongkong and Shanghai Banking Corporation Limited)	
Michael Shan Kelly	Yes.
Nicholas Pirie	<p>Section 34 (1) of the TA 2000 should be implement in Hong Kong, and a statutory power to insure the trust assets should be mandated, whether such assets, be in Hong Kong or elsewhere. Again if a Table A solution is adopted, then it should be the unusual trust instrument which would not require insurance.</p> <p>This provision only goes to trust assets. However most professional trustees do carry professional indemnity cover, and certainly for the MPF and ORSO business it is required. These costs are paid out of the management fees for the trust funds. There is something to be said to have a mandated provision where the Professional Trustee is remunerated, that he pay professional indemnity insurance out of the administration fee.</p>
ONC Lawyers, Hong Kong China	Yes.
Respondent A	The trustees should be given wide powers to insure (with no threshold imposed) and in exercising such powers, be subject to the general common law duty of care.
Respondent B	Yes.
Respondent C	We do not have any views are we believe professionally drafted trust instruments would adequately deal with the issues raised.
Respondent D	Yes, the wider powers would provide better protection to trust property.
The Arab Chamber of Commerce & Industry	Yes.
The Association of Chartered Certified Accountants, Hong	We agree.

Kong	
The British Chamber of Commerce in Hong Kong	Agreed.
The Chinese Manufacturers' Association of Hong Kong	贊成賦予受託人更廣泛的投保權力。
The Hong Kong Association of Banks	The existing statutory power to insure is clearly inadequate and the proposal to allow a more general power to insure should be supported.
The Hong Kong Bar Association	The subject matter of the above proposals/queries has been addressed by the recommendations of the relevant overseas law reform bodies (principle the Law Commission in the UK) and subsequently implemented through legislation. To this extent, they are uncontroversial. Given that the existing trust law in Hong Kong has been largely based on the law in the UK, the Bar believes that, save for one point to be discussed below, the examples set by the UK on the relevant subject matter can be followed.
The Hong Kong Society of Financial Analysts	Yes.
The Law Society of Hong Kong	<p>Yes. It should not be a contentious matter to afford trustees the power to take out prudent insurance against a range of risks. In principle it should be up to the trustees to determine whether to pay premiums out of capital or income.</p> <p>However, the question of insurable interest may need to be specifically addressed – as there may not be a potential loss to the trustee in many cases. It should be expressly provided that the trustee, acting in that capacity, has an insurable interest in the trust property.</p> <p>We would also like to see introduced an express power to insure the life of any person in which the trust has an interest. For instance a settler may establish a trust with a relatively small contribution initially but with the expressed intention of making additional contributions in future out of income as it arises or out of anticipated capital receipts. It is in the interest of the beneficiaries that he does so but in the absence of legislation it seems clear that the trustee itself has no insurable</p>

interest, and so irrespective of the relationship between the settler and the beneficiaries the trustee has no power to insure against the potential loss of expected future benefits.

Currently the settler must take out a policy on his own life and then assign the benefits to the trust, which is an unnecessary device to circumvent the underlying principle. A statutory recognition of the trustees' insurable interest in these circumstances would be welcome clarification and an incentive to major insurance companies to adopt Hong Kong trusts. This would benefit those who provide trust services in Hong Kong as well as those who advise on them.

Question 7

<p>(a) Do you agree that the TO should be amended to provide for a statutory charging clause for professional trustees of non-charitable trusts, subject to any express contrary intention in the trust instruments, along the lines of the TA 2000 and the STA?</p> <p>(b) Further to (a), if a trust instrument contains provisions entitling trustees to receive remuneration, do you agree that the TO should be amended to enable a professional trustee of the trust to charge for services that could be provided by lay trustees?</p> <p>(c) Do you think that professional trustees acting for charitable trusts should be allowed to charge for their services in the absence of a charging provision in the relevant trust instrument; and if the answer is yes, what constraints (if any) should be imposed?</p> <p>(d) Further to (c) above, if the trust instrument of a charitable trust contains provisions entitling trustees to receive remuneration, do you think that the TO should be amended to enable a professional trustee of the charitable trust to charge for services that could be provided by lay trustees?</p>	
<p>Baker & McKenzie</p>	<p>We have no objection to the proposal to provide for remuneration of trustees. It is rare for a trust instrument not to have provisions dealing with remuneration.</p> <p>However, we note that it is a current requirement that trustees of charitable trusts seeking to be exempt from tax under section 88 of the Inland Revenue Ordinance are not permitted to receive remuneration. This apparent inconsistency between the requirement of the Inland Revenue Department and the proposed amendment to the TO should be specifically addressed.</p>
<p>Bank of Communications Trustee Limited</p>	<p>(a) We agree. We had the experience that even a will nominating a trust company to be the sole executor and trustee of the estate of the testator was professionally drafted by a lawyer, the charging clause enabling the trust company to charge for its services was omitted. Amending the Trustee Ordinance as proposed will enable the deceased's estate to have professional management by a professional trustee or trust company under such circumstance. Moreover, if the lay trustee of a trust without a charging clause wants to retire and to have a professional trustee or trust company appointed as his replacement, he would have the difficulty if the Trustee Ordinance is not so amended.</p> <p>(b) We agree for the reasons stated in (a) above.</p> <p>(c) We agree for the reasons stated in (a) above because unlike the lay trustees, the professional trustees or the trust companies would usually have stronger financial position to compensate the trust funds for any wrongdoings. Therefore, for the public interest, professional trustees or trust companies should be encouraged to act as trustee for the charitable trusts. We suggest that the remuneration of the professional trustees should be fixed in agreement by the co-trustees with the professional trustees or otherwise by court direction.</p>

	(d) We agree for the reasons stated in (c) above.
Butterfield Private Office (HK) Limited	(a) Yes. (b) Yes. (c) Yes provided that the changes made are reasonable. (d) Yes.
David Gunson	(a) No. (b) No. (c) No. (d) No.
Hong Kong Institute of Certified Public Accountants	(a) We would agree, if, in the absence of a statutory charging provision in the TO. Or an express provision in the trust instrument, a professional trustee is prohibited from being remunerated, that the TO should be amended to allow professional trustees to be remunerated where no contrary intention is expressed in the trust instruments. (b) If a trust instrument contains provisions entitling trustees to receive remuneration, it is not clear why a professional trustee would not be able to charge for any services provided on a professional basis. If, however, there is any doubt about the matter, then it should be put legally beyond doubt. (c) The consultation paper does not explain why the UK and Singapore reforms have distinguished non-charitable and charitable trusts in this regard. Further clarification is needed therefore. However, subject to this point, in principle, it would seem reasonable that, where professional trustees are appointed to charitable trusts they should also be able to receive reasonable remuneration for their services, provided they are not the sole trustee in relation to any given charitable trust and the majority of other unconnected trustees agree that the professional trustee(s) may charge. (d) See the response to item (b) above.
James J Bertram	(a) Yes, but the doubt concerning the construction of section 29(2) TA 2000, which is explained in paragraph 58.12 of Underhill and Hayton Law of Trusts and Trustees (17 th Edition), should be resolved by making it clear that “once duly authorized thereafter duly authorized”. (b) Yes. (c) Yes, with the same constraints as are contained in TA 2000.

	<p>(d) Yes.</p> <p>[N.B. It should be noted that the Inland Revenue Department, in their publication “A Tax Guide for Charitable Institutions and Trusts of a Public Character”, in paragraph 9(d), state that “the governing instrument of a charity should generally contain[a] clause prohibiting members of its governing body (e.g. directors, trustees, etc) from receiving remuneration”. No authority is provided for this statement.]</p>
Joint Committee on Trust Law Reform	<p>2.30 We refer to paragraphs 2.55 to 2.62 of the Consultation Paper. Given the preponderance of professional trusteeships of non-charitable inter vivos and testamentary trusts, we think that it is right to give professional Trustees a statutory right to remuneration along the lines of the provisions in England and Wales and in Singapore.</p> <p>2.31 Clearly the position of professional Trustees of Charitable Trusts is more sensitive. We agree with the proposal for the reasons set out in clause 2.61 that default charging provisions in the TO should apply to professional trustees and we see no distinction between charitable and non-charitable trusts where, in Hong Kong at least, very many Trusts are administered, at least on the investment side, by professional Trustees. This will also fit in with the Law Reform Commission's impending look at regulation of charities in Hong Kong from a prudential i.e. not purely a tax deductible basis.</p> <p>(a) Yes. (b) Yes. (c) Yes. We think there should be no distinction between professional Trustees of charitable or non-charitable trusts. (d) Yes. See above.</p>
Law Debenture Trust (Asia) Limited	<p>(a) A bond trust instrument will always contain remuneration provisions which are governed by an accepted market standard. This should not be compromised as a result of any changes in the TO but to the extent that it is not we would agree with the proposed amendment.</p> <p>(b) Yes. (c) Yes. (d) Yes.</p>
Linklaters, Hong	<p>(a) We have no objection to the introduction of statutory charging clause for professional trustees along the lines of the TA</p>

<p>Kong (on behalf of Bank of New York Mellon, Deutsche Bank and The Hongkong and Shanghai Banking Corporation Limited)</p>	<p>except that we are of the view that all professional trustees, regardless of whether it is a trust corporation, a trustee of a charitable trust or a sole trustee, should be entitled to reasonable remuneration and that such remuneration should not be subject to approval of other trustees. In the context of capital markets transactions, professional trustees are often engaged to act as trustee in relation to shares of orphaned special purpose vehicles where the trust is declared in favour of charities. We note however that professional trustees are likely to have terms of remuneration in place in the trust instrument and the statutory charging clause is unlikely to be of practical application as a result of section 29(5) of the TA and provided that the statutory charging clause in no way affects or limits the express charging provisions in the trust instrument.</p> <p>(b) We agree that TO should be amended to enable a professional trustee (whether of non-charitable trusts or charitable trusts) to charge for services that could be provided by lay trustees.</p> <p>(c) Please see our responses in paragraphs 7(a) and 7(b).</p> <p>(d) Please see our responses in paragraphs 7(a) and 7(b).</p>
<p>Michael Shan Kelly</p>	<p>(a) Yes.</p> <p>(b) Yes.</p> <p>(c) No – if the Trust document did not so provide, then statute should not override, nor should Professional Trustees seek to be remunerated. If necessary the Court may consider particular circumstances and rule thereon.</p> <p>(d) No</p>
<p>Nicholas Pirie</p>	<p>With modern trusts which involve large assets, it is vital that professional standards are adopted in their management and administration. The charging clause should be the norm, where professional services are required and used. Further, trustees are required to travel to look at trust assets, or visit beneficiaries out of Hong Kong and this can be onerous on them. So the Ordinance should be amended to reflect not only charging, but re-imbusement for time travel and services afforded to the trust.</p> <p>Charitable Trusts are moving over to companies limited by guarantee, and therefore the charging provisions can be arranged in the instruments setting these up, and on transfer of assets. I think there is an even stronger argument for charging fees for charitable trusts where professional services are given. Always the accountants charge nominally for these troublesome small audits, and often they are not very satisfactorily undertaken for that reason. I have sat on a number of Charitable Trust Boards and this is a constant problem. Either the audit report is scant, or delivered late.</p>

ONC Lawyers, Hong Kong China	(a) Yes. (b) Yes. (c) Yes. There should not be such a difference because in reality many charitable trusts are administered by professional trustees. (d) Yes.
Respondent A	(b) Yes. (c) Yes, subject to notification of any change and at least annually to beneficiaries. (d) Yes.
Respondent B	(a) Yes. (b) Yes. (c) Yes, I would not differentiate between Charitable and non Charitable Trusts. (d) Yes.
Respondent C	We do not have any views are we believe professionally drafted trust instruments would adequately deal with the issues raised.
Respondent D	(a) No, professional trustees should have made adequate provisions in trust instruments. (b) No, services chargeable should be expressly provided for in the trust instruments. (c) No, it should be expressly provided for in the trust instruments. (d) The charging provisions contained in the trust instruments should be strictly adhered to, i.e. only chargeable if so provided in the trust instruments.
The Arab Chamber of Commerce & Industry	(a) Yes. (b) Yes. (c) Yes. (d) Yes.
The Association of Chartered Certified	We agree.

Accountants, Hong Kong	
The British Chamber of Commerce in Hong Kong	<p>(a) Agreed.</p> <p>(b) Yes.</p> <p>(c) Yes, professional trustees should be able to charge charitable trusts at levels up to their usual fee schedules, for their other trustee activities.</p> <p>(d) Yes.</p>
The Chinese Manufacturers' Association of Hong Kong	<p>(a) 贊成爲非慈善信託的專業受託人訂立法定收費條款。</p> <p>(b) 贊成修例以容許專業受託人就可以由非專業受託人提供的服務收取費用。</p> <p>(c) 應允許慈善信託的專業受託人就其服務收取費用。</p> <p>(d) 應修例以允許慈善信託的專業受託人就可以由非專業受託人提供的服務收費。</p>
The Hong Kong Association of Banks	<p>(a) We have no objection to the proposal provided that:</p> <ul style="list-style-type: none"> • There should be a clear definition of “professional trustees”, for example, whether a profession trustee should be a corporation, a licensed corporation or can be a natural individual with or without any specified professional qualification. • The exception referred to in paragraph 2.58(b) namely the words “(provided that he is not a sole trustee and each other trustee has agreed that he may be remunerated)” should be re-considered. We do not see any reason why a sole trustee should not be entitled to remuneration if he is acting in a professional capacity and the words “and each other trustee has agreed that he may be remunerated” do not seem to make sense in the context of a sole trustee. <p>(b) We agree that this proposal should be supported as it is often the case that professional trustees do provide an all round service including those services which could be provided by non-professionals. This being the case, we are agreeable that they should be remunerated.</p> <p>(c) We agree that trustees of a charitable trust should be entitled to remuneration and we suggest that the limitation should be the same as that with trustees of non-charitable remuneration namely that the remuneration should be limited to what is reasonable. Again, the words in the parenthetical in paragraph 2.59 are not understood. The same point arises as in</p>

	<p>relation to Question 7(a) in relation to these words which are the same as the words in paragraph 2.58(b).</p> <p>(d) We agree that trustees of charitable trusts should be allowed to receive remuneration for services that could be provided by lay trustees for the same reason as is mentioned in the answer to Question 7(b).</p>
The Hong Kong Bar Association	The subject matter of the above proposals/queries has been addressed by the recommendations of the relevant overseas law reform bodies (principle the Law Commission in the UK) and subsequently implemented through legislation. To this extent, they are uncontroversial. Given that the existing trust law in Hong Kong has been largely based on the law in the UK, the Bar believes that, save for one point to be discussed below, the examples set by the UK on the relevant subject matter can be followed.
The Hong Kong Society of Financial Analysts	<p>(a) No - Fees are the responsibility of the parties to the trust. It's not the duty of the law to amend an agreement between competent parties. At present, if there is a major issue then the parties can apply to the courts for a remedy - which seems to work well enough.</p> <p>(b) No - for the same reason as above.</p> <p>(c) No - for the same reason as above.</p> <p>(d) No - I don't think that the TO should be involved in this.</p>
The Institute of Accountants in Management	To commensurate with heavy duties of professional trustees, the Institute supports charging of fees by professional trustees on a reasonable basis, whether the trust is of a charitable nature or non-charitable nature. To allow charging of fees on a reasonable basis may help to retain the best professional trustees in Hong Kong and thus. Hong Kong will become, hopefully, a centre of trust industry in China and in the long run, in Asia.
The Law Society of Hong Kong	<p>(a) Yes, but the doubt concerning the construction of section 29(2) TA 2000, which is explained in paragraph 58.12 of Underhill and Hayton Law of Trusts and Trustees (17th Edition), should be resolved by making it clear that "once duly authorized thereafter duly authorized."</p> <p>For these purposes, the expression "professional trustees" should include persons exercising particular skill and knowledge, such as solicitors, whether acting in the course of their business or not: i.e. a person who is a solicitor should still be entitled to charge for the provision of his services as trustee even though he is not acting as trustee in the course of his practice.</p> <p>The power to charge should extend to the ability to retain remuneration for acting as directors of corporations underlying the trust.</p>

(b) Yes. If the intention is to provide protection for the beneficiaries and for proper skill and care not to be exercised in the administration of the trust, professionals should not be dis-incentivised by precluding their ability to recover payment for their time.

Where an individual trustee wishes to transfer the obligations of trusteeship to a professional trustee (because of complexity, old age or personal reasons) the absence of the ability to charge properly for professional services can prevent the handover of responsibilities – to the detriment of the beneficiaries.

(c) Yes, on the basis that, particularly in the case of large and substantially valuable charitable trusts, the trustees have high fiduciary duties for which they should be remunerated. Some directors serving on incorporated management committees of government subsidized schools (which are all accorded charitable status) are remunerated. There is therefore precedent for this in Hong Kong.

However, this should be with a very guarded approach. We should look at the TA 2000 constraints as a basis and also consider quorum and declaration of interest requirements. There should be a mechanism for the public and independent scrutiny of trustee charges in respect of charitable trusts, which should include an examination of the charges of any agent, especially an in-house agent; preferably with the Court of First Instance being the first port of call in examining fees and charges in these circumstances, or otherwise for the matter to be put to the Secretary of Justice, he being public guardian of charities.

(d) Yes. It is in the interests of a charitable trust that it is run as professionally as possible and frequently the “committed amateur” is an inappropriate choice for trustee. There seems to be no reason in principle why a distinction should be drawn in favour of the amateur.

[N.B. It should, however, be noted that the Inland Revenue Department, in their publication “A Tax Guide for Charitable Institutions and Trusts of a Public Character”, in paragraph 9(d), state that “the governing instrument of a charity should generally contain...[a] clause prohibiting members of its governing body (e.g. directors, trustees, etc) from receiving remuneration”. The IRD cite no legal authority on the requirement to prohibit payment to directors/trustees etc. It is administratively imposed- if you do not agree, you do not get charitable status. The Government would need to seek an understanding with the IRD if it should decide to go ahead with this proposal.]

Question 8

Do you have any other suggestions in relation to the default administrative powers of trustees provided in Parts II and III of the TO?	
Bank of Communications Trustee Limited	Trusts set up with the assistance and advices of professionals or the trust companies would usually render widest power of management to the trustees. We are of the view that the administrative powers provided in Parts II and III of the Trustee Ordinance apply mostly to those trusts which are not governed by professionally drafted trust instruments including the testamentary trusts created under the wills of the deceased persons. These provisions should be retained, subject to the amendments as proposed by the Consultation Paper as considered to be appropriate. We suggest that the current restrictions in s. 34 governing power of advancement should be removed in order to give greater flexibility to the trustees.
Butterfield Private Office (HK) Limited	No.
David Gunson	Please refer to the 1994 paper attached.
Hong Kong Institute of Certified Public Accountants	We have no further comments.
James J Bertram	No.
Joint Committee on Trust Law Reform	We think that the default administrative powers in Parts II and III of the TO should be changed as per our earlier detailed submissions see in particular paras 8.38 to 8.61 thereof.
Law Debenture Trust (Asia) Limited	For the purposes of a bond trust we would expect such powers to be recited exhaustively as being additional to those arising as a matter of general law.
The Law Society of Hong Kong	There is no particular justification for the restriction on advancement contained in Section 34(1)(a) of the TO and it is routinely excluded in trust instruments and professionally drawn Wills. It would make more sense for there to be no such restriction, subject to the trust instrument electing otherwise.
Linklaters, Hong Kong (on behalf of Bank of New York Mellon, Deutsche Bank and The	We refer to section 8(2) of the Trustee Ordinance (“TO”) which provides that bearer securities retained or taken as an investment by a trustee (not being a trust corporation) shall, until sold, be deposited by him for safe custody and collection of income with a banker or banking company. However section 18(1) of the TA (which we understand is proposed to be imported into the TO) provides that “if trustees retain or invest in securities payable to bearer, they must appoint a person to act as a custodian of the securities” and this provision does not apply “if the trust instrument or any enactment or provision

<p>Hongkong and Shanghai Banking Corporation Limited)</p>	<p>of subordinate legislation contains provision which (however expressed) permits the trustees to retain or invest in securities payable to bearer without appointing a person to act as a custodian” and “to any trust having a custodian trustee or in relation to any securities vested in the official custodian for charities”. We suggest that section 8(2) of the TO be amended to conform with the TA.</p> <p>Section 8(4) of the TO provides that any sum payable in respect of the deposit of bearer securities and collection of income shall be paid out of the income of the trust property. We suggest that such amounts can be payable out of trust funds generally (i.e., not necessarily related to that trust property and whether related to income or capital given that securities may not be income producing).</p> <p>Section 11 (5) of the TO provides that where any conditional or preferential right to subscribe for securities is offered to trustees, trustees may exercise such right and apply capital money subject to the trust in payment of such consideration. We suggest that such amounts can be payable out of trust funds generally so that income (in addition to capital moneys) can also be applied in payment of such consideration. Section 11(5) of the TO also provides that such rights may be assigned for the best consideration that can be reasonably obtained. This provision seems to be more onerous compared to common law which only requires trustee to sell when a fair price can be obtained. We believe that trustees should be entitled to sell at the fair market value at the time of sale and suggest that section 11(5) be amended accordingly.</p> <p>Section 12(2) allows trustees to apply capital money subject to a trust in payment of the calls on any shares subject to the name trust. We suggest that this provision be amended so that income, in addition to capital money, could be used to pay up calls on shares.</p>
<p>Michael Shan Kelly</p>	<p>No.</p>
<p>ONC Lawyers, Hong Kong China</p>	<p>No comment.</p>
<p>Respondent A</p>	<p>The default administrative powers should be as broad as possible.</p>
<p>Respondent B</p>	<p>As previously set out.</p>
<p>Respondent C</p>	<p>We do not have any views are we believe professionally drafted trust instruments would adequately deal with the issues raised.</p>
<p>Respondent D</p>	<p>No.</p>
<p>The Arab Chamber of Commerce &</p>	<p>No.</p>

Industry	
The British Chamber of Commerce in Hong Kong	Part II relates to investments; Part III to general powers of trustees and personal representatives. Many of these areas are covered in the specific questions already raised in this consultation.
The Chinese Manufacturers' Association of Hong Kong	無其他建議。
The Hong Kong Association of Banks	Nothing particular comes to mind.
The Hong Kong Society of Financial Analysts	No.

Question 9

- (a) Do you think that trustee exemption clauses should be regulated statutorily and whether the regulation should apply to all trustees or only professional trustees who receive remuneration for their services?
- (b) If the answer to the first part of questions (a) is yes, which of the following options do you prefer for regulating trustee exemption clauses:
- (i) prohibiting trustees to exclude liability for breach of trust for dishonesty or intentional or reckless failure to exercise the degree of care and diligence that is to be reasonably expected of a trustee along the lines of section 26 of the Mandatory Provident Fund Schemes Ordinance (Cap. 485);
 - (ii) prohibiting trustees to exclude liability for breach of trust where he fails to show the degree of care and diligence required of him as trustee along the lines of section 75B of the Companies Ordinance (Cap. 32);
 - (iii) imposing procedural safeguards to ensure that the settlor is aware of the trustee exemption clause;
 - (iv) subject trustee exemption clauses to a reasonableness test similar to the one imposed under the Control of Exemption Clauses Ordinance (Cap. 71)?
- (c) Do you have additional or alternative options for regulating trustee exemption clauses?

<p>Asiaciti Trust Hong Kong Limited</p>	<p>(b)(i) The use of the phrase “reckless failure”. I would prefer not to use this word in the new TO as I think the word “reckless” in and of itself alone is too generic and opens the door for a plaintiff’s lawyer to challenge a trustee.</p> <p>By example: What is “reckless” for a non-sophisticated investor is not necessarily reckless for a professional investor or a fund manager. So I think the word “reckless” provides too much ambiguity for plaintiffs to sue trustees. A phrase such as reckless needs to be clearly defined, again going back to the issue of clarifying ambiguities so that trustees and beneficiaries both know what the TO says about defining “reckless”. I think it would be too easy for counsel to bring an action and try to define “reckless” in court. It would be better to define it under the new TO.</p> <p>I disagree with the Joint Committee on Trust Law Reform (JCTLR) view on “simple negligence” versus “gross negligence”.</p> <p>A plaintiff’s lawyer could easily prove negligence or simple negligence on almost any matter after the fact. (e.g. Not coming back to the trustee’s office after lunch to look at emails on one investment on one Friday afternoon over 52 weeks in a year could be construed as negligence or simple negligence, but not gross negligence- the same behavior every Friday for 52 weeks could be construed as gross negligence).</p> <p>However, gross negligence seems to be a more willful and deliberate attempt to shirk one’s trustee duties. I think</p>
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	<p>trustees need to be protected from frivolous lawsuits from disgruntled beneficiaries and “negligence” or “simple negligence” would seem too easy of a cause for a plaintiff to prove while “gross negligence” requires more proof that the trustee willfully or followed a preconceived pattern of predictable behavior and did not handle their duties properly or opted out of a reasonable standard of care.</p> <p>Thus I would prefer to see the term “gross negligence” used throughout the new TO instead of the term “simple negligence”.</p>
Baker & McKenzie	<p>In relation to trustees’ exemption clauses, we are of the view that trustees’ exemption and exculpatory clauses should be statutorily regulated.</p> <p>We considered the proposal to limit the control of exemption clauses to ‘professional trustee’ but believe there is merit in providing a statutory limitation to all trustees. For trustees of the ‘informal’ and ‘unprofessional’ trust arrangements, it is unlikely that they will have the sophistication to draft exemption clauses into the trust instruments; if even there be a trust instrument. Therefore even if the statutory limitation applies to all trustees, these trustees would not be put to a more onerous standard. It is the professional trustees receiving remuneration who would turn their minds to draft an exemption/exculpation clause. They should be subject to control by the TO. Finally, there may be another group of players in the trust industry seeking to provide trusteeship as another “service” without a full appreciation of the duties and obligations of behaving as a fiduciary, and seeking to limit their business risks by use of exemption clauses in their terms of business. This may not be the part of the trust business that Hong Kong necessarily wishes to encourage.</p> <p>Distilled to the basics, the role of a trustee is that of a fiduciary. His duty of care is higher than that of an ordinary provider of services. In this sense, he should not be able to limit his liability for breach of trust arising only from ‘wilful’ misconduct or ‘gross’ negligence. To allow for certain players to limit their liability to that of gross negligence or willful misconduct is, in our view, setting the bar too low.</p> <p>In sum, our view is that the exemption clauses should be regulated by statute. It should apply to all trustees. We propose to adopt option (ii) along the lines of section 75B of the Companies Ordinance. Just as the standard of care proposed under Chapter 2 is a variable standard depending on the circumstances, so the exclusion of liability should be limited where the trustee fails to show the degree of care and diligence required of him as trustee in the relevant circumstances.</p>
Bank of Communications Trustee Limited	<p>(a) We consider that the regulation should apply to paid trustees only.</p> <p>(b) Option (i) is preferred which is in line with the suggestion of imposing statutory duty of care to the trustees.</p> <p>(c) We do not have additional option. In fact, the private trusts are commonly established by trust deeds which are in the</p>

	<p>form of special contract, that is, both the settlor and the trustee have to execute the document under seal and in solemn form. The settlor should not deny his awareness of the exemption clauses in any event.</p>
Butterfield Private Office (HK) Limited	<p>(a) I consider that trustee exemption clauses should be regulated statutorily and should apply to all trustees regardless of whether or not the trustee receives remuneration.</p> <p>(b) I prefer option (iv).</p> <p>(c) No.</p>
David Gunson	<p>(a) Yes.</p> <p>(b) Option (i).</p> <p>(c) No.</p>
Hong Kong Institute of Certified Public Accountants	<p>(a) There may be a case for reviewing the reasonableness of trustee exemption clauses and making them subject to control, primarily in relation to professional trustees who receive remuneration for their service. However, trustees that act dishonestly should not be able to benefit from exemption clauses,</p> <p>(b) Prima facie, option (i), that is, the approach adopted under section 26 of the Mandatory Provident Schemes Ordinance (Cap. 485) would seem to be the most appropriate option. Professional trustees acting in good faith, who may make an “honest mistake”, on the other hand, should not be denied the opportunity to limit their potential liability. Settlers should be made aware of any exemption or limitation clauses.</p>
James J Bertram	<p>(a) I am generally in favour of statutory regulation of trustee exemption clauses. In my view, such regulation should apply to all trustees who receive remuneration for their services and should extend to any attempt in the trust instrument to exclude or limit the statutory duty of care. However, certain types of trust should be excluded, viz. trusts where the trustee is already subject to statutory regulation of trustee exemption clauses (e.g. mandatory provident fund schemes) and so-called “commercial trusts” where the settlor is acting in the course of business (e.g. trusts in the context of corporate bond issues) where the terms of the trust will generally have been negotiated by sophisticated market professionals and where the trust will frequently have arisen out of contract rather than from the traditional transfer of property by way of gift - see the comments in paragraphs C.33 - C.40 of the UK Law Commission Report on Trustee Exemption Clauses (the UK Report).</p> <p>The UK Report concluded that a non-statutory approach should be adopted in the UK but I think that for Hong Kong statutory control is preferable notwithstanding some of the disadvantages associated with statutory control which the UK</p>

	<p>Report identifies.</p> <p>(b) I prefer either of options (i) - a prohibition along the lines of section 26 of the MPFS Ordinance - and (iv) - making an exemption clause subject to a reasonableness test as under the Control of Exemption Clauses Ordinance. The latter would have the added advantage of applying the same essential test to both trustee exemption clauses and to contractual exemption clauses.</p> <p>(c) None.</p>
<p>Joint Committee on Trust Law Reform</p>	<p>3.1 This is a complex legal issue. It also has complex policy ramifications for Settlers, Trustees and Beneficiaries and thus for Hong Kong in wanting to position itself as an attractive place to establish and administer Trusts It therefore deserves a “back to basics” analysis.</p> <p>3.2 The essential question is whether to regulate by statute the ability of Trustees to absolve themselves through the trust instrument or other trust documents from liability for behavior that would otherwise constitute a breach of trust.</p> <p>3.3 The starting point must therefore be “what is a breach of trust?” and that is a failure by the Trustee to meet his duty of care to the Beneficiaries. This brings us back to Part A of Chapter 2. The next question is whether the common law adequately deals with the exemption clause issue and then, if not, how trustee’s exemption clauses ought to be regulated by statute.</p> <p>3.4 The proposal is to adopt a statutory duty of care for Trustees with respect to the exercise of certain powers functions or discretions (see paragraph 2.2 above). That statutory duty is to behave reasonably, in the circumstances, having regard, essentially, as to whether the Trustee is a professional (i.e. paid) or a lay person (i.e. a volunteer). The impact of this professional / lay Trustee dichotomy in given cases is, essentially, thrown back on the courts to determine what is reasonable and they have shown increasingly less lenience on professional than lay Trustees.</p> <p>3.5 Of course, the statutory duty of care applies only to certain (the most critical) Trustee functions. The rest are left to the common law duty of care which is probably, in effect, not that much different given the courts’ recent tendency to hold professionals to a higher duty than lay persons. And the proposal is to allow Settlers or Trustees to “contract out” of the</p>

statutory duty with respect to some or all of the covered functions, this leaves the common law standard to govern that trustee behavior.

- (a) Professional Trustees who receive remuneration for their services should not have the benefit of exemption clauses except where the Settlor has been fully and properly and independently advised upon the nature and extent of exculpation.
- (b) Where all the beneficiaries who are sui juris consent to a specific breach of trust provided however that under no circumstances will exculpation for fraud, willful default and gross negligence be permitted.
- (c) Yes, retain the existing provision to allow the court to relieve any trustee (professional or lay) from personal liability for a breach of trust.

Reasons:

3.7 Given the flexible nature of the statutory standard of care, that Trustees can opt out of it and its closeness, in any event, to the default common law standard one must wonder why it should be necessary, or in fact possible, for Trustees to 'get out of it' at all.

3.8 What is the point of setting a flexible statutory standard of behavior that can be opted out of in any event, only then to allow Trustees to further lower the bar on the acceptability of their conduct through a choice of words in the trust instrument? *Armitage v. Nurse* says that trustees can, through the trust instrument, absolve themselves from all liability flowing from anything but fraud, willful misconduct or gross negligence. Even those who express concern at a strict liability on professional Trustees seem to agree that there should be no limitation on this decision.

3.9 How could a Trustee, calling himself a professional fiduciary in a position of high trust, be happy with such an undemanding standard; essentially not to be fraudulent or willful in misconduct but ok with engaging in misconduct and negligent behavior as long as is not grossly so? Other professionals would not, and often cannot under the law, adopt such meagre standards.

3.10 The fact is that the lower standards were expected of lay persons who were mostly the Trustees of yesteryear. This combined with the contract out approach to all but the “irreducible core of trust obligations” has created an opportunity to adopt inadequate standards and this should be addressed in our trust law reform. However, there may be circumstances where a Settlor is content to allow a Trustee to limit his liability for breach of trust such as where the trust investments are particularly risky or the Trustees fees are well below market.

3.11 How is it possible to achieve the right balance of interests here? By saying that it is not possible for professional Trustees to exempt themselves from liability for breach of trust except in the terms suggested in our answer to Question 9 above and to retain the current discretion of the court to relieve trustees from breach of trust in special cases (s.60 TO).

3.12 Lay-Trustees, who have a lesser standard in any event, should be thrown back on the common law regarding the enforceability of exculpation clauses i.e. Lord Millets begrudging test of limiting the effect of such clauses to protection from only honest to goodness old-fashioned negligence.

3.13 Professional Trustees may well have a different view on this issue and some have expressed strong reservations. They have argued that risk is an important commercial issue and that it makes business sense to choose a law that allows them to reduce that risk as far as possible and that what is proposed here will mitigate against them using Hong Kong. This is particularly the case if Hong Kong ends up having a higher standard of care than other jurisdictions. They may argue that it is better to leave this matter to the Courts than to legislate for it. The Courts will judge Trustees on the basis of conduct and not performance and will be sympathetic to Trustees who act properly.

3.14 Another view is that Hong Kong is a leading financial centre and should promote high standards across the board to protect the interests of Beneficiaries and thus the jurisdiction’s general reputation so that if professional Trustees do not want to meet high international standards, they should not operate under Hong Kong law.

3.15 Our answer provides, we think, a sensible compromise which is that Settlers and Trustees may opt for limited

	exculpation in circumstances where the legal nature and effect of such exculpation are both fully explained to Settlers.
Law Debenture Trust (Asia) Limited	<p>(a) In our view the approach taken in the UK should be followed and statutory regulation avoided.</p> <p>(b) A trustee cannot contract out of liability for breach of trust and the market standard providing that a trustee remains liable for negligence, wilful default and fraud should remain operative so that practice under Hong Kong law is not at odds with that followed in other markets with trusts that operate under English law. Importing the criteria from the other Ordinances referred to in this question would introduce uncertainty for all investors and other participants in the capital markets for bond issues governed by Hong Kong law.</p> <p>(c) The existing accepted international market practice of explicitly exempting liability other than for negligence, wilful default and fraud should continue in bond trust instruments governed by Hong Kong law.</p>
Linklaters, Hong Kong (on behalf of Bank of New York Mellon, Deutsche Bank and The Hongkong and Shanghai Banking Corporation Limited)	<p>(a) We are of the view that there should be no statutory regulation of trustee exemption clauses and that parties should be free to agree the scope of the trustee's liability exemption clause in the trust deed: this applies to all trustees including professional trustees. It is currently market practice for professional trustees to limit liability to negligence, fraud and wilful default. In addition to existing statutory controls which apply in specific contexts (e.g. in the context of an issue of debentures by Hong Kong companies as provided in S.75B of the Companies Ordinance), the scope of trustee exemption clauses are subject to more general limitations imposed by common law as reflected in <i>Armitage v Nurse</i>, so that trustee exemption clauses cannot validly exempt trustees from breaches of trust arising from trustee fraud. The nature of common law dictates that such limitations should be dynamic and evolve over time to be reflective of changes in the market within which the law operates. As further elaborated in paragraphs 9(b) and (c) below, we submit that the introduction of statutory regulation of trustee exemption clauses may inhibit a trustee from effectively, decisively and efficiently discharging trust business as a result of its scope of liability becoming uncertain or being subject to undue scrutiny.</p> <p>We submit that the current market practice, existing statutory controls and common law limitations together achieve a good balance between the trustees' need for certainty in the scope of their liabilities and recognition of parties' right to freedom of contract on the one hand and the beneficiaries' need to ensure that trustees do not act recklessly on the other, and there is therefore no need in practice for such statutory regulation to be imposed.</p> <p>(b)(c) As set out in paragraph 9(a), we are of the view that there should be no statutory regulation of trustee exemption clauses and that such clauses should be a matter of negotiation between the parties. In any case, we are of the view that there is no need for such statutory regulation in light of the current market practice which carves out liability for</p>

negligence, fraud and wilful default which is arguably consistent with the limitations set out in proposals (i), (ii) and (iv).

We submit that, if however trustee exemption clauses are to be regulated statutorily, at least in the context of commercial trusts, there is no reason to impose regulations that go beyond the position at common law as reflected in *Armitage v Nurse*, which establishes that trustee exemption clauses can validly exempt trustees from all breaches of trust except where the trustee commits actual fraud.

In relation to proposal (i), section 26 of the Mandatory Provident Fund Schemes Ordinance does not allow trustees to exempt their liabilities for breach of trust when they are (I) acting dishonestly or (II) when they intentionally or recklessly fail to exercise the degree of care and diligence reasonably expected of them. Whilst the limitation in (I) would be consistent with the common law position, the limitation in (II) goes beyond the common law position. For a trustee to be guilty of fraud, there had to be a fraudulent intention and proof of dishonesty so that even if trustees deliberately committed a breach of trust, if they did so in good faith, honestly believing that they were acting in the best interests of the beneficiary, there could be no fraud. We therefore disagree with the limitation outlined in (II) above.

We object to the proposals set out in (ii), (iii) and (iv) as a standard applicable to all trustees on the basis that they go beyond the position at common law.

In relation to proposal (ii), we note that under S.75B of the Companies Ordinance (the English law equivalent being s.192(5) of the Companies Act 1985), in the context of an issue of debentures by a company incorporated in Hong Kong, a trust deed for securing such issue may not exclude liability for breach of trust where he fails to show the degree of care and diligence required. In the context of professional trustees acting as bond or security trustee in capital markets transactions, it is usual for trustee exemption clauses not to exclude liability for negligence as a result of these provisions. However, such restriction on exemption clauses only applies in the context of trust deeds securing debentures issued by Hong Kong companies and there is no reason to expand this restriction to apply in other contexts. Limiting the freedom of professional trustees to exempt themselves from liability for breach of trust may result in capital market trustees being reluctant to exercise their discretion, and mean that investors' approval would more frequently be required, and even lead to trustees to refuse to act, each of which would affect the efficient administration of trusts and the promotion of Hong Kong law as governing law of trusts. It also interferes with the settlor's freedom to modify or restrict the liabilities of the trustees, especially in a commercial context where the law

	<p>has always sought to protect the freedom of commercial parties to determine contractual terms.</p> <p>The proposals set out in (iii) and (iv) seem to contemplate the situation where the settlor is an individual settlor in a non-professional context, which would clearly be inappropriate in the context of professional trustees in dealings with sophisticated or professional parties in a commercial context.</p> <p>Proposal (iii) would also be logistically burdensome for professional trustees who enter into high volumes of trust transactions in the commercial context. We note that the UK Law Commission's conclusion is that a rule of practice by relevant industry bodies, rather than legislation as proposed in 10(iii), be introduced to require paid trustees to take reasonable steps to ensure that the settlor is aware of the meaning and effect of an exemption clause for negligence.</p> <p>In relation to proposal (iv), we note that, following consultation in 2006, the UK Law Commission rejected a similar proposal to require trustee exemption clauses to satisfy a reasonableness test similar to that in the Unfair Contract Terms Act 1977 and we agree with this conclusion especially on the basis that trustees should know the extent of its protection before deciding whether or not to take on a trusteeship and in setting its fees. The application of a reasonableness standard to trustee exemption clauses would give rise to considerable uncertainty and potential litigation and reasonableness may possibly be judged in the light of circumstances prevailing after the trust instrument is entered into and with the benefit of hindsight. These risks impair the ability of trustee to act decisively in the interests of beneficiaries. Greater certainty in the effectiveness of exemption clauses also helps prevent speculative breach of trust claims and helps trustees to act decisively and reduces costs and fees associated with insurance payments and provision for litigation.</p>
Michael Shan Kelly	<p>(a) Exemption clauses should be statutorily regulated and no difference made between remunerated and unremunerated trustees. I am taking the expression “professional trustees” to mean “commercial’ trustees or ‘remunerated’ trustees.</p> <p>(b)(i) Yes.</p> <p>(b)(ii) Yes.</p> <p>(b)(iii) No, since the initial settlor of the trust might, in terms of settlements made, have settled very little of the total settled property of the trust.</p> <p>(b)(iv) No.</p> <p>(c) Philosophically, if you are in the business of trustee services there is no excuse for breaches of trust and only those</p>

	<p>already commonly exempted should be pardoned. That you are not in the trustee services business should also not be an exemption from responsibility. Better you don't act as a trustee than expect exemption.</p>
Nicholas Pirie	<p>Being an MPF trustee there are watered down provisions in Section 26 of the MPFO. We are also required to carry insurance for fraud. I see no reason why professional paid trustees should be able to exempt themselves from liability for breaches of trust, failures to act honestly, and for acts of gross negligence. Or where a criminal act is involved. They can now, and should obtain insurance.</p> <p>The "take it or leave it package" does not encourage responsibility, and it reflects institutional callousness at a point in time, when every other organ of government and the SFC and the Banking Commission are encouraging fiduciary and financial responsibility.</p> <p>The Trustee Association is at the moment developing a Code of Practice for Provident Fund and ORSO Scheme Providers. I am of the firm view that professional trustees should subscribe to a Code of Practice, being fiduciary agents for settlors etc., If a mere insurance agent has to subscribe to, and comply with a Code of Practice, there seems to be even less reason why a professional trustee should not do so also. Lord Justice Millett's remarks echo my feelings and the feelings of many. I echo what is set out in Paragraph 3.12</p> <p>In the last financial crisis responsible trust companies have in fact re-imbursed Lehman Brothers' losses and taken them on board and are resolving the claims with the intermediaries who sold them. The law ought to be encouraging the responsible trustee, and discouraging the hard nosed cowboy.</p> <p>The burden and risk should be taken by the professional trustee who charges, and the lay trustee should be exempt. How that translates into the legislation I am unclear. The suggestion of the adoption of a code, when set in the context of the Control of Exemption Clauses legislation could be good combination.</p> <p>Again there could be a Table A opt in provision, which if the settlor specifically does not want, then he can opt out.</p>
ONC Lawyers, Hong Kong China	<p>(a) Yes but to professional trustees only.</p> <p>(b)(i) No comment. At the moment we don't have a definite view.</p> <p>(b)(ii) No comment. At the moment we don't have a definite view.</p> <p>(b)(iii) Yes. Whatever the standard and the wordings eventually adopted, settlors/clients should be specifically drawn to the attention of the existence of such clauses.</p> <p>(b)(iv) No comment. At the moment we don't have a definite view.</p>

	(c) No.
Respondent A	(a) They should apply to all trustees. (b) The standard under (iv) above is preferred.
Respondent B	(a) Yes - Only for Professional Trustees. (b) (11) Prohibiting Professional Trustees to exclude liability for breach of Trust unless trustee unless approved by all beneficiaries of full age and legal capacity or the Courts. (c) No.
Respondent C	We do not believe that trustee exemption clauses need to be regulated as there is no evidence of abuses of exemption clauses and that if regulations were imposed, professional trustees will increase fees charged for the additional risks taken.
Respondent D	(a) Yes, but only trustee exemption clauses seeking to exempt professional trustees should be subject to statutory control; while lay trustees who provide services for free should not be subject to control. (b) Option (i) (which more or less reflects the common law position). (c) No.
The Arab Chamber of Commerce & Industry	(a) Yes. (b)(i) Yes. (b)(ii) No. (b)(iii) Yes. (b)(iv) No. (c) No.
The Association of Chartered Certified Accountants, Hong Kong	(a) ACCA Hong Kong agrees that trustee exemption clauses should be regulated statutorily. As suggested in Question 1 above, we are of the view that trustees, whether professional trustees or lay trustees, should owe a duty of care to the beneficiaries. Hence, we consider it more appropriate for the regulation to apply to all trustees. Amongst the four options provided in the consultation document, we consider that options (i), (ii) and (iv) could apply.
The British Chamber of Commerce in	(a) We doubt many trustee exemption clauses, although commonly included in trust deeds, would operate in practice. We would prefer to see legislation that confirms trustees cannot release or exonerate themselves from breach of trust arising

Hong Kong	<p>from the trustees own fraud, willful misconduct or gross negligence. This is because many trustees in Hong Kong are not qualified, or regulated by an existing professional body. We think even in circumstances where trustees receive no remuneration these provisions should operate.</p> <p>(b) We prefer option (iv).</p> <p>(c) No.</p>
The Chinese Manufacturers' Association of Hong Kong	<p>(a) 應以法例規管專業受託人的負責條款，不論其走否收取服務報酬；因為專業受託人在能力上理應達到較高的標準，亦應為其行為負責。</p> <p>(b) 可考慮採用方案二及三；循《公司條例》的方向規管受託人免責條款，同時亦訂定程序上的保障措施，要求受託人必須採取足夠的措施令財產授予人留意免責條款。</p> <p>(c) 無其他建議。</p>
The Hong Kong Association of Banks	<p>(a) We believe that trustee exemption clauses should be regulated but only in respect of trustees who receive remuneration for their services.</p> <p>(b) Of the proposals, we believe that section 26 of the Mandatory Provident Fund Schemes Ordinance seems to provide the best option. We do, however have a concern over the word "reckless". This is a concept normally applicable to criminal law and equates to gross negligence. There is authority that a civil law context "gross negligence" amounts to no more than ordinary negligence. In the context of the proposal, we believe that "reckless" is intended to convey something more serious than ordinary negligence and is akin to unreasonably disregarding an obvious risk. We think that thought should be given to replacing the word "reckless" with wording which is less likely to connote mere negligence.</p> <p>(c) Nothing particular comes to mind.</p>
The Hong Kong Bar Association	<p>It is proposed in the Consultation Paper that trustee exemption clauses seeking to exempt professional trustees who receive remuneration for their services should be subject to statutory control. Such a proposal does not appear to be based on the model in any other Commonwealth jurisdictions. That said, judicial sentiments have been expressed (as noted in 3.5 of the Consultation Paper) as to the need to restrict professional trustees' ability to exempt their liability. In view of the tendency for large trust corporations to force standard form exemption clauses upon users/clients who very often have no choice (or little awareness that such clauses are being included in the trust instruments that they are signing as settlor), the Bar recognizes that this is an area deserving serious attention.</p>

	<p>As to the legal mechanism of tackling the problem, there are two broad techniques. One is to leave it to the Courts to deal with the issues as and when they arise, by reference to existing common law or equitable doctrines (such as the line of reasoning developed by Millett LJ, as he then was, which was cited in 3.5 of the Consultation Paper), with or without the adoption by the industry of any Code of Practice. The other is by statutory intervention.</p> <p>It may be said that the common law is already capable of providing sufficient protection against unreasonable or oppressive exemption clauses. However, the position may not be clear cut. The sentiments of Millett LJ cited 3.5 of the Consultation Paper can be said, if one reads the passage in context, not to represent a statement as to what the law was but merely Millett LJ's recitation of what a lot of people had wished the law to be. His Lordship expressly stated (at 256D) that the matter should be left to Parliament to deny legal effect to exemption clauses of the type before him.</p> <p>In the Bar's view a better way of tackling exemption clauses which are regarded as unreasonable would be via statutory intervention. However, the Bar is not convinced that the appropriate model is the one based on the MPFS. A more appropriate model would be one based on Control of Exemption Clauses Ordinance. That has the benefit of being tried and tested and hence the Courts (and trustees and clients alike) have a body of jurisprudence from which to consult. Other regimes (e.g. those based on MPFS or provisions in the Companies Ordinance governing debenture trustees) are peculiar to me specific type of trusts concerned and the rationale may not readily apply to all trusts. The Bar is of the view that the proposed regulation should only apply to trustees who provide services as part of their business.</p> <p>As to safeguards about "client awareness" of the existence of exemption clauses the Bar is inclined to leave this matter to be dealt with by the existing legal principles. If the Control of Exemption Clauses model is followed, then it is to be noted that one of the statutory factors taken into by the courts is, in effect, client awareness. The problem of onerous terms being forced on a party or a client without any positive or subjective awareness is not unique to the area of trusts and we think that the problem should be tackled by the general law rather than some peculiar provisions applicable only to this area of the law.</p>
The Institute of Accountants in Management	<p>As professional trustees are recommended to be allowed charging fees on a reasonable basis, professional trustees should discharge their duties reasonably and professionally. As such, clauses exempting duties of trustees from negligence should not be allowed. At the same time, the law should impose strict rules and regulations on trustees in carrying out their duties. In particular, the highest standard of duties of care imposed on the trustees under both section 26 of the Mandatory Provident Fund Schemes Ordinance (Cap.485) and section 75B of the Companies Ordinance (Cap. 32) should be adopted. As such, the standard and reputation of the trust industry of Hong Kong will be maintained. In the long run, Hong Kong will be the leader of the trust industry in China and Asia. Further, legal changes should be made to allow early detection of</p>

	<p>irregularity of the undesirable acts of the black sheep in the industry so that the interests of trust assets, settlors and beneficiaries are protected.</p>
<p>The Law Society of Hong Kong</p>	<p>(a) Yes, we believe that trustee exemption clauses should be regulated statutorily.</p> <p>In our view, such regulation should apply to all trustees who receive remuneration for their services, and should be subject to the core duties referred to in regard to Question 1(a) which should not be capable of exclusion. However, certain types of trust should be excluded, viz. trusts where the trustee is already subject to statutory regulation of trustee exemption clauses (e.g. mandatory provident fund schemes) and so called “commercial trusts” where the settler is acting in the course of business (e.g. trustees acting in the context of corporate bond issues) where the terms of the trust will generally have been negotiated by sophisticated market professionals and where the trust will frequently have arisen out of contract rather than from the traditional transfer of property by way of gift – see paragraphs C.33- c. 40 of the UK Law Commission Report on Trustee Exemption Clauses (the UK Report).</p> <p>The UK Report concluded that a non-statutory approach should be adopted in the UK but we think that for Hong Kong statutory control is preferable notwithstanding some of the disadvantages associated with statutory control which the UK Report identifies.</p> <p>(b)(i) We prefer option (1). This has the merit of conforming the standards.</p> <p>(b)(ii) Not preferred. This covers any form of neglect and would be too far reaching.</p> <p>(b)(iii) Not preferred. This is not likely to prove workable in practice. Trusts may be created in a number of ways, and procedural safeguards will not be of general application. For instance, a trust may be created by declaration of trust by the trustee, where the settlor does not participate in the documentary formalities, and it may not be practicable to persuade him to execute a separate document which would be a trust document showing his agreement. In the case of a Will Trust, would the testator be obliged to execute an extra-testamentary instrument and how would this be dealt with in probate? Moreover, if the intention is to attract business from overseas, the formalities may have to take place outside the jurisdiction. Should independent notarization of the consent be obtained? This may not be practicable, or may operate as a disincentive to adopt HK law trusts.</p> <p>(b)(iv) Not preferred. This is fraught with potential difficulties. What may be reasonable for the settlor and trustee may not be reasonable in respect of the beneficiaries (to whom the trustee owes its duties). Moreover it may change over time. A trust relationship is likely to last much longer than a contractual one of the kind to which the Control of Exemption Clauses Ordinance applies.</p>

	(c) No.
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Question 10

<p>(a) Do you agree that the TO should provide certain basic rules regarding beneficiaries’ right to information?</p> <p>(b) If your answer to (a) is in the affirmative, do you prefer the first option (which is set out in paragraph 4.9) or the second option (which is set out in paragraph 4.10)?</p> <p>(c) If you do not agree with those two options but still believe that the TO should provide for beneficiaries’ right to information, please set out what you believe the TO should provide, for example, what information should trustees provide to beneficiaries and what class of beneficiaries (e.g. beneficiaries with interests in possession (such as life tenants), beneficiaries vested in interest only (such as reversionary or future entitlements) or beneficiaries with a right to be considered only (such as discretionary objects)) should be entitled to the information?</p>	
<p>Asiaciti Trust Hong Kong Limited</p>	<p>Right of beneficiaries-</p> <p>I think it is important to separate the beneficiaries who have an equity interest from beneficiaries who have a right to receive a distribution.</p> <p>A trust is set up by a settler with benefits accruing to those named as beneficiaries. A trust by its nature removes the beneficiaries from the right to legally “hold” outright the assets or to legally “own” the benefit of those assets. Beneficiaries enjoy the “distribution” of the assets (cash distributions) or the “value/benefit” conferred by those assets (e.g. the right to live in a house, right to use a boat).</p> <p>Settlors when they set up a trust, did not conceive that beneficiaries would have a right to insert themselves into the management of a trust. That is one reason why settlors do not give assets to beneficiaries outright. Settlors want the assets managed for the benefit of beneficiaries, but settlors do not necessarily want beneficiaries to actively manage the assets.</p> <p>Thus if the aim of the new TO is to give rights to the beneficiaries, then I think we need to agree and define a division of “equity rights” as to what beneficiaries are entitled to under the trust assets. Once we agree on a definition of the differences between beneficiaries rights to assets, then we can determine what rights to information the beneficiaries should have.</p> <p>If a beneficiary is of legal age, and has an equitable right/share to assets specific, then the new TO should address what information should be made available to the beneficiary (once they have reached legal age). However, if they only have a right to a distribution, then the TO should address this so that lawsuits to open up trust information to beneficiaries is regulated.</p> <p>I don’t believe any beneficiaries should be given copies of the trust deed. The beneficiaries are not a signing party to the</p>

	<p>trust in that they have not given any “consideration” in exchange for the right to receive information contained in a trust deed. The beneficiaries are only the recipients of rights and benefits conferred by the trust assets, they are not trustees, nor are they owners of the trust assets until such time as the assets are distributed.</p> <p>We can look to contract law to see that consideration is a key element in every contract. Both parties have to give or promise something in a contract in order to receive something in return. [In a trust deed, the beneficiaries do not give anything hence, what is their right to demand certain information to be turned over to them?]</p> <p>I think that is why Protectors should exist. The more rights to information we give to beneficiaries in the TO, the more problems we create for trustees. I think that most of these rights should be given to Protectors.</p> <p>My preference is that the TO should state that Trust deeds should indicate what the settler wants- in other words, if the settler says no information to beneficiaries, then the settlor’s wishes should be honored.</p>
Baker & McKenzie	<p>We do not agree that the TO should provide rules regarding beneficiaries’ right to information.</p> <p>The law is in a state of flux in this area; the landscape has changed dramatically just in the last decade both on the nature of the right to trust information, and the scope of that right. We agree with the concerns stated in paragraph 4.9 of the Consultation Paper that it would be premature to codify all the common law principles in this area.</p> <p>In our practical experience, some trusts would simply be better administered if beneficiaries were aware of the trust arrangement; other trusts would create all sorts of undesired consequences if disclosure to beneficiaries were mandated. On the one hand, it is the beneficiaries who have the right to enforce the trust, so they need to know of its existence. On the other hand, many wealth owners set up trust specifically to preserve wealth; wealth that could be dissipated when the beneficiaries know of its existence. Information in the hands of a beneficiary, or even a right to information, could create problems for a discretionary beneficiary faced with potential claims from creditors, divorcing spouse, etc.</p> <p>One could potentially legislate to provide that trustees have a duty to inform beneficiaries with vested interests. However, careful considerations need to be given as to the nature of information that should be provided. Should the disclosure be limited to information about the beneficiary’s own entitlement, or should it be about all of the trust’s assets and liabilities? What constitutes “trust information”, and whether disclosure is in the best interest of beneficiaries, are issues that attract litigation.</p> <p>In light of the above, we do not consider it desirable for the TO to provide any rules regarding beneficiaries' right to information.</p>
Bank of Communications	<p>(a) We agree. This will help the beneficiaries, in particular those of the trusts administered by lay trustees, to ensure that the trusts have been properly administered and their interests have not been damaged by wrongdoings of the lay trustees.</p>

Trustee Limited	<p>(b) We prefer the first option.</p> <p>(c) -</p>
Butterfield Private Office (HK) Limited	<p>(a) Yes, but only in respect of a beneficiary that has a vested interest in the trust.</p> <p>(b) Neither.</p> <p>(c) Only those beneficiaries who have a vested interest should be entitled to information on a trust. Such a beneficiary should be entitled to all information that reasonably they require in connection with their vested interest. This should not include discretionary beneficiaries.</p>
David Gunson	<p>(a) Yes.</p> <p>(b) The first option.</p>
Hong Kong Institute of Certified Public Accountants	<p>(a) We agree on the need to balance the various interests, as discussed in paragraph 4.8 of the consultation paper. While it seems that there is an increasingly common view that beneficiaries should be entitled to more information from trustees than the common law currently requires, there is as yet no consensus on the scope of that information and on whether or not to codify the requirement for disclosure of such information. The consultation paper does not quote an example of any jurisdiction that has codified the requirement at this stage. Under the circumstances, it may be better to wait and see whether and how recommendations for statutory amendments that have been made in other jurisdictions are implemented.</p> <p>(b) If, however, it is decided that codification of some basic rules is desirable, a cautious approach should be adopted initially in relation to both the categories of beneficiaries that are entitled to trust information and the scope of information to which they are entitled to be provided.</p> <p>As regards the option in paragraph 4.9 of the consultation paper, even providing the information referred to in the draft bill produced by the Law Institute of British Columbia of Canada, as outlined in the consultation paper, could be quite onerous for trusts with a range of assets, as it appears that, amongst other things, it would be necessary to obtain a valuation of each of the assets. It is also questionable whether any beneficiary should be able to receive this information upon request, including beneficiaries with only a right to be considered as discretionary objects. The second option, indicated in paragraph 4.10, may be preferable, but the statutory requirement to provide information could be limited to beneficiaries with a real expectation of benefit. However, further clarification is needed of precisely what information would be provided under this option, as disclosing to beneficiaries their interest in a trust without disclosing the trust property (e.g., assets and liabilities) would be of limited use to them.</p>

James J Bertram	<p>(a) Yes.</p> <p>(b) I prefer the second option.</p>
Joint Committee on Trust Law Reform	<p>4.1 This is a very unsatisfactory area of the law. A reading of paragraphs 4.1 through to 4.10 confirms this. Judicial pronouncement on this area has been widely varied to say the least. The English case of Schmidt v. Rosewood Trust Ltd essentially shifts the basis of beneficiaries' rights to information from the notion of a proprietary interest in trustee information as a species of property to a more general idea that because such information can be critical in allowing beneficiaries to enforce trusts it goes to the heart of the validity question i.e. an unenforceable trust is no trust at all. This latter view has resulted in expanded discretionary court powers to decide who should get trust information and what that information should be.</p> <p>4.2 There are those that argue that, given the state of the common law and the panopoly of circumstances that could determine not only the circumstances in which beneficiaries ought to be told that they are such, but the nature of the information to which they should then be entitled, no attempt should be made to codify this but to leave it to the supervisory powers of the court.</p> <p>4.3 The problem with this is that it does not provide much certainty either to beneficiaries or trustees.</p> <p>4.4 This should be subject of course to the terms of the trust deed except so far as rights of beneficiaries who have trust interests which are vested in possession.</p> <p>4.5 In terms of the information that should be provided, again, this depends upon the nature of the trust interest. The deed itself can deal with this but the default position should be that any beneficiary (other than a mere object of a power) should be entitled upon request to copies of the trust deed and all ancillary documents. That beneficiary should also be entitled to all information concerning the state of the investment of the fund and the amount of income they are entitled to.</p> <p>4.6 We think that a specific provision should be enacted which provides that subject to the terms of the trust and to any order of the court, a Trustee should not be required to disclose his deliberations leading to the manner in which he exercised a discretion or performed a duty, or his reasons therefore (refer paragraph 12.31 of our detailed submission).</p>

4.7 Whilst the majority of those who attended the Forum were in favour of guidelines, the details of them remain to be agreed (see paragraph 4.5 above). A minority feel that no codification is best and that the Courts should be left to decide who shall receive what in any particular case applying the decision in Schmidt v. Rosewood Trust Ltd. Arguably, that goes against the trend in legislation of providing guidelines and therefore some certainty. Not to provide some guidelines could mean that Hong Kong foregoes an opportunity to provide an attractive item on its agenda. There are certainly those who are concerned not to overly protect Beneficiaries in terms of the guidelines or at all. Some point to specific difficulties, for example:-

- (a) under pension schemes, whether the interest of an employee is vested or not, there may be questions as to entitlement; and
- (b) there may be circumstances where it is not in the best interest of a Beneficiary to know. This could be so where there are divorce proceedings involving the Beneficiary.

4.8 It is also sensibly pointed out that Settlers may not wish Beneficiaries to be informed. Therefore the terms of the Trust Deed should be able to override the guidelines, enabling a Settlor to opt out of them. Whatever the position the Court should be able to exercise its power to provide as it sees fit in any particular circumstances.

4.9 Broadly there is agreement with the approach taken in the Consultation Paper in paragraph 4.10. Following on from discussion at the Forum, we accept the need for further discussion on the terms of any guidelines and we are happy to work with Government on this or any other matters arising. We answer the questions as follows:

- (a) Yes.
- (b) We do not agree with either option but rather set out our preferred option below in answer (c).
- (c) The duty to inform a Beneficiary should be dependent upon the nature of his trust interest. If the Beneficiary has a trust interest which is vested in possession (which would normally necessarily require him to be of majority), he should be told of that fact and the nature of any contingency. If the Beneficiary is a mere object i.e. a member of a discretionary class so that he has no vested interest in possession contingent or otherwise he should only be told that id he asks. Even so, such guidelines should be subject to the Terms of the Trust Deed to enable the Settlor to opt out of them. Whatever the position the court should be able to override the situation in exercising its jurisdiction under the decision in Schmidt v. Rosewood Trust Ltd.

There should be transitional provisions which apply the new regime to Trusts coming into effect on or after the date of

	the passing of the new legislation.
Law Debenture Trust (Asia) Limited	(a) We disagree as the position in the capital markets needs to be addressed quite differently. The information provided in section 4 is more pertinent to private trusts than bond trusts where, in the latter case, there are firm and universally accepted practices for the provision of information to investor-beneficiaries, either through the clearing systems or following receipt of proper evidence of their holding of the investment concerned. There is the need also for the trustee to avoid creating any unfair advantage for one investor over the others when providing such information. Any inadvertent impact on the established international market practice for the dissemination of information to investors arising from a change in the TO should be avoided.
Linklaters, Hong Kong (on behalf of Bank of New York Mellon, Deutsche Bank and The Hongkong and Shanghai Banking Corporation Limited)	(a) The proposed rules regarding beneficiaries' right to information goes beyond the common law position. The context there is clearly that of family trusts in notifying beneficiaries that they have rights. However, in the commercial context in which professional trustees operate, and in particular, in the context of capital market transactions where the use of charitable trust structures for special purpose vehicles is common, these rules are inappropriate and again would be logistically burdensome for professional trustees who enter into high volumes of trust transactions. In a commercial context, any right to information would be provided in the trust instrument which would be negotiated between commercial parties. We note that the duty is subject to any express contrary intention in the trust instrument and professional trustees are likely to exclude such statutory rights in the trust instrument. (b)(c) N/A.
Michael Shan Kelly	(a) Yes, but not yet to discretionary beneficiaries. (b) The second option is preferred. (c) I believe major (over 18 years of age) discretionary beneficiaries should be informed, where possible, of the nature of their interest along with a summary of the terms of the trust including the names of the settlor and trustee as well as the contact details of the trustee. I do not support the provision of financial information being required to be given to discretionary beneficiaries under any circumstances except at the discretion of the trustee. For major non-discretionary beneficiaries I believe their rights to information are no less than shareholders of a company.
Nicholas Pirie	Open disclosure and discussion with beneficiaries often dispels myths and the "closed shop" secret elements of trust administration. I have sat on a range of public charitable trusts, club committees, and pension trusts, and the clear provision of relevant information is very important in Hong Kong. Otherwise an impression of partiality, cabalism, sectionalism, racialism is inculcated, whether or not such exists.

	<p>Provision of Information about Entitlements</p> <p>This must be given to those who are vested in interest without doubt. For those with future defeasible interests, one has to balance the provision of too much information giving rise to unfulfilled expectations, or those which are impossible to deliver. Or information which is too insensitive and makes the administration of the trust more difficult later. Thus if a Letter of Wishes indicates preference of 1 contingent beneficiary over another, and a rather derogatory reason for so preferring, then it is better that the trustees summarise the Letter.</p> <p>I am of the firm view that discretionary beneficiaries are entitled to information which affects the financial viability of the trust and its assets, and to exclude them from the provision of information courts disaster.</p> <p>With Provident Fund Trusts, there are often requests for information which can be met with clear rules as to how discretions are exercised. Always there is a problem about the statutory set off, which the employer asks for, when an employee is made redundant, and whether a refund can be obtained at the expense of residuary beneficiaries. So clear letters of policy are required. Similarly where the employee is made bankrupt and his entitlements fall in on retirement. So with the bigger trusts openness and accountability require clear statements on regular issues which arise, and policy statements in relation thereto.</p> <p>It is clear that not only the employees, but their divorcing spouses, children and other potential beneficiaries are entitled to get information. So in Hong Kong it is important to include discretionary beneficiaries in this information process.</p> <p>Again it would be better to adopt a list of information in a new Schedule which a trustee should provided to vested beneficiary and a non vested contingent beneficiary on an Opt in Opt out basis, similar to Table A.</p>
ONC Lawyers, Hong Kong China	<p>(a) Yes. For the sake of certainty especially in light of the rather diverse approaches by the courts under common law.</p> <p>(b) No comment. At the moment we don't have a definite view on the extent of this duty.</p> <p>(c) No comment. At the moment we don't have a definite view on the extent of this duty.</p>
Respondent A	<p>(a) Yes.</p> <p>(b) Beneficiaries should be entitled to information only when they have a vested interest in the trust OR if the settlor has expressly provided in the trust instrument that such beneficiary is entitled to receive such information whether or not his or her interests has vested. Furthermore, the protector (if any) should also have the right to sufficient information for the</p>

	protector to carry out his or her duties and functions under the terms of the trust.
Respondent B	<p>(a) Yes.</p> <p>(b) 4.9.</p> <p>(c) Neither option would be suitable. For life interest Trusts - Beneficiary should be advised he is a beneficiary when he attains majority and the nature of his entitlement Discetionary Trusts - Beneficiaries should not be advised. Support the view that it is important to allow Trustees and the Court wide discretion so that they can act in the best interests of the Beneficiaries.</p>
Respondent C	No comments as they are not relevant to Respondent C.
Respondent D	<p>(a) Yes, though the relevant provisions should be carefully drafted to strike a balance between the accountability of trustees, the maintenance of confidentiality and the proper administration of trust.</p> <p>(b) First Option is preferred because it provides certainty as to the class of beneficiaries who would be entitled to information.</p> <p>(c) Not applicable.</p>
The Arab Chamber of Commerce & Industry	<p>(a) Yes.</p> <p>(b) We prefer the first option set out in paragraph 4.9.</p> <p>(c) No comment.</p>
The British Chamber of Commerce in Hong Kong	(a) We do not think this area of law needs amending in Hong Kong at present. Case law is always developing in this area and the Courts set the boundaries on which types of information can be disclosed to which types of beneficiaries.
The Chinese Manufacturers' Association of Hong Kong	<p>(a) 贊成訂定有關受益人知情權的基本規則。</p> <p>(b) 可考慮採用第二個方案，即受託人須根據受益人的要求告知其在信託中所享有的權益。</p> <p>(c) 不適用。</p>
The Hong Kong Association of Banks	<p>(a) We believe that beneficiaries should have rights to information.</p> <p>(b) We consider neither of the alternatives suggested in paragraphs 4.9 and 4.10 to be ideal. The suggestion in paragraph 4.9 is very broad and applies the right to all beneficiaries who require information. The proposal also contains an exception which in practice would be difficult to operate (see the final paragraph of paragraph 4.7). As regards paragraph 4.10, again the proposal is wide and includes discretionary objects of trusts which we think is undesirable.</p>

	<p>(c) We think that the right to request for information should be for persons who are of full age and capacity and who have vested entitlements. This should be a right to be informed of the fact that they are a beneficiary and to be provided with trust documents, information about the trust and documents relating to the trust. We think that as long as the trust is vested, this should include future interests, defensible interests and conditional interests. We do not think that such right should apply to discretionary beneficiaries as we believe that that would inhibit trustees from making decisions as to which discretionary beneficiaries should benefit from a trust. Disclosure of trust information to discretionary beneficiaries should be subject to any express intention in the trust instrument or discretion of the trustees if the trust instrument does not provide for the same.</p>
The Hong Kong Bar Association	<p>Trusts (and trust information) come in all shapes and forms. The existing common law contains sufficient flexibility to enable the Courts to cater for the facts of individual trusts. The Bar does not believe that it would be fruitful to define the sort of information which, by default, trustees are obliged to provide to beneficiaries. The Bar does not support this proposal.</p>
The Institute of Accountants in Management	<p>Allowing beneficiaries' right to the information of trust is one of the means to have early detection of undesirable acts of trustees and to preserve the value of trust assets. Therefore, the Institute agrees to the proposal of allowing beneficiaries a right to the trust information.</p>
The Law Society of Hong Kong	<p>(a) Yes. The current state of the law in the light of the Rosewood Trust case is very unsatisfactory. Whilst the courts should retain their inherent jurisdiction, it is very desirable in our view that the TO sets out the fundamental rights of beneficiaries with vested interests to information, and these core rights should not be subject to adverse modification by the trust instrument, as it otherwise becomes impossible for beneficiaries having a legitimate and immediate interest in the trust assets to identify or enforce their rights, and this is a potential vehicle for fraud.</p> <p>However, given that this should not in principle be subject to modification by the trust instrument, these core rights to information should not be more than is absolutely necessary as a matter of public policy to permit those interested to exercise their rights. Beyond this it should be open to the settlor to determine the amount of information to be made available by the trustee and the restrictions on disclosure. There are many instances where settlors quite legitimately do not wish beneficiaries to know of a prospective entitlement. They may feel for instance that children, knowing of a large inheritance, may be disincentivised, or otherwise put at risk of adverse influences.</p> <p>(b) Neither. In particular any approach which contemplates an obligation to provide information to any beneficiary who asks for it even in the case of mere discretionary objects is particularly difficult, and would make Hong Kong an unattractive place to base a discretionary trust.</p>

(c) The nature of the information to be supplied should depend on the position of the individual beneficiary as follows:

<u><i>Nature of interest</i></u>	<u><i>Information entitlement</i></u>
Vested interest in possession	<ul style="list-style-type: none"> ● to be informed of his entitlement promptly upon it arising ● to be provided with accounts of the trust ● to be provided with any other information relating to the assets of the trust which he may request and which it is reasonable for the trustees to produce and for him to receive
Contingent Interest	<ul style="list-style-type: none"> ● to be informed of his contingent entitlement, promptly upon it arising and the nature of the contingency
Discretionary object	<ul style="list-style-type: none"> ● None, in the absence of an express direction in the trust instrument
Protector or Enforcer	<ul style="list-style-type: none"> ● to be informed of decisions of the trustee relating to any matters

Binding directions and other documents which the Trustees are obliged by the terms of the trust instrument to act in accordance with should be discloseable as trust documents.

Letters of Wishes or other, non-binding, indications of views or preferences given to the trustees, and information concerning the deliberations of the Trustees should be expressly protected in the absence of a court order requiring disclosure.

Question 11

Do you agree that the beneficiaries of a trust, who are of full age and capacity and are absolutely entitled to the trust property, should be empowered to remove a trustee, along the lines of the TLATA of the UK?	
Asiaciti Trust Hong Kong Limited	I don't think Beneficiaries should be allowed to remove trustees. Protectors should be given this power to remove trustees. Beneficiaries are not trustees, nor are they given power by the settler to run, manage or invest the trust assets or make changes to the trust deed.
Baker & McKenzie	We support the proposal set out in paragraph 4.14 giving the beneficiaries the right to remove trustees.
Bank of Communications Trustee Limited	We agree only if all the beneficiaries are of full age and capacity and have fulfilled the vesting condition specified in the trust instrument that entitles them to be distributed the trust assets. If the beneficiaries do not have vested interest in the trust assets, giving them the power to remove the trustee may render the objective of the settlor void if such power is abused. For example, the beneficiaries, before the age specified in the letter of wishes by the settlor to have trust assets distributed to them, may request the trustee to exercise its discretion to make the distribution earlier. If the trustee refuses, the beneficiaries may abuse the power to remove the trustee and appoint one of them or a person willing to co-operate with them to be the new trustee in order to have the distribution.
Butterfield Private Office (HK) Limited	Yes.
David Gunson	Yes.
Hong Kong Institute of Certified Public Accountants	We agree that beneficiaries of full age and capacity, who are absolutely entitled to the trust property, should be empowered to remove a trustee, in similar manner and circumstances to such beneficiaries under the UK Trusts of Land and Appointment of Trustees Act 1996.
James J Bertram	Yes.
Joint Committee on Trust Law Reform	Yes. 4.11 This is well summarized in the Consultation Paper and provides a relatively easy means for Beneficiaries of a Trust who are dissatisfied with the Trustee to remove such a Trustee rather than relying on the rule in <i>Sounders v. Vautier</i> to bring

	the trust to an end.
Law Debenture Trust (Asia) Limited	Our only comment is that a bond trust instrument will provide for mechanics for removing a trustee in accordance with the standard market practice that has been developed in the markets.
Linklaters, Hong Kong (on behalf of Bank of New York Mellon, Deutsche Bank and The Hongkong and Shanghai Banking Corporation Limited)	In the event that beneficiaries' right to remove a trustee along the lines of the Trusts of Land and Appointment of Trustees Act 1996 is introduced, we suggest that where the trust instrument already provides a right for beneficiaries to remove a trustee, the statutory right of removal is disapplied. In the context of capital markets transactions and professional trustees, trust instruments typically provide expressly for resignation and/or removal of trustees and the statutory right of removal should not invalidate or override the express terms of the trust instrument negotiated between the parties.
Michael Shan Kelly	Yes.
Nicholas Pirie	<p>There ought to be a provision in the Ordinance to remove trustees through incapacity or incompetence. However when dealing with Chinese Family Trusts, I believe that the beneficiaries getting together to remove father's appointed trustee will not be popular. Also this section is not clear as to whether it applies to trust corporations. This should not be a mere device to remove a trust out of the jurisdiction, or some other frivolous reason. In UK the power is required more often as there are more trusts set up under the Settled Land Act, and where land is held jointly on trust because of the legislation.</p> <p>The Court ought to retain the overriding right in the Hong Kong context, as the private trusts contain more assets than the average UK trust. If a new section was introduced for a summary application to Court upon the application by:</p> <ol style="list-style-type: none"> a. a request signed by all the beneficiaries to remove a trustee for cause; b. replace a trustee who is incapable of exercising his proper functions either because he mentally disordered, or constantly absents himself from the jurisdiction of Hong Kong, or otherwise fails to perform his duties as trustee, then a court can remove and appoint a new trustee. <p>This would enable the court to exercise wider powers than at present, and supervise the trust.</p>
ONC Lawyers, Hong Kong China	Yes.

Respondent A	The beneficiaries of a trust should be empowered to remove a trustee but only if there is unanimous consent from all beneficiaries.
Respondent B	Yes.
Respondent C	No comments as they are not relevant to Respondent C.
Respondent D	Yes, provided that it is not contrary to trust instruments / intention of settlor.
The Arab Chamber of Commerce & Industry	Yes.
The Association of Chartered Certified Accountants, Hong Kong	ACCA Hong Kong considers that respect should be paid to the wish of the settlor and hence trustees should not be removed unless a real need arises. Hence we consider that the existing route for beneficiaries to remove trustee is reasonably adequate. We do not agree that the beneficiaries should be empowered to remove trustees even though they are of full age and capacity.
The British Chamber of Commerce in Hong Kong	We disagree with this proposition. The existing common law precedent in <i>Saunders v Vautier</i> is sufficient, in our view. This requires a new trustee to be appointed; and thus the provisions of the trust arrangement will still be observed, as prescribed by the settlor. We would be concerned that removing the trustee would be used to break the trust, otherwise.
The Chinese Manufacturers' Association of Hong Kong	贊成在所有信託受益人一致同意的情況下，有權將受託人撤職及委任新的受託人。
The Hong Kong Association of Banks	A person who is of full age and capacity and is absolutely entitled to trust property is able to call upon the trustees to transfer that property to him. We think it is logical that such a person should also be empowered to remove a trustee and appoint a replacement. We would therefore support the proposal.
The Hong Kong Bar Association	The subject matter of the above proposals/queries has been addressed by the recommendations of the relevant overseas law reform bodies (principle the Law Commission in the UK) and subsequently implemented through legislation. To this extent, they are uncontroversial. Given that the existing trust law in Hong Kong has been largely based on the law in the UK, the Bar believes that, save for one point to be discussed below, the examples set by the UK on the relevant subject matter can be followed.

The Institute of Accountants in Management	So long as the beneficiaries are of full age and capable of entitlement and absolutely entitled to the trust properties, the Institute is of the view that they should be allowed to replace the trustees. Hong Kong adopts an economy of free market. Competition is one of the ways to maintain the quality of good trustees in the market.
The Law Society of Hong Kong	Yes provided the TLATA requirements are followed in full. Specifically (and this is not mentioned in the Consultation Paper) Section 19 of TLATA applies only to the extent that “there is no person nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust”. The power should apply only as a default power in the absence of any other person entitled to appoint trustees.

Question 12

<p>(a) Do you agree that RAP should be abolished, without retrospective effect?</p> <p>(b) If your answer to (a) is negative, do you agree that RAP should be modified by introducing one fixed perpetuity period, similar to that adopted by Singapore? How long do you think the new fixed perpetuity period should be (80 years, 100 years, 125 years, 150 years or any other period)?</p>	
Baker & McKenzie	<p>We strongly support the proposals to abolish the rules against perpetuity (“RAP”) and the rule against excessive accumulations (“REA”). The RAP is an archaic rule which, as noted in paragraph 5.6 of the Consultation Paper, is not consistent with the leasehold system of land law in Hong Kong. The existing REA under the Perpetuities and Accumulations Ordinance is one of the key reasons why settlors have historically sought to avoid the application of Hong Kong trust law.</p> <p>Trust instruments can, of course, still provide for termination of trust and for trust accumulation periods.</p> <p>As an aside, even without a RAP, the uncertainty of the laws of Hong Kong beyond 2047 must influence a settlor's decision to set up a perpetual trust in Hong Kong.</p>
Bank of Communications Trustee Limited	<p>(a) We support and agree to abolish me RAP without retrospective effect.</p> <p>(b) We may accept also the proposal of 150 years as our second preference.</p>
Butterfield Private Office (HK) Limited	<p>(a) Yes.</p> <p>(b) N/A.</p>
David Gunson	<p>(a) Yes.</p>
Hong Kong Institute of Certified Public Accountants	<p>As under the Perpetuities and Accumulations Ordinance, settlors may already choose a fixed perpetuity period of no more than 80 years (paragraph 5.3 of the consultation paper refers) and no argument is advanced against this provision, it would appear to be reasonable to make 80 years, or possibly 100 years, a fixed perpetuity period.</p>
James J Bertram	<p>(a) No.</p> <p>(b) In my view the RAP should be modified by the introducing a fixed period of 100 or 125 years subject to any shorter period specified in the trust instrument.</p>
Joint Committee on Trust Law Reform	<p>(a) Yes. We favour the flexible option set out in paragraph 5.4.</p>

	<p>5.1 The Consultation Paper clearly sets out the background and considerations, particularly in the interests of Hong Kong.</p> <p>5.2 The Government provides two options. One is to abolish the Rules against Perpetuities (“RAP”) without retrospective effect; the other is to provide a fixed perpetuity period. The Government is in favour of reforming RAP but is open minded upon which option should be adopted. The majority favour abolition of the rule. There was minority support for simplifying but retaining the rule and adopting a longer fixed maximum period such as 150 years.</p> <p>5.3 There is no doubt that for the benefit of dynastic succession and for perpetual Purpose Trusts to properly serve business requirements, there is a need for perpetual trusts. Without them, business is and will be lost to other jurisdictions. The simplest option is to abolish the rule and this is what this discussion draft proposes in answer to Clause 6.5 below.</p> <p>5.4 However, there is a further and more flexible option than those proposed worth consideration, namely:</p> <ul style="list-style-type: none"> • trusts are perpetual i.e. the rule be abolished; • despite this, statutory provision be enacted that trusts can later be changed to continue for a fixed period; and • if the continuity of a trust is initially or later confined to a fixed period, then the fixed period can, as per the terms of the trust deed, be shortened or extended or the trust can be made perpetual but all such actions can only be taken with the express consent in writing of the Settlor during his life but by no other person.
Law Debenture Trust (Asia) Limited	We have no views on this as the application of RAP is more relevant to private trusts.
Linklaters, Hong Kong (on behalf of Bank of New York Mellon, Deutsche Bank and The Hongkong and Shanghai Banking	We have not given great thought to the operation of RAP and REA in areas other than commercial finance and security transactions. However, in these areas, these rules serve no discernible purpose and represent technical pitfalls which must be navigated around - for example in documenting bank capital securities issues which may involve the issue of perpetual (i.e. non-redeemable) debentures. We would agree that in these areas at least the rules should be abolished.

Corporation Limited)	
Michael Shan Kelly	(a) Yes. (b) N/A.
Nicholas Pirie	Both are archaic and irrelevant in Hong Kong.
ONC Lawyers, Hong Kong China	(a) Yes. We submit that abolishing RAP altogether will increase the attractiveness of HK trust and that the reasons for RAP are rather obsolete. (b) N/A.
Respondent A	(a) The RAP should be abolished with retrospective effect.
Respondent B	(a) Yes. (b) 100 years.
Respondent C	No comments as they are not relevant to Respondent C.
Respondent D	(a) No, RAP should not be abolished. (b) Yes, agree that RAP should be modified by introducing one fixed perpetuity period; but no preference as to its length, so long as there is certainty.
The Arab Chamber of Commerce & Industry	(a) Yes. (b) No and 125 years.
The British Chamber of Commerce in Hong Kong	(a) Yes. (b) N/A.
The Chinese Manufacturers' Association of Hong Kong	(a) 不贊成廢除反財產恆繼規則。 (b) 同意參考新加坡的做法，實施固定財產恆繼期；並建講新的固定財產恆繼期應為50年。
The Hong Kong	(a) The rule against perpetuities in its present form is one of the most complex and at least understood rules of

<p>Association of Banks</p>	<p>English/Hong Kong jurisprudence. It is arcane in the extreme a trap for the unwary and can often give rise to persons benefiting who were never intended to benefit. The rule should therefore either be abolished or revised so that it is more easily understood.</p> <p>(b) There are however, strong policy arguments for there being a period beyond which assets should not be tied up and rather than there being the complex formulation of a life or life in being plus 21 years, a fixed period would be desirable as to which of the periods suggested is really a matter of balancing freedom of the settlor to tie up his assets in such way as he chooses against the undesirability of assets being tied up for an excessively long period. A period of 150 years may be a reasonable period for succession planning.</p>
<p>The Hong Kong Bar Association</p>	<p>The subject matter of the above proposals/queries has been addressed by the recommendations of the relevant overseas law reform bodies (principally the Law Commission in the UK) and subsequently implemented through legislation. To this extent, they are uncontroversial. Given that the existing trust law in Hong Kong has been largely based on the law in the UK, the Bar believes that, save for one point to be discussed below, the examples set by the UK on the relevant subject matter can be followed.</p>
<p>The Law Society of Hong Kong</p>	<p>(a) No. We are not in favour of total abolition of the RAP; rather RAP should be replaced by a new fixed period.</p> <p>(b) Yes. The RAP should be modified by introducing one fixed perpetuity period of 150 years and this should be without retrospective effect. Legislation with retrospective effect is a rarity at common law.</p> <p>Although the legislation should be amended without retrospective effect there should be specific provision to permit existing trust assets to be re-settled (if there is power to do so under the existing trust instrument) to extend up to the end of the permitted period without offending against the existing rule.</p>

Question 13

<p>(a) Do you agree that REA should be abolished? Please give reasons.</p> <p>(b) If your answer to (a) is yes, will your answer be different if RAP is also abolished so that there will be no control over the period of accumulation?</p> <p>(c) Do you think that REA should be retained in some form with regard to charitable trusts; and if so, how long should a charitable trust be allowed to accumulate its income?</p>	
Baker & McKenzie	<p>We strongly support the proposals to abolish the rules against perpetuity (“RAP”) and the rule against excessive accumulations (“REA”). The RAP is an archaic rule which, as noted in paragraph 5.6 of the Consultation Paper, is not consistent with the leasehold system of land law in Hong Kong. The existing REA under the Perpetuities and Accumulations Ordinance is one of the key reasons why settlors have historically sought to avoid the application of Hong Kong trust law.</p> <p>Trust instruments can, of course, still provide for termination of trust and for trust accumulation periods.</p> <p>As an aside, even without a RAP, the uncertainty of the laws of Hong Kong beyond 2047 must influence a settlor's decision to set up a perpetual trust in Hong Kong.</p>
Bank of Communications Trustee Limited	<p>(a) We agree. Nowadays, many families would have their family members residing in different countries, including those countries with higher tax rates. Trusts are therefore commonly used as lawful vehicle in tax planning arrangements for such families. One of such arrangements is to accumulate income of the trusts as capital. Abolition of REA would help to attract more such kind of trusts to choose Hong Kong as the situs of trust administration.</p> <p>(b) We hold the view that accumulations are only limited by the perpetuity period.</p> <p>(c) We agree. We have no preference for the length of the period but it should not be longer than 21 years.</p>
Butterfield Private Office (HK) Limited	<p>(a) Yes. Should it be the wish of a settlor that his/her trustees should distribute income, the settlor could use a life interest trust or can in the trust instrument give a vested interest in the income to a beneficiary or class of beneficiaries.</p> <p>(b) No.</p> <p>(c) Yes. 5 years.</p>
David Gunson	<p>(a) Yes. Rae gives the worst outcome and has no purpose any longer.</p> <p>(b) No.</p>

	(c) Yes.
Hong Kong Institute of Certified Public Accountants	We have no strong view regarding abolition of the rule against excessive accumulations of income (“REA”), generally, but consider that REA should be retained for charitable trusts, to ensure that the income from charitable trusts is applied for its intended purposes well within fixed perpetuity period (should one be adopted; see the response to question 12 above). The UK Law Commission proposal of 21 years is reasonable, but a slightly longer period might also be acceptable. It would be helpful to know what time periods have been adopted in similar circumstances in other jurisdictions.
James J Bertram	(a) Yes. I agree with the reasons given in the Consultation Paper. (b) No, but I am not in favour of total abolition of the RAP; rather RAP should be replaced by a new fixed period and simplified as in Singapore and the UK. (c) No. Trustees of charitable trusts are under a duty to further the charitable objects of the trust and must exercise a power to accumulate income with good reason in the context of discharging that duty.
Joint Committee on Trust Law Reform	5.6 Once again the Consultation Paper sets out clearly the Background and Considerations. 5.7 The Government considers the Rule Against Excessive Accumulations of Income (“REA”) to be archaic and proposes to abandon it. They are concerned as to whether Charitable Trusts should be able to accumulate income in perpetuity. (a) Yes. The rule is archaic, complicated, provides uncertainties, may frustrate the wishes of the Settlor and in modern times is unnecessary. Flexibility shall be provided by remitting accumulation of income throughout the life of a Trust or for any shorter period determined by the Trust Deed. (b) No. (c) We suggest that it is not a question of “how long” but rather “how much”, we propose that trustees of Charitable Trust should be required to distribute not less than, say, 25 of net income annually, perhaps looked at over 10 year average. The balance they could then distribute or accumulate as they decide. This would ensure a reasonable benefit to charity compulsorily and prevent abuse of the use of Charitable Trusts. The regulation of this should be addressed in the upcoming Law Reform Commission review of charitable trust regulation.
Law Debenture Trust (Asia) Limited	REA does not impact on our business but we would agree with abolishing uncertainty.
Linklaters, Hong	We have not given great thought to the operation of RAP and REA in areas other than commercial finance and security

Kong (on behalf of Bank of New York Mellon, Deutsche Bank and The Hongkong and Shanghai Banking Corporation Limited)	transactions. However, in these areas, these rules serve no discernible purpose and represent technical pitfalls which must be navigated around - for example in documenting bank capital securities issues which may involve the issue of perpetual (i.e. non-redeemable) debentures. We would agree that in these areas at least the rules should be abolished.
Michael Shan Kelly	(a) Yes because, like the RAP, it should not be a factor limiting a Trustees consideration of distributions in any one year. A settlor's specific wishes to accumulate or otherwise can be dealt with in the deed. (b) No. (c) No, I prefer to trust the trustees to distribute in accordance with the deed or the needs of the objects, subject only to prudence.
Nicholas Pirie	Both are archaic and irrelevant in Hong Kong. However, there are some good reasons for insisting that charitable income is not retained forever, and should be distributed. So an overall period for distributions of income after 21 years would ensure that the charitable trust does not become locked up as trust for the accumulation for income only.
ONC Lawyers, Hong Kong China	(a) Yes. This rule is out of date and might even frustrate the wishes of settlors in certain circumstances. (b) No. (c) No. At the moment we don't have a definite view save that there are other options if it is feared that there is no one to monitor the proper administration of a charitable trust; for instance, providing a statutory 'enforcer' for charitable and other non-charitable purpose trust (it is submitted that HK should have non-charitable purpose trust) could be an option.
Respondent A	(a) Yes, the REA should be abolished as there is no objective standard by which one can determine what "excessive" is. (b) No, my answer to (a) would not change even if RAP is also abolished.
Respondent B	(a) Yes- It is based on a historical and outdated principal, is complicated and frustrates the reasonable wishes of the Settlor to have lengthier accumulations. (b) No. (c) Yes- but with a requirement that annual distributions are made of an amount to be agreed.

Respondent C	No comments as they are not relevant to Respondent C.
Respondent D	(a) Yes, because REA is outdated. (b) No, provided that a fixed period of accumulation is introduced by legislation. (c) Yes, charitable trusts can be made an exception following UK approach, i.e. a direction to accumulate should cease to have effect 21 years after the 1st day on which the income may be accumulated.
The Arab Chamber of Commerce & Industry	(a) Yes, for the reasons stated in chapter 5 section B. (b) Yes and the period should be 125 years. (c) Yes and 21 years.
The British Chamber of Commerce in Hong Kong	(a) Yes. (b) No. (c) We believe charitable trusts should be obliged to distribute some agreed proportion of trust income annually. Too many Hong Kong charitable trusts make no distributions at all and accumulate income and capital indefinitely.
The Chinese Manufacturers' Association of Hong Kong	(a) 不贊成廢除反收益過度累積規則。 (b) 不適合。 (c) 慈善信託更應保留反收益過度累積規則。
The Hong Kong Association of Banks	(a) Again, this is a complex and little understood rule and should be revised or abolished. (b) If the rule against perpetuities is abolished, then we think it would be appropriate for the rule against excessive accumulations also to be abolished. If the rule against perpetuities is continued albeit in a simplified form, we would suggest that the rule against excessive accumulations should be simplified in the same manner. (c) We would suggest that the rule against excessive accumulation of income should be revised for charitable trusts to reflect a period of 21 years along the lines suggested by the UK Law Commission.
The Hong Kong Bar Association	The subject matter of the above proposals/queries has been addressed by the recommendations of the relevant overseas law reform bodies (principally the Law Commission in the UK) and subsequently implemented through legislation. To this extent, they are uncontroversial. Given that the existing trust law in Hong Kong has been largely based on the law in the UK, the Bar believes that, save for one point to be discussed below, the examples set by the UK on the relevant subject

	matter can be followed.
The Law Society of Hong Kong	<p>(a) No. REA should not be abolished but the accumulation periods should be the same as RAP to avoid confusion. At present, the length of RAP and REA are different. This has caused a lot of administrative inconvenience.</p> <p>(b) N/A.</p> <p>(c) No. Since charitable trusts in any event are under the control of Secretary for Justice (“SJ”), it appears they should not be subject to REA since SJ will be able to supervise and avoid any abuses.</p> <p>Trustees of charitable trusts are under a duty to further the charitable objects of the trust and must exercise a power to accumulate income with good reason in the context of discharging that duty.</p>

Question 14

Do you think that “protectors” should be statutorily defined in the TO and if so, how should the functions and duties of protectors be defined?	
Asiaciti Trust Hong Kong Limited	<p>Yes. Protectors should be statutorily defined in the TO.</p> <p>(a) I am not sure that any beneficiary should ever be a Protector. This could defeat the purpose of a Protector being a disinterested party if the Protector has an interest in distributions or an equity interest in the assets under a trust.</p> <p>(d) I don’t think beneficiaries should be able to remove Protectors. This opens up a situation where beneficiaries then appoint Protectors more sympathetic to the beneficiary’s desire to possibly obtain more trust documentation and remove a trustee simply because the beneficiary wishes for some one more sympathetic to the beneficiary to become the trustee. (e.g., witness a family member of legal age, who wants more money annually to feed a drug habit or a gambling addiction which is refused by both the protector and the trustee)</p> <p>The trustee then loses independence if the Protector can be removed and ultimately substituted which someone less independent and beholden to one or more, but not necessarily all of the beneficiaries</p> <p>Protectors of Trusts</p> <p>I agree with the powers suggested for Protectors.</p> <p>The position of the Protector should be defined and be mandatory in the new TO.</p> <p>I don’t think that Beneficiaries should have the power to remove a protector. Only a Protector can resign and appoint another protector.</p> <p>Only a Protector should be able to remove trustees, never beneficiaries.</p>
Baker & McKenzie	<p>We see the role of a protector as quite instrumental in many discretionary trust arrangements, but as this can be provided for in a trust instrument, we do not consider it necessary for the role to be statutorily defined. Giving a protector certain statutory duties or functions could have adverse impact on the tax outcome of various trust structure.</p>
Bank of Communications Trustee Limited	<p>If “protectors” were to be defined in the Trustee Ordinance, it is inevitable that their powers, obligations and duties have to be clearly defined too. In practice, many persons acting as protectors of the trusts set up by their relatives or friends are not willing to accept any legal responsibilities and fiduciary duties. This is me reason why the trust deeds with protectors appointed usually expressly state that the protectors do not owe any fiduciary duties to the beneficiaries. Defining</p>

	<p>“protectors” in the Trustee Ordinance with statutory duties imposed on them may make it difficult for the settlors to find persons willing to act in such a capacity and would even be more difficult if a protector resigns or dies so that a successor protector has to be appointed as replacement. We prefer to let the settlors to enjoy the utmost flexibility in defining the role, powers and duties of the protectors when they consider that protectors have to be appointed for their trusts.</p>
Butterfield Private Office (HK) Limited	No I do not think that any valuable purpose will be served by a statutory definition of a “Protector”.
David Gunson	No. Protection is inherent.
Hong Kong Institute of Certified Public Accountants	The concerns raised in paragraphs 6.9 and 6.10 of the consultation paper have some validity and need to be answered. In any case the concept of “protector” has not been widely adopted in trust laws elsewhere and, where it has been adopted, there appears to be no standard definition of the term or agreement on a protector’s legal role and standing. If settlors’ reserved powers are set out in law, as discussed in item B of chapter 6, then some of the rationale for having a protector could fall away. Under the circumstances, we are doubtful whether it would be helpful to give “protector” a statutory definition in the TO at this time.
James J Bertram	No. In my view the use of “protectors” in relation to trusts is very varied and to try to define them and their functions and duties would serve no useful purpose and would unnecessarily limit the discretion is settlors in designing trusts to suit their specific purposes.
Joint Committee of Trust Law Reform	<p>6.1 The Consultation Paper correctly sees Protector as “watch dogs” for Beneficiaries. It also correctly sees that there is surprisingly little legislation on Protectors.</p> <p>6.2 The office of Protector is a great comfort to Settlor and Beneficiaries who want a “check and balance” upon Trustees. Some say that Hong Kong would benefit from introducing legislation on the subject. Others fundamentally disagree that there should be legislation covering Protectors. Such legislation should cover:-</p> <ul style="list-style-type: none"> • who may be a Protector; • the proactive and reactive powers which may be given to Protectors; • appointment of Protectors; • resignation and removal of Protectors;

- whether or not they maybe remunerated and receive re-imburement of their expenses;
- whether or not they owe a fiduciary duty to the Beneficiaries;
- protection for them from being treated as Trustees and generally in terms of exculpation

6.3 If powers are given to Protectors at all, it is probably wise not to permit Protectors to have powers which are concerned with the distributions of income or capital. If the Settlor is Protector, then there can be a nominee arrangement (not a “sham”) and if the Protector has too many powers he is in danger of being treated as a Trustee.

6.4 It may be appropriate to give Protectors default powers, subject to the terms of the Trust, extending to the following:-

- adding, removing and excluding Beneficiaries;
- appointing and removing Trustees;
- changing the proper law of the Trust and the forum of administration of the Trust; and
- directing investments and investment management.

6.5 This would be somewhat more conservative than, say, Dubai but sufficient and appropriate.

6.6 Whilst sympathizing with the needs of a Settlor with regard to the role and scope of powers of a Protector in any given circumstances, those who feel that legislation is attractive and follows a modern trend, may wonder why there is a problem with provisions such as those mentioned below in paragraph 6.9 and with limited default powers. In some cases elsewhere the argument against legislation and default powers in particular has to some extent been based upon the probability that a Protector will have power to remove Trustees.

6.7 There is very little doubt that Protectors are fiduciaries. It therefore follows that they should be subject to the same standard of care as a Trustee acting in similar circumstances and having similar restrictions on their ability to rely on exculpation clauses.

	<p>6.8 The contrary view to what is said above is that all of this is up to the Settlor through the trust instrument and that the statute should not deal with this area at all. The argument against legislation is based upon the view that Protector to not a term of art needing definition. Further the role of the Protector and the powers given to the Protector can vary considerably from Trust to Trust. It is in any circumstances a matter for the Settlor to determine Legislation, it is argued would muddy the water, make the situation more complex and make Hong Kong less attractive in this respect.</p> <p>6.9 We think that Settlers and Trustees should be able to “opt in” to provisions concerning protectors for certainty but that these provisions not be default in nature; i.e. they do not apply unless specifically adopted. The terms of the Trust Deed should be paramount but that legislation should permit the inclusion in the Trust Deed of all or any of the following provisions-</p> <ul style="list-style-type: none"> (a) Who may be a Protector? The Settlor, any Beneficiary but not a Trustee. A Protector may be an individual or a corporation. In fact it can be any person who has good knowledge of either the settlor or the objects of his beneficence. (b) The powers of a Protector (whether proactive or reactive). (c) Who would appoint and remove Protectors? The Settlor could appoint and remove Protectors during his life and while he is not incapable Protectors should be able to appoint Successor Protectors, Joint Protectors and Alternative Protectors revocably or irrevocably (d) Beneficiaries should have the same right to remove and appoint Protectors as they would Trustees. (e) Protectors should be able to resign. (f) Protectors could be remunerated and should be able to reclaim expenses. (g) Protectors should be fiduciaries and owe a similar duty of care to Beneficiaries as a Trustee in similar circumstances and have similar restrictions on exculpation. (h) Protectors should be liable to Beneficiaries similarly to Trustees but would not be treated as Trustees by reason of the exercise of their powers. <p>We favour statutory guidelines as mentioned in paragraph 6.9.</p>
Law Debenture Trust	This has no application to our business.

(Asia) Limited	
Linklaters, Hong Kong (on behalf of Bank of New York Mellon, Deutsche Bank and The Hongkong and Shanghai Banking Corporation Limited)	These areas of law are not relevant in the context of professional trustees acting as trustees in capital markets transactions and we do not express any views as to the proposed reforms in these areas.
Michael Shan Kelly	No. These days trusts are so often created and evidenced by a document of some sort. There is also the widespread practice to incorporate some form of protector or guardian however named. If, however, the “protector” is to be defined in the TO then his responsibilities should be addressed along with any fiduciary duties arising. This role cannot become a sinecure and so must have penalties for lack of diligence.
Nicholas Pirie	<p>These may have become popular in other jurisdictions, but in Hong Kong where large trusts are established, usually a Company Limited by Guarantee is set up to maintain and keep the tax status in Hong Kong. The directors provide the independence and the buffer.</p> <p>However protectors all too often are either the settlors themselves, or shadow trustees who direct the trust for fraudulent or near fraudulent purposes. In Hong Kong we have a notoriously bad and lax system of enforcement of directors power and duties. Having Protectors in Hong Kong trusts will derogate from the supervisory activities of the court. I have come across cases where terrible investment decisions have been forced on trustees in foreign constituted trusts (Jersey in particular) and the trustees are left in an unenviable position when left to pick up the liabilities. Particularly in the context of Lehman Brothers’ investments, or accumulators, or decelerators, where the Protector thinks the investment is very attractive, and the trustees simply do not understand how the investment scheme works. Who is liable for the losses incurred? What effective security or guarantee or indemnity can the protector provide?</p> <p>Protectors in Jersey assume the same role and function as trustees quite often, but they do not have the same fiduciary duties, nor do they have the same responsibilities to beneficiaries. In the Hong Kong context where hot money flows in and out, then I am against Protectors hiding Hong Kong Trusts to conduct their financial activities.</p>

ONC Lawyers, Hong Kong China	Yes.
Respondent A	Protector should be statutorily defined and any amendment to the TO should specify that the protectors do not owe any fiduciary duties to the trust or to the beneficiaries.
Respondent B	No.
Respondent C	No comments as they are not relevant to Respondent C.
Respondent D	Protectors should not be introduced as they may confuse the roles of trustees.
The Arab Chamber of Commerce & Industry	No.
The Association of Chartered Certified Accountants, Hong Kong	We agree.
The British Chamber of Commerce in Hong Kong	We do not believe the role of “Protector” should be statutorily defined in Hong Kong. That role can be defined in the trust deed, as needed. Protectors, in our experience can detract from the role of the trustees, and of the supervisory role of the Courts. In practice they do not have the same fiduciary duties, or the same responsibilities to beneficiaries.
The Chinese Manufacturers’ Association of Hong Kong	應在《受託人條例》中界定「監察人」的定義。
The Hong Kong Association of Banks	Provisions in trust instruments regarding protectors are normally tailored made to the requirements of settlors and in view of this we do not feel that there is an obvious need for regulation and would suggest that for the time being there be no legislative provision made in respect of protectors.
The Hong Kong Bar Association	The queries which fall within this category are: (1) Query whether “protectors” should be statutorily defined in the TO14. (2) Query whether there should be legislation providing that a trust shall not be invalidated merely because the settler had

	<p>reserved to himself certain powers¹⁵.</p> <p>(3) Query whether there is a need to codify common law principles in relation to the governing law of trusts.¹⁶</p> <p>(4) Query whether there should be statutory provisions to me effect that forced heirship rules will not affect the validity of trusts or the transfer of property into trusts that are governed by Hong Kong law.¹⁷</p> <p>(5) Query whether the law should be amended to allow the creation of non-charitable purpose trust.¹⁸</p> <p>The issues raised by these queries are wide-ranging and extensive. The last query is a radical and fundamental change to trusts law in the Commonwealth jurisdictions. There has yet been no reported consensus internationally on this subject. Generally me Bar does not see any present need to reform the existing rules on the above areas. The Bar therefore does not favour any change.</p>
The Law Society of Hong Kong	<p>No. The user of “protectors” in relation to trusts is very varied and to try to define them and their functions and duties would serve no useful purpose and would unnecessarily limit the discretion of the settlors in designing the trusts to suit their specific purposes. After all, the terms of the trust deed are private agreement. Definition of “appointors” and “protectors” should be left to the draftsmen.</p>

Question 15

<p>(a) Do you agree that a statutory provision should be introduced to the effect that a trust will not be invalidated by reason only of certain reserved powers of settlors?</p> <p>(b) If the answer to (a) is yes, in your opinion, what kind of reserved powers of settlors should not affect the validity of trusts? Do you agree that we should permit the reservation of those powers stated in paragraph 6.15?</p>	
<p>Baker & McKenzie</p>	<p>Certainty of law is always a factor in choice of jurisdiction. To this end, it would be useful to provide certainty under Hong Kong law to confirm that the existence of certain reserved powers would not invalidate a trust; provided that Hong Kong wishes to go down the path of reserved powers trusts.</p> <p>That as it is, to the extent trust assets, the settlor and/or beneficiaries is/are outside of the jurisdiction of Hong Kong, jurisdiction shopping and conflict of laws issues could arise when a dispute happens; so a reserved power trust recognized as a valid trust under Hong Kong law may nonetheless be challenged in the courts of another jurisdiction, by tax authorities, in bankruptcy proceedings or in divorce proceedings. Indeed, even under local laws, trust income of an offshore trust not otherwise taxable in Hong Kong by virtue of the exemption in Section 20AC of the Inland Revenue Ordinance could end up being taxable in the hands of the Hong Kong settlor if the settlor has the powers to control the trust or the application of the trust funds.</p> <p>If Hong Kong allows very broad reservation of powers and this is the feature that attracts trusts to Hong Kong, we could find ourselves in the situation where Hong Kong trusts are more than occasionally challenged on their validity in courts overseas, or are considered tax inefficient; and these will hamper rather than enhance the reputation of Hong Kong as a trust jurisdiction.</p> <p>We prefer to see purpose trusts over reserve powers trust, if one was to choose between the two; see further our response to question 18.</p>
<p>Bank of Communications Trustee Limited</p>	<p>(a) We agree.</p> <p>(b) Since a trust is set up by the settlor for the persons that he wants to benefit it would be reasonable if the settlor could reserve the power to add and remove the beneficiaries of the trust. The trustee is also the person that a settlor feels he could trust and if he later loses confidence in the trustee, it is logical that the settlor could reserve power to remove the trustee. We also agree that we should permit the reservation of those powers stated in paragraph 6.15 as it would help Hong Kong to compete trust and other financial business with the other countries with similar reserved powers for the settlors.</p>

Butterfield Private Office (HK) Limited	(a) Yes. (b) Yes.
David Gunson	(a) No.
Hong Kong Institute of Certified Public Accountants	(a) Introducing a statutory provisions that a trust will not be invalidated by reason only of certain reserved powers of settlors should help to strengthen certainty in relation to this area of the law. As indicated above, it could also reduce the need to provide specifically for protectors of trusts in the legislation, which, given the doubts over the role and status of protectors, would not help to increase the level of certainty. (b) For the reasons stated in paragraph 6.15 of the consultation paper, we would advocate a cautious approach when specifying the extent of reserved powers settlors may retain. It would not be beneficial to business here were other jurisdictions to question the validity of trusts set up under Hong Kong law due to the statutory right of settlors to retain very extensive powers over trusts that they have established. We would agree with including reserved powers of investment or asset management and, possibly, the power to add or remove trustees for good reason.
James J Bertram	Generally, I agree with the views expressed in the Consultation Paper.
Joint Committee of Trust Law Reform	6.11 Reserved powers to a Settlor and in a more limited way to a Protector (as mentioned previously) are essential for Hong Kong to take its position as a premier trust jurisdiction. Those who make Trusts, particularly in Asia, look for control. Without these provisions trust business is being, and will continue to be, lost. 6.12 The Consultation Paper contains a brief but useful discussion and remains open to the idea of following Singapore in introducing provisions to the effect that a trust will not be invalidated only because the settlor reserves to himself investment and asset management functions. The Consultation Paper rightly Expresses concern “that allowing the settlor to reserve too many powers may lead to criticism that a trust established under Hong Kong law is in fact a sham”. 6.13 The key issue is how to remove the common law uncertainties as to the impact on essential trust validity caused by reservation of powers to settlors without ending up with a statute that seeks to validate a legal arrangement with the barest resemblance to a classic trust and which other jurisdictions might view as a pure nominee arrangement, or at worst, a sham. This would tempt bad trust practice and possibly bring the jurisdiction into disrepute.

	<p>6.14 It is therefore a question of balance. There is bound to be disagreement about what reserved powers should be protected by statute. Our detailed submission made substantial reference to comparative legislation. We suggest that the law should provide that a Hong Kong law trust would be valid despite the inclusion or more limited powers to settlors (or protectors) as follows:</p> <ul style="list-style-type: none"> (a) To determine the law of which jurisdiction shall be the governing law of the trust; (b) To change the forum of administration of the trust; (c) To remove Trustees; (d) To appoint new or additional Trustees; (e) To remove any Beneficiary of the Trust and to declare that any person shall be excluded altogether from benefit under the Trust; (f) To add any person as a Beneficiary of the Trust in addition to any existing Beneficiary of the Trust; (g) To exercise the power of investment and of investment management; (h) To release any of those powers. <p>6.15 The legislation would therefore not invite or exclude additional reserved powers. Apart from the certainty of validity with regard to the limited powers mentioned, it will be left to the court to decide any questions of validity or otherwise having regard to any wider reserved powers.</p> <p>6.16 Those who voiced an opinion at the Forum on this topic were all in favour of the answers given below.</p> <ul style="list-style-type: none"> (a) Yes. (b) As per para 6.14 above.
Law Debenture Trust (Asia) Limited	This has no application to our business.
Linklaters, Hong Kong (on behalf of	These areas of law are not relevant in the context of professional trustees acting as trustees in capital markets transactions and we do not express any views as to the proposed reforms in these areas.

Bank of New York Mellon, Deutsche Bank and The Hongkong and Shanghai Banking Corporation Limited)	
Michael Shan Kelly	(a) Yes. (b) Yes, but differentiate between trusts intended to be reversionary and those that are not. In the case of non-reversionary trusts the settlor should have very limited powers to, for instance, instruct the Trustee on the appointment or removal of beneficiaries, exclude objects, the making of distributions and in the role of consultant, advise on the management of investments.
Nicholas Pirie	This is a continuing problem in Hong Kong, as rich people think they own institutions, or the trusts they set up. One often hears “it is my company, it is like my own bank”. If the purpose of the trust is to set up a fund or entity for beneficiaries, then the settlor ought to be encouraged by the law to step back from the trust and its management and not reserve powers to himself. A saving provision, to keep the trust alive similar to Section 90 (5) of the STA would be useful as a fall back provision, if there was doubt as to whether there is an effective trust established.
ONC Lawyers, Hong Kong China	(a) Yes. This will give certainty to the jurisdiction and increase the competitiveness of HK trust. (b) Yes. At the moment we don't have a definite view but the reserved powers eventually approved by the statute should exceed those set out in paragraph 6.15 of the consultation paper.
Respondent A	(a) Yes, but in any event, there should not be any reserved powers. If powers need to be reserved, such should be catered for by structures such as private trust companies. (b) See comments to (a) above.
Respondent B	(a) Yes. (b) Powers of :- Investment Revoke

	<p>Direct income Remove and appoint Trustees Remove/add/exclude Beneficiaries</p> <p>Agree that reservation of those powers stated in 6.15 should be permitted.</p>
Respondent C	No comments as they are not relevant to Respondent C.
Respondent D	<p>(a) Yes, but depending on the extent of the reserved power of the settlor as it may potentially frustrate the purpose of trusts. (b) Powers not inconsistent with settlor's intention to transfer the property to the trustee and to divest himself/herself of the power and control over the property or otherwise its allocation or distribution.</p>
The Arab Chamber of Commerce & Industry	<p>(a) No. (b) N/A.</p>
The Association of Chartered Certified Accountants, Hong Kong	We agree.
The British Chamber of Commerce in Hong Kong	<p>(a) Yes. (b) Reserved powers of settlors should not usually be encourage; a provision such as Section 90(5) of the STA could be enacted, if there was doubt as to the validity of the trust.</p>
The Chinese Manufacturers' Association of Hong Kong	<p>(a) 贊成仿效新加坡的做法，訂立法定條文，表明信託不會因為財產授予人保留某些權力而變成無效。 (b) 建議政府應小心釐定准予財產授予人保留的權力，以防患出現虛假安排的情況。</p>
The Hong Kong Association of Banks	<p>(a) Making statutory provision for this will create certainty. (b) The reserved powers should be limited and should not extend beyond:</p> <ul style="list-style-type: none"> • power of adding or removing trustees, protectors or beneficiaries; and

	<ul style="list-style-type: none"> • power of investments.
The Hong Kong Bar Association	<p>The issues raised by these queries are wide-ranging and extensive. The last query is a radical and fundamental change to trusts law in the Commonwealth jurisdictions. There has yet been no reported consensus internationally on this subject. Generally the Bar does not see any present need to reform the existing rules on the above areas. The Bar therefore does not favour any change.</p>
The Law Society of Hong Kong	<p>(a) Yes. This is important to establish the validity of the Trust with adequate certainty and to pre-empt litigation. It assists those selecting Hong Kong as a jurisdiction to do so with confidence knowing that certain core powers will not potentially invalidate the structure. However the extent of the powers which a settlor may reserve to himself should be relatively limited.</p> <p>(b) Suitable powers would be those which permit the settlor a continuing role in the trust but not those which ultimately infringe on the trustee's decision-making role. These may include the powers:</p> <ul style="list-style-type: none"> ● Of investment/asset management ● To appoint or remove trustees ● To appointment or remove protectors or enforcers ● To add, remove or exclude beneficiaries of a discretionary trust. ● To consent to the exercise of any power of the trustee to wind-up the trust. ● To consent to any change of the proper law or forum of administration of the trust <p>If wider powers were reserved by the trust instrument the validity of the trust would be for the court to determine in all the circumstances if the question is raised.</p>

Question 16

Do you agree that there is no need to codify the common law principles in relation to the governing law of trusts? If you do not agree, please explain the reasons.	
Baker & McKenzie	<p>We are of the view that there are benefits in codifying the common law and Hague Convention principles in relation to the governing law of trusts. It is the type of certainty that will benefit the perception of Hong Kong as a trust jurisdiction.</p> <p>The principles in the Hague Convention are fine. However, it is not correct to assume, as stated in paragraph 6.20 of the Consultation Paper that the Convention will apply to most trusts. Particularly relevant to Hong Kong is the fact that Mainland China is not a party to the Convention. Many trusts involving Hong Kong parties will have China assets or beneficiaries from Mainland China.</p> <p>Codifying the common law and Hague Convention principles will provide a safety net and certainty, especially in the situations involving informal trust arrangements (where the trust may not be properly or fully evidenced in writing) and unsophisticated trustees (who may not have explicitly made a choice of law).</p> <p>What would be even more powerful is if the Hong Kong legislation could explicitly provide for migration of trusts.</p>
Bank of Communications Trustee Limited	We agree.
Butterfield Private Office (HK) Limited	Yes. This is covered adequately by The Hague Convention.
David Gunson	No need. Please refer to the 1994 paper. Codification will be impossible anyway.
Hong Kong Institute of Certified Public Accountants	On the basis of the explanation given in the consultation paper, we do see any need to codify the common law principles in relation to the governing law of trusts.
James J Bertram	I agree.
Joint Committee of Trust Law Reform	<p>6.18 The background and considerations are clearly set out in the Consultation Paper.</p> <p>6.19 In addition to providing for the choice of governing law, this is a good opportunity for providing, as in Dubai, for the</p>

	<p>migration of trusts into Hong Kong which will be more attractive to existing trusts as a result of this law reform.</p> <p>6.20 The point is that properly incorporating Hague Convention concepts into domestic law will provide greater certainty of an issue central to the administration of a trust; its governing law.</p> <p>Yes. With the request that the provisions adopted by Dubai be used as a model for ours.</p>
Law Debenture Trust (Asia) Limited	We agree.
Linklaters, Hong Kong (on behalf of Bank of New York Mellon, Deutsche Bank and The Hongkong and Shanghai Banking Corporation Limited)	We agree that there is no need to codify the common law principles in relation to the governing law of trusts. In the context of professional trustees acting as trustees in capital markets transactions, trust instruments and other bond and security documentation typically contain an express choice of law provision and it is clear that the express choice of law will govern on the basis of Recognition of Trusts Ordinance.
Michael Shan Kelly	Yes agree.
Nicholas Pirie	The Hague Convention as enshrined in Cap 76 – the Hong Kong Recognition of Trusts Ordinance works well and is certain, and the current law is clear and should be retained.
ONC Lawyers, Hong Kong China	Yes.
Respondent A	There is no need to codify the common law principles governing trusts. Case laws are sufficiently well defined to protect beneficiaries. Indeed, this is one reason law makers should not lightly amend the duties of trustee. To do so would jeopardize the protection offered by the rich body of laws governing trusts creating considerable uncertainty.

Respondent B	Yes.
Respondent C	We do not have any views are we believe professionally drafted trust instruments would adequately deal with the issues raised.
Respondent D	Yes, we fail to see any strong need to introduce statutory provisions on the governing law of trusts.
The Arab Chamber of Commerce & Industry	Yes, we agree there is no need to codify the principles.
The Association of Chartered Certified Accountants, Hong Kong	We agree.
The British Chamber of Commerce in Hong Kong	Hong Kong has already adopted The Hague Convention in Cap76 The Hong Kong Recognition of Trusts. This is certain and works well and we do not think any further legislation is required.
The Chinese Manufacturers' Association of Hong Kong	同意。由於《海牙公約》已可適用於大多數信託，故香港無須把有關管限信託法律的普通法原則編纂為成文法則。
The Hong Kong Association of Banks	We do not see the need to codify the common law principles in relation to the governing law of trusts as this is well established and does not seem to present problems.
The Hong Kong Bar Association	The issues raised by these queries are wide-ranging and extensive. The last query is a radical and fundamental change to trusts law in the Commonwealth jurisdictions. There has yet been no reported consensus internationally on this subject. Generally me Bar does not see any present need to reform the existing rules on the above areas. The Bar therefore does not favour any change.
The Law Society of Hong Kong	Yes, we agree that there is no need to codify the common-law principles in relation to the governing law of trust.

Question 17

<p>(a) Do you agree that there should be statutory provision to the effect that forced heirship rules will not affect the validity of trusts or the transfer of property into trusts that are governed by Hong Kong law?</p> <p>(b) If your answer to (a) is yes, should the provisions follow the Singapore model (i.e. section 90 of the STA), the BVI model (i.e. section 83A of the BVITO) or any other model? Please specify and explain.</p>	
Baker & McKenzie	<p>We agree that there should be statutory provisions to protect the validity of Hong Kong trust and the transfer of assets held in Hong Kong trust against forced heirship rules.</p> <p>Again, this would be the type of certainty a settlor or trustee will look for when determining the choice of jurisdiction.</p> <p>We support me Singapore approach set out in paragraph 6.24 of the Consultation Paper.</p>
Bank of Communications Trustee Limited	<p>(a) We agree.</p> <p>(b) We prefer the BVI model as there is no geographical restriction.</p>
Butterfield Private Office (HK) Limited	<p>(a) Yes.</p> <p>(b) Section 90 of STA.</p>
David Gunson	<p>(a) No.</p>
Hong Kong Institute of Certified Public Accountants	<p>(a) Introducing a statutory provision to the effect that forced heirship rules will not affect the validity of trusts or the transfers of property into trusts that are governed by Hong Kong law would on the face of it help Increase certainty.</p> <p>(b) On the basis of the information provided it not easy to distinguish the relative merits of the legal provisions introduced in different jurisdictions. In addition, it is possible to envisage circumstances in which trusts would be set up merely to circumvent forced heir-ship rules. Given that the incidence of cases where conflicts arise are likely to be limited, another option that may be worth considering would be to clarify in the law that the courts in Hong Kong are not obliged to give effect to forced heirship rules under foreign law (the Hague Convention notwithstanding), and either that there should be a presumption in favour of trusts validly set up under Hong Kong law. or that the courts may weigh up the respective merits In individual cases.</p>
James J Bertram	<p>(a) Again, I agree generally with the view expressed in the Consultation Paper.</p> <p>(b) Generally, I prefer the Singapore model as described in paragraph 6.24 of the Consultation Paper.</p>

Joint Committee on Trust Law Reform	<p>6.22 These are clearly set out in the Consultation Paper. The broad objective is to strengthen the integrity of the trust law itself, and the jurisdiction of the courts have over it, by removing uncertainty created by conflicts of law principles as to when our courts should entertain claims made under foreign law. The provisions would make it clear that Hong Kong courts can ignore specified claims made against Hong Kong law trusts that may arise under foreign law.</p> <p>6.23 Singapore and Dubai (amongst others) have recently amended their laws to ensure paramountcy of their local laws over the personal laws of claimants against the trust. As stated above, removal of such conflicts adds strength and certainty to a jurisdiction. Although the Consultation Paper rightly points out that many such claims arise only on death of a testator/settlor and therefore should not extend to challenge the validity of inter-vivos trusts, those foreign laws could change or contain “claw back” provisions which might expose Hong Kong trusts to attack.</p> <p>6.24 We therefore propose adopting the Dubai model which refers to the unenforceability of lifetime claims and claims on death and which covers proprietary claims regarding divorce.</p> <p>(a) Yes and see below. (b) The Dubai model for the reasons stated above.</p>
Law Debenture Trust (Asia) Limited	This has no application to our business.
Linklaters, Hong Kong (on behalf of Bank of New York Mellon, Deutsche Bank and The Hongkong and Shanghai Banking Corporation Limited)	These areas of law are not relevant in the context of professional trustees acting as trustees in capital markets transactions and we do not express any views as to the proposed reforms in these areas.

Michael Shan Kelly	(a) Yes agree. (b) I prefer Singapore's model since it overcomes any constraint the settlor may have under his own country's or religion's laws.
Nicholas Pirie	I do not see how this does arise in cases of personalty. It only operates on real property in the country where it is situate. Professional advice in Hong Kong has always been, have a will in each country, and have a trust set up in each country to deal with such real estate problems. The only problems which do occur are statutory charges on the estate thus settled, by the equivalent Inheritance Family Provisions Ordinance which does not seem to have been considered here
ONC Lawyers, Hong Kong China	(a) Yes. We submit that this is another area of great significance for enhancing the competitiveness of HK trust. The degree of uncertainty afforded by the rules under conflicts of law leaves much to be desired. (b) No comment. At the moment we don't have a definite view. Yet it is submitted that the more resolute we are in upholding the validity of HK trust against foreign claims arising from forced heirship, divorce and the like, the more attractive our jurisdiction will be.
Respondent A	(a) Yes. (b) The provisions should follow a model that has the broadest scope of exemption to forced heirship rules.
Respondent B	(a) Yes. (b) Singapore.
Respondent C	No comments as they are not relevant to Respondent C.
Respondent D	(a) Yes, such provisions will provide greater certainty as to the validity of trusts. (b) No strong preference on any model as all have similar effect.
The Arab Chamber of Commerce & Industry	(a) No, unless legislation would promote the use of Hong Kong trust law. (b) N/A.
The British Chamber of Commerce in Hong Kong	(a) Yes. (b) The BVITO could be the basis for this amendment.
The Chinese	(a) 贊成訂立法例反強制繼承權的法定條文，表明強制繼承權不會影響信託的效力或財產轉移的安排。

Manufacturers' Association of Hong Kong	(b) 可參考新加坡的模式。
The Hong Kong Association of Banks	<p>(a) We believe that any provisions which strengthen the validity of trusts and make them less liable to be set aside would be beneficial and should be supported. No consideration, however, is included in the Consultation Paper regarding the Inheritance (Provision for Family and Dependents) Ordinance. This is an ordinance which allows claims to be made by family members and dependents against estates of deceased persons for financial provision. Any proposed change to the law in this area should clearly not affect the rights of persons under the Inheritance (Provision for Family and Dependents) Ordinance.</p> <p>(b) We believe that both the Singapore and the BVI models provide suitable protections albeit that they adopt different approaches. We think that a possibility would be to combine both of them so that the changes to the law cover both disposition of property to be held on trust and the validity of the trust and transfer of property to be held on trust.</p>
The Hong Kong Bar Association	The issues raised by these queries are wide-ranging and extensive. The last query is a radical and fundamental change to trusts law in the Commonwealth jurisdictions. There has yet been no reported consensus internationally on this subject. Generally the Bar does not see any present need to reform the existing rules on the above areas. The Bar therefore does not favour any change.
The Law Society of Hong Kong	<p>(a) Yes. The Hague Convention does provide directly for such matters, and it does not apply to matters of the formality of creation of the trust or transfer of assets to it.</p> <p>However, as pointed out in paragraph 6.23 it does expressly seek to preserve certain succession rights. Whilst it may be correct to state that courts will not give effect to forced heirship claims “unless conflict rules classify the claims as part of the succession law applicable to the settlor’s estate” this is precisely what forced heirship is about. It is unhelpful to reply on the suggestion (in an academic text, not case law, it seems) that there is nothing to claw back once the trust property has vested in the trustee. It is the validity of this vesting which is in point.</p> <p>If a trust is established under Hong Kong law it is an important element of this that there is certainty as to the effectiveness of the trust and that it cannot be set aside for reasons based on principles of foreign law. This otherwise supplants the jurisdiction of the Hong Kong court and makes the validity of the trust uncertain. This in turn potentially makes dealings with a Hong Kong trust uncertain.</p> <p>(b) We prefer the Singapore model as described in paragraph 6.24 of the Consultation Paper.</p>

Withers, Hong Kong	<p>This question is part of the wider issue of what should trustees of Hong Kong law trusts do when a foreign Court (or conceivably a Court in another part of China) orders the trustees to pay over or deal with trust assets? This question can arise not only in the context of forced heirship rights but also as a result of divorce, insolvency or other proceedings in another jurisdiction.</p> <p>Legislation providing for orders in aid of foreign insolvency proceedings is well established in Hong Kong law and generally works well such that we do not consider that the Trustee Ordinance needs to be amended to address this area. However matrimonial proceedings where a spouse claims assets held by a trust governed by the laws of another jurisdiction are becoming increasingly common and consideration should be given to the position of trustees of Hong Kong trusts to orders obtained in relation to foreign divorces.</p> <p>Divorce and trusts is a highly complex topic. It is an area in which our firm has significant and acknowledged international expertise and experience having both a global trusts and a family law practice. We have been involved in the drafting of trusts legislation in various jurisdictions.</p> <p>Although the topic does not appear to have been specifically covered in the Consultation Paper, it is our respectful view that the Government of Hong Kong should consider it in this review and should be aware of the options available to it. One of the motivations of other jurisdictions in revising their trust laws (such as the Cayman Islands, the BVI, Jersey and Guernsey) to include provisions which exist to protect trust assets from overseas litigation was, in part, to improve the position of trusts in divorce. Like Hong Kong, those jurisdictions wanted to modernize their trust law and “strengthen the competitiveness and attractiveness of [their] trust service industry”.</p> <p>It is noteworthy that a number of high profile international trust cases in recent years have been divorce cases where the financially weaker party has been ‘attacking’ the trust by seeking to obtain an order varying the terms of the trust so that he/she is made a beneficiary of the trust. Where the trust assets in question are held by a trust governed by the laws of a jurisdiction outside the divorce jurisdiction difficult questions of enforcement often arise and in the case of Hong Kong the Government might want to enact legislation to deal with the situation where (say) a Court is faced with the question as to whether it should enforce an English divorce court order varying the terms of a Hong Kong trust.</p> <p>The Family Division of the English High Court, in particular, has used its powers under section 24 of the Matrimonial Causes Act 1973 (substantially the same as Hong Kong's Matrimonial Proceedings and Property Ordinance Cap 192 - section 6) to vary trusts governed by the law of another jurisdiction. One of the most prominent has been the case of Mubarak in Jersey in 2008 (see below) where the Jersey court applied a recent amendment to its trust legislation.</p>
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What is the position now under Hong Kong law? Our understanding is that Orders of foreign Divorce Courts are not generally enforceable against Hong Kong trusts in Hong Kong but the Hong Kong courts have a discretion to enforce based on the common law principle by which the courts of one jurisdiction seek to respect the decisions so far as possible of foreign courts (the so-called principle of 'comity').

The recognition arrangements concluded with the mainland apply only to commercial judgments for fixed sums while the common law doctrine of an action on a judgment likewise only applies to a judgment for a liquidated sum, not for example to an order of a foreign Divorce Court purporting to vary a Hong Kong trust. The Commonwealth Scheme of reciprocal enforcement under (inter alia) the Administration of Justice Act 1920 ceased to have effect in Hong Kong in 1997.

In the Jersey case of *Mubarak [2008] JRC 136*, the Jersey Royal Court was asked to enforce the English order of Holman J and to vary the terms of a Jersey settlement. The court held that (1) by reason of Article 9(4) of the Trusts (Jersey) Law 1984, it could not enforce a judgment of the English Family Division varying or altering a Jersey Trust under the English Matrimonial causes Act 1973. It also held on the other hand (2) that, where a variation ordered by the Family Division did not amount to an alteration of the terms of the trust, the Court could give directions under Article 51 of the Trusts Law having the effect of achieving the objectives of an English judgment. In practice the Royal Court of Jersey has established a flexible middle way. Its detailed legislation is designed to protect Jersey trusts from attacks by the Courts of other jurisdictions but, as interpreted by the Royal Court itself in *Mubarak*, permits the Court to direct trustees to give effect to foreign orders (such as in divorce proceedings) where it considers that the trustees have such powers under the governing instrument of the trust and the Court considers the exercise of such powers to be in the overall interest of the beneficiaries.

The Hong Kong Government might consider the Jersey legislation to be the appropriate flexible model for Hong Kong to follow.

The key Jersey provisions (9(2) and 9(4)) are modelled on sections 90 to 93 of the Cayman Trusts Law (see below). These provisions may be summarized as follows:

1. Section 90 provides for Cayman law to govern exclusively all relevant aspects of a Cayman trust (validity, interpretation, etc)
2. Section 91 makes it clear that a Cayman trust cannot be attacked on account of foreign rules relating to inheritance or any personal relationship including marriage; nor is the trustee to be personally liable to anyone as a result.

3. Section 92 prevents an argument that the right to inherit from another can have any personal or proprietary effects during the tatter's lifetime.
4. Section 93 makes it clear that if the Cayman Court is prevented from doing something because of section 91 or 92 then no other Court in another jurisdiction can do it and expect the Cayman Court to give affect to that decision.

Articles 9, 9(2) and 9(4) of the Jersey law are clearly drafted to achieve the same effect as sections 90, 91 and 93 respectively of the Cayman law.

You may consider that there must be merit in providing that questions of Hong Kong trust law should be (1) exclusively considered by the Hong Kong Courts and (2) under Hong Kong law: although this is, to some extent, a principle of international private law it is, on occasion, overlooked in practice: for example in *Minwalla v Minwalla* [2004] EWHC an English judge felt able to conclude that a Jersey trust was a sham.

The BVI have introduced very detailed provisions in their Trust Law in order to protect BVI trusts from attacks from other jurisdictions. The provisions include a double layer of protection by virtue of section 83A(12)(b) which is effectively a sweeper clause, that is a wide ranging clause intended to supplement the very detailed lists of matters reserved to the exclusive jurisdiction of the BVI Court.

Statutory provisions that purport to provide that questions as to the essential capacity of the settlor to (1) create a trust and (2) to dispose of the property providing the trust's corpus should be governed by the proper law of the trust might be criticized as creating potential conflicts of law (and so multi-jurisdictional litigation) should there be a challenge to the trust by a dissatisfied beneficiary. There may, however, be good policy reasons for including a provision in the revised Trustee Ordinance expressly providing for the non-recognition of foreign ancillary relief orders that purport to cover assets owned by Hong Kong trusts and for providing expressly that only Hong Kong courts can vary a Hong Kong trust.

Should you be inclined to include provisions disapplying foreign family law claims, the scope of these provisions will need to be considered. A number of jurisdictions (for example BVI) disapply foreign claims through personal relationships with the settlor failing to recognize that divorce claims often stem from relationships with beneficiaries who are not settlors: Guernsey recognizes this point in section 14(3) of its amended trust law.

The provisions contained in section 90 of the Singapore Trust Act are much less detailed than those considered above in respect of the BVI, Jersey and Cayman. In particular, they make no express reference to claims by reason of a personal relationship to the settlor and therefore do not apparently address (at least explicitly) the effect of foreign divorce laws on

	<p>Singaporean trusts. They do however appear to be targeted at possible forced heirship claims by persons outside Singapore. If legislation were to be enacted to specifically frustrate claims by heirs, there would also seem to be merit in precluding claims by spouses and former spouses.</p> <p>We wish to make it clear that our view and the view of Withers is neutral. We are not suggesting that the Government should or should not legislate in this area.</p>
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Question 18

<p>(a) Having balanced the reasons for and against, do you think that the law should be amended to allow the creation of non-charitable purpose trusts? Please give your reasons. <i>[Please answer (b), (c) and (d) if your answer to (a) is in the affirmative.]</i></p> <p>(b) Should any limitations and safeguards be imposed on the use of non-charitable purpose trusts and what should they be?</p> <p>(c) What measures should be introduced to facilitate the enforcement of non-charitable purpose trusts? For example, do you agree to provide for the role of “enforcers” in Hong Kong law?</p> <p>(d) If you consider that the concept of “enforcers” should be introduced in Hong Kong, how should the role of “enforcers” be defined? Would you support the approach in Dubai, Cayman Islands or BVI?</p>	
Baker & McKenzie	<p>We are in support of proposals to introduce purpose trusts as additional statutory creations under Hong Kong law. In our view, this is more attractive than reserve power trusts in that the validity of the latter is more likely to be challenged by courts in other jurisdictions, by tax authorities, in bankruptcy proceedings and in divorce proceedings.</p> <p>A jurisdiction serious about attracting and promoting a trust industry should have these types of legislation to be competitive. As Singapore has gone down the path of reserved power trusts, Hong Kong may wish to look more closely at special purpose trust legislations to provide alternative offerings to the trust industry in Asia.</p> <p>The main issue with purpose trust is to have in place a mechanism to enforce the stated purpose. The answer in Dubai, the Cayman Islands and the BVI all seeks to introduce an enforcer. Our view is that it is also important to have in place a regime whereby the enforcer is under the positive duty to enforce the trust, and should be held accountable to the court for failing to carry out his duties.</p>
Bank of Communications Trustee Limited	<p>(a) We strongly support the idea of making non-charitable purpose trusts valid under the Hong Kong law. As an illustrative example, a purpose trust may be set up by industry leaders for supporting advancement of technology of a group of Hong Kong commercial enterprises to strengthen their competitiveness. This in turn would be good for Hong Kong and enhance employment opportunity here. Unfortunately, such an objective with commercial value and for the benefits of a designated group do not meet the definition of charitable trust in order to be valid under the common law although this trust creates benefits to the public indirectly. Moreover, purpose trusts are commonly used with business arrangements nowadays and if Hong Kong does not recognize their validity, it will lose the business opportunity to the others.</p> <p>(b) We suggest to set a requirement that a trust company must be appointed as a trustee to a non-charitable purpose trust. This would help to reduce the chance of a non-charitable purpose trust being abused as it is under the administration of a</p>

	<p>professional trustee.</p> <p>(c) We suggest to impose a statutory requirement that the trust instrument must have provision for an “enforcer”, who is a professional such as lawyer, accountant etc. be appointed. In default of such an appointment or whenever vacancy arises, a public officer, say the Attorney-General be the default enforcer. S. 57A of the existing Trustee Ordinance offers a mechanism of seeking assistance from the court if the interested parties find that problems relating to administration of charitable trusts exist. Similar provisions may be created in respect of the non-charitable purpose trusts so that the interested parties may invite the enforcer to step in for protecting the trust assets should they find that administrative problems arise.</p> <p>(d) The role of enforcer may be defined in the Trustee Ordinance that is similar to s. 57A.</p>
Butterfield Private Office (HK) Limited	<p>(a) Yes.</p> <p>(b) Yes. For the avoidance of illegal or tax evasion.</p> <p>(c) An enforcer who is a lawyer.</p> <p>(d) Cayman Islands.</p>
David Gunson	<p>(a) Yes. REITS need it.</p> <p>(b) Yes. Commercial purposes and some purposes as set out in CAP 306.</p> <p>(c) –</p> <p>(d) No. The High Court has done the job well for ordinary trusts.</p>
Hong Kong Institute of Certified Public Accountants	<p>Given the concerns raised about possible abuse of non-charitable purpose trusts, which, in our view, are legitimate concerns, we consider that these issues will have to be addressed first, and a more convincing case made as to the need for and/or benefits of providing for the creation of an unlimited, or broader, scope of non-charitable purpose trusts, if this proposal is to be further pursued in future.</p>
James J Bertram	<p>(a) On balance, I think it would be desirable to permit the creation of non-charitable purpose trusts established for any lawful purposes. These would include trusts for the public benefit which are nevertheless not charitable within the narrow, archaic, meanings of that term, as well as trusts for private and commercial purposes. Once the problem of enforcement of such trusts is overcome (e.g. by providing for an “enforcer”), there is no reason why such trusts should not be permitted.</p>

	<p>(b) The overriding limitation/safeguard should be that the trust should be established for a lawful purpose.</p> <p>(c) I agree with the proposal for “enforcers”.</p> <p>(d) I prefer the Dubai model as described in paragraph 6.29(a) of the Consultation Paper. In addition, the court should be empowered to fill any vacancy in the office of “enforcer”.</p>
<p>Joint Committee of Trust Law Reform</p>	<p>6.26 We agree that the definition of charity requires legislative widening. Dubai provides a good example of a modern legislative definition.</p> <p>6.27 There are many valid uses of non-charitable Purpose Trusts. The Consultation Paper highlights some but there are many proper commercial uses (and uses that are strictly non-charitable but nonetheless laudable) making such trusts a useful tool in the armory of a jurisdiction's attraction for trusts. These have been substantially referred to in our earlier detailed submissions.</p> <p>6.28 It is not the role of trust law to prevent the use of such trusts for tax evasion purposes. Hong Kong already has The Organized and Serious Crimes Ordinance to control this and is intending to strengthen its anti-money laundering regulations to meet OECD and FATAF requirements. Hong Kong is also intending to have at least 12 comprehensive DTAs and/or TIEAs to meet similar exchange of information requirements. It is these provisions which counter tax evasion, not trust law. It can be expected that professional trustees will act fully in accordance with the law and cooperate with law enforcement agencies.</p> <p>6.29 The question of who enforces the enforcers is a fair one but it has never deterred the good operation of non-charitable Purpose Trusts in other jurisdictions. The use of a “designated person” as Trustee also assists.</p> <p>6.30 If individuals can benefit in addition to purposes, then legislation can allow those individuals to enforce the trust as regards their interests.</p> <p>6.31 A substantial majority of those who attended the Forum were in favour of the introduction of non-charitable Purpose</p>

	<p>Trusts.</p> <p>(a) Yes. There is much more to be gained by having such Trusts than letting the work go elsewhere. We believe that in paragraph 7.24 we have dispelled the arguments against such Trusts.</p> <p>(b) Most trust jurisdictions provide generally in Trust Law for trusts which are invalid for illegality. Hong Kong should do this. Otherwise there is no need to mention trust law. Other law and regulations do and will prevent the illegal use of such trusts.</p> <p>(c) Yes, we would propose to provide for Enforcers. We suggest that Section 84A BVI TO be used as the primary source of reference but reference can also be made to the legislation in Dubai.</p> <p>(d) We propose that the approach set out in Section 84A BVI TO be adopted.</p>
Law Debenture Trust (Asia) Limited	This has no application to our business.
Linklaters, Hong Kong (on behalf of Bank of New York Mellon, Deutsche Bank and The Hongkong and Shanghai Banking Corporation Limited)	These areas of law are not relevant in the context of professional trustees acting as trustees in capital markets transactions and we do not express any views as to the proposed reforms in these areas.
Michael Shan Kelly	<p>(a) Yes, it is a convenience particularly for holding shares in a private company trustee. Possible abuse cannot justify not allowing them just as gunpowder has its abusers too.</p> <p>(b) It would all be quite cosmetic in reality and if you are too concerned about abuse then simply let the business be handled in BVI, Dubai or elsewhere. I don't think writing in a number of rules will ever been seen as anything more than cosmetics by those in G20 who have other agendas.</p> <p>(c) Not as such. However, you can create business for accountants and solicitors and require that they certify once a year a</p>

	<p>particular trust is valid by virtue of having fulfilled its purpose for the preceding year. Where all this paper goes is another matter.</p> <p>(d) See earlier comments.</p>
Nicholas Pirie	I have no comments on this aspect at all.
ONC Lawyers, Hong Kong China	<p>(a) Yes. This is another issue of significance for enhancing the popularity of HK trust.</p> <p>(b) Yes. Only under one situation - when the purpose of the trust is illegal under HK law.</p> <p>(c) No comment. At the moment we don't have a definite view.</p>
Respondent A	(a) Yes.
Respondent B	<p>(a) Yes. We should ensure that the Trust Law review makes Hong Kong a preferred jurisdiction for Trust Administration and allow it to benefit from new business.</p> <p>(b) No.</p> <p>(c) Yes.</p> <p>(d) Would support the Cayman approach.</p>
Respondent C	No comments as they are not relevant to Respondent C.
Respondent D	<p>(a) No preference but appropriate provisions should be in place to guard against risk of creation of non-charitable purpose trusts for illegal/tax evasion purposes.</p> <p>(b) No suggestion.</p> <p>(c) No suggestion.</p> <p>(d) No suggestion.</p>
The Arab Chamber of Commerce & Industry	<p>(a) No, for the reason of the concerns stated in paragraphs 6.30 and 6.31.</p> <p>(b) N/A.</p> <p>(c) N/A.</p> <p>(d) N/A.</p>
The Association of Chartered Certified	(a) ACCA Hong Kong agrees that the law should be amended to allow the creation of non-charitable purpose trusts. This helps to enhance Hong Kong's position as a major asset management centre in Asia.

Accountants, Hong Kong	<p>(b) In order to align Hong Kong’s position of being an asset management centre with other well-known jurisdictions for setting up trusts, we consider that other jurisdictions’ experience could be shared in this regard. However, we note that there are concerns about these non-charitable purpose trusts being used for illegal or tax evasion purposes, which could have a negative impact on Hong Kong’s position as an international financial centre. As such, safeguards should be imposed on the use of these trusts. We consider that the purpose of non-charitable purpose trust has to be specific, reasonable and possible, and it should be moral, not contrary to public policy and lawful. We consider that these conditions should be taken into account for the setting up of non-charitable purpose trust in Hong Kong.</p> <p>In addition, we propose that at least one trustee of the trust needs to be a professional trustee who should possess better knowledge and experience than a lay trustee in administering a modern day trust.</p> <p>(c) As there is no specific beneficiary for non-charitable purpose trust, we agree to the introduction of “enforcers”. We also consider it appropriate to learn from experience of other well-known jurisdictions for setting up such trusts. We consider the Cayman Islands trust law model an adequate safeguard in respect of the appointment of “enforcer”.</p>
The British Chamber of Commerce in Hong Kong	<p>(a) Yes, we think there is a good argument for enabling “non charitable purpose trusts” under Hong Kong law. For example they can be used to hold shares in a Hong Kong Family Trustee Company. Cayman STAR trusts or BVI VISTA trusts, or foundations are commonly used in those circumstances at present, usually forcing the whole trusteeship into an alternative jurisdiction for many major Hong Kong families.</p> <p>(b) Illegal uses for such purpose trusts should be detailed, and stopped. We believe a person in HK should be the Enforcer, without going so far as define their role in statute.</p> <p>(c) No.</p> <p>(d) See above.</p>
The Chinese Manufacturers’ Association of Hong Kong	<p>(a) 贊成准許設立非慈善性質目的信託，但需就該類信託的用途設立的一定的限制和保障措施，以防患被用作非法或逃稅的用途。</p>
The Hong Kong Association of Banks	<p>(a) On balance, we believe that the answer to this question is negative for the following reasons. First, we do not believe that there is any reason to suppose that a demand exists for this kind of trust. Secondly, although there is a concern regarding illegality or tax evasion, we believe that this is addressed adequately by the reporting requirements under the Drug Trafficking (Recovery of Proceeds) Ordinance and the Organized and Serious Crimes Ordinance but more</p>

	<p>importantly the problems on enforcement are very difficult to address in any meaningful manner and none of the approaches adopted by Dubai, Cayman Islands or the BVI present a satisfactory solution. We feel that having non-charitable purpose trusts with no viable means of enforcement would not enhance Hong Kong's reputation as a jurisdiction for establishment of trusts. Finally, we note that the UK has not adopted a structure for establishment of non-charitable purpose trusts.</p> <p>(b) Not applicable. (c) Not applicable. (d) Not applicable.</p>
The Hong Kong Bar Association	<p>The issues raised by these queries are wide-ranging and extensive. The last query is a radical and fundamental change to trusts law in the Commonwealth jurisdictions. There has yet been no reported consensus internationally on this subject. Generally the Bar does not see any present need to reform the existing rules on the above areas. The Bar therefore does not favour any change.</p>
The Law Society of Hong Kong	<p>(a) Yes. From a user's point of view, we welcome the possibility of having a non-charitable purpose trust. The concept of charity under common law is archaic and private donors should have freedom to decide on the purposes (e.g. benevolent purposes) they wish to support without the need to be confined under the common law to charitable purpose. There should be a wider variety of instruments/vehicles available to enhance more sophisticated planning options.</p> <p>Non-charitable purpose trusts are a useful tool in securitisation transactions and similar "off-balance sheet" financing arrangements, as well as the creation of trust holding structures. Also, they can be used for philanthropic purposes that would not strictly be regarded as charitable. Paragraph 6.28 of the consultation paper provides good examples of the advantages of legislation for the creation of non charitable purpose trusts.</p> <p>If the objective of the revisions to the trust law is to attract business to Hong Kong then such structures should be made available. They are available in most, if not all of the leading offshore jurisdictions, including OECD "White List" jurisdictions such as Bermuda, Guernsey and Jersey.</p> <p>The expressed concern is that they may be used as a vehicle for "illegal or tax evasion purposes". This could be said equally of companies. In fact, it is possible to establish a company limited by guarantee for any lawful purpose, not limited to charitable purposes. There are many effective Know-Your-Client and anti-money laundering controls in place in Hong Kong and elsewhere to identify the illegitimate use of corporate and non-corporate vehicles alike, and the fact that purpose trusts can be used to validly divorce individuals or entities from ultimate beneficial ownership of</p>

underlying assets is not of itself a reason not to adopt them. There is a profound difference between facilitating tax evasion and making available modern and sensible structuring opportunities.

In introducing non-charitable purpose trusts we would suggest that proper safeguards be imposed to ensure that they may only be used for legitimate reasons and to afford reasonable transparency.

(b) Yes, there should be limitations and safeguards imposed on the use of non-charitable purpose trusts.

The following are some suggestions to consider:

- the scope of “non-charitable purpose trust” should be clearly defined.
- the Trustees of a Hong Kong purpose trust should be Hong Kong resident, as this facilitates oversight by the Hong Kong court.
- the non-charitable purpose trust should be established for lawful and non-tax evasion purposes.
- the duration of non-charitable purpose trust (as in, e.g. Mauritius) be limited to ensure there is a periodic opportunity to review them, but it should be possible to continue them with the consent of the enforcer or the court.

(c) Yes, we agree to provide for the role of enforcers in Hong Kong law.

There must be a mechanism by which the trusts of purpose trusts can be enforced, and although the courts may retain an inherent jurisdiction to intervene upon the application of any interested person, it is necessary to have someone with information rights. Enforcers will be vital on non-charitable purpose trusts.

(d) The enforcer should have a duty to enforce the trust, and in this respect we would support the Dubai approach as described in paragraph 6.29(a) of the Consultation Paper.

The duty of care should be the same as for the trustee.

It should be a requirement that an enforcer of a non-charitable purpose trust is appointed under the trust instrument. In the absence of an enforcer the powers of the Trustee should be suspended other than as may be necessary for preservation of the trust assets.

There should be a mechanism to protect the independence of the enforcer, and any successor to the enforcer should not be capable of being appointed in default by the Trustee. In the absence of a successor appointed by the outgoing enforcer or some other mechanism for appointment such as a nominated “Appointor” the appointment should be made by the Court on the application of the Trustee or any person interested.

Note

1. Respondents A, B, C and D have requested that their identity as respondents to the captioned consultation exercise be kept confidential.