

**THE JERSEY LAW COMMISSION**



**CONSULTATION PAPER**

**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 The application of the “cy-près” doctrine and proposals for reform similar to Guernsey.
- 4 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.
- 5 The role of a Jersey Charities Commission.

## LAW OF CHARITIES

There is currently much debate 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 Current provisions are seen as insufficient and outdated, and questions have been raised in respect of the potential for the funding of terrorist activities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 Fid  icommis 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”

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.

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

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

The Jersey Charities Association 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 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 II**

### **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.

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

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

<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

- 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 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 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:

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 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>

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

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

<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

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 have conducted extensive research and recommended four defining principles of charitable organisations:

- Overriding purpose is for the public benefit
- Non-profit distributing
- Independent
- Non-party political<sup>12</sup>.

The 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.

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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.

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

“have the purpose to relieve the need, 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 Cabinet Office Strategy Unit Report deserves commendation. It states that:

“A charity .....(is)..... an organisation which provides public benefit and which has one or more of the following purposes:

- 1 The prevention and relief of poverty.
- 2 The advancement of education.
- 3 The advancement of religion.
- 4 The advancement of health including the prevention and relief of sickness, disease or of human suffering.
- 5 Social and community advancement including the care, support and protection of the aged, people with a disability, children and young people.
- 6 The advancement of culture, arts and heritage.
- 7 The advancement of amateur sport.
- 8 The promotion of human rights, conflict resolution and reconciliation.
- 9 The advancement of environmental protection and improvement.

10 Other purposes beneficial to the community.

## 2 Methods of charitable giving:

### Gift Aid

Jersey currently provides for the deduction of tax<sup>13</sup> from outright gifts in excess of £250 but less than £500,000 per calendar year. No benefits may be receivable by the donor for the gift and a certificate 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.

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

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 £250 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

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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.

- 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. Donors can claim higher tax relief for donations against both income tax and/or capital gains tax.

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 Reform**

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 UK and Guernsey charities under a revised gift aid scheme, which could also be extended to any bona fide EU charity.

### 3 Lack of an Effective Doctrine of Cy-Près

Article 38(2) of the Trusts (Jersey) Law 1984 provides that

“Where an interest or property is held by the trustee for a purpose which has *ceased to exist or is no longer applicable*, that interest or property shall be held for such other purpose as the court may declare to be consistent with the original intention of the settlor”<sup>15</sup>

A general definition of the English doctrine of cy-près is provided in Halsbury’s Laws:

“Where a clear charitable intention is expressed, it will not be permitted to fail because the mode, if specified, cannot be executed, but the law will substitute another mode cy-près, that is, as near as possible to the mode specified by the donor.

An application cy-près results from the exercise of the court’s ordinary jurisdiction to administer a charitable trust of which the particular mode of application has not been defined by the donor.”

Following this definition, it is therefore crucial that there is a charitable intention which transcends the particular mode of application prescribed in the trust.

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<sup>15</sup> own italics

This doctrine was accepted in both *re. Meaker* and '*Re. The Dispensary and Infirmary*' *P.-G. intervenant*<sup>16</sup> and it has since been confirmed that there is "no doubt" that it forms part of the law of Jersey<sup>17</sup>.

The doctrine was further examined in *Re. Greville Bathe Fund* where the Court stated:

"in general the cy-près doctrine applies to the case where the objects of a charitable trust do not exhaust the subject matter of the gift as it does to the case where they cease to exist."

The importance of establishing a "general charitable intention" of the trust was recognised and this was defined as either "an intention on the part of the donor that his gift shall be devoted to charity generally" or "an intention on the part of a donor to promote a particular form of charity falling under one of the four recognised heads of charity". It was concluded that:

"it is essential that the original trusts, that is to say the purposes of the donor must have been carried out as far as it is possible to do, because it is the duty of the trustees of a charitable trust to execute the wishes of the donor where those have been expressed, and it is the duty of the Court not to apply any surplus income cy-près unless it is satisfied that such surplus is not, and never will be, required to implement such wishes"<sup>18</sup>

This doctrine has been applied to extend a charitable gift<sup>19</sup>, to apply funds to the nearest possible charitable object where that specified by the donor could not be achieved<sup>20</sup> and to apply a surplus in a fund to discretionary charitable gifts where the court was satisfied that potential beneficiaries had been properly identified and there was no increase needed in the level of benefit<sup>21</sup>.

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<sup>16</sup> (1955) 249 Ex. 465, 13 CR

<sup>17</sup> *Re. The Greville Bathe Fund* (1973) J.J. 2513

<sup>18</sup> *ibid.*, at 2520

<sup>19</sup> *Re. Attorney-General* 1973 J.J. 2513

<sup>20</sup> *Re. Fergus* 1993 JLR N-3

<sup>21</sup> *Re. Attorney-General*, ante

## Reform

The problem with the current position in Jersey is that the object of a trust must fail completely or no longer exist before an application can be made to apply the assets of a charitable trust *cy-près*.

The Trusts (Guernsey) Law 1989 offers a wider definition of the *cy-près* doctrine and provides a potential basis for reform to Jersey law. Crucially, this extends the application of the doctrine beyond the parameters of the Jersey Law, to include situations where trust property is held for a charitable purpose and “the purpose provides a use for part only of the property”<sup>22</sup>. In this and all other situations to which the doctrine applies:

“the property, or the remainder of the property, as the case may be, shall be held for such other charitable purpose as the court, on the application of Her Majesty’s Procureur or the trustees, may declare to be consistent with the original intention of the settlor.”<sup>23</sup>

A question also arises as to whether the Fidéicommiss Law provides for a wider definition of *cy-près*. The Fidéicommiss Law contains a form of statutory *cy-près* concerning the authorisation of immovable and dependent funds (“fonds dépendant”) of a fidéicommiss to be applied to a different object (preferably one with an affinity to the original object or in accordance with the intentions of the founder) where the objects of the trust or corporation can no longer be fulfilled, either wholly or partly, or where the circumstances require changes to the terms or rules (Article 10).

The provisions of Article 17 of the Fidéicommiss Law were amended by the 1963 amendment to that Law to provide that the benefit of Article 10 could be extended to fidéicommiss outside the terms of that law. Questions have been raised as to whether this would extend the wider application of the *cy-près* doctrine to trusts outside the ambit of the law itself, such as to private charitable trusts and testamentary charitable trusts, but it is thought to be a better view that Article 17 extends Article 10 to fidéicommiss within Articles 1 and 2, namely *inter vivos* trusts of immovables for public purposes but which, as referred to in Article 17, are not “in conformity” with Articles 3 and 4. Consideration should be given to this point with a view to clarifying the Law.

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<sup>22</sup> s.54(c) Trusts (Guernsey) Law 1989

<sup>23</sup> s.54 (h) Trusts (Guernsey) Law 1989

## 4 Financial Action Task Force on Money Laundering

### Special Recommendations on Terrorist Financing

The eight Special Recommendations on terrorist financing were adopted by the Financial Action Task Force (FATF) in October 2001 in recognition of the “vital importance of taking action to combat the financing of terrorism”. They are to be combined with the FATF’s Forty Recommendations on money laundering and 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>24</sup>

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<sup>24</sup> FATF ‘Guidance Notes for the Special Recommendations on Terrorist Financing and the Self-Assessment Questionnaire’, pg. 6-7

‘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.

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>25</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

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<sup>25</sup> see ‘Guidance for Financial Institutions in Detecting Terrorist Financial Activities’

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.
- 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 OECD, EU and 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>26</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>27</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 as well as the Criminal Justice (International Co-operation) (Jersey) Law 2001. 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>28</sup>.

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<sup>26</sup> See letter from the States of Jersey to the OECD dated 22.02.02

<sup>27</sup> Previously, the only part of the finance industry not regulated

<sup>28</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.

The Home Affairs Committee has agreed to request the extension to Jersey of the UK's ratification of the United Nations Conventions for the Suppression of Terrorist Bombings and for the Suppression of Financing of Terrorism. In response to this, the States passed 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.

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>29</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>30</sup>.

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<sup>29</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>30</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.

## 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 consider 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 and/or which seek official subsidy in the form of exemption from Jersey income tax under Article 60 of the Income Tax (Jersey) Law 1961. Private charities are those charities funded by a single donor, family or corporation. Specifically, therefore, it is recommended that:-

- (a) a register of public charities established with an independent body being given the task to:-
  - (i) determine whether or not an entity is a charity;
  - (ii) maintain the register; and
  - (iii) 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 audited financial statements, thus significantly reducing, if not eliminating, the possibility of it being used for a fraudulent purpose. An exemption from the audit requirement (but not the requirement to produce accounts) could be allowed for registered charities with lower income, say, less than £5,000 per annum so that small charities are not over-burdened with cost. This is discussed further below in section 5 (headed “The Potential for a Jersey Charities Commission”).
- (b) As regards private trusts with charitable objects or other private charity, a requirement should be introduced that at least one of the trustees or directors

or one member of the management would have to be a registered person under the Financial Services (Jersey) Law thus implicitly introducing an adequate degree of regulation. Such private trusts or other private charity would not have to register or apply for exemption from tax.

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

The Jersey Charities Association 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. The lack of any register of charities and the fact that there is no body to administer or regulate charities in Guernsey, was noted and commented upon by its Court of Appeal 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 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>31</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
- 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>32</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. While no organisation had previously been charged with taking forward a charity reform agenda in Scotland, the Scottish Charity Law Commission (SCLRC) have now recommended that such

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<sup>31</sup> i.e. usually because other arrangements already exist to supervise and regulate such a charity.

<sup>32</sup> He has no powers of management and can only act on the trustees' instructions

a body be established to offer clarity and focus in the system and to both protect the public interest and provide effective support and regulation for charities.

The SCLRC recommended the following functions for Charity Scotland<sup>33</sup>:

- Determination of charitable status
- Maintenance of charity register
- Providing for public accountability of charities
- Monitoring charities
- Providing support services for charities
- Supervising charity reorganisations
- Protecting the public interest

It was recommended that this body should be independent and have a wide range of supervisory and quasi judicial powers. The board should be represented by people from a range of relevant backgrounds and should be appointed in both an open and independent way. It would be necessary for such a body to work closely with tax bodies and its position should allow it to undertake systematic and preventative monitoring of charities. Recommendations were also made in respect of public charitable collections and charity fundraising in order that a proper balance may be struck between preventing abuse of the public goodwill and maximising the help that charities set out to do, in particular it was noted that there is no effective regulation of professional fundraising organisations<sup>34</sup>.

## **Reform**

Much debate exists as to whether or not there is 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 that the Islamic ‘Muwafaq Foundation’ did not have any links with any terrorist regime, investigation prompted further scepticism in respect of the provisions in place in Jersey. Such events have placed considerable political pressure on the

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<sup>33</sup> The recommended regulatory body of charities in Scotland

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. It is suggested that either the Jersey Charities Association or a Charities Commission would have better knowledge of the field and be better equipped to deal with applications of this nature.

A Charities Commission could also provide for a register of charities. 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. A body like Charity Scotland would enable all charitable trusts involved in capital markets transactions to fall wholly outside the scope of any regulation.

While there may be compelling arguments for a Charities Commission, several factors suggest that the burden placed upon charities by such a body would create an unnecessary layer of bureaucracy and create additional costs that would lessen the net benefits available to charities. Such a body would create various administration and regulatory costs that would ultimately lie with the charities themselves - charities should free as far as possible from such costs.

Ultimately, 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 questionnaire of the members of the Jersey Charities Association, 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

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<sup>34</sup> It was recommended that Charity Scotland should scrutinise information regarding expenditure on fundraising when examining charity accounts.

of the Association are in favour of a Charities Commission but opinion is still thought to be divided.

Various possible alternatives exist to the creation of a Commission such as Charity Scotland. It may be possible for the Jersey Charities Association to fulfil certain roles of a Commission via some limited official status<sup>35</sup>. Possible roles include:

- Determination of charitable status - this would allow the Association to influence the factors necessary for assessment
- Provide support to charities and charity workers<sup>36</sup>
- Tighten the rules in respect of membership to the Association
- Create a system of voluntary registration whereby improved status would be afforded to member charities or provide statutory requirement for an approved list of charities

It would be necessary to ensure that the articles of association of the Jersey Charities Association were appropriate to its quasi judicial function/official capacity if any such changes were made.

Further reforms that could benefit in the regulation of charities may be to follow the recommendations of the SCLRC in respect of their review of the legal form of charities. The UK Department of Trade and Industry is currently investigating whether charities should be required to register as companies in order to secure limited liability for their trustees within the context of a review of company law. Proposals for such reform have been made and include:

- The formation of a new type of incorporation called a Charitable Incorporated Organisation (CIO)
- CIO status should be restricted to charities
- CIO status should be optional to charities

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<sup>35</sup> The Association are not thought to have been asked for their views on such a move.

<sup>36</sup> This possibility has not yet been discussed with the Association.

## **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.

In conclusion, the Law Commission recommends:-

- (a) The adoption of a new Charities Law which would:-
  - (i) establish a non-governmental Charities Commission based on the Jersey Charities Association;
  - (ii) provide for a system of registration of public charities with the Charities Commission;
  - (iii) require both private and public charities to have at least one trustee who is registered under the Financial Services (Jersey) Law 1998;
  - (iv) redefine “charitable purposes” and require them to be of public benefit in order to qualify for registration;
  - (v) require registered charities to undergo an annual audit and to file audited accounts with the Charities Commission;
  - (vi) allow members of the public to inspect the accounts of registered charities filed with the Commission;
  - (vii) exempt smaller charities from the need to undergo an audit but not from the need to file annual accounts;
  - (viii) exempt from the requirements of the law any charity which was already registered as a charity in an EU member state.

- (b) Income tax law changes:-
  - (i) abolish the legislation relating to covenanted gifts and introduce provisions relating to a “no trust” gift aid scheme by which Jersey registered charities or Guernsey or EU charities could reclaim income tax in respect of donations made to them.
  - (ii) establish a specific tax exemption for all registered charities; and
  - (iii) establish a specific exemption from income tax for private trusts formed for wholly and exclusively charitable purposes and where at least one of the trustees was a registered person under the Financial Services (Jersey) Law.
  
- (c) Trust law changes:
  - (i) Incorporate suitable provisions (drawn from the Guernsey trust law) to provide for “cy-près” applications.

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Responses to this Consultation Paper should be made in writing, by 31 March 2004, to:

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