



The Law Reform Commission

**REGULATION OF
CHARITABLE
NON-PROFIT ORGANISATIONS
IN THE CAYMAN ISLANDS**

DISCUSSION PAPER

23rd January, 2009

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A. INTRODUCTION

1. This discussion paper sets out proposals to reform the regulation of charitable non-profit organisations in the Cayman Islands which are established in the Islands to provide a benefit to the general public and which solicit funds from the general public in order to fulfill specific charitable purposes.

2. There are private trusts, foundations and associations which are established in the Cayman Islands for charitable purposes which do not solicit funds from the public in order to carry out such purposes. While some of these entities provide a benefit to the public, their funding originates from private sources. Accordingly, entities falling within this category will not be affected by the proposals set out in this paper.

3. The Commission is of the view that the current legislative regime comprising of the Monetary Authority Law (2007 Revision), Companies Management Law (2003 Revision), the Banks and Trust Companies Law (2007 Revision) and the Proceeds of Crime Law, 2008 already offer comprehensive regulation of these entities.

B. BACKGROUND

4. The issues to be discussed first arose in relation to proposals which were made by way of a Private Member's Motion (No. 25 of 1994,) ¹ moved in the Legislative Assembly to amend the 1958 Gambling Law. At that time, the issue was whether the Gambling Law should be amended to allow the conduct of raffles for the purpose of fund-raising by charitable and non-profit organisations, associations, clubs and fraternities which were registered with the Government.

5. A Select Committee of the Legislative Assembly ² was established to review the Private Members Motion. Among the areas targeted for deliberation were the need to define a charitable organisation, the creation of a register identifying charitable organisations, the establishment of mechanisms to hold charitable organisations accountable for donations received and distributed and facilitating the oversight of the operations of charitable organisations.

6. In its final report ³ the Committee determined that in order to deal with the issues attached to the regulation of charitable organisations, it was more appropriate for a

¹ The motion was moved by the then Second Elected Member for Cayman Brac and Little Cayman, Mr. Gilbert A McLean. The motion read as follows:

"WHEREAS large numbers of charitable and non-profit organisations, associations, clubs and fraternities engage in raffles as a means of fund raising;

AND WHEREAS the Gambling Law, Law 6 of 1958, makes a raffle for any purpose illegal;

BE IT NOW RESOLVED THAT the Gambling Law be amended to allow charitable and non-profit organizations, associations, clubs and fraternities, registered as such with Government, to raffle for the purpose of fund-raising."

² The Committee was chaired by the then Honourable Second Official Member of the Legislative Assembly, Richard H. Coles, Attorney-General.

³ 9th May, 1996

charities law to be formulated as opposed to an approach which relied on amending the Gambling Law.

7. Accordingly, it was recommended that a new law include provisions for the establishment of a permanent charities register in which all charitable and non-profit organisations, associations, clubs and fraternities should be registered. In relation to accountability for funds and donations, the charitable organisations would be liable to maintain and present to the Registrar an account of the funds raised.

8. The then Hon. Attorney-General⁴ pointed out that the legislation should be formulated to regulate and register charities as opposed to not-for-profit companies. This statement seems to have been made in light of the fact that a range of companies could register under section 79⁵ of the Companies Law (1995 Revision) and benefit from the not for profit status.

9. However, not all companies registered under section 79 can be construed as having a charitable purpose. In other words, while not-for-profit associations are traditionally established for charitable purposes, not all not-for-profit associations can be classified as charitable organisations since there are many of those organisations which may be formed for the exclusive benefit of their members. The Hon. Attorney-General was of the view that these are two separate issues and that the focus should be placed on regulating charitable organisations in keeping with their traditional meaning.

10. In formulating the necessary legislation to deal with the regulation of charitable non-profit organisations, the Cayman Islands is required to take into account the Financial Action Task Force⁶ (FATF) recommendations⁷ which relate to the establishment and implementation of a comprehensive legislative framework to combat money laundering and terrorist financing activities. Our legislation must provide measures designed to prevent the use of charitable organisations as a conduit through which terrorism and money laundering is facilitated.

11. Cognizance is also taken of the Cayman Islands National Strategic Plan 1999-2008 (Vision 2008) which, as one of its actions,⁸ calls for the international exposure of Cayman Islands culture. The overall policy suggests that one of the measures to facilitate this effort is to create appropriate laws and regulations to govern non-profit organisations

⁴ Memo dated 20 October, 1998

⁵ This is now Section 80 of the Companies Law (2007 Revision)

⁶ The Financial Action Task Force (FATF) is an inter-governmental body founded by the G7 whose purpose is the development and promotion of national and international policies to combat money laundering and terrorist financing. The FATF is therefore a "policy-making body" created in 1989 that works to generate the necessary political will to bring about legislative and regulatory reforms in these areas. The FATF has published 40 + 9 Recommendations in order to meet this objective.

⁷ See *post at p.11*

⁸ Strategy V, Action plan 10

in a manner which strengthens their existence, promotes their ability to raise funds overseas⁹ and solidifies the legitimacy of their operations.

12. The Government is seeking the formulation of legislation which will bring under a regulatory regime all organisations seeking to conduct charitable activities within the Cayman Islands.

13. While the Government is mindful of its international obligations in the light of the FATF recommendations, its overall desire to treat with this issue arises from a recognition that the work of charitable organisations is essential to the development of any society and that an environment in which charities operate should be one that remains free and independent.

14. In contemplation is the introduction of a legal framework which ensures that charities meet the legal requirements of existing as a charity and are equipped to operate lawfully. Mechanisms which would determine whether charities are operated for public benefit as opposed to private advantage are essential. Preservation of the independence of charities and their trustees is also an important element in detecting and remedying serious mismanagement or deliberate abuse by or within charitable organisations.

15. The implementation of these measures would in turn increase public confidence in charities, help new and existing charities to work effectively, ensure that donations are applied for legitimate purposes and deal with abuses in an expeditious and effective manner.

16. Accordingly, the Law Reform Commission is seeking to formulate a modern legal and regulatory framework which facilitates a vibrant and diverse charitable sector.

17. It is the intention of the Commission to propose a legislative framework which will deal with the regulation of charitable non-profit organisations in a holistic manner by covering those issues relating to the establishment of a charities commission, registration requirements, regulation of public collections and fund raising activities, investigative powers of the commission and the conduct of charitable trust proceedings.

B. THE CHARITABLE NON-PROFIT ORGANISATION CONCEPT

18. A non-profit organisation (NPO) is defined as a legally constituted organisation whose primary objective is to support or engage in activities of a public or private interest without the expectation of any commercial or monetary profit. NPOs are most commonly associated with activities involving the environment, humanitarian aid, animal protection, education, social issues and more central to our discussion, charities.¹⁰ Legitimate forms of non-profit organisations include associations, foundations,

⁹ Paper by the Hon. Roy Bodden, Minister for Education, Human Resources and Culture, Copy No 15. Exp No. 1509/02, May 29, 2002

¹⁰ Non-profit Organization, (accessed June 24, 2008); available from <http://en.wikipedia.org/wiki/Non-profit-organisation>.

fundraising committees, community service organisations, corporations of public interest and limited liability companies.¹¹

19. The Interpretative Note¹² to the FATF recommendations defines the term non-profit organisation as a legal entity or organisation that primarily engages in raising or disbursing funds for charitable purposes *inter alia*.

20. At times the term “not-for-profit” is interchanged with “non-profit”. There seems to be no consensus however as to whether a distinction does exist between the two terms. Recognising that the goal of these organisations is not to make money but rather to provide a benefit to social stakeholders, commentators¹³ have gone as far as suggesting that “non-profit” organisations be renamed “social profits” organisations.

21. Generally, NPOs are operated either by volunteers, salaried staff or a combination of both. Profit generation is not one of the objectives and focus is not placed on distribution of profits amongst owners or shareholders of the organisation.

22. NPOs are primarily funded by donations from the private sector, public sector or from the generation of service fees. They may accept, hold and disburse money and trade at a profit or hold investments, which are restricted solely to attaining the organisation’s objectives and for the purpose of supporting its existence.

C. CAYMAN ISLANDS REGULATION OF CHARITABLE NON-PROFIT ORGANISATIONS

23. The charitable non-profit sector in the Cayman Islands currently comprises approximately two hundred and forty-four associations¹⁴ and it may be regarded as a subset of the wider voluntary or not-for-profit sector which encompasses non-profit organisations that benefit only their members and not the general public. Also included might be organisations which are not eligible for charitable status because their primary purpose is to achieve a change in the law or public policy.

Legislative Regulation:

24. In the Cayman Islands, the regulation of charitable non-profit organisations falls within the scope of section 80¹⁵ of the *Companies Law (2007 Revision)*. The terminology used is “Association not for Profit”.

¹¹ FATF, Combating The Abuse of Non-Profit Organisations, International Best Practices, 11 October, 2002.

¹² Note no.4

¹³ Alvarado, Elliott I.: "Nonprofit or Not-for-profit -- Which Are You?", page 6-7. Nonprofit World, Volume 18, Number 6, November/December 2000

¹⁴ Figures obtained from the Cabinet Office

¹⁵ Section 80 provides:

(1) Where any association is about to be formed as a limited company, if it is proved to the satisfaction of the Governor that it is to be formed for the purpose of promoting commerce, art, science,

25. The provision confers on the Governor the power, on application by an association, to direct that the association not-for-profit be registered as a limited liability company without the addition of the word “limited” to its name if it is proven that the association-

- (a) is formed for the purposes of promoting commerce, art, science, religion, charity or any other useful object,
- (b) intends to apply its profits or other income to promoting its objectives, and
- (c) intends to prohibit the payment of any dividend to the members of the association.

On fulfilling those conditions, the association benefits in that it is not required to-

- (a) use the word “limited” as any part of its name;
- (b) publish its name;
- (c) send a list of its members, directors or managers to the Registrar; or
- (d) pay the fees prescribed by sections 41 and 188.

26. Additional conditions may also be imposed by the Governor in Cabinet before granting a licence to an Association wishing to be registered as not for profit.

27. The *Trusts Law (2007 Revision)*, provides¹⁶ for the vesting in a trustee of any freehold, leasehold or other land or property which has been acquired *inter alia* for any charitable purpose or for any purpose concerned with or dependant on a charity as a hospital, poorhouse, asylum or other institution. It also recognises a trust as one which qualifies for a charitable purpose even though that charitable purpose may in part benefit the public or a section of the public outside the Islands.¹⁷

28. Taking these provisions and juxtaposing them against the broader need to establish a holistic legislative framework to regulate charities, in issue is whether the provisions do in fact offer the type of regulation and safeguards contemplated and indeed whether they create the proper environment within which charities can function without any negative exposure.

religion, charity or any other useful object, and that it is the intention of such association to apply the profits, if any, or other income of the association in promoting its objects, and to prohibit the payment of any dividend to the members of the association, the Governor may, by licence under his hand and the Public Seal, direct such association to be registered with limited liability without the addition of the word “limited” to its name, and such association may be registered accordingly, and upon registration shall enjoy all the privileges and be subject to all the obligations by this Law imposed on companies, except that none of the provisions of this Law that require a company to use the word “limited” as any part of its name, or to publish its name, or to send a list of its members, directors or managers to the Registrar or to pay the fees prescribed by sections 41 and 188, shall apply to an association so registered.

(2) The licence aforesaid may be granted upon such conditions and subject to such regulations as the Governor may think fit to impose, and such conditions and regulations shall be binding on the association, and shall be inserted or endorsed on the memorandum or articles of association.

¹⁶ Section 71

¹⁷ *ibid*

Cabinet Policy Regulation:

29. The Cabinet, in an effort to guard against any negative exposure of charitable organisations, introduced measures designed to supplement the legislative framework provided under the Companies Law.

30. Generally, the current process for registering a “Section 80” company is set out by the Cabinet and is in two stages.¹⁸ The first is to obtain a licence from the Governor in Cabinet. The second is to register the company with the General Registry.

In terms of the actual specifics the following apply-

(i) Application requirements

- (a) a processing fee of CI\$1,000.00 (one thousand dollars) for registration under section 80;
- (b) copies of the proposed memorandum and articles of association (to include the names, addresses and description of subscribers and founding members);
- (c) list of the names, dates of birth, occupation, nationality, immigration status (if non Caymanian) and addresses of the members of the board of directors/executive committee;¹⁹
- (d) a letter addressed to the Hon. Financial Secretary on the source of funds for the association; and
- (e) application letter to specify reasons why the Association wishes to be registered as a non profit organisation under section 80 of the Companies Law (2007 Revision).

(ii) Requirements to be incorporated in the memorandum or articles of association

- (a) the association is to maintain records of contributions and contributors and how the contributions were applied;
- (b) when the association has gross income of CI\$50,000 per annum or more, the books of accounts are to be the subject of an annual audit review;
- (c) the records required to be maintained by all forms of companies under the Companies Law (2007 Revision) that is to say-
 - (i) registers of members and directors;
 - (ii) proper books of accounts;
 - (iii) minutes of all resolutions and proceedings; and
 - (iv) a register of mortgages and charges.are to be subject to inspection by the Governor in Cabinet;

¹⁸ Advice coming from the office of the Assistant Financial Secretary, Portfolio of Finance & Economics.

¹⁹ In May 2006 the Government, directed that all future s.80 applications contain information on all executive members relating to their occupation, nationality and immigration status (where not in Cayman). The objective was to ensure that s.80 companies have a sufficient nexus with the Cayman Islands.

- (d) The association is to maintain its primary bank account with a licensed Cayman Islands bank and maintain its registered office in the Cayman Islands; and
- (e) The association is to obtain the prior approval of the Governor in Cabinet for any changes in its board/ executive committee and changes to the name of the association, its Memorandum and Articles of Association. An application fee of \$500.00 (five hundred dollars) is required to give effect to any requested change.

The Commission was also advised of the following:

- Applications are generally made through attorneys-at-law;
- The application is sent to the Portfolio of Finance & Economics. If there are errors in the application, or questions that require answers these are directed to the applicants;
- At times, applicants tend to take long periods of time to address issues, possibly due to the fact of their volunteer nature and the lack of adequate staff to respond. Some applications have been “on hold” for several months awaiting responses from applicants or their attorneys;
- The Memorandum and Articles of Association for each application are referred to the Legal Department for scrutiny;
- Background checks on suitability of Directors are referred to the Cayman Islands Joint Intelligence Unit (JIU) of the Royal Cayman Islands Police Service;
- On the Legal Department, JIU and the General Registry being satisfied of positive background of the applicant and submission of a complete application, the request for a licence is set out in a Cabinet Paper and sent to the Governor in Cabinet for approval; and
- On approval and issuance of the licence, the organisation must then apply to the General Registry for registration.

D. ASSESSMENT OF REGULATORY MEASURES

31. The current position is that section 80 of the Companies Law (2007 Revision) coupled with the Cabinet policy directives stipulated by the Portfolio of Finance and Economics for an organisation to attain not-for-profit status are the official measures in place to deal with the regulation of non-profit charitable organisations. In 2007 the Caribbean Financial Action Task Force (CFATF) ²⁰ made reference to the current

²⁰ See the Cayman Islands Ministerial Report on the CFATF Mutual Evaluation/Detailed Assessment Report on Money Laundering and Combating the Financing of Terrorism, November 23, 2007 at p. 129 - 132. Note the CFATF is the regional affiliate of the Financial Action Task Force (FATF)

licensing and registration systems of the Cayman Islands and indicated that such systems facilitated initial due diligence checks of applicants.

32. It should be pointed out that while we are not aware of any negative reports concerning the operation of charitable organisations in the Cayman Islands, the aim of the proposals set out in the paper is to guard against any opportunity for future abuse of charitable not-for-profit organisations. This initiative is therefore one of proactivity and reform driven.

33. In this regard, the current regulation process could benefit from a requirement that not-for-profit associations publish their names and forward a list of their members, directors or managers to the Registrar of Companies.

34. Further, uncertainties could be removed if the provisions define or give a specific indication of what is to be regarded as a charitable purpose. Though the inference to be drawn from the articulation of some of the activities identified in the Law²¹ is that those activities are to be treated as falling within a charitable purpose, without a specific definition in place, uncertainties tend to arise.

35. The establishment of procedures which facilitate the production of an updated list identifying the number of not-for-profit associations registered in the Cayman Islands²² could enhance the identification process. Additionally, the Registrar of Companies should be required to maintain a separate list of “not-for-profit” registrations under section 80 of the Companies Law.

36. Continued overall confidence in the charitable sector can be maintained if an authority is charged with the responsibility of disseminating information on charitable not-for-profit associations and monitoring the operational activities of these associations.

37. Essentially, procedures which deal with proper registration, oversight responsibility, review and compliance would facilitate greater clarity, certainty, transparency and accountability in the entire regulation process.

E. FINANCIAL ACTION TASK FORCE RECOMMENDATIONS

38. As indicated earlier, in preparing legislation to regulate charities, the Cayman Islands is required to ensure that it complies with FATF recommendations on anti-money laundering measures and thwarting terrorist activities relating to charitable organisations.

²¹See section 80, Companies Law (2007 Revision) - “commerce, art, science, religion”.

²² The Government Information Services (GIS) Department has indicated that it is unaware of any official body that maintains an up to date list of all charitable organisations. It was pointed out that the Women’s Resource Centre seems to be the only group which has a complete list of charities in Cayman. Under the list, as of July 2005, there were 135 Charities. The information recorded includes the mission statement of the charitable organisation, the title of the contact person, whether the post is an elected post, physical address, mailing address, telephone numbers, fax numbers, hours of operation, email address, website, clientele serviced and services provided.

39. A typical case²³ reported by the FATF²⁴ involved a situation in which a non-profit organisation solicited donations by falsely asserting that the funds collected were destined for orphans and widows. In fact, the finance chief of the organisation served as the head of organised fundraising for a terrorist group and rather than provide support for the purpose represented, the funds collected by the non-profit organisation were used to further terrorist activities.

40. It is against this background that Eight Special Recommendations on terrorist financing were formulated. The Special Recommendations broadly extend the application of the initial Forty Recommendations,²⁵ to terrorist financing and introduce new requirements relating *inter alia*²⁶ to non-profit organisations. These requirements are articulated in Special Recommendation VIII (SR VIII) and essentially set out the basic framework to detect, prevent and suppress the financing of terrorism through the use of non-profit organisations.

41. The FATF Special recommendation VIII (SR VIII) provides that:

“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 terrorists 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

²³ We have no evidence that this reported case involves the Cayman Islands; Note the CFATF Mutual Evaluation/Detailed Assessment Report, *supra* at paragraph 639 which states that there has been no knowledge or suspicion that any person or entity in the Cayman Islands has been or is involved in terrorism or terrorism financing.

²⁴ FATF, Combating The Abuse of Non-Profit Organisations, International Best Practices, *supra*.

²⁵ Developed in 1990 in an initiative to combat the criminal misuse of financial systems. The Forty Recommendations require states, among other things, to:

- (i) implement relevant international conventions;
- (ii) criminalise money laundering and enable authorities to confiscate the proceeds of money laundering;
- (iii) implement customer due diligence (e.g. identity verification), record keeping and suspicious transaction reporting requirements for financial institutions and designated non-financial businesses and professions;
- (iv) establish a financial intelligence unit to disseminate suspicious transaction reports;

cooperate internationally in investigating and prosecuting money laundering.

²⁶ The Eight Special Recommendations relate to:

- (i) Ratification and implementation of UN instruments;
- (ii) Criminalising the financing of terrorism and associated money laundering;
- (iii) Freezing and confiscating terrorist assets;
- (iv) Reporting suspicious transactions related to terrorism;
- (v) International co-operation;
- (vi) Alternative remittance;
- (vii) Wire transfers;
- (viii) Non-profit organizations

- (iii) to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organisations.”²⁷

42. The objective behind SR VIII therefore is to ensure that non-profit organisations are not used by terrorists as a cover for or a means of furthering the financing of terrorist activities. To facilitate the implementation of this recommendation, the FATF has developed suggested practices that would best assist jurisdictions in the prevention of terrorist exploitation of legitimate charitable non-profit organisations. Some of these practices include a requirement that an oversight authority for charitable organisations be established, charitable non-profit organisations register with a designated authority, financial and personnel records be maintained and mechanisms to investigate abuses of charitable organisations be introduced.²⁸

43. The CFATF in evaluating the compliance of the Cayman Islands with SR VIII,²⁹ pointed to the absence of an authority to monitor the operations of non-profit organisations.

44. Accordingly, several measures³⁰ were recommended by the CFATF to protect and enhance the efficiencies of the charitable non-profit sector. These include-

- (i) developing a supervisory programme for NPOs in order to identify non-compliance and violations;
- (ii) establishing systems and procedures to allow information on NPOs to be publicly available;
- (iii) identifying points of contacts or procedures to respond to international inquiries regarding terrorism related activity of NPOs should be put in place; and
- (iv) facilitating outreach programmes to the NPO sector with a view to protecting the sector from terrorist financing abuse.

45. It is our intention to formulate proposals which will give effect to these practices and recommendations, as we believe that adoption of the measures stipulated will facilitate the preservation of the positive international standing of the Cayman Islands in its efforts to counteract terrorist and money laundering activities.

F. LEGISLATIVE MODELS ON CHARITABLE NON-PROFIT ORGANISATIONS

46. The Commission examined some key features of the legal framework established to regulate charitable organisations in other jurisdictions. In this regard, primary focus was placed on:

²⁷ FATF on Money Laundering, Special Recommendations on Terrorist Financing, 22 October 2004.

²⁸ See Appendix for additional practices

²⁹ See the Cayman Islands Ministerial Report on the CFATF Mutual Evaluation/Detailed Assessment Report on Money Laundering and Combating the Financing of Terrorism, November 23, 2007 at p. 129 - 132

³⁰ *Ibid* at p. 131

- (a) The New Zealand Charities Act, 2005,
- (b) The United Kingdom Charities Act, 2006,
- (c) The New South Wales Charitable Trusts Act, 1993,
- (d) The Bermuda Charities Act 1978 (1989 Revision), and
- (e) The Barbados Charities Act, 1985.

47. Generally, the laws examined identify several similar features in legislation of this nature including provisions for the establishment of a commission or a similar authority to monitor charitable organisations, identifying what are charitable purposes, identifying the factors to determine whether a charitable purpose is for a public benefit, establishing registration procedures, requiring the maintenance of proper accounts and dealing with the treatment of property cy-pres.

The New Zealand Charities Act, 2005

48. The New Zealand Charities Act 2005 establishes a Charities Commission which provides for a registration and monitoring system for charitable organisations. The Commission facilitates the education of the charitable sector on good governance and management.

49. A board is appointed by the Minister and the Chief Executive and other staff members are responsible for the day-to-day work of the Commission. The Commission is independent of Government but must act in accordance with government policy when directed by the responsible Minister.

50. The key functions of the Commission include-

- deciding on whether to accept applications for registration as a charitable organisation;
- monitoring annual returns submitted by charitable organisations;
- reporting and making recommendations to Government about charitable sector matters;
- promoting public trust and confidence in the charitable sector;
- encouraging the effective use of charitable resources;
- educating charitable organisations about matters of good governance and management; and
- stimulating and promoting research about the charitable sector.

51. Though registration as a charity is voluntary, there are benefits to be obtained if a charitable organisation is registered by the Commission such as various tax and duty exemptions.

52. Under the Act, even if an organisation is already a charitable trust, it will still need to register with the Commission if it wishes to receive or maintain tax-exempt status and be deemed a 'registered charity'.

53. An organisation can register as a charitable entity if-

- it is established and maintained exclusively for charitable purposes;
- it is not for the private profit of any individual or group; and
- all the officers of the charitable organisation are qualified to be officers.

54. In determining whether the purpose of a charity is charitable, the Commission will examine whether the purpose is to-

- advance education;
- advance religion;
- relieve poverty; or
- provide some other community benefit.

55. Also, the charitable organisation's object must be of benefit to the public. A charitable organisation is not however disqualified from registering if it also has a secondary non-charitable function as part of its charitable purpose.

56. The procedure to register as a charity requires the organisation to-

- submit a copy of its rules to the Commission;
- provide information about its current and proposed charitable activities;
- register the officers of the organisation.

57. After registration, the organisation is required to file an annual return and notify the Commission of any changes to the organisation.

58. If a registered charitable organisation does not comply with the Act, the Commission has the authority to-

- impose administrative penalties;
- issue warning notices;
- publicise instances of non-compliance;
- undertake further investigations; and
- deregister charities that have failed to comply with the Act.

59. The Commission also has the overarching authority to check whether registered charitable organisations are fulfilling their described purpose and operating in compliance with the Act.

The United Kingdom Charities Act, 2006

60. The Charities Act 2006 sets out a wide range of purposes which may be charitable and helps give greater clarity about what is charitable and seeks to reflect the diversity of the charitable sector. Charitable purposes under the Act include-

- the prevention or relief of poverty;
- the advancement of education;
- the advancement of religion;
- the advancement of health or the saving of lives;
- the advancement of citizenship or community development;
- the advancement of the arts, culture, heritage or science;
- the advancement of amateur sport;
- the advancement of environmental protection or improvement;
- the relief of those in need by reason of youth, age, ill-health, disability; and
- the advancement of animal welfare.

61. Organisations are required to pass two tests in order to qualify as a charity. The first is that their objects are in fact charitable and secondly that they operate for the public benefit.

62. Those charities which advance education, religion or relief of poverty are required to demonstrate that they are providing a public benefit. The determination of whether the activity is for the public benefit is left within the purview of the Commission which is established under the Act. Among the functions of the Commission are-

- to increase public trust and confidence in charities;
- to promote awareness and understanding of the operation of the public benefit requirement;
- to promote compliance by charity trustees with their legal obligations;
- to promote the effective use of charitable resources;
- to enhance the accountability of charities to donors, beneficiaries and the general public.

63. The Act creates a Charity Tribunal to deal with appeals and reviews of the Commission's decisions. It also deals with referrals from the Commission or Attorney-General involving the operation or application of charity law.

64. The Act provides for the small charities category, that is charities with an annual income of less than £5,000. These charities are not required to register with the Commission. Additionally, charities which are exempted by order of the Commission and whose gross income does not exceed £100,000 are also not required to register with the Commission.

65. The licensing regime provides for inter alia-

- a definition of what is regarded as a public space;
- public collections certificates;
- the issuance of permits for public place;
- the regulation of door to door collectors;

- the regulation of short-term collections; and
- the power of the Commission to suspend or withdraw a certificate.

The New South Wales Charitable Trusts Act, 1993

66. The Charitable Trusts Act 1993 makes provision for the protection of charitable trusts which are defined as “any trust established for charitable purposes and subject to the control of the Court in the exercise of the Court’s general jurisdiction with respect to charitable trusts”. It gives the Attorney-General powers to bring charitable trust proceedings, in addition to the power to establish, by order, schemes for the administration of any charitable trust.

67. Charitable trust proceedings are defined as “proceedings in the Court brought, whether by a trustee or other person with respect to any breach or supposed breach of a charitable trust or with respect to the administration of a charitable trust”.

68. If, following charitable trust proceedings, the Court is satisfied that it is necessary to act for the purpose of protecting trust property, it may make several orders including-

- an order removing any or all trustees of the charitable trust;
- an order appointing a person as a trustee of the charitable trust;
- an order precluding the employment or engagement of a person in the affairs of the charitable trust.

69. Under the Act, provision is made for the application of the cy-pres principle. This allows the original purposes of a charitable trust to be altered in circumstances in which the original purposes, wholly or in part, have, since they were laid down ceased to provide a suitable and effective method of using the trust property, having regard to the initial spirit of the trust.

The Bermuda Charities Act, 1978 (1989 Revision)

70. Similar to other legislation, the Bermuda Charities Act defines charitable purpose to mean purposes which are beneficial to the public in general or to a certain section of the public irrespective of location.

71. The Act establishes a committee called the Charity Commissioners for Bermuda which has as its general function the oversight of the operation of charitable organisations. The Minister is authorised to appoint persons to serve as Charity Commissioners for the committee.

72. Every charitable organisation in Bermuda wishing to undertake any money-raising activities is required to apply for to the Registrar-General to be registered as a charitable organisation. The Registrar-General in turn is required to cause every application to be placed before the Commissioners for their consideration. On approval,

the names of each organisation shall be maintained in a register to be maintained by the Registrar-General.

73. A registered charitable organisation is obligated to maintain accounts containing a statement of all moneys received for charitable purposes and the expenditures undertaken.

74. The Act further provides for the application of property cy-pres in circumstances where-

- the original purposes of a trust, in whole or in part, cannot be carried out in accordance with the directions given by the donor;
- the original purposes provide a use for only part of the property available by virtue of the gift; or
- or where the original purposes, in whole or in part, have since they were laid down been adequately provided for by other means.

The Barbados Charities Act, 1985

75. Some of the salient features of the Barbados Charities Act are that it provides for a public benefit test similar to other legislative models and a registration process for charitable organisations.

76. The Act expands upon other legislation by specifically identifying the activities that fall within the broader charitable purposes. For example-

- (a) the charitable purpose of relieving and preventing sickness and disability, includes-
 - (i) the provision and staffing of hospitals, nursing and convalescent homes and clinics;
 - (ii) the promotion of medical research; and
 - (iii) the provision of advice, treatment or comfort;
- (b) the charitable purpose of advancing education, includes-
 - (i) the improvement of knowledge and its public dissemination in a way not constituting propaganda;
 - (ii) the provision of schools, colleges, universities and other like institutions; and
 - (iii) the establishment in such institutions of professorships, fellowships, lectureships and other teaching and research posts; and
- (c) the charitable purpose of the advancement of religion includes-
 - (i) the organisation and carrying out of religious instruction and pastoral and missionary work;
 - (ii) the provision and maintenance of buildings for worship and other religious uses,
 - (iii) the payment of stipends to and the provision of houses for ministers of religion, their widows and dependent children.

77. The Act defines public benefit as one which is directed to members of the public at large or to a section of the public ascertained by reference to some specified geographical area. It does not however include a benefit to a person who is identified by reference to his relationship with some body or other person.

78. As far as the monitoring of the operations of charities is concerned, the Attorney-General is authorised to conduct full examinations and inquiries into any trusts established for charitable purposes and the Registrar of Corporate Affairs and Intellectual Property is authorised to determine whether a charitable organisation is operating in compliance with the law.

G. ISSUES FOR CONSIDERATION

79. The various legislative models when examined have as their objective the comprehensive regulation of the operation of charitable non-profit organisations. This is achieved by providing safeguards to uphold public trust in the charitable sector, simplifying the role of trustees by facilitating more flexibility and less bureaucracy, particularly in the case of smaller charities and allowing for easy changes in purposes, structures, administration and objects.

80. Drawing from the modern legislative models adopted by other jurisdictions, the Commission recommends a legislative framework which primarily makes provision for the following matters under this Part. It is believed that the collective implementation of these recommendations will streamline the Law relating to charitable non-profit organisations and satisfy the CFATF recommendations for reform as set out in paragraph 44.

The Establishment of a Charities Commission:

81. It is proposed to make provision for a modern regulator in the form of a Charities Commission which will operate independently in the exercise of its jurisdiction.

82. The objectives of the Commission will be to (i) increase public trust and confidence in charities; (ii) promote awareness and understanding of the operation of the public benefit requirement; (iii) promote compliance by charity trustees with their legal obligations; (iv) promote the effective use of charitable resources; and (v) enhance the accountability of charities to donors, beneficiaries and the general public.

83. The Commission will consist of no fewer than five nor more than seven Commissioners, including (a) a chairman; (b) a deputy chairman; (c) an attorney at law; and (d) a certified accountant, all of whom are to be appointed by the Governor and hold office for a period of five years.

84. While the Commission would be an entity that is independent, it will be required to have regard to government policy when directed by the responsible Minister. The Commission would be accountable to the Minister and be required to submit its audited

financial accounts each year to the appropriate authority, publish regular reports along with the reasons for important decisions which reflect a change in policies or operational practices.

85. An obligation will be placed on the Commission to investigate complaints against charities and it will have the power to request information and documents where concerns are expressed about serious mismanagement in circumstances where there is a failure to observe the requirements of the Law.

86. Provision will be made for an appeals procedure which reviews the decisions and referrals of the Commission in relation to the operation or application of the Law. Where the Commission refuses to register a charity, has directed the cancellation of its registration, has refused to issue a public collections certificate or withdraws its issuance, the charity concerned may appeal to the Minister against such refusal, withdrawal or cancellation. A charity which is dissatisfied with the decision of the Minister will have a right of appeal to the court for final determination.

A Definition of Charitable Purpose:

87. Academic sources have argued that there is no comprehensive statutory definition of charitable purposes.³¹ It is usual therefore to identify in legislation a list of activities which might be construed as charitable. This tends to provide greater clarity about what is charitable and better reflects the diversity of the charitable sector. It is proposed to categorise charitable purposes under the heads of-

- (a) the prevention or relief of poverty;
- (b) the advancement of education;
- (c) the advancement of religion;
- (d) the advancement of health;
- (e) the advancement of citizenship or community development;
- (f) the advancement of the arts, heritage or science;
- (g) the advancement of amateur sport;
- (h) the advancement of environmental protection or improvement;
- (i) the relief of those in need, by reason of youth, age, ill-health, disability, financial hardship or other disadvantage; and
- (j) the advancement of animal welfare.

88. Our aim is to clarify the scope of charitable purposes for a modern society while providing for flexibility to keep up with future developments and changes through case law which might impact upon the society.

A Definition of Public Benefit:

89. It is proposed to make the requirement of satisfying a public benefit a condition precedent to acquiring charitable status. Though a charitable trust might fall within one

³¹ Gilbert Kodilinye, *Commonwealth Caribbean Trusts Law*, 2002, p. 160

of the heads of charitable purposes, that trust will not achieve charitable status unless it satisfies the requirement of benefit to the public or a section of the public. If its object is designed to benefit certain private individuals, however numerous, it will not be considered charitable.³²

90. What constitutes a benefit to the public is often a matter of personal opinion. A purpose is beneficial to the public if it goes towards achieving a universal common good and is not harmful to the public. While the provision of benefits is not limited to material benefits, the purpose must have some practical utility.³³

91. The test³⁴, of who should be regarded as “the public” indicates that public refers to the general community or a sufficient section of it in which the number of potential beneficiaries of the charity are not numerically negligible and there is no personal relationship between the beneficiaries and any named person or person.

92. Therefore, under the proposed law, to be considered a charity, an organisation must be able to demonstrate that it is set up for aims that are capable of being charitable and will be conducted for the public benefit.

93. It is proposed that decisions on how the public benefit test operates will fall within the purview of the Charities Commission which will be guided in its decision making by case law and modern trends in the charities sector. Additionally, the function of the Commission will be to ensure all organisations with charitable status are able to demonstrate that they are providing a public benefit on an on-going basis and not just at the initial registration stage.³⁵

The Registration of Charitable Organisations:

94. Any organisation soliciting funds from the public for charitable purposes will be required to register with the Charities Commission. For this purpose the Governor will have the power to appoint a suitable person to be the Registrar of Charities.

95. The registrar will be required to maintain a record of every charity operating in the Islands, whether that charity is classified as exempt or small. The register will reflect the name and address of every charity approved by the Commission.

96. Applications for registration will be required to include matters such as the purpose of the charity, a mission statement of the charity, records of the amounts contributed, evidence of how contributions are usually applied, evidence of client familiarity and evidence of board structure and function.

³² *Ibid* at p. 173

³³ H Picarda, *The Law and Practice Relating to Charities* (Butterworths, 3rd ed, 1999) 19-29;

³⁴ *Re Compton* [1945] 1 Ch 123 and *Oppenheim v Tobacco Securities Trust Co Ltd* [1950] UKHL 2; [1951] AC 297

³⁵ Joint Committee on the Draft Charities Bill, Volume I HL Paper 167 –I HC 660 -I

97. On registration the charity will be issued a unique registration number and be required to affix the letter RCO (Registered Charitable Organisation) to any of its documents or promotional material. This advises the public that a particular charity has complied with the legal requirements for registration.

98. Charities which comply with different registration obligations will thereafter be required to maintain audited accounts containing a statement of all monies received for charitable purposes and the expenditures undertaken.

99. A registration regime of this nature will allow the public to easily search the Register to ascertain information about a registered charity. Further, registration provides the Commission with information about the charitable sector in the Cayman Islands and this will help the Commission fulfil its education and support function to the sector and the public.

The Regulation of Public Charitable Collections and Fundraising Activities:

100. The primary source of funding of charitable organisations is through the conduct of public collection drives and fund raising activities. The focus of our legislation will be on fund-raising and collection methods used by charities which, if abused, could undermine the public confidence in the charities sector.

101. Public collections are likely to create a public nuisance and abused if not managed properly since there is always the risk of individuals fraudulently claiming to be collecting donations on behalf of a charity. The Law will establish a scheme of regulation in which focus will be placed on regulating the number of collectors soliciting funds and the actual method of collections.

102. Persons conducting fund raising activities will be required to submit documentation which explains the purpose of a contribution to those making donations by direct debit or standing order. In addition, fund-raisers will be required to carry with them a collector's identity card from the charity for whom they are acting and this should be made accessible to the public when requested.

103. Fund-raisers will be prohibited from soliciting money or other property for the benefit of a charity unless it is done in accordance with an agreement with the charity. Additionally, there will be a prohibition against representations which indicate that charitable contributions are to be given to, or applied for, the benefit of a charity unless it is done in accordance with an agreement of the charity.

104. The Law will provide for a certification system for public charitable collections whereby a public collections certificates will be issued by the Charities Commission if it deems such issuance to be appropriate.

105. Public charitable collections methods will be covered under the regime. Public space will be defined to include privately owned land to which the public has unrestricted access. Provision will be made for direct-debit solicitation and door-to-door collectors

must inform the Commission of collection activities. Short-term collectors will not have to obtain a certificate but will be required to inform the Charities Commission of their activities. Ultimately, the Commission will have the power to suspend or withdraw a certificate.

The Conduct of Charitable Trusts Proceedings:

106. In dealing with the issue of regulating charities, the Law Reform Commission is of the view that any modern comprehensive charities law should reflect provisions which seek to deal with the conduct of charitable trust proceedings.³⁶

107. Charitable trusts are referred to as public trusts because they are considered to be of value and importance to the community at large³⁷ and not any specific individual. They are enforceable by the Attorney-General on behalf of the state. However, it is not unusual for a Charities Commission to oversee and regulate charitable trusts.

108. While charitable trusts are usually subject to the same rules as private trusts by virtue of their public nature, they are accorded certain privileges which are not available to private trusts. For example, a charitable trust will not fail for uncertainty of objects. If a charitable trust is established for such purposes as a trustee may determine, the court is usually given the jurisdiction to establish a scheme for application of the funds and indicate the specific charitable objects which are to benefit.

109. Charitable trusts are not subject to the rule against perpetual trusts. This rule prohibits a grant from being vested outside a specified period. If there is a possibility of the estate vesting outside of the period, regardless of how remote that chance may be, the whole interest is void and is removed from the grant. The rule is concerned with the utility of property and tries to prevent the control of assets by the testator for an unduly long period.

110. These are areas which have a potential to become contentious and lend themselves to charitable trust proceedings. In this regard, it seems appropriate to include in our law provisions which deal with the conduct of charitable trust proceedings.

111. The Law will provide for charitable trust proceedings to be commenced by the Attorney-General or by any interested party with the leave of the court or with the authorisation of the Attorney-General.

112. If the Court, in charitable trust proceedings, determines that there has been any misconduct or mismanagement in the administration of a charitable trust it may make several orders including removing the trustees of the charitable trust, appointing a person as a trustee of the charitable trust, precluding the employment or engagement of a person in the affairs of the charitable trust or directing a bank or person who holds property of

³⁶ This is an area that the Hon. Chief Justice, Anthony Smellie has recommended for inclusion in a law dealing with charities, memo dated 18th June, 2004

³⁷ Gilbert Kodilinye, Commonwealth Caribbean Trusts Law, 2002, p. 157

the charitable trust not to part with the property without the approval of the court or the Attorney-General.

113. In circumstances where property is granted for a charitable purpose which cannot be carried out in the way intended, the court will be given the power to order a scheme whereby the property can be applied for other charitable purposes as close as possible to that originally designated. This is referred to as the cy-pres rule³⁸ and will also apply where it is impractical to follow through on the intent behind the trust. Charitable trusts which fall into this category will be managed by the Attorney-General who will be given power to establish appropriate schemes for the alteration of the original purposes of a charity so as to enable the trust property or any part of it to be applied cy-pres.

H. CONCLUSION

114. It is submitted that a Charities Law formulated along the lines recommended will facilitate a clearer and more modern legal framework for charities. The legal framework would operate to empower the charitable sector and allow charities to operate with greater freedom and flexibility in responding to changes in society while allowing charitable non-profit organisations to continue to feature prominently in the Cayman Islands. Institutions tend to flourish in any environment which comprises a strong regulatory framework supported by the independent oversight of a regulator. This in turn inspires a high level of public trust and confidence, all ingredients necessary in attaining the desired successes.

115. Accordingly and against the background of the current legal framework in place to regulate charities, the legislative models of other jurisdictions, the FATF Special Recommendation VIII on non-profit organisations and the recommendations of the Law Reform Commission, a Draft Bill entitled the Charities Bill, 2009 is commended for consideration.

³⁸ *ibid* at p.189

APPENDIX

FATF SPECIAL RECOMMENDATION VIII GUIDELINES

In attaining compliance with SR VIII, the FATF recommends the following-

- (i) jurisdictions should review the legal regime of non-profit organisations, to prevent their misuse for terrorist financing purposes;
- (ii) 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 organizations;
- (iii) review the adequacy of domestic laws and regulations that relate to non-profit organisations;
- (iv) acquire timely information on the activities, size and other relevant features of their non-profit sectors for the purpose of identifying the features and types of non-profit organisations (NPOs) that are at risk of being misused for terrorist financing by virtue of their activities or characteristics;
- (v) conduct periodic reassessments by reviewing new information on the sector's potential vulnerabilities to terrorist activities;
- (vi) raising awareness in the NPO sector about the risks of terrorist abuse and the available measures to protect against such abuse;
- (vii) promoting transparency, accountability, integrity, and public confidence in the administration and management of all NPOs;
- (viii) NPOs should maintain information on: (1) the purpose and objectives of their stated activities; and (2) the identity of person(s) who own, control or direct their activities. This information should be publicly available either directly from the NPO or through appropriate authorities;
- (ix) countries should be able to demonstrate that there are appropriate measures in place to sanction violations of oversight measures or rules by NPOs or persons acting on behalf of NPOs and the application of such sanctions should not preclude parallel civil, administrative, or criminal proceedings with respect to NPOs or persons acting on their behalf where appropriate;
- (x) Sanctions may include freezing of accounts, removal of trustees, fines, de-certification, de-licensing or de-registration;
- (xi) NPOs should be licensed or registered. This information should be available to competent authorities;
- (xi) NPOs should maintain, for a period of at least five years, and make available to appropriate authorities, records of domestic and international transactions that are sufficiently detailed to verify that funds have been spent in a manner consistent with the purpose and objectives of the organization;
- (xii) measures to ensure that they can effectively investigate and gather information on NPOs;
- (xiii) ensure effective domestic co-operation, co-ordination and information sharing to the extent possible among all levels of appropriate authorities or organisations that hold relevant information on NPOs of potential terrorist financing concern;

- (xiv) countries should ensure that full access to information on the administration and management of a particular NPO (including financial and programmatic information) may be obtained during the course of an investigation;
- (xv) develop and implement mechanisms for the prompt sharing of information among all relevant competent authorities;
- (xvi) mechanisms in place that allow for prompt investigative or preventative action against such NPO;
- (xvii) identify appropriate points of contact and procedures to respond to international requests for information regarding particular;
- (xviii) Financial transparency - non-profit organisations should maintain and be able to present full program budgets that account for all programme expenses;
- (xix) Programmatic verification - The need to verify adequately the activities of a non-profit organisation is critical;
- (xx) Non-profit organisations should be able to document their administrative, managerial, and policy control over their operations;
- (xxi) Law enforcement and security officials should continue to play a key role in the combat against the abuse of non-profit organizations;
- (xxii) Specialised Government Regulatory Bodies - there should be interagency outreach and discussion within governments on the issue of terrorist financing;
- (xxiii) Government Bank, Tax, and Financial Regulatory Authorities- sharing of financial information on charities;
- (xxiv) private Sector Watchdog Organisations - engage such watchdog and accreditation organisations in their attempt to put best practices into place for combating the misuse of non-profit organizations; and
- (xxv) use existing laws and regulations or establish any such new laws or regulations to establish effective and proportionate administrative, civil, or criminal penalties for those who misuse charities for terrorist financing.

Law Reform Commission
23rd January, 2009