

# FORMAL RESPONSE TO THE CONSULTATION ON THE DRAFT CHARITIES LAW

## ASSOCIATION OF JERSEY CHARITIES

On behalf of the Committee of the Association of Jersey Charities the following comments represent our formal response to the consultation on the draft Charities Law.

The Committee of the Association of Jersey Charities (“the Committee”) is supportive of a Charities Law in Jersey. We believe that such a law will benefit the sector by providing a clear and modern definition of ‘charity’ and providing the framework to develop proportional regulation in the future. Having appropriate regulation of charities in Jersey should provide comfort and confidence to donors, volunteers and beneficiaries which will enhance the credibility of the sector. Additionally, the registration requirement of the draft Charities Law should enable Jersey to demonstrate to the outside world and relevant agencies (such as the IMF) that it has oversight of this sector which is important for the prevention of money laundering and terrorism financing.

We set out below our comments on the Charities Law for you to consider and are happy to discuss these further with you if this would assist. As a general point, we do have concerns about the complexity of the Law and how difficult it is to determine its intention. By way of example, the Draft Charities Law Consultation Paper clearly identifies the term “entity” to include all structures (companies, foundations, organisations, trust, bodies or associations) which are, or could be, registered charities. This is clear and easily understood. The definition of “entity” in the draft Law, however, refers to ten possible definitions of “entity” which also cross refer to other provisions in the Law and indeed to other local legislation. It seems to us that this is overly complicated. Before applying for registration under the Law, the applicant must, first of all, establish whether it is an “entity” under the Law. That, in itself, will require careful consideration of complicated legal provisions. We do hope that this will not deter charities from seeking registration. Our points below in relation the charity test potentially have a similar effect and we would ask that you consider these too in the context of an intended applicant’s consideration of the requirements of this Law.

We are particularly concerned about how the proposed requirements will impact the smaller charities that we see through our membership. These charities provide invaluable and much needed support in various areas of our community but we are concerned that they may find the law simply too difficult to understand and apply. We would obviously not wish to see those smaller charities conclude that it is simply too onerous for them to continue or indeed for others who may be considering starting a small charity from doing so. It is our view that the Law could be written in clearer and less complicated language. We are happy to expand on this and provide further such examples if you would like us to do so. In relation to the small charities that we regularly interact with, we note that the UK Charity Commission only has a requirement for registration if a charity has an income of over £5,000 per year. Perhaps this could be considered to ensure that these smaller charities continue to provide an invaluable service to the vulnerable and needy of our community. Again, we can provide further information on this if it would assist.

As a further general point, we note that the intention of the Charities Law is to introduce the role of Commissioner and consider, after the introduction of the Law, the merits of any proposal for further regulation of charities. As you know, in the UK, the Charity Commission is the regulator for charities in England and Wales and performs a dual role, the Scottish position is similar too in that the Office of the Scottish Charity Regulator performs a dual function. We consider that the introduction of the Law now, without including how charities will be regulated, has the potential to cause confusion and uncertainty. Rather surprisingly,

however, the general functions of the Commissioner (as set out in the draft Law) include a duty to “supervise the compliance of charity managers with their duties under Part 5”. It is not clear from the Law how this will be done nor indeed how this supervision role will sit if regulation is introduced. Additionally, we are concerned about how this supervisory role will be carried out. On the face of it, it would appear to be a particularly onerous task. Without further guidance on how the proposed regulation of charities will look, we cannot comment further on the division of roles (if any) between those two functions.

## **Registration**

For charities over the proposed minimum threshold (if this was considered appropriate), we would suggest that the registration requirement is made compulsory for those organisations that meet the charity test.

As stated above, one purpose of the draft Charities Law should be to enable Jersey to demonstrate proper oversight of this sector for the prevention of money laundering and terrorist financing. The introduction of a Charities Law with compulsory registration would enhance Jersey’s compliance with special recommendation 8 of the FATF 40+9 recommendations. Non-profit organisations that purport to be charities but which act as a conduit for laundering funds or funding terrorism would not be likely to seek to register voluntarily and would forego the tax exemptions and ability to use the title ‘charity’ in order to continue to operate. However, a formal requirement to register as a charity could (say) permit a recipient of funds in another jurisdiction to check that the payer was a registered charity in Jersey, thereby increasing the compliance function of the legislation.

Additionally, it is the experience of the Committee that some of the individuals involved in Jersey’s charitable sector, whilst excellent at delivering services, may have difficulty with completing forms and we raise a concern with regard to the registration process. Given that the Commissioner will need to rely upon the information obtained at the time of registration there will be a need for some form of operational review of the information submitted if the resulting database is to be reliable for future monitoring and regulatory requirements.

The initial requirements that the applicant must meet in order to apply for registration consist of three parts. One of those parts is that the applicant must be a Jersey entity or “carries out, or intends to carry out, any relevant activity *in or from within* Jersey (emphasis added). It is not clear what this means? The third part of those initial requirements is that, in order to apply, the applicant must consider that it meets the “charity test”. This is defined in Part 3 but our concern is that this is not sufficiently explained to enable an applicant to consider properly whether the initial requirements can be met. The charity test is split into two distinct parts, charitable purposes and public benefit. Looking at each of these in turn:-

### **Charitable Purposes**

Based upon the experience of the Committee, there is potential scope for disagreement as to what constitutes ‘poverty’, ‘education’, ‘religion’, ‘advancement of health’ etc.

By way of examples:

- What constitutes poverty? Is there a cut off on income or assets that distinguishes those in poverty from those who are less well off?
- What is education and how is it differentiated from (say) dissemination of information?
- For religion, is it sufficient to be a charity if only one group within a single community in the world holds that belief?

- If a charity and its supporters were convinced of the health benefits of a particular practice is that sufficient to qualify it under the purpose of 'advancement of health' or should there be recognised empirical evidence to support the claims and/or an independent regulatory body governing practitioners?
- For sport, the definition provides that this means sport that involves "physical skill and exertion". Is this too narrow? Should there not be the inclusion of sports that involve mental skill? The definition under the UK Act is "sports or games which promote health by involving physical or mental skill or exertion".

We believe there is scope for further guidance in this area. It would be helpful to have this guidance before the draft Charities Law is formally adopted so that it can be carefully and properly considered. In our view, the words used by the legal draftsman in this context must to be properly defined to ensure that any prospective applicant is aware of what is expected when any application for registration is made.

### **Public Benefit**

The Committee welcomes the idea to define 'charity' not just by charitable purpose but by whether a public benefit is provided.

However, we are concerned that there is no guidance on what will constitute public benefit. Since public benefit is a key part of the charity test to define whether an organisation will or will not be treated as a charity under the draft Charities Law, the absence of a definition or guidance makes it difficult to comment on whether the charity test (the key determinant) is reasonable for the sector in Jersey. At the simplest level, organisations which currently consider themselves to be charities cannot be certain that they will meet the public benefit aspect of the charity test. Therefore, they will not be able to comment upon this aspect of the draft Charities Law. Additionally, the absence of guidance at this stage means that organisations cannot take any constructive action to meet the public benefit test before the draft Charities Law is formally adopted and may not even have sufficient time to do this before they need to register. Consequently, there may be a risk that some organisations may not be able to register as charities as they will not have had sufficient time to ensure they comply with the public benefit part of the charity test.

It is also not clear to the Committee how the Commissioner will be able to publish guidance on public benefit before the draft Charities Law becomes effective. Our concern is that the role of the Commissioner is only established once the draft Charities Law is passed (Article 3) but that Article 5(5) then specifies that the Commissioner must consult before issuing guidance. Therefore it appears to the Committee that there is likely to be a time lag between the law being enacted and the Commissioner consulting and issuing guidance on public benefit. Because of this, there will not be clarity around which organisations will pass the charity test.

We are aware that there may be some draft guidance on public benefit issued before the draft Charities Law is formally adopted but such guidance will not be drawn up by the Commissioner and could be changed following their appointment or the required consultation.

There is a further argument that a definition of public benefit should be provided in the draft Charities Law and that the guidance on this area is issued by the States, rather than delegating this to the Commissioner. The advantage of this approach is that such guidance should carry more weight in the court whereas any guidance issued by the Commissioner must (as prescribed in the draft Charities Law) be subject to a consultation process and can then be challenged in the courts (since the Commissioner's guidance may be seen as an interpretation whereas guidance issued in conjunction with the law carries more weight of the intent of the draftsmen).

It is the view of the Committee that the position would be clearer if draft guidance on public benefit (and indeed on charitable purpose) was issued together with the draft law and that the Commissioner was obliged to follow the guidance once the Charities Law took effect. This would remove the risk of delay or revision and would allow organisations to review themselves against the required registration criteria ahead of time and knowing that the criteria would not be changed when the Commissioner was appointed.

### **Decision to refuse registration**

If the decision is made by the Commissioner to refuse registration due to the applicant failing to meet one of the requirements under the Law, it would appear that there is no ability for the applicant to ask for that decision to be reviewed by the Commissioner. The Committee has, on a number of occasions, refused membership to the AJC and has based that decision on the information submitted during the application process. We have often found that after further information is submitted following that refusal, we have often reviewed the position and reversed the decision. Would a review stage not be worth considering in advance of an appeal to the Charity Tribunal as envisaged in the draft Law?

### **Use of the term 'Manager'**

We note that the term 'manager' is used in both the draft Charities Law and the accompanying guidance notes to describe a trustee, board member, director, committee member, council member, governor etc. This term is not a familiar one and we are concerned that the use of this term will cause unnecessary confusion.

The Committee considers that the term 'manager' already has an implied meaning of someone who is involved in the day to day management and administration of a charity which is not necessarily the same meaning as is ascribed by the draft Charities Law.

We would propose that the term 'manager' be replaced by the term 'those charged with governance of the charity'. The precise meaning of this term can be defined in the law to mean a trustee, board member, director, committee member, council member, governor etc who has effective overall control of the charity (either singularly or collectively).

### **The Ability of a Charity to Pay a 'Manager' (Board/Committee Member)**

Article 19 of the draft Charities Law prohibits the payment of a charity 'manager' for work done as a 'manager'.

As with our previous point, the Committee's concern here is the understanding of the term 'manager'. The Committee can envisage a situation in which a larger charity may wish to appoint a chief executive or member of a senior management team to sit on the main governing body. Is the intention to prevent a Charity registered under the Law from paying senior executives/CEO's at all?

As drafted, the law appears confusing in that it may be read as suggesting that appointing a paid employee (one who is managing the charity in the general sense) would then prevent the charity from paying that employee. This could be clarified by adopting a different term than 'manager' (see our proposal above).

### **Effects of deregistration**

We note the proposed provisions in relation to this. Is there any intention to oversee the distribution of funds on the winding up of the affairs of any entity? The extent of the Commission's duties here are not clear.

## **Automatic Entitlement to Tax Benefits**

The draft Charities Law is proposing an automatic entitlement to tax benefits for any registered charity.

It is the Committee's belief that the taxation of any organisation should be primarily based upon the activities undertaken by that organisation and not determined by the purpose of the organisation.

Our concern here is that a Jersey charity could be used to avoid taxation liabilities as long as that aspect of its activities was did not provide a public disbenefit that outweighed the primary purpose and activities. Additionally, there is the scope to use a Jersey charity to conduct a trading activity that competes with a commercial concern on terms that may be viewed as unfair (since the charity would not pay tax).

It has been explained during the consultation process that the requirement for a charity to provide a public benefit should ensure that the activities will be not be taxable. However, in the absence of any definition or guidance on what comprises public benefit there is no clarity on how this will work in practice and so our concern remains.

## **Comments/queries On Specific Points**

- Part 1 Article 2 (3) page 17 defines a 'Jersey entity' as anything within the definition of (a) – (h) in Article 2(1). This includes 'the person or persons, taken together, who are the trustees of a trust' and 'a company'. Does this mean that trustees or companies in the UK or elsewhere automatically meet the definition of a 'Jersey entity'?
- Part 4 Article 11 (7) page 28 states that the States *may* make Regulations which *may* include refusing an entity from registration on the grounds that it only has one 'manager' or if a proportion of those 'managers' are related to one another. The use of the word "may" appears indecisive and lacks clarity. The supporting paper indicates that relationship mean e.g. spouse, co-habitants, family relationships etc. The membership of the Association currently includes organisations where those charged with governance are related, e.g. a husband and wife team. If such entities are not going to qualify for registration then it would be helpful for this to be clear in advance so that they could reconsider their governance structure.
- Part 4 Article 17(6) - an entity must continue to use its property for its registered charitable purposes immediately before de-registration. Will this be the same for a restricted entity whose funding came from an individual?
- In the supporting paper page 27 re PTAs - a PTA can only be a charity if 'the conditions associated with accessing that school are not so restrictive as to only benefit those can met those conditions'. Leaving the grammatical errors aside, what does this mean? Is the suggestion that the PTA of a school with entrance requirements will not be a charity, but the PTA of a school open to all will be? Although not an article in the law itself this is an example of where the guidance is complex.

## **Minor Points**

- There is a typographical error at the beginning of article 5(2) – "A" should be "An".