

STATES OF JERSEY



DRAFT CHARITIES (JERSEY) LAW 201- (P.108/2014): ADDENDUM TO REPORT

**Presented to the States on 8th July 2014
by the Chief Minister**

STATES GREFFE

ADDENDUM TO REPORT

PART A: INTRODUCTION

The Draft Charities (Jersey) Law 201- (the “draft Law”) was lodged *au Greffe* by the Chief Minister on 3rd June 2014. The draft Law is scheduled for debate on 14th July 2014, pending confirmation of the Order of Business. It is lodged as Proposition number P.108/2014

Consultation

As set out in the report accompanying P.108/2014, the draft Law was subject to extensive consultation.

An initial public consultation on the principles of a draft Law was undertaken in July and August 2013 (240 people attended meetings, 130 submitted written comments); with follow-up consultations in March and April 2014 focusing on the draft legislation (181 people attended meetings, 27 submitted written comments).

Requirement for Addendum to Report

In developing the draft Law, officers from the Chief Minister’s Department worked alongside the Jersey Voluntary and Community Sector Partnership and Jersey Finance Limited (“JFL”), who set up a dedicated Charities Law working group of finance industry experts.

Further to the lodging of the draft Law on 3rd June 2014, the JFL working group raised a number of points regarding how the wider regime for Charities in Jersey is envisaged to look and this related, in particular, to entities that will remain non-registered but may still be considered charitable,¹ and also entities that wish to be registered charities but whose legal form is a company.²

Structure of the draft Law

The draft Law, as lodged, provides for primary legislation on which to bring forward more detailed Regulations and Orders, and also, where necessary, mechanisms by which to shape amendments to other legislation.

The draft Law does not, therefore, present the whole picture. This will be developed through secondary and amending legislation, in consultation with all relevant stakeholders, once the primary legislation has been adopted by the States.

It has been recognised, however, that this has given rise to uncertainty on some issues regarding how the Law may apply in its entirety (including the operation of Regulations and Orders) when it is brought into force.

¹ The draft Law proposes the establishment of a charity registration scheme for Jersey. Registration is, however, voluntary; and many charitable structures used in the financial services industry – for example charitable trusts and foundations – as established respectively under the Trusts (Jersey) Law 1984 and the Foundations (Jersey) Law 2009 – will choose not to register. These are known as non-registered entities.

² A registered charity can take a number of forms – for example trust, foundation, fidéicommis, company or unincorporated association.

This report aims to address that uncertainty, by setting out key issues raised and the proposed response, in order to provide a more comprehensive overview of the entire future Charities regime.

PART B: SPECIFIC AREAS

The charity test in relation to the treatment of non-registered entities

Article 5 of the draft Law sets out the charity test and states that a charity only meets the test if its purposes are charitable and it provides “public benefit in Jersey or elsewhere to a reasonable degree”.

In a number of other areas of law the notion of being “charitable” already exists by virtue of the customary Law of Jersey. This is particularly so in relation to trusts and foundations governed by the Trusts (Jersey) Law 1984 (the “Trusts Law”) and the Foundations (Jersey) Law 2009 (the “Foundations Law”). Whilst these entities are capable of becoming charities under the draft Law by virtue of an application to the Commissioner, there is no requirement for them to do so.

Therefore, the point has been raised as to how these entities (including those already in existence and those yet to come into existence) may be affected by the coming into force of the Charities Law. Two main questions were asked –

- will the test for charitable status still be that under customary law?
- will amendments be forthcoming to the Trusts Law or Foundations Law?

It is also worth noting that there has been concern from the financial services industry about any potential requirement to apply the charity test to non-registered charitable entities. These concerns have been compounded by the use of the phrase “to a reasonable degree” in the test, in relation to public benefit, as it is, by its nature, subjective.

Response

As it is currently drafted, the draft Law does not make it a requirement to apply the charity test, as set out in Article 5, to non-registered entities.

The position with regard to non-registered entities is as follows.

Charitable purpose:

The position in respect of charitable purposes is that non-registered charitable entities, established after the draft Law comes into effect, must have charitable purposes in accordance with the draft Law to be considered charitable.

Amendments will be lodged to the relevant legislation³ to achieve the above policy position in the near future.

³ Legislation dealing with trusts, foundations, fidéicommis, companies or unincorporated associations.

Public benefit:

The proposed position with regard to public benefit for non-registered entities that are established after the draft Law comes into effect, and that wish to be considered charitable, is as follows.

- Consideration will be given as to whether other amendments are required to relevant legislation⁴ to clarify the relationship, if any, between charitable purposes and public benefit.

The degree to which any form of public benefit test is to be introduced, if at all, for non-registered entities, is still to be determined. This will be done in consultation with stakeholders.

- that said, there will not be any requirement for non-registered entities to meet the full charity test as set out in Article 5.

Charitable structures currently in existence:

In respect of charitable entities established before the Law comes into effect, the proposed position is as follows.

- These entities will continue to be considered charitable if they were considered charitable at the time of their establishment (under whatever structure they were established). This will effectively introduce a “grandfathering” provision to relevant legislation.
- Amendments will be lodged to the relevant legislation⁵ to achieve the above policy position in the near future.

Tax provisions:

This issue is dealt with through Article 41 of the draft Law, which amends the Income Tax (Jersey) Law 1961 at Article 115(ac), and which only makes reference to charitable purpose. It does not put in place a public benefit requirement.

It does, however, set out that income tax relief will only apply to donations made to registered charities or excepted foreign charities under the draft Law, thereby ensuring public benefit through the recipient charity.

In addition to the income tax relief provided via Article 41, it is important to note that, as set out on page 31 of P.108/2014, the Tax Policy Unit and Comptroller of Taxes will liaise with interested parties to consider amending the wording of the concessional tax treatment applied by the Comptroller of Taxes, known as Concessions 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 Ibid.

⁵ Ibid.

“To a reasonable degree”:

As set out on page 6 of P.108/2014, a degree of subjectivity is an inherent characteristic of public benefit. The draft Law, at Article 5(4), therefore places a responsibility on the Commissioner to bring forward Guidance on the application of the charity test.

For the reasons set out above, this is not relevant for non-registered entities.

Guidance developed by the Commissioner

The guidance which, by law, must be developed in consultation with key stakeholders and must be laid before the States, will be published in advance of the draft Law coming into effect. It is expected to be similar, in many respects, to the Guidance provided by the Office of the Scottish Charity Regulator:

<http://www.oscr.org.uk/publications-and-guidance/meeting-the-charity-test-guidance-in-full>

Customary law of Jersey

In relation to the points made above, concerns have been raised regarding the inter-relation of the draft Law with the customary law of Jersey concerning charities.

It has been questioned whether the draft Law is intended to abolish the customary law. An extension of this point is a query as to whether entities may be able to continue to exist by virtue of the customary law and whether this could be problematic in practice.

Response

The draft Law does not replace the customary law of Jersey in respect of charities. To do so would present a real risk of unforeseen consequences and may remove some of the inherent customary law powers of the Attorney General and the Royal Court. This point has been considered by the Law Officers’ Department in considering the customary law powers of the Attorney General and the Royal Court.

It will, therefore, be possible for non-registered entities, established before the draft Law comes into effect, to continue to operate by reference to the customary law definition of charity.

Due to the continued existence of the customary law, it may also be possible for some non-registered entities to continue to exist as charitable entities by reference to the customary law after the draft Law has come into force.

Use of companies as a legal form for a registered charity

Some charities currently take the legal form of a company, as opposed to a trust, foundation, fidéicommis, etc.

This is the case for both existing Jersey-based charities and UK charities who may wish to replicate their UK structure (e.g. company limited by guarantee) when forming a parallel Jersey company.

It is therefore essential that the draft Law works to allow an efficient use of company structures by charities, as well as all other relevant structures.

In light of this, concern has been raised about whether or not Article 2(6), as currently drafted, adequately caters for charitable entities that use a company structure. The concern is that the Companies (Jersey) Law 1991, which does not place *ultra vires* restrictions on a company's purposes, may be problematic given that the draft Law requires charities to limit their purposes to solely charitable purposes.

Response

Consideration has been given as to whether an amendment to Article 2(6) of the draft Law is required at this point in time.

Through discussion with the Law Officers' Department and the Law Draftsman's Office, the position has been taken that this issue may better be resolved via amendments to the Companies (Jersey) Law 1991 (the "Companies Law").

A review of the required changes will commence in the near future, with a view to lodging appropriate amendments to the Companies Law.

If, as a result of that review, it should be determined that this issue is, in fact, better addressed via the Charities Law, an amending Law will be brought forward for debate, alongside other secondary legislation and amendments, prior to the Charities Law coming into force.

Any amendments will only be lodged after full consultation.

Article 6: Charitable purposes

Article 6(1) sets out a list of charitable purposes based on the Charities and Trustee Investment (Scotland) Act 2005 (the "Scottish Act"). A number of stakeholders suggested, prior to the draft Law being lodged, that other potential purposes should be included (e.g. mental health; bio-diversity and conservation; handicraft).

No amendments were made to the position in the Scottish Act because it was considered that many suggested additions would be fall into Article 6(1)(p) which includes "any other purpose that may reasonably be regarded as analogous" to any of the purposes already listed.

There were also suggested additions made in respect of completely new charitable purposes which, whilst they may be considered charitable in some other jurisdictions, are not within the categories of charitable purpose listed in the Scottish Act.

It is also of further note that subsequent to the lodging of the draft Law it was suggested that Article 6(1)(p) should be extended to recognise purposes that are both analogous to the listed purposes and analogous to analogous purposes. It is perceived that it could potentially offer greater flexibility.

Response

Article 6(1)(p) has not been amended to include purposes that are analogous to analogous purposes, because Article 6(3) of the draft Law already allows the States, by Regulations, to make additions to the list of charitable purposes. This power is a unique characteristic of the draft Law in that, unlike the UK charities laws, it allows for the list of charitable purposes to be expanded and defined in secondary legislation. This provides greater certainty than simply relying on determinations relating to the concept of what is, or is not, analogous.

It was determined that the draft Law lodged *au Greffe* should only contain those charitable purposes within the Scottish Act.

The Chief Minister's Department has committed to working with key stakeholders to review the list of charitable purposes in order to assess whether additional purposes should be brought in prior to the draft Law coming into force.

The addition of charitable purposes by Regulations offers significant flexibility for development of the draft Law in the future.

Article 9(3): Soliciting donations from the public

Article 9(3)(b) allows for the making of an Order, defining what is meant by "soliciting donations". Concern has been raised about the need for this Order to make a distinction between legitimate trading activity and soliciting donations.

Response

It is agreed that there are perfectly legitimate trading activities that should not be considered as soliciting donations. Indeed, for many non-profit organisations, trading is central to the way in which such entities operate.

There is a commitment to introducing a balanced definition, which will be developed in full consultation with key stakeholders.

Article 21: Unauthorised use of the expression “charity”

Article 21(3) places restrictions on a Jersey entity, which is not a registered charity, calling itself a charity. Concern has been raised about whether this is viable with respect to trusts, given that the definition of trust (as set out in Article 1 and Article 2) includes non-registered charitable trusts which use the Trusts (Jersey) Law as their governing Law but have limited connection to the Island.

Response

This complexity is recognised and it has been agreed that the Regulation-making power in Article 21(8) will be used to prescribe exceptions where the word “charity” can be used without risk of prosecution. These Regulations will be developed in consultation with key stakeholders.

Article 24: Restrictions on use of the term “charitable” when soliciting donations

As above, concerns were raised about restrictions on the use of the term “charitable” when soliciting public donations. In particular, how such restrictions would work if a non-registered charitable trust were to undertake legitimate fund-raising activity.

Response

Article 24 does not place any restrictions on the use of the term “charitable” when soliciting donations; it simply provides for a Regulation-making power in the event that such restrictions are deemed desirable at some point in the future.

If such Regulations were to be developed, it would be done in full consultation with all stakeholders, including the financial services industry, who play a key role in the establishment and ongoing management of non-registered charitable structures.

Offences

In addition to the above issues, concern has been raised with regard to use of the wording “liable to imprisonment of 2 years and to a fine” in relation to offences. It has been queried whether this allowed discretion for imprisonment to be less than 2 years and if an offence had to result in both a fine and imprisonment.

Response

This wording is in line with the Interpretation (Jersey) Law 1954 and it is confirmed that it allows for the discretion sought.

PART C: CONCLUSION

In the Report within P.108/2014, the following was made clear regarding the aims of the draft Law –

“The Draft Charities (Jersey) Law 201- (the “draft Law”) aims, therefore, to put in place a modern legal framework that will support Jersey charities to flourish, in order that they are better placed to deliver their own aims and objectives and meet community need.

Alongside that, the draft Law will help support the growth of the charitable trusts and foundations market in Jersey, enabling the Island to position itself as a centre of excellence for philanthropic wealth management.”.

As stated above, it is recognised that the draft Law does not present the whole picture, which has, therefore, generated some uncertainty with regard to the wider charitable regime in Jersey. This addendum to the report is intended to help address those concerns and to set out a very clear commitment to working in partnership with all stakeholders, including the finance industry, to ensure delivery of the over-arching aims of the draft Law. This includes developing Jersey as a centre of excellence in philanthropic wealth management.

Chief Minister
4th July 2014