



## **CHARITIES REGISTRATION AND REGULATION BILL 2018 EXPLANATORY NOTES**

*These notes are circulated for the information of Members with the approval of the Member in charge of the Bill, HM Attorney General, John Quinn, QC, MLC.*

### **Introduction**

1. These explanatory notes relate to the draft Charities Registration and Regulation Bill 2018. They have been prepared by the Attorney General's Chambers in order to assist readers of the Bill. They do not form part of the Bill and have not been endorsed by the Legislative Council.
2. The notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill.

### **Background**

3. The registration and regulation of charities is currently provided for by the Charities Registration Act 1989 ("the 1989 Act"). Over time, the provisions of that Act have become outdated and additional requirements are necessary so that there is a modern system in place which will enable the public to retain confidence in the Manx charitable sector. It is also necessary to take account of recent changes to the meaning of "charity" in England and Wales so that bona fide charities which are established in that jurisdiction are not prevented from carrying on activities here.
4. Accordingly, the Bill has six main purposes, namely:
  - 4.1 to update the meaning of "charity" in the Island so that it remains at least as broad as in England and Wales;
  - 4.2 to provide for a modern register of charities which are carrying out activities within the Island;
  - 4.3 to assist charity trustees (however described, e.g. as trustees, directors or committee members) in the proper delivery of their charity's objectives, by ensuring that charities have constitutional documents which are fit for purpose and that the process of responding to a changing environment is straightforward and inexpensive;
  - 4.4 to ensure more effective regulation of charities by increasing reporting requirements and ensuring accountability within the Island on the part of all charities carrying on activities here, in addition to providing for the automatic disqualification of individuals for acting as trustees on the happening of certain events and for consideration of the risk of a charity seeking registration to be used for money laundering activities or the financing of terrorism;
  - 4.5 to improve public service and administrative efficiency by combining the functions of registrar and regulator in HM Attorney General, thus mirroring the Charity Commission in England and Wales; and

4.6 to provide a simplified mechanism for appealing decisions of the registrar/regulator by establishing a Charities Tribunal.

## Commentary on Clauses

### PART 1 – INTRODUCTORY

5. **Clause 1** gives the short title of the resulting Act of Tynwald. **Clause 2** provides for the Act to be brought into operation by one or more orders made by the Attorney General. The power includes provision to make consequential, incidental, supplementary and transitional provisions in connection with its commencement. **Clause 3** sets out the interpretation of certain terms used within the Bill.

### PART 2 – MEANING OF “CHARITY” AND “CHARITABLE PURPOSE”

6. **Clause 4** restates the existing definition of “charity”, which is currently set out in *section 14 of the Charities Act 1962* (“the 1962 Act”), namely (subject to express exclusions) “an institution, corporate or not, which is established for charitable purposes, and is subject to the control of the Court in the exercise of the Court’s jurisdiction with respect to charities”.
7. The 1962 Act provides that “charitable purposes” means “purposes which are exclusively charitable according to the laws of the Isle of Man”. As the only statutory provisions which describe charitable purposes are the *Recreational Charities (Isle of Man) Act 1960* and *section 2 of the 1962 Act*, the primary description, and interpretation, of what is charitable under Manx law has been provided by the High Court.
8. From a review of the Court’s judgments, in particular *In re Costain* (1961) and *In re Ring* (1962), in considering the interpretation of “charitable” in the Island, the Court has primarily adopted the principles which had been developed by the English Courts, albeit indicating that Scottish and Irish cases could also be treated as guides. There are no reported cases, however, in which either Scottish or Irish precedents have been considered. Thus, despite the Learned Deemster having accepted, *In re Ring*, as substantially correct the contention that the law of the Isle of Man “was more liberal in interpreting what was charitable, and in any event not narrower, than the interpretation which English law had put on the Statute of Elizabeth”, in practice it is the English Courts’ interpretation to which regard has been had in cases to which the statutory provisions referred to in paragraph 7 do not apply.
9. Prior to the enactment of the Charities Act 2006 (of Parliament) (“the 2006 Act”), the definition of “charitable purposes” had been developed entirely through case law having regard to the preamble to the Statute of Charitable Uses 1601 (also known as the Statute of Elisabeth). The preamble, which did not form part of the statute law as it was not in the body of the Act, contained a list of purposes or activities which the State believed were of general benefit to society, and to which the State wanted to encourage private contributions. The Courts, in considering whether or not a particular purpose was charitable in law, have tended to look for an analogy between the purpose under consideration and the 1601 list, and to recognise the purpose as charitable if an analogy with the 1601 list could be found. This resulted in the classification, by Lord Macnaghten in *Pemsel’s* case (1891), of “charitable purposes” into four principal heads, namely:-

- 9.1 the relief of poverty;
  - 9.2 the advancement of education;
  - 9.3 the advancement of religion; and
  - 9.4 other purposes beneficial to the community not falling under any of the preceding heads (on which the Courts have relied, having also had regard to the preamble, in holding to be charitable well recognised purposes such as the relief of elderly persons, the relief of ill-health, the care of animals and the preservation of the environment).
10. With the passing of the 2006 Act, these principal heads of charity were codified and expanded into a list of thirteen descriptions of purposes, which preserved those purposes which had already been recognised as being charitable by the English Courts as well as broadening the meaning of "charitable purpose", in particular by including within the list "the advancement of amateur sport". Prior to the 2006 Act, such a purpose was only deemed to be charitable if it could be shown to fall within accepted charitable purposes, such as the promotion of education (which would encompass sporting activities for children and young people), the promotion of public health or the provision of recreational facilities in the interests of social welfare.
  11. Although the Manx Courts can still have regard to English case law in determining whether a particular purpose can be said to be charitable where that purpose was deemed to be charitable in England and Wales prior to 2006, they cannot adopt a purpose which has only become charitable in England and Wales as a consequence of its inclusion in the statutory list. This means that a bona fide charity established in England and Wales may now be unable to carry out any activities in the Island. For this reason, **clause 5** sets out a definition of "charitable purpose" which requires the purpose to be one included in the list contained in **clause 6** (which includes all of the purposes which are presently applicable in England and Wales, as well as preserving the purposes recognised by the Manx statutory provisions referred to in paragraph 7).
  12. The new definition of "charitable purpose" includes the requirement adopted by the 2006 Act that the purpose must be for the public benefit, as described in **clause 7**. Under the existing law, when the status (charitable or non-charitable) of an organisation established for the relief of poverty, the advancement of education, or the advancement of religion is being considered, the organisation's purpose is presumed to be for the public benefit unless there is evidence that it is not for the public benefit. For organisations established for all other purposes, the opposite is the case. **Subsection (2)** abolishes this presumption and puts all charitable purposes on the same footing. **Subsection (3)** makes clear that the meaning of the term "public benefit" is, and remains, that which has been developed under the common law.
  13. **Clause 8** re-enacts the existing law which provides that it is an offence for an institution to hold itself out as being a charity unless it is a registered charity or a charity exempt from the requirement to register. One of the reasons for this is to prevent an institution from claiming, or appearing, to be a charity when it is not, in fact, established for charitable purposes. It is also to prevent a foreign charity from carrying on activities within the Island if it does not meet the criteria for registering as a Manx charity and, thus, be subject to regulation here. The existing penalties on conviction are being retained.

### **PART 3 – THE REGISTER AND REGISTRATION**

14. Although the 1989 Act does provide a requirement for a charity in the Island to register by filing a "statement" in the General Registry (as did its predecessor, the

Public Charities Act 1922), it does not provide the clear vires for the establishment and operation of a register which are necessary in a modern world. Accordingly, **clause 9(1)** provides for there to continue to be a register, to be kept by the Attorney General. The effect of this will be to combine the role of registrar with the Attorney General's existing role as regulator, thus reflecting the position in England and Wales where those roles are combined in the Charity Commission. This will have the benefit of streamlining the regulatory function and also providing a "one stop shop" for members of the public, including charity trustees, who are often uncertain as to the respective roles of the registrar and the Attorney General.

15. The remaining provisions of **clause 9** set out the information which must be contained in the register and enable the Attorney General to prescribe the particulars of the charity which are to be included. **Clause 9(3)** provides that the register is public except to the extent prescribed by regulations made by the Attorney General under **clause 9(4)**. This will enable the necessary balance to be struck between the public interest and an individual's right to privacy. It will also enable all details about certain trustees to be kept private, for example in circumstances where there is a genuine risk to them in being identifiable on a public register.
16. **Clause 10** imposes an express requirement to register and preserves the requirement that a registered charity have a substantial and genuine connection with the Island. Failure to register is an offence, with the penalties mirroring those which apply for an offence under **clause 8**.
17. **Clauses 11 to 13** provide for the application for registration, the criteria for the determination of an application and the administrative steps to be taken on registration.
18. The determination criteria include matters such whether the institution is a charity under Manx law, the nature of its connection with the Island, whether its name can be considered to be undesirable or misleading and whether the governing instrument is fit for purpose (i.e. it sets out the necessary powers and management/administrative procedures to enable it to function effectively), as well as whether there is reason to be concerned about the suitability of the persons appointed as its trustees (i.e. the persons who have general control and management of its administration, whether described, for example, as directors, trustees or committee members) to undertake such role and the risk of the charity being used for money laundering activities or of its property being used to finance terrorism. The reason why these matters are being considered in detail at the time of registration is to ensure that a charity coming onto the register is not only suitable for registration but, with the principle in mind that "prevention is better than cure", that it, and its trustees, have the necessary powers and understanding of how they should be used so that the charity can operate successfully both in regard to the achievement of its charitable purposes and the meeting of the necessary regulatory requirements.
19. **Clause 14** provides that the Attorney General is not liable for the accuracy of any document submitted for inclusion on a register maintained under the Bill but provides a power to make inquiries to establish the accuracy of any information provided. **Clause 15** provides for the circumstances in which an institution must be removed from the register, which will enable the register to be an accurate record of the charities which are presently carrying on activities in the Island.

#### **PART 4 – REGISTERED CHARITY: FORMAL REQUIREMENTS**

20. **Clause 16** requires that every registered charity have a written governing instrument, including those originally registered under the Public Charities Act 1922 or the 1989 Act. A lack of a written governing instrument can cause uncertainty as to the purposes for which a charity was established, as well as regards the powers of the trustees concerning its day to day management. In many instances, only the High Court can resolve such uncertainties, which has financial implications for the charity concerned as well as imposing a burden on the public purse, as the current Rules of the High Court require the Attorney General to be named as a defendant in respect of applications concerning charities.
21. Although adopting a written governing instrument should not be a complex task in most circumstances, particularly given the provisions set out in **clauses 21 and 22**, **clause 16(2)** provides that existing charities without written governing instruments will have a period of at least two years from the date the requirement comes into force in order to adopt one.
22. **Clauses 17 and 18** make provision for the amendment of the governing instrument, including the amendment of a charity's objects. To ensure that a charity's governing instrument remains fit for purpose, except in a case where the High Court has authorised the amendment (in which case the Attorney General's views will have been considered), the Attorney General's consent must be obtained for any change to have effect. This does not apply in the case of a foreign charity (i.e. one established under the law of a country or territory outside the Island) as any changes will be governed by the laws of the jurisdiction in which it is established, but the charity would be removed from the register if the effect of any changes was that the institution was no longer established for charitable purposes.
23. **Clauses 19 and 20** make provision as regards the change to a charity's name, including preserving the existing power of the Attorney General to direct that a charity abandon a misleading or undesirable name. It will remain an offence to fail to comply with a direction, with the existing penalties on conviction being retained. As the purpose of the power is to ensure that an unsuitable name is changed, **clause 20** will enable the Attorney General to change the name of the charity following a conviction.
24. The provisions in **clause 21** will enable charities which registered prior to the Act coming into force to seek the consent of the Attorney General to amend their governing instruments, or to adopt a governing instrument, in circumstances where the only alternative would be to make an application to the High Court under the Charities Act 1962., to which the Attorney General would be a party. Enabling the Attorney General to give the necessary consent would make the process of adopting necessary change more straightforward and reduce the cost to both the charity concerned and the public purse. Further, as at present, officers in the Attorney General's Chambers will provide guidance to charities as to the requirements, including providing model documents. **Clause 21** does not limit the Court's powers under the 1962 Act and neither does it have any effect on the general principles which must be considered irrespective of whether the necessary approval is given by the Court or by the Attorney General.
25. In the case of a charity which has been constituted under an Act of Tynwald, **clause 22** enables the Attorney General to make an order, subject to Tynwald approval, amending the Act of Tynwald to effect the necessary amendments. This mechanism

will be in addition to, and not in place of, the usual process for amending primary legislation.

26. To ensure that information on the register is kept up to date, **clause 23** provides for the notification to the Attorney General of amendment to the various particulars of registered charities. The existing offence in the 1989 Act for non-compliance with the requirement to notify is retained, as are the penalties on conviction.

## **PART 5: CHARITY TRUSTEES**

27. **Clause 24** defines a "charity trustee" for the purposes of the Bill.
28. **Clause 25** provides the automatic disqualification of a person for acting as a charity trustee in circumstances which give rise to concern as to his or her suitability to undertake such a role, given the degree of trust involved. Such circumstances include being convicted of an offence of dishonesty, being disqualified for being a company director, being an undischarged bankrupt, being subject to an order of the High Court removing or suspending him or her as a trustee of a charity, or being on the sex offenders' register.
29. At present, the mechanism for removing an unsuitable trustee is the obtaining by the Attorney General of an order from the High Court, which is administratively burdensome and imposes a cost on the public purse. The proposed automatic disqualification provisions, which mirror those which are in place in England and Wales, do not oust the jurisdiction of the court but, instead, will reduce the need to have resort to it. A person acting as a charity trustee whilst disqualified will commit an offence and be liable, on summary conviction, to 12 months custody and/or a fine of level 5 on the standard scale (currently £10,000).
30. As there may be circumstances where a person remains suitable to be appointed as a trustee of a charity notwithstanding the application of the automatic disqualification provisions, **clause 25(4)** enables the Attorney General to disapply the provisions in relation to any person where he or she considers that it is in the public interest to do so.
31. **Clause 26** provides that a person who is disqualified for acting as a charity trustee is also disqualified for holding an office or employment with senior management functions in a charity.

## **PART 6 – CHARITY ACCOUNTS AND ANNUAL REPORTS**

32. Effective regulation of any sector requires the regulator to be provided with information from which problems, actual or potential, can be identified. In the case of charities, this is presently achieved by the filing of annual accounts at the Registry. **Clause 27** re-enacts the existing requirement for the filing of annual accounts, which may be subject to audit or examination depending on whether the charity's income exceeds the relevant thresholds. Supplementary provisions as regards auditors and examiners are made by **clause 28**.
33. Annual accounts provide only limited information concerning the activities of a charity and, to improve transparency, **clause 29** makes provision for a report on the activities of the charity to be filed at the time of filing the annual accounts. The information to be contained in the report will be prescribed, meaning that the reporting requirement can be tailored to reflect the size of the charity. It is not anticipated that the reporting

requirement will place any significant burden on trustees as, in most cases, they are already required to report on the previous year's activities at their charity's AGM.

34. **Clause 30** clarifies that, in the case of a foreign charity, the requirement as to the filing of annual accounts and reports is in relation to the activities of the charity carried on by it in, or otherwise connected with, the Island.

## **PART 7: CHARITY MERGERS**

35. **Clause 31** provides for a register of charity mergers to be kept by the Attorney General. **Clause 32** describes the circumstances which constitute a charity merger for the purpose of **clause 31**, namely where charity A ceases to exist having transferred its property to charity B, or where, following a transfer of their property to charity C, charities A and B cease to exist. **Clauses 33 and 34** make provision in relation to the notification of a charity merger and the details to be entered onto the register of charity mergers.
36. The main purpose of **Part 7** is so that registered charities which have otherwise ceased their activities do not have to remain in existence, and subject to regulation, merely to be able to receive future gifts, such as bequests. Accordingly, **clause 35** provides that, where a charity merger has been registered, the gift to a charity which has ceased to exist will take effect as a gift to the charity to which its property was transferred as a consequence of the merger.

## **PART 8 – REGULATION AND INSPECTION**

37. As well as re-enacting the existing powers under the 1989 Act of the Attorney General to obtain information as to the investments and property of a registered charity, **clause 36** provides the power to obtain such other information as may be prescribed (for example, information concerning the charity's safeguarding policies, where relevant, and compliance with such policies). The application of **clause 36** is extended to ecclesiastical charities and to trusts of property falling within paragraph 1(2) of Schedule 3 to the Church Act 1992. **Clause 37** re-enacts the power of the Attorney General to institute inquiries into an institution which is, or purports to be, established for charitable purposes. The existing offence provisions and penalties are preserved. **Clause 38** makes new provision for the obtaining of search warrants in connection with an inquiry under **clause 37**, the detailed provisions concerning their obtaining and use being set out in the Schedule.
38. **Clause 39** re-enacts the existing powers of the High Court, on the application of the Attorney General, to make orders for the protection of charities and their property, such as for the removal or suspension of a trustee.

## **PART 9 – FOREIGN CHARITIES**

39. To ensure accountability within the Island of the activities of a foreign charity (that term being defined in **clause 40**), **clause 41** imposes a requirement that, if none of its trustees are ordinarily resident in the Island, a foreign charity must appoint a person resident in the Island as the "responsible person", who will be responsible for the compliance by, or on behalf of, the charity in respect of all applicable statutory requirements. This will avoid the difficulties that can arise at present if none of the persons carrying on the charity's activities in the Island have the necessary authority within the charity to ensure, for example, that the annual accounts are prepared and filed, and those persons that do have that authority are outside our jurisdiction.

## **PART 10 - APPEAL**

40. The Bill increases the number of decisions which the Attorney General can make in relation to charities, including those which are related to the function of registrar. It also provides for the Attorney General to be able to exercise certain functions which currently fall solely within the jurisdiction of the High Court, such as the approval of the adoption, or amendment of, constitutional documents.
41. As a public authority, decisions of the Attorney General are subject to judicial review by the High Court by way of a Doleance Claim. In order to provide a more straightforward and cost effective mechanism for challenge, however, **clauses 42 and 43** provide for the creation of a Charities Tribunal to hear appeals in respect of decisions taken by the Attorney General, with the exception of decisions concerning the exercise of his powers under **Part 8**, namely to inquire into the activities of charities and to make applications to court for the protection of charities, and section 51 (consent to a prosecution). As is usual in relation to the decision of an administrative tribunal, a further appeal lies to the High Court on a point of law.

## **PART 11 – MISCELLANEOUS PROVISIONS**

42. **Clause 44** imposes a requirement for a decision or direction which is subject to a right of appeal to be given in writing and to include a statement of reasons. This is in keeping with the status of the Attorney General as a public authority.
43. As already stated, the Bill increases the number of decisions to be taken by the Attorney General in respect of charities. So that this does not become administratively burdensome, **clause 45** enables the Attorney General to appoint a person employed as an officer in the Attorney General's Chambers to perform certain specified functions, namely those which are functions which relate to the maintenance of the register and the taking of certain steps by the charities. In practice, much of this work is presently undertaken by a Senior Lawyer in Chambers, in advising the current registrar or the Attorney General as to the exercise of their functions. Functions such as making an application to the court for the removal of a trustee, issuing a direction that the name of a charity be changed or exercising the regulation and inspection powers under **Part 8** will continue to be exercisable solely by the Attorney General.
44. For the purpose of any appeal, a decision of a person appointed under **clause 45** is treated as if it were a decision of the Attorney General.
45. **Clause 46** makes provision as regards the making by the Attorney General of regulations to carry the provisions of the Bill into effect. Tynwald approval is required.
46. **Clauses 47 and 48** re-enact existing provisions under the 1989 Act regarding the winding up of institutions by the High Court and as to the invalidity of certain transactions of charitable companies.
47. **Clause 49** makes provision as to the reference on a registered charity's correspondence and other documents to matters to be prescribed. This will enable charities to be required to include information such as charity number, contact details and names of trustees on its correspondence and other communication methods such as its website, social media platforms and publicity documents.

48. **Clause 50** re-enacts the existing offence of knowingly or recklessly to furnish any information which is false or misleading in a material particular.
49. **Clause 51** sets out supplementary provisions in relation to offences under the Bill, including re-enacting a provision which makes certain persons connected with an institution, which is not a body corporate, liable for its non-compliance. In the case of an institution which is a body corporate, the necessary liability of persons connected with it is provided by section 54 of the Interpretation Act 2015. Thus, it is unnecessary to repeat them in the Bill.
50. **Clause 52** makes provision as to the delegation by charity trustees of their functions so that, notwithstanding that a particular charity is not constituted as a trust to which the provisions of the Trustee Act 2001 apply, only those functions which are described as “delegable functions” in section 11(2) of that Act (i.e. those which may be delegated by the trustees of a charitable trust) may be delegated by charity trustees.
51. **Clause 53** makes provision as regards approved forms to be used for the submission of information and **clause 54** makes provision as regards the keeping of records by the Attorney General, and for their destruction.
52. To enable the efficient use of public resources, **clause 55** empowers the Attorney General to enter into arrangements with the Registrar General for the provision of services in connection with the delivery of the Attorney General’s functions under the Bill, which will enable the register to be hosted within the Central Registry, thus taking advantage of existing IT provision.
53. **Clause 56** makes provision as regards the refusal of unacceptable documents.
54. **Clauses 57 to 59** provide for the disclosure of information between public authorities and the Attorney General for the purpose of enabling them to discharge their respective functions.

## **PART 12 – AMENDMENTS AND REPEALS**

54. Finally, **Clauses 60 to 68** provide for certain consequential amendments as well as for the repeal of the Charities Registration Act 1989.

### **Financial Expenditure**

55. The Bill is not expected to give rise to any more than a minimal increase in public sector expenditure which will be dealt with during the normal budgeting process. There will be no reduction in its income.

### **European Convention on Human Rights**

56. In the opinion of HM Attorney General, the provisions of the draft Bill are compatible with the Convention rights (within the meaning of the Human Rights Act 2001).