

Blurred Lines and Tough Choices

JAMAICA'S COMPLEX LEGAL ENVIRONMENT FOR
CIVIL SOCIETY ORGANIZATIONS AND SOCIAL
ENTERPRISES AND IMPLICATIONS FOR REFORMS

JUNE 2018

**Blurred Lines and Tough Choices:
Jamaica’s Complex Legal Environment for Civil Society Organizations
and Social Enterprises and Implications for Reforms**

An Initial Assessment for Discussion among Stakeholders

June 2018

Executive Summary

The International Center for Not-for-Profit Law (ICNL)¹ is pleased to contribute this initial assessment of the legal environment for civil society organizations (CSOs) and social enterprises (SEs) in Jamaica as a reference document for stakeholder dialogues on opportunities for reform. We have produced the assessment based on desk research and interviews generously granted to ICNL by representatives of CSOs, SEs, various Government bodies, academics, international cooperation agencies, and domestic donor organizations. The assessment seeks to present the laws – or lack thereof – implementation practices, and impact on CSOs and SEs within a framework of international legal standards and comparative practice. Our aim is to facilitate a systematic, multi-stakeholder, participatory review of the legal environment for CSOs and SEs. That review, in turn, should contribute to consideration of potential reforms to enable greater exercise of freedom of association and a strengthened SE sector in Jamaica.

“DCFS is really trying, and I’ve seen big changes. There’s been a huge improvement.”

SE leader

This initial assessment begins with a review of the legal environment for Jamaican CSOs. The assessment presents the laws governing registration and oversight of various legal forms that Jamaicans may consider if they wish to formally associate with others for not-for-profit objectives:

- The Friendly Societies Act, implemented by the Department of Cooperatives and Friendly Societies (DCFS);
- The Companies Act, implemented by the Companies Office of Jamaica (COJ); and

¹ The International Center for Not-for-Profit Law (ICNL) is an international not-for-profit organization that facilitates and supports the development of an enabling environment for civil society and civic participation. ICNL provides cutting-edge technical assistance, research, and education to support the development of appropriate laws and regulatory systems for civil society organizations in countries around the world. ICNL has worked on civil society law reform projects in over one hundred countries, including Jamaica, Guyana, Dominican Republic, and Haiti, among 20 countries in the Western Hemisphere. For more information, please visit: <http://www.icnl.org>

- The Charities Act, administered by DCFS, COJ, and the Tax Administration of Jamaica (TAJ).

As we discuss below, neither the Friendly Societies Act nor the Companies Act is drafted specifically for not-for-profit organizations. As a result, CSOs that register under those legal forms do not necessarily have internal rules or structures compatible with the requirements for registration as a charity, an optional status that offers preferential tax treatment. Moreover, each of the three relevant Acts includes ambiguous provisions that may be implemented by the three oversight agencies in discretionary and inconsistent manners. Hindrances in the Acts include high minimum membership, high costs for registration and reporting, vaguely described oversight authority, limitations on CSOs’ ability to engage in income-generating activities for their sustainability, and disproportionate sanctions. As a result, it difficult for both CSOs and public officials to understand and efficiently comply with or enforce the laws. These barriers to registering and operating a CSO are inconsistent with Jamaica’s obligations under international law to guarantee freedom of association.¹

“Things are improving. Years ago you had to go to Kingston. Now the Companies Office has a branch in Montego Bay.”

CSO leader from western Jamaica.

The second section of the assessment addresses the legal environment for SEs – income-generating organizations with a primary social mission that may operate with a secondary profit motive. The section builds on the previous discussion, as many of the same barriers to forming and operating a CSO – including limitations on the permissibility of economic activities by registered charities – are applicable to SEs. The complicated underlying legal environment is exacerbated by the fact that there is no currently effective law, regulation, or policy specifically governing SE in Jamaica. While Jamaicans have considerable experience forming, promoting, and studying SEs, the lack of a specific SE legal form or a legal status (analogous to registered charity status) prevents Jamaicans from enjoying many of the benefits of a strong SE sector. The section concludes with a review of the advantages of an enabling legal environment for SE based on comparative international experience, and how it could benefit the sector in Jamaica.

ICNL welcomes comments with additional context, corrections, or confirmation of the points raised in this initial assessment. Please share your comments at ICNL-facilitated dialogues or via e-mail to Jocelyn Nieva at jnieva@icnl.org.

I. THE LEGAL ENVIRONMENT FOR JAMAICAN CSOs

In dialogues across Jamaica, CSO representatives highlighted aspects of DCFS and COJ oversight that they consider positive. In particular, some CSOs mentioned the increased transparency and improved management practices that come with DCFS support for benevolent societies. Because the aim of this assessment is to identify opportunities for enabling reforms, the focus of this section is on problematic aspects of legal requirements and enforcement practices.

1. The procedure to form a legally registered CSO is complex, lengthy, and costly for many Jamaicans.

Issue: Jamaicans who wish to come together in a legally registered not-for-profit CSO to carry out activities that benefit the public may choose among a variety of legal forms. Each legal form carries its own requirements for registration as well as distinct rules that govern the lifecycle of the organization. The

principal legal form options for CSOs, their main features, and corresponding threshold requirements for registration are:

Legal Form	Main Features	Key Registration Requirements
Friendly Societies	Large local associations governed under the Friendly Societies Act and intensively overseen by DCFS following an introductory training program. Friendly societies are principally dedicated to managing collective financial contributions towards care of orphans, the elderly or infirm; funeral expenses; and insurance coverage for members. Distribution of annuities among members is explicitly permitted. ²	Must have 21 dues-paying founding members. Registration fee is \$2,000. ³ Registrar may make enquiries and solicit information “as he thinks fit.” Must have a registered office. Must be willing to undergo intensive training and oversight by DCFS. ⁴
Benevolent Societies	Large community-based membership associations established for charitable purposes and governed under the Friendly Societies Act. Benevolent societies are also intensively overseen by DCFS following an introductory training program. The Act also permits lump sum or annual payments to members. ⁵	Identical requirements.
Limited Liability Companies: Company Limited by Guarantee without Share Capital or Company Limited by Guarantee with share capital	Private companies governed under the Companies Act and overseen by COJ. Companies typically have a profit motive. ⁶ They may provide limited liability to members.	Simplified registration process with limited documentation; registration of a company typically takes five business days. ⁷ Application fee of \$30,000, without considering the additional costs of legal or accounting services.

An alternative is to simply operate without registering as a formal entity. Some unregistered community-based organizations (CBOs) in Jamaica function – with Government recognition and support – as Community Development Committees (CDCs), Development Area Committees (DACs) and Parish Development Committees (PDCs).ⁱⁱ

² See Friendly Societies Act, Articles 3, 12, 34.

³ All amounts in this assessment are in Jamaican dollars except where noted.

⁴ See Friendly Societies Act, Articles 5, 6, 8(1), 20.

⁵ See Friendly Societies Act, Articles 3, 5, 34.

⁶ Companies limited by shares typically have a profit motive; companies limited by guarantee are most commonly used for not-for-profit purposes. See COJ, Types of Business Organizations in Jamaica and the Benefits of Each (available at: http://www.jdic.org/files/seminars/jdic_financial_markets_fair_-_shellie_leon.pdf.)

⁷ American Bar Association Center for Human Rights *Memorandum on Jamaica*, p. 2 (hereinafter, *ABA Memorandum*).

Discussion: International law establishes that

Everyone shall have the right to freedom of association with others... No restrictions shall be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others.⁸

In order to comply with its international obligations, therefore, Jamaica has the burden of demonstrating that restrictions on the freedom of association meet three requirements.⁹

- First, restrictions must be “prescribed by law,” meaning that: (a) the restriction is “introduced by law (through an act of Parliament or an equivalent unwritten norm of common law)” rather than “Government decrees or other similar administrative orders”;¹⁰ and (b) the law is sufficiently precise for an individual or organization to foresee a violation to the law.¹¹
- Second, restrictions must be in the interests of national security, public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others. This is a closed list, and these limited circumstances must be “narrowly interpreted.”¹²
- Third, restrictions must be “necessary in a democratic society.” Necessity amounts to a proportionality test: “Where such restrictions are made, states must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights.”¹³ Furthermore, “there must be a ‘pressing social need’ for the interference.”¹⁴ The “democratic society” component “places the burden on States imposing restrictions

⁸ Article 22, International Covenant on Civil and Political Rights (ICCPR; ratified by Jamaica in 1975). Freedom of association is enshrined in the almost identically-worded Article 16 of the American Convention on Human Rights (American Convention; ratified by Jamaica in 1978).

⁹ *Defending Civil Society Report*, International Center for Not-for-Profit Law and World Movement for Democracy (2nd Ed., June 2012), p. 40, (2012), available at http://www.icnl.org/research/resources/dcs/DCS_Report_Second_Edition_English.pdf.

¹⁰ Margaret Sekaggya, UN Special Rapporteur on the situation of human rights defenders, *Commentary to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, p. 44 (July 2011).

¹¹ *Defending Civil Society Report*, p. 31.

¹² Organization for Security and Co-operation in Europe / Office for Democratic Institutions and Human Rights (hereinafter “OSCE/ODIHR”), Guidelines on Freedom of Association, ¶ 34 (17 December 2014) (available at: [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2014\)046-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)046-e)).

¹³ ICCPR Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligation Imposed on State Parties to the Covenant, ¶6 (26 May 2004).

¹⁴ Maina Kiai, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, ¶17, U.N. Doc. A/HRC/20/27 (21 May 2012) citing OSCE/Office for Democratic Institutions and Human Rights (ODIHR), Key Guiding Principles of Freedom of Association with an Emphasis on Non-Governmental Organizations, ¶ 5.

to demonstrate that the limitations do not harm the principles of ‘pluralism, tolerance and broadmindedness.’”¹⁵

In interpreting this right, the Inter-American Commission on Human Rights (IACHR) has established that,

While States are free to regulate the registration and oversight of organizations within their jurisdictions ... the right to associate freely without interference requires that States ensure that those *legal requirements not impede, delay, or limit the creation or functioning of these organizations.*¹⁶

In the context of the creation of CSOs – the process of obtaining formal legal recognition or registration of an association¹⁷ – the former United Nations Special Rapporteur for the Freedoms of Peaceful Assembly and of Association provides guidance on best practices to meet States’ obligations. The procedures should be “simple, non-onerous or even free of charge (e.g., Bulgaria) and expeditious (e.g., Japan where registration applications may be directly filled in online).”¹⁸ To meet this standard, States may only require that CSOs submit information appropriate for registration; States should respond to applications within legally established maximum time frames.¹⁹ High threshold requirements for founding members,²⁰ excessive or open-ended document submissions, or high registration costs are considered to be barriers to entry inconsistent with the right to freedom of association.²¹ Finally, international law recognizes the right of individuals to associate informally in organizations without legal recognition.²²

As reflected in the chart above, Jamaicans have several choices of legal form for registering a CSO, but making the determination is complex – each choice may entail barriers to entry or other limitations on the right to freely associate. *Consider, for example, a group of neighbors in a low-income community with a shared vision for promoting or defending rights or otherwise addressing social concerns.* Would they in practice have an option for forming a legally registered CSO that conforms to Jamaica’s obligations under international law? We illustrate their decision process for choosing a legal form in the chart below.

¹⁵ *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27* (May 21, 2012) ¶17, available at http://freeassembly.net/wp-content/uploads/2013/10/A-HRC-20-27_en-annual-report-May-2012.pdf (hereinafter, *Special Rapporteur Report on Best Practices*).

¹⁶ IACHR, *Second Report on the Situation of Human Rights Defenders in the Americas* (2011) ¶163 (emphasis added), available at <https://www.oas.org/en/iachr/defenders/docs/pdf/defenders2011.pdf> (hereinafter, *Second IACHR Report*).

¹⁷ The European Court on Human Rights in interpreting Article 22 of the ICCPR held, “that citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning.” *Sidiropoulos and Others v. Greece*, application No. 26695/95, 10 July 1998.

¹⁸ *Special Rapporteur Report on Best Practices*, ¶57.

¹⁹ *IACHR Second Report*, ¶173.

²⁰ The former UN Special Rapporteur for the Freedoms of Peaceful Assembly and of Association (UN Special Rapporteur) points to the laws of Armenia and Estonia, setting a minimum number of two persons, as a best practice, noting that “this number should not be set at a level that would discourage people from engaging in associations.” *Special Rapporteur Report on Best Practices* ¶54.

²¹ Categories of barriers to entry, along with extreme examples of violations by States, are identified in *Defending Civil Society*, pp. 15-16.

²² *Special Rapporteur Report on Best Practices*, ¶56.

Decision process for choosing a CSO legal form		
Legal Form	Illustrative Considerations	Do the requirements conform to international standards of freedom of association? <i>Is this an appropriate form, or do we keep looking?</i>
Friendly Society	<ul style="list-style-type: none"> • Are the problems we have identified best addressed by disbursing funds for care of orphans, the elderly or infirm; funeral expenses; and insurance coverage for members? 	<p>The Friendly Society Act’s requirements for friendly societies may be suited for a local level financial institution, where heavy government oversight may be appropriate to protect the interests of investors.</p> <p><i>If the answer to this question is “no,” consider a different form.</i></p>
↓	↓	↓
Benevolent Society	<ul style="list-style-type: none"> • Do we have and can we maintain 21 dues-paying members? • Do we have or can we obtain an office? • Are the members willing to accept intensive, hands-on oversight by DCFS – beginning at the application stage – in exchange for the agency’s technical assistance? 	<p>Twenty-one members is a high barrier to entry that could discourage people from forming associations, contrary to international standards.²³ If potential members of the organization are cash-poor, then required dues payments – even in modest amounts – may make it even more challenging to overcome this minimum member barrier to entry.ⁱⁱⁱ</p> <p>Similarly, the requirement of registering an office for a benevolent society can constitute a financial challenge for an association in a low-income neighborhood. It is difficult to identify a State interest for the requirement that all members make in-cash financial contributions to an association, or that the CSO must obtain an office (as opposed to a mailing address for notifications) that is necessary in a democratic society for one of the limited justifications set forth in Article 22 of the ICCPR. As a result, even though the fee for registering a benevolent society is a low \$2,000, the total financial requirements may be prohibitive.</p> <p>Finally, the open-ended, highly discretionary disposition in the Friendly Societies Act that grants DCFS the authority to demand any</p>

²³ See *Special Rapporteur Report on Best Practices*, ¶154.

		<p>information at all from groups applying for registration as a benevolent society is not consistent with the requirement that any limitation be precise rather than ambiguous,²⁴ and that the registration process be simple and fast, requiring only the necessary documentation.²⁵</p> <p><i>If the answer to any of these questions is “no,” consider a different form.</i></p>
↓	↓	↓
Company	<ul style="list-style-type: none"> Do we have a minimum of \$30,000, and typically significantly more, to register as a Company?²⁶ 	<p>Even though the legal form of a company is typically associated with for-profit entities, Jamaican CSOs may and frequently do register under the Companies Act. This option would enable the group to avoid the high minimum member requirement as well as the physical office requirement established in the Friendly Societies Act.^{iv} With a typical 5-day turnaround, the COJ would likely respond to the application for registration faster than DCFS.^{27v} The financial requirements for registration as a company, however, may constitute a substantially greater barrier to entry than the options regulated by the DCFS under the Friendly Societies Act. It is far from the best practice of making CSO registration available at no cost, and not “necessary in a democratic society,” to assess a fee to register a not-for-profit association that is identical to the fee assessed to register a for-profit company.²⁸</p> <p><i>If the answer to this question is “no,” is there a different form the members may consider?</i></p>

²⁴ *Defending Civil Society Report*, p. 31. See also *IACHR Second Report*, ¶173 (“The Commission reiterates that the principle of legality also requires restrictions to be formulated ... in an express, accurate, and restrictive manner to afford legal certainty to individuals.”)

²⁵ See *IACHR Second Report*, ¶173.

²⁶ According to a 2014 study, the cost of registering a company at that time ranged from \$20,000 to \$100,000. Since the fee alone in 2018 is \$30,000, the total cost of registration for some companies, including legal and accounting services, likely exceeds \$100,000. See British Council, *Assessment of the Civil Society in Jamaica* (2014), p. 25.

²⁷ See *ABA Memorandum*, p. 2.

²⁸ See *Special Rapporteur Report on Best Practices*, ¶57.

If the answers to the questions in the chart above for each legal form are negative, then the hypothetical association of neighbors may have to fall back on establishing an informal, unregistered CSO. It is positive that unregistered Jamaican CSOs are free to operate; as we discuss below, they are even eligible to apply for charity status and the substantial tax benefits that may come with it. Nevertheless, organizations that lack legal recognition may also forego the benefits of that status, such as a voice on public policy decisions, access to public funds or private donations, and more.

A contributing factor to the legal barriers identified is *that neither of the underlying Acts for the legal forms identified above is designed specifically for not-for-profit organizations*. The Friendly Societies Act is designed to regulate local level organizations, including friendly societies that are created with the mission of collecting funds from and distributing funds to their members. If the required minimum members, costs, and open-ended evaluations needed to register are so high or cumbersome that they obstruct creating a registered organization *under any legal form*, then it will be difficult to conclude that Jamaica is meeting its obligations under international law to guarantee freedom of association.²⁹

Suggested questions for multi-sector dialogue:

- *Should friendly societies, which operate like local financial institutions that rightly merit significant Government oversight, and benevolent societies, which operate more like associations at the community level, be subject to the same general threshold requirements for registration?*
- *Can DCFS modernize its infrastructure and procedures to streamline CSO registration and ease administrative burdens on its staff as well as regulated societies?*
- *Can the requirements of one or more existing legal forms be revised to remove the highlighted barriers to entry, or might establishing a new not-for-profit legal form be preferable?*
- *May friendly societies consider their members' "sweat equity" or other in-kind donations as an acceptable substitute for required dues?*

2. Government oversight requirements and practices can limit CSOs' ability to make determinations about their internal governance and compromise their privacy rights.

Issue: The Friendly Societies Act establishes a series of requirements for the internal governance and oversight of friendly societies and benevolent societies, including the following:

- By-laws and amendments to by-laws are subject to the Registrar's approval.³⁰
- Individuals may not serve as treasurer in more than one Society.³¹

"We had to intervene with DCFS on behalf of CBOs seeking registration because of very arbitrary determinations as to whether forms submitted were complete."

Leader of CSO that provides technical assistance to CBOs.

²⁹ See *IACHR Second Report*, ¶163.

³⁰ Friendly Societies Act, Article 10.

³¹ Friendly Societies Act, Article 65.

- Officials have access to a Society’s books “at all times,”³² and may enter and inspect any Society’s office or meeting place at “any reasonable time by day or night.”³³
- Societies must pay DCFS to conduct an annual financial audit; the cost is estimated at \$3,000-\$5,000.³⁴

CSOs registered with the COJ must submit annual audited financial statements, but qualified smaller companies may request exemption from the audit requirement.³⁵ All companies must report any changes of directors, secretary, or address within 14 days of a change.³⁶

Discussion: As explained above, any limitation on the right to freely associate must be prescribed by law and necessary in a democratic society in the interests of national security, public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others.³⁷ Freedom of association has been interpreted to require that CSOs have the “right to set into motion their internal structure, activities and action programme, without any intervention by the public authorities that could limit or impair the exercise of the respective right.”³⁸ With regard to oversight of finances and activities, CSOs and their members are protected by the right to privacy under Article 17 of the ICCPR. Governments do not, therefore, have unlimited power to inspect organizations: “oversight and supervision must have a clear legal basis and be proportionate to the legitimate aims they pursue.”³⁹ Of course, States have authority under other legislation to inspect CSO records or premises in the context of criminal investigations or civil enforcement actions, in line with due process rights.⁴⁰

Jamaican CSOs that choose to register under the Friendly Societies Act receive initial training on organizational management as well as on-going technical support including low-cost audits. These benefits come at a price: intrusive restrictions on what would typically be independent governance determinations, such as selecting officers of their own choice, as well as open-ended, discretionary DCFS access to the societies’ private information. Other countries offer CSOs similar trade-offs. Mexican states, for example, offer CSOs the option of registering as private assistance institutions (IAPs).⁴¹ IAPs are eligible to receive public funds and support; in exchange they give up substantial autonomy to government overseers. Significantly, however, Mexican CSOs that do not wish to relinquish their autonomy to IAP regulators have several other not-for-profit legal forms they may choose from, including associations and foundations.

³² Friendly Societies Act, Article 53.

³³ Friendly Societies Act, Article 54.

³⁴ Friendly Societies Act, Article 23; a DCFS official provided the cost estimate.

³⁵ *ABA Memorandum*, p. 14.

³⁶ *Id.*

³⁷ ICCPR, Article 22; American Convention, Article 16.

³⁸ *IACHR Second Report*, ¶175 (citing I/A Court H.R., *Case of Baena-Ricardo et al. v. Panama*. Merits, Reparations and Costs. Judgement of February 2, 2001. Series C No. 72 ¶ 156.

³⁹ Organization for Security and Co-operation in Europe and Venice Commission, *Guidelines on Freedom of Association*, ¶ 228 (17 December 2014).

⁴⁰ ICNL and Open Society Institute, *Guidelines for Laws Affecting Civic Organizations*, 2nd Ed. (2004), p. 70, available at http://www.icnl.org/research/resources/assessment/guidelines_en.pdf.

⁴¹ See *Mexico Country Note*, available at <https://www.cof.org/content/mexico#Private>.

Jamaicans lack such options; if they make the strategic choice to forego DCFS support in order to avoid State intervention in internal affairs and limitations on their right to privacy,⁴² their only alternative is to register as a company. COJ may exempt smaller CSOs from a required annual audit, while DCFS requires benevolent societies to pay the agency a modest amount to conduct an annual audit. Larger CSOs that are not eligible for the exemption, however, are subject to the same auditing requirements as for-profit companies, which may involve considerable expense that can limit or impair the organization’s ability to operate.⁴³ As discussed above, a CSO that chooses to register as a company to get around these significant restrictions on the right to freedom of association must have first overcome a substantial initial barrier in order to cover the fees and other costs associated with registration.⁴⁴

Suggested questions for multi-sector dialogue:

- *Might both the DCFS and benevolent societies benefit from more efficient oversight requirements? For example, DCFS could begin with training for CSOs that choose the form, but provide greater latitude to CSOs to establish their membership requirements and internal governance structure, consistent with international standards?*
- *Would it be feasible to establish a new not-for-profit legal form for CSOs without limitations on internal governance and with proportionate reporting requirements?*
- *Could CSOs and oversight agencies collaborate to define reporting requirements that include sufficient information to guard against fraud, yet respect CSO privacy interests?*

All the Companies Office in Montego Bay did was register us. It didn't provide a guidebook or any assistance on next steps.

Leader of CSO that registered as a company.

3. Societies are subject to severe sanctions including forced dissolution for failure to comply with requirements that do not represent grave or imminent threats to State interests.

Issue. The Friendly Societies Act includes an extensive sanctions regime for organizations and their members. The DCFS Registrar may remove an officer or other person from a friendly or benevolent society and order elections to replace an officer if the Registrar is “satisfied” after an inquiry and opportunity to be heard that the person “has been guilty of negligence, irregularity or misconduct.” After removal, the individual has 30 days to appeal to a tribunal that is comprised of three individuals appointed by the Minister who oversees DCFS, only one of whom is required to be a legal professional.⁴⁵ A removed person is disqualified from serving as an officer in any society for up to five years at the Registrar’s discretion.⁴⁶ Any society or officer or member who “willfully neglects or refuses to do any act or to furnish any information required” or is required “to give any notice, to deliver up, return or send any contribution card, report, return or document, or to do or allow to be done any other act, and fails to comply with such requirement; or willfully makes a false return or furnishes any false information” is guilty of an offense against the Act.⁴⁷ Penalties following summary conviction for such an offense include “a fine not exceeding

⁴² See *IACHR Second Report*, ¶175; *Guidelines on Freedom of Association*, ¶ 228.

⁴³ See *IACHR Second Report*, ¶175.

⁴⁴ See *Special Rapporteur Report on Best Practices*, ¶157.

⁴⁵ The Friendly Societies Regulations, Article 51.

⁴⁶ Friendly Societies Act, Article 56.

⁴⁷ Friendly Societies Act, Article 70.

one hundred dollars or in default of payment to imprisonment with or without hard labour for a term not exceeding six months.”⁴⁸ If a society is found guilty of an offense against the Act, “every member of the committee of such society shall, unless he is proved to have been ignorant of or to have attempted to prevent the commission of that offence, be liable to the same penalty as if he had committed the offence.”⁴⁹

The DCFS Registrar also has the discretion to cancel the registration of a society if, after holding an inquiry or making an inspection of the constitution, working and financial condition of the society, or upon the request of three-fourths of its members, he “is of the opinion that the society ought to be dissolved.”⁵⁰ Members of the dissolved society have two months to appeal the determination to the tribunal described above.⁵¹ The Registrar may also dissolve a society “if at any time he is satisfied that the number of members has been reduced to less than twenty-one and such cancellation shall take effect forthwith.”⁵²

“Twenty-one members is a barrier. We are in a rural area and members are from near and far and it’s difficult for us to meet.”

Western Jamaica
CSO leader

Discussion. The right to freedom of association is guaranteed throughout the life of a CSO; therefore, any restriction on that right is subject to the same Article 22 standards as apply to registration.⁵³ Any restriction must therefore be formulated “in an express, accurate, and restrictive [narrowly construed] manner to afford legal certainty to individuals.”⁵⁴ As explained by the former UN Special Rapporteur,

The suspension and the involuntarily dissolution of an association are the severest types of restrictions on freedom of association. As a result, it should only be possible when there is a *clear and imminent danger resulting in a flagrant violation of national law*, in compliance with international human rights law. It should be strictly proportional to the legitimate aim pursued and used only when softer measures would be insufficient.⁵⁵

Any sanctioned CSO must have the right to challenge the decision based on the rules of due process “before a court that is independent of the body that established the restriction. The IACHR considers that a resolution that results in the dissolution of an organization must be based on a judicial decision.”⁵⁶

The DCFS sanctions regime described above would authorize the agency to forcibly remove, try, and convict a society member for technical and correctable failures to meet reporting requirements or other vaguely described “irregularities.” This provision lacks the specificity required to give individuals legal certainty.⁵⁷ An officer may be removed and barred from serving in any society for years, and a benevolent society may be forcibly dissolved on similarly ambiguous grounds or for falling below a minimum of 21 members. In each of these circumstances, the DCFS Registrar wields tremendous discretion to apply

⁴⁸ Friendly Societies Act, Article 71(1).

⁴⁹ Friendly Societies Act, Article 71(2).

⁵⁰ Friendly Societies Act, Article 58(1).

⁵¹ Friendly Societies Act, Article 58(2)(a).

⁵² Friendly Societies Act, Article 59.

⁵³ See European Court of Human Rights, *United Communist Part of Turkey and Others v. Turkey*, No. 19392/92, ¶133.

⁵⁴ *IACHR Second Report*, ¶165.

⁵⁵ *Special Rapporteur Report on Best Practices* ¶75 (emphasis added).

⁵⁶ *IACHR Second Report*, ¶168.

⁵⁷ See *id.*, ¶165.

disproportionately severe limitations on the right to freely associate based on administrative failures, including the ultimate sanction of dissolution for violations that do not represent grave or imminent threats to State interests.⁵⁸ Moreover, members, officers, and CSOs who are sanctioned by DCFS are granted recourse to a tribunal of individuals appointed by the Minister who oversees the DCFS, not all of whom must be trained legal professionals, rather than an independent court.⁵⁹ While the State clearly has an interest in deterring and sanctioning fraudulent stewardship of societies, the scenarios described here – in particular, dissolution for falling below 21 members – are difficult to reconcile with the right to freedom of association under international law.^{vi}

Suggested questions for multi-sector dialogue:

- *Should benevolent societies be subject to the same severe sanctions regime as is applicable to friendly societies, when their missions do not involve managing substantial funds entrusted to the organizations by community members?*
- *Could the Friendly Societies Act be revised to describe violations with greater specificity and establish a range of sanctions that are clearly defined and proportionate?*
- *Might existing criminal laws cover the fraudulent activities that underlie the Friendly Societies Act sanctions regime, permitting removal of those disproportionate sanctions from the Act?*

4. Recognized Charity status that could bring tax relief is not benefitting large numbers of CSOs due to discretionary and unpredictable implementation.

One benevolent society leader described its constant challenge to avoid forced dissolution:

– *It was founded to support victims of events that occurred more than half a century ago, and as survivors grow old, infirm, and pass away, maintaining 21 members is a challenge.*

– *Although it has established very low weekly dues of just \$100 to comply with the requirement, even this amount is prohibitive for some. The society must dismiss members for non-payment, adding to the difficulty of maintaining 21 members.*

– *Keeping up with the rent for the required office is a struggle.*

Issue. CSOs registered under the Friendly Societies Act or the Companies Act, as well as unregistered informal organizations⁶⁰ have the option to register for optional charity status under the Charities Act and receive significant relief from the following taxes:

- Customs duties;
- General Consumption Tax;
- Income Tax;
- Property Tax;
- Stamp Duty; and
- Transfer Tax.⁶¹

In addition, registered charities are eligible to receive donations that are tax deductible: individual, corporate, or organizational donors may deduct the full amount of a donation up to 5% of the donor's statutory income.⁶²

⁵⁸ See *Special Rapporteur Report on Best Practices* ¶175.

⁵⁹ See *IACHR Second Report*, ¶168.

⁶⁰ Charities Act, Article 2.

⁶¹ Charities Act, Third Schedule.

⁶² Income Tax Act, § 13(1)(q).

The Charities Act is administered by three agencies with interrelated responsibilities, each of which has additional mandates to regulate both for-profit and not-for profit legal forms. This means, for example, that a CSO registered as a company is dependent upon the COJ, DCFS, and TAJ (and potentially other Government entities as well), to process its application for charity status.

Prior to implementation of the Charities Act in late 2013, preferential tax treatment of public interest CSOs was regulated by TAJ only. Since the Charities Act took effect, CSOs registered under any form have been required to accommodate their by-laws to conform to the Charities Act in order to obtain approval or registration from each of these agencies. CSOs interested in receiving charitable status submit applications to DCFS acting as the Charities Authority. DCFS then:

- Reviews the CSO's application and "such additional information or document as it may specify"⁶³ to ensure that the organization conforms to the following requirements:
 - It must have an exclusive charitable purpose and operate for the public benefit;
 - No income or assets may personally benefit any governing board member or other individual;
 - Each governing board member is a "fit and proper person,"⁶⁴ meaning that he or she:
 - Has not been convicted of an offence involving dishonesty;
 - Is not in bankruptcy; and
 - Is "a person of sound probity, and is able to exercise competence, diligence and sound judgement;"⁶⁵ and
 - There is no *other* reason why registration as a charity would not be in the public interest;⁶⁶
- Invites the written comments or recommendations regarding the application from any other public agency it considers appropriate, within a timeframe it establishes;⁶⁷
- Passes the application package to TAJ as Commissioner General for a 14-day review leading to an "objection or no objection" based on an independent analysis of the CSO, including,
 - The Commissioner General's determination as to whether the organization has a non-charitable purpose that may nevertheless be allowable if it is deemed ancillary (secondary, subordinate, or incidental) to the charitable purpose;⁶⁸ and
- Issues a certificate of approval, which the CSO presents to COJ as Registrar of Charities, or a written explanation of the reasons for denial to the CSO.⁶⁹

The Charities Authority/DCFS exercises a similar degree of discretionary oversight of charities after they are registered. For example, it may:

- Access a charity's books "at all times";⁷⁰
- Suspend a charity's registration if it is in breach of any provision of the Act;⁷¹ and

⁶³ Charities Act, Article 15(3).

⁶⁴ Charities Act, Article 17.

⁶⁵ Charities Act, Article 18.

⁶⁶ Charities Act, Article 19(1).

⁶⁷ Charities Act, Article 16(1)(c).

⁶⁸ Charities Act, Article 16(2).

⁶⁹ Charities Act, Article 16(7), (8).

⁷⁰ Charities Act, Article 27(4).

⁷¹ Charities Act, Article 21(1).

- Revoke a charity’s registration if the organization is deemed to be “conducting its affairs in a way that is harming or jeopardizing, or is likely to harm or jeopardize, the public trust and confidence in charitable organizations.”⁷²

CSOs that are *not* registered charities are assessed at least the Minimum Business Tax of \$60,000. CSOs without charity status may solicit waivers of some assessed taxes, including the Stamp Duty, Income Tax, and Customs Duties, but limitations apply.⁷³

Discussion. The IACHR reminds States that their obligation under the American Convention is to “guarantee the exercise of the right of association in the broadest possible manner, which includes the *obligation to promote it*. [O]ne way to comply with this obligation is through tax exemptions.”⁷⁴ Good international practice is to exempt every registered not-for-profit CSO from income taxation on money or other items received from donors, the State, or dues-paying members.⁷⁵ International practice varies on the tax treatment of public benefit CSO income derived from economic activities; tax laws may provide that income is:

- Exempt, so long as all profits earned are *destined* to the CSO’s principal public benefit;
- Subject to income tax in whole, or in part – for example, on income earned above a certain profit threshold;
- Taxed, but only if the activity is not *related* to or is not in furtherance of the CSO’s not-for-profit purpose; or
- A combination of the above.⁷⁶

In addition to exempting donations from income tax, good international practice is to promote philanthropy and good citizenship by entitling donors to tax deductions or credits for charitable donations. “If deductions are limited to donations made to [public benefit organizations], i.e., organizations contributing to the public good and often relieving the burdens of the state, generous deduction limits are appropriate.”⁷⁷

Jamaica’s record of promoting the exercise of freedom of association through tax exemptions, as recommended by the IACHR,⁷⁸ is mixed. In practice, limited numbers of Jamaican CSOs have benefited from preferential tax treatment by registering under the Charities Act. According to an April 2016 study, more than two years after it went into effect, fewer than 300 of Jamaica’s estimated 5,000 CSOs had registered under the Charities Act.⁷⁹ The statistics for benevolent societies are even more striking: a senior DCFS official acknowledged that 100 percent of registered benevolent societies are technically eligible to apply for charity status, yet she estimated that only 1 percent are currently registered as charities.⁸⁰

⁷² Charities Act, Article 22(1)(h).

⁷³ See <http://www.mof.gov.jm/mof-media/media-centre/press/1563-new-conditions-regarding-the-waiving-of-taxes.html>.

⁷⁴ *IACHR Second Report*, ¶187.

⁷⁵ See *Guidelines for Laws Affecting Civic Organizations*, p. 78.

⁷⁶ See *id.*, p. 81.

⁷⁷ See *id.*, p. 79, 80.

⁷⁸ See *IACHR Second Report*, ¶187.

⁷⁹ Dexis Consulting Group/USAID, *Local Capacity Mapping: Civil Society Organizations and Social Enterprises in Jamaica*, p. 6.

⁸⁰ ICNL interview with DCFS official.

The tax benefits for registered charities are significant: exemptions from income tax, customs duties, and more, as well as the ability to receive tax deductible donations. With such incentives available, what explains this low rate of CSO registration under the Charities Act? Interviews with stakeholders and a review of the Act reveal several legal and practical barriers that collectively answer this question. We present below key barriers; the legal root to the problem; and the practical impact.

A. The registration process is lengthy and costly. Some interviewed CSO leaders indicated that it took nine months to a year to register their organizations as charities, even though they paid for lawyers they considered highly qualified to represent them. Others stated that they have waited even longer, without a definitive answer to their applications. The summaries of the Friendly Societies Act, Companies Act, and Charities Act provided above explain some of the root causes for these expensive delays:

- The underlying legal forms for friendly societies, benevolent societies, and not-for-profit companies allow for distribution of profits and assets. DCFS and COJ thus routinely approve the by-laws of CSOs formed without a profit motive, but with provisions for liquidation of assets that may be inconsistent with the not-for-profit requirement of the Charities Act. CSOs in such circumstances must amend their by-laws.
- Some of the criteria for charity status are written in an open-ended manner that invites DCFS and TAJ personnel to make subjective determinations, for example, of fitness of CSO boards of directors or likelihood of harm to public confidence in the charitable sector.
- DCFS may solicit any information from the applying CSO or from any government body considered appropriate, without any limitations in terms of content or clear evaluation criteria.
- With the exception of the TAJ review, the Charities Act lacks firm deadlines for resolution of applications for charity status.^{vii}

“Some benevolent societies applying for charity status distribute their reserve at winding up, so we reject them. It’s like trying to fit a square peg in a round hole.”
TAJ official

These underlying legal ambiguities make capacity-building challenging for DCFS, TAJ, and COJ in terms of training CSOs as well as their own staffs. TAJ officials struggling to interpret the Act resort to weekly meetings to collectively resolve judgement calls.⁸¹ Interviewed CSOs perceive that officials implementing the Charities Act exercise this vast discretion with the goal of finding problems. They further contend that reviewing officials reject applications as soon as they identify a problem, rather than conducting a comprehensive review that flags every technical issue at one time. The result is an inefficient, frustrating, and costly process for CSOs and the officials who supervise them.

⁸¹ ICNL interview with TAJ officials.

B. The three agencies that administer the Charities Act do not interpret its provisions on CSO income-generating activities in the same way. The determination of whether a CSO’s income-generating activities are ancillary to their charitable purpose or not can be decisive for obtaining and maintain charity status. According to officials interviewed from each of the three agencies, the agencies apply different tests to make that determination. DCFS and COJ reportedly consider the *destination* or use of the income: if all of the income earned is spent in furtherance of the organization’s charitable mission, those agencies consider the activity to be ancillary and permissible. In contrast, TAJ additionally considers the *relatedness* and scope of the activity: it is only ancillary if it flows from and is limited in scope to the organization’s main charitable purpose.⁸² For example, according to TAJ, a charity that operates a school could earn income from selling lunch to its students, but if it sold lunch to outsiders, that activity would fail the ancillary test, even if all income earned was spent on school activities. This disagreement on the meaning of a key provision of the Charities Act translates into inconsistent instructions and uncertainty on the part of CSOs. It is a particularly significant barrier in the context of CSOs seeking to engage in SE activities, as described in the next section.

C. Benevolent societies are not encouraged to apply. Finally, one explanation of the low numbers of registered charities is that not many benevolent societies have applied and DCSF does not actively encourage them to do so beyond waiving the application fee.⁸³ Recently, however, DCFS and the Citizen Security and Justice Programme have reportedly entered into an agreement to provide technical assistance to several dozen CBOs to help them submit applications for charity status. This effort may provide lessons in how to effectively help potential applicants overcome some of the barriers mentioned above.

You would think that it would be easy for us to be approved for charity status since DCFS already registered us as a benevolent society, but that wasn't the case. TAJ auditors are picking, picking; they have to find something wrong with our application. I had to call four general assembly meetings to make changes to the by-laws to try to satisfy TAJ. It was embarrassing. We even followed the DCFS template for our by-laws and it was turned down by TAJ.

Leader of benevolent society seeking charity registration.

For CSOs without charity status but with public benefit missions, tax relief is challenging and unpredictable. The \$60,000 Minimum Business Tax is inconsistent with international good practice of exempting not-for-profit organizations from income tax, and it can be a hardship for CSOs.⁸⁴ Several CSOs with legal registration but no charity status complained that supporters in the diaspora had sent badly needed in-kind donations that they could not retrieve from Customs because the organization lacked the funds to cover the duties. The CSOs explained that no waivers are available if the donation value falls below a certain threshold or it is unrelated to the organization’s social mission. Notwithstanding the low numbers of registered charities, CSO interviews reflect a great interest in charity status in order to receive expanded tax relief.

⁸² See *Guidelines for Laws Affecting Civic Organizations*, p. 81.

⁸³ Interview with senior DCFS official.

⁸⁴ See *Guidelines for Laws Affecting Civic Organizations*, p. 78.

Suggested questions for multi-sector dialogue:

- *Could the Charities Act be revised to include a closed list of defined eligibility criteria, a precise and short list of required documents for review, and a reasonable timeline for a comprehensive response?^{viii}*
- *Could the Charities Act be revised to include a new definition for permissible economic activities that contributes to financial sustainability for CSOs that provide a public benefit?^{ix}*

II. The Legal Environment for Jamaican Social Enterprises

Many Jamaicans stakeholders have significant interest and expertise in SE:

- Social entrepreneurs across Jamaica are conducting business activities with a social mission;
- Champions in national corporate foundations and international cooperation support individual SEs and are bringing them together to nurture SE sector solidarity and development;
- Academics are assessing these experiences, sharing their findings in extensive publications, and experimenting on their campuses; and
- A working group led by the Planning Institute of Jamaica (PIOJ) is collaborating across sectors to develop a new national policy on SE.

This assessment is informed by publications and interviews with Jamaicans representing each of these perspectives, as well as the work of international experts. The aim is to address a gap in previous work: how the legal environment is affecting SE development in Jamaica and how it might be improved based on international and comparative law and practice.

This assessment of the legal environment for SE builds on the assessment of the legal environment for CSOs in the previous section. The same issues of ambiguous norms for CSO registration and oversight, the lack of a clear legal form and oversight agency dedicated to not-for-profit organizations, and confusion over the legal and tax implications of income-generating activities impact not-for-profit SEs. As we describe below, parallel ambiguities and gaps impact both not-for-profit and for-profit SEs. Most significantly, *there is no currently effective law, regulation, or policy specifically governing SE in Jamaica.*

1. SE in the context of international law and experience.

International experts have identified five core criteria for SEs:

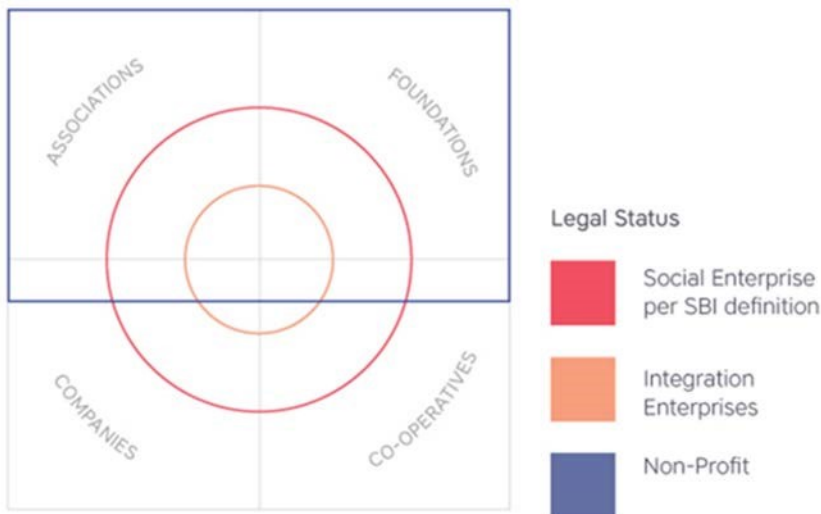
- The organization must engage in economic activity;
- It must pursue an explicit and *primary* social aim that benefits society;
- It must have *limits* on distribution of profits or assets to prioritise the social aim;
- It must be independent from the State or other for-profit organisations; and

- It must have inclusive governance, i.e., characterized by participatory and/or democratic decision-making processes.⁸⁵

Note that the organization’s primary aim must be to provide a social benefit, and distribution of profits or assets, while allowed, must be limited or capped, and secondary to the social aim. International experience reflects various approaches to limiting personal gain from SEs; one example is the Community Contribution Company (C3) of British Columbia, Canada, which must dedicate at least 60 percent of profits to its social purpose.⁸⁶ These core criteria thus encompass:

- Not-for-profit public benefit CSOs, which by definition may allow *no* distribution of profits; as well as
- For-profit companies, but only if their decision-making and activities are guided more by a public benefit mission than a quest for profit.

Legal Concept Map Venn Diagram



The diagram above⁸⁷ of a typical national SE sector illustrates several key points:

- SEs may be established under a variety of legal forms (*the four quadrants*);
- The sector includes both not-for-profit and for-profit entities (*the upper and lower halves*);
- A majority of SEs – even when they have a typical for-profit legal form, operate without a profit motive (*the blue rectangle*);

⁸⁵ European Social Enterprise Law Association (ESELA), *Social Enterprise in Europe: Developing Legal Systems which Support Social Enterprise Growth* (2015), p.16 (emphasis added), available at: http://esela.eu/wp-content/uploads/2015/11/legal_mapping_publication_051015_web.pdf.

⁸⁶ See the British Columbia Ministry of Finance’s questions and answers on C3s, <http://www.fin.gov.bc.ca/prs/ccc/caq.htm>.

⁸⁷ *Social Enterprise in Europe: Developing Legal Systems which Support Social Enterprise Growth*, p. 42.

- National laws *may* include both an SE legal form (*for example, the smaller orange circle*) and an SE legal status – a legally defined status analogous to charity status that carries certain legal and tax benefits (*for example, the larger red circle*); and
- The SE legal form and legal status may be comprised of entities that are legally registered under a variety of both for-profit and not-for-profit legal forms (*the intersection of the four quadrants and two circles*).

Given that CSOs typically comprise a large percentage of SEs, it is important to consider the legal standards regarding freedom of association when evaluating SE laws and policies. As explained in the previous section, freedom of association guarantees individuals the right to establish and operate not-for-profit CSOs.⁸⁸ Access to funds from all legal sources, including income-generating activities and charitable donations, is a component of that right that enables CSOs to “set into motion their internal structure, activities and action programme, without any intervention by the public authorities that could limit or impair the exercise of the respective right.”⁸⁹ Laws or policies that regulate not-for-profit SEs must therefore conform to international standards and refrain from limiting the rights of CSOs to access funds from economic activities or other legal sources absent a justification consistent with ICCPR Article 22.

One way that States may fulfill their obligation to promote freedom of association is through preferential tax treatment of CSOs.⁹⁰ Therefore, States may choose to provide CSOs tax relief for income earned through economic activities and donations, and to incentivize philanthropy through tax deductions for donations.⁹¹ If States decide against providing such tax benefits, they should nevertheless “not resort to tax pressure to discourage associations from receiving funds.”⁹²

2. SE in Jamaica: Legal forms and status.

Jamaica’s SE sector has been mapped and assessed, but SE has not been legally defined.⁹³ This means that each scholar, consultant, regulator, CSO, and entrepreneur may adopt a definition that suits his or her purposes. Moreover, studies that map SEs do not consistently identify SEs surveyed by their legal form. For example, one 2016 mapping of CSOs and SEs in Jamaica⁹⁴ categorizes organizations interviewed by the following types: NGO, CSO, CBO, and NGO with SE – not one of which is a legal form in Jamaica. Another mapping exercise indicated that 62.4% of the survey respondents were “a registered organization created under Religious, Educational, Social or Charitable institutions,” which could be legally established under various forms, while 15.7% of respondents were unregistered.⁹⁵ For their part, Government regulators drafting a new policy to promote SE, the *Jamaica Micro, Small & Medium Enterprises &*

⁸⁸ See ICCPR, Article 22; American Convention, Article 16.

⁸⁹ *IACHR Second Report*, ¶175. See also *Special Rapporteur Report on Best Practices*, ¶167 (“The ability for associations to access funding and resources is an integral and vital part of the right to freedom of association.”)

⁹⁰ See *IACHR Second Report*, ¶187.

⁹¹ See *Guidelines for Laws Affecting Civic Organizations*, pp. 78-83.

⁹² *Special Rapporteur Report on Best Practices* ¶72.

⁹³ See, for example, K’nife, *Status of Social Enterprise in Inner Cities: The Kingston Metropolitan Area* (2016), p. 19.

⁹⁴ See *Local Capacity Mapping: Civil Society Organizations and Social Enterprises in Jamaica*, p. 31-32.

⁹⁵ *Status of Social Enterprise in Inner Cities*, p. 44.

Entrepreneurship Policy indicate that “all social enterprises that meet the size definition are [micro, small, and medium enterprises (MSMEs)],”⁹⁶ and that the MSME sector is heavily comprised of entities that are not registered under any legal form.⁹⁷ One recent survey of SEs indicated that only 50% had a taxpayer identification number, reinforcing the heavy degree of informality in the sector.⁹⁸

What types of Jamaican entities, then, may currently self-identify or be considered SEs?

Registered with the COJ	Registered with DCFS	No legal registration
Company Limited by guarantee without share capital	Benevolent societies	CBOs
Companies limited by guarantee with share capital	Cooperatives	Partners
Companies		Individual entrepreneurs
Partnerships		
Sole proprietors		

Note that not all the entries on the chart fit the core criteria for SE based on international best practice – in particular, sole proprietorships and individuals cannot meet the requirement of inclusive governance. In the absence of any legal definition, however, there is no impediment to an individual holding him or herself out to the public as a social enterprise.

In addition to these legal forms, the requirements for charity status under the Charities Act impact the legal environment for SEs. The provisions and implementation practices related to ancillary purpose and prohibitions on distribution of profits or assets– as well as the overlapping authorities of the three agencies that administer the Act – are particularly relevant, as reflected in the next section.

3. Current legal barriers and impact on SEs.

The chart below identifies key barriers that are particularly relevant to legally establishing and operating an SE in Jamaica. Statements by CSOs and SEs describing their experiences, shared with ICNL in interviews and roundtable discussions, illustrate the practical impact on SEs of those barriers.

Barrier	SE observations on the practical impact of barriers
<p>Lack of a simple, fast, and inexpensive legal form for registering SEs.</p> <p>Individuals who wish to come together to establish an entity with income-generating</p>	<p><i>“CBOs that want to start SEs register with the Companies Office because it’s quicker. But it’s a step too far for many. There are no easy guidelines to help CBOs figure out regulations and reporting requirements. The forms are very complicated.</i></p>

⁹⁶ Ministry of Industry, Commerce, Agriculture and Fisheries (MICAF) in Collaboration with National Stakeholders, *Jamaica Micro, Small & Medium Enterprises (MSME) & Entrepreneurship Policy* (hereinafter *MSME & Entrepreneurship Policy*) (2017), p. 2.

⁹⁷ *Id.*, pp. 15-16.

⁹⁸ *Status of Social Enterprise in Inner Cities*, p. 48.

<p>activities and a social purpose have the same challenges in selecting an appropriate legal form as any CSO. This is especially the case for smaller CBOs with limited resources and experience. Jamaican advisors and consultants have indicated that they tend to steer prospective SEs away from DCFS and towards COJ.⁹⁹ Yet many CBOs find registration as companies prohibitively burdensome.</p>	<p><i>Officials find one error and everything stops. Forms are rejected over and over and over. You need to hire a specialist.”</i></p> <p>CSO advisor to CBOs</p>
<p>Financial and reporting barriers to establishing and operating a company.</p> <p>Although COJ provides simplified financial reporting for some smaller companies, the costs of obtaining and maintaining legal registration can be high for an SE with a social mission that is registered as a company.</p>	<p>One SE leader’s estimates of costs for filing annual reports to COJ:</p> <p>US\$5,000 in legal fees and US\$1,000 in accounting fees.</p>
<p>Discretionary registration, oversight, and sanctions of SEs registered under the Charities Act.</p> <p>The ambiguous registration and oversight provisions for charities lead to confusing and time-consuming application and reporting experiences. The resulting unpredictability interferes with the process of launching and maintaining business activities with a social mission.</p>	<p><i>“We tried to get the required certificate of good standing and it took almost a year. The auditor found one issue and then another at another time. I couldn’t see a script that showed me what is required. I felt discriminated against. All the business had to be put on hold, and we were not able to get a license to operate as a tourist attraction.”</i></p> <p>SE leader</p>
<p>Inconsistent interpretations on the permissibility of director compensation and “profit.”</p> <p>SEs may face limitations on their ability to compensate directors for work performed to carry out income-generating activities – a particularly significant barrier for smaller organizations where a few individuals may be responsible for all activities. Benevolent societies must be run by volunteers. Directors of registered charities, regardless of legal form, may only be compensated for out-of-pocket expenses. TAJ officials explained that in some cases they allow charities to pay salaries, but that they make a judgement call as the appropriate amount.¹⁰⁰</p>	<p><i>“We are not allowed to pay anyone. Whatever you do for the benevolent society you cannot be reimbursed for your work.”</i></p> <p>CSO director who would like to begin income-generating activities</p>

⁹⁹ See, for example, *Status of Social Enterprise in Inner Cities*, p. 16.

¹⁰⁰ Interview with senior TAJ officials.

<p>These rules may make charity registration problematic for some SEs, requiring them to forego tax benefits notwithstanding their charitable missions.</p> <p>A recent survey of SEs in metropolitan Kingston suggests that this lack of clarity on the permissibility of payments to directors and staff may be limiting growth and professionalization of the SE sector; the entities surveyed reported 537 full-time paid employees and 301 part-time paid employees, but 6,240 volunteers.¹⁰¹</p> <p>These limitations on compensation may also influence government and public perceptions on the permissibility of <i>profit</i> for SEs. Findings from a recent survey found that a “<i>large majority of the organisations ... were not of the view that social organizations (or social enterprises) should operate to make a profit. Many were adamant that such a practice was unethical.</i>”¹⁰² Such perceptions may complicate legal registration of SEs that allow distribution of profits so long as it is not the organization’s primary motive.</p>	
<p>Inconsistent legal treatment of income-generating ancillary activities for registered charities.</p> <p>CSO leaders and government officials openly recognize that there is no uniform interpretation of permissible ancillary activities for registered charities. DCFS and COJ would approve activities if income earned is destined to the CSO’s charitable purposes, while TAJ requires that the activities also be related and limited in scope to the charitable purposes. As a result, SEs may proceed with income-generating activities approved by DCFS or COJ, yet find their registration application rejected or status rescinded based on a TAJ objection.</p> <p>These rules may make charity registration problematic for some SEs, requiring them to forego tax benefits notwithstanding their charitable missions.</p>	<p><i>“The Government thinks of you first as a tax evader, and only secondly as an SE. I don’t know who to call, what to say, what to ask for.”</i></p> <p>SE leader whose application for charity status was denied.</p>

¹⁰¹ *Status of Social Enterprise in Inner Cities*, p. 39.

¹⁰² K’nife, *Survey of Jamaica’s Social Enterprise Landscape* (2016), p. 11. See also *Status of Social Enterprise in Inner Cities*, p. 7.

<p>Uncertainty regarding favorable tax treatment for SEs or tax incentives for donating to or investing in SEs.</p> <p>Only registered charities are entitled to income and customs tax exemptions and to receive tax deductible donations. SEs that are not registered charities may be able to request tax waivers, but the likelihood of receiving a timely or favorable response is unclear.</p>	<p><i>We need corporate tax breaks for SEs. Lowering tariffs on equipment would help my SE grow.</i></p> <p>Self-described SE leader who is a sole proprietor with a social mission.</p> <p><i>There are zero tax incentives [for SE]. I don't know if our culture would tolerate it.</i></p> <p>Representative of a corporate foundation.</p>

4. Reasons for promoting a more enabling legal environment for SE according to Jamaican policymakers and international experience.

Jamaican policymakers, in consultation with stakeholders, recognize the need for a more enabling legal environment for SEs. Among the rationales for enabling reforms set forth in the *MSME & Entrepreneurship Policy* are the need to strengthen SE access to financial and non-financial resources as well as a framework to accurately measure social return on investment from SE.¹⁰³ The *MSME & Entrepreneurship Policy* sets as a priority activity “to research & propose viable legal structures for social enterprise operation.”¹⁰⁴

International experience reveals a number of concrete benefits from establishing an SE legal form or legal status. A legal form or status, as opposed to mere policy guidelines, could help address some of the barriers identified above, by:

- *Establishing concrete criteria for SE.* The legal form or status would resolve questions that currently elude consensus among Jamaican stakeholders, such as the permissibility – even ethics – of profit for SEs.
- *Providing for consistent legal and tax treatment of SEs by Government regulators.* Clearly drafted provisions that avoid the ambiguities in the Friendly Societies Act and the Charities Act described above would make registration and oversight of SEs more efficient and predictable for both SEs and Government officials.
- *Increased opportunities for SEs to access funding from private and public sources.* A legal form or status could provide for tax deductions for donations to SEs. Such base funding can ease start-up costs and make it easier for SEs to qualify for credit from financial institutions. Local and national governments can open public contracting opportunities to legally recognized SEs, increasing access to and transparency of public procurement.
- *Greater visibility and recognition of SEs by the public.* Legal recognition of SEs would heighten public awareness of the SE sector, including its contributions to local communities as well as opportunities for the public to patronize or donate to the SEs.

¹⁰³ See *MSME & Entrepreneurship Policy*, pp. 64-65.

¹⁰⁴ *Id.*, p. 66.

- *Stronger documentation of SE contributions to development.* A legal form or status would permit accurate monitoring and reporting on a consistently defined SE sector, including data on benefits provided, individuals employed, and communities served.¹⁰⁵

Suggested questions for multi-sector dialogue:

- *What lessons from Jamaica’s recent experience implementing the Charities Act might be useful in assessing the pros and cons of establishing a new legal status for SE?*
- *Could an existing legal form be adapted to facilitate SE formation and operation?*
- *Could the Charity Act be amended to facilitate SE formation and operation?*
- *Should mission-driven SEs be eligible for tax benefits? Should they be eligible if the SE allows limited distribution of profits to members or investors?*
- *How can DCFS, COJ, and TAJ work together, with the PIOJ, and with other stakeholders to implement enabling reforms for SEs?*

Conclusions

Jamaican stakeholders have come a long way in advancing SE in the country. The *MSME & Entrepreneurship Policy* reflects a valuable commitment to convert increased interest in SE into multi-sector collaboration towards enabling reforms. In order for Jamaicans to reap the benefits of a strengthened SE sector, however, stakeholders must address the underlying legal barriers discussed in this assessment. In particular,

- DCFS, TAJ, and COJ must work together to synchronize their shared oversight of CSOs and SEs. Each of these agencies should be an active participant as early as feasible in development of an SE legal form or status.
- Similarly, the three agencies should collaborate with other stakeholders on needed reforms for CSO registration and operation. Neither CSOs nor SEs will be able to flourish in Jamaica without an enabling legal framework for CSOs.

“Look at the journey. It’s been a lovely process.”

SE leader describing the evolution of Jamaica’s SE sector.

ICNL hopes that this assessment contributes to dialogue on the legal environment for CSOs and SEs in Jamaica. ICNL stands ready to assist local partners to draft legal reforms for CSOs and SEs that conform to international guarantees of freedom of association.

¹⁰⁵ See European Commission, *Social enterprises and the social economy going forward: A call for action from the Commission Expert Group on Social Entrepreneurship* (2016), p. 8 (available at: https://ec.europa.eu/growth/content/social-enterprises-and-social-economy-going-forward-0_en).

ⁱ One government official takes issue with these statements, contending, “the problem is that persons refuse to read and implement the systems and standards in keeping with good governance and fiduciary management; so they blame the process on the inefficiencies. The official recommends review of the numbers of entities registered, interventions given, and organizations in compliance with regard to audits, meetings, and active committees.

ⁱⁱ A government official notes that these entities must have some legal registration in order to facilitate access to funds from the Jamaica Social Investment Fund or the Citizens, Security and Justice Programme.

ⁱⁱⁱ A government official states that rules permit non-payment of dues, as well as arrangements where schools, churches, or community centers permit benevolent societies to use offices on their premises.

^{iv} A former government official notes: “Every company in Jamaica is required to have a registered office under section 106 of the [Companies] Act. To be fair, the same section does “define” it as somewhere “to which all communications and notices may be addressed” but when read with section 107 which requires the company name to be “painted or affixed” on the office, it is clear that the intention is for the company to have a physical office. Whether or not this is strictly observed is another matter; however the requirements are as stated.”

^v Regarding the length of time for registration as a benevolent society, one government official contends that “the delay in the process is usually as a result of the applicants’ tardiness in submitting requested information or documentation.”

^{vi} A government official notes: “Laws are established to ensure structure, compliance etc. If laws have no sanctions then the laws are deemed toothless, if persons choose to be registered under the Friendly Societies Act they have a fiduciary responsibility to adhere to those laws and guiding principles under the Act.”

^{vii} A government official states “there is a thirty day timeline for registration and this is communicated to all applicants.”

^{viii} A government official explains that Guidance notes, fliers, and the DCFS website provide this clarity.

^{ix} A government official notes that the Charities Act is currently under review.