

# PHILANTHROPY

## OCORIAN BRIEFING

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**For many people, philanthropy is a topic of increasing importance. Whilst philanthropy may, in strict terms, focus on the wellbeing of human kind, the term tends to be given a wider meaning, encompassing a broad range of giving initiatives. Some of those initiatives will be characterised as charitable in the relevant jurisdiction, others - albeit altruistic and benevolent in nature - may not.**

This briefing uses the term philanthropy to include all giving initiatives, whether intended to promote human wellbeing or not and whether charitable or not, and gives an overview of the two principal structures used in Jersey for philanthropy: the trust and the foundation.

For those interested in philanthropy, Jersey can be an attractive choice as the jurisdiction in which to establish their structures for a variety of reasons. Chief among these will be that the Island offers stability (politically, economically and geographically), a robust and highly regarded regulatory regime, a well-respected judicial system with adherence to the rule of law, a depth and breadth of experience amongst its professional advisers, and a body of legislation which places a strong emphasis on the importance of flexibility, allowing for the creation of structures designed to meet an individual client's requirements.

### Trusts

The Trusts (Jersey) Law 1984 as amended (the "Trusts Law") allows for the creation of both charitable and non-charitable purpose trusts. It is therefore possible to establish a trust for philanthropic purposes in circumstances where a chosen purpose may not be capable of being categorised as strictly charitable.

### Charitable trusts

Whilst the Trusts Law allows for the creation of charitable trusts, it does not define "charity" or "charitable purposes". The position is therefore covered by case law and the leading case [1] on the topic has established the following:

- There must be a clear intention on the part of the settlor to devote the whole of the property to charitable purposes (which will be determined as a matter of construction of the words of the gift).
- The purpose must be enforceable by the court.
- The purpose should be either within the express terms or the "spirit and intendment" of the preamble to the English Charitable Uses Act 1601 (also known as the Statute of Elizabeth). Four principal categories have been derived from this:
  - trusts for the relief of poverty;
  - trusts for the advancement of education;
  - trusts for the advancement of religion; and
  - trusts for other purposes beneficial to the community not falling within any of the preceding three categories.
- The purpose must be for the public benefit. There is a rebuttable presumption that a purpose falling within the first three of the above categories will be for the public benefit. However, in relation to a purpose falling within the fourth category - other purposes beneficial to the community - the element of public benefit will have to be demonstrated.
- The trust must be exclusively charitable.

<sup>1</sup> Meaker v Picot (1972) JJ 2161

### Non-charitable purpose trusts

Non-charitable purpose trusts are expressly provided for by the Trusts Law and can be used in circumstances where particular purposes, whilst philanthropic, may nevertheless not be capable of being categorised as strictly charitable. Examples, here, would be trusts for humanitarian, ecological or research purposes.

Whilst the Trusts Law provides that a trust will be invalid to the extent that "it is created for a purpose in relation to which there is no beneficiary, not being a charitable purpose", it also states that a trust will not be invalid by reason of this provision "if the terms of the trust provide for the appointment of an enforcer in relation to its non-charitable purposes, and for the appointment of a new enforcer at any time when there is none."

### Key points

With a trust established under Jersey law, the following are key points to note:

**Duration:** The trust can be established for an unlimited period.

**Registration:** There is no public registration of trusts in the Island.

**Restrictions:** The Trusts Law provides that a trust cannot directly hold immovable property situate in the Island. A separate piece of legislation - the Loi (1862) sur les teneures en fideicommiss et de l'incorporation d'associations (the "1862 Law") - allows for trusts of Jersey situate immovable property in certain defined circumstances. (A consideration of the 1862 Law is outside the scope of this briefing.)

**Enforcement:** The Attorney General in the Island has the duty to enforce charitable trusts. In relation to non-charitable purpose trusts, an office holder known as an enforcer has the statutory duty to enforce a trust in relation to its non-charitable purposes.

Subject to the qualification that the enforcer of a non-charitable purpose trust cannot also be a trustee of the trust, there are no other limitations with regard to the choice of the enforcer. An individual or a corporate entity can be appointed, and there is no requirement for the enforcer to be resident in Jersey.

The Trusts 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, and also to apply to the Royal Court 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.

To facilitate his role, the enforcer is entitled to see trust accounts and can apply to the Royal Court for orders and declarations.

**Amendments:** The Trusts Law provides that a trust can be varied in any manner provided by its terms. In addition, there is a statutory cy-pres provision which allows the Royal Court, in certain specified circumstances, to declare that the trust property is to be held for such other charitable or non-charitable purpose, as the case may be, as the court considers to be consistent with the settlor's original intention.

This jurisdiction can operate, for example, where a trust's stated purpose has been fulfilled, or no longer exists, or provides for only a partial use of the property.

The Trusts Law also allows the Royal Court to approve an arrangement that varies or revokes the purposes of a trust or enlarges or modifies the trustee's powers of management or administration, if it is satisfied that the arrangement is suitable and expedient, and is consistent with both the settlor's original intention and the spirit of the gift. Before exercising this jurisdiction, the court will need to be satisfied that any person with a material interest in the trust has had an opportunity to be heard.

**Taxation:** In relation to charitable trusts, the Income Tax (Jersey) Law 1961 as amended (the "Income Tax Law") provides that an exemption from income tax will be granted in respect of income derived from the property of a trust established in Jersey for the advancement of education, the relief of poverty, the furtherance of religion, a purpose beneficial to the whole community, or the service of any church or chapel or any building used solely for the purpose of divine worship, in so far as the income is applied to those purposes.

In relation to non-charitable purpose trusts, whilst a Jersey resident trustee of such a trust would ordinarily be chargeable to income tax in respect of all income arising to the trustee in that capacity, a concession is available for non-charitable purpose trusts under which no resident of Jersey (other than a charity) has an interest or is intended to have an interest, whether during or at the end of the trust period. In such circumstances, Jersey income tax is not payable in respect of foreign income or Jersey bank interest.

### Foundations

The Foundations (Jersey) Law 2009 (the "Foundations Law") is very flexible and allows for the creation of a foundation for purposes - known as objects - which are charitable, non-charitable, or both charitable and non-charitable. The Jersey foundation can therefore be an ideal vehicle to use in circumstances where an individual is keen to pursue particular philanthropic initiatives, some or all of which may not be strictly charitable.

### Key points

With a Jersey foundation for purposes which are charitable, non-charitable, or both charitable and non-charitable, the following are key points to note:

**Duration:** As with charitable and non-charitable purpose trusts, the foundation can be established for an unlimited period.

**Registration:** Unlike a trust, a Jersey foundation is an incorporated body which has its own legal personality, can hold assets and can sue (and be sued) in its own name. A foundation comes into existence following the completion of an incorporation process: an entry made in the register of foundations is a matter of public record and conclusive evidence that a foundation has been incorporated and that the requirements of the Foundations Law in relation to incorporation have been complied with.

The constitutional documents of a foundation are its charter and its regulations. A foundation will be incorporated on the instruction of the founder, and will have a council (which is similar to a board of directors) to administer its assets and to carry out its objects, and a guardian. One of the council members must be a "qualified person" with the appropriate

regulatory licence pursuant to the Financial Services (Jersey) Law 1998 as amended: this member is known as the qualified member.

In terms of publicly available information, the register of foundations contains:

- the foundation's name and registered number;
- the qualified member's name and business address in Jersey (which will be the foundation's business address and, unless the charter provides otherwise, will also constitute the place of administration of the foundation's activities and assets); and
- the foundation's charter (but not its regulations).

The charter is required to specify its objects, but details of these can be determined in accordance with provisions found in the regulations.

The information required to be included in the charter is limited and it is not necessary to include the names of the founder, the council members and the guardian. The identities of the founder and of those officer holders (other than the qualified member) need not, therefore, be a matter of public record. However, for those who would, in fact, prefer to maintain an open profile, additional information beyond that which is prescribed by the Foundations Law can be incorporated into the charter and thereby become a matter of public record.

Unlike a trust, a foundation can be incorporated without any initial endowment. Where endowments are going to be permitted after a foundation's incorporation, this has to be made clear in the foundation's charter.

**Restrictions:** The doctrine of ultra vires does not apply and a foundation can exercise all the functions of a body corporate, save only that it cannot directly (a) acquire, hold or dispose of immovable property in Jersey or (b) engage in commercial trading that is not incidental to the attainment of its objects. However, both of these restrictions can be overcome by interposing an underlying company, so that the relevant activity is not undertaken directly by the foundation.

**Enforcement:** Every foundation has a guardian with a statutory duty to take such steps as are reasonable in all the circumstances to ensure that the council carries out its functions. The guardian can also be given such other powers and duties as the foundation's constitutional documents provide. There is no regulatory requirement in relation to the office of guardian and there is considerable flexibility as to who should be the guardian. The founder and the qualified member (although no others) are permitted to fulfil a dual role as both council member and guardian. As with the enforcer of a non-charitable purpose trust, the guardian can be an individual or a corporate entity, and there is no requirement for the guardian to be resident in Jersey.

The guardian can require the council to account to him for the way in which it has administered the foundation's assets and acted to further its objects, and can apply to the Royal Court for orders and directions. The powers available to the Royal Court include the power to order a foundation to carry out its objects in circumstances where it has failed to do so, and also the power to appoint or remove the council members.

A guardian can be given the power, in certain circumstances, to sanction or authorise actions taken by the council that would not otherwise be permitted by the foundation's constitutional documents.

**Amendments:** The foundation's constitutional documents can allow for amendments to be made to the charter and regulations, including amendments to the foundation's objects or purposes. When any such changes are made, an updated charter will need to be filed with the registrar of foundations.

In addition, the Foundations Law provides that the Royal Court can propose amendments to a foundation's charter or amend its regulations if the court is satisfied that the change will assist the foundation to administer its assets or to attain its objects or that the stated objects are no longer attainable and that the proposed change will help the foundation to attain objects as near as reasonably possible to the stated objects.

**Taxation:** With regard to taxation, whilst the exemption contained in the Income Tax Law which applies to charitable trusts (please see above) does not expressly apply to foundations, the Comptroller of Taxes will nevertheless grant an exemption from Jersey income tax, by concession, to a foundation which is established solely for charitable purposes.

Where a foundation is established for philanthropic purposes which are not strictly charitable, it is charged to income tax at the rate of 0% (save for a prescribed category of profits or gains deriving from land situate in Jersey in respect of which it is charged to income tax at the rate of 20%). If a Jersey resident has an interest in a foundation (directly or indirectly), an application should be made to the Comptroller of Taxes for pre-clearance prior to incorporation (to determine whether or not the statutory anti-avoidance provisions are relevant).

## KEY CONTACTS

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