STATES OF JERSEY

JERSEY CHARITY COMMISSIONER: RESULTS OF PUBLIC CONSULTATION ON DRAFT GUIDANCE ON THE CHARITY TEST; AND GUIDANCE ON THE OPERATION OF THE CHARITIES (JERSEY) LAW 2014

Presented to the States on 24th May 2018
by the Chief Minister

STATES GREFFE

Jersey Charity Commissioner

Report on Results of Public Consultation on Draft Guidance on the Charity Test

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(In this report, the Charities (Jersey) Law 2014 is referred to as 'the Law'.)

John Mills CBE
Commissioner
21 May 2018

Introduction

1. The Charity Commissioner is required under the Law to publish and maintain guidance on the operation of the Law. This includes guidance on the determination of whether an entity meets the charity test, including in particular on whether it provides or intends to provide public benefit. The Commissioner must have regard to the guidance in determining the test. Before issuing guidance on the charity test he or she must first consult any persons appearing to her or him to be representative of charities or bodies with charitable purposes, the Minister and such other persons as considered appropriate. The Commissioner must then publish a report on the results of that consultation and the reasons for her or his decisions on the guidance in the light of those results. This report is that report.

2. The final version of the guidance on the charity test having been published, the Commissioner must within a reasonable time give a copy of it, and the report, to the Minister, who must lay copies of both before the States as soon as practicable after having received them. The guidance, together with all other relevant materials, is published on www.charitycommissioner.je alongside this report, and copies of both have been sent to the Minister for her or his action as described above.

3.These requirements apply also to guidance that the Commissioner must publish and maintain regarding how he or she will determine whether an applicant for registration that is not a Jersey entity intends to carry out 'substantial activity' in or from within Jersey. This is a requirement of the charity test but only for such entities. This report covers that too.

4. Other guidance on the operation of the Law is also being published on the website as it is prepared, including on the applications process for registration and the duties of charity governors. Although the particular procedure described above does not apply to such other guidance it is in each instance being published, and publicised, in draft form, with a request for comments from any interested party. Short reports on the outcomes of such consultation will be placed on the website. All guidance will be kept under review by the Commissioner.

Background

5. A consultation draft of guidance on the charity test was published on the Commissioner's website, www.charitycommisioner.je, on 16 February last. It was styled as draft 'Guidance Note 2 on the Operation of the Law'. It also included guidance on the 'substantial activity' point noted above.

6. Attention was drawn to the consultation draft by press notice and advertisement in the newspaper, and by a range of best endeavours to ensure that people with an interest were able to be aware of the consultation. That included the holding of two public meetings, one in St Brelade and one in St Helier, where presentations on the draft guidance were given, questions and comments addressed, and printed copies of it made available. Some 60 persons attended the public meetings, almost all of whom were either current charity trustees or representatives of relevant organisations (or both). Both meetings were very positive in the sense that no-one appeared to be saying that the new regulatory regime in Jersey for registered charities was not, or was less

than, a good thing. Naturally, though, many interesting and pertinent questions were posed and comments proffered.

7. I have also drawn sought to draw attention to the draft guidance and enlarge upon the issues with which it aims to deal in a considerable number of meetings and discussions both with representatives of potential applicant entities and persons from law firms and trust companies who are knowledgeable about charity law and may act on behalf of some of those entities. I have also had meetings and exchanges with one particular representative body, Jersey Finance. This interlocution is valuable, and will continue. And there have been a fair number of 'dummy run' applications, which have proved to be a helpful means of not only explaining the practicalities of the intended process but also ensuring that the on-line application form covers the ground sufficiently and clearly. I thank in particular Richard Jouault Esq of the Constitutional and Community Affairs Department, who has worked hard and with aplomb to ensure that the new website, the applications process and the arrangements for the public register are now ready to go. These processes will, of course, be subject to refinement as things go along but everything is now in place for the register to begin to be populated as applications are approved.

Responses to the Consultation on the Charity Test Guidance

8. Six written responses were received. One was anonymous and another posed questions about the new arrangements rather than making comments upon them. The five known respondents are listed in the appendix to this report. Their thoughtful and constructive questions and responses are appreciated. The main points raised are addressed in this report but I have also found useful a range of small or minor comments on particular aspects of my drafting. I equally acknowledge many comments and pointers about the draft guidance and the concepts underpinning it received informally from other interested parties. All these have been taken into account in my preparing the final version of the guidance which is being published coincident with this report.

General Views on the Draft Guidance

9. A number of what I would term general views on the draft guidance were proffered. All were very supportive of the regulatory cause which the guidance represents. I have reflected carefully in their light and although I have not accepted them all they have caused me to make numerous changes of structure and style, and maybe tone, in preparing the final version, while perhaps not much affecting matters of substance. The main views in this category are set out in the following paragraphs, with my responses then following.

(i) **the general length, and arguable complexity, of the draft**

10. Several examples were referenced where perhaps the wording of the draft was not as clear as it might be, or where it could be seen as perhaps tending towards either prolixity or to offer commentary that, in respondents' opinions, might be said not actually to be 'guidance'. It was commented too that the draft was fairly long and that maybe this also helped create a sense of complexity. The various points in this regard were well made; fresh eyes on a significant draft are invariably helpful and I have drawn on them extensively for the final version of the guidance. Hopefully, I have

thereby simplified certain lines of argument, perhaps made its navigation easier, and, as far as possible, averted repetition. The points made also prompted me to review and seek to improve the nature of the text as a whole, even where no specific comment had been made. It remains, however, quite long, and no doubt still able to be perceived as complex or too detailed by some. There are, however, certainly some good reasons for the shape and size it has taken which I hope will be apparent from this report.

(ii) **some mistakes**

11. One or two mistakes were spotted, for which I am grateful. (Notably, the draft was wrong to say that the Law required entities' written constitutions to be placed on the register; they merely have to be submitted with applications.) I was also prompted by such comments to find a few other mistakes or misconceptions, which I have sought to correct in the final version. Another particular mistake I made is noted at paragraph 26 below.

(iii) **not enough said about the exercise of the Commissioner's various discretions and a lack of clarity, or 'benchmarks', as to what charity governors may or must do (or not do)**

12. It was suggested that in some instances that I had not said enough about how I intended to exercise various discretions entrusted to me in the Law; and that the draft guidance perhaps did not seem to give prospective charity governors enough precision about what they needed to contemplate or do in fulfilling their roles.

13. I have reflected with care upon this comment but have concluded that the general approaches outlined in the draft about how I shall proceed with decision-making are all right. These mainly comprise: a 'common sense' approach, taking the ordinary meaning of words, engaging in dialogue where things may be a bit uncertain, setting out key principles governing certain spheres of decision-making and then working on a case-by-case basis, and being informed as necessary or appropriate by existing case law (which, actual decisions apart, is brim full of incisive analysis of (almost) all the relevant concepts in the Law). This list also includes being ready in unusual or particular situations to be reasonably flexible (say, where a public benefit programme needs time to establish itself or where an entity with a 'general' charitable purpose may need to adjust its focus from year to year).

14. The Commissioner's function is a regulatory one and in my experience these are the kind of approaches both necessary and desirable in such circumstances, even more so, perhaps, since the new registration arrangements in Jersey have been mandated to start from scratch. One particular illustration of this - or, perhaps, confirmation - is the specific requirement in the Law for registered charitable purposes and intended public benefit statements to be submitted in draft. That will lead to a good deal of iteration between the Commissioner and applicant entities. I do not believe that it would be practicable, even if it was sensible, to go beyond approaches such as these (and, especially, not to recognise the implications of submission in draft), provided they are well-founded in law, including administrative law, and good practice. I sense from my discussions with a number of people active in the field of charity, and charity law, that this is not controversial. In any case, the charity sector in Jersey is too diverse, in every respect, to allow anything but a case by case approach, derived from principles, if the Commissioner's discretion is not to be fettered. It is fair to say,

though, that this approach may need to be developed over the coming year as the focus of the charity test moves from registration applications to ongoing compliance, and this important comment has given me some food for thought on that score, which will be drawn upon in subsequent guidance notes.

15. In the same vein, separate guidance on the duties of governors of registered charities will be published soon for consultation.

(iv) **the way the draft guidance educes the linkages between the Law and the English common law of charity**

16. One interesting strand of some respondents' comments concerned the extent to which the draft attempted to set the rules in the Law in the context of the English common law of charity and the extent to which this was germane to the purpose of giving guidance on the charity test. The background to this has several strands. First, the stated position of the court in Jersey is that English charity law provides it with 'valuable guidance' in the absence of Jersey customary law on the subject. This may, in general, be expected to continue, at least for the time being, to govern the position of charitable trusts in Jersey that do not become registered charities. The Law explicitly provides for such continuation. Secondly, many of the key concepts in the charity test, including the list in the Law of statutory charitable purposes and some of the specific public benefit rules, are founded in the long-standing general law of charity. The list of purposes itself is akin to the statutory list in England and identical to that in Scotland. It is neither practicable nor appropriate to put this large reservoir of analysis and interpretation to one side, as it were; nor, however, is it reasonably possible (as was suggested by one respondent) to seek to extract from it, and list in the guidance, all those aspects of it that will be applied by the Commissioner. There are, for example, very many leading cases in England on the meaning of 'public benefit' in a wide variety of circumstances, which may or may not be replicated in Jersey; but a range of principles runs through such judgments and I have sought to draw the main ones out in key parts of the guidance. The guidance cannot cover every possible reference but does make clear that case law will be drawn upon for information where necessary and appropriate. Just as the common law of charity has grown case by case, the key principles being applied and refined each time, so with the present regulatory task, which must of course be backed by the full and accessible information on the Commissioner's part.

17. Indeed, one of the most interesting challenges as the Law is implemented will be to address and manage the tension (so to speak) between the 'old' law and the new. This may well be area to which I shall need to revert as a little time goes by, and in the light of experience of the registration process in Jersey. But, now, my view is that the linkage is so significant that it, with the main implications, needs to be brought out in the guidance quite thoroughly. This, though, is not the same as trying to bring out in the guidance itself every possible aspect or principle that may be relevant to the determination of the charity test; that would be unrealistic. I have, however, amended some of the relevant drafting in the light of the comments made but have not altered the general approach.

Conclusions on General Views

18. The final version of the guidance note, as amended in the light of dialogue upon it and the written comments made, remains relatively long and detailed. In summary, the reasons for this include:

- the Law itself is lengthy and its provisions on the charity test not without their complexities; there is a deal of ground to cover
- the Law gives the Commissioner a range of discretions. While the guidance cannot begin to cover all possible situations it does need to seek to set out carefully the Commissioner's intended approach to the exercise of the key ones, notably on how the various tests on public benefit are to be approached. This has to be founded as appropriate in the law of charity on which the Law is based and the key points of this, and the main considerations arising, need to be elucidated
- the points above are of moment not only intrinsically but also because the Commissioner is required to have regard to the guidance in determining the charity test. The same goes for the Charity Tribunal if it has to make such a determination on appeal. An appropriately thorough frame of reference has to be established to govern the exercise of such duties
- the guidance has to be able to serve a number of purposes and distinct spheres of interest at one and the same time. These range from the needs of relatively small, well-established, applicant entities, for which the charity test should normally be a relatively straightforward exercise (one that must, though, be got right), to the requirements of large charitable structures managed in Jersey but with a global reach (whether existing or new), for which determination of the test may not necessarily be an entirely simple matter. It is therefore important that the guidance covers the ground; and
- the guidance has to go beyond the immediate issue of the application process and govern the approach taken by the Commissioner towards registered charities' continuous compliance with the test year by year

19. For applicant entities in 'straightforward' cases, the applications process will be as simple as possible consistent with the Law's requirements, and the on-line application form has been designed to that end. This will mirrored in relevant communications, too. But everyone does also need to understand that the Law, together with the legal principles from which it is derived, is not necessarily or always straightforward itself. The charity test requires a range of considerations about an entity's purposes and activities to be balanced. It has been welcome to note that there has been no suggestion from anyone with whom I have discussed the draft guidance, or from any of the respondents to the consultation, other than that this is fully appreciated.

20. The heart of the matter is that the charity test is the cornerstone of the Law's aim to protect public trust and confidence in registered charities. It ought not to be too hard a test for most applicant entities but it is still a test and there will be cases at the margin where it may be difficult to accept an application for registration. The guidance needs to be ready for that eventuality and, to be able to meet it, must aim to show how applications will be assessed in relation to appropriate regulatory principles and lawful criteria. It will always have to be shewn too that the Commissioner's decision-making is well-founded especially where unusual or complex situations arise. One can always

write a different or shorter document but, having carefully reviewed the responses, my judgement is that, for the reasons given, the relative level of detail it offers is apt for what is likely to be required of it. The guidance will, in any event, be kept under review and if any changes become necessary or desirable other than trivial ones the procedure described at the beginning of this report will be repeated.

Specific Comments

21. There were a number of specific or detailed comments by respondents on particular aspects of the draft guidance, notably from Jersey Finance, which convened a working group of lawyers and trust specialists to review it. Some of the points raised by that representative body were made or touched on by others too. These detailed comments are addressed in the following paragraphs of this report. Their nature perhaps underlines the general point about complexity adumbrated in preceding paragraphs. I have not accepted them all but with them to hand I have reviewed and sought to clarify the relevant sections of the guidance in order to be sure of my arguments and exposition, I hope with satisfactory results. I must record that all such comments have been extremely helpful in helping to ensure that the guidance on the charity test does properly reflect the Law itself together, as appropriate, with the general law of charity.

(i) general charitable purposes

22. The point was made that the draft guidance did not adequately address how the charity test will operate in respect of entities established for general charitable purposes, from among which charity governors may, say, be empowered to select from time to time for their distributions.

23. This was a very good point to make and I have addressed it in the final version of the guidance. I have said that governors should set out their purposes for the time being, with the facility readily to revise the list as and when, with the Commissioner's assent. The key point of principle is that the registered statement of charitable purposes, notwithstanding any adjustments from time to time, properly reflects the policy the governors are actually following in line with their entity's objects; and ditto the provision of public benefit. There will be no problem in an entity's seeking to revise both its registered statements from time to time in order accurately to reflect what it is actually doing or intends to do within the framework of its purposes, though the Commissioner will always need to be vigilant in such circumstances that the activities selected for the time being are in pursuit of charitable purposes.

24. The view was further put by one respondent that, in a 'general charitable purposes' situation (or, indeed, any situation) it was incorrect for the guidance to say that the public benefit element of the charity test must be met in respect of each and every purpose. I do not accept this point. An entity's purposes must all be charitable (save for any purely ancillary or incidental) and the public benefit element of the test requires that public benefit to a reasonable degree is provided in giving effect to them (all of them, including those ancillary or incidental). It is not open to an entity to pick and choose from its statement of registered charitable purposes or bring other purposes into play other than for whose delivery the entity has been established; it must, rather, show how it intends to provide public benefit in respect of all the purposes described in its registered statement of charitable purposes.

(ii) purposes purely ancillary or incidental

25. It was put that although an entity's purpose must be charitable purposes, the exception for other purposes that are 'purely ancillary or incidental' meant that it was wrong for the draft guidance to suggest that all an entity's purposes must have a public character. I do not accept this point. First, the relevant general point made in the guidance is that it is charity itself that necessarily has a public character. That is the absolute essence of the concept in law, and has been so for centuries. That, however, is not to say that, as the Law provides, there cannot also be a purpose purely ancillary or incidental; but it is, and can only be, just that. By the same token, on the 'benefit' side of the charity test there can be private benefit – it is almost impossible for there to be none – but it must only ever be incidental since beyond that it would mean or imply that the registered charitable purposes are not properly being addressed and given effect. Obviously there has to be a degree of flexibility in applying such rules but the point of principle cannot, in my opinion, be gainsaid.

26. This comment led me to revise somewhat, for the final version of the guidance, the section on 'purposes purely ancillary or incidental' in order to set out the above points with perhaps greater clarity. The revision also addresses one or two other comments about aspects of the initial wording of that section. The guidance now also makes clear that even if a purpose is 'purely ancillary or incidental' it is still subject to the public benefit test in Art. 5(1) (b) of the Law, since that applies to all an entity's purposes, without exception. I had got this particular point wrong in the draft. It also now emphasises that this narrow exception is not a way of seeking to justify a so-called 'mixed purpose' trust as charitable for the purposes of the charity test; it could not be if its substantive purposes were not all charitable.

(iii) Philanthropy

27. There was a criticism that the draft version of the guidance perhaps had too much to say about the nature and scope of 'philanthropy', although the need for something to be said was not disputed since, as it was noted, the concept may go wider than the statutory charitable purposes.

28. This is an important point, for two main reasons. First, the word is quite widely used in Jersey's finance industry, both to describe a particular group or type of products and in marketing Jersey as an ideal country for the formation and administration of philanthropic structures; and this has been linked in national publicity, in quite an explicit way, with the implementation of the Law. Secondly, the word has a fairly broad meaning, which is analysed in the guidance. In essence, for instant purposes, while what is charitable is probably also philanthropic, what is philanthropic may not necessarily be charitable, as the response in question noted. So it is a matter of some significance for the operation of the charity test that the distinction between the two is discerned and understood. As Commissioner, I am also keen to ensure that those concerned with promoting Jersey as a global centre for philanthropic structures, obviously a very good thing, do not relate that to the implementation of the Law other than in a wholly correct manner from the perspective of the charity test. I doubt I would be at ease, given my duty to seek to promote public trust and confidence in registered charities, were the two words, 'charity' and

'philanthropy', to come to be used, or simply regarded, in a way that implied or presumed that they were wholly interchangeable.
29. So I have not accepted the point that too much was said of 'philanthropy' in the draft, but I have taken the opportunity to revisit the wording of the section on this in the final version of the guidance. The main point of principle is that, in order to meet the charity test, purposes must be charitable purposes and not just, or even partially, philanthropic purposes if those cannot or do not fall within the definition of charitable purposes. I recognise, though, that there will be a need for dialogue, and no doubt a degree of flexibility, in cases where the distinction may be genuinely open to question or not clear-cut.

(iv) Definition of Public Benefit

30. One interesting comment concerned the definition of public benefit, or, rather, the lack of one, either in the Law, or in the Scottish or English charity statutes. The question was, therefore, what weight should be attached to pre-existing judicial authority in relation to public benefit? This flows quite interestingly from what is said in paragraph 16 above and shows, perhaps, the challenge of preparing guidance for all seasons. The answer to the question is, in my view, quite a bit of weight, if only because there is a truly extensive *corpus* of English case law on the subject, as to both principles and actual situations. Given the nature of the Law and the way the English law of charity has been brought into play in Jersey (not only in past cases before the court but also, for example, in the Income Tax Law), there is not really any other approach. The knowledge, reasoning and analysis are there for the taking, as will on occasions need to be had in one way or another. But it is something to be done in a measured way, and the guidance makes clear in several places that if it is to be done it must be subject to where it is necessary or appropriate, and tied to the facts of a particular case. I believe that this is a sensible and realistic approach.

31. The same goes for Scottish cases, if or when there are any, on those features of the public benefit element of the charity test which have been taken from the Scottish Act. It does not go, though, in respect of the 'to a reasonable degree' requirement, which is peculiar to Jersey. (See paragraphs 38-44 below.)

32. This comment sent me back to the words written in the draft introducing the concept of public benefit and I have reformulated them somewhat in order to seek to indicate the various main meanings and interpretations of the phrase that have come from case law, as a means of seeking to illustrate, broadly, what the concept means in practice. Generally speaking, I think most people will know what public benefit is when they seek it, but there are some specific rules to be met which may be less easy to comprehend and thus warrant explanation in the guidance.

(v) Private Benefit

33. There was a criticism that the draft guidance was perhaps overly restrictive in its approach to private benefit, which is the opposite of public benefit and not something that should flow from charity save incidentally as, say, a necessary or unavoidable consequence of delivering public benefit. In particular, my determining the charity test on public benefit requires that I have regard to how both any private benefit and public 'disbenefit' arising therefrom compare with the public benefit identified in any registered public benefit statement. It was asserted by one respondent that this did not

"exclude the possibility of there being what might be considered a material private benefit". It was also argued that this putative restrictiveness was reflected in what the draft had to say about remuneration of governors, which was seen as too tight or strong. The illustration was given of an entity's being established and requiring significant private benefit in the start-up, in a manner that might outweigh public benefit in a given year, whereas the position in the guidance was that, *a priori*, the charity test would not be met where private benefit outweighed public.

34. As urged by the respondent in question I have looked again at the relevant sections of the draft guidance, carefully. I think the point made about some of the words I used was not entirely unfair and I have refreshed them with a view to greater clarity about what private benefit is permissible or impermissible, and why, including in respect of governors' remuneration. The revised wording is at paragraphs 77-78 and 94-97 of the final version and is justified in the following three paragraphs. I do not, however, accept at all that the Law possibly leaves a way open to "material private benefit" in the sense of the qualifying adjective meaning 'to a considerable or important degree'.

35. In the final version I have made clear, first, that private benefit is not ruled out by the Law. I perhaps did not say that clearly enough in the draft. As already noted in this report, it would be almost impossible, on a strict construction, for there to be no private benefit within any registered charity's public benefit offering. At the simplest level, a charity delivering services may need to pay people to do what it does, and that is a private benefit to them (but one that is a necessary or unavoidable consequence of its public benefit provision). While, however, the permissibility of private benefit is well recognised in English common law, there is equally an established line of authority that it must only ever be incidental since by definition it cannot be a substantive part of public benefit, which is what a charity is established to do. I carry this reasoning over to the Law: an entity must show how it will provide public benefit in giving effect to its charitable purposes, and all it may do is give effect to those. Indeed, it must do the same in giving effect to any ancillary or incidental purposes. Starting from this position in the statute, any private benefit must be viewed in the context of the whole benefit an entity intends to provide and a balance struck. It will be a matter for the Commissioner's judgement whether in any case the extent of it reaches a point where it is clearly more than incidental. That, however, is not entirely to exclude situations such as the example of the 'start-up', just as there needs to be a degree of flexibility on, say, the development of a public benefit programme over a given period of time. I have rewritten this part of the guidance to seek to bring out these points and I shall have careful regard to it in decisions on the charity test, with a degree of appropriate flexibility to be admitted if the circumstances warrant.

36. As for remuneration of governors, I have revised the wording of the draft guidance to seek to echo the above position of principle about needing to view private benefit in the whole context of an entity's activities. Payments to governors (or staff, for that matter) for services rendered would probably go beyond the incidental where they were, or appeared to be, of such a scale relative to an entity's total resources that its ability to give effect to its charitable purposes was, or could be considered to be, capable of being compromised or inhibited. In any case, for public register charities payments to governors will be a matter of public record and that should act as something of a brake on egregious behaviour if one was needed. But it is, nonetheless, an area for the Commissioner to watch.

37. As noted above, with regard to assessing the 'balance' between private and public benefit I do not accept the point that the Law admits the possibility of 'material' private benefit. That would go against the whole grain of charity, which is about public benefit. The 'balancing' required in the charity test is about looking at private benefit in the whole context of the registered public benefit statement, relative to an entity's resources, subject to the facts of each case and with any line drawn dependent upon circumstances. My view is that there will be a point in any registered charity's programme where, if any private benefit provision seems manifestly to be too high or is appearing to be creeping upwards in scale, so to speak, that will be a trigger for considering whether the private benefit has gone beyond the incidental, thus compromising the charity test. The final version of the guidance sets out some principles and factors relevant to any such eventuality.

(vi) "Reasonable Degree" of Public Benefit

38. The draft guidance on this aspect of the charity test was criticised by one respondent because the approach I adopted was to interpret the phrase 'to a reasonable degree' as setting a higher bar in the public benefit element of the charity test than if (as in Scotland, for example) the words were not present. If the latter obtained an entity would be required, in giving effect to its purposes, simply to 'provide public benefit'. It was asserted that the qualifier 'to a reasonable degree' was included in the then draft law in order to allay concerns about too high an expectation of public benefit. Another respondent also felt the same and considered that the intentions of the Legislature on it should be the guiding light.

39. There is no doubt that the phrase is possibly a little problematic. It seems to appear in this context in no other modern charity statute in the common law world. There is, however, no written evidence that I have seen or been invited to consider that supports the view asserted by the respondents, including nothing of any germaneness in the thorough report (P.108/14) which covered the draft law when it was lodged in 2014. Nothing was said about it in the Legislature when the law was approved. Nothing appears to have been said about it in any consultation comments at the time (although I have not seen every comment made). So, as Commissioner, I need to interpret it.

40. The approach in the draft guidance that it represents a higher bar than there would be absent the phrase was based on my presumption that if a higher bar had not been meant there would have been no need for any extra words. It did not seem to me that the States would have agreed the extra words in order to imply a lower rather than a higher 'quantum' of public benefit on (what one might term) a deemed continuum of benefit; and I felt that if such an implication had been the Legislature's intention, it would have said so, because the point is potentially of some moment for many civil society organisations. I remain of this view, and thus do not accept the point made. That is a view I reached independently consider but it has been reinforced by what I have learnt from officials involved at the time, whom I asked about it; the policy intention was indeed to seek to set a somewhat higher bar than had the phrase not been inserted. It is, however, obviously important that where the 'reasonable degree' point sits on that continuum of public benefit needs to be established in a reasonable way.

41. I have therefore looked again at the wording of the guidance on this to be sure that it is apposite and have revised it somewhat in order to set out my reasoning a little

more fully and clearly but without changing the approach. The guidance now emphasises that there are three main things to consider. First, taking the 'continuum' illustration again, a reasonable degree of public benefit is certainly not near the bottom of it. That seems to be uncontentious (and there is common law authority that public benefit must be more than 'token'). Nor, though, is it, or need it be, at the top, though it could well be and it would be good if it was. That also ought not to be contentious. It follows, therefore, that 'a reasonable degree' of public benefit must sit round the middle of that putative continuum. All things considered, that seems to me to be reasonable. If there is not a reasonable amount of public benefit on the part of a registered charity, its giving effect to its charitable purposes could, at the very least, be called into question, which would compromise the charity test.

42. But, continuing with the same illustration, the 'balance' of the continuum once a reasonable degree of public benefit has been provided is certainly not thereby available to be filled, so to speak, by private benefit. For different reasons, the latter may only be incidental. So things are therefore best viewed in terms of the amount of activity undertaken by a registered charity. It does not have to be 'providing' public benefit in an active manner all the time (although many will). But it needs to be reasonably active in order to hit that spot around the middle of the continuum; and that of itself will confirm it as reasonably active and thus providing public benefit to a reasonable degree.

43. It follows that a registered charity must not be reasonably inactive although some relative inactivity in a given period is acceptable and may, in some cases, be normal (say, as an example, where a charity focusses on helping people at Christmas). Any level of activity is also, importantly, relative to resource and, in certain cases, to the nature of the charitable purposes. The public benefit continuum for a small entity, moreover, will be different in scale from that for a large one, but the principle of a reasonable level of activity should be a constant. This seems to me to be the most objective possible way of endeavouring to judge what is , or may not be, 'public benefit to a reasonable degree' in any given instance.

44. Following from this, the final version of the guidance makes clear that the 'reasonable degree' requirement is probably not met if there is obvious or considerable inactivity, unless there is a very good reason for that, such as accumulation for a major capital investment. Things may be gauged from, for example, the extent of assets lying unused or underused without good reason, or from evidence that funds are being raised but not spent (or not spent on providing public benefit) or indeed not raised at all. The guidance also emphasises that, to coin the phrase, the balance of the continuum is not to be made up by private benefit once a 'reasonable' amount of public benefit has been achieved. That, beyond the incidental, would be an improper use of charitable assets.

Other Things

(i) **'Substantial Activity'**

45. No comments on this aspect of the guidance were received and the final version is the same as the draft save for a few stylistic changes.

(ii) **Sports Clubs**

46. Two respondents suggested that the draft guidance erred in referring to the unlikelihood of a club's meeting the charity test were its membership criteria capricious. Does the fact, it was put, that a club has the power to refuse membership for any reason mean that it could never be charitable? I do not accept this point. A sports club may be charitable if its purpose is to advance public participation in sport (the test in the Law) but this will depend upon the benefit it provides being public benefit. This means that its facilities must be available to all on a reasonable basis. If they are not – that is to say, it has the power to exclude certain people for no particular reason, and does so – then it may not meet the charity test because the benefit it provides may be unduly restrictive. That is what is meant by capriciousness. There is nothing to stop a club from having membership criteria but they must not be such that people are excluded, or could be excluded, for untoward reasons, which could amount to an undue restriction and thus jeopardise the charity test. So I have retained the example in the final version of the guidance. The real issue, however, for most sports clubs if they seek registration is whether their objects are in alignment with the relevant statutory charitable purpose cited above, which follows the Scottish law. The 'public participation' test is somewhat different from the English equivalent, which is the advancement of 'amateur sport'.

(iii) **Political Involvement by Registered Charities**

47. One respondent made a thoughtful comment on this, noting that although the draft guidance covered the question of political control of, and involvement in, registered charities (closely following the provisions of the Law) it did not go further and cover the question of political involvement by a charity. It was observed, most correctly, that there is extensive English case law on this, although most of it, it should be said, predates the widening of the statutory charitable purposes in that country in 2006. The essential, old, common law rule was that political involvement could not generally be a charitable purpose since the benefit flowing from it – say, an aim to change the law – could not be discerned by the court; such a change could be beneficial to some people, but it might not be, or it might give rise to disbenefit for others. But the notion of 'political' activity in the modern era undertaken by registered charities needs to be considered. Normal, day-to-day campaigning on any public policy issue is 'political' but that is all right under the Law provided that the activity is not geared towards the platform of an actual political party. Statutory charitable purposes such as the advancement of human rights or equality, or community development, are inevitably 'political' (with a small 'p') and it would be unrealistic to limit in any precise manner the way they might be given effect through, for example, campaigning. It seems to me that that is what a lot of charities do these days, for example through social media. The important point is that such activity is demonstrably enshrined in the charitable purposes and the registered public benefit statements. It would potentially be a matter for intervention by the Commissioner (as in any case) if that point was lost or foregone.

48. In the light of the comment made I have made suitable reference to this in the final version of the guidance.

49. It should be emphasised this does not apply to political parties. The Law expressly rules out their being charitable. But that is very different from typical public policy campaigning, which should normally be within the charitable province if it is in line with what a charity is set up to do and what is says it will do to provide public benefit.

(iv) **Poverty**

50. Likewise, the point was made that the draft guidance did not specifically consider the common law rule – described by the respondent as 'purported' – that a charitable purpose, to be charitable, may not exclude the poor from benefiting from it (although it was, in fact, touched on in the section of the guidance about 'philanthropy'). The point being made here was really the same as the one described at paragraphs 12-13 above, *viz*. the desirability of offering greater advance precision for charity governors as to the legal rules they must follow. It is a fair point, but I stand by the view that it would be impracticable, and perhaps fettering of my discretion, to seek to try to adduce all the common law considerations that could be relevant as the charity register is established in Jersey. The sector and the law generally are too broad for that. More important is to ensure that the linkage with the common law of charity of so many aspects of the Law is recognised and then drawn on, with reasons given, if or when the need arises.

51. On the specific point itself, though, as the respondent in question observed, the matter may not be settled law since the notion hardly fits in practice with several of the widened list of statutory charitable purposes. It is also a concept that perhaps sits more readily with the English statutory approach (where if a purpose is for public benefit it is *prima facie* a charitable purpose) than the charity test model enacted in Jersey. It may, though, come into play in the consideration of undue restrictions where those may arise from high fees or charges, and the guidance alludes to that. My view is that it is better for the purposes of the guidance to draw broad attention to the importance and significance of the common law of charity and explain how I shall turn to it for information and guidance in any particular instance. Full reasons will of course always be given where a determination of the charity test is negative, whereupon any points of law can, if an entity so wishes, be argued in an appeal before the Tribunal against a registration decision of mine.

ENDS

List of Respondents to the Consultation

1. Jersey Finance
2. The Revd. Martin Dryden
3. Professor Claire De Than
4. Jersey Community Partnership
5. Jersey Hospice Care
6. Anonymous

Their submissions are available to view on www.charitycommissioner.je

Guidance by the Jersey Charity Commissioner on the Operation of the Charities (Jersey) Law 2014

Guidance Note 2: The Charity Test

Published on www.charitycommissioner.je on 21 May 2018

John Mills CBE
Commissioner
21 May 2018

Although this Guidance Note is based on, and reflects, the 2014 Law, any relevant statement expressed in it is at all times subject to the Law itself and any Regulations or Orders made under the same. The Charities (Jersey) Law 2014 is referred to throughout this Guidance Note as 'the Law'. The 'charity test' is set out in Part 3 of the Law. See Guidance Note 1 for terminology used in the Guidance Note series.

All references to 'the Commissioner' include her or his designated staff, save in respect of registration decisions, which may not be delegated.

Guidance Note 2: The Charity Test

Contents

The Charitable Purposes Element of the Charity Test

Introduction

1. The Law creates a new statutory framework for the registration of charities in Jersey with a principal object of thereby protecting public trust and confidence in charities so registered. It does not alter – indeed it follows - the position in general law that a charity's purposes must be charitable and its activities of a public character, albeit with some added, specific, requirements. Nor should the Law have any bearing on the position taken by the Royal Court that English case law on charity provides 'valuable guidance' in Jersey[1]. For the purposes of registration, however, it widens the range and nature of purposes that may be regarded in Jersey as charitable purposes. In this it is akin to recent reform of the law of charity in both England and Scotland, while it also reflects certain rules and principles long-established in the English common law of charity. And, as a condition of registration, it brings into effect the 'charity test' that is a feature of the law in Scotland, albeit with a few adjustments to which attention is drawn to in this Guidance Note.

2. The Law builds on the common law rule that, for an entity to be charitable, its purposes must, as charitable purposes, be publicly beneficial. This is not, however, left as purely a matter for charity governors. It requires the public benefit an entity provides in giving effect to those purposes, or intends to provide at the point of application for registration, to be written in a statement that will be on the public register. A similar statement of charitable purposes is also required. The Law then places a duty on governors of registered charities to act in a manner consistent with the registered charitable purposes and registered public benefit statements of the entities they govern. These two elements - charitable purposes and public benefit – comprise the two elements of the charity test with which this Guidance Note is concerned.

3. The charity test must be met by an applicant entity in order for it to be registered and, subsequently, in a continual manner in order for it to maintain registered charity status. For registration to be achieved, the way the charity test is to be met must be demonstrated regardless of an applicant entity's prior status or activity. In determining the test in each case, the Commissioner must have regard to her or his guidance on it.

[1] *Meaker v Picot*, 1972 [J.J 2161 at 2177], where the Court noted a dearth of references to charity in the customary law, and concluded that the legal meaning of 'charitable purposes' in Jersey had the same meaning as in England and Wales. See also Art.40(1) of the Law, which preserves the broader jurisdiction of the Court with regard to charities and acts for charitable purposes

The Charity Test

4. An entity meets the charity test if

- all its purposes are charitable purposes, or are purposes purely ancillary or incidental to any of those charitable purposes; and
- in giving effect to those purposes, it provides (or, in the case of an applicant for registration, intends to provide) public benefit in Jersey or elsewhere to a reasonable degree.

5. The Commissioner must be satisfied in respect of both these elements. They are, however, to a considerable extent intertwined and, for each application for registration, will generally be regarded side by side. The Commissioner's determination of the one will be informed by her or his consideration of the other.

6. Statements of both charitable purposes and intended public benefit must be submitted by applicant entities to the Commissioner in draft. This is a requirement of the Law. This will facilitate dialogue where there may be some question about the nature of an applicant entity's submission, or if further information is required. It is part of the Commissioner's role, where necessary or appropriate, to seek to assist applicant entities in getting to a position where, other things being equal, they are able to meet the test, and as much help and advice as is reasonably practicable will be offered to that end. If, however, it is determined by the Commissioner, notwithstanding such interaction, that an applicant entity fails to meet the test, he or she will give reasons for the decision that will duly have regard to this Guidance Note. It is open to an applicant entity to appeal to the Charity Tribunal against a registration, or other, decision of the Commissioner. A third party may also appeal against a registration decision of the Commissioner on the ground that the applicant in question does not meet the charity test.

7. The application process itself is addressed in Guidance Notes 3a and 3b.

The Purposes of an Entity, and Charitable Purposes

8. The 'purpose' or 'purposes' of an applicant entity, as stated in the Law, is that or are those which is, or are:

- in the case of a trust, the benefit of its beneficiaries or any other purpose not for the benefit only of the trustee
- in the case of a court-approved fideicommis or incorporated '1862 association', the objects for which it was created or incorporated, or that were subsequently authorised under the Loi of 1862
- in the case of a foundation, the objects specified in its charter or regulations

- in relation to any other entity, a purpose or purposes to which its property may lawfully be applied (other than by court order) in accordance with its powers as set out in its constitution (including on its winding-up or other termination).

9. It first needs to be established that an applicant entity's objects, as set out in its constitution or equivalent document and taken together, may be construed as charitable purposes, save for any purposes that are purely incidental or ancillary to those. (The latter, however, if any, must also be confirmed.) How the Commissioner will interpret 'purely incidental or ancillary' is described at paragraphs 26-33 below.

10. Sixteen statutory charitable purposes, intituled (a) to (p), are prescribed in the Law. They are set out for reference at paragraph 36 below. The first fifteen are subject-related. The sixteenth is for any other purposes that can reasonably be regarded as analogous to any of the first fifteen. The statutory purposes are, in general, broadly put, although to some the Law attaches certain restrictions or exemplifications. In practice they serve to describe categories of activity within the scope of which many differing charitable activities may be pursued. They serve significantly to broaden the range of purposes that can, in Jersey, readily be regarded in law as charitable purposes.[2]

11. It is unlikely that an applicant entity's purpose or purposes, or indeed those of any charitable trust, will be written in exactly the form of the sixteen statutory charitable purposes. What matters for meeting the charity test is that the purpose or purposes of the entity in question, stemming from its objects, fall clearly within the ambit of one or more of the sixteen, without being constrained by any of the limitations to which some of them are subject. Thus an object of providing, say, first-aid services might fall under purpose (e), *the saving of lives*, and an object of maintaining a school under purpose (b), the *advancement of education*. But an object of running a sports club might not necessarily fall under purpose (h), *the advancement of public participation in sport*, because of the limitations inherent in the formulation of that purpose.

12. More is said later about the sixteenth purpose, purpose (p), since that requires a judgement to be made as to whether a given purpose may properly be regarded as 'analogous' to one or more of the other fifteen. This Guidance Note, however, does describe two purposes in relation to which the Commissioner intends to treat relevant objects of applicant entities as included by analogy. (See paragraphs 53-57 below.)

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[2] The prior position in Jersey, as described by the Jersey Law Commission in 2006, was that while a charitable trust must exist for exclusively charitable purposes, there was no statutory provision as to what those purposes were. In practice, the Law Commission said that, in line with the judgement of the Royal Court in *Meaker v Picot*, the English common law rules were followed, based on the four so-called 'heads' of charity set out by the Court of Appeal in 1891 as deriving from the preamble to the Charitable Uses Act 1601: the relief of aged, impotent or poor people; the advancement of education; the advancement of religion; and trusts for other purposes beneficial to the community not falling under the preceding three heads. The position in practice was that a charitable purpose had to be either within the express terms of the Preamble or within its 'spirit and intendment'. There is very extensive English case law on the nature and extent of charitable purposes deriving or flowing from the four heads. There is also a growing amount related to the wider list of purposes set out in the 2006 Act (now the Charities Act 2011), to which Jersey's statutory list is now akin. The four 'heads' are, with some slight variation (notably, the word 'community' having been given the qualifier 'whole'), prescribed in Art.115 (ad) of the Income Tax (Jersey) Law 1961 as governing tax exemptions for charities and will remain applicable for the continuing purposes of the provisions of that Article. Continued tax exemption for registered charities will, however, from 2020 depend upon the fact of registration

13. An applicant entity must have a constitution, or an equivalent founding document (such as a memorandum and articles of association in the case of a company). This will give the governors of the entity their powers to act. Whatever its nature, it must be written and it must include the object or objects of the entity. It must be submitted with an application for registration.

14. A draft statement of an applicant entity's charitable purpose or purposes must be submitted with an application. This statement must clearly relate to the objects in an applicant entity's written constitution or founding document, and link the intended purposes to one or more of the statutory charitable purposes. The Law requires the Commissioner to be satisfied on this point. He or she will commence a dialogue with an applicant entity if a question arises whether some or all the objects in a constitution or as presented in a draft statement of charitable purposes may not in fact be charitable purposes, or where the linkage between objects and charitable purposes may not be apparent or clear. The regulatory objective is to establish satisfactory linkage between the written objects of an entity, its draft statement of purposes and the list of statutory purposes itelf. A determination may also have to be made at this point by the Commissioner as to the nature of any non-charitable purposes asserted to be purely incidental or ancillary to the charitable purposes (paragraphs 26-33 below).

15. Applicant entities may well have several purposes in their constitutions falling within the scope of more than one of the sixteen charitable purposes. A church, for example, may have one purpose falling under purpose (c), *advancement of religion*, and another under, say, purpose (k), *advancement of religious or racial harmony*. It may even have another falling under, say, purpose (n), *relief of those in need*. That is not problematic, as long as

- first, all the objects properly fit within the ambit of the list of statutory charitable purposes
- secondly, duly cover the entirety of what the applicant entity actually does, or intends to do; and
- thirdly, the intended public benefit to be provided in giving effect to the purpose flowing from each object can be satisfactorily described in order for the public benefit element of the charity test to be met.

16. There is no particular merit for the purposes of meeting the charity test in an applicant entity's having more than one charitable purpose. But, other things being equal, nor is that problematic. What matters is that the object or objects stated in its constitution and, flowing from those, its statement of charitable purposes properly and accurately reflect what the entity actually does or intends to do, and do not refer to or describe things that in practice it does not – or maybe cannot – do.

17. Where perhaps several charitable purposes are put forward as correctly flowing from an entity's objects, the statement of public benefit will need to demonstrate an appropriately broader spread of public benefit activity covering all the purposes. The

charity test is not met if there is an object which is a charitable purpose but to which no provision of public benefit is attached. The statement of public benefit is about the intended outputs and outcomes from giving effect to all an applicant entity's purposes and, thus, the proper application of its charitable assets to pursuit of its objects.

18. Furthermore, an applicant entity will meet the first element of the charity test only if all its purposes are charitable purposes (save, as already noted, for any purely incidental or ancillary purposes). It will not meet the test if it has so-called mixed purposes, that is to say, several substantive objects one (or more) of which is not charitable. It is important for governors of applicant entities to consider this point before making an application for registration and engage with the Commissioner if in any doubt about it.

19. A sports club, for example, may have an object in line with purpose (h), *the advancement of public participation in sport*, by which it works to encourage such participation in a sport that involves physical skill and exertion. But if, say, it also has a similar object with regard to a 'sport' that clearly does not involve physical exertion, that will not qualify as a charitable purpose because of the limitation in purpose (h) to 'physical' sport. Or if, say, an entity works to develop the business skills of voluntary sector organisations (subject to the facts, quite probably a charitable purpose under purpose (f), *the advancement of citizenship or community development*) but also has an object under which it is to devote resources to doing the same for private businesses, that aspect of its endeavours might well not meet the test. Similarly, an entity whose purpose is to give grants to particular good causes may not meet the test if it cannot be shown that a statutory charitable purpose is thereby advanced.

20. On the other hand, such considerations may be unlikely to arise in respect of purpose (c), "*the advancement of religion*", because that statutory purpose is set out in a particularly wide-ranging way that brings within it several definitions by analogy. The question of imprecisely stated objects such as, say, 'the education of the public', addressed in paragraph 22 below, is also germane in this context[3].

21. In most cases the linkage between an applicant entity's objects and the statutory charitable purposes should be a relatively straightforward matter. If, however, a particular object, although inherently charitable, addresses or focusses on a notion or ambition that may be inherently difficult to discern or unrealistic to contemplate, or is

[3] The Royal Court enlarged at some length on this point in *Meaker v Picot*, and its judgment there helps to illustrate the point about the purposes of a charity having to be charitable purposes and not 'mixed' purposes. Citing House of Lords authority, the Court said that there were three classes of case in this sphere: (i) where charitable purposes are mixed up with non-charitable purposes, or purposes are written in vague language such that the court could not execute them, a trust fails to be charitable because of uncertainty; (ii) where trustees have a discretion as between giving effect to charitable or non-charitable purposes, that too leads to failure of the trust for breach of the principle that charitable assets must be used wholly for charitable purposes; (iii) but where, however, there is a general, overriding, trust for charitable purposes but some of the particular purposes are not strictly charitable, the trust is nevertheless good but the trustees are restricted from applying the funds of the trust to the purpose or in the manner which are objectionable. (This is clearly reflected in the description of the 'pre-2006' position by the Jersey Law Commission.) As far as the charity test is concerned, the Commissioner's view is that for the purposes of registration the Court's third point is overtaken by the Law, which requires that, for a registered charity, all objects must be charitable within the ambit of the statutory list if not purely incidental or ancillary, and public benefit in giving effect to all of them duly demonstrated

simply written in a vague or imprecise way, it may follow that intended public benefit from giving effect to it cannot, by definition, readily be demonstrated for the purposes of the public benefit element of the charity test.

22. One possible example of this may be a rather abstract object, like, for instance, 'education of the public', where precise definition may, intrinsically, not be easy to pin down. In such circumstances, the Commissioner will need to be satisfied that the relevant purpose, in this case purpose (b), *the advancement of education*, is met. The principal consideration in this example would probably be whether the activity properly fell within the ordinary meaning of 'education' as a process of organised instruction, as opposed to what might in practice seem closer to the mere provision or making available of information. Another example could be an object referring to the 'health' or 'well-being' of people generally, concepts with obviously broad scope. Whether a purpose stated in this kind of way is, or could be, a charitable purpose under purpose (b), *the advancement of health*, or any other of the statutory purposes, will depend on the Commissioner's judgement of the facts of the case, taking account, too, of the way 'delivery' is presented in the draft statement of public benefit.

23. The point of emphasis is that a degree of precision, in relation to the ordinary meaning of words (and, if appropriate, relevant case law), is important in an applicant entity's objects in order for their linkage to the statutory list to be clearly established and for the public benefit in giving effect to them properly described. This is necessary in order to protect public trust and confidence in registered charities and the Commissioner will approach any such cases with particular care, including possibly requiring further information or explanation from the applicant entity.

24. There may well be some applicant entities whose object or objects, while charitable, are all defined in a rather general way and which, therefore, may not sit easily within the approaches outlined in preceding paragraphs. An example might be a trust established for what are termed 'general charitable purposes'. The Commissioner will approach such cases on an individual basis, through asking the governors to set out in appropriate detail in their draft statement of charitable purposes the purposes which they intend to pursue for the time being, describing also the intended public benefit accordingly. Registered statements can then be revised, with the Commissioner's assent, if or as governors' policies changed. The key requirement is that assurance can always be had from the public register that charitable purposes are being followed, notwithstanding alterations in those over time, and requisite public benefit provided accordingly.

25. The Commissioner will seek to make a reasonable, 'common sense', determination, subject to law, in each case where, in her or his view, uncertainty may have arisen from a draft statement of charitable purposes regarding its precise linkage with objects. This will be preceded by, and take into account, dialogue with the applicant entity concerned and will include looking at the interplay between the statement of charitable purposes and the accompanying public benefit statement. Nonetheless, governors of applicant entities are encouraged to give careful aforethought to the exact nature of the objects of the entity taking account of this section of the guidance.

Purposes purely Ancillary or Incidental

26. As already noted, there is an exception in the Law from the requirement that all purposes must be charitable purposes in respect of any purposes that are *purely ancillary or incidental* to any of an entity's charitable purposes. This therefore allows the possibility that an applicant entity with any non-charitable objects in its constitution would not fail to meet the charity test solely on that account. But that is subject to the interpretation of the exception, which is cast narrowly.

27. The range of issues brought into play by this exception is not immediately obvious. One possible example may be where, say, an entity is empowered by its constitution to advise private businesses on matters within its field of expertise. It would be making use of its expertise (sustained with charitable resources) for what might not be a charitable purpose but, subject to the precise facts, such activity might reasonably fall within the scope of the exception, provided the income derived from it was applied to the charity's purposes. Another, similar, example might be where a charity dedicated to advising individuals about, say, debt management under purpose (a), *the prevention or relief of poverty*, was also enabled to advise such people who were sole traders or owners of micro-enterprises, or even charity governors. A further example might be political activity of the kind described in paragraph 38 below. There may also be objects in this category focussed on the management of an entity and enabling it to establish certain types of structure for delivery of those objects; objects of that kind may normally be expected to be but *purely ancillary or incidental*.

28. One activity likely to be common to all applicants for registration is fundraising and the soliciting of funds, in all their many forms. Where in a constitution these are an actual object of the entity concerned, the Commissioner will regard them as coming within the scope of the exception, provided that the object is clearly to raise funds for giving effect to the registered charitable purposes. Where fundraising, on the same basis, is an 'activity' rather than a 'purpose' it, and its necessary accompaniments such as communications and promotional programmes, will be regarded as an integral and necessary part of an entity's public benefit provision.

29. The Commissioner will approach determination of the exception having regard to the following principles. Any *purposes that are purely ancillary or incidental to any of the charitable purposes*:

- should readily flow from, and relate to, an applicant entity's constitution
- or be an obvious or natural 'by-product' of a charitable purpose and the activity through which effect is to be given to that purpose
- should clearly reflect the word '*purely*' as the qualifier in the statutory phrase. That word is taken, in its ordinary meaning, to mean 'wholly' or 'entirely'; thus the bar above which any given non-charitable object would cease to be merely an *ancillary or incidental* purpose has to be set at quite a low level

- must clearly be *ancillary*: that is to say, it should be something supplementary to, or at the margin of, the charitable purpose or purposes
- or must clearly be *incidental* to the charitable purposes: that is to say, it should be something occasional, arising only from time to time, perhaps as a consequence of giving effect to the main purposes and certainly subordinate to them.

30. A purpose other than fundraising and related activities would be unlikely to be *purely ancillary or incidental* if, reasonably, it appeared that to give it effect would require a use of resources beyond a merely token (in the sense of being a small proportion of the available whole) or marginal amount that had no material impact on, and led to no significant diversion from, giving effect to the main purposes. Anything more than that would point towards detraction from the principle that a charity's resources must be devoted to pursuit of its charitable purposes, thus bringing into question a positive outcome to the charity test.

31. It follows from the foregoing paragraphs that this exception is just that and would not, save in exceptional circumstances, admit as potentially meeting the charity test an entity whose substantive objects were 'mixed' between the charitable and the non-charitable. The Law requires, for the purpose of meeting the charity test, that all an entity's purposes are charitable save in the narrow circumstances where the exception may apply.

32. The Commissioner will look carefully at applicant entities' written constitutions and draft statements of charitable purposes to establish whether in her or his view there may potentially be any non-charitable objects and purposes, and consider each case on its merits as to whether those purposes fall within the scope of the *purely ancillary or incidental* exception, having regard to the principles indicated in this section of the guidance.

33. It is also important to note that the charity test is prescribed in the Law in such a way that the public benefit element of the test applies not only to an entity's charitable purposes but, equally, to any purposes that are admitted as purely ancillary or incidental to the former, notwithstanding that those will by definition not themselves be charitable.

Trading Activities

34. It is emphasised that the "*purely incidental or ancillary*" exception is about 'activity' only in the sense that the two concepts of 'purpose' and 'activity' have the potential to be viewed, in practice, through one lens. In particular, it is not about an applicant entity's trading activities. Those are, in principle, quite in order and of no particular account in respect of the charity test as long as it is quite clear that the purpose and aim of such activities is to generate resources for giving effect to the stated charitable purposes. A café attached to a museum would be a simple example of this,

unproblematic provided that the net returns generated by the café are appropriately devoted to the stated charitable purposes in a transparent way and that none of the particular rules relating to public benefit, described later in this Guidance Note, apply.

35. Where, however, trading is actually an object of the applicant entity or appears, in effect, to be its principal purpose or main activity the Commissioner will look very carefully at the particular circumstances, taking account of any broader considerations as to the nature of the trading. These might include whether any disbenefit to members of the public generally (that is to say, people other than those who may be direct beneficiaries of the trading activity) appears to arise as a result of the trading in question - say, because of potentially unfair competition – or whether there might in practice be more than incidental private benefit, in order to assess whether or not both elements of the charity test are properly met.

The Statutory Charitable Purposes

36. The sixteen charitable purposes set out in the Law, in some instances with certain restrictions or exemplification (reproduced below in italics), are as follows:

(a) **the prevention or relief of poverty**

(b) **the advancement of education**

(c) **the advancement of religion**
for the purposes of purpose (p), advancement of any philosophical belief (whether or not involving belief in a god) is analogous to this purpose

(d) **the advancement of health**
this includes prevention or relief of sickness, disease or human suffering

(e) **the saving of lives**

(f) **the advancement of citizenship or community development**
this includes (i) rural or urban regeneration, and (ii) the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of registered charities

(g) **the advancement of the arts, heritage, culture or science**

(h) **the advancement of public participation in sport**
in this purpose 'sport' means sport that involves physical skill and exertion

(i) **the provision of recreational facilities or the organisation of such activities, with the object of improving the conditions of life**

for the persons for whom the facilities or activities are primarily intended
this purpose applies only in relation to recreational facilities or activities that are (i) primarily intended for persons who have need of them by reason of their age, ill-health, disability, financial hardship or other disadvantage; or (ii), available to members of the public at large or to male or female members of the public at large

(j) **the advancement of human rights, conflict resolution or reconciliation**

(k) **the promotion of religious or racial harmony**

(l) **the promotion of equality and diversity**

(m) **the advancement of environmental protection or improvement**

(n) **the relief of those in need by reason of age, ill-health, disability, financial hardship or other disadvantage**
this includes relief given by the provision of accommodation or care

(o) **the advancement of animal welfare**

(p) **any other purpose that may reasonably be regarded as analogous to any of the purposes listed above.**

37. The Law gives the States the power, on the Commissioner's recommendation, to add new purposes to the above list but prohibits its amending or restricting any of the given sixteen purposes. The same goes for the prohibition concerning political parties, noted in the next paragraph. The Commissioner has no plans to make any recommendation to the States about any additional charitable purposes beyond the sixteen listed. More about purpose (p) is set out at paragraphs 53-57 below.

38. The Law states that the advancement of a political party or the promotion of a candidate for election to any office, in Jersey or elsewhere, is neither a charitable purpose nor a purpose ancillary or incidental to the same. This enshrines in Jersey law a long-established principle of English common law. It should, however, be noted that this limitation does not of itself extend to what might be termed 'political' activity in the sense, for example, of public policy campaigning, or for a change in the climate of opinion in a given sphere. Those kinds of activities should normally be perfectly all right, provided they are demonstrably in line with an entity's registered statements of charitable purposes and public benefit and do not embrace what might be regarded as a 'party' line and meet the second, public benefit, element of the charity test. More is said about intangible public benefit, which is what such activity would probably be, at paragraph 76 below.

39. Similarly, an entity that otherwise meets both parts of the charity test will nonetheless not meet it if its constitution expressly permits its activities to be directed or otherwise controlled by, or any of its governors to be, a Minister, a member of the States Assembly, or any equivalent of such a person in another country, where the person in question is acting in the capacity of that or such an appointment. The Law, however, permits the Minister, by Order, to disapply this rule in respect of any entity or description of entity.

40. An applicant entity may not actually have such a person, acting in that capacity, as one of its governors but will still be caught by this rule if its constitution expressly permits such a governorship. It is all right for a governor to be a States member or Minister provided that the person has been appointed in a personal capacity and there is no actual requirement in the given entity's constitution for such a person, as an office-holder, to be a governor. For the avoidance of doubt, the Commissioner's interpretation of this, unless the circumstances or written constitution clearly dictate otherwise (which they may), is that it does not apply where a governor is either a constable of a parish, a Crown Officer, the Dean or the Lieutenant Governor, by virtue of her or his holding one of those offices, notwithstanding that such office-holders are *ex-officio* members of the States Assembly. By the same token, though, the rule would apply if, say, a deputy of, or for a constituency within, a parish was a governor of a charity based in the said parish by virtue simply of her or his being such a deputy. The same goes for any Minister or Assistant Minister.

41. As for the equivalent of such a person [equivalent, that is, to a States member or Minister] in a country other than Jersey, the Commissioner's approach in respect of the four countries comprising the United Kingdom will be that the restriction applies to any person elected to public office in government or principal local authorities, or taking a party whip in the House of Lords, provided the governorship in question involves her or his acting by virtue of the given office or seat. In the case of other countries, the question will be determined on the facts of the case, following the same general approach.

42. As for an applicant entity's being under the *direction* [of] *or otherwise controlled* by a Minister or any member of the States, there is little uncertainty in the ordinary meaning of the words and determination in any instance will take account of what is said in an entity's constitution. A power of appointment or removal of any governor by a Minister, for example, will normally be taken to mean 'control'. The same will apply if there is, say, a requirement for ministerial approval of anything regarding an entity's affairs generally, or ditto a power of veto. Where, however, any member of the States, acting in that capacity, is the 'patron' of an applicant entity, the issue will turn on whether any relevant powers are attached to such a position, presuming that such a position is not actually a governorship. If no such powers do attach, then, other things being equal, there is no problem.

43. The Commissioner is unlikely to have any cause to apply the rule described in the previous paragraph where a Minister or any other States member seeks, pursuant to the responsibilities of her or his office, to establish a trust for charitable purposes, or some other kind of entity, including a statutory one, with the intention or prospect that it may then or in due course seek to become a registered charity. This would be so even if there was a necessary 'start-up' power vested in the minister or member. Any organisation has to be founded and that ought not, for these purposes, to exclude the Ministry or Legislature. The important point is that there should be no ongoing direction or control by the same enshrined in the newly-established entity's constitution. There would, in principle, not be any such direction or control where the Minister or other office-holder had a continuing responsibility, as a matter of public policy, for making taxpayers' or other funds available to the entity for it give effect to its charitable purposes, as long as the Minister or other office-holder had neither a say, nor the power to have a say, in the actual application of those funds, once committed to the entity. The actual wording of written constitutions may be of importance in this regard.

44. Some applicant entities may be of a type or structure that involves, or could involve, delivery of public or other services under a contract or a 'service level agreement', or suchlike, with the Jersey Ministers, a government department or other public authority, such delivery playing to the strengths of their charitable purposes and public benefit provision. It would be surprising if there were never any elements of direction or control in favour of the client side in such contracts or agreements. Such arrangements, however, should not normally fall within the scope of the *directed or otherwise controlled* rule because they would relate to the contract rather than the governance of the entity. This is always provided that that was indeed the nature of the arrangement.

45. The Commissioner, however, will look very carefully where such a contract or contracts comprises a substantial proportion of the entity's activity, such that its public benefit provision could be said, in effect, to be provided, or principally provided, on behalf of taxpayers. It is recognised, and not problematic, that applicant entities, or charities once registered, may deliver taxpayer-funded services but the question of degree will need to be considered so that there is assurance for the public that any such contracts properly fit with the entity's charitable purposes and do not, in practice, dominate its work to the extent that all those purposes cannot properly be given effect or so that a minister is, in practice, perhaps exercising control over a significant part of the entity's business, or capable of being seen to be so.

46. Where the work of applicant entities is able to be seen as substituting for taxpayer-funded public services, or, so to speak, taking pressure off the public purse, that is not of itself a charitable purpose although the work in question may well contribute to, and be intertwined with, the delivery of an entity's objects and reflected accordingly in its registered statement of charitable purposes and public benefit. Each such case will

be looked at by the Commissioner on its merits, taking account of all aspects of the guidance.

Aspects of the Application of the Statutory Charitable Purposes

47. This section of the Guidance Note is not aimed at addressing all the possible objects and activities that would or might fit with each listed statutory charitable purpose but rather with looking at certain factors and issues, mainly of a general nature, that may arise in the determination of the purposes element of the charity test.

48. For most applicant entities, stating their charitable purpose or purposes should not be difficult, provided that their constitutions set out their objects in a manner that can be seen to fall within the scope of the statutory list of charitable purposes. It is a wide list, drawn in a broad manner and, provided the ordinary meanings of words are followed, the import and scope of each stated purpose should be reasonably straightforward to discern. Where there are words or phrases whose ordinary meaning may perhaps be open to a greater deal of interpretation and scope than some others - say, just as an example, purpose (f), *the advancement of citizenship or community development* - the Commissioner's approach will be to take a 'common sense' approach to interpretation, starting with the words as they stand and taking into account as necessary informed or expert opinion, or examples from case law, as to the scope of the concepts. The general approach will, normally, tend towards breadth of interpretation rather than narrowness. Elucidation of objects may also, as already noted, be aided by consideration of the accompanying draft statement of public benefit.

49. In some cases, however, concepts or limitations are stated in the Law with a degree of specificity which must be respected. Thus, for purpose (h), *the advancement of public participation in sport*, there are two fairly specific limiting factors: sport not involving *physical skill and exertion* is not admissible and there has to be advancement of *public participation*. While there may be room for some debate about whether a particular activity is or is not a sport and whether, if it is, it involves physical exertion (and the Commissioner will give careful consideration to the matter if it arises in an application, taking advice as appropriate) it would be impermissible because of the nature of the wording in the Law for the charity test to bring into scope by analogy any sport that on the balance of evidence did not truly involve physical skill and exertion, or an activity that might involve the latter but could not properly be regarded as a 'sport'. And the requirement to advance *public participation* in sport will need to be considered in each case on its merits.

50. The same, for instance, goes for purpose (i), *the provision of recreational facilities or the organisation of recreational activities*....., if the relevant provision does not comply with the quite extensive limitations in its explanatory words. Where there may be doubt about whether a particular object or activity falls within the scope of the statutory purposes, the Commissioner will enter into a dialogue with the applicant

entity, drawing on relevant evidence or case law as necessary and approaching the matter from an objective perspective.

Philanthropy

51. The term 'philanthropy' is a word which is used not only generically to encompass a range of altruistic activities that may or may not be charitable purposes as defined in the Law (or not exclusively one or the other), but also sometimes as an alternative for 'charity' itself. It is recognised that it is an important word, often used, for example, as a descriptor in certain quarters of the financial services industry or, indeed, as an aspect of promoting Jersey's finance industry overseas.

52. 'Philanthropy' means, generally, benevolence towards mankind in the round and concern for its general welfare. An applicant entity may have objects embedding such concepts but which are perhaps not easily linked to the statutory charitable purposes. A case in point would be an object relating to activities 'beneficial to the community', where governors have a discretion to direct funding to a range of possible activities or programmes that they judge meet that broad object[4]. In such an instance, the Commissioner's approach, for the purpose of the registered statements required for the charity test, will be to invite an applicant entity to prepare a forward business plan, covering, say, a three years period, specifying charitable purposes to be addressed in that period in relation to which the charity test may be assessed. The plan would then be refreshed as and when, with the assent of the Commissioner, whose duty would be to be satisfied, for the ongoing purposes of the charity test, that all the objects of the entity, as defined and implemented from time to time, were duly admissible as charitable purposes.

53. A philanthropic purpose, however, may not be a charitable purpose at all, even if 'beneficial to the whole community' in a general sense. An example might be gifts or other kinds of support offered or given to a particular group of persons, where individual need was not shown. That would no doubt be good, and well-motivated (and thus almost certainly philanthropic), but it might not be charitable. Its potential scope might simply be too wide, too uncertain or too indiscernible for the purpose of meeting the charity test. It would depend on the facts of the case. The Commissioner will look with particular care at any application in which, one way or another, the notion of 'philanthropy' emerges or is to the fore, in order to ensure that there is no uncertainty or doubt as to all the purposes being charitable save for any purely ancillary or incidental. This may be especially important where intended public benefit is to be

[4] 'beneficial to the whole community' is the phrase used in Art.115 of the Income Tax (Jersey) Law 1961 to encapsulate the fourth head of charity under English common law (see the footnote to paragraph 10) and on the basis of which charitable tax exemption has historically been available. Thus, not surprisingly, it has evidently been a quite commonly used term in the objects of Jersey charities over the years. Its breadth, however, may not sit readily with the need, under the charity test, to link objects to the specific charitable purposes, not least because the phrase can clearly or possibly encompass purposes (or activities) that might not be charitable as defined by the Law even if philanthropic

provided elsewhere than in Jersey. It is also a sphere where the Commissioner may wish particularly to be informed as appropriate by English case law.

Analogous Charitable Purposes

54. Purpose (p) is different from the others. It covers *any other purpose that may reasonably be regarded as analogous to any of [the preceding fifteen]*. The ordinary meaning of 'analogous' is taken to mean 'corresponding', 'resembling' or 'parallel in certain respects' as between things otherwise different. It is a 'broad' word but its meaning in the context of the charity test is not without limit. It has, for instance, already been noted that because the definition of 'sport' in purpose (h), *the advancement of public participation in sport*, limits the meaning of the term to sport which involves physical skill and exertion, it would not be analogous to that to bring non-physical sport or games within the scope of purpose (h) even if the latter might commonly be regarded as 'sport' by people involved with them. Some other statutory purposes also have explanatory language that may serve similarly to limit their scope in relation to purpose (p).

55. Purpose (f), the *advancement of citizenship or community development*, is, because of the relatively abstract nature of the concepts, perhaps the statutory purpose likely to be most amenable to analogy. It is already exemplified in the Law to include rural or urban regeneration, and the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness and efficiency of registered charities. The Commissioner's view is that there are two other particular purposes that can properly be regarded as analogous to it.

56. The first of these, by analogy with *[the advancement of] the efficiency and effectiveness of registered charities*, is a purpose of

"providing financial or other kinds of support in advancement of any of the statutory charitable purposes, including, but not confined to, providing such support to other registered charities"

An example of this might be the activities of a grant-giving entity, or a 'friends' body that supported an institution such as a school or care home. Such an entity may support other registered charities, or organisations that, while not registered charities themselves, nevertheless carry out certain activities that can reasonably be regarded as charitable purposes so that the outcome of the support is the provision of public benefit to a reasonable degree. Where, however, such support is directed at other than registered charities, the Commissioner will require good evidence to show that it is properly founded in both elements of the charity test.

57. The second of the two, by analogy with the *advancement of citizenship* element of purpose (f), is a purpose of

"promoting the effectiveness, welfare and standing in the community of Jersey of the Armed Forces of the Crown, including the Army Reserve, cadet forces and veterans"

There is a similar purpose in the English Act, but not in the Scottish. Although this could be said to be covered by the *advancement of citizenship*, the Commissioner's view is that it is desirable to put the position of Armed Forces charities beyond doubt. The analogous purpose will be viewed in a broad manner as one element of the *advancement of citizenship*.

58. Other potential analogous purposes will no doubt arise. The Commissioner will consider all such cases carefully, having regard to this guidance and taking account of the test of reasonable analogy to one of the fifteen specific purposes. Any proposal of substance for a further analogous purpose that the Commissioner is minded to accept, or where he or she considers that such a proposal could give rise to controversy or possible disbenefit, will be subject to consultation.

Consideration of Draft Statements of Charitable Purpose

59. The Commissioner's approach in considering applicant entities' draft statements of charitable purposes will be to let the words of those statements, in relation to the statutory purposes, speak for themselves, following ordinary meanings. There will be dialogue with applicant entities where questions arise in the Commissioner's mind or where he or she considers there may, potentially, be problems. There is also scope for dialogue before applications for registration are made, and indeed the Commissioner will welcome this. Dialogue will be instituted in good faith with the aim of seeking to reach resolution on the relationship of objects to statutory charitable purposes, and on how, therefore the related public benefit statement should be composed. A period of development on the part of an applicant entity may be requisite or desirable if its basic case is satisfactory but some weaknesses or shortcomings in relation to the charity test are nonetheless apparent. As noted already, in all such cases the Commissioner will look at the overriding position, including the draft statement of intended public benefit, but the importance of clear linkage between an entity's objects and the statutory charitable purposes is once again emphasised.

60. The Commissioner will, as appropriate, draw for information and guidance in such dialogue, and to inform decision-making, on the English common law of charity. The same goes for the statutory guidance and information materials, to the extent relevant, produced by the Charity Commission in England and the Scottish Charity Regulator.[5]

The Public Benefit Element of the Charity Test

[5] Key reference materials will be available to view by appointment at the Commissioner's office in St Helier: notably, *Tudor on Charities*, 10th edition, 2015 (Sweet and Maxwell); Hubert Picarda QC, *The Law and Practice Relating to Charities*, 4th edition, 2010, plus 1st supplement, 2014 (Bloomsbury Professional); Alan Eccles and Gillian Donald, *Charity Law in Scotland,* 2011 (Bloomsbury); and Jonathan Garton, *Public Benefit in Charity Law*, 2013 (Oxford)

Introduction

61. The first element of the charity test is met once it has been determined that an entity's purposes, as derived from its written constitution, are charitable purposes (save for any purely incidental or ancillary purposes). The second element then needs to be addressed. This is that, in giving effect to its charitable purposes, an entity must provide public benefit in Jersey or elsewhere to a reasonable degree. An applicant entity must show how it intends to do that, through the submission of a draft statement of intended public benefit that the Commissioner must approve.

62. There is no definition of 'public benefit' in the Law although there is extensive English case law on the subject that may provide useful assistance in particular instances. A view has to be taken by the Commissioner as to the general meaning of the concept in the context of the charity test, and whether the public benefit to be provided by an applicant entity in relation to its charitable purposes meets the test taking account of the various rules and considerations set out in this part of the guidance. The Commissioner will accordingly review each entity's draft statement of intended public benefit on its merits, having regard to this guidance and the various rules on and relevant to public benefit set out in the Law itself, and informed as necessary or appropriate by relevant case law. This may include reference back to the statement of charitable purposes since the two statements required for the charity test need to be in harmony one with the other.

63. For most applications the Commissioner's expectation is that this should be straightforward but there may be some more complex cases where further information and evidence will need to be sought and where a very careful assessment will be needed to ensure lawful compliance. More complex cases may well include those which involve the provision of public benefit elsewhere than in Jersey.

What the Law prescribes on Public Benefit

64. Notwithstanding the lack of an actual definition of public benefit, the Law says that the charity test is met only if an entity, in giving effect to all its purposes, provides public benefit in Jersey or elsewhere to a reasonable degree. This therefore covers not only an entity's charitable purposes but also any other purposes it may have that are *purely ancillary or incidental* to the charitable purposes (see paragraph 33 above).

65. The Law prescribes six particular requirements regarding the determination of the public benefit element of the charity test. They are as follows:

(i) it must not be presumed that any particular charitable purpose is for the public benefit

(ii) **if benefit is, or is likely to be, provided to a section of the public only, regard must be had to whether any condition on obtaining that benefit (including any charge or fee) is unduly restrictive**

(iii) **one particular natural person, or a group of identified natural persons, must not be treated as a section of the public. An entity that benefits only such a person or persons may not be treated as providing public benefit**

(iv) **any private benefit gained by members of an entity or by any other persons (other than as members of the public) from the exercise of its functions, must be compared with the benefit gained or likely to be gained by the public from that same exercise of functions**

(v) **any disbenefit incurred or likely to be incurred by the public from a given exercise of functions must be compared with the benefit gained or likely to be gained by the public from that same exercise of functions**; and

(vi) **public benefit must be provided, in Jersey or elsewhere, to a reasonable degree.**

66. The first five of these requirements are not novel concepts, being founded, variously, not only in both the Scottish and English Acts, but also in the common law. The sixth, the *to a reasonable degree* requirement, is novel in charity law, and is specific to Jersey. The Commissioner must have regard to requirements (ii), (iv) and (v) above when determining the public benefit element of the charity test; so must the Tribunal and the Court if one of those is making the determination. Requirements (i), (iii) and (vi) are injunctive but their interpretation is subject to having regard to this guidance.

What is Public Benefit?

67. The Commissioner's starting-point is the ordinary meaning of the words. There is an abstract noun *benefit* governed by *public* used in this instance as an adjective. Benefit is taken to mean something that is good, or an advantage that is given. A public benefit is thus a benefit that, in a reasonable, unrestricted and non-discriminatory way, is available to people at large and from which they can benefit if that is what they choose or need. Benefit may be provided or available free of charge or it may depend upon a charge, ranging, for example, from admission charges to, say, a theatre, museum or other facility, and membership or subscription fees to possibly much more significant charges for services provided. Where benefit is provided only to a section of the public, that is to say, access to it is not universally available, regard must be had by the Commissioner as to whether any condition on obtaining it is unduly restrictive.

68. Public benefit, in general, should not be intrinsically difficult to discern and describe. But, for the purposes of the charity test, it must be demonstrable, available to a sufficient number of people generally and the outcome of giving effect to charitable purposes. Public benefit by definition has a wholly public character. Benefit available only to an individual person or a limited group of persons linked, for example, by name, family or contract is not public benefit. Benefit, however, is nonetheless public benefit where the cohort of persons able or likely to benefit is linked by a common attribute, such as a particular medical condition, to whose cure, alleviation or betterment a charitable purpose may be directed, provided that the cohort is not self-selective or otherwise restricted in an untoward way. The point is that for benefit to be public benefit it must, in principle, be available to any person who seeks it. So, in the example above, the cure for the medical condition must be available to anyone who acquires such a condition and not limited to, say, a group of persons who had the condition at only a given moment in time or who were linked by a particular connection such as family. Nor must access to it be limited by price or some other constraint in an unduly restrictive way.

69. Another way of describing public benefit is 'benefit to the community', in the sense that the widely-recognised concept of 'community' (or, sometimes, 'local community') refers to the whole of the people in the country or a reasonable part of it but not to specific individuals, groups of individuals, or very small geographical (but probably unnamed) groups such as, for example, the residents of one particular road. Benefit is public benefit if it is available to the whole community, in the sense that there should be no discrimination as to anyone's access to the benefit even though many individuals may well choose not to access it or have no want or need of it. 'Availability', moreover, does not necessarily imply actual provision to the whole community, for that would be impracticable if not impossible. But those who may benefit must be sufficiently numerous, and identified in such manner, as sufficiently to constitute a 'non-private' section of the public, having regard to the resources and operational scale of a particular entity and the scope of its charitable purposes. In general the same principles apply by analogy in the case of an animal welfare charity.

70. The totality of inhabitants of a parish in Jersey, for instance, would certainly be likely to constitute a 'sufficient section' of the public while those of the one road, or maybe just a few roads, might possibly not. The decision would depend on the precise facts of the case. Continuing the medical example above, where the object of an entity was directed at assisting persons afflicted with a particular disease that group of persons might comprise a very small number of persons; provided, however, it was not one person or a group of named, linked persons, it would certainly be a sufficient section of the public because of the nature of the object in question.

71. A further example may be where intended public benefit is aimed at a relatively narrow group of private individuals such as, say, 'doctors', or 'bicyclists' (those are just illustrative examples) even if the group is relatively numerous. It may be harder to argue in such cases that a section of the public is 'sufficient' where the common thread is profession or shared pastime and where access to the group is potentially, or in

practice, rather limited. It would depend on how the group or class of persons to benefit was comprised and how open it was in practice to any member of the public who needed or wished to access the benefit on offer. In such an instance the Commissioner may wish to request evidence about access for newcomers to the group or class.

72. 'Public' in the context of *public benefit* means pertaining to people and citizens generally, certainly not necessarily all of them but a sufficiently numerous group of them taking into account the nature of the purpose to which the benefit is designed to give effect. Something public is available or open to people at large, or to the community as a whole, such as a park or a museum, or a service that anyone is free to seek to access, and who is not, save for some strong reason (such as, say, gender (in certain circumstances) or an unspent conviction), deemed to be ineligible in any way. Something, however, is equally 'public' where access, albeit not limited, is nonetheless relevant only to a small or relatively small cohort of persons whose particular circumstances relate for the time being to the entity's purpose in question. Since Jersey is a small country, the Commissioner will aim to interpret the appropriate size and scale of a class or group of beneficiaries with due flexibility, subject to the facts of the case.

73. Where, however, access to a potential benefit depends upon, say, a specific invitation, status or selection process that has the capacity to be restrictive, in the sense of not generally or necessarily being open to all, the benefit may tend towards being private not public. A public park is 'public', but the facilities of a club may well be 'private', perhaps through the club's having a membership restricted in some way. While membership of a club may properly be limited to the class of people wishing to enjoy whatever the public benefit is that the club offers, and while membership of it may also be require a charge or fee, that would not normally undermine the essential public character of the club as long as it is open to all who wish to join, and any fee or charge is reasonable in relation to the cost of running the club and thus enabling it to meet its registered public benefit statement.

74. Conversely, the benefit offered by such a club may be unlikely to be 'public' if the club's membership arrangements require or permit certain people to be excluded regardless of their own interest in accessing the benefit provided by the facilities in question. This could arise if, say, the membership rules are unwritten or otherwise have the potential to be capricious so that someone could be unreasonably excluded from membership. In such circumstances it may well be that the public benefit element of the charity test cannot be met. It should, moreover, be noted that discrimination against potential members (or anyone) on grounds of colour or, as appropriate, any other protected characteristic, will never meet the charity test, and may indeed amount to unlawful conduct. (The statutory rules on discrimination are addressed in Guidance Note 1.)

75. Public benefit may be something tangible, such as, for example, payments to relieve financial hardship, the provision of food or shelter to avert want, the relief of physical or mental need through care services, treatment for a particular disease or the making available of certain types of recreational facility to combat a disadvantage. It may be something intangible, albeit fructive, such as the provision of education, religious worship or the promotion of citizenship or diversity. It may be tangible only in the longer-term; certain environmental improvements, for example, could well fall into that category. Or it may be indirectly tangible to people; animal welfare is a possible example of that. Benefit may also be direct, through specific actions such as, say, the giving of alms; or it may be indirect, where, say, improvement of the health and wellbeing of certain people – carers, for example – has the capacity to have a broader, positive, effect in the community as well as benefiting those people as one section of the public. A deal of public benefit will, in practice, probably comprise a range of outcomes of these kinds.

76. An intangible benefit, however, must nonetheless be capable of being reasonably observed or comprehended, even if essentially based upon belief or faith, so that pursuant to whatever description of it is given in the draft public benefit statement it can actually be assessed in a reasonable way for the purposes of the charity test. In respect of intended public benefit arising from broadly-stated objects like, for instance, 'the education of the public', 'raising awareness' of particular issues, the 'power of prayer' or, say, the promotion of certain virtues, beliefs or campaign objectives, an applicant entity's draft public benefit statement should indicate realistic and credible intended outcomes, backed as necessary by evidence, to enable the charity test to be determined. Broadly speaking, the greater the intangibility, of whatever kind, the more carefully and rigorously the intended public benefit outcomes will need to be both described and assessed.

Private Benefit

77. Private benefit is not ruled out by the Law. Its permissibility is, equally, well recognised in English common law, but with a general limitation that it must only ever be incidental since by definition it cannot be part of the public benefit necessary in respect of charitable purposes. Many instances of public benefit will result in private benefit and in fact much provision of public benefit will depend on private benefit as a necessary consequence of whatever activity is in question. A good example is benefits to an entity's staff, on which the delivery of its charitable purposes depends. The same would in principle apply where, say, an entity was managed by a remunerated professional trustee, or indeed where a constitution permitted payments to governors. Such payments ought to be uncontroversial if they are clearly connected with the ordinary running and good management of an entity. In that sense they properly remain 'incidental'. Normally, exactly the same would apply to payments in pursuance of fundraising, even though they might be expected to benefit private firms or individuals. All such payments, and indeed all private benefit, need to be looked at in the context of the whole benefit the entity intends to provide. It would be a question

of degree for the Commissioner to consider in any individual case whether the extent of private benefit reached a point where it clearly became more than 'incidental'. In such circumstances the charity test might not be able to be met but the circumstances themselves would depend upon the facts of each case.

78. Another example would be where the provision of benefit was focussed on the members of an entity as a relatively small or closed group (including, if relevant, family members), or indeed its governors, rather than the public. Subject to the facts, that might normally be unlikely to be merely 'incidental' private benefit. (This does not, however, apply to 'open access' membership organisations such as Guides or Scouts.) Where an applicant entity's constitution actually permitted the generation of private benefit, since that would be unlikely to be purely an ancillary or incidental purpose it could thus only be a non-charitable purpose, incompatible with the charity test. Attention is also drawn in this regard to the second sentence of paragraph 63 and the section at paragraphs 93-96 below.

The 'No Presumption of Public Benefit' Requirement

79. In determining the question of public benefit for the purposes of the charity test the Commissioner must not presume that any particular charitable purpose is for the public benefit. The Law imposes the same duty on the Charity Tribunal and the court. In this context, the Commissioner takes the ordinary meaning of 'presume' to be the supposing of something but without proof, or the taking of something for granted without evidence. In other words, the public benefit to be provided by an applicant entity must be demonstrated to the Commissioner's satisfaction. For charity test purposes, this will, in essence, be by means of the draft public benefit statement which must be submitted by all applicant entities.

The 'Not Unduly Restrictive' Requirement

80. Where benefit is, or is likely to be, provided only to a section of the public, in determining the public benefit element of the charity test the Commissioner must have regard to whether any condition on obtaining that benefit (including any charge or fee) is *unduly restrictive*. The Tribunal and the court must have the same regard if it falls to either of them to make the determination on appeal from a Commissioner's decision.

81. A restriction of any kind or scale is by definition restrictive to a degree. This rule, however, is about the extent of any restrictiveness in the provision of public benefit and whether, if that is the case, it goes beyond what is reasonable in the circumstances to a point where it becomes undue.

82. This requirement applies only where public benefit is to be provided to *a section of the public only*; that is to say, where the class or group of persons able to be beneficiaries is limited by reference to factors such as, say, membership rules or entry

criteria, a geographical limitation or ability to pay. Where potential beneficiaries are clearly the public at large, with no restriction on access to a benefit by price (over and above anything marginal like an entry fee to a museum) or anything else, the requirement is of no account.

83. '*Unduly*' is taken to mean either 'unjustifiably' or 'more than is right or reasonable'. It is quite a strong descriptor, which therefore serves to impose quite a high bar as to whether any condition imposed in giving effect to charitable purposes is, in fact, *unduly restrictive* as opposed to being, say, only 'slightly' restrictive or just 'restrictive' and in that vein either justified by the facts of the matter or merely inconsequential.

84. Where a restriction goes beyond the merely inconsequential it will need to be weighed as part of of the public benefit test. Relevant factors in this will include the costs of providing the benefit in question, its quality, its value and importance to, and in, the community (having regard to those costs), the reasonable availability of broadly equivalent alternatives, and the nature of the section of the public to which the benefit is, in practice, available.

85. Certain types of restriction are probably more likely than others to be capable of being *unduly restrictive* and not just 'restrictive'. They may be operational, such as fees and charges that have the effect of excluding people from access notwithstanding eligibility in all other respects. They may be restrictions due to religious faith or a requirement for special prowess of one kind or another. Or they may be restrictions on the number of people able to benefit from a given service that is unrelated to how many could benefit if there was open access to the service. Of such examples, fees and charges are probably the most capable of being considered undue, if they serve to exclude people so that the section of the public to which benefit is available or provided is relatively small and limited in practice to those who can afford to pay. Whether or not such restrictions are *unduly restrictive* will be a matter of judgement in each case, taking account of the factors outlined in this section of the guidance.

86. The Commissioner's general view is that restrictions will normally not be unduly restrictive if they are reasonable in all the circumstances, are not unlawful and do not appear to generate disbenefit to anyone in the sense that, restricted from accessing benefit from one entity, she was therefore unable to access similar or equivalent benefit elsewhere.

87. A restriction, however, arising in a capricious or irrelevant manner, such as opaque membership rules, charges set in an arbitrary manner or barriers to access or eligibility that do not bear any good relation to the benefit to be provided will normally be likely to be unduly restrictive, on grounds of not being capable of reasonable justification. The same goes, obviously, where a restriction is based upon unlawful discrimination.

88. In considering a case involving possible undue restriction, the Commissioner will take into account the scale and range of public benefit generally that the applicant entity intends to provide in relation to all its objects, its available resources and scale

of operation. Also important in this regard will be the intent and ambition of the entity to work, over a defined period of time, towards reducing the scale of any potentially undue restrictions, for example through programmes to widen access to those for whom the benefit would be of value but who would otherwise effectively be barred from it for reasons of cost. It is important to note that this applies (as does the whole charity test) whether the public benefit in question is to be provided in Jersey or elsewhere.

89. While any fee or charge for a service is capable of restricting the availability of that service to those who might not be able to afford it, in practice a fee or charge set at a relatively low level in relation to the service in question and the price level in the country generally would hardly have that effect. An annual membership fee for, say, a heritage or cultural organisation, or a club, that was of a fairly modest order – say, purely for illustration (and subject to the facts of the case), up to no more than the middle hundreds of pounds on an annual basis – and which necessarily reflected or contributed towards the running costs or overheads of the service to be provided, would be unlikely to be unduly restrictive. The Commissioner will, however, look particularly carefully in cases where fees are set, or made available, at a higher or lower level for some persons but not others, perhaps in return for particular or extra benefits that are unavailable to the public generally.

90. At the other end of the spectrum of such illustrations may be, for example, an applicant entity where fees or charges are of an altogether greater order: say, of a number of thousands of pounds annually. Other things being equal, fees or charges at such a level are more open to being described as 'unduly restrictive' in that, in relation to an indicative measure such as household income distribution, they may be seen as having the effect of excluding quite a wide range of people from access to the intended benefit if they wished to seek it because they could not afford to do so. In other words, the public benefit on offer could in practice end up being confined to a relatively narrow class of persons able to afford the fees. It is recognised, though, that the matter is not straightforward, not least since 'affordability' may well depend on people's individual spending preferences rather than just on income level; and any assessment of a restriction will have to keep that in mind.

91. The Commissioner, however, in determining the charity test in such a case, will normally begin with a presumption that high fees or charges, broadly defined for this purpose as a sum measured in thousands, not hundreds, of pounds on an annual basis, are at least capable of being unduly restrictive.

92. Apart from the other considerations outlined in this section, this presumption is open to possible mitigation by reference to an entity's wider public benefit provision, provided that it flows appropriately from the registered charitable purposes. This may include (non-exhaustively):

- other public benefit intended to be provided in giving effect to charitable purposes (including the purpose to which the potentially undue restriction applies), such as providing support to other, less-favoured, organisations in its sphere of expertise, making its facilities available for community use when not in sole use, or using its experience, expertise and resources (including land, buildings and intellectual capital) for new ventures in keeping with its charitable purposes
- clear commitment to progress and improvement in respect of the above
- in the case of a school, the extent of arrangements for widening access through, for instance, bursaries awarded on merit for those whose parents would otherwise not be able to meet the cost of school fees; and the ambition demonstrated regarding the same
- in the case of other types of organisation, similar arrangements for widening access to the service provided taking account of ability to pay; and
- support provided towards the entity's registered charitable purposes by other entities, which may themselves be or become registered charities, such as *alumni* or 'friends' associations; or similar arrangements that are established within the confine of the principal entity.

The 'Natural Persons' Requirement

93. Public benefit does not arise where an entity benefits, or intends to benefit, only a natural person or a group of identified natural persons. The Commissioner may not regard such a person or group as a *section of the public*. Accordingly, he or she may not treat the entity providing benefit to such a group as providing public benefit. The point underpinning this requirement in the Law, which derives from the common law, is that since the essence of charity is its necessarily public character, adherence to that principle is broken if giving effect to charitable purposes is focussed on a single individual or identified group of individuals. It does not matter how worthy such a cause may be; it may well be philanthropic but will not be charitable. Such a class of persons, linked, say, by blood or by contract (as with a group of employees of a single firm) is a private not a public class of persons. Another way of putting this is that a registered charity must have purposes not individual persons as its objects, although it is natural persons in general, albeit unnamed, who will benefit from its giving effect to its charitable purposes.

The 'Private Benefit *versus* Public Benefit' Requirement

94. In determining the question of public benefit the Commissioner must have regard to how any private benefit gained or likely to be gained by the members of an entity, or gained by anyone else in relation to the same entity who, for that particular purpose, is not a member of the public, compares with the benefit gained or likely to be gained by the public in relation to the same exercise of functions. The nature of private benefit is addressed at paragraphs 77-78 above.

95. This requirement covers anyone who is associated with an applicant entity other than as a member of the public, that is to say, persons such as governors, staff, volunteers, members, advisers, administrators and contractors; and, according to degree (that must be judged on a case by case basis), their families, relations and friends. All such persons are potentially in a position to obtain private benefit from the entity with which they are associated. That might be pecuniary, from remuneration (including pensions), payment in kind, or expenses; or, say, contract arrangements not at arm's length or special access to benefits.

96. Such private benefit may in many cases be inconsequential or simply a necessary consequence of managing an entity well. In that case, the comparison which the Commissioner is required to make between that and the public benefit the entity provides will normally be straightforward, and the relationship between them unproblematic. This includes situations where, for example, there might be a temporary 'spike' in private benefit for, say, particular and short-lived reasons of management; what matters is that, taking an overall view, any private benefit remains incidental at the most.

97. It will be more difficult for the Commissioner to be satisfied that this requirement has been met where, for instance:

- payments, including in kind and expenses, whether to governors, staff, administrators or volunteers, are or appear to be of such a scale in relation to the total resources available to the entity that its ability to give effect to its charitable purposes through provision of public benefit is or could be compromised or inhibited. At an extreme, there could be a situation where an applicant entity is, in effect or seemingly, run as much if not more for the benefit of persons employed by it, or its governors, than to provide public benefit;

- an applicant entity has a closed or opaque membership structure, not really open to all, and it appears that a significant number of its beneficiaries are in fact members or in a nexus along with members. (This does not include, though, young people's membership organisations which, importantly, are open to all and where the essential purpose of membership is to receive benefit.)

- or where there are unusual arrangements for the intended provision of public benefit, for example through the use of separate or subsidiary companies

These are examples of situations where there would or could be an imbalance between public benefit and private benefit, in which the latter might have moved upwards in scale, relative to resources, beyond a reasonable 'incidental' level. In any such cases the Commissioner will seek to probe matters in depth in order to establish whether or

not there is indeed, or could be, an inappropriate imbalance. There is no one line to be drawn; each case will have to be considered on its facts but private benefit must always be no more than incidental.

The 'Benefit *versus* Disbenefit' Requirement

98. The Commissioner must have regard to whether any *disbenefit* is incurred, or is likely to be incurred, by the public as a consequence of an entity's exercising its functions, and how that compares with the public benefit gained or likely to be gained from the same exercise of functions. The requirement is about disbenefit to the public generally, not to individuals.

99. *Disbenefit* is not an entirely straightforward notion and in this particular context may take a number of forms. At one level it is simply the opposite of 'benefit', in which case it may mean something that is not good or not advantageous. But it can also has a more nuanced meaning: 'disadvantage' or 'loss' (including loss of a benefit), or even mere 'inconvenience'. This relative breadth of meaning will be taken into account by the Commissioner in having regard to this particular requirement of the public benefit test.

100. The balancing implied by this requirement is not 'weight for weight'. It certainly does not mean that, for a given quantity of public benefit provision, half can lead to *disbenefit* as long as the other half does not. Rather, it requires a qualitative approach. It is essentially about assessing any negative effects on the public of the intended activities of an applicant entity and whether that has any impact on the charity test. A particular element of public benefit activity may be beneficial to certain people (or seen by them as beneficial) who are able to take advantage of it accordingly; but, looking at an overall picture, would the assessment of that public benefit remain unchanged if a side or consequential effect was harm or loss, either to other people, or indeed to the people in receipt of the benefit themselves? The Commissioner has to have regard to whatever the answer to that question may be in any given case (where the issue arises) in determining the public benefit element of the charity test.

101. One example might be an environmental improvement project which, although beneficial to people generally from an overall perspective, could give rise to disbenefit to people living in the vicinity. That example could also be turned round the other way: a community development proposal, for instance, perhaps involving new infrastructure, could be seen as having an adverse effect on the environment although it would be beneficial to local residents. Another example might be where the question arose that the aims and objectives of an applicant entity could in a general sense give rise to harm in or to a particular section or cohort of the community.

102. In weighing any potential public disbenefit against public benefit along the lines indicated above, the Commissioner will generally not take into account views, from any party, that are essentially subjective as to alleged potential harm, loss or

inconvenience arising from any particular intended activity. Disagreement by some about an entity's ethos, policy or activities, or even its general place in the polity, may be strongly felt but may be some way, or far, from a considered general view that the activities in question have a negative impact on the public generally, in a way that outweighs the benefit to be gained. Some, for example, may have strongly-held views that certain ways of distributing overseas aid are of disbenefit not benefit to recipients in general (or non-recipients), or that a certain type of religious observance may be fundamentally wrong. Some may argue that a particular environmental protection approach is unlikely to achieve the results claimed for it. Some may express a strong view against the principle of fee-charging schools, or take a certain political view of a particular activity or a moral view of, say, a sorority or some other association. Such views will normally be treated as subjective.

103. Objective evidence, on the other hand, will need to be carefully assessed, having regard to the facts and scale of the case. This may include expert evidence. If by such means, and in a rigorous manner, potential negative effects of an applicant entity's intended public benefit provision can reasonably be adduced, the Commissioner will necessarily pay careful regard to that while also inviting an applicant entity the opportunity to respond. One example might be where a health benefit is claimed for a certain therapy but where there is also genuine uncertainty among others as to its efficacy, or even evidence of its causing harm. Another, different, example might be where a trading activity, although effecting a charitable purpose, is of a scale or type that it could be said was having a harmful effect on competitors that did not enjoy the benefits of registered charitable status and thus, indirectly, on consumers.

104. So where a question of potential *disbenefit* arises, it will be addressed objectively through evidence and the Commissioner will take expert advice as necessary. It should be added, however, that *disbenefit* will always outweigh 'benefit' if an entity's exercise of its functions is unlawful.

The 'To a Reasonable Degree' Requirement

105. To meet the charity test, an applicant entity must, in order to give effect to its charitable purposes, intend to provide public benefit in Jersey or elsewhere *to a reasonable degree*. This phrase requires careful interpretation for it is at the heart of the public benefit element of the charity test. There is no indication on the record of the Legislature's intent in inserting this qualification in the charity test but it is not part of the Scottish charity test, which is the model for Jersey's, which suggests some particular intent in its having been added to the draft of the Law that was put to the States for its consideration.

106. A *reasonable degree* is just that. 'Reasonable' is taken to mean 'rational' or 'not excessive'; the use of the word moderates the phrase 'to a….degree'. Imagining, say, a given continuum of public benefit provision for a given quantity of resource available to an entity, a reasonable amount or degree of public benefits is not a small or token

amount of such provision. It is more, too, than just 'a degree', which would be a fairly small amount; 'reasonable', as a qualifier in that context, implies something rather more than that. Equally, *a reasonable degree* is not right at the top end of that same continuum, although it could be. The phrase can be therefore be said, in the Commissioner's view, to imply a point somewhere round the middle of that continuum.

107. The provision qualifies the requirement upon an applicant entity to provide, or intend to provide, public benefit in giving effect to all its purposes, that is to say, both its charitable purposes and any others purely ancillary or incidental to those. As a qualifier it serves to modify the ordinary meaning of the words *provide, or intend to provide, public benefit*. Those words on their own mean or imply no particular amount of provision; they could equally mean either a very high, or a very low, quantum of provision. If, however, they mean 'very high', there would be no need for the qualifier. It serves a purpose only if, without it, the amount is, or could be, quite low.

108. Thus the Commissioner will interpret *to a reasonable degree* as raising the bar, so to speak, of requisite public benefit provision above what might otherwise be only a low level of provision. It is to be emphasised that this illustration is not about absolute quantities of 'public benefit'. It sets a bar on a scale that relates to the resources available to an entity. In any given case this would be subject to the facts of the matter, including the size and scale of the applicant entity in question as well as its financial resources, intellectual capital or general capacity. Thus *to a reasonable degree* is a relative requirement, applicable whatever the nature, business or size of the entity concerned, but applicable relatively. It will not be met if the intended level of activity of an applicant entity is clearly set unambitiously at a token or low level relative to its resources, and relative to the charitable purposes it exists to effect.

109. This does not, however, mean that an applicant entity can spend a lot of time and effort on private rather than public benefit, once a reasonable degree of the latter has been achieved. In giving effect to charitable purposes, private benefit is not impermissible but it must be incidental, as already set out in this guidance. *To a reasonable degree* is a measure of activity. Public benefit activity cannot be displaced by private benefit activity, save incidentally.

110. It can, however, go in tandem with a degree of inactivity. In other words an applicant entity does not have to demonstrate continual - in the sense of unceasing - activity in providing public benefit, although many, especially if delivering services, may do that, and take pride in so doing. The public benefit element of the charity test can equally be met through activity that may have peaks and troughs, whether for intrinsic reasons, such as seasonality, or for business planning reasons. In such circumstances, public benefit provision would nonetheless be continuous, in the sense of uninterrupted over a continuum. An aid charity, for example, may undertake only one or two missions in a year and its public benefit provision is naturally focussed on those times. Or an entity whose object is to support registered charities may meet but

four times a year and thus have bursts of activity followed by periods of quiet. An entity whose purpose is to advance education may be relatively inactive during school holidays. Or an entity's very purpose may be to act only upon some occurrence such as an emergency. What matters is that the level of activity, relative to the entity's scale and purposes, is *to a reasonable degree* in the circumstances, having regard to this section of the guidance, and that it is public activity that generates public benefit.

111. The charity test may also not be met even if all an entity's activities are wholly devoted to providing public benefit but there is not actually much activity, and this leaves charitable assets underused or unused. That would not, generally, appear to be public benefit provision *to a reasonable degree*. There may be good reasons for, say, accumulating a capital reserve, in which case things would not be problematic; but the reverse is more likely to apply if there was such accumulation driven essentially by inertia or an absence of strategy, thus inhibiting the giving of effect to charitable purposes. Such situations will be examined by the Commissioner for the purposes of the charity test with particular care.

Registered Charities' Names

112. An applicant entity having met both parts of the charity test, the Commissioner must register it provided it has submitted all requisite and requested information. The full requirements in this regard are set out in Guidance Notes 3a and 3b. The Commissioner, however, must be satisfied that the entity's name is not in her or his opinion undesirable, because

- its name is the same as, or too similar to, the name of any other registered charity
- the name is likely to mislead the public as to the purpose, activities or identity of the entity
- the name gives the impression that the entity is connected to any person to which it is not connected, whether in Jersey or elsewhere; or, or and,
- it is offensive.

113. The Commissioner's view is that it is important for public trust and confidence in registered charities, that, in the likely quite rare instances where they may come into play, these rules are applied in a strict manner. It is, for example, of real importance that when people give they are able to know to exactly what cause or organisation they are contributing, especially if there is to be more than one registered charity in the same sphere of endeavour. Name distinctions, and how names are represented in branding, matter and the Commissioner will reflect that in any interventions he or she may decide to make in reviewing names.

The 'Substantial Activity' Requirement for Non-Jersey Entities

114. The Commissioner must also be satisfied that an applicant entity that meets the charity test but which is not a Jersey entity intends to carry out, in or from within Jersey an activity that is 'substantial'. An entity's draft statement of intended public benefit is likely to be key to any decision on this but the Commissioner may also require additional information in order to be able to reach a decision on the point. This applies only to any entity not falling within the descriptions set out in paragraph 19 of Guidance Note 3a. Normally, the Commissioner would expect this to mean that the management and control of the entity was in the United Kingdom.

115. In this context, the ordinary meaning of *substantial* will be taken to mean 'having substance', 'solidly based' and 'durable'. Such meanings are quite strong in that they are well to the right hand side of a spectrum whose left hand marker might be, say, 'token' or 'of little consequence'. To meet the substantial activity in Jersey test the Commissioner will expect a relevant applicant entity, notwithstanding the location of its 'management and control' in another country,

- to have, or intend to have, a permanent base in Jersey, albeit perhaps looked after by volunteers
- to be reasonably well-known to the public at large through advertisements, regular fundraising and its general activities; and
- to be fully in line with the terms of this guidance with regard to providing public benefit *to a reasonable degree*

The Commissioner's decision will in each case depend upon the facts of the case, in the round. Determination of the 'substantial activity' requirement will, where applicable, generally follow determination of the charity test itself although when appropriate the Commissioner may raise it at an earlier stage in dialogue with an applicant entity.

Conclusion

116. The charity test as set out in the Law is a set of provisions which, taken together, have the aim of ensuring that those entities that meet its requirements have and pursue substantive objects intended in all respects to be charitable, and thus beneficial to the community of Jersey, or to others in other lands. While the charity test may well be harder for some entities to meet than others, the general approach that will be taken by the Commissioner with all applications for registration will be to treat every entity fairly and equally taking account of the provisions of the Law and having regard to this guidance; and to offer help and assistance, especially for small entities, where the legal requirements for successful registration may seem a little challenging or even puzzling to meet.

117. The charity test is, nonetheless, a real test that will demand high standards from applicant entities. They alone, as registered charities, will be entitled to hold

themselves out to the public as charities (or privately as the case may be) and to enjoy the fiscal, reputational and other benefits that may flow from that status, in return for delivering public benefit. The charity test may not readily be met by applicant entities that fail to show evidence of those high standards.

118. The charity test is not a once-off event. Registered charities will have to continue to meet its requirements as described in this guidance note. Guidance Note 5 addresses the ongoing nature of the charity test once an applicant entity has successfully become a registered charity.

119. The Commissioner's overarching approach in administering the charity test, both at the application stage and subsequently, will be to seek to act in a way that best protects public trust and confidence in registered charities. This, however, certainly does not preclude her or his giving advice and appropriate support to those entities that, with good intent, may need some time or help to improve and develop in order to be able to meet the test or sustain their compliance with it, thus justifying their position as registered charities in Jersey. The charity test is a test to be passed not failed.

120. This Guidance Note will be kept under review.

ENDS