
CONSULTATION PAPER
ON
CHARITABLE TRUST LAW
GENERAL PROPOSALS

(LRC CP 36 – 2005)

IRELAND

The Law Reform Commission
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THE LAW REFORM COMMISSION

Background

The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20 October 1975, pursuant to section 3 of the *Law Reform Commission Act 1975*.

The Commission's Second Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas in December 2000. The Commission also works on matters which are referred to it on occasion by the Attorney General under the terms of the 1975 Act.

To date, the Commission has published seventy one Reports containing proposals for reform of the law; eleven Working Papers; thirty five Consultation Papers; a number of specialised Papers for limited circulation; An Examination of the Law of Bail; and twenty five Annual Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained in the Appendix to this Consultation Paper.

Membership

The Law Reform Commission consists of a President, one full-time Commissioner and three part-time Commissioners. The Commissioners at present are:

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NOTE

The Law Reform Commission's Second Programme for examination of certain branches of the law with a view to their reform: 2000-2007, identified the law of trusts including the law of charities for examination.

In December 2003, the Department of Community, Rural and Gaeltacht Affairs published a consultation paper entitled "*Establishing a Modern Statutory Framework for Charities*". This was followed up by the publication of a *Report on the Public Consultation* in September 2004. The Law Reform Commission agreed to assist and advise the Department on addressing issues raised in chapter 8 (entitled *Governance*) of the Consultation Paper as these relate to charitable trusts.

Given the considerable interaction between general trust law and the law relating to charitable trusts, the Commission decided to cover both of these topics in one Consultation Paper. In the main paper, *Trust Law – General Proposals* (LRC CP 35-2005), each chapter begins by setting out the general trust law position and then examines any particular issues relating to charitable trusts. The main paper contains a detailed discussion of the issues involved including comparisons between Irish law and the law pertaining in other jurisdictions. This present paper is being published at the same time and contains a summary of the recommendations made in the main paper in relation to charitable trusts. **If further detail is required in relation to any particular topic, it is recommended that the reader refer to the main paper for a fuller discussion of the issues involved together with the reasoning behind the Commission's recommendations in relation to each of the issues.**

The Consultation Papers examine some specific areas of the Law of Trusts and the Law of Charities and do not purport to represent a comprehensive review of either topic. The proposals put forward are designed to clarify the law and bring it up to date rather than to effect fundamental changes to the existing law. Further issues in relation to trust law and charity law may be addressed by the Commission in the future.

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INTRODUCTION

Charitable Trusts

1. A charitable trust is a type of trust which is formed for charitable purposes. A charitable trust is usually set up by a group of persons who make a declaration of trust outlining the purposes of the trust. A charitable trust may also be created by a settlor or testator who transfers or bequeaths funds or property to trustees upon trust for wholly and exclusively charitable purposes. The governing document of a charitable trust is a trust instrument which sets out the purposes of the trust and the powers of the trustees.

2. The principal legislation governing general trusts is the *Trustee Act 1893*. The legislation was designed primarily to facilitate the creation and administration of trusts, particularly where the trust instrument was silent or deficient in some respect. The only significant amendments since 1893 have been the *Trustee Act 1931* which made provision, among other matters, for the appointment of new trustees in place of the holder of an extinct office and the *Trustee (Authorised Investments) Act 1958* which amended the law in relation to the investment of trust funds.

3. Charitable trusts are, to a large extent, governed by the same principles and body of case law as general trusts. The distinguishing features are that charitable trusts are not subject to the same extent as other trusts to the requirement of certainty of objects and they may be of perpetual duration. The principal legislation governing charities is to be found in the *Charities Acts 1961* and *1973*, both of which are largely devoted to conferring many wide enabling and facilitative functions and powers on the Commissioners of Charitable Donations and Bequests for Ireland.

4. In December 2003, the Department of Community, Rural and Gaeltacht Affairs published a consultation paper entitled “*Establishing a Modern Statutory Framework for Charities*”. This was followed up by the publication of a *Report on the Public*

Consultation in September 2004.¹ The Law Reform Commission agreed to assist and advise the Department on addressing issues raised in chapter 8 (entitled *Governance*) of the Consultation Paper as these relate to charitable trusts.

5. The following proposals are contained in chapter 8 of the Department's Consultation Paper:

“The law would be codified so that the role, duty of care, responsibilities and duties of charity trustees, officers or directors would be confirmed as being the same no matter what form of legal structure or governing instrument was used.

A statutory exoneration would be provided for lay trustees against liabilities arising out of acts committed honestly, reasonably and in good faith.

Default administrative powers (particularly in relation to investment) would be updated to assist in the administration of charities with unwritten or incomplete/deficient constitutions.”²

6. Given the considerable interaction between general trust law and the law relating to charitable trusts, the Commission decided to cover both of these topics in one Consultation Paper entitled *Trust Law – General Proposals* (LRC CP 35-2005). Each chapter begins by setting out the general trust law position and then examines any particular issues relating to charitable trusts. The main paper contains a detailed discussion of the issues involved including comparisons between Irish law and the law pertaining in other jurisdictions. This present paper is being published at the same time and contains a summary of the recommendations made in the main paper in relation to charitable trusts. **If further detail is required in relation to any**

¹ Both papers are available from the Department's website [www.pobail.ie/en/Charities Regulation/](http://www.pobail.ie/en/Charities%20Regulation/). The Commission also notes that, in 2002, the Law Society of Ireland published a Report entitled *Charity Law: The case for reform* (July 2002). The recommendations in that Report are discussed throughout this Paper. For a general overview of the area, see also O'Halloran, *Charity Law* (Round Hall Sweet & Maxwell, 2000).

² *Establishing a Modern Statutory Framework for Charities* (Department of Community, Rural and Gaeltacht Affairs, 2003) at 16.

particular topic it is recommended that the reader refer to the main paper for a fuller discussion of the issues involved together with the reasoning behind the Commission’s recommendations in relation to each of the issues.

7. Charities currently operate under various different legal structures and each of these structures has a separate body of law governing its operation. The traditional legal structures used by charities are the charitable trust, the unincorporated association or a company – usually the company limited by guarantee.³ Charitable trusts are subject to general trust law, charitable companies are subject to company law and unincorporated associations are subject to general contract law as well as to the law in respect of charities. This creates obvious difficulties in any attempt to codify any set of rules to apply across all of the different legal structures. Difficulties relating to the interaction of charity and trust and company law have also been encountered in other jurisdictions.⁴

8. In its consultation paper, the Department considered that “[i]t is generally recognised that none of the existing legal structures is ideally suited to the nature of charitable entities” and indicated that “there could now be a window of opportunity for the charities sector to liaise with the Department of Enterprise, Trade and Employment in the development of a new legal structure suitable for charities”.⁵ The Commission notes that a new form of incorporation – the designated activity company (DAC) is actively under consideration by the

³ There are also other charitable bodies such as societies incorporated by charter (for example, the Royal College of Surgeons in Ireland), or created by statute or under other legislation (such as the industrial and provident societies legislation).

⁴ In England, the *Trustee Act 2000* does not apply to charitable companies – the Law Commission having come to the conclusion that “it had become apparent in finalising the recommendations that there would be considerable technical difficulties in doing so... [c]haritable corporations are not necessarily subject to all the rules applicable to trustees, and it is by no means clear that it would be appropriate for some of the proposed provisions (such as those relating to powers of delegation) to be applied to them.”

⁵ *Establishing a Modern Statutory Framework for Charities* (Department of Community, Rural and Gaeltacht Affairs, 2003) at 16. In this regard the Commission notes that certain areas of charity law reform lie outside the remit of the Department of Community, Rural and Gaeltacht Affairs – see Appendix 5 of the *Report on the Public Consultation* - September 2004.

Department of Enterprise, Trade and Employment. Because these proposals are still being considered, the Commission has been constrained in its consideration of the applicability of its recommendations across the various legal structures and has confined this paper, unless otherwise indicated, to charitable trusts. The general issue of legal structures for charities is not covered in this Paper but may form the basis of further review by the Commission in the future.⁶

9. The Department's Consultation Paper, referred to above, envisages a new regulatory framework to deal with charities.⁷ The Department's Paper notes that the current institutional arrangements are spread through a number of entities and bodies.⁸ The Attorney General has a role as the protector of charities. The Revenue Commissioners have a role in the administration of the charity tax exemptions under the *Taxes Consolidation Act 1997*, the *Stamp Duties Consolidation Act 1999* and the *Capital Acquisitions Tax Consolidation Act 2003*.

10. The Commissioners of Charitable Donations and Bequests for Ireland, a collegiate body established in the mid-19th Century,⁹ also have a wide role as an enabling body, rather than as a regulatory body with investigative or punitive powers. The Board of the Commissioners includes a wide range of professional persons of experience, including members of the judiciary (both serving and former), the legal profession, senior clerics, and the accounting and banking professions. The Commissioners exercise their mainly facilitative functions on a voluntary basis. In light of the composition and enabling role of the Board of the Commissioners, it would be inappropriate for the Board to take on or perform a regulatory role of a strongly investigative or punitive nature. Under the diverse statutory powers currently conferred on the Commissioners by the Oireachtas in the *Charities Acts 1961* and *1973*, they may assist

⁶ The Commission's Second Programme 2000-2007 identified the law of trusts including the law of charities for examination.

⁷ *Establishing a Modern Statutory Framework for Charities* (Department of Community, Rural and Gaeltacht Affairs, 2003), Chapter 5.

⁸ *Ibid.* at 10-11.

⁹ The Commissioners of Charitable Donations and Bequests were originally established by statute enacted in 1844.

charitable trustees where the trust deed does not provide sufficient powers, for example, by the approval of voluntary dispositions for less than market value, and by the approval of proposed compromises of litigation, and also by giving approvals in respect of the exercise of powers of sale and the application of the proceeds therefrom; and also giving approvals in respect of the exchange of land when for the benefit of the charity. They also have a wide power to frame a *cy-près* scheme (now without a financial ceiling),¹⁰ thus giving a means at minimal cost of applying a gift to an alternative charitable purpose. This important function was exercised more usually by the courts until 1961. They are also empowered to approve a scheme for the establishment of a common investment fund for charities, which has been done and is of benefit to many charities with limited funds. They also give trustees advice on difficult charity problems and, where trustees act on this advice and in good faith, the trustees are personally indemnified. The Commissioners may also certify certain charity cases to the Attorney General for his attention as the protector of charities. The Commissioners perform some supervisory and admonitory tasks by, for instance, warning trustees of concerns about a transaction or even very occasionally applying to the High Court to deal with a supposed breach of a trust for charitable purposes.

11. The Director of Corporate Enforcement and the Registrar of Companies also have a role where a charity is a limited company. While these and other bodies¹¹ play important and valuable roles, it is clear that the existing arrangements, in particular the absence of a regulatory body, are not sufficiently comprehensive to meet current needs. A decision has not yet been taken by the government or the Oireachtas as to the proposed format of the new regulatory body.

12. The Commission expresses no view in this Consultation Paper on the issue of the format of the proposed regulatory body, but

¹⁰ See section 16 and Part 2 of the Schedule to the *Social Welfare (Miscellaneous Provisions) Act 2002*, which repealed the previous financial ceiling on the Commissioners' powers in *cy-près* schemes. This ceiling had been progressively increased over the previous 50 years by the Oireachtas.

¹¹ The Department's Consultation Paper *Establishing a Modern Statutory Framework for Charities*, above, noted that the Garda Síochána, the Valuation Office and the Probate Office also currently play certain roles in the context of charities: see Chapter 5, at 11.

the Commission notes that the Department refers in its Consultation Paper to the various bodies currently having a role in this area. The current role and composition of these bodies and the need for timely liaison between them will, no doubt, be taken into consideration in discussions about the format of any proposed regulatory body. This Consultation Paper uses the term “the Registrar of Charities” where necessary to refer to the proposed regulatory body. This is without prejudice to which body or bodies will ultimately carry out the registration and regulatory tasks and various other functions referred to in this Paper.

13. The reader is also alerted to the various uses of the terms Commission and Commissioners in this paper in order to avoid confusion:

- The Law Reform Commission of Ireland – an independent statutory body established in 1975 whose main aim is to keep the law under review and to make practical proposals for its reform;
- The Law Commission for England and Wales - an independent body established by Parliament in 1965 to keep the law of England and Wales under review and to recommend reform when it is needed;
- The Scottish Law Commission – also established in 1965 to recommend reforms to improve, simplify and update the law of Scotland;
- The Commissioners of Charitable Donations and Bequests for Ireland – originally established by statute in 1844 and is predominantly an enabling, rather more than a regulatory, body – see paragraph 10 above;
- The Charity Commissioners for England and Wales – established by law as the Registrar of Charities and registrar for charities in England and Wales.

14. To be a trustee of a charity involves time, understanding and effort. The roles, duties, powers and responsibilities of charity trustees can sometimes be difficult to determine and may vary depending on the size of the charity involved. The position of trustee (particularly that of a charity trustee) is normally undertaken without any remuneration, and while this may allow some scope for a more lenient attitude towards behaviour and actions of a trustee of a

charity, it cannot be used as a basis for neglecting the proper administration of the trust. A charity trustee must be prepared to participate actively in the administration of the trust to ensure that high standards are maintained. The role of charity trustee should not be undertaken lightly and it is important that before accepting such a position, the individual involved should fully consider and reflect upon the objectives of the trust and the nature of the duties and responsibilities to be undertaken. The purpose of this review is to examine some of the existing law in relation to charities and make proposals for change where considered necessary.

15. It should be noted that implementation of the recommendations in this paper may be achieved in different ways. Implementation may take the form of primary legislation, that is by way of amendment to existing general trust law or charity law, or by way of Ministerial Regulations, or by means of best practice guidelines or codes of practice, depending on the appropriate context. Some of the recommendations relate to general trust law and will therefore be applicable to charities operating as charitable trusts only.

16. The paper begins in Chapter 1 by looking at the office of trustee including such matters as capacity, numbers, appointment, removal, retirement, disqualification and suspension. The overall aim is to facilitate the efficient management and administration of trusts. A further purpose is to reduce the need for recourse to the courts in relation to matters which should be capable of being resolved by the trustees themselves.

17. Chapter 2 considers the question of trustee remuneration and the policy issues associated with any proposal to introduce a statutory charging clause. The distinction between lay and professional trustees is discussed and the danger of eroding the voluntary ethos of charities is discussed.

18. The need for greater supervision of the activities of trustees is examined in Chapter 3. The standard and duty of care expected of trustees is considered together with the instances in which the duty of care should apply. The Commission is also mindful of the danger in setting standards so high as to discourage individuals from becoming involved in voluntary activities. At the same time it is important to ensure that public confidence in the charity sector is maintained.

19. Chapter 4 considers the current powers of investment available to trustees and the need for any reform in this area. The

question of ethical investment policy is also considered and the extent to which trustees may allow non-financial considerations to inform their investment decisions.

20. The ability of trustees to deal with trust property by way of purchase or sale and the power to issue receipts is considered in Chapter 5.

21. The desirability on occasions for trustees to be able to delegate some particular aspects of the administration of the trust is considered in Chapter 6 and the duty of care required of trustees when exercising their powers of delegation is outlined.

22. Chapter 7 considers the issue of trustees' liability for breach of trust and in this context examines the extent to which trustees can exclude or restrict their liability for breach of trust. The need for regulation of trustee exemption clauses is considered, the aim being to ensure that trustees cannot exclude liability for breach of the irreducible core obligations of trustees. The distinction between professional and lay trustees arises amidst the discussion as to whether there is any justification for drawing a distinction for the purposes of trustee exemption clauses, or whether there should be a single, universally applicable standard. The role of the courts in examining and perhaps exonerating charitable trustees from liability for certain breaches of trust is also discussed.

23. The need for more expansive powers of insurance is dealt with in Chapter 8 and the question of whether the insurance may be paid for out of income or capital is discussed.

24. Chapter 9 reviews the existing power to compound liabilities and recommends that any new legislative code on trustees' powers and duties should simplify and clarify the power to compound liabilities.

25. Chapter 10 deals with the variation and termination of trusts. In this regard, the paper points out that the Commission has already published a report on the topic of variation of trusts.¹² The Chapter then proceeds to address the issues of winding-up or merger of charities. Finally, Chapter 11 summarises the provisional recommendations of the Commission.

¹² LRC 63-2000.

26. The Commission usually publishes in two stages: first, a Consultation Paper and then a Report. This Consultation Paper is intended to form the basis for discussion and accordingly the recommendations, conclusions and suggestions contained herein are provisional. The Commission will make its final recommendations on this topic following further consideration of the issues and consultation. Submissions on the provisional recommendations included in this Paper are also welcome. The Report gives an opportunity, which is especially welcome with the present subject, for further thoughts on areas covered in the Paper. In order that the Commission's Report may be made available as soon as possible, those who wish to make their submissions are requested to do so in writing or by e-mail to the Commission by **15 April 2005**.

CHAPTER 1 THE OFFICE OF TRUSTEE

A Introduction

1.01 Trusts are created for a variety of purposes but those purposes cannot be fulfilled without persons who are prepared to act as trustees by managing the trust and carrying out the purposes of the trust. The office of trustee is an onerous one. In the performance of the office, a trustee must act exclusively in the interest of the trust. The success of the trust administration often turns upon the energy and conscientiousness, not to mention expertise and wisdom of the trustee.

1.02 A trust may continue for lengthy periods of time and so provision has to be made for the appointment, retirement and removal of trustees. A trustee may die or become incompetent or incapable of carrying out the duties of trustee under the trust. In other instances trustees may simply not be prepared to continue to devote their time and energy to the trust and may wish to retire. The *Trustee Act 1893* contains provisions relating to the appointment, retirement and removal of trustees, and the purpose of this chapter is to examine the extent to which these particular provisions need to be modernised. The *Charities Act 1961* as amended by the *Charities Act 1973* also contains provisions regarding the appointment of trustees. The overall aim is to facilitate efficient management and administration of the trust.

B Capacity and Suitability to act as a Trustee

1.03 In Ireland, any person may be appointed to act as a trustee, including a minor. A beneficiary or a relative of a beneficiary may be appointed as a trustee but in some cases this may be inappropriate due to the potential conflict of interest which may arise. A company may act as a trustee either solely or jointly with another person (whether an individual or another company) provided its memorandum and articles of association provide express authority to carry out such a

role. There are no provisions in the *Trustee Act 1893* or the *Charities Acts 1961 and 1973* regarding who may act as a trustee.¹

1.04 There are no residence requirements in relation to trustees² and a person resident outside the jurisdiction may act as trustee for an Irish trust. However, for the purposes of granting charitable tax exemptions, the Revenue Commissioners specify that there should be a minimum of three trustees or officers or directors³ the majority of whom must be resident within the State.⁴

1.05 One of the fundamental requirements in granting charitable status to a charity is that its purposes must possess sufficient public benefit, that is it must benefit the community or an appreciable section of the community. There is, therefore, a public interest aspect to charities which is not a requisite for private trusts created for the benefit of identified beneficiaries or classes of beneficiaries. It may be argued that, given this public aspect, and the fact that the funds of a charity are funds in which the public have an interest, a more stringent attitude should be adopted in considering who may act as trustee of a charity, and that the State, in the interests of the public, should regulate who may act as trustees of charities.

1.06 There are many examples, based on case law, of situations where the courts have considered that certain persons should not act, or continue to act as trustees. For example, it has been held that unsoundness of mind, bankruptcy and liquidation or composition, or conviction for a dishonest crime should disqualify a trustee.

1.07 The question arises as to whether or not qualifying criteria for trustees of charitable organisations should be set out in statute. General trust law currently provides that new trustees may be appointed, without recourse to the courts, among other matters, where

¹ In the case of charities operating through a company, the provisions of the *Companies Acts 1963-2003* as to who can be a director of a company will apply. Generally, any person may become a director unless disqualified under Part VII of the *Companies Act 1990*.

² See paragraph 1.31 below.

³ Unless certain specified criteria are met, every Irish registered company must have at least one Irish resident director – see section 43 *Companies (Amendment) (No 2) Act 1999*.

⁴ *Applying for relief from tax on the income and property of Charities* (Leaflet CHY1 May 2003).

a trustee is unfit to act or is incapable of acting. The court also has statutory powers and an inherent jurisdiction, to replace trustees.

1.08 The Law Society, in its report, recommended that statutory provision be made in relation to qualifications for charity trustees as follows. They recommend that trustees must:

- “be eighteen years of age or over;
- be of sound mind;⁵
- not have been convicted of an indictable offence;
- not be an undischarged bankrupt;
- not have been disqualified under Part VII of the *Companies Act 1990*, the *Pensions Act 1990* as amended by the *Pensions (Amendment) Act 1996*, the *Trustee Act 1893* or the proposed new legislation.”⁶

1.09 The Commission is of the view that it is not advisable for a minor to be appointed to act as trustee. Being a trustee involves duties and responsibilities which a minor may lack the ability to fulfil. While it is accepted that some minors (particularly those close to attaining majority) may be more than capable of acting and that others may be unsuitable even though they have come of age, it is felt that, on balance, some minimum age must be set so as to protect the trust and the interests of the beneficiaries.

1.10 *In line with its recommendation in relation to general trust law, the Commission provisionally recommends that a minor, whether married or not, should be prohibited from acting as a charity trustee and that any purported appointment of a minor to act as trustee in relation to any settlement or trust shall be void from when the appointment would take effect.*⁷

1.11 The question of establishing a person’s mental capacity may cause considerable difficulties in practice. The question of legal

⁵ Note the terminology used in this context is currently the subject matter of discussion and may no longer be considered appropriate.

⁶ Law Society of Ireland *Charity Law: The case for reform* July 2002 at 220.

⁷ In the case of a trust created during the lifetime of the settlor this will be the date of coming into effect of the trust and in the case of a trust set up under a will this will be the date on which the assets are due to be passed to the trustees.

capacity has been examined in detail as part of the Commission’s review of Law and the Elderly⁸ and will form the subject matter of a further consultation paper. The assessment of capacity on an issue-specific basis is known as the “functional approach”. The modern view is that capacity should be assessed and adjudicated upon on the basis of a functional approach which asks whether the individual has the capacity to carry out a particular function at a specific time. Because of the complexities involved, the Commission is of the view that, in this context, it would be inappropriate to set any qualifying criteria in relation to mental capacity in respect of trust law and that the general functional approach should apply. However, there may be some specific instances where an individual is made a ward of court or where a power of attorney comes into effect under the *Powers of Attorney Act 1996*. In the case of a ward of the court, the Committee of the ward does not automatically step in as trustee in place of the ward.⁹ Where a power of attorney comes into effect, the donee or donees of the power does not take over any functions which the donor has as a trustee.¹⁰

1.12 *The Commission considers that qualifying criteria for the appointment of charity trustees should be embodied in legislation and recommends that a charity trustee shall be disqualified from being and shall cease to be a charity trustee if that person:*

- *is a minor;*
- *is a ward of court or where a power of attorney has come into effect;*

⁸ Law Reform Commission *Consultation Paper on Law and the Elderly* (LRC CP 23 – 2003).

⁹ Section 87 of the *Lunacy Regulation (Ireland) Act 1871* provides that the President of the High Court may on the application of the committee of the ward order that the committee act as trustee. It is understood that in practice such applications are rare. Section 88 of the 1871 Act provides that a committee appointed to act as trustee may also exercise a power of appointment of new trustees vested in the ward.

¹⁰ See section 16(2) *Powers of Attorney Act 1996* which provides that the general power of attorney under the Act “does not apply to functions which the donor has as a trustee or personal representative or as a tenant for life within the meaning of the Settled Land Act, 1882, or as a trustee or other person exercising the powers of a tenant for life under section 60 of that Act”.

- *is adjudicated bankrupt;*
- *makes a composition or arrangement with creditors;*
- *is a corporate trustee which is in liquidation or has been wound-up;*
- *is convicted of an indictable offence;*
- *is sentenced to a term of imprisonment by a court of competent jurisdiction;*
- *is disqualified or restricted from being a director of any company (within the meaning of the Companies Acts 1963-2003) or is disqualified under the provisions of the Pensions Acts 1990-2002;*
- *has been removed from the office of charity trustee by an order of the Registrar of Charities or the Courts.*

1.13 *The Commission welcomes suggestions as to whether or not the Registrar of Charities should have power to waive a disqualification under the above provisions. For example, the Registrar of Charities might have power to allow a trustee to act subject to certain conditions or limitations or to act for a particular charity or class of charities.*

1.14 The Commission is of the view that the Registrar of Charities will also have an important role to play generally in relation to assessing the capacity of persons to act as charity trustees.¹¹ The Charity Commissioners for England and Wales have recently published a consultation paper on Draft Guidance on Checking the Eligibility of Charity Trustees (27 May 2004). Their policy is set out in a new draft publication “Recruitment, Selection and Appointment of Charity Trustees”.

1.15 *The Commission recommends that guidelines on checking the eligibility of charity trustees be issued by the Registrar of Charities.*¹²

¹¹ For example, in relation to assessing a person’s mental capacity under the functional approach discussed above.

¹² This corresponds with the proposal in the Department’s Consultation Paper *Establishing a Modern Statutory Framework for Charities* which

1.16 The Commission also acknowledges calls in relation to the need for screening for a history of offences involving children before a person can be appointed as a trustee of a charity working with children and adolescents.¹³ The Commission in principle supports the introduction of measures which would make it easier for charities to carry out such screening. Pending the introduction of any such measures, the Commission is of the view that charities working with vulnerable individuals should be aware of their obligations and carry out their own checks prior to appointing trustees, other officers and employees. The need to ensure the suitability and integrity of trustees is an essential part of the proper management of the charity and a matter which existing trustees should treat with care, prudence and vigilance. In this regard, the Commission notes that the Department of Health and Children has published comprehensive guidelines for community and voluntary organisations that provide services for children.¹⁴ The guidelines offer guidance on the promotion of child welfare and the development of safe practices in work with children. The Registrar of Charities may also have a role to play in issuing guidelines or codes of practice for the appointment of trustees in relation to specific types of charities.¹⁵

C Number of Trustees

1.17 There are no specific provisions in the *Trustee Act 1893* or the *Charities Acts 1961* and *1973* as to the minimum or maximum number of trustees required. Section 56 of the *Charities Act 1961* makes provision for a body corporate to act as sole trustee in certain circumstances. Section 43(8) of the *Charities Act 1961*¹⁶ also provides that where the Commissioners of Charitable Donations and Bequests appoint a body corporate to act as a sole trustee or where a

recommends that the Registrar of Charities' functions might include issuing Best Practice Guidelines.

¹³ Law Society of Ireland *Charity Law: The case for reform* July 2002 at 220.

¹⁴ *Children First – National Guidelines for the Protection and Welfare of Children* 1999 and *Our Duty to Care – The principles of good practice for the protection of children and young people* 2002. See also the *Report of the Working Group on Garda Vetting* (February 2004) available from www.justice.ie.

¹⁵ See footnote 12.

¹⁶ As substituted by section 14 of the *Charities Act 1973*.

body corporate appointed under the section becomes a sole trustee of a trust which originally by its terms required more than one trustee, then the terms of the trust shall be deemed to require the appointment of one trustee only and one trustee shall be deemed to have been originally appointed.

1.18 In considering whether any minimum or maximum number of trustees should be imposed, it must be remembered that charities operate within many different legal structures, the main ones being; the charitable trust, the unincorporated association and the company limited by guarantee without a share capital.¹⁷ A corporate body may also act as trustee of a charitable trust, either solely or jointly.

1.19 For the purposes of granting charitable tax exemption, the Revenue Commissioners specify that there should be a minimum of three trustees or officers or directors, who are not related and the majority of whom must be resident within the State.

1.20 In relation to the numbers of trustees in a charity, it may be argued that stringent controls should be put in place, given the public aspect to their activities and that they are effectively managing funds in which the public have an interest. Increased numbers of trustees should enhance internal accountability and safeguard the assets and funds of the charity against possible fraud.

1.21 The Commission therefore does not consider it necessary to impose any maximum number of trustees in the case of charitable trusts. However, see below at paragraph 1.34 where it is recommended that the power to appoint additional trustees (where not specifically provided for in the trust instrument) is to be subject to the consent of the Registrar of Charities.

¹⁷ In the case of charities or trusts operating through a company, the provisions of the *Companies Acts 1963-2003* apply. Every company must have at least two directors. A body corporate cannot act as a director. Except in certain specified circumstances at least one of the directors must be resident in Ireland. A company limited by guarantee may have unlimited membership but must have a minimum of not less than seven members and it must have at least two directors. The Company Law Review Group recommended that private companies limited by shares (ie the new model company envisaged by the group) need only have one director. This recommendation has been incorporated into the general scheme of the new *Companies Bill*.

1.22 The Law Society, in its report, recommended a statutory requirement for a minimum of two trustees.¹⁸

1.23 The Commission is of the view that the Law Society recommendation does not go far enough and supports the Revenue requirement for three trustees and recommends that it be put on a statutory footing.

1.24 *The Commission provisionally recommends that a minimum of three trustees be required to act for a charitable trust or three officers in the case of an unincorporated association. A corporate trustee may act as sole trustee but in such circumstances the Commission recommends that there should be at least three directors on the board of directors. If the numbers fall below three, and the person or persons having power to appoint new trustees are unable or unwilling to do so, the Registrar of Charities should have power to appoint additional trustees to bring the numbers back up to the statutory requirement. This is without prejudice to the existing powers of the Commissioners of Charitable Donations and Bequests under section 43 of the Charities Act 1961, as amended by section 14 of the Charities Act 1973 and to the need for timely liaison with the Commissioners.*

1.25 *In the case of a charity operating through a company, the Commission also recommends that there should be at least three directors on the board of directors. However, the Commission notes that any legislation in this regard will need to form part of the current review and consolidation of company law and would ask the Company Law Review Group to consider this recommendation as part of its proposals.*

D Appointment

1.26 Apart from the initial appointment of trustees to facilitate the management of a trust, new trustees may be required at various stages throughout the lifetime of the trust to cater for death, retirement or removal of trustees. Questions arise as to who should make these appointments and when they may be made? Currently trustees may be appointed in the following ways:

¹⁸ Law Society of Ireland *Charity Law: The case for reform* (July 2002) at 221.

- Under the terms of the trust instrument;
- Under the relevant statutory provisions governing general trusts – section 10 (non-judicial power of appointment) and section 25 (judicial power of appointment) of the *Trustee Act 1893*;
- By the Commissioners of Charitable Donations and Bequests – section 43 of the *Charities Act 1961*.

1.27 Under Section 43 of the *Charities Act 1961*¹⁹ the Commissioners of Charitable Donations and Bequests have power to appoint a new trustee or new trustees either *in substitution for or in addition to* any existing trustee or trustees or where there is no existing trustee. This broad power may be exercised on the application of a trustee or trustees of the charity, on the application of any person having an interest (if there are no trustees of the charity, or they cannot be found), or of the Commissioners' own motion.

1.28 Under the general trust law provisions, in some instances appointment of trustees may be made without any application to the court (non-judicial power of appointment) and in other instances a court application may be required (judicial power of appointment).

1.29 The non-judicial power of appointment,²⁰ under the general trust law provisions, may currently be exercised where a trustee:

- is dead;
- remains out of the jurisdiction for more than twelve months;
- desires to be discharged from the duties;
- refuses to act;
- is unfit to act, or;
- is incapable of acting.

1.30 The persons entitled to appoint new trustees, under the general trust law provisions, are currently listed as being; the person

¹⁹ As substituted by section 14 of the *Charities Act 1973*. The section as originally enacted only applied where the property consisted of land. The amendment extended the section to also cover situations where the property consists of cash or securities.

²⁰ Section 10 of the *Trustee Act 1893*.

or persons nominated to appoint new trustees by the trust instrument or, if there is no such provision or the person nominated is unable or unwilling to act, then the power may be exercised by the surviving or continuing trustee or trustees for the time being or the personal representative of the last surviving or continuing trustee.

1.31 The Commission makes a number of recommendations in relation to the non-judicial power of appointment of trustees. It should be noted that the following recommendations relate to the general trust law provisions. Charities will also have the option of seeking assistance from the Registrar of Charities in relation to the appointment of trustees.

Currently, the non-judicial power of appointment only allows for the appointment of replacement trustees and does not allow for the appointment of additional trustees unless a vacancy arises.

The Commission is of the view that a non-judicial power to appoint additional trustees would be useful in practice and would reduce the need for recourse to the courts. Accordingly we recommend that such a power be introduced.

At present, the non-statutory power of appointment and replacement may be exercised where a trustee remains outside the jurisdiction for more than twelve months.

The Commission is of the view that the statutory provision regarding the removal of a trustee on the ground of absence from the jurisdiction for twelve months or more should be deleted as it is no longer an appropriate ground for the replacement of a trustee under the non-judicial power of appointment.

As indicated earlier, there may be some specific instances where an individual is made a ward of court or where a power of attorney comes into effect under the *Powers of Attorney Act 1996*. In the case of a ward of the court, the Committee does not automatically step in as trustee in place of the ward.²¹ Where a power of attorney comes into effect,

²¹ See footnote 9.

the donee or donees of the power does not take over any functions which the donor has as a trustee

The Commission is of the view that instances where a trustee is made a ward of court or a power of attorney comes into effect should be specifically included as grounds for the exercise of the non-judicial power of appointment.

Bankruptcy and liquidation do not currently form grounds for the appointment of replacement trustees.

The Commission is of the view that bankruptcy of a trustee²² should be specifically included as a ground for the exercise of the non-judicial statutory power of appointment.

The Commission is also of the view that where a corporate trustee is in liquidation or is wound-up, it may be subject to replacement under the non-judicial statutory power of appointment.

Currently, if a person is removed under a power contained in the trust instrument a replacement trustee cannot be appointed under the non-judicial statutory power of appointment (unless the trust instrument so provides).

The Commission recommends that where a trustee has been removed under a power contained in the trust instrument, that trustee may be subject to replacement under the non-judicial statutory power of appointment.

The persons entitled to appoint new trustees under the non-judicial power of appointment are currently listed as being; the person or persons nominated to appoint new trustees by the trust instrument or if there is no such provision or the person nominated is *unable or unwilling to act* then the power may be exercised by the *surviving or continuing trustee* or trustees for the time being or the personal representative of the last surviving or continuing trustee.

The question of a person being “unwilling to act” is open to interpretation and a distinction needs to be drawn between the situation where the person refuses to exercise the

²² Where a trustee is adjudicated bankrupt or makes a composition or arrangement with creditors.

authority and a situation where the person actively considers the matter but ultimately decides that the appointment of a new trustee is not warranted.

The Commission is of the view that a person nominated to remove and replace trustees should not lose the authority conferred by the trust instrument unless that person (1) refuses to exercise the authority, or (2) lacks the capacity to exercise the authority.

A “continuing trustee” includes a refusing or retiring trustee, if willing to act. The term “refusing” trustee includes a trustee who disclaims the trust. Refusal arises where the trustee has been active and now refuses to act, whereas with disclaimer the trustee has never acted and refuses to act. It is unlikely that the legislature would have wished to allow an individual who had never acted as trustee to become involved in appointing new trustees.

The Commission recommends that anyone who has disclaimed the trust should be excluded from joining in the appointment of a new trustee.

Under the current provisions it is not clear whether or not an executor who has renounced or not proved the will is required to join in the appointment of a replacement trustee.

For the purposes of clarification, the Commission recommends that the power of appointment given to the personal representatives of a last surviving or continuing trustee is deemed to be exercisable by the executors for the time being of such surviving or continuing trustee who have proved the will of their testator or by the administrators for the time being of such trustee, without the concurrence of any executor who has renounced or has not proved.

The Commission is also of the view that, where a corporate trustee is dissolved or in liquidation, the liquidator should be allowed to exercise the power of appointment of a new trustee²³ if there is no person nominated for that purpose in the trust instrument. If there are other remaining trustees the liquidator should join in the appointment (if there is no person nominated in the trust instrument with power to

²³ Subject to any views of the Company Law Review Group.

appoint) and if the corporate body was a sole trustee the liquidator may make the appointment solely.

1.32 *To summarise, therefore, the occasions giving rise to the non-judicial appointment of trustees under the general trust law provisions would be as follows; where a trustee:*

- *is a minor;*
- *is a ward of court or where a power of attorney has come into effect;*
- *is dead;*
- *desires to be discharged from the duties;*
- *refuses to act;*
- *is adjudicated bankrupt;*
- *makes a composition or arrangement with creditors;*
- *is a corporate trustee which is in liquidation or has been wound-up.*

1.33 *In addition, the powers would be further supplemented to allow for the appointment of additional trustees and the appointment of replacements where a trustee had been removed under a power in the trust instrument.*

1.34 *The Commission is of the view that in relation to the appointment of new trustees of charitable trusts, even where such trusts have the power to appoint new trustees, the Registrar of Charities will have an important role to play. This is particularly important in the protection of the public interest in respect of such trusts. The Commission therefore recommends that:*

- *The Registrar of Charities should have power to appoint replacement or additional charity trustees. This power is currently exercisable by the Commissioners of Charitable Donations and Bequests under section 43 of the Charities Act 1961, as amended by section 14 of the Charities Act 1973.*

- *The non-judicial statutory power to appoint additional charity trustees²⁴ should be subject to the consent of the Registrar of Charities before any such appointment.*
- *Any change in charity trustees made pursuant to the non-judicial powers of appointment should be notified immediately to the Registrar of Charities. This could form part of the periodic return to the Registrar of Charities.²⁵*

The Commission would welcome further submissions on the role of the Registrar of Charities in relation to the appointment of charity trustees.

E Retirement

1.35 A trustee who has taken up office may only retire if the trust instrument permits retirement, or under the relevant general trust law statutory provisions.²⁶

1.36 The aim of the non-judicial statutory powers in relation to retirement should be to make it easy for trustees to retire but not so easy that it will jeopardise the administration of the trust.

1.37 The first matter to be considered is to what extent, if any, the trust instrument should be allowed to exclude the statutory provisions regarding retirement. In relation to general trust law, the current non-judicial statutory powers in relation to retirement only apply if and as far as a contrary intention is not expressed in the trust instrument. It is generally accepted that a trustee who wishes to withdraw should not be forced to continue in office as a trustee. It is difficult to envisage circumstances in which the court would refuse to discharge a trustee and force a trustee to act under duress. If the trust instrument is allowed to oust the ability to retire the inevitable result

²⁴ As recommended at paragraph 1.31 above.

²⁵ The Registrar of Charities may set different requirements for returns depending on the size of the charity involved.

²⁶ Section 10 or 11 of the *Trustee Act 1893*. The Commissioners of Charitable Donations and Bequests also have power to appoint a new trustee or new trustees either *in substitution for or in addition to* any existing trustee or trustees or where there is no existing trustee - section 43 of the *Charities Act 1961*, as amended by section 14 of the *Charities Act 1973*.

is that an application to the court will be required and that this will almost invariably be granted.

1.38 *The Commission is of the view that nothing in the trust instrument should be capable of restricting the right of a trustee to retire from the trust or a part thereof and that any such provision should be invalid.*

1.39 The current non-judicial statutory powers in relation to retirement speak in terms of retirement from “the trust” which could be construed as indicating that it does not permit retirement from part of the trust. By contrast also when a new trustee is being appointed “a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property...”. By further contrast the appointment provisions allow for the appointment of a new trustee “[w]here a trustee...desires to be discharged from all or any of the trusts or powers reposed or conferred on him...”.

1.40 *The Commission is of the view that, under the general trust law provisions, there is an anomaly between the appointment and retirement provisions and recommends that the retirement provisions should be clarified to make it clear that a trustee can retire from part of a trust where any part of the trust property is held on trusts distinct from those relating to any other part or parts of the trust property.*²⁷

1.41 Under the present provisions retirement can only take place if there are at least two trustees remaining. *In view of the recommendation at 1.24 above, the Commission recommends that a trustee should not be permitted to retire from a charitable trust or an unincorporated association unless at least three trustees or officers of an unincorporated association or a corporate trustee remains.*

1.42 *The current provisions require the prior consent of the co-trustees and any person empowered by the trust instrument to appoint trustees before retirement can take place. The Commission is of the view that this regime should continue but that if consent is not forthcoming, the trustee wishing to retire should be able to apply to the Registrar of Charities for assistance.*

1.43 *The Commission recommends that a charity trustee must vacate office if that person:*

²⁷ *Ie where there is a clearly defined sub fund or sub trust.*

- *is a minor;*
- *is a ward of court or where a power of attorney has come into effect;*
- *is adjudicated bankrupt;*
- *makes a composition or arrangement with creditors;*
- *is a corporate trustee which is in liquidation or has been wound-up;*
- *is convicted of an indictable offence;*
- *is sentenced to a term of imprisonment by a court of competent jurisdiction;*
- *is disqualified or restricted from being a director of any company (within the meaning of the Companies Acts 1963-2003) or is disqualified under the provisions of the Pensions Acts 1990-2002;*
- *has been removed from the office of charity trustee by an order of the Registrar of Charities or the Courts.*

F Removal

1.44 There is a certain overlap between the question of appointment, retirement and removal of trustees. Often the appointment of new trustees is consecutive to efforts to remove or the retirement of a trustee.

1.45 A trustee may be removed from office if the trust instrument makes specific provision for removal. A trustee may also be removed as a result of the exercise of the statutory power of appointment of a new trustee²⁸, in other words the trustee is effectively being removed by way of replacement.

1.46 While the Commissioners of Charitable Donations and Bequests have no express powers to remove a trustee from office, the Commissioners of Charitable Donations and Bequests also have power to appoint a new trustee or trustees either *in substitution for or in addition to* any existing trustee or trustees or where there is no

²⁸ Section 10 of the *Trustee Act 1893*.

existing trustee.²⁹ The Commissioners, or any person, with the consent of the Attorney General may apply to the High Court for relief where there is a breach or supposed breach of any trust for charitable purposes or whenever the direction or order of the Court is considered necessary for the administration of any trust for charitable purpose. This could include or lead to a request to the court that a trustee be removed from office.³⁰

1.47 A trustee may also be removed by the court pursuant to its powers when exercising its jurisdiction to appoint new trustees.³¹ The power is exercisable by the court whenever it is expedient to appoint a new trustee or new trustees and it is found inexpedient, difficult or impracticable to act without the assistance of the court. The legislation provides, in particular, that the court may make an order for the appointment of a new trustee in substitution for a trustee who is convicted of a felony, or is a bankrupt. The section refers to the substitution of a trustee so a trustee cannot be removed unless a replacement trustee is appointed.

1.48 Apart from this statutory power, the court also has an inherent jurisdiction to remove a trustee from office, without necessarily appointing a replacement. This jurisdiction will generally be exercised where a trustee acts dishonestly or incompetently or wilfully obstruct the objects of the trust. The court will also remove a trustee where there is a clear conflict of interest between the trustee's personal position and that of the trust. In exercising its jurisdiction to remove trustees the overriding principle which the court has regard to is the interests of the charity and its charitable purposes.

1.49 *In relation to the judicial removal of trustees of charitable trusts, the Commission is of the view that the inclusion of enumerated grounds does provide some guidance for the public as to the situations where the court will exercise its jurisdiction and recommends that bankruptcy of a trustee³², liquidation of a corporate*

²⁹ The application may be made by a trustee or trustees or if there are no trustees, or they cannot be found, on the application of any person having an interest or of the Commissioners' own motion - section 43 of the *Charities Act 1961*, as amended by section 14 of the *Charities Act 1973*.

³⁰ Section 51 of the *Charities Acts 1961*.

³¹ Section 25 of the *Trustee Act 1893*.

³² Where a trustee is adjudicated bankrupt or makes a composition or arrangement with creditors.

trustee, conviction of an indictable offence, or where an individual is sentenced to a term of imprisonment by a court of competent jurisdiction, should all form grounds for the removal of a trustee and the appointment of a replacement by the court. The court also has general power to appoint new trustees in any case where the court is of the view that it is necessary to do so to ensure the proper administration of the trust.

1.50 *In view of the recommendation at 1.24 above, the Commission recommends that, in the case of charitable trusts or unincorporated associations, non-judicial removal without replacement should not be permitted unless at least three trustees or officers of an unincorporated association or a corporate trustee remain.*

1.51 The Law Society recommended that “the proposed Charity Regulator”³³ be given discretionary powers to petition the High Court for the removal of a charity trustee and that the power to remove a trustee (whether of a charity established by constitution, trust or company limited by guarantee) should be exercisable where:

there is misconduct or mismanagement in the administration of the charity;

the trustee has failed to carry out the duties imposed either by law or by the governing instrument of the charity;

the charity is being or has been administered in such a manner as to jeopardise the charity or its property;

it is necessary to act in order to protect the charity, its property or any property coming to the charity;

within the previous five years, the trustee has been discharged from bankruptcy or an arrangement with the creditors;

the trustee is a company in liquidation;

the trustee is incapable of acting by reason of mental disorder;

³³ This is one of the terms used by the Law Society to describe the new regulatory body. In this paper the regulatory body is referred to as the Registrar of Charities.

the trustee has not acted, and will not declare a willingness or unwillingness to act;

the trustee is outside the jurisdiction or cannot be found or does not act, and the absence or failure to act impedes the proper administration of the charity.”

1.52 The Law Society further recommended that any trustee who is threatened with being removed should be told the grounds on which removal is sought and have a right to present reasons for opposing removal to the body seeking such removal, whether this is the members of the charity or the Charities Office³⁴.

1.53 The question to be addressed is whether or not the Registrar of Charities should have the power to remove a trustee without recourse to the courts. It may be considered that there could be a potential conflict between the Registrar of Charities’ regulatory functions and a power of removal. On the other hand, it could be argued that the Registrar of Charities, precisely because of its regulatory and investigative functions, would be best placed to make decisions designed at protecting the property of the charity, up to and including the removal of charity trustees. The Commission is of the view that the Registrar of Charities should have power to remove charity trustees from office but that any such power must be accompanied by an appropriate appeals process to the courts taking account of Constitutional protections.³⁵

1.54 *The Commission, having carefully considered the matter, is of the view that the Registrar of Charities should have power to remove charity trustees from office but that this should be accompanied by an appropriate appeals process to the courts taking account of Constitutional protections. This power will form part of the Registrar of Charities’ overall inquiry and investigative functions.*

1.55 *The power to remove a charity trustee will arise where, following an investigation or inquiry, the Registrar of Charities is satisfied that a charity trustee has become incapable of acting or has been responsible for, or privy to, misconduct or mismanagement of*

³⁴ This is one of the terms used by the Law Society to describe the new regulatory body. In this paper the regulatory body is referred to as the Registrar of Charities.

³⁵ Cf the current appeals process to the High Court in section 43 of the *Charities Act 1961*, as amended by section 14 of the *Charities Act 1973*.

the charity or has contributed to or facilitated it. In light of the Commission's views in relation to capacity, a charity trustee may also be removed by the Registrar of Charities if that person:

- *is a minor;*
- *is a ward of court or where a power of attorney has come into effect;*
- *is adjudicated bankrupt;*
- *makes a composition or arrangement with creditors;*
- *is a corporate trustee which is in liquidation or has been wound-up;*
- *is convicted of an indictable offence;*
- *is sentenced to a term of imprisonment by a court of competent jurisdiction;*
- *is disqualified or restricted from being a director of any company (within the meaning of the Companies Acts 1963-2003) or is disqualified under the provisions of the Pensions Acts 1990-2002.*

G Disqualification

1.56 There are no provisions in the *Trustee Act 1893* or the *Charities Acts 1961* and *1973* in relation to the disqualification of trustees.

1.57 The position of charitable trusts may be distinguished on the basis of their public nature and that they are holding funds in which the public has an interest. The overriding criterion is to achieve the protection of the charity property for the purposes of its objects. If a trustee of a charitable organisation has been removed from office for embezzlement of funds, for instance, is it not appropriate that the trust or any other charitable trust should be protected from appointing such a person?

1.58 The Law Society recommended “that a person should be disqualified from acting as a charity trustee if that person:

has been convicted at any time of an offence involving deception or dishonesty;

is an undischarged bankrupt or has made a composition with the creditors and has not been discharged;

is of unsound mind;

has at any time been removed by the Court from being a trustee because of misconduct;

is disqualified from being a company director.”³⁶

1.59 These are similar to the issues raised in relation to qualification to act, as discussed at section B above. The questions raised in relation to removal by the Registrar of Charities are also relevant in the context of disqualification. Should the Registrar of Charities have powers to disqualify a trustee subject to some form of appeal process against the decision? Again any such power should be accompanied by an appropriate appeals process - see 1.53 above. Disqualification could be for a specified period but the Registrar of Charities could have further powers to allow a trustee to act even though disqualified. For example, the Registrar of Charities might allow a trustee to act subject to certain conditions or limitations.

1.60 A further issue arises as to the need for the Registrar of Charities to maintain a list of charity trustees who have been disqualified or removed from office. In the absence of such a list it would be difficult for charities to ascertain whether or not potential trustees had been so removed. The Commission is of the view that a list should be maintained but that it should not be available for public inspection.³⁷ Persons with a legitimate interest in obtaining such information should be able to contact the Registrar of Charities to ascertain whether or not a potential trustee has been disqualified.

1.61 *The Commission recommends that the Registrar of Charities should have power, as part of its inquiry and investigative functions, to disqualify persons from acting as charity trustees and should maintain a list of persons so disqualified or removed. The Registrar of Charities should have further powers to impose sanctions on any person purporting to act while disqualified.*

1.62 *The power to disqualify a charity trustee will arise where, following an investigation or inquiry, the Registrar of Charities is*

³⁶ Law Society of Ireland *Charity Law: The case for reform* July 2002 at 228.

³⁷ This proposal may be dealt with more appropriately by way of Ministerial Regulations rather than inclusion in the primary legislation.

satisfied that a charity trustee has become incapable of acting or has been responsible for, or privy to, misconduct or mismanagement of the charity or has contributed to or facilitated it. In light of the Commission's views in relation to capacity, a charity trustee will also be disqualified if that person:

- *is a minor;*
- *is a ward of court or where a power of attorney has come into effect;*
- *is adjudicated bankrupt;*
- *makes a composition or arrangement with creditors;*
- *is a corporate trustee which is in liquidation or has been wound-up;*
- *is convicted of an indictable offence;*
- *is sentenced to a term of imprisonment by a court of competent jurisdiction;*
- *is disqualified or restricted from being a director of any company (within the meaning of the Companies Acts 1963-2003) or is disqualified under the provisions of the Pensions Acts 1990-2002;*
- *has been removed from the office of charity trustee by an order of the Registrar of Charities or the Courts.*

1.63 *The Commission welcomes suggestions as to whether or not the Registrar of Charities should have power to waive a disqualification under the above provisions. For example, the Registrar of Charities might have power to allow a trustee to act subject to certain conditions or limitations or to act for a particular charity or class of charities.*

H Suspension

1.64 The points made in relation to disqualification apply equally in relation to suspension. Suspension will only be appropriate in the context of an investigation or inquiry by the Registrar of Charities.

1.65 The Law Society recommended that the Charities Registrar be enabled to apply to the High Court to suspend any charity trustee,

officer, agent, or employee of the charity from the exercise of the office or employment pending consideration being given to the removal, subject to the initiation of a formal inquiry.³⁸

1.66 Again, the question arises as to whether the Registrar of Charities should have power to suspend charity trustees directly or whether an application to court should be required? In the case of trustees of pension schemes, the Pensions Board has to apply to the court to have a trustee suspended. If the Registrar of Charities is given extensive powers in relation to investigation of charities this could include the power to suspend along similar lines to the powers of the Charity Commissioners for England and Wales. In cases where the Registrar of Charities proposes to suspend a charity trustee, the legislation should provide for a suitable appeal process as discussed above.

1.67 *The Commission recommends that the Registrar of Charities should have power to suspend persons from acting as charity trustees, for a period not exceeding 6 months, following the institution of an investigation or inquiry. The Registrar of Charities should have further powers to impose sanctions on any person purporting to act while suspended.*

³⁸ Law Society of Ireland *Charity Law: The case for reform* July 2002 at 230.

CHAPTER 2 REMUNERATION OF CHARITY TRUSTEES

2.01 The office of trustee is essentially unpaid. As a general principle, trustees are not entitled to remuneration for work carried out by them in their capacity as trustees. Trustees are precluded from making any personal profit from the trust and must be careful to ensure that no conflict of interest arises between their own personal interests and those of the trust. They are entitled to be reimbursed for any expenses properly incurred in the performance of their duties, but they are only entitled to payment for work done if the trust instrument makes express provision for remuneration.

2.02 Where the trust instrument contains an express charging clause, the extent to which the trustee is permitted to charge is determined by the terms of the charging clause. Such clauses are strictly construed against the trustee. Unless the trust instrument provides otherwise, a charging clause, which allows a trustee who carries on a profession to charge for services, will only permit payment for services within the scope of the profession.

2.03 With regard to charities, the arguments against having a statutory provision in relation to remuneration of trustees are strong and the following are some of the concerns which have been expressed elsewhere¹:

“Charities exist for the public benefit. Persons administering charities must act altruistically and not for their own benefit.

Statutory default powers for trustees should encapsulate “best practice” in the drafting of trust instruments. Unlike non-charitable trusts, it is not standard practice for instruments establishing charities to include professional charging clauses. To do so is not accepted as best practice.

Providing a universal power for professional trustees to charge for their services might be detrimental to public

¹ See Law Commission for England and Wales - *Trustees' Powers and Duties* (Law Com No 260 1999) at 80.

confidence in the charity sector by undermining its ethos of volunteer management.”

2.04 Charities must have an element of public benefit and giving charity trustees a right to charge for their services may undermine the whole voluntary ethos of charitable activities. It may also undermine public confidence in the charity sector by giving the impression that funds donated to a charity may be used for administrative rather than charitable purposes. As the Charity Commissioners for England and Wales state “[t]he concept of unpaid trusteeship has been one of the defining characteristics of the charitable sector, contributing greatly to public confidence in charities.”² The danger that any such statutory provision may be open to abuse is a real fear and has to be considered. In the case of charities there may be no identifiable beneficiaries to exercise control over the trustees. On a more practical level, in many cases, charities may not be in a position financially to remunerate trustees.

2.05 For the purposes of granting charitable tax exemption, the Revenue Commissioners expressly prohibit the remuneration of charity trustees by specifying that a clause be inserted into the charity’s governing instrument providing that:

“The income and property of the company/trust/body shall be applied solely towards the promotion of its main object(s) as set forth in the memorandum of association / deed of trust/constitution/rules. No portion of the company/trust/body’s income and property shall be paid or transferred directly or indirectly by way of dividend, bonus or otherwise howsoever by way of profit to members of the company/trust/body. No director/trustee/officer shall be appointed to any office of the company/trust/body paid by salary or fees, or receive any remuneration or other benefit in money or money’s worth from the company/trust/body.”³

2.06 In view of the prohibition by the Revenue Commissioners on remuneration of charity trustees in this jurisdiction as a pre-condition to granting charitable status, the numbers of professionals acting as trustees of charities in their professional capacity must be

² CC 11 – *Payment of Charity Trustees* May 2004.

³ *Applying for relief from tax on the income and property of Charities* (Leaflet CHY 1 May 2003).

minimal. A distinction must be made between a professional acting as a trustee in that capacity and an individual, such as an accountant or lawyer, who is acting as trustee on a purely voluntary basis and just happens to be a professional. Over the years, charities have had the benefit of such persons agreeing to act as trustees and such altruism must continue to be encouraged. The question as to whether such persons are “acting in a professional capacity” becomes somewhat blurred and will in most instances depend on the facts of each particular case. The English *Trustee Act 2000* clarifies this by stating that acting in a “professional capacity” means acting “in the course of a profession or business which consists of or includes the provision of services in connection with the administration or management of trusts or in connection with a particular aspect of the administration or management of trusts.”

2.07 A further distinction must be drawn in relation to instances where lay trustees engage the services of professionals to assist in the administration of the trust.

2.08 *The Commission does not consider it appropriate to introduce a statutory default provision in relation to remuneration of charity trustees, being of the view that the voluntary nature of charitable activities should be maintained to ensure public confidence in the administration of charities.*

2.09 The Law Society in its report recommended that the existing rules on payments and benefits to trustees (the Revenue Commissioners’ stipulations) be incorporated in legislation, subject to discretion on the part of the Charities Office to authorise payments or benefits to members and directors or trustees in certain circumstances.⁴

2.10 The Commission is of the view that the general principle outlined above is sufficient and that incorporation of the rules into legislation may prove inflexible and considers that it would be more appropriate for the Registrar of Charities to issue any further guidance required in relation to remuneration and benefits.⁵

⁴ *Charity Law: The case for Reform 2002* at 214.

⁵ This corresponds with the proposal in the Department’s Consultation Paper *Establishing a Modern Statutory Framework for Charities* which recommends that the Registrar of Charities should issue Best Practice Guidelines.

2.11 A further question which arises is the need, if any, for a statutory power allowing charities to remunerate an individual trustee where that trustee or a person connected with that trustee is providing services to the charity.

2.12 The English *Charities Bill*⁶ provides a statutory power for charities to remunerate an individual trustee where that trustee, or a person connected with that trustee, is also providing non-trustee services to the charity. It also provides safeguards to prevent misuse of the power. The consultation process in advance of the Bill showed that many people were in favour of relaxing the rules which prevent a trustee receiving payment for providing the charity with a trade or professional service outside the person's duties as a trustee. The Consultation Paper "Private Action, Public Benefit: A Review of Charities and the Wider Not-For-Profit Sector"⁷ made the following observations:

"Often a trustee can provide such a service on much more favourable terms than the charity could obtain elsewhere. For instance, a trustee who is a plumber might agree to replace the central heating at cost price; or a trustee who is a solicitor might agree to carry out some conveyancing for a nominal fee. We believe that a trustee should be allowed to be paid for a service if the trustee body, as a whole, reasonably believe it to be in the charity's interests that the service should be provided by that trustee. The trustee body would of course have to manage the inherent conflict of interest properly, and any transaction for value between a charity and one of its trustees should be conducted openly and reported as required."

2.13 The *Charities and Trustee Investment (Scotland) Bill*⁸ also makes provision for the remuneration of charity trustees who provide non-trustee services to or on behalf of the charity.

2.14 *The Commission is of the view that legislation allowing for remuneration of trustees for non-trustee services should be*

⁶ The English *Charities Bill* was introduced in the House of Lords on 20 December 2004 [HL Bill 15].

⁷ Published by the Strategy Unit in September 2002.

⁸ The Scottish Bill was introduced to Parliament on 15 November 2004 [SP Bill 32].

introduced. Any such provision should contain safeguards which would emphasise that it does not apply to remuneration for services provided by a person acting in the capacity of trustee.

CHAPTER 3 DUTY OF CARE

3.01 In Ireland, there are no provisions in the *Trustee Act 1893* or the *Charities Acts 1961* and *1973* in relation to duty of care. As for general trustees, the standard and duty of care is governed by equitable principles and case law. The main distinction is that in the case of general trusts it may be said that the duty of care is owed to the present and future beneficiaries of the trust, whereas in the case of charities the trustees' main duty is to ensure that the charitable purposes of the charity are fulfilled.

3.02 The Law Society of Ireland recommended that the role, responsibilities and duties of charity trustees should be the same, no matter what form of legal structure is chosen.¹ The Department's consultation paper also contains a similar proposal.² The Law Society also recommended that the duty of care should be a statutory duty.

3.03 The main problem with codification of roles, responsibilities and duties is the fact that currently charities operate under various different legal structures and each of these structures has a separate body of law governing its operation. The traditional legal structures used by charities are the charitable trust, the unincorporated association or the company – usually the company limited by guarantee. The difficulty with codification is how to cater for the charitable company and the inevitable interaction with company law. Difficulties relating to the interaction of charity, trust and company law have also been encountered in other jurisdictions.³

3.04 One of the issues raised in the debate is the legal uncertainty as to exactly how the fiduciary duties imposed on directors by company law overlap with the duties imposed by charity law on

¹ *Charity Law: The case for Reform* (2002) at 230.

² *Establishing a Modern Statutory Framework for Charities* (December 2003) at 16.

³ For example, in England, the *Trustee Act 2000* does not apply to charitable companies.

trustees and, where there is a conflict, which prevails. The general scheme of the new *Companies Bill* now contains a statutory statement of directors' fiduciary duties. The provision relates to directors of private companies limited by shares but it is envisaged that the same provisions will also apply to directors of designated activity companies (DACs) or companies limited by guarantee and will also therefore apply to directors of charitable companies if the DAC structure is used.

3.05 Because of the difficulties outlined above, the Commission is of the view that, given the various existing legal structures, it is not possible to achieve absolute codification of the roles, responsibilities and duties of charity trustees. The difficulties highlighted identify the possible need for a new optional corporate structure for charities⁴ and this topic may form the basis for further review by the Commission.⁵

3.06 *The Commission is of the view that charity legislation should provide for a general statutory duty of care rather than set out specific statutory duties. It considers that further specific requirements for charity trustees should be dealt with by way of guidelines issued by the Registrar of Charities.*

3.07 The first step is to find a common term to describe persons involved in controlling and managing the administration of a charity. The term used to describe those involved in the management of trusts varies depending on the legal structure. As a precursor to specifying a statutory duty of care, it is desirable that a common term be used to describe the persons having the general control and management of the administration of a charity.

3.08 The use of the term "charity trustees" seems an apposite description and appropriate for Ireland given the fact that this term is already in use in other jurisdictions in a similar context. The language conveys an understanding that the trustees of charitable trusts, the directors of companies and the officers of unincorporated associations all have special fiduciary responsibilities to use the assets

⁴ Similar to the English and Scottish proposals in relation to charitable incorporated organisations (CIOs) which have now been given life in the draft *Charities Bill* and the *Charities and Trustee Investment (Scotland) Bill* respectively.

⁵ The Commission's Second Programme 2000-2007 has identified the law of trusts including the law of charities for examination.

of the company or the trust or the association for charitable purposes. The use of the term “trustee” conveys the quality of duty that the governing body has. It points specifically to the underlying trust relationship that the legal structure embodies.

3.09 *The Commission recommends that the term “charity trustees” be defined as “the persons having the general control and management of a charity”.*

3.10 The next question to be addressed is the standard of care required. This issue cannot be considered in isolation from the nature of charities and the individuals who agree to assist in their administration. The first point to remember is that trustees of a charity which wishes to avail of charitable tax exemptions are prohibited from receiving remuneration – see full discussion at chapter 2. This means that any individual who becomes involved as trustee of a charity does so on a voluntary and unpaid basis, giving freely of their time for the benefit of others. Many professionals, for example accountants or lawyers or other professional people, agree to act as trustees but importantly in this context, are not doing so in the course of their profession or business.

3.11 In setting a duty of care for charity trustees, therefore, one must carry out a careful balancing act to ensure that the standard is not set so high as to discourage individuals from becoming involved in voluntary activities, yet at the same time ensuring that public confidence in the charity sector is maintained by ensuring that funds donated to a charity are properly applied for the purposes of the charity.

3.12 It is for these reasons that the Commission considers that a different statutory duty of care should be prescribed for charity trustees than for trustees of general trusts.⁶ The overriding principle is that the charity trustee should act in good faith and in the interests of the charity.

3.13 *The Commission recommends the following duty of care for charity trustees:*

⁶ Bearing in mind that trustees of general trusts can, and in many instances do, charge for their services. For full discussion see chapter 3 of the main paper – *Trust Law – General Proposals* (LRC CP 35-2005).

A charity trustee must, in exercising functions in that capacity, act in the interests of the charity and must, in particular:

(a) seek, in good faith, to ensure that the charity acts in a manner which is consistent with its purposes, and

(b) act with the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person.

3.14 *The Commission provisionally recommends that the duty of care should apply to all charity trustees, including the trustees of charitable trusts, trustees and committee members of unincorporated associations, the directors of charitable companies and the governors of bodies incorporated by charter, but would welcome submissions in this regard.*

CHAPTER 4 POWERS OF INVESTMENT

4.01 In determining the scope of the power of investment in respect of a particular trust, the first source of any such powers is the specific terms of the trust instrument, which generally includes an investment clause setting out the trustees' powers of investment. Where the powers of investment are specifically delineated by an investment clause in the trust instrument, the trustees are obliged to comply with such terms as are stipulated. In such circumstances, any investment in securities not authorised by the investment clause will constitute a breach of trust.

4.02 Where the trust instrument contains no such express clause in relation to investment, or the terms of such clause are not drafted appropriately widely, the scope of trustees' powers of investments are set out in Part I of the *Trustee Act 1893* as amended by the *Trustee (Authorised Investments) Act 1958*. The provisions set out the various classes of authorised investment under the legislation and provide for the variation of the list of authorised investments by the Minister for Finance. The scope of the investments authorised by statute have been extended a number of times, most recently in 2002. Trustees are also required to review the investment of trust funds at intervals of not more than six months.

4.03 The Commission is of the view that the current situation in relation to authorised investments has many advantages, particularly in relation to default trusts¹ as these may be administered by persons with little or no expertise in the administration of trusts or investment of trust monies. The list of authorised investments may therefore provide invaluable guidance to such trustees in the exercise of the power of investment.

4.04 The existing provisions regarding the investment powers of charity trustees are broadly similar to those outlined above for general

¹ For example trusts arising on an intestacy and which involve minors whose interests require protection.

trustees. The charity trustees' powers of investment derive from the specific terms of the trust instrument or if the trust instrument contains no such terms, the scope of the powers of the charity trustees will be governed by Part 1 of the *Trustee Act 1893* as amended by the *Trustee (Authorised Investment) Act 1958*. The duty of charity trustees to manage and invest trust assets properly is governed by equitable principles and case law.

4.05 The *Charities Acts 1961* and *1973* also make provision whereby the trustees of a charitable trust can seek advice from the Commissioners of Charitable Donations and Bequests in relation to the investment of charity funds. The Act provides that the Commissioners may confer on the trustees the power to invest any fund held on charitable trust in such manner, on such terms and subject to such conditions, as the Commissioners may think proper, whether or not such investment is authorised by the trust instrument, if any, or by law.

4.06 Charity trustees may also invest in the instruments approved by the Commissioners – and for this purpose the Commissioners have developed a list of approved investments known as the “Commissioners’ List”. However, as the Law Society points out in its report,² “the Commissioners’ List” does not coincide with the list authorised by the Minister for Finance and this may give rise to confusion in practice. The Commissioners are aware of this situation and have sought and received expert financial advice as to the steps to be taken to resolve this perceived problem appropriately.

4.07 A further point to note in relation to investments by charity trustees is the existence of the Commissioners’ Common Investment Fund.³ The Commissioners set up this fund so that a number of charities can pool their funds so as to make one substantial fund for investment thereby benefiting from a higher rate of return and a reduction in administrative costs.

4.08 *The Common Investment Fund is particularly useful for charities with limited funds and the Commission recommends that the scheme be retained.*

² *Charity Law: The case for Reform 2002* at 243.

³ This fund was established in 1985 under a scheme pursuant to section 46 of the *Charities Act 1961*.

4.09 The Charity Commissioners for England and Wales have issued detailed guidance on the investment of charitable funds.⁴

4.10 *The Commission considers that it would be helpful if guidelines on the investment of charitable funds could be issued in this jurisdiction in relation to charity investments.*

4.11 In the context of the Commission's proposals in respect of general trust law, the Commission considered that a default statutory power of investment which would allow trustees to invest trust funds as if they were absolute beneficial owners was inappropriate.⁵ The Commission reached this conclusion having regard to the needs of lay trustees who may have little or no experience in the office of trusteeship, and also having regard to the relatively broad scope of the current statutory scheme governing investment of trust funds.

4.12 *The recommendation made in relation to general trust law that the statutory power of investment should continue to be governed by the current statutory scheme of authorised investments applies equally to charity trustee investment. The Commission recommends that it should be clarified that the list compiled by the Commissioners of Charitable Donations and Bequests would be reviewed periodically by reference to the list compiled by the Minister for Finance.*

4.13 By way of clarification, if a charity realises an investment, the proceeds, subject to any contrary intention expressed in the trust instrument, may be applied for its charitable purposes rather than re-invested. In other words, just because the original donation was in a particular form, for example, government stock, the income from which was being used to fund the charity's purposes and if the trust instrument permits realisation of the investment, the proceeds can, subject to the provisions of the trust instrument, be used to fund the charity's purposes rather than being re-invested.

4.14 A question arising with greater frequency in the context of modern trusts is the extent to which trustees may allow non-financial considerations to inform their investment decisions. Specifically, this

⁴ CC 14 *Investment of Charitable Funds* – February 2003.

⁵ For full discussion see chapter 4 of the main paper – *Trust Law – General Proposals* (LRC CP 35-2005).

can arise in relation to whether the trustees' powers of investment allow them to make "socially responsible" or "ethical" investments.

4.15 The issue of socially responsible investments is of particular importance for charities. An additional factor is that the charity is pursuing an aim, so that the question arises whether the trustees can invest in undertakings which are incompatible with its objectives. The potential difficulty which can arise in respect of ethical investments is where the operation of an ethical investment policy may have negative financial repercussions for the charity fund.

4.16 The Law Society has called for the position on ethical investment to be clarified by a statutory (or ministerial or Charities Office) confirmation that it is in order for charity trustees to consider the objects or mission of the charity in question as a relevant and overriding factor in making any investment decisions.⁶

4.17 *The Commission is of the view that legislative intervention to allow trustees to follow an ethical investment policy is inappropriate and that such powers, if any, should be dictated only by the terms of the trust instrument. An ethical policy may only be pursued if it results in overall financial benefit to the charity.*

⁶ *Charity Law: The Case for Reform* (July 2002) at 248-249.

CHAPTER 5 POWER OF SALE, PURCHASE AND TO ISSUE RECEIPTS

A Introduction

5.01 The ability of trustees to deal with trust property by way of purchase or sale may, in many instances, be essential to the sound administration of the trust. While many trust instruments contain such powers, this is not always the case, and the lack of statutory powers governing acquisitions and sales may cause difficulties in practice.

B Power to acquire land

5.02 In relation to charitable trusts, the general trust principles on the acquisition of land apply; thus, trustees of a charitable trust may only acquire land if the trust instrument so provides. The power in the trust instrument may specify that land can only be acquired for a particular purpose, for example, for the fulfilment of the charity's purpose or for investment. If the trust instrument does not confer such a power it may be possible to imply the existence of a power, for example, if the charity's purposes cannot be fulfilled without the acquisition of land.

5.03 Land acquired under an express power by trustees of a personalty settlement, or by trustees of land held upon trust for sale, is held upon trust for sale, unless the settlement otherwise provides. Trustees are under a duty to sell land purchased in breach of trust.¹

5.04 Under section 32 of the *Charities Act 1961*² the Commissioners of Charitable Donations and Bequests may confer on the trustees the power to invest any fund held on charitable trust in such manner, on such terms and subject to such conditions, as the

¹ In the case of general trusts where all the beneficiaries are over eighteen and absolutely entitled to the entire beneficial interest of the trust, they may direct the trustee to retain the land.

² As substituted by section 9 of the *Charities Act 1973*.

Commissioners may think proper, whether or not such investment is authorised by the trust instrument, if any, or by law. This allows the Commissioners to authorise the acquisition of land by the trustees where the trust instrument contains no such power.

5.05 *The Commission does not recommend granting charities a general default power to acquire land.*

C Power of sale

5.06 If the trustees of any charity comprising land wish to dispose of land and the trust instrument does not constitute a trust for sale, or contain a power of sale, the trustees may apply to the Commissioners of Charitable Donations and Bequests for authorisation. The Commissioners can authorise the trustees to sell, exchange, mortgage, surrender a lease or accept a surrender of a lease of any charity land. They can also authorise the lease of charity land and authorise the sale or purchase of any periodical payments in relation to charity land. All sales, leases, exchanges and other transactions authorised by the Commissioners have the like effect and validity as if they had been authorised by the express terms of the trust affecting the charity.

5.07 The overriding factor in granting consent is whether the Commissioners are satisfied that the application made by the trustees would be advantageous to the charity. For example, the Commissioners will not normally sanction a sale at an undervalue unless they are satisfied that the proposed disposition would both be for the benefit of a specified charitable purpose other than a purpose of the existing charity and would operate for the benefit of the public. When authorising a sale, the Commissioners may give directions for securing the due investment of the money arising therefrom, for the benefit of the charity, as they think fit.

5.08 The Commissioners may frame a *cy-près*³ scheme to deal with charity property. In the case of charities established or regulated

³ *Cy-près* has been interpreted as meaning “as near as possible” to the spirit of the original gift. The doctrine allows the High Court, or the Commissioners of Charitable Donations and Bequests to give effect to a donor’s charitable intention where it is impossible or impracticable to give effect to the donor’s wishes in the precise terms intended, for example, where the gift can be better used in conjunction with other property and can suitably, regard being had to the spirit of the original gift, be made

by a statute or by a charter they may also frame a scheme to enable the trustees, with the approval of the Commissioners, to sell, lease, exchange, and mortgage or charge any land or any other property of the charity. In fact, the applicant would usually submit a scheme to the Commissioners for approval and thus a scheme would come to be considered and to be framed.

5.09 If a charity's governing instrument constitutes a trust for sale or contains a power of sale, the question of consent from the Commissioners does not arise and is primarily a matter for the solicitors for the purchaser to be satisfied that the sale is valid and is not liable to challenge.

5.10 *If a charity's governing instrument does not contain a power of sale or if the terms of the power of sale are unclear, the Commission recommends that the charity trustees should obtain appropriate consent, which at present is by way of application to the Commissioners of Charitable Donations and Bequests.*

5.11 Difficulties may arise, for example, where the land represents permanent endowment of the charity or if the governing instrument stipulates that the land is to be used for the purposes, or any particular purposes, of the charity.

5.12 It is also important for charity trustees to note that they cannot give themselves a power of sale, for example, by transferring the charity land to a holding company whose memorandum contains a power of sale. This device cannot be relied upon to effect a valid sale where the original conveyance or grant did not include a power of sale.

5.13 The general principles outlined above may also be applied to any leases, mortgages or exchange of charity land.

D Power to issue receipts

5.14 Section 41 of the *Charities Act 1961* authorises the Commissioners of Charitable Donations and Bequests have power to give effectual receipts for payments for charitable purposes where there is no person available or competent to do so. The section provides that where:

applicable to common purposes. See also paragraph 10 of the Introduction.

(a) a person is liable to make any payment to or for any charitable purposes, and

(b) difficulty arises in making the payment by reason of the death, absence, incapacity or non-existence of a person competent to give an effectual discharge,

the Board, may, if they think fit, accept the payment (to be applied by them according to the trusts affecting it) and the receipt of the Board shall be an effectual discharge to the person making the payment.

5.15 The Commission does not consider that any amendments are required to these provisions.

CHAPTER 6 POWER TO DELEGATE

6.01 The power of trustees to delegate may also be framed in the negative form of a “duty not to delegate”, though it is questionable whether much turns on the distinction. The trust instrument may provide trustees with an express power of delegation. It is only in the absence of such express authority in the trust instrument that the power of trustees to delegate, and the circumstances in which such delegation may be permitted, become an issue. The rationale underpinning the prohibition on delegation has been described as resulting from the fact that “the office is viewed as one where confidence is placed in the abilities of the particular individual and it is therefore expected that he should personally look after the interests of the beneficiaries.”¹ Thus, if a trustee delegates without authority, that trustee will be held liable for any default by the person to whom the powers have been delegated.

6.02 The *Trustee Act 1893* deals with the power of trustees to authorise receipt of moneys by a banker or solicitor. A trustee may appoint a solicitor to receive purchase money derived from the sale of trust property by permitting the solicitor to have custody of, and to produce, a deed containing a receipt for the money. A trustee may appoint a banker or solicitor to receive and give a discharge for any money payable by virtue of an insurance policy, with the validity of the delegation in this case being dependent on the banker or solicitor being in possession of, and authorised to produce, the insurance policy with a receipt signed by the trustee.

6.03 For the avoidance of doubt it should be noted that where a power of attorney comes into effect under the *Powers of Attorney Act 1996*, the ward or the donor of the power may not delegate the functions which the ward or donor has as trustee.² Where an

¹ Delany *Equity and the Law of Trusts in Ireland* (3rd ed Thompson Round Hall 2003) at 421.

² See section 16(2) *Powers of Attorney Act 1996* which provides that the general power of attorney under the Act “does not apply to functions which

individual is made a ward of court the Committee of the ward does not automatically step in as trustee in place of the ward.³

6.04 Besides the statutory provisions discussed above, there are no statutory provisions in the *Charities Acts 1961* and *1973* governing delegation. The Commissioners of Charitable Donations and Bequests have powers to frame schemes for the application *cy-près* of the property comprised in the charitable gift. The Commissioners also have authority to confer power on the trustees to invest the charity fund, in such manner, on such terms and subject to such conditions as the Commissioners may think proper. These powers are considered sufficiently broad as to allow the Commissioners to confer on the trustees the power to delegate as part of the scheme or in relation to the investment of the charity fund.

6.05 The Law Society in its report, recommended that a statutory power to delegate day to day investment decisions (as opposed to strategic, long-term, investment decisions) be created subject to certain protections such as the professional qualifications of the agent and the need to provide a statement of investment principles.⁴ The Commission considers that this approach would best serve the public interest.

6.06 *The Commission recommends the introduction of default statutory powers of delegation.⁵ The classes of functions which trustees of charitable trusts should be permitted to delegate are as follows:*

the donor has as a trustee or personal representative or as a tenant for life within the meaning of the Settled Land Act, 1882, or as a trustee or other person exercising the powers of a tenant for life under section 60 of that Act”.

³ Section 87 of the *Lunacy Regulation (Ireland) Act 1871* provides that the President of the High Court may on the application of the committee of the ward order that the committee act as trustee. It is understood that in practice such applications are rare. Section 88 of the 1871 Act provides that a committee appointed to act as trustee may also exercise a power of appointment of new trustees vested in the ward.

⁴ *Charity Law: The case for Reform 2002* at 247.

⁵ For a full discussion of the issues leading up to this recommendation see chapter 6 of the main paper – *Trust Law – General Proposals* (LRC CP 35-2005).

(a) any function consisting of carrying out a decision that the trustees have taken;

(b) any function relating to the investment of assets subject to the trust (including, in the case of land held as an investment, administrative powers or procedures relating to the management of the land or the creation or disposition of an interest in the land);

(c) any function relating to the raising of funds for the trust otherwise than by means of profits of a trade which is an integral part of carrying out the trust's charitable purpose;

(d) any other function prescribed by Ministerial Regulations.

6.07 *The trustees should be required to act in accordance with any guidance given by the Registrar of Charities concerning the selection of a person for appointment as a nominee or custodian. This is without prejudice to the powers currently exercised by the Commissioners of Charitable Donations and Bequests in respect of investment and delegation under sections 32 and 33 of the Charities Act 1961, as amended by sections 9 and 10 of the Charities Act 1973. Arrangements for timely liaison in respect of these matters would need to be carefully considered.*

6.08 *The Commission recommends that the statutory duty of care shall apply to trustees' power of delegation.*

6.09 *Provision should also be made in relation to the terms of appointment and remuneration of custodians and nominees.*

CHAPTER 7 LIABILITY OF TRUSTEES

A Introduction

7.01 A trustee may be found to be acting in breach of trust if failing to perform the duties required or if acting in an unauthorised manner. A breach of trust may occur in a variety of circumstances, such as investment of trust monies in unauthorised investments, or failure to exercise the appropriate degree of supervision over the management of the trust by co-trustees. An issue which has attracted considerable attention in many common law jurisdictions in recent times has been the extent to which a trustee may be protected from liability by the inclusion of an exemption clause in the trust instrument.

7.02 The government's Consultation Paper – *Establishing a Modern Statutory Framework for Charities* recommends that a statutory exoneration be provided for lay trustees against liabilities arising out of acts committed honestly, reasonably and in good faith.¹

7.03 The Commission is of the view that the issues of duty of care, liability of trustees, exemption clauses, professional indemnity insurance and statutory exoneration are all inextricably linked and should not be considered in isolation.

7.04 The questions that arise in relation to liability issues for charities are:

Should there be a distinction between lay trustees and professional trustees to exonerate and take account of the status or more particularly the expertise and skill of the trustee? The skill and expertise would relate to the duty of care required. The duty of care is discussed in chapter 3.

Should charity trustees be allowed to have the benefit of exclusion clauses?

¹ *Establishing a Modern Statutory Framework for Charities* at 16.

If so, is there a need for regulation of such clauses to prevent contracting out of an ‘irreducible core of obligations’?

Should charity trustees be allowed to purchase indemnity insurance out of charity funds?

B Professional and Lay Trustees

7.05 In Ireland, there is no statutory distinction between lay and professional trustees. Traditionally, trustees have fallen into two categories; first non-professional or lay trustees, who in private trusts are often family members or close associates of the settlor or testator, or are volunteers in the case of a charity, each of whom agree to act out of a sense of duty; and secondly professional trustees, usually banks and financial institutions who undertake the role only in circumstances where suitable provision is made for their remuneration.

7.06 In England and Northern Ireland, the terms “lay trustee” and “professional trustee” have been defined for the purposes of determining the trustee’s entitlement to remuneration.² In relation to liability, the question arises as to whether a distinction should be drawn between professional and lay trustees or should a single standard apply to all trustees. The argument in favour of differentiating between the two types of trustees rests mainly on the issue of qualifications. However, this is an issue in relation to the standard of care³ rather than an exemption from liability. The courts have long held that there is a distinction in the standard of care and pointed to the unfairness which would be caused by the application of one uniform standard.

7.07 In any event, the question arises as to whether there are situations where professional trustees act as trustees to charitable

² Trustees act in a professional capacity if they act in the course of a profession or business, which consists of, or includes, the provision of services in connection with the management or administration of trusts or in connection with a particular aspect of the administration of the trusts. A person acts as a lay trustee if he or she is not a trust corporation and does not act in a professional capacity. Section 28(5) and (6) of the English *Trustee Act 2000*.

³ See chapter 3.

trusts? Bearing in mind the Revenue prohibition on remuneration of charity trustees, whether or not they are incorporated, the question of having professional trustees act as trustees of charitable trusts is not an option at present. Charities do, of course, purchase professional advice where it is required.

C Duty of Care

7.08 The duty of care has been dealt with in Chapter 3 and the Commission's recommendations in relation to charity trustees are contained at paragraph 3.13. The Commission is of the view that this duty of care should at least consist of an irreducible core of obligations for charity trustees.

D Exemption Clauses

7.09 A trustee exemption clause may be defined as "a provision contained in a trust document that purports to excuse the trustee from liability for conduct that may constitute a breach of trust". The origins of the trustee exemption clause may be linked to the relatively unrestricted nature of trustees' liability for breach of trust; initially such clauses were relatively narrow, and were strictly construed against trustees. However, the transformation of trusts in modern times – including the changed nature of trust assets and the use of the trust for purposes never before envisaged, and the extended powers given to trustees – has led to the inclusion of ever wider trustee exemption clauses in trust instruments

7.10 The difficulties in respect of trustee exemption clauses lie in the conflict between the autonomy of the settlor, and the entitlement of trustees to be protected from liability on the one hand, with the entitlement of beneficiaries for redress, the "irreducible core of trustee obligations" and public policy on the other.

7.11 There has been a wide ranging debate in other jurisdictions on the issue of exemption or exoneration clauses and whether there should be a statutory limitation to debar what is now a standard practice of inserting trustee exemption clauses into trust instruments

relieving trustees from liability which results from an act or omission that would otherwise be regarded as a breach of trust.⁴

E Exoneration

7.12 In contrast to the situation in Ireland, many jurisdictions grant discretionary power to the court to relieve trustees from breach of trust where they act reasonably and in good faith. A typical provision would read as follows:

If it appears to the court that a trustee is or may be personally liable for any breach of trust,[and if the trustee] has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, then the court may relieve the trustee either wholly or partly from personal liability for the same.

7.13 Many jurisdictions regard the discretionary power of the courts to relieve trustees from liability for breach of trust where they have acted reasonably and honestly as a fair and useful provision, offering protection for trustees against claims by beneficiaries in respect of what are technical or less culpable breaches of trust. There is an obvious interaction between such a provision and the issue of trustee exemption clauses; indeed, many jurisdictions have considered reform of the law on trustee exemption clauses based upon a tandem approach of limited prohibitions on trustee exemption clauses with the possibility of trustees applying to court for relief from liability.

F Indemnity Insurance

7.14 Trustee indemnity insurance indemnifies trustees against the risk of personal liability, whether to the charity or to a third party, arising from their breach of trust. Where the charity is incorporated or where it carries out a part of its business through a separate company, the trustees' personal liability for their wrongful acts as a company's directors or officers may also be covered. It provides cover against liabilities which are those of the trustees, rather than those of the charity.

⁴ See chapter 7 of the main paper– *Trust Law – General Proposals* (LRC CP 35-2005).

7.15 Trustee indemnity insurance provides a personal benefit to the trustees it insures. This, like any other form of personal benefit for trustees, requires specific authorisation in the trust instrument in order for a charity to be permitted to obtain such cover. Alternatively, trustees may arrange and pay for their own insurance privately, at their own expense, without the need to obtain authorisation. In Ireland, the Revenue Commissioners do not regard the provision of insurance as a charitable object.⁵

7.16 The introduction of a new simple form of charitable organisation which would have limited liability and a legal personality separate from the trustees and members would go some way towards resolving the issue of concerns about the personal liability of trustees of charities and thus obviate the need for indemnity insurance.

7.17 Apart from the actual cost to the charity in providing insurance for trustees, the other main concern is that trustees may purchase insurance where there is clearly no need to do this.

G Recommendations

7.18 *The Commission is of the view that the simplest and clearest approach as to liability is to avoid the distinction between lay and professional trustees, to avoid having to stipulate what breaches should be excused and to give the court discretion to excuse trustees of liability where they have acted honestly, reasonably and in good faith.*

7.19 *The issue of trustee exemption clauses should be addressed in relation to the standard of the “irreducible core obligations” of trusteeship, in conjunction with the statutory duty of care.*

7.20 *The Commission is of the view that trustees should not be allowed to purchase indemnity insurance out of charity funds.⁶*

⁵ Revenue Commissioners’ precedent number APP 11332 – 2 February 1995 which states that “the provision of insurance is not a charitable object”.

⁶ For a full discussion of the issues leading up to this recommendation see chapter 7 of the main paper – *Trust Law – General Proposals* (LRC CP 35-2005).

CHAPTER 8 POWER TO INSURE

8.01 In relation to general trusts, the power of trustees to insure trust property is governed by section 18 of the *Trustee Act 1893*. Section 18(1) provides that trustees may insure against “loss or damage by fire any building or other insurable property” to any amount not exceeding three quarters of the full value of such building or property. Section 18 also provides that the premiums for such insurance may be paid out of the income of the trust property in question, or the income of any other property subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to such income.

8.02 Charity trustees have the usual statutory power to insure the charity property against risks of loss or damage due to any event and to pay the premiums out of the trust fund. The nature of this power in the context of charities is further elaborated by the Charity Commissioners for England and Wales, stating as follows:

“Trustees’ general duty to protect the property of their charity means that they should give proper consideration to the use of this power, so that the property of the charity is adequately insured against loss or damage, where such insurance is appropriate.... The governing document of a particular charity may go further and apply a positive duty to purchase insurance. If there is a doubt about the scope of such a duty when expressed in the governing document, the trustees should seek suitable legal advice or approach the Commission.”¹

8.03 The Charity Commissioners also note that “where trustees have a power to take out insurance against loss or liability, and unreasonably refuse to exercise it, or have a duty to take out such

¹ CC49 *Charities and Insurance* (revised 2003) at paragraph 20, available at <http://www.charity-commission.gov.uk/publications/cc49.asp#5>

insurance, and fail to discharge the duty, they may become personally responsible for any loss or liability which results.”²

8.04 *In relation to general trust law, the Commission considers that section 18 of the Trustee Act 1893 is in need of reform. The Commission recommends that a new statutory provision be introduced, extending the trustees’ existing power of insurance beyond the current limit of “loss or damage caused by fire”. The Commission recommends that trustees be empowered to insure trust property up to the replacement value. The exercise of the statutory power to insure should be subject to the general duty of care.*

8.05 *The Commission recommends that any new legislation should not impose upon trustees a duty to insure.*

8.06 *The Commission recommends that, in relation to general trust law, a new statutory power to insure should confer upon trustees discretion to pay insurance premiums from the “trust funds”, with trust funds defined as comprising either trust income or capital.*

8.07 *The Commission recommends that the new statutory power to insure should apply to all existing and new trusts subject to a contrary expression of intention.*³

² CC49 *Charities and Insurance* (revised 2003) at paragraph 14.

³ For a full discussion of the issues leading up to this recommendation see chapter 8 of the main paper – *Trust Law – General Proposals* (LRC CP 35-2005).

CHAPTER 9 POWER TO COMPOUND LIABILITIES

9.01 In relation to general trusts, the power to compound liabilities is contained in section 21 of the *Trustee Act 1893*, which provides that trustees may “compromise, compound, abandon, submit to arbitration or otherwise settle” any debt or claim without being responsible for any loss occasioned by any act done by them in this regard in good faith.

9.02 In addition to the provisions of the *Trustee Act 1893*, section 22 of the *Charities Act 1961* allows the trustees of a charity to compromise any claims brought by or against the charity. The trustees must submit a proposal for a compromise to the Commissioners of Charitable Donations and Bequests and the Commissioners, after such inquiry as they think necessary, may approve the compromise if they are of the opinion that the proposal, with or without modification, is fit and proper and for the benefit of the charity.

9.03 The 1961 Act also grants the Commissioners power to advise the trustees of a charity on any question or dispute relating to the charity or its property. Where the Commissioners give their opinion or advice in relation to any matter, a trustee who acts on or in accordance with the opinion or advice is deemed to have acted in accordance with the trust. A trustee is not indemnified for any act done if the trustee has been guilty of fraud, concealment or misrepresentation in obtaining the opinion or advice.

9.04 *The Commission is of the view that, in relation to general trusts, section 21 of the Trustee Act 1893 is in need of reform. The Commission recommends that any new legislative code on trustees’ powers and duties should simplify and clarify the power to compound liabilities. Section 60(8) of the Succession Act 1965 provides a useful model in this regard.*¹

¹ For a full discussion of the issues leading up to this recommendation see chapter 9 of the main paper – *Trust Law – General Proposals* (LRC CP 35-2005).

9.05 *The Commission recommends that the power to compound liabilities should be made subject to the proposed statutory duty of care.*

CHAPTER 10 VARIATION AND TERMINATION OF TRUSTS

A Variation of Trusts

10.01 The primary duty of any trustee is to administer the trust exactly in accordance with the terms of the trust instrument. The corollary of this fundamental principle is that the trustee is not entitled to deviate from the terms of the trust in any way. This “no variation” rule, while desirable in most circumstances, has the potential to give rise to difficulties when rigidly applied.

10.02 The topic of variation of trusts was considered in detail by the Commission in its report *The Variation of Trusts*.¹ The Commission ultimately concluded that there is no logical reason why the courts should be constrained by the settlor’s intention at the time of the settlement and that the court’s sole point of reference should be whether or not a given variation will be for the benefit of the beneficiary on whose behalf the court’s consent is being sought. The proposed legislation envisages granting the court power to approve any arrangement varying, resettling or revoking all or any of the trusts, or enlarging, adding to or restricting the powers of the trustees to manage or administer any of the property subject to the trusts.

10.03 In its Report, the Commission recommended that charitable trusts be included within the scope of the proposed Variation of Trusts legislation. The Commission noted that charities already had the option of applying to the Commissioners of Charitable Donations and Bequests for a *cy-près*² scheme but did not see this as a reason for excluding charitable trusts from the proposed legislation. Since the publication of the Report, the Commissioners now have power to deal

¹ LRC 63-2000.

² See footnote 3 in chapter 5.

with *cy-près* applications without the previous ceiling limit on the value of the assets of the charity involved.³

10.04 The Commission noted that, in reality, the overlap between the existing and proposed jurisdictions would be very slight. Any possible overlap between *cy-près* and Variation of Trusts legislation would be confined to those marginal cases where there is a gift to a charity and a gift to a person who falls within one of the categories on whose behalf the court is empowered by Variation of Trusts legislation to consent.⁴ The other marginal case in which an overlap might possibly occur is where the charity's interest in the trust property is contingent. It was further contended that, even if there were a case in which the old and new jurisdictions were to coincide, trustees would usually prefer to approach the Commissioners of Charitable Donations and Bequests, rather than going through the trouble and expense of an application to court.

10.05 Finally, the Commission noted that not all trusts which are classified as "charitable" are amenable to *cy-près* jurisdiction and so if they were excluded from the reach of the Variation of Trusts legislation, those charitable trusts which fall between the existing and proposed jurisdictions would be unjustifiably left without any solution when difficulties arise.

10.06 *The Commission does not consider that any amendments are required to the existing cy-près provisions. The Commission also confirms its view that Variation of Trusts legislation should apply to charitable trusts and recommends that the recommendations contained in its Report on Variation of Trusts (LRC 63-2000) should be implemented.*

B Termination or Merger of Charities

10.07 There are many reasons why a charity may have to be dissolved. A distinction must be made between the termination of a charity's legal structure and its charitable content. While the legal structure of a charity may be easily dissolved, it has been suggested

³ Section 16 of the *Social Welfare (Miscellaneous Provisions) Act 2002* – previously the Commissioners' jurisdiction applied only to charitable gifts of less than £250,000.

⁴ Where there is a beneficiary who is not *sui juris*, who cannot be found or who has a contingent interest.

that a gift to a charity continues absolutely and perpetually. This is recognised by its exclusion from the rule against inalienability and from the rule against perpetuities.

10.08 As an alternative to winding-up, two or more charities may wish to merge their operations.⁵ This may be achieved by the transfer of assets from one charity to the other and the dissolution of the first or by the formation of a new charity and the dissolution of the merging charities. Difficulties may arise as to the power to merge and the use of charity property following the merger.

10.09 The Law Society in its report⁶ recommended that legislation should provide for the dissolution of a charity constituted as a company or unincorporated association and distribution of its property along the lines of the present requirements of the Revenue Commissioners. They recommended that the power of dissolution and distribution should be exercisable by special resolution of the members of the charity and require a two thirds majority and that prior approval should be obtained from the Charities Office. In the case of a charity constituted as a trust, they recommended that the Charities Office should be given a discretionary power to dissolve the trust and distribute the property by order on the application of at least two thirds of the trustees.⁷

10.10 They further recommended that the Charities Office should have discretion to reverse or confirm an unauthorised distribution.⁸ In relation to mergers they recommend that:

the proposed merger be subject to a special resolution and require a two thirds majority of the respective members or trustees of the two or more charities;

the prior approval of the Registrar of Charities be sought; and

the two or more charities have the same or similar objects.⁹

⁵ It should be noted that the *Competition Act 2002* which deals with mergers only applies to an undertaking which operates for gain – this definition would usually be expected to exclude purely charitable institutions.

⁶ Law Society of Ireland *Charity Law: The case for reform* July 2002.

⁷ *Ibid* at 216.

⁸ *Ibid* at 217.

10.11 The Commission is of the view that the procedures to be adopted in relation to winding-up or merger will depend on a number of factors:

does the charity have any remaining funds or assets?

does the governing instrument make any provisions in relation to winding-up or merger?

if the charity proposes to transfer funds to another charity, or to merge with another charity, is that other charity a registered charity?

10.12 If there are no funds or assets remaining in the charity then there should be no great difficulty in winding-up the charity. The trustees should simply notify the Registrar of Charities of the position and furnish any outstanding final accounts and returns.

10.13 If a charity wishes to wind-up its operations and there are funds or assets remaining in the charity then the first step will be to consider what provisions have been made in the governing instrument. If the governing instrument makes provisions which conform with the current Revenue Commissioners' requirements (to the effect that the proceeds will be given to some other charity having similar main objects to that of the charity being wound up and the receiving charity also prohibits the distribution of its income and property among its members), and the other charity is a registered charity, then there should be no difficulty and a simple notification to the Registrar of Charities should suffice. If the other charity is not a registered charity then an application should be made to the Registrar of Charities. Of course this situation should not arise because it is envisaged that all charities will be obliged to register and that a failure to do so will be dealt with by means of appropriate sanctions.

10.14 If two or more charities wish to merge operations and each of the charities is registered and if their governing instruments allow for merger, in terms with which they can comply, there should be no need for approval of the merger by the Registrar of Charities. The Registrar of Charities should be notified of the merger.

10.15 If the governing instrument makes no provisions regarding winding-up or merger of the charity then a *cy-près* application will have to be made.

⁹ Law Society of Ireland *Charity Law: The case for reform* July 2002 at 218.

10.16 *The Commission recommends that, in relation to charitable trusts which expressly provide for mergers or winding-up, the current Revenue Commissioners' requirements should be put on a statutory footing, that is, that on the winding up or dissolution of such a charity, where there remains after the satisfaction of all its debts and liabilities any property whatsoever, that such property will not be distributed among the members of the charity but will be given to some other charity having similar main objects to that of the charity and which also prohibits the distribution of its income and property among its members.*

10.17 *The Commission recommends that, unless the governing instrument provides otherwise, any proposed dissolution or merger should be subject to a special resolution and require a two-thirds majority of the trustees.*

CHAPTER 11 SUMMARY OF RECOMMENDATIONS

The provisional recommendations contained in this Paper may be summarised as follows:

Chapter 1 The Office of Trustee

11.01 In line with its recommendation in relation to general trust law, the Commission provisionally recommends that a minor, whether married or not, should be prohibited from acting as a charity trustee and that any purported appointment of a minor to act as trustee in relation to any settlement or trust shall be void from when the appointment would take effect. [Paragraph 1.10]

11.02 The Commission considers that qualifying criteria for the appointment of charity trustees should be embodied in legislation and recommends that a charity trustee shall be disqualified from being and shall cease to be a charity trustee if that person:

- is a minor;
- is a ward of court or where a power of attorney has come into effect;
- is adjudicated bankrupt;
- makes a composition or arrangement with creditors;
- is a corporate trustee which is in liquidation or has been wound-up;
- is convicted of an indictable offence;
- is sentenced to a term of imprisonment by a court of competent jurisdiction;
- is disqualified or restricted from being a director of any company (within the meaning of the *Companies*

Acts 1963-2003) or is disqualified under the provisions of the *Pensions Acts 1990-2002*;

- has been removed from the office of charity trustee by an order of the Registrar of Charities or the Courts. [Paragraph 1.12]

11.03 The Commission welcomes suggestions as to whether or not the Registrar of Charities should have power to waive a disqualification under the above provisions. For example, the Registrar of Charities might have power to allow a trustee to act subject to certain conditions or limitations or to act for a particular charity or class of charities. [Paragraph 1.13]

11.04 The Commission recommends that guidelines on checking the eligibility of charity trustees be issued by the Registrar of Charities. [Paragraph 1.15]

11.05 The Commission provisionally recommends that a minimum of three trustees be required to act for a charitable trust or three officers in the case of an unincorporated association. A corporate trustee may act as sole trustee but in such circumstances the Commission recommends that there should be at least three directors on the board of directors. If the numbers fall below three, and the person or persons having power to appoint new trustees are unable or unwilling to do so, the Registrar of Charities should have power to appoint additional trustees to bring the numbers back up to the statutory requirement. This is without prejudice to the existing powers of the Commissioners of Charitable Donations and Bequests under section 43 of the *Charities Act 1961*, as amended by section 14 of the *Charities Act 1973* and to the need for timely liaison with the Commissioners. [Paragraph 1.24]

11.06 In the case of a charity operating through a company, the Commission also recommends that there should be at least three directors on the board of directors. [Paragraph 1.25]

11.07 The Commission makes a number of recommendations in relation to the non-judicial power of appointment of trustees as follows. It should be noted that the following recommendations relate to the general trust law provisions.

The Commission is of the view that a non-judicial power to appoint additional trustees would be useful in practice and would reduce the need for recourse to the courts.

Accordingly we recommend that such a power be introduced.

The Commission is of the view that the statutory provision regarding the removal of a trustee on the ground of absence from the jurisdiction for twelve months or more should be deleted as it is no longer an appropriate ground for the replacement of a trustee under the non-judicial power of appointment.

The Commission is of the view that instances where a trustee is made a ward of court or a power of attorney comes into effect should be specifically included as grounds for the exercise of the non-judicial power of appointment.

The Commission is of the view that bankruptcy (where a trustee is adjudicated bankrupt or makes a composition or arrangement with creditors) should be specifically included as a ground for the exercise of the non-judicial statutory power of appointment.

The Commission is also of the view that where a corporate trustee is in liquidation or is wound-up, it may be subject to replacement under the non-judicial statutory power of appointment.

The Commission recommends that where a trustee has been removed under a power contained in the trust instrument, that trustee may be subject to replacement under the non-judicial statutory power of appointment.

The Commission is of the view that a person nominated to remove and replace trustees should not lose the authority conferred by the trust instrument unless that person (1) refuses to exercise the authority, or (2) lacks the capacity to exercise the authority.

The Commission recommends that anyone who has disclaimed the trust should be excluded from joining in the appointment of a new trustee.

For the purposes of clarification, the Commission recommends that the power of appointment given to the personal representatives of a last surviving or continuing trustee is deemed to be exercisable by the executors for the

time being of such surviving or continuing trustee who have proved the will of their testator or by the administrators for the time being of such trustee, without the concurrence of any executor who has renounced or has not proved.

The Commission is also of the view that, where a corporate trustee is dissolved or in liquidation, the liquidator should be allowed to exercise the power of appointment of a new trustee if there is no person nominated for that purpose in the trust instrument. If there are other remaining trustees the liquidator should join in the appointment (if there is no person nominated in the trust instrument with power to appoint) and if the corporate body was a sole trustee the liquidator may make the appointment solely. [Paragraph 1.31]

11.08 To summarise, therefore, the occasions giving rise to the non-judicial appointment of trustees under the general trust law provisions would be as follows; where a trustee:

- is a minor;
- is a ward of court or where a power of attorney has come into effect;
- is dead;
- desires to be discharged from the duties;
- refuses to act;
- is adjudicated bankrupt;
- makes a composition or arrangement with creditors;
- is a corporate trustee which is in liquidation or has been wound-up. [Paragraph 1.32]

11.09 The Commission is of the view that in relation to the appointment of new trustees of charitable trusts, even where such trusts have the power to appoint new trustees, the Registrar of Charities will have an important role to play. This is particularly important in the protection of the public interest in respect of such trusts. The Commission therefore recommends that:

- The Registrar of Charities should have power to appoint replacement or additional charity trustees. This power is

currently exercisable by the Commissioners of Charitable Donations and Bequests under section 43 of the *Charities Act 1961*, as amended by section 14 of the *Charities Act 1973*.

- The non-judicial statutory power to appoint additional charity trustees should be subject to the consent of the Registrar of Charities before any such appointment.
- Any change in charity trustees made pursuant to the non-judicial powers of appointment should be notified immediately to the Registrar of Charities. This could form part of the periodic return to the Registrar of Charities.

The Commission would welcome further submissions on the role of the Registrar of Charities in relation to the appointment of charity trustees. [Paragraph 1.34]

11.10 The Commission is of the view that nothing in the trust instrument should be capable of restricting the right of a trustee to retire from the trust or a part thereof and that any such provision should be invalid. [Paragraph 1.38]

11.11 The Commission is of the view that, under the general trust law provisions, there is an anomaly between the appointment and retirement provisions and recommends that the retirement provisions should be clarified to make it clear that a trustee can retire from part of a trust where any part of the trust property is held on trusts distinct from those relating to any other part or parts of the trust property. [Paragraph 1.40]

11.12 In view of the recommendation at paragraph 1.24, the Commission recommends that a trustee should not be permitted to retire from a charitable trust or an unincorporated association unless at least three trustees or officers of an unincorporated association or a corporate trustee remains. [Paragraph 1.41]

11.13 The current provisions require the prior consent of the co-trustees and any person empowered by the trust instrument to appoint trustees before retirement can take place. The Commission is of the view that this regime should continue but that if consent is not forthcoming, the trustee wishing to retire should be able to apply to the Registrar of Charities for assistance. [Paragraph 1.42]

11.14 The Commission recommends that a charity trustee must vacate office if that person:

- is a minor;
- is a ward of court or where a power of attorney has come into effect;
- is adjudicated bankrupt;
- makes a composition or arrangement with creditors;
- is a corporate trustee which is in liquidation or has been wound-up;
- is convicted of an indictable offence;
- is sentenced to a term of imprisonment by a court of competent jurisdiction;
- is disqualified or restricted from being a director of any company (within the meaning of the *Companies Acts 1963-2003*) or is disqualified under the provisions of the *Pensions Acts 1990-2002*;
- has been removed from the office of charity trustee by an order of the Registrar of Charities or the Courts. [Paragraph 1.43]

11.15 In relation to the judicial removal of trustees of charitable trusts, the Commission is of the view that the inclusion of enumerated grounds does provide some guidance for the public as to the situations where the court will exercise its jurisdiction and recommends that bankruptcy of a trustee, liquidation of a corporate trustee, conviction of an indictable offence, or where an individual is sentenced to a term of imprisonment by a court of competent jurisdiction, should all form grounds for the removal of a trustee and the appointment of a replacement by the court. The court also has general power to appoint new trustees in any case where the court is of the view that it is necessary to do so to ensure the proper administration of the trust. [Paragraph 1.49]

11.16 In view of the recommendation at 1.24 above, the Commission recommends that, in the case of charitable trusts or unincorporated associations, non-judicial removal without replacement should not be permitted unless at least three trustees or

officers of an unincorporated association or a corporate trustee remain. [Paragraph 1.50]

11.17 The Commission, having carefully considered the matter, is of the view that the Registrar of Charities should have power to remove charity trustees from office but that this should be accompanied by an appropriate appeals process to the courts taking account of Constitutional protections. This power will form part of the Registrar of Charities' overall inquiry and investigative functions. [Paragraph 1.54]

11.18 The power to remove a charity trustee will arise where, following an investigation or inquiry, the Registrar of Charities is satisfied that a charity trustee has become incapable of acting or has been responsible for, or privy to, misconduct or mismanagement of the charity or has contributed to or facilitated it. In light of the Commission's views in relation to capacity, a charity trustee may also be removed by the Registrar of Charities if that person:

- is a minor;
- is a ward of court or where a power of attorney has come into effect;
- is adjudicated bankrupt;
- makes a composition or arrangement with creditors;
- is a corporate trustee which is in liquidation or has been wound-up;
- is convicted of an indictable offence;
- is sentenced to a term of imprisonment by a court of competent jurisdiction;
- is disqualified or restricted from being a director of any company (within the meaning of the *Companies Acts 1963-2003*) or is disqualified under the provisions of the *Pensions Acts 1990-2002*. [Paragraph 1.55]

11.19 The Commission recommends that the Registrar of Charities should have power, as part of its inquiry and investigative functions, to disqualify persons from acting as charity trustees and should maintain a list of persons so disqualified or removed. The

Registrar of Charities should have further powers to impose sanctions on any person purporting to act while disqualified. [Paragraph 1.61]

11.20 The power to disqualify a charity trustee will arise where, following an investigation or inquiry, the Registrar of Charities is satisfied that a charity trustee has become incapable of acting or has been responsible for, or privy to, misconduct or mismanagement of the charity or has contributed to or facilitated it. In light of the Commission's views in relation to capacity, a charity trustee will also be disqualified if that person:

- is a minor;
- is a ward of court or where a power of attorney has come into effect;
- is adjudicated bankrupt;
- makes a composition or arrangement with creditors;
- is a corporate trustee which is in liquidation or has been wound-up;
- is convicted of an indictable offence;
- is sentenced to a term of imprisonment by a court of competent jurisdiction;
- is disqualified or restricted from being a director of any company (within the meaning of the *Companies Acts 1963-2003*) or is disqualified under the provisions of the *Pensions Acts 1990-2002*;
- has been removed from the office of charity trustee by an order of the Registrar of Charities or the Courts. [Paragraph 1.62]

11.21 The Commission welcomes suggestions as to whether or not the Registrar of Charities should have power to waive a disqualification under the above provisions. For example, the Registrar of Charities might have power to allow a trustee to act subject to certain conditions or limitations or to act for a particular charity or class of charities. [Paragraph 1.63]

11.22 The Commission recommends that the Registrar of Charities should have power to suspend persons from acting as charity trustees, for a period not exceeding 6 months, following the institution of an investigation or inquiry. The Registrar of Charities

should have further powers to impose sanctions on any person purporting to act while suspended. [Paragraph 1.67]

Chapter 2 Remuneration of Charity Trustees

11.23 The Commission does not consider it appropriate to introduce a statutory default provision in relation to remuneration of charity trustees, being of the view that the voluntary nature of charitable activities should be maintained to ensure public confidence in the administration of charities. [Paragraph 2.08]

11.24 The Commission is of the view that legislation allowing for remuneration of trustees for non-trustee services should be introduced. Any such provision should contain safeguards which would emphasise that it does not apply to remuneration for services provided by a person acting in the capacity of trustee. [Paragraph 2.14]

Chapter 3 Duty of Care

11.25 The Commission is of the view that charity legislation should provide for a general statutory duty of care rather than set out specific statutory duties. It considers that further specific requirements for charity trustees should be dealt with by way of guidelines issued by the Registrar of Charities. [Paragraph 3.06]

11.26 The Commission recommends that the term “charity trustees” be defined as “the persons having the general control and management of a charity”. [Paragraph 3.09]

11.27 The Commission recommends the following duty of care for charity trustees:

A charity trustee must, in exercising functions in that capacity, act in the interests of the charity and must, in particular:

- (a) seek, in good faith, to ensure that the charity acts in a manner which is consistent with its purposes, and
- (b) act with the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person. [Paragraph 3.13]

11.28 The Commission provisionally recommends that the duty of care should apply to all charity trustees, including the trustees of charitable trusts, trustees and committee members of unincorporated

associations, the directors of charitable companies and the governors of bodies incorporated by charter, but would welcome submissions in this regard. [Paragraph 3.14]

Chapter 4 Powers of Investment

11.29 The Common Investment Fund is particularly useful for charities with limited funds and the Commission recommends that the scheme be retained. [Paragraph 4.08]

11.30 The Commission considers that it would be helpful if guidelines on the investment of charitable funds could be issued in this jurisdiction in relation to charity investments. [Paragraph 4.10]

11.31 The recommendation in relation to general trusts that the statutory power of investment should continue to be governed by the current statutory scheme of authorised investments applies equally to charity trustee investment. The Commission recommends that it should be clarified that the list compiled by the Commissioners of Charitable Donations and Bequests would be reviewed periodically by reference to the list compiled by the Minister for Finance. [Paragraph 4.12]

11.32 The Commission is of the view that legislative intervention to allow trustees to follow an ethical investment policy is inappropriate and that such powers, if any, should be dictated only by the terms of the trust instrument. An ethical policy may only be pursued if it results in overall financial benefit to the charity. [Paragraph 4.17]

Chapter 5 Power of Sale, Purchase and to Issue Receipts

11.33 The Commission does not recommend granting charities a general default power to acquire land. [Paragraph 5.05]

11.34 If a charity's governing instrument does not contain a power of sale or if the terms of the power of sale are unclear, the Commission recommends that the charity trustees should obtain appropriate consent, which at present is by way of application to the Commissioners of Charitable Donations and Bequests. [Paragraph 5.10]

Chapter 6 Power to Delegate

11.35 The Commission recommends the introduction of default statutory powers of delegation. The classes of functions which

trustees of charitable trusts should be permitted to delegate are as follows:

- (a) any function consisting of carrying out a decision that the trustees have taken;
- (b) any function relating to the investment of assets subject to the trust (including, in the case of land held as an investment, administrative powers or procedures relating to the management of the land or the creation or disposition of an interest in the land);
- (c) any function relating to the raising of funds for the trust otherwise than by means of profits of a trade which is an integral part of carrying out the trust's charitable purpose;
- (d) any other function prescribed by Ministerial Regulations. [Paragraph 6.06]

11.36 The trustees should be required to act in accordance with any guidance given by the Registrar of Charities concerning the selection of a person for appointment as a nominee or custodian. This is without prejudice to the powers currently exercised by the Commissioners of Charitable Donations and Bequests in respect of investment and delegation under sections 32 and 33 of the *Charities Act 1961*, as amended by sections 9 and 10 of the *Charities Act 1973*. Arrangements for timely liaison in respect of these matters would need to be carefully considered. [Paragraph 6.07]

11.37 The Commission recommends that the statutory duty of care shall apply to trustees' power of delegation. [Paragraph 6.08]

11.38 Provision should also be made in relation to the terms of appointment and remuneration of custodians and nominees. [Paragraph 6.09]

Chapter 7 Liability of Trustees

11.39 The Commission is of the view that the simplest and clearest approach as to liability is to avoid the distinction between lay and professional trustees, to avoid having to stipulate what breaches should be excused and to give the court discretion to excuse trustees of liability where they have acted honestly, reasonably and in good faith. [Paragraph 7.18]

11.40 The issue of trustee exemption clauses should be addressed in relation to the standard of the “irreducible core obligations” of trusteeship, in conjunction with the statutory duty of care. [Paragraph 7.19]

11.41 The Commission is of the view that trustees should not be allowed to purchase indemnity insurance out of charity funds. [Paragraph 7.20]

Chapter 8 Power to Insure

11.42 In relation to general trust law, the Commission considers that section 18 of the *Trustee Act 1893* is in need of reform. The Commission recommends that a new statutory provision be introduced, extending the trustees’ existing power of insurance beyond the current limit of “loss or damage caused by fire”. The Commission recommends that trustees be empowered to insure trust property up to the replacement value. The exercise of the statutory power to insure should be subject to the general duty of care. [Paragraph 8.04]

11.43 The Commission recommends that any new legislation should not impose upon trustees a duty to insure. [Paragraph 8.05]

11.44 The Commission recommends that a new statutory power to insure should confer upon trustees discretion to pay insurance premiums from the “trust funds”, with trust funds defined as comprising either trust income or capital. [Paragraph 8.06]

11.45 The Commission recommends that the new statutory power to insure should apply to all existing and new trusts subject to a contrary expression of intention. [Paragraph 8.07]

Chapter 9 Power to Compound Liabilities

11.46 The Commission is of the view that, in relation to general trusts, section 21 of the *Trustee Act 1893* is in need of reform. The Commission recommends that any new legislative code on trustees’ powers and duties should simplify and clarify the power to compound liabilities. Section 60(8) of the *Succession Act 1965* provides a useful model in this regard. [Paragraph 9.04]

11.47 The Commission recommends that the power to compound liabilities should be made subject to the proposed statutory duty of care. [Paragraph 9.05]

Chapter 10 Variation and Termination of Trusts

11.48 The Commission does not consider that any amendments are required to the existing *cy-près* provisions. The Commission also confirms its view that Variation of Trusts legislation should apply to charitable trusts and recommends that the recommendations contained in its Report on Variation of Trusts (LRC 63-2000) should be implemented. [Paragraph 10.06]

11.49 The Commission recommends that, in relation to charitable trusts which expressly provide for mergers or winding-up, the current Revenue Commissioners requirements should be put on a statutory footing, that is, that on the winding up or dissolution of such a charity, where there remains after the satisfaction of all its debts and liabilities any property whatsoever, that such property will not be distributed among the members of the charity but will be given to some other charity having similar main objects to that of the charity and which also prohibits the distribution of its income and property among its members. [Paragraph 10.16]

11.50 The Commission recommends that, unless the governing instrument provides otherwise, any proposed dissolution or merger should be subject to a special resolution and require a two-thirds majority of the trustees. [Paragraph 10.17]

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