
Setting up a charity in Hong Kong

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Setting Up a Charity in Hong Kong

(I) What is a charity?

(A) Charity must be established exclusively for charitable purposes

For an institution or a trust to be a charity, it must be established for purposes which are exclusively charitable as defined in law.

The definition of “charity” was given in the judgment of Lord MacNaghten in the case of Income Tax Special Purposes Commissioners v. Pemsel [1891-1894] All ER Rep 28.

In the judgment, it was held that the following purposes may be accepted as “charitable”:-

- (a) relief of poverty;
- (b) advancement of education;
- (c) advancement of religion; and
- (d) other purposes of a charitable nature beneficial to the community not falling under any of the preceding heads.

For the purpose of obtaining profits tax exemption under Section 88 of the Inland Revenue Ordinance only, while the purposes under the first three heads may apply to activities carried on in any part of the world, those under head (d) will only be regarded as charitable if they are of benefit to the Hong Kong community.

➤ **Examples of purposes which the court had held to be charitable purposes include:-**

- (a) relief of poor people;
- (b) relief of victims of a particular disaster;
- (c) relief of sickness;
- (d) relief of physically and mentally disabled;
- (e) establishment or maintenance of non-profit-making schools;
- (f) provision of scholarships;
- (g) diffusion of knowledge of particular academic subjects;
- (h) establishment or maintenance of a church;
- (i) establishment of religious institutions of a public character;
- (j) prevention of cruelty to animals;
- (k) protection and safeguarding of the environment or countryside.

➤ **Examples of purposes which the courts had held to be non-charitable purposes include:-**

- (a) attainment of a political object;
- (b) promotion of the benefits of the founders or subscribers;
- (c) provision of a playing field, recreation ground or scholarship fund for employees of a particular company or industry;
- (d) encouragement of a particular sport such as angling or cricket.

(B) Charity must be established for public benefit

A purpose is not charitable unless it is directed to the public or a sufficient section of it. An institution cannot generally be charitable if it is in principle established for the benefit of specific individuals.

II. How to set up a charity?

(A) The structure of a charity

The most common types of structures of charities are:-

- (a) a trust;
- (b) a society established under the Societies Ordinance (Cap 151) excluding, among others, an unincorporated trust of a public character established solely for charitable purposes (see Section 2(2) and Schedule of the Societies Ordinance);
- (c) a company incorporated under the Companies Ordinance (Cap 622) (usually a company limited by guarantee); and
- (d) a statutory body established by the Hong Kong legislature.

(B) The governing instrument of a charity

The governing instrument of a charity should contain the followings:-

- (a) stating precisely and clearly its objects (This also applies to companies incorporated under the Companies Ordinance on and after 10 February 1997 and not required to state their objects in their Memorandum of Association);
- (b) limiting the application of its funds towards the attainment of its stated objects;
- (c) prohibiting distribution of its incomes and properties amongst its members;
- (d) prohibiting members of its governing body (e.g. directors, trustees, etc) from receiving remuneration;
- (e) specifying how the assets should be dealt with upon its dissolution (The remaining assets should normally be donated to other charities); and
- (f) requiring the keeping of sufficient records of income and expenditure (including donation receipts), proper accounting books and compilation of annual financial statements.

(III) Tax Exemption

A charity, subject to the approval of the Inland Revenue Department, is exempted from profits tax under Section 88 of the Inland Revenue Ordinance and is also exempted from obtaining a Business Registration Certificate (unless a trade or business is carried on).

(IV) Types of organization (society vs company limited by guarantee)

(1) A society formed under the Societies Ordinance

(a) Nature of organisation

According to Section 2 of the Societies Ordinance, a society means:-

“any clubs, company, partnership or association of persons, whatever the nature or objects, to which the provisions of the Ordinance apply”

According to Section 2(2) of the Societies Ordinance, the provisions of the Societies Ordinance do not apply to certain persons as set out in the Schedule of the Societies Ordinance. In short, they are companies, trade union, credit unions etc. For ease of reference, a copy of the Schedule is attached herewith.

(b) Application for registration as a society under the Societies Ordinance

The procedures for registration as a society under the Societies Ordinance are relatively simple.

A society is required to apply to the Societies Officer for registration within 1 month of its establishment (Section 5(1) of the Societies Ordinance). The application must be signed by 3 office-bearers and include details of:

- (i) the name of the society;
- (ii) the objects of the society;
- (iii) the particulars of the office-bearers of the society; and
- (iv) the address of the principal place of business of the society and of every place or premises owned or occupied by the society.

A copy of the application form can be found at <http://www.police.gov.hk/info/doc/New%20Application%20for%20Societies%20Registration.pdf>

(c) Choosing a name of the society

There are certain restrictions on the name of the societies. According to Section 9(1) of the Societies Ordinance, no local society shall use a name for itself or its branch which:

- (i) is identical with that by which a society already in existence is known or so closely resembles that name;
- (ii) is likely to mislead the public as to the true character or purpose of the society;
- (iii) suggests that the society belongs to a class of persons specified in the Schedule when in fact it does not so belong; or
- (iv) contains the words “rural committee” or any other words which, in the opinion of the Societies Officer, suggest or are calculated to suggest that the society is a rural committee or federation or other association of rural committees unless such society is a rural

committee or a federation or other association of rural committees acknowledged as such by the Secretary for Home Affairs.

(d) Fees

No fees are payable for the application for registration of a society.

(2) A company limited by guarantee formed under the Companies Ordinance

(a) Nature of a company limited by guarantee

For a company limited by guarantee, the liability of its members is limited by the company's articles to the amount that the members undertake, by those articles, to contribute to the assets of the company in the event of its being wound up.

This form of company is appropriate when initial share capital is not required and when there is no intention to distribute profits. It is typical of charities and non-profit organisations.

(b) Setting up of a company limited by guarantee under the Companies Ordinance

- (i) A name search needs to be carried out with the Companies Registry on the proposed company name to avoid using a name which is the same or too similar to that of another company which is already registered.
- (ii) An Articles of Association setting out the objects of the company and a Form NNC1G - Incorporation Form (Company Not Limited by Shares) have to be prepared and filed to the Companies Registry upon signing by the members and the directors of the company.
- (iii) Relevant activation documents, including the appointment of directors, secretary and the application for a Business Registration Certificate have to be filed.
- (iv) Upon the filing of all the relevant documents, it normally takes 5 to 6 weeks for the Companies Registry to issue a Certificate of Incorporation and for the Inland Revenue Department to issue a Business Registration Certificate.

(c) Continuing obligations of a company limited by guarantee

The continuing obligations of a Hong Kong company under the Companies Ordinance include:-

- (i) maintaining registers of debenture holders, members, charges, directors and company secretaries;
- (ii) keeping proper books of account;
- (iii) holding annual general meetings;

- (iv) preparing and filing annual returns with the Companies Registry together with the certified true copies of the company's audited accounts (including the balance sheet laid before the company at its annual general meeting (“AGM”), the report of the auditors and the report of the directors) within 42 days after the company's return date. The return date for a guarantee company is 9 months after the end of the company's accounting reference period. The accounting reference period is the period by reference to which the company's annual financial statements are to be prepared. (a filing fee of HK\$105 is payable to the Companies Registry);
- (v) preparing and putting before an annual general meeting a profit and loss account and a balance sheet;
- (vi) preparing and putting before an annual general meeting an auditor’s report and a directors’ report (audit fee to be payable to an accountant for the preparation of the audit report); and
- (vii) renew the Business Registration Certificate upon its expiry - *Not applicable if the company is exempted from profits tax under Section 88 of the Inland Revenue Ordinance*

(d) Fees

- (i) Incorporation fee payable to the Companies Registry on application:
 - HK\$170 for 25 or less members;
 - HK\$340 for exceeding 25 members but not exceeding 100;
 - HK\$20 for every 50 members or less after the first 100 (subject to a maximum fee of HK\$1,025);
- (ii) Business Registration fee payable to the Inland Revenue Department - *Not applicable if the company is exempted from profits tax under Section 88 of the Inland Revenue Ordinance*; and
- (iii) Audit fee payable for the audited account to be filed annually.

(3) Society or company limited by guarantee ?

(a) Advantages of a society

The setting up of a society is simple, less formal and quicker.

A society is more flexible as there is no particular set of rules governing the internal operation of the society. Members of the society are free to set their own rules.

There are no specific continuing obligations of a society. It is not required to file any annual returns or any other documents to the Societies Officer.

It is also cheaper to set up a society than a company limited by guarantee. There is no registration fee. If the society is not carrying on a business, a Business Registration Certificate is not required and the annual fee is not applicable. It is also not required to file any audited accounts annually and the fee to an accountant is not required.

(b) *Advantages of a company limited by guarantee*

The internal operation of a company limited by guarantee is governed by its Articles of Association and the Companies Ordinance. The rules are clear and the members are well informed of how the company will operate.

As an audited account is required to be filed with the Companies Registry annually, the accounts of the company will be better managed. As the audited accounts are required to be tendered at the annual general meeting, members of the company will be well informed of the financial position of the company.

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This note is intended for information purposes only. Specific advice should be sought in relation to any particular situation.

Schedule to Societies Ordinance (Cap. 151)

PERSONS TO WHICH THE ORDINANCE DOES NOT APPLY

- (1) Any company registered under the Companies Ordinance (Cap 622). (Amended 28 of 012 ss. 912 & 920)
- (1A) Any company registered under a former Companies Ordinance as defined by section 2(1) of the Companies Ordinance (Cap 622). (Added 28 of 2012 ss. 912 & 920)
- (2) Any co-operative society registered under the Co-operative Societies Ordinance (Cap 33).
- (3) Any trade union or any trade union federation registered under the Trade Unions Ordinance (Cap 332). (Replaced L.N. 59 of 1964)
- (4) (a) An association the affairs of which are conducted wholly or partly in any school premises and which consists wholly or mainly of persons under the age of 21 years who are undergoing primary education or secondary education in any school.

(b) For the purposes of this item, "primary education" (小學教育), "school" (學校), "school premises" (校舍) and "secondary education" (中學教育) have the meanings assigned to them by section 3 of the Education Ordinance (Cap 279). (Replaced 8 of 2001 s. 30)
- (4A) Any incorporated management committee as defined in section 3(1) of the Education Ordinance (Cap 279). (Added 27 of 2004 s. 73)
- (5) Any company or association constituted pursuant to or under any Ordinance or other legislation applicable to Hong Kong. (Replaced 13 of 1999 s. 3)
- (5A) Any company or association which was, immediately before the commencement of the Adaptation of Laws (No. 3) Ordinance 1999 (13 of 1999), a company or association constituted under Royal Charter, Royal Letters Patent or any Imperial Act and was, immediately before that commencement, a local society. (Added 13 of 1999 s. 3)
- (6) Any company, association or partnership formed for the sole purpose of carrying on any lawful business and registered under any other Ordinance. (Amended 71 of 1988 s. 2)
- (7) (Repealed 75 of 1992 s. 32)
- (8) Any Chinese temple registered under the Chinese Temples Ordinance (Cap 153).
- (9) Any credit union registered under the Credit Unions Ordinance (Cap 119). (Added L.N. 41 of 1970)
- (10) Any corporation registered under the Building Management Ordinance (Cap 344). (Added L.N. 107 of 1973. Amended 27 of 1993 s. 48)
- (11) Any association of owners or occupiers of premises which is approved for the purposes of this Ordinance by the Secretary for Home Affairs by notice in writing. (Added L.N. 107 of 1973. Amended L.N. 94 of 1974; L.N. 17 of 1982; L.N. 14 of

1983; L.N. 18 of 1983; L.N. 262 of 1989)

- (12) Any association or group of persons which-
- (a) is formed for the sole purpose of recreation or training;
 - (b) conducts its activities wholly or largely in a Community or Youth Centre;
- and
- (c) was formed with and continues to have the approval of the Director of Social Welfare. (Added L.N. 114 of 1974)
- (13) Any association of which-
- (a) one or more of the directors, trustees or other office holders; or
 - (b) the committee or board or other body having the management of the association,
- is or are incorporated by any Ordinance. (Added L.N. 93 of 1975)
- (14) The operator of, and participants in, any chit fund, as defined in section 2 of the Chit-Fund Businesses (Prohibition) Ordinance (Cap 262), which complies with section 5(2) of that Ordinance. (Added L.N. 225 of 1975)
- (15) (Repealed 75 of 1992 s. 32)
- (16) An unincorporated trust-
- (a) of a public character established solely for charitable purposes; or
 - (b) established solely for the purpose of engaging in a retirement scheme approved under section 87A of the Inland Revenue Ordinance (Cap 112). (Added 75 of 1992 s. 32)