

The New Charities Law - a bright new dawn

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Introduction

As of Friday 21 November 2014, the new Charities (Jersey) Law 2014 (the “**Law**”) (or at least certain parts of it) came into effect. This represents a quantum leap forward for Jersey in the charity field. The Law has introduced a new test for what is charitable (the “**Charity Test**”) has introduced the post of a Charity Commissioner and a Charity Tribunal, and in time will introduce standards that those who run charities in the Island will have to abide by. It is hoped that the Law will enable the Island to flourish as a centre for the administration of charitable and philanthropic structures.

Importantly, there will be no obligation for charitable organisations to become registered charities under the Law. In effect, it will be possible for existing charities to continue to operate under the current customary law. Therefore, by way of helpful reminder, **part 1 of the schedule** at the end of this briefing sets out the current customary law definition of charity in Jersey.

This briefing is primarily intended to help service providers and charities understand how the Law might affect them, and how they should respond.

Key elements of the Law

As said, only parts of the Law have thus far been brought into effect. In summary, it is only the provisions which introduce the Charity Test, those provisions which allow for the establishment of the Charity Commissioner and the Charity Tribunal, and certain other miscellaneous provisions which came into effect on 21 November this year.

The Charity Test

The Charity Test represents the new statutory definition of “charity” and “charitable purposes”. It is based on the test in Scotland and represents a real step forward. An entity will satisfy the test and be regarded as a charity if (1) all of its purposes are charitable purposes, or purposes that are purely ancillary or incidental to any of its charitable purposes, and (2) in giving effect to those purposes, it provides a public benefit (in Jersey or elsewhere) to a reasonable degree.

In relation to the first part of the Charity Test (whether an entity will be regarded as having a charitable purpose) I

have set out **at part 2 of the schedule** at the end of this briefing the purposes that under the Law are considered to be charitable.

In relation to the second part of the Charity Test (whether an entity provides a public benefit), the Law provides that no particular charitable purpose is presumed to be for the public benefit. In addition, when considering whether an entity provides public benefit, comparisons should be made between, on the one hand, benefits gained by members of the entity, and disbenefits incurred by the public and, on the other hand, benefits gained by the public.

Jersey Charity Commissioner

As regard the Charity Commissioner, he or she will be appointed by the Chief Minister. The Charity Commissioner's primary responsibilities will be to administer the Charity Test and the Charity Register, to supervise the compliance by charity governors of their duties, to seek to enforce the requirements as to the restricted use of the word "charity" and related terms, and to publish and maintain guidance on the operation of the Law, including guidance on the duties of governors and guidance on the Charity Test.

Registration

It is important to note that there will be no obligation for charitable organisations to become registered charities. However, after the relevant provisions of the Law come into force, only a charity registered under the Law will be able to refer to itself as a "Charity" and receive tax relief in Jersey by virtue of its charitable status. The register will comprise a general section, a restricted section and an historical section.

The Register - General Section

Charities intending to solicit donations from the public will be required to become registered charities of the general section. Charities will be required to provide their registration number, name, address, names of their governors, their registered charitable purpose statement and their registered public benefit statement. It will also include details as to whether the charity pays or intends to pay its governors and whether the charity has submitted its annual return. The general section will be open for inspection by the public.

The Register - Restricted Section

Charities which are privately funded will be registered entities on the restricted section. This section will include details as to the entity's registration number, registered charitable purpose statement, and registered public benefit statement, together with an explanation as to why the charity is on the restricted section. The name of a charity on the restricted section and its governors will not be available for inspection by the public.

The Register - Historic Section

This section will contain details of de-registered charities which will include details as to the former registered number of the charity and its name, the reasons for de-registration and the dates of registration and de-registration.

Use of the expressions "Charity", "Jersey Charity" and related terms

The Law sets out a prohibition against the unauthorised use of the expressions "Charity" and "Jersey Charity", or referring to an entity as being "registered by the Commissioner". However, the prohibition will not restrict a "foreign

excepted charity” from referring to itself as a charity, provided that it is established under the law of either the United Kingdom, or the law of a jurisdiction that is prescribed for this purpose by delegated legislation, and is entitled under the law of that jurisdiction to refer to itself in that jurisdiction as a “Charity”, and is managed wholly or mainly from the jurisdiction under the law of which it is established, and finally is not a registered Jersey charity.

Governors

The Law will impose general duties and some regulatory obligations upon the governors of Charities. Essentially the governor is the person who has the general control and management of the administration of the Charity. Unless the rules of the entity in question prescribe a more onerous level of duty, the Law states that the governor must act (i) with due diligence, (ii) as would a prudent person and, (iii) to the best of the governors ability and skill. Separately he must observe the utmost good faith. The governor should also seek, in good faith, to ensure that the Charity acts consistently with its registered charitable purpose and registered public benefit statement and that it complies with the Law. The Law contains further details of what constitutes “misconduct” on the part of a governor. The remuneration of governors must be declared in an application by an entity to register under the Law.

The practical effects of the Law

At the time the Law was presented to the States in the summer, an addendum to the report to the States was published. This addendum dealt with a number of concerns regarding the new regime which had been raised by industry.

1 The Charity Test in relation to non-registered entities

The Government's position is that entities which were in existence at the time the Law came into force (ie. 21 November this year) are not under an obligation to register, and therefore there is no requirement to apply the Charity Test if they are content not to be registered. These entities will be considered charitable if they meet the customary law definition at the time of their establishment. However, for charitable entities established after the Law came into force, they will require to have charitable purposes in accordance with the Charity Test in the Law. Amendments to various other laws (such as the Trusts Law and the Foundations Law) will require to be made to achieve this.

2 Non-registered entities and Public benefit

The extent to which a public benefit test under the Law is to be introduced for non-registered charities is still to be determined. As said, for pre-existing charities, it is not intended that these entities should be required to meet the Charity Test as set out in Article 5 of the Law. It would be the job of the Charity Commissioner to put forward guidance on the application of the Charity Test. It is expected that the Jersey Guidance will be similar to the guidance provided by the Office of the Scottish Charity Regulator.

3 What about non-registered entities and the tax provisions under the Income Tax Law?

The required changes will be brought about through Article 41 of the Law (one of the provisions not yet in force) which will amend Article 115(ac) of the Income Tax (Jersey) Law 1961. Whilst Article 115 currently makes reference to charitable purposes, it does not impose a public benefit requirement. When amended, it will set out that income tax relief will only apply to donations made to registered charities or excepted foreign charities under the Law, thereby ensuring public benefit through the recipient charity. Furthermore consideration will be given to amending the

Comptroller's concession (at M1 and M2) to clarify that the treatment of charitable trusts should be no different to other trusts whose beneficiaries are all outside Jersey.

4 Use of companies for charitable purposes

Charitable entities wishing to be registered under the Law will require to apply their property for exclusively charitable purposes. Given that the ultra vires principle does not apply to companies under our Companies Law, (and therefore as a matter of corporate capacity, a company strictly has the ability to apply its funds for any purpose as opposed to a purely charitable one), the government intends to amend the Companies Law so as to enable companies to continue to be used for charitable purposes.

5 Unauthorised use of the expression "Charity"

Article 21 (3) of the Law places restrictions on a non-registered Jersey entity calling itself a charity. The government has indicated that Article 21 (8) of the Law will be used to prescribe exceptions where the term "charity" can be used without fear of prosecution.

In light of the above, what action, if any, do charities need to take now?

As stated, whilst the Law has come into effect now, it is only essentially those parts which will enable the Charity Commissioner and the Tribunal to be established. The Charity Commissioner will work with the Chief Minister's office to agree and put in place the remaining elements of the Law. We expect these will come into force in 2015.

In the meantime, existing charities need to consider now what their position will be when the Law becomes fully operative. As hopefully will have been noted, it is not necessary for charities to register. Our expectation is that it will be possible for entities which are charitable under the customary law test to continue as they are. Such an entity will not be able to call itself a "charity" (although this issue is being looked at) and will not be able to claim exemption from tax under the Income Tax Law. Nonetheless, many privately funded entities will not be concerned about this.

Registration (whether on the general or restricted registers) will have to happen for charities that either solicit donations from the public, or want to be registered for other reasons, such as the desire to claim tax exemption, or the ability to retain the right to describe themselves as a charity, or simply the ability, when dealing with bodies outside the Island, to say you are registered in Jersey.

For entities that wish to register, we suggest they could prepare for registration by:-

- (i) reviewing their constitution so as to ensure their purposes meet the Charity Test;
- (ii) preparing a purpose statement;
- (iii) preparing a public benefit statement;
- (iv) considering whether they are in a position to file accounts in the future, (the requirement to file accounts being an obligation likely to be introduced in due course).

Conclusion

There is no doubt that the Law represents a welcome and timely modification of the law on charities in Jersey. The hope is that the new Law will allow for the introduction of the various other provisions of the Law during 2015, and

that this will be done in a sympathetic way enabling existing charities operating under the customary law to continue largely unaffected by the Law, whilst providing a sensible and flexible framework for new charities to operate.

SCHEDULE

Part 1 – Customary Law definition of charity

Until now there has been no statutory definition of charitable purposes under Jersey law. The test was essentially based on the English Statute of Charitable Uses 1601, often referred to as the statute of Elizabeth (the “1601 Act”). The test in Jersey therefore differed from the test in England which is set out in more modern statutes.

The Jersey case of *Meaker v Picot* (1972) J.J. 2161 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”. The charitable purposes listed in the 1601 Act principally divide into two categories – purposes for the relief of the poor, and purposes of public works. *Pemsel’s Case* [1891] AC531 re-classified the criteria contained in the 1601 Act under the following four headings:

- (1) The relief of aged, impotent and poor people;
- (2) The advancement of education;
- (3) The advancement of religion;
- (4) Other purposes beneficial to the community not falling under any of the three preceding heads.

The purposes have to be exclusively charitable. Furthermore public benefit is also required.

Tax position of a charity under the customary law.

Subject to meeting the test above (and satisfying the Comptroller of Taxes of the same) a charity under the customary law regime was able to take advantage of the exemption from income tax under Article 115 of the Income Tax (Jersey) Law 1961 as amended. In effect, it would not pay tax on its income in Jersey. Furthermore, even if the charity were not exclusively charitable, provided there were no Jersey resident beneficiaries of the charity in addition to its charitable purposes, the charity would be able to take advantage of the longstanding concession whereby there is no tax levied in Jersey, other than on any Jersey source income. I shall return to how this position has been affected by the Law in due course.

Part 2 – The new Charitable Purposes

1. The prevention or relief of poverty;
2. The advancement of education;
3. The advancement of religion;
4. The advancement of health (which includes the prevention or relief of sickness, disease or human suffering);
5. The saving of lives;

6. The advancement of citizenship or community development (which includes rural or urban regeneration, and the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities);
7. The advancement of the arts, heritage, culture or science;
8. The advancement of public participation in sport (which means sport that involves physical skill and exertion);
9. 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 (which applies only in relation to recreational facilities or activities that are (i) primarily intended for persons who have need of them by reason of their age, ill-health, disability, financial hardship or other disadvantage or (ii) available to members of the public at large);
10. The advancement of human rights, conflict resolution or reconciliation;
11. The promotion of religious or racial harmony;
12. The promotion of equality and diversity;
13. The advancement of environmental protection or improvement;
14. The relief of those in need by reason of age, ill-health, disability, financial hardship or other disadvantage (which includes relief given by the provision of accommodation or care);
15. The advancement of animal welfare;
16. Any other purpose that may reasonably be regarded as analogous to any of the purposes listed in (1) to (15) above.

It should be noted that the purpose of advancing a political party or promoting a candidate for election to any office, in Jersey or elsewhere, is excluded as a charitable purpose.

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