

# **THE JERSEY LAW COMMISSION**



**CONSULTATION PAPER (REVISED)**

## **THE JERSEY LAW OF CHARITIES**

The Jersey Law Commission was set up by a Proposition laid before the States of Jersey and approved by the States Assembly on 30 July 1996.

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# **THE LAW OF CHARITIES**

## **Executive Summary**

The attached paper covers a number of issues which affect charities in Jersey.

- 1 The definition of charitable purpose - in particular the extent to which “public benefit” should be a key factor in establishing a charitable purpose.
- 2 Tax relief and the possibility of Jersey adopting a more liberal UK-style “Gift Aid” scheme to encourage greater giving.
- 3 FATF Recommendations and their impact on charitable and similar institutions, broadly concluding that the combination of the present law relating to trusts combined with the new regulatory environment and specific anti-terrorist legislation is adequate.
- 4 The role of a Jersey Charities Commission.

## **LAW OF CHARITIES**

This paper updated and revises the one originally published by the Law Commission in January 2004. It discusses the same issues other than in relation to reform of the legal doctrine of “Cy-pres” which has now been taken forward by Jersey’s government and reform of which is included in the Trusts (Amendment No. 4) (Jersey) Law.

There has been much debate in recent years, particularly in the UK, relating to charities and the legislation and bodies in place to govern and protect them. Current provisions are seen as insufficient and outdated, and questions have been raised in respect of the potential for the funding of terrorist activities<sup>1</sup> through charitable trusts.

Charitable status provides an organisation with particular advantages in respect of certain fiscal and other matters, it places them in a favourable position in the eye of the public and encourages charitable donations and voluntary activities by citizens. It is therefore crucial that effective provisions are in place adequately to regulate, monitor and protect these bodies and the public which supports them. They must exist in a manner in which donation is encouraged while public confidence in charitable organisations is secured. Clarity in the law will be crucial to such developments.

### **PART 1**

#### **Background**

Jersey law allows for the creation of various charitable structures, including incorporated associations under the Fidéicomis Law<sup>2</sup>, unincorporated associations and charitable trusts. Prima facie, all of these vehicles may be liable to Jersey Income Tax. However, Article 115 of the Income Tax (Jersey) Law 1961 provides that exemption from income tax shall be granted in respect of:

“any income derived from the property of a corporation, association or trust established for a charitable object or for the service of any church or chapel, or any building used solely for the purpose of divine worship and in so far as such income is applied to those purposes”

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<sup>1</sup> See FATF Recommendation VIII

Following the agreement by the Comptroller of Income Tax that the conditions of this provision are satisfied, a Certificate of Exemption will be granted under Article 60 of the Income Tax (Jersey) Law 1961.

The Association of Jersey Charities has in excess of two hundred members, all of which are charities. This is, however, an independent body and has no regulatory powers.

The number of charitable organisations in existence in Jersey is unknown, particularly in light of the increased popularity of charitable and mixed purpose<sup>3</sup> trusts in international finance structures. Special purpose companies are usually established for the purpose of issuing some form of debt on the international capital markets and will typically be owned by charitable trusts set up for the purpose of owning shares in the company. While such trusts do not conduct any public fundraising, they will receive an amount of money to be distributed to charity, usually by way of a dividend from the underlying special purpose company which will be paid by the Trustees to one or more active charitable organisations, often based in Jersey. Such special purpose companies must be owned by an independent (preferably non-tax paying) entity but other non-charitable trusts, such as a non-charitable purpose trusts, could be used for similar purposes.

## **PART 2**

### **Issues**

#### **1 Definition of “charity” and “charitable purpose”**

While a charity must exist for exclusively charitable purposes, no statutory provisions are in place in Jersey to provide a definition of what these purposes are. Current authority is essentially based on the English statute of Elizabeth I 1601 but this is arguably outdated and insufficient for modern day purposes. In this section we review various definitions used in other jurisdictions and put forward a proposed means of bringing clarity to the issue in Jersey.

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<sup>2</sup> Loi (1862) Sur les tenures en fidéicommis et l’incorporation d’associations

<sup>3</sup> i.e where the objects of the trust may be both charitable and non-charitable

English authority was accepted in *re. Meaker*<sup>4</sup> where it was held that a charitable purpose must be both enforceable by the court and within “either the express terms or the ‘spirit and intendment’ of the preamble to the ancient statute of Elizabeth”<sup>5</sup>. The criteria contained in the Act were first laid down by Lord Macnaughten in *Pemsel’s Case*<sup>6</sup> as relating to:

- The relief of aged, impotent and poor people
- The advancement of education
- The advancement of religion
- Other purposes beneficial to the community not falling under any of the three preceding heads.

### **Public benefit**

A rebuttable presumption exists that where the purposes of an organisation fall under the first of the three heads of charity, it will be operating for the benefit of the public. However, no such presumption exists in relation to purposes that are for the benefit of the community and it is for an organisation to prove the “public benefit” that it offers. This latter head has caused particular problems in the United Kingdom and it will often be necessary to search by analogy through the extensive case law that has developed. It was accepted in *re. Meaker*, as in England, that this test of “public purpose” (i.e. for the benefit of the community) is “an overriding test”<sup>7</sup>. The meaning of “public benefit” should therefore be given careful consideration.

Two distinct elements exist in relation to “public benefit” as interpreted by case law:

1. the purpose itself must be beneficial and not harmful to the public<sup>8</sup>

“The question whether a purpose will or may be operative for the public benefit is a question to be answered by the court by forming an

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<sup>4</sup> (1972) J.J. 2161

<sup>5</sup> Repealed by the Mortmain and Charitable Uses Act 1888. However, the preamble was expressly preserved at s.13(2). Note also that the English Charities Act 1993 provides no statutory definition as to what purposes are and are not charitable and therefore all case law is still relevant in this regard. It is the court’s duty to determine whether particular purposes are charitable.

<sup>6</sup> *Income Tax Special Purposes Comrs. v. Pemsel* [1891] AC 531

<sup>7</sup> *ibid.*, 2177

<sup>8</sup> *National Anti-Vivisection Society v. IRC* [1948] AC 31, 65

opinion on the evidence before it, having strict regard to the conditions of the gift.”<sup>9</sup>

2. the benefit of the purpose must be available to a sufficient sector of the public<sup>10</sup>

“a benefit must benefit the community, or an appreciably important class of the community, which must be sufficiently defined and identifiable by some quality of public nature but may be restricted within narrow limits.”<sup>11</sup>

For a benefit to be public it would be insufficient to show that some benefit would follow from acting in a certain way if some disadvantage or harm would be caused to another part of the community - a charitable purpose cannot exist where it provides more harm than benefit.

The notion of ‘public benefit’ is also examined in ‘Tudor on Charities’ (7th edn.) under the head “The Requirement of Public Benefit”. This provides that it was established by the Court of Chancery that in defining a charitable trust consideration should be given to two closely related questions:

1. whether the purpose of the trust confers a benefit on the public or a section of the public; and
2. whether the class of persons eligible to benefit constitutes the public or a section of it.

## **Reform**

In light of the recognition of the changing nature of charitable concepts and with a view to providing clarity and securing public confidence in charity, the Scottish Charity Law Reform Commission conducted extensive research and recommended four defining principles of charitable organisations:

- Overriding purpose is for the public benefit
- Non-profit distributing

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<sup>9</sup> Halsbury’s Laws of England, Charities - 1(1)7

<sup>10</sup> *Verge v. Somerville* [1924] AC 496, 499

<sup>11</sup> Halsbury’s Laws of England, Charities - 1(1)8

- Independent
- Non-party political<sup>12</sup>.

The Scottish Commission's approval of 'public benefit' as the overriding purpose allows for incidental, non-charitable benefits sometimes to arise from charitable work. It was concluded that an incidental private benefit may be legitimate if it arises as a necessary consequence of a decision by the trustees which is directed only at furthering the organisation's charitable purposes.

Due to the many potentially different interpretations of 'benefit', it is hard to provide a solid assessment of the concept. However, the Scottish Commission provided the following test, whereby a charity should:

“have the purpose to relieve the needy, or sustain or enhance the lives of people in the community. Alternatively a [charity] could promote animal welfare, or protect or enhance the environment.”

If Jersey was to accept such a test of purely public benefit, it may be possible to remove the need for use of the four heads of charity established from the statute of Elizabeth. The test would then be one of public purpose and net benefit to the general public, and this may include a need to widen the definition of 'charitable purpose' to include, for example, sports and campaigning organisations. In addition to the Scottish Commission, the National Council for Voluntary Organisations in a consultation document in 2001 and the UK Cabinet Office Strategy Unit Report of 2002 reiterated the central importance of public benefit.

The Law Commission recommends that there should be a statutory definition of "charity" and believes that the definition provided in the Charities and Trustees Investment (Scotland) Act 2005 deserves commendation. Section 7 of that Act provides:

- “(1) A body meets the charity test if-
- (a) its purposes consist only of one or more of the charitable purposes, and

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<sup>12</sup> This is not for reasons of illegality but rather the fact that the court has no means of judging whether proposed changes in the law will or will not be for the public benefit and therefore cannot be certain that a gift to secure the change is a charitable gift.

- (b) it provides (or, in the case of an applicant, provides or intends to provide) public benefit in Scotland or elsewhere.
- (2) The charitable purposes are-
- (a) the prevention or relief of poverty,
  - (b) the advancement of education,
  - (c) the advancement of religion,
  - (d) the advancement of health,
  - (e) the saving of lives,
  - (f) the advancement of citizenship or community development,
  - (g) the advancement of the arts, heritage, culture or science,
  - (h) the advancement of public participation in sport,
  - (i) the provision of recreational facilities, or the organisation of recreational activities, with the object of improving the conditions of life for the persons for whom the facilities or activities are primarily intended,
  - (j) the advancement of human rights, conflict resolution or reconciliation,
  - (k) the promotion of religious or racial harmony,
  - (l) the promotion of equality and diversity,
  - (m) the advancement of environmental protection or improvement,
  - (n) the relief of those in need by reason of age, ill-health, disability, financial hardship or other disadvantage,
  - (o) the advancement of animal welfare,
  - (p) any other purpose that may reasonably be regarded as analogous to any of the preceding purposes.

(4) A body which falls within paragraphs (a) and (b) of subsection (1) does not, despite that subsection, meet the charity test if-

- (a) its constitution allows it to distribute or otherwise apply any of its property (on being wound up or at any other time) for a purpose which is not a charitable purpose,
- (b) its constitution expressly permits the Scottish Ministers or a Minister of the Crown to direct or otherwise control its activities, or
- (c) it is, or one of its purposes is to advance, a political party.”

## **2 Methods of charitable giving:**

### **Gift Aid**

Jersey currently provides for the deduction of tax<sup>13</sup> from outright gifts in excess of £100 but less than £500,000 per calendar year. No benefits may be receivable by the donor for the gift and a certificate signed by the donor must be completed for the charity in order that it can claim back tax from the Comptroller of Income Tax. The gift has to be made to a charity established in the Island, so major international charities, unless with a Jersey branch, cannot benefit from the reclaim of income tax.

By comparison, the UK Gift Aid scheme is far more extensive than the arrangement in Jersey, allowing donors to make payments, large or small, regular or one-off to UK charities. Recent reforms extending the scheme have been made in response to the Chancellor’s announcement in the 2000 Budget of a package of measures to ‘*Get Britain Giving*’. The donor will give the charity a declaration, either in writing (including e-mail) or orally, requiring confirmation that the donor will pay an amount of income tax or capital gains tax equal to the tax the charity claims on their donations. Gifts may include:

- Money, now including foreign currency
- Real property<sup>14</sup>
- Certain shares, securities or investments

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<sup>13</sup> at the standard rate of 20p in the pound

<sup>14</sup> The whole interest in such a freehold or leasehold property must be given.

Gift Aid allows a charity to reclaim the basic rate tax on the donation from the Inland Revenue, allowing the donation to be worth an extra 28% to the charity.

The provisions for the UK scheme were amended by the Finance Act 2000, to:

- Abolish the £100 minimum limit for Gift Aid donations
- Withdraw separate tax relief for payments made under a Deed of Covenant and give relief for all such payments under the Gift Aid scheme
- Require a new, simpler and more flexible Gift Aid declaration
- Allow donors to give either written or oral declarations
- Allow crown servants, members of the UK armed services and other non-UK residents who make donations out of income or gains charged to UK tax, to use the Gift Aid scheme

Modest benefits received from charities will not stop a donation from qualifying as a Gift Aid donation, provided their value does not exceed certain prescribed limits. Individual donors must pay an amount of income and/or capital gains tax, whether at basic or some other rate, equal to the tax deducted from their donations. A donor cannot receive payment of non-payable tax credits on dividends paid by UK companies but those credits can be used by the donor to cover the tax reclaimed by the charity on the donation. Non-repaid tax deducted from bank and building society interest can also be used to cover tax reclaimed by the charity.

Gift Aid Donations by companies must be paid without deduction of income tax and no certificate or declaration will be required. When calculating profits for corporation tax, relief can be claimed for the gross amount of donations under the Gift Aid scheme.

A charity must keep the necessary accounting records normally required to record donations and the company should retain any correspondence with the charity in relation to the donation as evidence of its having been made.

## **Covenanted Gifts**

Jersey also presently provides for the recovery of tax in respect of payments made under a deed of covenant. The deed of covenant must provide for regular payments over a period of more than four years. There are no limits, either minimum or maximum, to the amount that can be so covenanted and, unlike the gift aid scheme, the charity concerned does not have to be established in Jersey but can also be a UK or a Guernsey charity.

## **Reform**

The object of tax benefits on charitable gifts must be to encourage donation. A move in Jersey towards the extension of provisions such as those under the UK Gift Aid scheme could encourage this purpose and allow greater good to be achieved by charities. Specifically, it is proposed that, as in the UK, the separate tax relief for payments under a deed of covenant should be abolished and relief should be given for all payments made under a revised gift aid scheme which would have no minimum or maximum criterion. Furthermore, there appears to be no logical reason for allowing recovery of tax by UK and Guernsey charities under the deed of covenant scheme but not under the gift aid scheme and it is proposed that recovery of tax should be allowed for all Jersey registered charities (as to which, see further below) under a revised gift aid scheme.

Account will need to be taken of Jersey's current tax reforms. Assuming individuals continue to pay income tax at 20% the existing regime would continue to apply, but it is accepted that gifts by companies which paid no income should afford no relief or recovery and gifts by companies paying income tax at 10% should entitle the charity to the lower level of recovery.

## **3 Financial Action Task Force on Money Laundering**

### **Special Recommendations on Terrorist Financing**

The Financial Action Task Force<sup>15</sup> (FATF) has now adopted nine Special Recommendations in recognition of the "vital importance of taking action to combat the financing of terrorism". They are combined with the FATF's Forty Recommendations on money laundering and

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<sup>15</sup> An inter-governmental body whose purpose is the development and promotion of national and international policies to combat money laundering and terrorist financing.

together set out a basic framework for the detection, prevention and suppression of the financing of terrorism and terrorist acts.

Recommendation VIII concerns non-profit organisations and states:

“Countries should review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism. Non-profit organisations are particularly vulnerable and countries should ensure that they cannot be misused:

- (i) by terrorist organisations posing as legitimate entities;
- (ii) to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; and
- (iii) to conceal or obscure the clandestine diversion of funds intended for legitimate purposes of terrorist organisations.”

It is recognised that this recommendation consists of two elements:

- Jurisdictions should review the legal regime of entities, in particular non-profit organisations, to prevent their misuse for terrorist financing purposes; and
- With respect specifically to non-profit organisations, jurisdictions should ensure that such entities may not be used to disguise or facilitate terrorist financing activities, to escape asset freezing measures or to conceal diversions of legitimate funds to terrorist organisations.<sup>16</sup>

‘Non-profit organisations’ are generally taken by the FATF to include entities organised for charitable, religious, educational, fraternal and other ‘good’ purposes and it was recognised that ‘offshore companies’ and trusts may offer increased benefits to terrorist financing arrangements.

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<sup>16</sup> FATF ‘Guidance Notes for the Special Recommendations on Terrorist Financing and the Self-Assessment Questionnaire’, pg. 6-7

The FATF has developed special guidance for financial institutions to help in the detection of techniques and mechanisms used for the financing of terrorism<sup>17</sup>. Recognition is made of:

- Sources of terrorist funds:

Community solicitation and fundraising appeals are recognised as a very effective means of raising terrorist funds and may be carried out in the name of a charitable or relief organisation.

These entities may be legitimate in that they do engage in some of the work they purport to carry out but most of the members of the organisation will have no idea that a portion of the funds raised are being diverted to terrorist causes.

- Laundering of terrorist related funds:

Where terrorist funds are raised from legal charitable sources (donations, etc.), tracing the funds may be made more difficult as there may be few, if any, indicators that would make an individual financial transaction or series of transactions stand out as being linked to terrorist activities.

- Characteristics of financial transactions that may be cause for increased scrutiny:

Indicators relating specifically to charities include the use of a charity's bank accounts to collect and then funnel funds immediately or after a short time to a small number of foreign beneficiaries and financial transactions which appear to have no logical economic purpose or in which there appears to be no link between the stated activity of the organisation and the other parties in the transaction

The Forty Recommendations of the FATF contain three main features:

- The requirement that, in addition to knowing their own customers, banks and other institutions must look beyond their customers (e.g. when they are trusts or companies) to establish the principals behind them.

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<sup>17</sup> see 'Guidance for Financial Institutions in Detecting Terrorist Financial Activities'

- The tightening up of requirements on banks and other institutions to ensure that due diligence is properly carried out, even where the customer is referred to them by other institutions claiming to have already carried out background checks.
- The requirement that all institutions embark upon a progressive risk prioritised programme to bring the records of existing accounts up to current standards (where deficiencies exist in information and documentation held), if the nature of the client or transaction meets certain criteria.

While these recommendations have received careful consideration in the Island, many provisions are already in place effectively to monitor charitable organisations of whatever form. Jersey has recently come under scrutiny from several bodies including the Organisation for Economic Co-operation and Development (OECD), the European Union (EU) and the United Nations (UN) and several laws and initiatives have been introduced in response. This includes Jersey's general political commitment to the OECD initiative on 'Harmful Tax Competition'<sup>18</sup>.

All charities organised as trusts will be subject to the Trust (Jersey) Law 1984 and following the introduction of the Financial Services (Extension) (Jersey) Law 2000<sup>19</sup> professional trustees are also regulated under the provisions of the Financial Services (Jersey) Law 1998. Trustees must also comply with the Proceeds of Crime (Jersey) Law 1999, the Criminal Justice (International Co-operation) (Jersey) Law 2001 and the Terrorism (Jersey) Law 2002. Article 1(1) of that Law provides for the wider definition of 'financial institution' contained in the Proceeds of Crime (Jersey) Law 1999, Article 23 relates to disclosures of suspicious activities by such institutions and Article 33 and Schedule 7 to disclosure of accounts. Public trusts are also regulated to a degree by the Bailiff's office which controls the number of public collections in St Helier and the Attorney General has powers to bring suit to enforce a charitable trust in the Royal Court<sup>20</sup>.

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<sup>18</sup> See letter from the States of Jersey to the OECD dated 22.02.02

<sup>19</sup> Previously, the only part of the finance industry not regulated

<sup>20</sup> The court knows what are charitable purposes and can apply trust property accordingly but a trust for benevolent purposes cannot be so enforced and so is void for uncertainty: thus the system is imperfect.

In addition to extensive existing legislation, the Jersey Financial Services Commission (JFSC) has issued a Position Paper in respect of the revised ‘Know Your Customer Framework’ as well as policy on ‘Outsourcing’.

Concerns have been expressed in relation to the inherently suspicious form of “blind” trusts<sup>21</sup>. However, the provisions already mentioned should adequately eradicate the potential for the use of such vehicles for fraud, money laundering or tax-evasion reasons<sup>22</sup>.

## **Reform**

The Law Commission recognises that the current regulatory environment for charities, in spite of existing criminal and regulatory laws that exist, does not fully meet all the issues raised by FATF VIII. Thus, reluctantly, the Law Commission remains of the view that further regulation will be required but, so far as possible, it should be introduced in such a way that it does not decrease the level of charitable giving or add significantly to the burden of cost suffered by charities, whether public or private.

The Law Commission is of the opinion that in the application of further regulation a distinction should be drawn between public and private charities. Public charities can be defined as charities which seek to solicit money and donations from the general public. Private charities are those charities funded by a single donor, family or corporation. Specifically, therefore, it is recommended that:-

- (a) a register of charities be established with an independent body being given the task to:-
  - (i) determine whether or not a trust or an entity is a charity on the basis of the public benefit test outlined above; and
  - (ii) exercise some disciplinary powers to ensure that a charity complies with the requirements of registration. If registered, the charity would have to produce and file annual financial statements, thus significantly

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<sup>21</sup> i.e. an essentially discretionary trust in which the class of beneficiaries at the outset contains a limited number of persons, often charitable, who are either not intended to benefit at all, or although they are intended to benefit, are not intended to be the only persons to benefit. There will invariably be power, to be exercised by the trustees, protector or some other third party, to add additional persons or objects to the class of beneficiaries at a later date.

<sup>22</sup> In reality the worst that could arise out of such a sham agreement would be the creation of a resulting trust of a part of it.

reducing, if not eliminating, the possibility of it being used for a fraudulent purpose and generally encourage transparency, so that in particular the public can see to what extent a charity's income is devoted to charitable purposes and to what extent administrative costs.

- (b) such a register would be held by the Jersey Financial Services Commission or Registrar of Companies as agent for the body;
- (c) all charities must ensure they are registered with the body unless they are exempt, as defined below; and
- (d) a charity will be exempt from the requirement to register if it:
  - (i) is a private charity that is to say it does not seek to raise funds from the public but does have public benefit as its objective; and
  - (ii) it has upon its management board, or as a trustee, a person who is registered under the Financial Services (Jersey) Law. A registered person is able to be supervised by the Jersey Financial Services Commission, and therefore such a requirement will result in an adequate degree of regulation for those charities that are exempt. However, both the Jersey Financial Services Commission and the independent body will retain a power to remove such a concession if either is of the opinion that, due to the nature of the management board, they are unable to investigate the charity to their satisfaction.
- (e) Public charities with income above a certain threshold would be required to file audited financial statements. It is not easy to recommend an appropriate "size" above which audit should be required. It is recognised that auditors are bound by increasingly rigorous standards and auditing any organisation that raises money by public donation, often significantly in the form of cash, presents particular difficulties. In Scotland, it is understood that the threshold for audit is income or expenditure of over £250,000.
- (f) Where a charity is registered it would automatically be entitled to "tax free" status (i.e. not be subject to Jersey income tax. It is anticipated, however, that

to the extent it buys goods and services locally, it would suffer and be unable to recover Goods & Services Tax (GST) and be entitled to reclaim the appropriate level of tax paid or deemed paid in respect of any donations under the revised gift aid scheme discussed above.

- (g) Where a charity is exempt from the registration requirement on the basis outlined in (d) above but wishes to avail itself of the tax benefits (exemption from taxation on its income, recovery of tax paid on gifts), the charity should nevertheless obtain a “certificate of public benefit” from the independent body charged with oversight of charities. This would entail filing details of the charitable purpose with the independent body and payment of a modest fee, perhaps £100. The certificate would be provided to the Comptroller of Income Tax as evidence of the tax free status of the Charity and the Comptroller of Income Tax would thus be relieved of the responsibility for determining what is or is not charitable.

The certificate would be issued by the independent body on a private basis so that a private charity would not be “registered” on the public register of charities.

#### **4 The Potential for a Jersey Charities Commission**

The Association of Jersey Charities is an independent body approved by and registered with the States and was established as a mechanism to facilitate communication between charities. It has more than 200 members, all of which are charities and many of whom are national charities. All members qualify under the Association’s rules and regulations which, although they provide a wide definition of charity, insist that all prospective members have a properly formed constitution with at least 10 members and a committee.

While the Association provides much assistance to Jersey charities, it is not a public body and has no system of compulsory registration of charities nor any regulatory role beyond its limited membership requirements. A similar state of affairs in Guernsey has drawn judicial comment: see the Court of Appeal judgement in *Re. Insinger (Guernsey) Limited*.

The Charity Commission of England and Wales has been in existence for some time and its powers and functions are set out in the Charities Act 1993. The Commission aims to

maintain public confidence in charities by encouraging better methods of administration, advising trustees and correcting abuses of charities. The Commission is represented by up to five Commissioners, at least two of whom must be lawyers, appointed by the Home Secretary. They are answerable to the courts for their legal decisions and interpretation of charity law and to the Home Secretary and Parliament for the effective performance of the Commission as a statutory regulatory organisation.

While the statutory basis of the Charity Commission does not provide any power to administer charities and will not normally allow for interference in the exercise of trustees' discretion, a public register of charities is maintained containing key particulars and annual reports of all registered charities.

Statutory provisions provide categories of charities exempted and excepted from registration. A charity will normally be exempt where it has been specifically decided that it does not need supervision<sup>23</sup> and will be excepted either by Regulation, Order or by being neither a permanent endowment nor using or occupying land, or by having an income of less than £1,000.

The Commission's roles include:

- Advising trustees
- Providing authority for trustees to do certain things for which they do not have powers under existing trusts of the charity
- Resolving problems in respect of the appointment of new trustees
- Providing guidance on resolutions of small charities
- Authorising land transactions for charities unable to comply with the procedures set out in the Charities Act 1993
- Authorising the spending of permanent endowment in special circumstances
- Assessing applications for charities to make ex gratia payments

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<sup>23</sup> i.e. usually because other arrangements already exist to supervise and regulate such a charity.

- Ensuring that trustees comply with the law, including with duties to provide annual returns, reports and accounts.
- Supervising the charitable sector by responding to complaints, monitoring returns and opening enquiries.
- Providing an Official Custodian for Charities to hold land on behalf of trustees<sup>24</sup>

While the Charity Commission of England and Wales does much to regulate the charitable sector, the changing nature of charitable concepts has been recognised in Scotland and has prompted much research into the modernisation, reform and regulation of charities. The Charities and Trustee Investment (Scotland) Act 2005 established the “Scottish Charity Regulator” whose general functions are::

- Determination of charitable status
- Maintenance of charity register
- Encouraging, facilitating and monitoring compliance of charities with the 2005 Act
- Identifying and investigating apparent misconduct
- Giving information or advice in making proposals to Scottish Minister on issues relating to the regulator’s functions

There are then extensive provisions in the 2005 Scottish Act regarding the regulator’s powers.

## **Reform**

Is there a need for a Charities Commission in Jersey? Recent events have brought about much concern about effective suppression of the funding of terrorism. While it transpired, following investigations in the light of the “9/11” attack in New York in 2001, that the Islamic ‘Muwafaq Foundation’ charity did not have links with any terrorist regime, investigation prompted further scepticism in respect of the provisions in place in Jersey.

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<sup>24</sup> He has no powers of management and can only act on the trustees’ instructions

Such events have placed considerable political pressure on the States, from both international and local sources, to ensure that the island is fulfilling its international obligations.

While the role of assessment of charitable bodies currently rests with the Comptroller of Income Tax, these duties place a considerable burden on him and it is thought that his role would be readily be relinquished. A Jersey Charities Commission with a statutory basis along the lines of the Scottish Regulator would have better knowledge of the field and be better equipped to deal with applications of this nature.

A Jersey Charities Commission could also maintain the register of charities (although seek to “outsource” the function of the registrar of companies as suggested above) and discharge the other functions outlined above. This would enhance the stature of local charities where reference was made to such status but would only benefit charities raising money from the public.

Currently, the Association of Jersey Charities has certain powers in relation to the awarding of grants to Jersey charities. The Association, since 2001, has received the Jersey share of profits from the Channel Island Lottery, and distributes this money amongst its members. There is also discussion regarding the extension of the UK National Lottery to Jersey that may also make use of the Association. Such National Lottery derived powers will be in conflict with the values of some charities and also the potential powers of a Charity Commission as a regulator.

In establishing any sort of charities regulator or commission, one must be careful not to place an unnecessary layer of bureaucracy and create additional costs that would lessen the net benefits available to charities. However, one does have to recognise that in an era of sophisticated international terrorism, controls over non-profit making organisations need to be adequate.

In an ideal world, charitable giving must be encouraged and as few fetters as possible should exist to call this into question. Far fewer charities exist in Jersey than, for example, in Scotland (27,000 charities and 44,000 voluntary organisations) and no major abuses are ever known to have occurred in respect of public charities in the Island. Charities are already subject to some sort of testing through tax exemption applications, although this may demand some reform, and current provisions would seem to provide adequate protection through

transparency, know your client provisions, etc. If there is no real need for major administrative change, it may be better to avoid upsetting the balance.

Following a survey a few years ago of the members of the Association of Jersey Charities, it was found that there was insufficient opinion in favour of a Charities Commission due to greater regulation, costs and complexities that would be involved in such a body. Certain members of the Association are in favour of a Charities Commission but opinion is still thought to be divided. This survey was carried out in 1999, so it is recommended that a further survey be commissioned to gauge current opinion.

Various possible alternatives exist to the creation of a body such as Scottish Charity Regulator. It may be possible for the Association of Jersey Charities to fulfil certain roles of a Regulator via some limited official status<sup>25</sup>. Possible roles include:

- Determination of charitable status
- Provide support to charities and charity workers<sup>26</sup>
- Tighten the rules in respect of membership to the Association
- Maintaining the register of charities

Further reforms that could enhance the regulation of charities may be to follow the Scottish Act which allows for a charity to be constituted as a charitable incorporated organisation (see Section 49 of the 2005 Act). Alternatively, amendments could be made to the Fidéicomis Law to make incorporated associations a more user friendly vehicle and move responsibility for their registration to the registrar of companies.

### **PART 3**

#### **Summary of proposals**

The Law Commission is anxious that in reforming the law of charities, so far as possible, nothing should dissuade the public from charitable giving. Although the audit requirement for registered charities will increase their costs, it should however also provide comfort to the public who are contributing to such charities and so enhance the stature of charitable organisations.

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<sup>25</sup> The Association have not been asked for their views on such a move.

In conclusion, the Law Commission recommends:-

- (a) The adoption of a new Charities Law which would:-
  - (i) establish an independent and non-governmental Jersey Charities Commission;
  - (ii) provide for a system of compulsory registration of charities with the Charities Commission;
  - (iii) exempt from registration private charities with a person on its management board or a trustee who is registered under the Financial Services (Jersey) Law;
  - (iv) redefine “charitable purposes” and require charities to be of public benefit in order to qualify for registration and empower the Jersey Charities Commission to determine whether or not a charity, public or private, met the “public benefit” test;
  - (v) require registered charities to prepare and file annual financial statements with the Jersey Charities Commission;
  - (vi) allow members of the public to inspect the financial statements of registered charities filed with the Commission; and
  - (vii) require larger charities to undergo an annual audit,.
- (b) Income tax law changes:-
  - (i) abolish the legislation relating to covenanted gifts and introduce provisions relating to a gift aid scheme by which Jersey registered charities or charities holding a “public benefit” certificate could reclaim income tax in respect of donations made to them.
  - (ii) establish a specific tax exemption for all registered charities or unregistered charities holding a “public benefit” certificate.

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<sup>26</sup> This possibility has not yet been discussed with the Association.

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Responses to this Consultation Paper should be made in writing, by 31 March 2007, to:

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