

Jersey Charity Commissioner

**Report on Results of Public Consultation on Draft Guidance on the  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

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the Charities (Jersey) Law 2014 ('the Law')

**(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](http://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](http://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 be 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 shown 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 uncontroversial (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 it 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.charitycommissoner.je](http://www.charitycommissoner.je)