



## Non-Profit Organisations: Guidance Paper on Governance Measures

### 1 Background

The Policy & Resources Committee (the Committee) has reviewed the legal framework applicable to charities and other non-profit organisations (NPOs). In undertaking the review it has been mindful of the importance from a public policy perspective of introducing minimum standards for a governance framework for NPOs. Such standards will allow the public to have greater confidence in the administration, management, transparency and integrity of NPOs and also demonstrate to other stakeholders inside and outside Guernsey that the third sector is a mature sector which is regarded as such by both government and the sector itself. These stakeholders include the Financial Action Task Force, an intergovernmental body based in Paris, which has issued standards for NPOs on the combatting of the financing of terrorism.

This maturity is demonstrated by the partnership approach between the Association of Guernsey Charities (AGC) and the Committee in developing this guidance paper on governance measures. The AGC is committed to ensuring that minimum governance measures are established and maintained for NPOs.

The guidance paper covers three main themes, namely the constitutions of NPOs, risk mitigation, and financial probity and transparency.

With the benefit of input by the NPO Registrar and the AGC, the Committee is also considering the enactment of legislation which would, amongst other matters, require NPOs that are subject to registration by the Registrar of NPOs (the NPO Registrar) to put in place formal governance measures. This guidance paper is a precursor to the legislation and it is envisaged that the governance framework in this paper will be form part of the legislation.

The Committee recognises that, while some NPOs have measures relating to all or some of the provisions in this guidance paper in place already, for others this paper will involve a departure from the current position, which could take some time to implement. The AGC has indicated to the Committee that it would be beneficial if NPOs could receive advance information about the nature and scope of the new requirements. Therefore, the Committee is issuing this guidance paper for Guernsey NPOs which, while not legally binding, is intended to assist NPOs in putting in place the kind of governance measures expected to be required under the forthcoming legislation. Registered NPOs will be required to have these measures in place by the end of December 2019.

The legislation will apply to registered NPOs, i.e. those that meet the criteria for compulsory registration or that do not meet the criteria but have chosen to be registered on a voluntary basis. There are two points to note here.

First, in addition to looking at governance, the Committee has reviewed the current criteria for compulsory registration and will be asking the States to approve an amendment to the legal framework in this area to take effect at the same time as the requirement for governance measures. This amendment would do two things. First, it would raise the compulsory registration threshold from £10,000 to £100,000 in respect of gross assets or funds, and from £5,000 to £20,000 in respect of annual income. Second, it would introduce a new risk-based criterion for registration, which would require NPOs that distribute assets outside the Bailiwick to be registered, irrespective of whether or not they meet the financial thresholds referred to above. This would not apply where overseas distributions are incidental to the activities of the NPO or *de minimis*. It is envisaged that the NPO Registrar would issue guidance on what is incidental or *de minimis*. An example of incidental or *de minimis* distributions would be where an NPO is a Bailiwick sports club that sends a team to compete overseas, and provides funds to the team while they are away to pay for the hire of a coach or for everyday expenses such as refreshments. Any NPO that does not meet the proposed new thresholds and that would like clarification on whether it would be required to register under the proposed new risk based criterion before taking any steps to implement the changes set out in this guidance paper is advised to contact the NPO Registrar.

Second, it is important to be aware that it is envisaged that registration will continue to be necessary for NPOs which wish to claim an exemption from liability to income tax (ie as is the case now). Consequently, any NPO in that situation which no longer meets the criterion for compulsory registration under the revised framework will need to register voluntarily (it is envisaged that NPO registration will continue to be free, and not an onerous process) and will, therefore, need to comply with the measures in this guidance paper once they have been expressed as legislation.

Other NPOs may also wish to seek registration on a voluntary basis.

For ease of reference, terms generally applicable to companies such as members or boards have been used in this guidance paper. It is, however, recognised that NPOs may take different forms and all references to a particular party or office should be taken as including any party or office with corresponding functions, powers and duties.

## **2 Constitution**

The key features of the proposals for NPO constitution documents are to ensure that:

- the constitution documents cover the basic minimum standards expected of NPOs;
- meetings of both members and officers (if different) are governed by adequate minimum quorum requirements that exclude connected parties;
- there is proper independent oversight of the NPO's finances and disbursements; and
- adequate record-keeping is undertaken, including the production of accounts which have been independently verified or inspected, or audited (such as is required by the NPO's constitution).

For many NPOs a constitution will be their principal governance document. Details of the matters that the constitution should cover are set out in the appendix to this document.

For NPOs that are legal persons, some of these matters will already be covered in their incorporation documents (e.g. a company's Memorandum and Articles of Incorporation). It is envisaged that these incorporation documents can be amended to include the provisions that will be required to be contained within NPO constitutions, so that a separate document is not required, and all constitutional matters are contained within the incorporation documents.

Occasionally there can be uncertainty about what is required where an NPO only has an organising committee, but, apparently has no members or trustees. In such cases, particular for smaller NPOs, it must be recognised, when the NPO is established, that the members of the board or organising committee are acting both as members or trustees, as well as officers of the board or committee. These roles are not necessarily inconsistent, and the proposals for NPO constitutions contained herein do not need to distinguish between these roles, provided the provisions for proceedings at meetings are adequate, particularly on minimum quorum requirements and voting procedures.

### **3 Risk mitigation**

An NPO should put in place processes to try to ensure that it cannot be used for criminal purposes (e.g. fraud, corruption, terrorist financing or money laundering). This should include identification etc. measures<sup>1</sup> in respect of its donors and beneficiaries or any other NPO with which it transacts, as well as financial controls. However, given the profile of the local NPO sector it would be disproportionate to require identification measures to apply in every case, and this would also fail to take into account the fact that in some circumstances it may be difficult to identify all the parties involved. Instead, NPOs should apply the measures set out below, which reflect a risk-based approach.

#### **3.1 Identification etc. of donors**

An NPO should where possible establish, verify and document the identity of a donor where the donation meets one or more of the following criteria;

- it comes from outside the Bailiwick (unless exempt – see below);
- it is a significant amount i.e. £1000 or more (unless exempt – see below);
- the NPO considers the donation to be unusual because of its origin, nature or otherwise.

The requirements in the first two bullet points above do not apply in two situations. The first exemption is where an NPO registered in Guernsey or Alderney is also registered in the

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<sup>1</sup> This requirement reflects the fact that, in many cases reported internationally, where an NPO has inadvertently been used for criminal purposes, this has been because the NPO in question did not know enough about the parties to or from whom it was ultimately making or receiving donations.

UK, Jersey or the Isle of Man, or is affiliated to such an NPO, and a donation is received in the course of its own operations in that jurisdiction. The second exemption is where a donation is incidental to the activities of the NPO or is *de minimis* – see under section 1 above about the meaning of these terms.

It should be noted, however, that none of these exemptions applies if the third criterion above is met, i.e. if the NPO considers the donation to be unusual.

### **3.2 Identification etc. of beneficiaries**

An NPO should where possible establish, verify and document the identity, credentials, bona fides and good standing of any legal or natural person to which it directly provides funds, assets or forms of assistance if one or more of the following criteria are met:

- the person in question is outside the Bailiwick (unless exempt – see below);
- the funds or other assets or forms of assistance provided are significant i.e. £1000 or more (unless exempt – see below);
- the provision of funds or other assets or forms of assistance is requested in a way which the NPO considers to be unusual, whether because of the circumstances or nature of the request or otherwise.

The exemptions for the first two bullet points are identical to the three situations applicable to donations mentioned above, subject to one distinction which is made on the basis of risk.

The first exemption is where an NPO registered in Guernsey or Alderney is also registered in Jersey or the Isle of Man, or is affiliated to such an NPO, and confers a benefit on a person in either those jurisdictions in the course of its operations there. However, there is **not** a corresponding exemption to that for the UK mentioned above for donations (except that UK NPOs that are affiliates are covered by a separate exemption – see the paragraph below). This is because the UK and its NPO sector has a higher crime risk profile than Jersey and the Isle of Man (and Guernsey) and there is a greater risk of assets leaving the NPO sector being used for criminal purposes, including terrorist financing purposes, than there is for assets entering it.

Second, payments made to a registered NPO in the UK, Jersey or the Isle of Man are exempt.

Third, payments to beneficiaries that are incidental to the activities of the NPO or are *de minimis* are exempt – here too section 1 above applies.

As with donations, it should be noted that none of these exemptions applies if the third criterion above is met, i.e. if the NPO considers that assistance is requested in an unusual way.

### **3.3 Identification etc. of other NPOs**

An NPO should where possible establish, verify and document the identity, credentials, bona fides and good standing of any NPO outside the Bailiwick with which it transacts. This

is subject to an exemption for any NPO in the UK, Jersey or the Isle of Man to which the NPO based in Guernsey or Alderney is affiliated, and any other NPO that is registered in Jersey or the Isle of Man. It should be noted that non-affiliates in the UK are not exempt. This is on the basis of risk, for the reasons set out under section 3.2 above.

### **3.4 Financial Controls**

An NPO should put in place all necessary internal and other controls to ensure:

- its funds or other assets are fully accounted for;
- its funds or other assets are used in a manner consistent with its purpose, mission and objectives;
- it fulfils all other obligations under its constitution; and
- it discharges any legal obligations to which it is subject.

## **4 Financial probity and transparency**

An NPO should put in place measures to ensure the transparency of its dealings to its members or other interested parties as appropriate. These measures should include the following:

- a requirement for all funds given to or received from the NPO to pass through its bank account, other than payments made or received wholly within the Bailiwick that do not exceed a total of £1,000 in any twelve month period and which relate to purchases that are ancillary or incidental to the purpose of the NPO;
- the proper division of functions to ensure that responsibility for the approval for the release of funds and the release of funds itself rests with separate, unconnected individuals;
- the adoption of policies and procedures which follow accepted principles of accounting and control, which are compliant with the record keeping obligations under the NPO legislation or any other applicable legal obligations, and which include provision for the availability to the board or committee of financial information;
- the issuing of annual financial statements containing breakdowns of income and expenditure, which are made available to all members and which may be made available to any donors or potential donors at the discretion of the board or committee; and
- the independent audit, or independent verification, or independent inspection, such as is required under the constitution, of the annual financial statement by a person who is commissioned by the board or committee and who is not related to any member of the board or committee.

This is subject to the caveat that the details of identity or other private information in

respect of particular donors or potential donors to the NPO, or particular recipients or potential recipients of assistance from it, may be treated as confidential at the discretion of the board or committee. However, this will not affect any obligation to make information available that may be applicable outside the context of the legal framework for NPOs.

November 2018

## APPENDIX

### CONSTITUTION

The constitution of an NPO should include the following:

1. The name of the NPO
2. Its legal status (e.g. company, unincorporated association, foundation)
3. Its purpose and mission or objectives
4. If applicable, its relationship to other NPOs, whether as a member of an affiliation network or otherwise
5. The nature or, if applicable the identity, of its members
6. Membership rules such as eligibility, suspension and expulsion
7. Rules for proceedings at members' meeting, including provisions for quorum and voting (such that at least two unconnected members must be present, with a casting vote by a third unconnected person such as the Chairman of the meeting)
8. The rights of members to elect whether the annual financial statements should be independently audited, or verified or inspected, as befits the NPO's size, nature and complexity
9. The rights of members to see the annual financial statements of the NPO within a reasonable period following the end of the accounting period. Such statements should be either independently audited or appropriately verified or inspected independently of the NPO, as required by the membership or committee members and for their election by the membership, including
  - a. minimum number of members of the board or committee (which should comprise at least three unconnected people, two of whom to occupy the roles of Chairman, and Treasurer) The role of Secretary can be held by any member of the board or committee
  - b. terms of office
  - c. conflict of interest provisions
  - d. provisions for retirement and dismissal of board or committee members
  - e. remuneration of board members (if applicable)
  - f. a requirement that at least one of the board or committee members must be Guernsey resident
10. Duties and powers of the board or committee, including

- a. a requirement for board or committee members to be persons of integrity and probity who have suitable and appropriate skills and experience
  - b. a duty to act in good faith at all times, with a general duty of care
  - c. a duty to act only in accordance within the powers afforded by the Constitution
  - d. a duty to ensure that there are measures in place to enable the NPO to achieve its purpose and mission or objectives effectively, to fulfil its other obligations under its constitution and to discharge any legal obligations to which it is subject
  - e. a duty to review the activities of the NPO, as well as its own performance, from time to time to ensure that the NPO continues to achieve its purpose and mission or objectives effectively, to fulfil its other obligations under its constitution, and to discharge any legal obligations to which it is subject
  - f. a duty to ensure that the financial position of the NPO is satisfactory and prudent for the purposes of the organisation's mission or objectives, in particular that disbursements are subject to dual control by unconnected people
11. Duties and powers of the Chairman
  12. Duties and powers of the Secretary
  13. Duties and powers of the Treasurer
  14. Rules concerning frequency of, and proceedings at, meetings of board or committee members, including provisions for quorum and voting (such that at least two unconnected board or committee members must be present, with a casting vote by a third unconnected person such as the Chairman).