

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

Guidance Note 1: Introduction to the Guidance

Published on www.charitycommissioner.je, following a report dated 12 April 2018, also on the website, on the outcome of public consultation on drafts of Guidance Notes 1 and 2

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17 April 2018

Although this Guidance Note is based on, and reflects, the Law, any statement expressed in it is at all times subject to the Law itself and any Regulations or Orders made under the same. All the latter are available to view, or there are links to them, on www.charitycommissioner.je.

Guidance Note 1

Introduction to the Guidance

<u>Contents</u>	<u>Page</u>
1. Introduction	3
2. Summary of Main Provisions of Law	4
3. Terminology	6
4. Role of Commissioner	7
5. General Approach to Implementation of the Law	8
6. Aspects of Legal background to the Law	9
7. Non-Discrimination	11

Introduction

1. The Charities (Jersey) Law 2014 ('the Law') requires the Charity Commissioner, following consultation, to publish and maintain guidance on the operation of the Law. The guidance must in particular address the 'charity test' which is at the heart of the scheme established by the Law, and the Commissioner must have regard to it in determining the test. The whole Law, however, is a fairly dense document of 44 articles and two schedules, reflecting the relative complexity and breadth of charity law, and the aim of the guidance will be to help applicants for registration, and others, to comprehend what the Law provides as well as to set out the Commissioner's approach to its interpretation as the basis for her or his work.

2. There will be a numbered series of Guidance Notes covering all aspects of the operation of the Law. The series as planned at present is as follows:

Guidance Note 1: this document, providing an introduction to the Guidance Note series. It summarises the main provisions of the Law, addresses terminology and the role of the Commissioner, sets out the Commissioner's general approach to the implementation of the Law and covers aspects of the extensive legal background to it, including how it relates to the law of England and Scotland. It also, importantly, addresses the provisions regarding charities in the Discrimination (Jersey) Law 2013

Guidance Note 2: on all aspects of the Charity Test. This is the most significant document in the series; the two elements of the charity test, on charitable purposes and intended delivery of public benefit, must both be met in order for registration to proceed

Guidance Note 3: on the applications process for registration, in respect both of the public register and the restricted section of the register intended, subject to certain rules, for entities that do not intend to solicit donations from the general public. It sets out exactly what information must accompany an application, and requirements regarding charities not based in Jersey that nonetheless wish to operate in the country

Guidance Note 4: on the duties of governors of registered charities and the steps open to the Commissioner (and ultimately the court) to address shortcomings or failings in charity governance

Guidance Note 5: on what is required for registration to be successfully maintained over time, including the procedures for annual returns to be made to the Commissioner and for notifying changes to a registered charity's list of governors, or other relevant changes that would need to be entered on the register

Other notes in the series may follow, to address any particular issues or problems that may have emerged as the Law is implemented.

3. The date of publication of this Guidance Note 1, 17 April 2018, is also the date of publication of Guidance Note 2, in both cases following public consultation. Guidance Notes 3 and 4 are published for consultation on www.charitycommissioner.je, and will be finalised at the end of April. All relevant materials and items of interest will be available on that website. Printed copies of the Guidance Notes will also be available to view at Jersey Library or, at certain times (as may be notified on the website), at the Commissioner's office at 31 Broad Street, St Helier. Books and documents referred to in the Guidance Notes will also be available to view at that address, by appointment.

4. All Commissioner's guidance on the operation of the Law, new or varied, will be subject to public consultation in draft, in as effectual a manner as reasonably practicable and as warranted by the subject matter. Not least, this will be a means of raising awareness about the operation of the Law and its impact upon charities, among both charities themselves and citizens. Such formal process apart, the intention is to aim to ensure that there is good opportunity for charity governors, existing and prospective, and other actors such as those involved with representative bodies, to be able to get to know about the requirements of the Law as it affects both them personally and their organisations. Reports on the outcome of all consultations will also be available on the website.

5. The aim is to create a suitable framework for issuing, storing or providing links to initial, additional or varied guidance and other information, such as regulations and orders made under the Law, which can readily be referenced by any interested party. The website will be the main repository for information about registered charities in Jersey, including providing a link to the public register itself, and will be used as the primary means of communication of any changes or developments whether of general or specific effect or interest.

Summary of Main Provisions of the Law

6. The Law, together with orders and regulations made under it, establishes, in summary, the following main things:

- **the office of Charity Commissioner**, to administer the charity test, operate and maintain the charity register and otherwise oversee the operation of the Law including through guidance, and generally to facilitate and encourage the compliance of registered charities with the Law, and to seek to ensure that public trust and confidence in registered charities is protected
- **a charity test** which is met by an entity if its purposes are charitable and it provides public benefit to a reasonable degree in giving effect to those purposes, subject to various specific requirements as described in Guidance Note 2
- **a public register of registered charities**, accessible without charge, which will contain a registered charity's statements of charitable purposes and public benefit together with other relevant information about it including financial information. It will be possible in particular cases for such or certain information not to be made publicly available on grounds of safety or security.

To be registered, and remain registered over time, an entity must meet, and continue to meet, the charity test

- **a restricted section of the public register**, for those registered charities that do not, and do not intend to, solicit donations from the general public (as prescribed by regulations). In the restricted section, a charity will be identified by its registration number not its name; and names and addresses of its governors and the address of its premises, and financial information, will not be publicly revealed. The registered charity's statements of charitable purposes and public benefit will, however, be open to view in the same way as all other information on the register but identified only by the charity's number. Also publicly accessible will be a note of the legal status of 'restricted section' entity, whether or not an annual return has been filed and any 'required steps' notices the Commissioner may, in the fullness of time, have had cause to issue in respect of it or any of its governors. The Commissioner must hold all other 'restricted' registration data in confidence. Any reporting on it will be only in aggregate in a way that ensures that no individual entity can be identified
- **voluntary registration** open to any entity; but any such as have previously qualified for charity tax exemption under the Income Tax (Jersey) Law 1961 must apply to become a registered charity by the end of 2018 if it wishes, presuming successful registration, to retain its present tax exemptions and continue to be able to describe itself as a 'charity'. (There are certain exceptions to this, referenced at Note 1 to this paragraph.) There are special rules for certain foreign charities that undertake activity in or from within Jersey
- **an application process** for charity registration. An applicant entity must provide to the Commissioner its written constitution or other type of founding document, statements of its charitable purposes and the public benefit it intends to provide in giving effect to those purposes, certain financial information and certain declarations about its governors. The statements of purposes and public benefit must first be submitted in draft; having been agreed by the Commissioner, they will be made available on the charity register together with other information about the now-registered entity
- **protection of the noun 'charity'**, so that an entity that is not registered (or has not applied for registration by 31 December 2018), and which is not excepted as a foreign charity, may not be described, either by itself or any other person, as a 'charity' or as a 'Jersey charity'
- **annual returns**: all registered charities are required to make an annual return to the Commissioner the details of which will become publicly available on the register except where the information is restricted
- **sixteen charitable purposes** within whose compass the objects of any charity must fall for the purposes of the Law. This is the basis of the first part of the charity test
- **a range of requirements regarding the public benefit** that a charity must provide in giving effect to its charitable purposes. The Law does not define 'public benefit' but sets out a variety of rules in relation to how it is to be

determined to which the Commissioner, or any other person determining the question, must have regard, and on which the Commissioner must publish guidance. This is the basis of the second part of the charity test. If both parts of the charity test are duly met, the entity concerned must be registered subject to a few, mainly procedural, matters

- **standards in respect of the conduct of governors of registered charities**, including a duty upon governors to ensure that their charities act in a manner consistent with their registered charitable purposes and registered public benefit statements
- **various powers for the Commissioner** to address failings in the conduct of governors and in the governance of charities, aimed at enabling her or him to ensure that registered charities remain true to their purposes and deliver public benefit in giving effect to those purposes. There is a power to ‘strike off’ a registered charity in certain exceptional circumstances
- **a Charity Tribunal** to hear appeals against decisions of the Commissioner
- **amendments to the Income Tax (Jersey) Law 1961** principally to the effect that the continuation of any tax exemption for charities enjoyed now by entities that intend to seek registration becomes dependent upon that registration [Note 1]

Terminology

7. The Law adopts the term ‘governor’ in relation to those who manage or administer entities that become, or seek to become, registered charities. This term covers, for the purposes of the Law, anyone who might currently be styled as a trustee, a fideicommissaire, a member of the council of a foundation, a director of a company, a member of the management committee of an unincorporated entity or anyone who has, under an entity’s constitution, general control and management of its administration. The term ‘governor’ will thus be used throughout the Guidance Notes on the basis that it includes and covers all such persons responsible for charities. The term does not extend to a paid employee of an entity who is not also a governor of it.

8. The Guidance Notes adopt the term ‘applicant entity’ to describe or refer to those organisations applying or seeking to apply for registration. The adjective ‘applicant’ should, in an appropriate circumstance, be understood to have been omitted. The same goes for the clause “intends to provide [public benefit]”, the verb ‘provides’ being understood instead. Even though applicant entities may currently style themselves as

Note 1: Art.115 of the Income Tax (Jersey) Law 1961 is amended with effect from 1 January 2019 by the Charities (Transitional Provisions) (Jersey) Regulations 2018, approved by the States on 6 March 2018. Certain charitable trusts and foundations will, however, continue to receive the benefit of tax exemption by virtue of that Article

even if they do not register as registered charities or seek such registration before the end of 2018.

‘charities’, through having charitable purposes as defined under the Income Tax Law and status as charities for tax exemption purposes confirmed accordingly by the Comptroller of Taxes, what matters looking ahead is that, applications for registration having been successful, such entities for the first time become ‘registered charities’ under the Law. That will be the key to their continuing lawfully to be able to describe themselves, or be described, as charities, to continue to enjoy such tax exemptions as may go with that status and to benefit from any broader advantages pertaining to being, and being styled as, a registered charity. An important consequence of this provision, and indeed reason for it, is the protection of public trust and confidence in the concept or notion of a ‘charity’.

9. Unsuccessful applicant entities that had hitherto described themselves as charities, whether or not pursuant to a decision of the Comptroller of Taxes, or any in the same category that have chosen not to apply for registration, will, from 1 January 2019, have to cease describing themselves as charities if they currently do so. The adjective ‘charitable’, however, will not be protected, although there is a power in the Law to do that by regulations were the States so to decide. Similarly, there is a power, if the States chose to exercise it, for regulations to be made in order to permit exceptions from the restriction on use of the word ‘charity’ to describe an entity.

The Role of the Charity Commissioner

10. In administering and supervising the operation of the Law, the Commissioner is required to seek to act in performing her or his functions in a way that, so far as appears to her or him to be reasonably practicable,

- protects public trust and confidence in registered charities
- is compatible with the encouragement of all forms of charitable giving
- is also compatible with voluntary participation in the work of registered charities; and,
- is proportionate as to the burden imposed on, and which supports the development of, registered charities.

11. Although these requirements are written in respect of charities once they are registered, the Commissioner’s intention is to apply them equally, as far as practicable, in relation also to applicant entities, by seeking to ensure that the process of registration is as straightforward as possible subject to the requirements of the Law. Any entity, however, must make its own decision about an application to register, taking into account its intended charitable activity and public benefit delivery underpinning that. The Commissioner will nonetheless aim to offer helpful general advice about the registration process, the general requirements of the charity test, and the duties and responsibilities of registered charities and their governors, especially to

those concerned with small entities who may feel a little daunted by the registration process mandated by the Law. Details concerning this will be notified on the website.

12. The Commissioner has a broadly-based responsibility to do that which she or he judges is best calculated to facilitate the effectual performance of the functions of the office, a responsibility which must, of course, be exercised in accordance with law. In particular, the Commissioner is enjoined to provide information about the system of registration of charities, including information about the difference between charities and bodies with charitable purposes, and about the advantages of donating to registered charities. The Law states that the Commissioner may advise the Minister as to the nature of charities in Jersey and the merits of any proposals for their further regulation; and also that he or she may assist bodies in other jurisdictions equivalent to her or him, or the court, the Attorney General, the Comptroller of Taxes or the Jersey Financial Services Commission. This is all without prejudice to the generality of the Commissioner's powers. The Law also provides for appropriate information-sharing by the Commissioner with the Comptroller and Financial Services Commission.

General Approach towards Implementation of the Law

13. While a proportionate approach to regulation is important and correct, any aim of simply limiting or restricting 'burdens' on registered charities or applicant entities needs to be balanced with doing that which is considered necessary to protect public trust and confidence in registered charities in Jersey. The Law imposes a variety of requirements on applicant entities and registered charities that will require a degree of compliance effort by all those wishing to seek and maintain registration and thus enjoy any reputational or financial fruits of registered charity status.

14. In dealings with applicant entities and registered charities or other interested parties (such as, say, volunteers), it will be the Commissioner's responsibility not to be shy about the need for such effort, and the importance for all concerned of striving to meet the standards and requirements laid down in, and implied by, the Law. It is fundamental to the Law's scheme that the bars for registration, governance and performance (including especially the delivery of public benefit) are set and maintained at an appropriate level in accordance with the rules it prescribes so that the object of seeking to protect public trust and confidence in registered charities may be met. The principal method for achieving this is registration, which in turn will depend upon good information about registered charities being freely available to citizens except in the limited circumstances where it may lawfully be restricted.

15. While the Guidance Notes will aim faithfully to set out what the Law says, the way it should operate and the way in which the decision-making entrusted to the Commissioner will be approached, they will not, where they describe the purview of the Law, be a substitute for it, and any interested person should look to the Law itself for authoritative text. The Guidance Notes, however, once published following consultation, will seek to state how the Commissioner will work by having regard to the guidance. That formulation - 'having regard' - leaves room for some flexibility in

any given, particular, case, provided any such flexibility is reasonable and does not compromise the overall satisfactoriness of an entity's activities as a registered charity and always points in the right direction, so to speak, that is to say, towards a goal of compliance. An example of this might be where there is a sense that an intended public benefit programme would need to build up over time, but on the basis of a clear plan to which the governors in question are committed, in order to achieve 'a reasonable degree' of public benefit and thus the public policy goal required by the Law. Generally, however, it is important that all the Commissioner's decision-making has regard to the guidance on the operation of the Law as closely as practicable, without, though, fettering the Commissioner's discretion to make decisions (including giving reasons for those decisions) that reflects the totality of the responsibilities of the office under the Law, including especially the encouragement of all forms of charitable giving.

16. It is noted here for information that the Charity Tribunal established under the Law must also have regard to the guidance on the charity test in Guidance Note 2 when determining whether an entity meets the test and when performing any other function under the Law to which the guidance on the test is relevant. The Tribunal, however, is not the responsibility of the Commissioner and there will be no guidance about the operation of Part 8 of the Law, by which the Tribunal is established.

Aspects of the Legal Background to the Law

17. As regards the charity test, the Law to a fair degree (but certainly not wholly) follows the Charities and Trustee Investment (Scotland) Act 2005, an act of the Scottish Parliament. In a number of respects the Law is also akin to the Charities Act 2011 (a consolidation statute which includes the former Charities Act 2006). While cognisance is important of those elements of the Law which are different from anything equivalent or akin in either the Scottish or the English acts, in the Commissioner's view it is only realistic and sensible for the implementation and administration of the Law in Jersey to be informed or guided, to the extent appropriate or relevant, by this considerable body of case law, non-binding in the Jersey court though it, or some of it, may be. The Commissioner will also seek to ensure good working relations and a sharing of best practice with the Charity Commission in London and the Scottish Charity Regulator at Dundee, alongside the power to assist described in paragraph 12 above (which is broadly replicated in the others' legislation).

18. Key provisions of the Law – examples are the provision relating to private *versus* public benefit (see Guidance Note 2) and the list of statutory charitable purposes (despite certain specific differences) - are in any event rooted in the English common law of charity as it has developed over the centuries. By 'common law' is meant the framing and developing of rules by the courts in the absence of a comprehensive statutory legal code. The Royal Court of Jersey confirmed in a leading case in 1972 that under the general law of Jersey charitable purposes were, at that point, the same as under English law and that the latter provided valuable guidance to the Court. In the Charities Act 2006 (now consolidated in the Charities Act 2011) Parliament specifically retained the common law relating to charities in England and Wales in respect of

purposes and public benefit, while at the same time, as was done in Scotland, significantly widening the scope of the statutory charitable purposes to reflect modern conditions. The Scottish Regulator has stated that for its decision-making English common law, while not binding, is persuasive.

19. The Law does not inhibit the continued creation and use of charitable purpose trusts for which those responsible for them may or may not choose to seek registration, thus subjecting them to the charity test for that purpose. Registration is a voluntary act for any entity although upon it depends (save for limited exceptions referred to in Note 1 to paragraph 6) the continuation of charity tax exemption as currently allowed and, in all cases, continued use of the appellation ‘charity’.

20. Beyond the points mentioned in the preceding paragraph, what is new in Jersey, in accordance with the Law, is, essentially:

- the charity test
- the new, wider, list of statutory charitable purposes
- new, specific, rules about public benefit
- the public register
- a restricted section of the public register for charities that do not solicit donations from the general public
- the office of Charity Commissioner
- and the Charity Tribunal

21. Some rules either rooted in English common law or part the law of Scotland are slightly modified by the Law. The rule, for example, which asserts that a charity’s purposes must be exclusively charitable is altered to permit in Jersey an exception for non-charitable purposes that are purely incidental or ancillary to the main charitable purposes. And the requirement in the Scottish version of the charity test, that a body meets the public benefit element of the test only if (without qualification) it provides the same, is adjusted in the case of Jersey so that public benefit must be provided in giving effect the entity’s purposes (including any that are purely incidental or ancillary) ‘to a reasonable degree’. The Commissioner’s approach to the interpretation of these key requirements is set out in Guidance Note 2. Notwithstanding, however, the procedure required by the charity test, such as statements on the public register of charitable purposes and public benefit delivery, its requirements reflect the long-standing position in English common law that public benefit is required of any entity established for charitable purposes and that it is the public character of the activity of such an entity that is at the heart of its being a charitable entity.

22. It will naturally be for others to judge how the modernisation of charity law in Jersey introduced by the Law may sit with the way, over the years, the general law of

charity in Jersey has drawn on the common law of England and Wales, and how far that position continues to obtain alongside and in the light of the new statute. But, while the Law has introduced a variety of new arrangements as conditions of registration, the fundamentals of charitable status have not changed, viz. the general requirement for purposes to be exclusively charitable purposes (save for the purely incidental or ancillary) and the delivery of public benefit in effecting those purposes, together with a corpus of rules relating to the same, such as, for example, those which require benefit to be delivered to a sufficient section of the public and not a closed group.

23. Following on from this, there is a deal of English judicial opinion and case law that can be drawn upon to inform the approach taken in Jersey, especially where reflection may be needed about whether certain purposes are actually sufficiently in line with the statutory charitable purposes, or whether or not, for instance, certain types of activity provide public benefit. For example, a fair amount of English case law has already arisen over the last decade or so on the scope of widened lists of statutory charitable purposes of the kind now introduced in Jersey: case law, say, on concepts such as the charitable extent of activity concerning the advancement of human rights or citizenship. Much the same goes for the variety of guidance issued in England by the Charity Commission and in Scotland by the Scottish Charity Regulator, the latter in particular offering informative illustrations and case studies germane in several places to the charity test in Jersey.

24. As stated in paragraph 17 above, it is appropriate, and indeed realistic, that the Commissioner's decision-making is informed by such material, as appropriate and as circumstances may warrant, while recognising that there are specific differences in the laws of each country; and this will be the approach adopted. As already noted, though, there are certain aspects of the Jersey charity test that are not replicated in Scotland and which will therefore require a purely local approach. In some cases the Commissioner will wish or need to take legal advice, in Jersey or elsewhere, or seek expert professional or technical advice especially on draft statements of charitable purposes or public benefit submitted with applications for registration, where, for instance, there may be a degree of doubt or controversy as to the nature, scope or extent of the purposes or intended public benefit.

Non-Discrimination

25. There is one further, important, point to cover in this introductory Guidance Note. The Discrimination (Jersey) Law 2013 prescribes certain characteristics which are protected from discrimination. They are race, sex, sexual orientation, gender reassignment, pregnancy and maternity, and age. There are certain rules regarding charities, and the role of the Commissioner, at paragraph 2C in Part 1 of Schedule 2 of the 2013 law ['General Exceptions to Prohibited Acts']. These must be taken into full account in respect of any determination of the charity test under the Law and they apply to any entity that meets the charity test, not just registered charities. They apply to acts of discrimination committed in Jersey, including in its territorial waters.

26. The provisions in relation to charities are, in summary, that:

- a person does not commit an act of prohibited discrimination only by restricting the provision of benefits to persons who share a protected characteristic, if that person is acting in pursuance of the constitution of a charity and the provision of benefits in question is either a proportionate means of achieving a legitimate aim or is for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic
- this does not, however, apply if the constitution of the charity in question enables the provision of benefits to persons of a class defined by reference to colour; were there such a constitution, the effect of such a restriction is denied and the benefits have to be provided to persons generally or to those of the class that results if the reference to colour is ignored
- and it does not apply in respect of any type of employment, including guidance on careers and any services related to employment
- a person, in relation to an activity whose purpose is the promotion or support of a charity, does not contravene the law by restricting participation in the activity to persons who share a protected characteristic. But this does not apply to the protected characteristic of race in as far as it relates to colour (that is to say, it may apply in respect of nationality, national origins or ethnic origins); and that
- the Commissioner does not contravene the law only by exercising a function in relation to a charity in a manner that he or she thinks is expedient in the interests of the charity, having regard to its constitution. This exception, however, does not apply to the protected characteristic of race in as far as it relates to colour (that is to say, it may apply in respect of nationality, or national or ethnic origins).

The above summary is for general information only and should not be regarded as an authoritative statement of the law.

27. Not least because of the Commissioner's duty to seek to protect public trust and confidence in registered charities, particular attention will be paid to compliance with these rules in respect of applicant entities and registered charities, from a stringent standpoint and with expert or legal advice taken if necessary. Applicant entities or registered charities will be invited to provide confirmation of compliance, and the Commissioner may wish to receive further information in any cases of uncertainty. Confirmation from excepted foreign charities may also be sought that they are fully compliant with relevant anti-discrimination legislation in their own countries.

28. This Guidance Note will be kept under review by the Commissioner.

17 April 2018