

Philanthropy Vehicles
&
Charity Law in Jersey, Channel Islands

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INTRODUCTION

While major donors and benefactors of charity who are resident in onshore jurisdictions may be deterred from establishing an offshore domiciled charity where there are difficulties in structuring a tax efficient cross-border flow of monies to endow such an offshore structure, the existing mass of global wealth which is already held and administered offshore presents a fertile source of funding for philanthropy. Many high net worth families and corporates who have amassed wealth in offshore locations from their international business and other activities are increasingly seeking to create offshore entities and conduits to serve charitable or other philanthropic objectives. Also the opportunities to structure charitable and quasi-charitable vehicles in a flexible manner are usually greater in many offshore jurisdictions by comparison with the increasingly regulated environment within which charities must operate in many onshore jurisdictions.

This memorandum outlines the current law and rules in Jersey, Channel Islands governing charities and other entities available under Jersey law for use in connection with philanthropic purposes.

For further information on the establishment of philanthropy vehicles or related advice please contact Simon Howard at simon.howard@howard.je

This document is a brief guide to the subject matter covered and is not intended to be a detailed or comprehensive treatment of the topic. It should not be treated as investment, legal or taxation advice. You are recommended to take professional investment, legal, taxation or other appropriate advice before pursuing any particular course of action.

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BACKGROUND

Jersey law allows for the creation of various charitable structures including: incorporated statutory associations; unincorporated associations; and charitable trusts. Charities can also be established in the form of Jersey companies limited by guarantee or as Jersey law foundations. [Incorporated statutory associations and public trusts which can hold title to real estate in Jersey pursuant to the Loi (1862) sur les teneures en fidéicommiss et l'incorporation d'associations ("1862 Law") are not described in this memorandum. Nor does this memorandum deal with the possibility of using a Jersey foundation for charitable purposes].

All these types of charitable structure (other than those established in the form of Jersey companies limited by guarantee) are in principle liable to Jersey income tax on their revenue profits. However Article 115 of the Income Tax (Jersey) Law 1961 as amended provides that exemption from Jersey income tax shall be granted in respect of:

- “(a) any income derived from any of the following:
 - (i) the property of a corporation, association or trust established for any of the following:
 - (A) the advancement of education,
 - (B) the relief of poverty,
 - (C) the furtherance of religion,
 - (D) a purpose beneficial to the whole community,
 - (E) the service of any church or chapel or any building used solely for the purpose of divine worship,
 - (ii) the property of a non-profit organization within the meaning of the Non-Profit Organizations (Jersey) Law 2008 where that organization:

- (A) is established solely or primarily for cultural purposes,
and
- (B) receives funds wholly or mainly from the government
of Jersey in pursuance of those purposes,

in so far as such income is applied to those purposes.”

Application for an exemption from tax is made in writing to the Comptroller of Income Tax in Jersey who will issue written confirmation of exemption under the Income Tax (Jersey) Law 1961 as amended upon acceptance of an application.

There is no register of charities in Jersey. The view is currently taken in Jersey that the regulation by the Jersey Financial Services Commission of fiduciary businesses in Jersey (which applies amongst others to professional trustees and directors) under the Financial Services (Jersey) Law 1998 provides sufficient safeguards and means that regulation applies at the level of service providers to Jersey-based charities rather than directly to the charities themselves. This preserves considerable freedom and flexibility as to how charities can be established and operated in Jersey. There is on-going discussion however about the possibility of introducing a Charities Commission in Jersey in connection with the further extension of anti-money laundering controls to Jersey charities. See below for further information on this.

DEFINITION OF “CHARITY” AND “CHARITABLE PURPOSE”

Under Jersey law a charity must exist for exclusively charitable purposes. There is currently no statutory provision in Jersey defining exactly what these purposes are. [A proposal however has been mooted for the introduction of a statutory definition of “charity” in Jersey as a result of the implementation of the Non-Profit Organizations (Jersey) Law 2008 which applies light touch anti-money laundering controls to certain charitable and non-profit organisations in Jersey. At the date of this memorandum however the proposal for a statutory definition of “charity” in Jersey has not been progressed.] The Jersey case of *Re Meaker* (1972) JJ 2161 confirmed that English common law authorities on the definition of charity would

be followed in the island. Accordingly, notwithstanding the statutory reforms and innovations introduced in recent years into English law governing the definition and regulation of charity in the UK, the law of charity in Jersey is still based on the Preamble to the English statute of Elizabeth I of 1601 and the principles laid down by Lord Macnaughten in *Pemsel's Case* (1891) AC 531. Consequently the broad heads of charity recognised under Jersey law are:

- The relief of aged, impotent and poor people
- The advancement of education
- The advancement of religion
- Other purposes beneficial to the community not falling under any of the preceding headings.

PUBLIC BENEFIT

Unlike the position under English law where, following statutory reforms to charity law in the UK, public benefit needs to be demonstrated to achieve charitable status, a rebuttable presumption still exists under Jersey law, where the purposes of an organisation fall under any of the first three heads of charity referred to above, that the organisation will be operating for the benefit of the public. In connection with the final head of charity Jersey follows the old common law position as to the interpretation of public benefit, identifying two distinct elements: that the purpose itself must be beneficial and not harmful to the public; and that the benefit of the purpose must be available to a sufficient sector of the public. It is not a requirement that there must be public benefit in Jersey provided sufficient benefit arises to the public or a section of the public outside Jersey.

NON-CHARITABLE PURPOSE TRUSTS

In addition to beneficiary trusts and charitable trusts the Trusts (Jersey) Law 1984 as amended ("1984 Law") permits the creation of non-charitable purpose trusts governed by Jersey law in respect of which there are no beneficiaries.

In addition to their use as off-balance sheet holding arrangements to constitute “orphan companies”, non-charitable purpose trusts can have a role to play as “quasi-charitable” trusts where the settlor wishes to create a trust for good causes or social or philanthropic purposes which are not strictly charitable either because the purpose falls outside the accepted definition of charity or perhaps because the proposal does not involve sufficient public benefit for the arrangement to be categorised as charitable. Examples of quasi-charitable trusts which may be constituted under Jersey law include trusts with humanitarian, ecological, environmental or research objects.

Historically the principal perceived obstacle to the creation of non-charitable purpose trusts has been the need for a valid trust to have someone who can enforce the obligations of the trustee to administer the trust in accordance with its terms. In relation to a trust for identified persons, those persons are able to enforce the trustee’s obligations. Similarly, in relation to a trust for charitable purposes, the Attorney General in Jersey as the representative of the public interest, is able to enforce the trustee’s obligations under a charitable trust.

To overcome this obstacle the 1984 Law makes it a structural requirement for the creation of a valid Jersey law non-charitable purpose trust that an individual or a corporate entity must be appointed to act as the enforcer of the trust and a new enforcer must be appointed at any time when the office of enforcer becomes vacant.

The trustee of a non-charitable purpose trust cannot also be its enforcer but subject to this exclusionary rule any person whether legal or natural can be the enforcer. The enforcer does not need to be resident in Jersey. The 1984 Law imposes a duty on the trustee of a non-charitable purpose trust to secure the appointment of a new enforcer at any time when there is none. It is also incumbent on such a trustee to apply to the court in Jersey for the removal of the enforcer and the appointment of a replacement where the trustee has reason to believe that the enforcer is unwilling or refuses to act or is unfit or incapable of acting.

There are no particular formalities for the creation of a non-charitable purpose trust. There is no requirement to register or file the trust with any official body in Jersey. There is no maximum duration for a non-charitable purpose trust under Jersey law although a trust can be set up with a specified duration if this is desired.

The enforcer is subject to a statutory duty to enforce the non-charitable purposes of the trust and the enforcer has the character of a fiduciary. Under the terms of the 1984 Law, subject to any contrary provision in the trust instrument, the enforcer is prohibited from profiting from his appointment or from transacting with the trust or from causing or permitting other to profit from the enforcer's appointment. To facilitate the enforcer's role, the enforcer is entitled to see trust accounts and can apply to court for orders and declarations.

JERSEY TAXATION ARRANGEMENTS FOR NON-CHARITABLE PURPOSE TRUSTS

The normal Jersey taxation principles and concessionary tax treatment applicable to private trusts also apply to non-charitable purpose trusts where no resident of Jersey (other than a charity) has an interest in or is intended to have an interest in the trust assets whether during or at the end of the trust period. Accordingly trustees of a qualifying non-charitable purposes trust will, notwithstanding that such trustees are resident themselves for tax purpose in Jersey, have the benefit of an exemption from Jersey income tax on non-Jersey source income arising to the trust and also any bank deposit interest arising to the trust from deposits held with banks in Jersey.

JERSEY GUARANTEE COMPANIES AS CHARITABLE VEHICLES

One of the permitted forms for incorporation of Jersey companies is as companies limited by guarantee. The only formal requirement in this context is that all of the participants in the company must take on the status of guarantee members and the memorandum of association of the company must state that the vehicle is a guarantee company. There is no minimum amount that each member must

guarantee to the company. It is normal practice for guarantee members to agree to subscribe £1.00 to the company.

All Jersey companies have unlimited legal capacity. In order to dedicate the guarantee company to one or more charitable purposes it is advisable to embed the purpose or purposes in the memorandum of association of the company which will have the effect of limiting the directors' powers in relation to the activities that they can commit the company to. Application can then be made to the Comptroller of Income Tax in Jersey for approval of the company as a charitable body under Article 115 of the Income Tax (Jersey) Law 1961 if formal recognition of charitable status of the Company in Jersey is desired.

EXEMPTION FROM GOODS AND SERVICES TAX

Jersey introduced a 3% Goods and Services Tax ("GST") in 2008 pursuant to the Goods and Services Tax (Jersey) Law 2007 ("the GST Law").

Under the GST Law charities in Jersey enjoy a uniquely preferential regime. While their supplies of goods and services have been formally exempted from the need to levy GST by Schedule 5 of the GST Law, unlike a business that makes exempt supplies and which cannot reclaim input tax, charities are able to apply to the tax authorities in Jersey for a refund of GST on their purchases and expenses. Charities can also import goods and items into Jersey without having to pay and reclaim GST on those imports.

Charities in Jersey have effectively been carved out of the GST Law and the exemptions have been structured so as to minimise the administrative burden on charities.

REGULATION OF FIDUCIARIES IN JERSEY

There is no Charities Commission in Jersey. While discussion of the possible introduction of such a body has taken place as part of the Jersey Law Commission review on the state of charity law in Jersey there are no current plans

to set up such a body. The formal approval of charitable entities (other than in respect of incorporated statutory associations and public trusts established under the 1862 Law which have to be registered with the court in Jersey) is limited to the process of applying for and obtaining exemption from income taxation in Jersey for the charitable entity from the Comptroller of Income Tax in Jersey. In connection with non-charitable purpose trusts used as vehicles to achieve social or other philanthropic objectives the standing concessionary taxation exemption available for purpose trusts as described above will apply without the need to make express application to the Comptroller of Income Tax in Jersey.

There is no public register of trusts in Jersey.

Carrying on trustee functions by way of business or providing director services on a professional basis in the context of a fiduciary business are regulated activities in Jersey under the Financial Services (Jersey) Law 1998. Trust companies in Jersey which act as trustees of charitable trusts and provide administration services to the charity for reward require to be registered under the 1998 Law with the Jersey Financial Services Commission to conduct trust company business. Trust company business employees of a registered trust company in Jersey can act as individual or co-trustees of a trust in respect of which their employer trust company provides administration services without these individuals needing to be individually registered with the Commission. An individual who is resident in Jersey and who is not a trust company business employee would need to register in person with the Commission if they were to act as trustee of one or more charities by way of a business undertaking in their individual capacity.

Charitable trusts may be established with a special purpose Jersey company incorporated to act as a sole corporate trustee of the trust. Provided the private trustee company is administered in Jersey by a trust company business which is itself registered under the 1998 Law, the activities of the private trustee company are confined to acting as trustee of the specific charity and the trustee company does not hold itself out generally as available to provide trustee services then the private trustee company is exempt from registration under the 1998 Law.

Carrying on business as a professional director also requires the individual concerned if they are resident in Jersey to register with the Commission unless their services as director are provided by a trust company business which employs them and which is itself authorised under its terms of its registration under the 1998 Law to provide or procure director services for companies.

Where a Jersey guarantee company is used as the charitable vehicle and the guarantee company itself does not declare or hold assets conferred on it under express trusts but rather the constitution of the company requires it to manage and apply its corporate assets for charitable purposes then the guarantee company will not be a trustee for the purposes of the 1998 Law and will not need to register under that Law. However unless it is self-managed by its own members there will be a need to arrange for company administration services to be provided to enable the guarantee company to operate and these services can only be sourced from a regulated trust company in Jersey. This means that the underlying professional administrator to a guarantee company will normally be a regulated trust company business in Jersey.

Accordingly it can be seen that the regulation of fiduciaries in Jersey applies at the level of the trustee/administrator service provider and does not attach directly to the charitable entity itself. This preserves considerable freedom of operation for the charity. The mission statement and policies to be followed in implementing the philanthropic objectives of the trust or charitable entity, its investment policy and any investment restrictions which will be adhered to and other matters such as whether it will be subject to an annual audit all fall to be determined according to the constitutional documents of the charitable entity which will reflect the wishes of the settlor/donor (subject to acceptance of the same by the underlying administrator/service provider in Jersey).

The underlying administrator/service provider in Jersey will be obligated in the provision of services to the charity to follow high level conduct of business principles set out in Codes of Conduct issued by the Commission which are

applicable to registered trust company businesses in Jersey. In summary the conduct of business principles will require the registered trust company to:

- Conduct its business with integrity.
- Have the highest regard for the interests of its clients.
- Organise and control its affairs effectively for the proper performance of its business activities and be able to demonstrate the existence of adequate risk management systems.
- Be transparent in its business arrangements
- Maintain and be able to demonstrate the existence of both adequate financial resources and adequate insurance.
- Deal with the regulator and other authorities in Jersey in an open and cooperative manner.

CY-PRES PROVISIONS IN JERSEY

Article 47A of the Trusts (Jersey) Law 1984 as amended sets out a revised and wider power for the Jersey court on application by a trustee or the Attorney General to operate a cy-pres jurisdiction and effectively alter the purpose or objective to which assets or remainder assets of a charitable or non-charitable purpose trust can be applied.

This jurisdiction exists in a number of sets of circumstances set out in the Law including where the purpose of the trust in question has so far as reasonably possible been fulfilled or has ceased to exist or is no longer applicable; or where the trust property or other property applicable for a similar purpose can be more effectively applied to a common purpose, regard being had to the spirit of the settlor's gift.

Power also exists under these provisions for the court in Jersey to approve any arrangement to vary or revoke the purposes of the trust or enlarge or modify powers of management or administration where the court is satisfied that the arrangement is suitable and expedient and consistent with the original intention of the settlor and the spirit of the gift.

ANTI-MONEY LAUNDERING AND COUNTER TERRORISM PROVISIONS – APPLICATION TO CHARITIES

In line with standards set by the Financial Action Task Force Jersey has introduced “light touch” anti-terrorism controls which apply to charities and non-profit organisation under the Non-Profit Organizations (Jersey) Law 2008. This legislation requires charities to notify themselves to and be registered by the Jersey Financial Services Commission and supply prescribed information. However, charities which are administered by a Jersey-based trust company which provides either trustee or director services to the charity are exempt from the registration requirement of the Law as the administering trust company is obliged to undertake anti-money laundering due diligence on their client entities. The underlying trust company providing administration services or foundation

council member services to the charity will, however, have to provide certain categories of aggregated information to the Commission on the charities for which it provides administration services.

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