

The Ann Alice Rayner Fund (AARF): Proposition 92/2021

Note by the Jersey Charity Commissioner

Summary

- As Commissioner I was consulted by the Treasury on the plans for AARF now given shape in 92/2021
- I am in agreement with what is recommended, noting, however, that it is deliberately not a permanent arrangement
- giving the Jersey Community Foundation administrative responsibility for AARF in place of Jurats is a pilot scheme for good reason, since it does not fit with the Foundation's objects. Thus the arrangement must be regarded as ancillary to those. Such an approach was my proposal to make the planned adjustment work well to meet the immediate need but leave matters open for final resolution once there is some experience, one way or the other, arising from the changes proposed, if agreed by the legislature as trustee
- The removal of the words *or philanthropic* from the objects of AARF is not problematical save that the States was to exhibit a desire or design to repurpose AARF as a philanthropic venture, but, equally, is not an essential component of the change now being proposed
- at this stage I have no particular views about the idea of a Public Trustee. It is worth study. But if such an entity was to take on responsibility for potentially registered charities (such as AARF could or should become) it would need to be wholly independent of both the ministry and the legislature; else it could expressly not meet the charity test

Introduction

1. This note references proposition 92/2021 [reissue] which is, I understand, shortly to be considered by the legislature. It has been requested of me by the Chair of the Corporate Services Scrutiny Panel, Senator Moore. I am very content for it to be given such circulation as may be desired.

2. The report accompanying the proposition indicates that I was briefed on the emergent proposals for AARF. Indeed, I was consulted, and proffered my views to, and had several discussions with, those officials leading the work in the Treasury. I was also given access to AARF's detailed benefit distribution data. The report correctly says that the draft proposals initially on the table were adjusted in the light of my comments. The pilot scheme approach was my idea, for reasons given below.

3. My comments were made pursuant to the Commissioner's power, in Art.3(b) of the Charities (Jersey) Law 2014, *to advise the Minister as to the nature of charities in Jersey and as to the merits of any proposal for further regulation of charities*. My involvement, however, was also germane since the intended solution to the identified

problem involves the Jersey Community Foundation (JCF), which is a registered Jersey charity (no.346).

4. I should also add that, a while ago, I had a useful meeting with the Jurats then responsible as administrators of AARF. It is no surprise to me that they have now confirmed their wish to step away from the role. The 92/2021 report sets the scene well on this. They deserve thanks for keeping the show on the road for many years but, as the report indicates, things have moved on and complexities have multiplied, and it's time to change.

AARF

5. The first point to note about AARF is that, in relation to registered charities in Jersey generally, it is fairly large. Disbursements from it in 2020 were some £0.35 million, which fact itself goes some way to explaining the desire of the Jurats to step away. Significant work and governance is needed to spend a third of a million wisely and well. By contrast, median annual expenditure of registered charities in 2020 was of the order of £37,000. Be it said, however, that a not inconsiderable element of AARF payments finds its way to registered charities. Such resources are a force for good in the country but they need to be utilised in a proper, and above all fair, manner, the benefit they offer being appropriately available under given, transparent, criteria to the public at large.

6. AARF is not, at this time, a registered charity. In my view, in principle it could quite readily meet the charity test subject to careful review of exactly how and whither its funds are distributed, but in practice it cannot meet the charity test because of the express prohibition in the Charities Law in respect of entities under the 'control' of ministers or the States Assembly. There is no doubt that that is the position which currently obtains by virtue of the 2001 States resolution, which is AARF's constitutional document. The proposed changes now on the table would not of themselves change this obtention, but they can be regarded as the beginning of change and modernisation.

7. The objects of AARF are, perhaps, something of a product of their time:

the provision of pecuniary relief to needy persons residing in Jersey; and

such other objects or purposes of a charitable or philanthropic nature as the States may hereafter in their absolute discretion determine

The first of these would not, today, be an easy object for any group of dedicated charity governors to implement, let alone a group of Jurats busy with other things. The particular reason for this is the focus on relief of individual persons. How are the *needy* properly and fairly to be discerned or sought out, in a complex world? Until not so long ago the concept of parish doles for the poor was alive and well, and the drafting of the object perhaps seems to look to that model: there have, for example, been a number of applications for registration from entities whose purpose is to assist the *deserving poor*, a tricky concept for today's times. A deal of obvious need is now relieved for individuals by the taxpayer through the social security system. Doles are out of favour; there are no obedient queues now at the parish hall. So, an entity like AARF, with few administrative resources of its own needs to work – and, in fact, has quite largely done

so for a good while - through intermediaries: charities, in the main, whether, say, (as examples) Citizens Advice, Churches or entities like Caritas. Even so, the process of identifying individual need in a truly fair way, resting on fair and transparent selection criteria and which aims to ensure potential access to benefit is available to the widest possible relevant section of the public at large, is difficult, to say the least, even for charities 'on the ground'. That, in turn, makes it genuinely hard for trustees of the larger unit to assure themselves whether or not they are fulfilling their trusts. It also creates potential opportunity for 'gaming' by certain individuals or entities, which can have the effect of weakening or undermining the ensuring of wide potential access to benefit among the public at large.

8. Whatever, there are some sound reasons for reforming AARF, so that its resources are put to work in addressing need in a modern climate. That might, for instance, to include particular focus on the many citizens and families who or which cannot access the social security system because of the restrictions which the States Assembly has imposed through 'residence' qualifications and the like, within which cohort one could perhaps expect the more readily to find *need*. There is plenty of precedent on charities changing their objects to meet new circumstances, sanctioned either by the court, or, more recently in the case of registered charities, by the regulator, or, in this instant case, the States.

9. Turning to the second object, one notes that in half a century or more the States Assembly has, it seems, never been invited to make a determination under it, nor proposed such of its own accord. That is the reality of the 'control' the States has exercised but, on paper, it still is *control*. One must presume, therefore, that the provision of public benefit has, perforce, arisen entirely in the seeking by the Jurats of giving effect to the first.

10. I think it follows that any serious reform of AARF, to make it fit for the 21st century, wherein its substantial resources could be a significant force for good, would require a reworking both of its objects and how it operates. If that becomes the intent it should, in my view, precede not follow permanent organisational change, so that the latter is adapted to the former and not *vice versa*.

The Jersey Community Foundation

11. The objects of the JCF, as agreed last year when it was established, are to

(a) *pool, steward and deploy donations from Jersey Government, charitable structures, individuals, families and businesses to promote and enhance the community of the island of Jersey; and to*

(b) *act as a grant-making entity to [registered charities] in furtherance of such charitable purposes as the directors may from time to time determine*

The statutory charitable purpose to which these objects relate is that at Art.6(f) of the Law, *the advancement of community development*.

12. The JCF's registered public benefit statement, which creates its public benefit duty under the Charities Law, reflects these objects, saying for avoidance of doubt that the support it provides from the resources available to it is to be by way of grants or

payments to charities and for charitable purposes [since those can sometimes be delivered by an entity not registered]. Its stated aim is to create an enduring source of funds dedicated to the good of the community of the island of Jersey. It intends, the statement continues, to define key social and economic challenges and problems affecting and or impacting upon the community of Jersey and to work with, and support, registered charities to provide effectual solutions to those. In all cases, the statement ends by saying, organisations that are potential beneficiaries of grant funding will need adequately to demonstrate that they can deliver support to the community in a manner requisite for delivery of JCF's own public benefit duty.

13. The last sentence of paragraph 12 above should be noted. The assurance identified there is a crucial element of JCF's own duty. In the same way, assurance is actively required that AARF's objects are being given effect in a good way through the provision of public benefit. If change happened so that AARF became a registered charity, it would be rather easier for that assurance to be realised.

14. A phrase in the JCF's public benefit statement also to be noted is *community of Jersey*, which may be contrasted with the focus on individuals in AARF. That is sort of the heart of the matter and why I advised that the proposed plan should be in the form of a pilot scheme which could be regarded as *ancillary* to JCF's main purpose. It doesn't fit from a 'mainstream' perspective.

15. It was, in fact, to avoid this general problem that the JCF's objects and registered public benefit statement, which I as Commissioner agreed last year, do not extend to supporting *individuals*. JCF works through other registered charities as intermediaries. That, in turn, accounts for why what is proposed in 92/2021 is a pilot scheme. I would not have been able to sanction a wholesale transfer of AARF's functions to JCF because of the incompatibility. But the Charities Law makes provision for a registered charity to undertake activity that is *purely ancillary* to its principal objects without compromising the charity test, albeit that that activity must also be given effect through the provision of public benefit. I was content to authorise that, to meet the immediate need arising from the Jurats' withdrawal. Then, over a time limited period, we can all see how things go.

16. With respect to the Treasurer, the report – at the second and third paragraphs on the fifth page - is not quite as pellucid on this point as it might have been. The 'pilot' is the proposed way forward for the reason described above. This of itself, however, will not ensure that (what is termed in the report) the 'public benefit' test is met. AARF cannot, by definition, meet the charity test as long as its constitutional document is in the gift of the States. Thus AARF, as is, so to speak, could not be taken on by JCF or any other registered charity on a permanent basis without reform.

17. That reform, so that AARF could become a registered charity, would not in my view intrinsically be challenging save that it would require the legislature, by dint of its own legislation, to relinquish 'control'. (The States has already done this in several instances these last few years, by agreeing to the removal of 'control' provisions in constitutional documents to enable entities such as Jersey Heritage or the Child Care Trust to be registered.) It would require but:

- a resolution to relinquish States 'control' of AARF and a fresh constitutional document

- Probably (and probably preferably), the Treasurer's relinquishing his formal trustee role in favour of a new body of trustees (whether existing or newly-formed); and
- a consequent application to become a registered charity. For this, it would need to be shown that AARF's purposes were exclusively charitable and that it would deliver public benefit in giving effect to those purposes, to a reasonable degree, in a manner that met the various requirements of the law as to public benefit [the charity test]

18. On the latter point, the Commissioner would need to be satisfied that arrangements were well in place to ensure that the benefit offered was properly available to the public at large, or a sufficient section of it, in a way that was fair, open and transparent. This would warrant, for an entity the scale of AARF, clearly stated strategies and criteria for achieving that, which took account of the inherent difficulties noted earlier about reaching out to individual persons if such an object remained intact. But the requisite change would not be complicated and I hope the arguments will be developed fully during the pilot period.

19. The parenthesis comprising the third paragraph on page 5 of the report is not quite accurate. If the view was taken that JCF was the trustee of choice for the future, either its objects would have to be amended in order to encompass support for *individuals*; or AARF's first object would have to be adjusted to enable the delivery of benefit to be conducted entirely through intermediaries, most likely other registered charities. I do not think I would find it easy to permit extension of the pilot beyond the envisioned period since, as already noted, AARF's object is not really in line with JCF's and I doubt the latter should continue with a *purely ancillary* activity beyond a given deadline. The deadline, moreover, is a good way to move decisions on permanent change along.

Philanthropy

20. It is also proposed in the report that the phrase *or philanthropic* in AARF's second object should be deleted. The report, however, omits to adumbrate a reason for this. The matter springs from some of the initial discussions on AARF a few months ago about whether its objects as they stood met the charity test. The essential point is that while something charitable is almost certain also to be philanthropic, the reverse may not be so, since the latter notion encompasses a range of possible activity in support of humankind that may not find a home in the relatively limited world of statutory charitable purposes. A specific example might be specific support for individuals or entities but where need was not, or not properly, shown; or where support was given that had a private benefit impact beyond the incidental (such as helping a business). So, removing the words could be regarded as one step in helping AARF at some point to meet the charity test.

21. I have no problem with the change, and it would probably be necessary at the point if or when AARF was ready for the seeking of registration; but it is not essential for the pilot scheme now on the table. Making the change now is fine save if there was a clear view or vision on the part of the States that it wished AARF to proceed in a more clearly defined philanthropic, as opposed to charitable, direction. No indication of such has ever been shown by legislators but one never knows. Making the change also, incidentally, has the advantage of confirming the mandate of the States to change AARF's objects by resolution as it will. That is probably helpful for the future.

Possible Public Trustee Office

22. I have no particular view on this idea, which has been mooted on and off for a long time. It is, however, well worthy of study and may be one way of enabling the Treasurer to step away from trustee roles. I observe only at this stage that if such an office was to be trustee of registered charities it would need to be established fully independent of both the ministry and the legislature.

John Mills
21 November 2021