Charity Law:
The case for reform

A report by
the Law Society’s Law Reform Committee

July 2002
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MAIN RECOMMENDATIONS

DEFINITION OF CHARITY

1. Relief of poverty as a term has stood the test of time but it is capable of improvement. A more modern definition would make it clear that it covers both direct and indirect aid; that relief of poverty extends beyond social deprivation and covers activities such as social inclusion and community welfare. (p. 57)

10. Having considered the reviews conducted in other jurisdictions, we recommend that the basic proposal put forward by the Charities Definitional Inquiry in Australia be considered here as a good basis from which to adapt a new definition for charity, specific to the needs of this jurisdiction.1 (p. 85)

11. If it is accepted that sometimes, to be effective, charity must not only provide relief, but must question why the system has failed the donees thereby placing them in a situation of needing assistance in the first place, we recommend that the current absolute prohibition on political advocacy should be reviewed. (p. 85)

17. The concept of public benefit should be redefined so as to include express reference to the concept of ‘altruism’. (p. 90)

18. Tax relief should continue to be an automatic consequence of obtaining charitable status, subject to the Revenue Commissioners’ right of appeal to the High Court. (p. 94)

1. That Report put forward the following re-worked ‘definition’ of charitable purposes to include:
   • “The advancement of health (which without limitation includes the prevention and relief of sickness, disease or of human suffering)
   • The advancement of education
   • The advancement of social and community welfare, (which without limitation includes – the prevention and relief of poverty, distress or disadvantage of individuals or families
   • The care, support and protection of the aged and people with a disability
   • The care, support and protection of children and young people
   • The promotion of community development to enhance social and economic participation
   • The advancement of religion
   • The advancement of culture
   • The advancement of the natural environment
   • Other purposes beneficial to the community (which without limitation would include the promotion and protection of civil and human rights and the prevention and relief of suffering of animals)”.
REGISTRATION AND REGULATION

20. An independent statutory office should be created, to be known as the Registrar of Charities. Subject to consultation with that body, the Commissioners for Charitable Donations and Bequests should be reconstituted as an advisory board under the title of the Charities Board. The Charities Registrar should be a member of the Board ex officio. Both the Registrar and the Board should be supported by a Charities Office. Like the Companies Registrar, the Charities Registrar should operate independently under the auspices of a Minister responsible for charities. (p. 128)

27. Questions of charitable status should be decided by the Charities Board, and their authority should be given a statutory basis. (p. 132)

28. An integrated system of registration, regulation (including regulation of fundraising), supervision and support of the sector as a whole should be legislated for in comprehensive new legislation. (p. 133)

30. There should be a general requirement for all charities operating in the Republic to register with the Charities Office, subject to an exemption for small charities which do not fundraise. In England and Wales the exemption relates to a charity’s income, and currently charities with an income of under Stg £1,000 are not required to register. We recommend that a similar threshold be chosen here, set perhaps at an income of €2,000 or under or assets of €10,000 or under. (p. 134)

37. Registered charities, unless exempted because of size, should be required to file annual reports and accounts, using a version of the Statement of Recommended Practice in relation to Accounting and Reporting by Charities, 2000 (SORP 2000). (p. 136)

46. The information held on the register should be readily available to the public, including by means of a website, and important decisions, standards and processes should also be published, assisting charities in understanding the principles to which the Charities Office is working, and also making the public aware of the Charities Office and its work. The Charities Office should publish a comprehensive and timely annual report, to be laid before the Oireachtas by the Minister responsible for charities. (p. 138)
64. The Charities Registrar should be empowered to institute an investigation on grounds of suspected fraud, dishonesty or illegal purpose, formation of an organisation for an illegal purpose, involvement of trustees or charity directors who are suspected of being guilty of fraud, misfeasance or other misconduct, or serious past, ongoing or planned future breach of trust. (p. 150)

FUNDRAISING

84. The Charities Office in consultation with the charity sector and the Irish Institute of Fundraisers should develop best practice guidelines for fundraising and a system of certification or self certification. The purpose of this would be for participating organisations to certify their fundraising procedures in the manner of Quality Assurance. (p. 166)

87. The Charities Office should take responsibility for the granting of permits and licences for fundraising, with appeals to the District Court. (p. 173)

88. A national computerised database should be set up and managed by the Charities Office, showing a calendar of all collection permits granted throughout the country by district. (p. 173)

89. The current exclusion from regulation of fundraising by means of charitable street trading should be reviewed. Such fundraising should be made subject to controls as to dates and locations in the interests of the fair sharing of dates and locations between all charities. Such fundraising should also be brought under the same controls of regulation and accountability as street collections in the public interest. The sale of items for charity or promotions in conjunction with charities should clearly state the amount or percentage which is payable to the charity. (p. 173)

LEGAL STRUCTURES

98. There may be advantages in having a separate legal vehicle for charities to be administered by the Charities Office, which would be more specifically attuned to the needs and the public policy interest of charities, as well as removing the burden of dual registration and regulation. The proposals of the DTI (UK) should be considered, notably that a new form of incorporation called Charitable Incorporated Organisation (CIO) should be made available to charities, that it should be restricted to charities and optional, not mandatory. (p. 209)
99. The UK Charity Commission’s proposals in relation to CIOs should be considered, particularly as these proposals have been made as a result of their experience and consultation with the charity sector. Any development of a new legal structure for charities along these lines should take into account developments in the UK and the wider European community. (p. 209)

108. To provide for cases where no power of amendment is included in the governing instrument, an implied power of amendment should be legislated for, much as such a power is contained in the Companies Acts. The proposed legislation should provide for the general amendment of the governing instrument by the members of a charity if constituted as a company or unincorporated association. This power of amendment should be by special resolution of the members of the charity and require a two-thirds majority. If the proposed amendment concerns a change of the objects of the charity or its dissolution and disposal of property, the prior approval of the Charities Office should be required. The amended governing instrument should be forwarded to the Charities Office within 28 days of the resolution, to ensure that the Charities Office will automatically be notified of the amendments to the governing instrument and will have an up to date copy of the governing instrument on file. If the charity is constituted as a trust, the Charities Office should be given a discretionary power to amend the trust instrument by order on the application of at least two-thirds of the trustees. The Charities Office should have discretion to reverse an amendment to the governing instrument if it is of the opinion that it jeopardises the organisation’s charitable status. (p. 216)

LEGAL REQUIREMENTS FOR CHARITY TRUSTEES

120. The role, responsibilities and duties for charity trustees should be the same, no matter what form of legal structure or governing instrument is used. (p. 230)

121. Trustees (whether trustees, directors or otherwise) of all charities should be given broad statutory powers unless they are expressly excluded in the governing instrument. (p. 233)

122. The duty of care owed by trustees or directors of a charity should be a standard one, and should be adhered to whether the charity is an unincorporated association, a trust or a company limited by guarantee. We recommend that this duty of care should be statutory. The duty of care
required of a charity trustee should reflect any special knowledge, experience or skill which the trustee professes to possess. If the trustee acts as a trustee in the course of his business or profession, his duty of care is to exercise such care and skill as is reasonable to expect of a person in the course of his business or profession. (p. 238)

INVESTMENT POWERS

124. If retained (see below) both the list of authorised investments and the conditions applying to such investments under the Trustee (Authorised Investments) Act 1958 should be revisited. (p. 241)

126. If a list is retained we recommend that the Commissioners’ List is consolidated into a revised Statutory Instrument under the Trustee (Authorised Investments) Act 1958 with a view to creating one list applicable to trustees. The Commissioners’ powers to confer, on application by charity trustees, a power to invest in such manner as the Commissioners think proper should be retained separately but should not give rise to a separate list of charitable authorised investments. (p. 244)

131. The duty of investment and the appropriate standard of care for trustees should be codified in statute consistent with the principles of prudential investment (i.e. suitability, risk, diversity and appropriateness) on the basis that subject to a contrary intention in the instrument creating the trust, trustees should have the same power to make an investment of any kind as if they were absolutely (or beneficially) entitled to the assets of the trust. This duty of investment and standard of care we feel would be preferable to restricting investments to those authorised by the Minister’s Order or the Commissioners’ List. (p. 249)

132. A statutory exoneration should apply to lay trustees against any liability for loss due to poor investment performance arising out of the exercise of the statutory power and in good faith. (p. 250)
SUMMARY OF RECOMMENDATIONS

DEFINITION OF CHARITY

1
Relief of poverty as a term has stood the test of time but it is capable of improvement. We recommend a more modern definition which would make it clear that it covers both direct and indirect aid; that relief of poverty extends beyond social deprivation and covers activities such as social inclusion and community welfare. (p. 57)

2
Even if the definition of relief of poverty is not modernised, we recommend consideration of the strong arguments for applying the public benefit criteria consistently across the heads of charity. (p. 57)

3
We do not recommend that sport per se should be charitable. However, we feel that the existing situation in relation to sport is unsatisfactory and that where the purpose of the sport in question is to further another charitable purpose, as defined below, it too should be viewed as charitable. (p. 65)

4
We recommend that recreation (within which definition we would include sport) pursued in the advancement of health or fitness should be deemed charitable, where all the other normal criteria are satisfied. (p. 66)

5
We recommend that a separate heading be created for the advancement of culture. We recommend that the requirement of public benefit should remain a crucial element under this heading in so far as candidates would be required to demonstrate the practical utility of the proposed project. (p. 67)

6
In light of the discussion in other jurisdictions and in order to provide clear guidance for any bodies deciding questions of charitable status, we recommend that it would be advisable to clarify the concept of ‘advancement of religion’ and the constituent elements of worship and whether the legal definition of religion extends beyond Supreme Beings (i.e. a theistic approach) to embrace supernatural things or principles (i.e. a non-theistic approach). (p. 75)
We recommend that no change be made to section 45 of the Charities Act 1961, which provides inter alia that public benefit should be conclusively presumed in relation to any gifts for the advancement of religion. (p. 76)

We recommend that new guidelines should be put forward in relation to the definition of charity which would aid the body charged with making the decision (be it the courts, the Revenue Commissioners, or a new statutory body established for this purpose such as the proposed Charities Office). (p. 85)

We recommend that these guidelines should take a statutory form, but would not necessarily constitute a statutory definition in that they would facilitate the decision making body in exercising its discretion in each case. (p. 85)

Having considered the reviews conducted in other jurisdictions, we recommend that the basic proposal put forward by the Charities Definitional Inquiry in Australia be considered here as a good basis from which to adapt a new definition for charity, specific to the needs of this jurisdiction. (p. 85)

If it is accepted that sometimes, to be effective, charity must not only provide relief, but must question why the system has failed the donees thereby placing them in the situation of needing assistance in the first place, we recommend that the current absolute prohibition on political advocacy should be reviewed. (p. 85)

Direct support for a political party or person should remain outside the realm of charity. In terms of permissible activities for charities, particularly in the context of lobbying or advocacy, we recommend that the main factor should be that the advocacy is directed at the attainment or furtherance of a charitable purpose and to this extent it would be ancillary to that purpose. (p. 86)

We recommend that a charity should be able to advocate a change in the law or public policy which can reasonably be expected to help it to achieve its charitable purposes and be allowed to oppose a change in the law or public policy which can reasonably be expected to hinder its ability to do so. (p. 86)
We recommend that the proposed Charities Office draw up guidelines to assist charities in differentiating between subordinate political activities which further the predominant charitable purpose and party political or propaganda activities which are not ancillary to charitable purposes. (p. 86)

In relation to advocacy by charities, it may be that the proposed Charities Office will decide that both qualitative and quantitative thresholds are necessary. We therefore recommend that the guiding criteria should be qualitative but that such criteria may include reference to an optional quantitative threshold against which a charity may be asked to justify expenditure over a certain threshold where it is to such a degree that it casts doubt on the ancillary or incidental nature of the political activity to the charity in question. In setting the quantitative threshold we recommend that further consideration should be given to how these thresholds have operated in both the United States, which is viewed by Canada as a better role model in terms of this requirement. (p. 86)

We recommend that the position regarding the charitable status of certain self-help organisations be open to reconsideration. (p. 87)

We recommend that the concept of public benefit should be redefined so as to include express reference to the concept of ‘altruism’. (p. 90)

We recommend that tax relief should continue to be an automatic consequence of obtaining charitable status, subject to the Revenue Commissioners’ right of appeal to the High Court. (p. 94)

We recommend that the option of tiered tax relief depending on the type of charitable purpose being undertaken should be given further consideration, particularly as it might allow for the possibility of according voluntary organisations certain tax exemptions, while reserving the full gamut of relief to those organisations qualifying as charities. (p. 94)
REGISTRATION AND REGULATION

20
We recommend that an independent statutory office be created, to be known as the Registrar of Charities. (p. 128)

21
We recommend, subject to consultation with that body, that the Commissioners for Charitable Donations and Bequests be reconstituted as an advisory board under the title of the Charities Board. (p. 128)

22
We recommend that the Charities Registrar be a member of the Board ex officio. (p. 128)

23
We recommend that both the Registrar and the Board should be supported by a Charities Office. Like the Companies Registrar, the Charities Registrar should operate independently under the auspices of a Minister responsible for charities. (p. 129)

24
We recommend that the Charities Office (as we shall call the Registrar, Board and Office together) should have a role encompassing

- the decision of issues of charitable status;
- the maintenance of a register of charities;
- the public accountability of charities;
- the regulation of charities and monitoring them on an ongoing basis;
- the provisions of a support service for charities, particularly in relation to compliance with registration and other legal requirements; and
- the protection of the public interest by monitoring and investigating possible abuses.

The Charity Commission of England and Wales has as its stated function "the general function of promoting the effective use of charitable resources by encouraging the development of better methods of administration, by giving charity trustees information and advice and by investigating and checking abuses". We recommend that a similar role be given to the Charities Office, providing a focus for charities in Ireland and developments in the charity sector in the future. (p. 129)
We recommend that the primary representative of the public interest in relation to charities should be the Charities Office. We recommend that the traditional powers of the Attorney General in relation to charities should be retained by the AG concurrently with the new powers vested in the Charities Office, but not used unless a formal order is made by the AG to suspend the regulatory powers of the Charities Office after consultation with the Minister responsible for charities and the Charities Office, the trustees of the charity or charities concerned or any other important stakeholders, and where the AG has reasonable grounds for believing that this is in the best interests of the charity. (p. 132)

The charity sector should have some formal way of interacting and making representations to the Charities Office. We recommend the institution of a User Panel to fulfil this role. (p. 132)

We recommend that questions of charitable status should be decided by the Charities Board, and that their authority should be given a statutory basis. We recommend that following the English example, controversial issues in relation to charitable status should be approached by the Board consulting with the Revenue Commissioners and other interested parties, inviting comment from the public if that is appropriate, and arriving at reasoned decisions which are published. (p. 132)

We recommend an integrated system of registration, regulation (including regulation of fundraising), supervision and support of the sector as a whole, to be legislated for in comprehensive new legislation. (p. 133)

We recommend that a suitors’ fund be established to help finance cases involving important points of law in the High Court. (p. 133)

We recommend a general requirement for all charities operating in the Republic to register with the Charities Office, subject to an exemption for small charities which do not fundraise. In England and Wales the exemption relates to a charity’s income, and currently charities with an income of under Stg £1,000 are not required to register. We recommend that a similar threshold be chosen here, set perhaps at an income of €2,000 or under or assets of €10,000 or under. (p. 134)
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31
If trustees fail to register after notification by the Registrar to do so, we recommend that the Registrar should have power to bring the matter to the Circuit Court for a mandatory order. (p. 134)

32
We recommend that no organisation over a certain size, as outlined above, should be entitled to call itself a charity or a registered charity without being registered as such. (p. 134)

33
In order to avoid a duplicated burden of registration and regulation, we recommend that the Charities Office should have discretion to grant exemptions from registration in cases or categories of cases where charitable organisations are effectively registered and regulated by other organisations, and the relevant information is available to the public. (p. 134)

34
We recommend that the new Charities Office develop its own requirements as to the information to be provided on registration. (p. 135)

35
We recommend that the Charities Office should have powers similar to the Companies Registration Office to refuse registration of a name or require a change of name where
- it is identical or similar to a name already used by another charity, company or organisation;
- it is potentially misleading;
- it is offensive;
- it may incorrectly imply state sponsorship. (p. 135)

36
Transitional arrangements will have to be made for all those existing charities which already have charitable status with the Revenue Commissioners, to assist them in registering with the Charities Office as soon as possible. This is a matter which we recommend should be left to the new Charities Office in consultation with the charity sector. (p. 135)

37
We recommend that registered charities, unless exempted because of size, be required to file annual reports and accounts, using a version of the Statement of Recommended Practice in relation to Accounting and Reporting by Charities, 2000 (SORP). (p. 136)
We recommend that the Charities Office work with the Institute of Chartered Accountants and representatives of the charitable sector to review the SORP initially to ensure its suitability for Irish conditions, and then periodically to ensure it reflects changing requirements. (p. 136)

We recommend that the Minister or the Charities Office be enabled to change the reporting requirements without the need for changes to the primary legislation. (p. 137)

We recognise that the SORP may impose too high a standard of reporting on smaller charities and recommend that in the case of charities with an annual income below say €25,000 or assets valued at below say €125,000, and not employing any staff, simplified reports and accounts such as an income and expenditure account and balance sheet would be acceptable. (p. 137)

We recommend that the accounts for such smaller charities need not be professionally audited or independently certified, but instead should be signed off by two or more named trustees. (p. 137)

We recommend that larger charities’ accounts, perhaps involving an income of up to €125,000 or assets of up to €650,000, be professionally audited or independently certified, and that the accounts of the largest charities, those with incomes over €125,000 or assets of over €650,000 be professionally audited. We recommend that these thresholds should be reviewed regularly, and be adjustable by the Charities Office or ministerial order and not dependent on primary legislation. (p. 137)

We recommend that auditors and others certifying accounts be placed under a duty to report any matter of concern to the new Charities Office, as well as to the trustees of the charity concerned. (p. 137)

We recommend that the main cost of running the Charities Office and its work should be born by central funds. We recommend that a registration fee, if any, should be set by the Charities Office or by ministerial order from time to time after consultation with the Charities Office. (p. 138)
We recommend that the proposed Charities Office and related activities should be properly funded. (p. 138)

We recommend that the information held on the register be readily available to the public, including by means of a website, and important decisions, standards and processes should also be published, assisting charities in understanding the principles to which the Charities Office is working, and also making the public aware of the Charities Office and its work. We recommend that the Charities Office publish a comprehensive and timely annual report, to be laid before the Oireachtas by the Minister responsible for the charity sector. (p. 138)

We recommend that as part of the registration process the Charities Office should inform applicant charities about existing organisations where there is a possibility of overlap of interest. (p. 139)

We recommend that the Charities Office work with other organisations to standardise the reporting requirements where possible, and agree protocols for sharing or forwarding information so that charities only have to file this information once. (p. 139)

We recommend that the registration in Ireland of foreign registered charities should be an operational decision left to the Charities Office, but that in general where the foreign registration and regulation is of at least a similar standard to that obtaining here, and the relevant details are available to the public, a simplified form of registration should be permitted to reduce the administrative burden on the charity concerned. Registration and regulation of non-Irish charities could be limited to any activities which they carry out in this jurisdiction, for example, fundraising. A difference in the CHY or other registration number could be made to indicate to the public that the charity concerned is a foreign registered one. (p. 140)

We recommend that in due course the proposed Charities Office enter into dialogue with charity registration authorities in neighbouring jurisdictions, starting with the Inland Revenue in the North, to agree reciprocal recognition and registration arrangements. These discussions should also address the question of
criteria for deciding where an organisation should register. We recommend that there should be consultation with the authorities in Northern Ireland with a view to harmonising processes both in the North and the Republic as much as possible, as the Northern Irish law on registration is also in a state of development and there is an exceptional opportunity to co-ordinate the two systems. (p. 140)

51
We recommend that all charities over a certain size operating in this jurisdiction be registered and be subject to supervision and monitoring by a principal regulator, whether the Charities Office or an equivalent body abroad. (p. 141)

52
We recommend that the new Charities Registrar be empowered to require all changes to a charity’s constituting documents to be approved by the Charities Office before becoming effective. (p. 142)

53
We recommend that the Charities Office undertake periodic or rolling reviews of the Register, to ensure that dormant charities are revitalised or appropriately wound up and de-registered. (p. 142)

54
We recommend that the 15 year dormancy period for charitable dormant accounts be reviewed in the light of experience, with a view to reducing it to five years. (p. 143)

55
We recommend that all charities, including those exempted from registration, should be accountable to the Charities Office as the primary regulatory authority of the sector. (p. 143)

56
We recommend that regulation be applied uniformly, regardless of the legal structure used by any organisation. (p. 144)

57
We recommend that the Charities Office in consultation with the sector should develop standards for expenditure by charities on charitable objects and administration, fundraising costs in relation to funds raised, returns on investment, and so on. (p. 145)
In developing guidelines and standards, we recommend that the Charities Office should consult widely and work with the charity sector and representatives of donors. (p. 146)

We recommend that the Charities Office monitor the annual reports and accounts received from registered charities to identify

- charities which are no longer functioning and are defunct, and may need assistance in being wound up,
- charities which are in need of assistance in complying with the requirements for reporting and accounting,
- charities which are in need of assistance in relation to some aspect of their operations, for example, lack of trustees, and
- charities which are the subject of mismanagement or fraud. (p. 146)

We recommend that the Charities Office use the annual reports and accounts filed by charities to undertake systematic and preventative monitoring. (p. 147)

If a charity is late in making an annual return, or files a return which is incomplete or below a reasonable standard of reporting, we recommend that the Charities Office use this information to trigger a review of the organisation. (p. 147)

We recommend that information from the public should be systematically investigated, and the results of investigations should be published. (p. 147)

We recommend that the Charities Office should undertake inspections and audits on a random basis, in addition to any investigations it initiates on the basis of the triggers built into the monitoring system. It would also be desirable that every charity be inspected and audited on a periodic basis, just as VAT inspections are periodically carried out, and the resources to make this possible should be made available to the Charities Office. We recommend that every charity be inspected at least once every five years. (p. 148)
We recommend that the Charities Registrar be empowered to institute an investigation on grounds of suspected fraud, dishonesty or illegal purpose, formation of an organisation for an illegal purpose, involvement of trustees or charity directors who are suspected of being guilty of fraud, misfeasance or other misconduct, or serious past, ongoing or planned future breach of trust. (p. 150)

We recommend that other persons should also have standing to apply to the Charities Registrar or the Circuit or High Court (which would have concurrent jurisdiction) for an order to institute an investigation, including the trustees of a charity or a majority of them, creditors, significant donors or grant makers and beneficiaries or potential beneficiaries. (p. 150)

We recommend that the Charities Registrar be empowered to either conduct an investigation through the Charities Office or to appoint a person to conduct it and report to him. The Charities Office or person appointed should have power to direct a trustee or member of the charity concerned or any other person:

(a) to furnish accounts and statements in writing with respect to any matter in question at the inquiry, being a matter on which he has or can reasonably obtain information, or to return answers in writing to any questions or inquiries addressed to him on any such matter, and to verify any such accounts, statements or answers by statutory declaration;

(b) to furnish copies of documents in his custody or under his control which relate to any matter in question at the inquiry, and to verify any such copies by statutory declaration;

(c) to attend at a specified time and place and give evidence or produce any such documents."

The Registrar should also have power to require any person to furnish him or the person conducting the inquiry with any information in his possession or any document or copy thereof which relates to any charity and is relevant to the discharge of the functions of the Charities Office. (p. 150)

In the event that a person knowingly or recklessly provides false or misleading information, in circumstances where that person knows that an investigation is being undertaken, or that it is needed for the discharge by the Charities Office of its functions, we recommend that such a person should be guilty of an offence on summary conviction or on indictment. If a person refuses to co-operate in the
course of an inquiry, the Charities Office should be empowered to refer this refusal to the Circuit Court, which should be empowered to make an order as it sees fit, non-compliance with which would result in the person concerned being held in contempt of court. (p. 151)

68
We recommend that interim powers to secure any property of the charity should be made available to the Charities Office. If the Charities Registrar is satisfied that there is or has been any misconduct or mismanagement in the administration of a charity, or if he is satisfied that it is necessary or desirable to protect the charity’s property or ensure its correct application, we recommend that he should be empowered to make orders including those listed in section 18 of the England and Wales Charities Act 1993:

• to prevent an organisation holding itself out as a registered charity,
• to apply to the High Court for the suspension of one or more trustees, officers, agents or employees,
• to appoint one or more trustees as they consider necessary for the proper administration of the charity,
• to order any person holding property on behalf of a charity not to part with it without the approval of the Charities Office,
• to order any debtor of the charity in question not to make payment of monies due without approval of the Charities Office,
• to restrict payments it can make or receive and contracts it can enter into,
• to freeze its bank accounts and other assets, and
• to appoint a manager to manage the charity on an interim basis.

We further recommend that if at any time after an inquiry has been instituted it appears to the Charities Registrar that there has been misconduct or mismanagement in the administration of the charity, and that one or more trustees, officers, agents or employees have been implicated, the Registrar should be empowered to apply to the High Court to suspend such person or persons, and by order to establish a scheme for the administration of the charity. (p. 153)

69
We recommend that excessive payments by charities by way of remuneration or contracts should be explicitly included in the definition of misconduct and mismanagement. (p. 153)

70
On completion of an investigation we recommend that the Board should have power, on its own motion to
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• wind up the charity and apply its resources cy-près;
• establish a scheme for the future administration of the charity;
• remove the charity from the register;
• appoint one or more new trustees;
• apply to the High Court for disqualification of one or more persons from acting as charity trustees, for such period as the Court sees fit;
• refer the report on the inquiry to the DPP;
• impose lesser sanctions such as a reprimand or personal fine on a trustee who has acted improperly (a system of lesser sanctions could provide that they are recorded for a limited period on the register and that a number of them, say three, disqualifies the trustee from acting as a charity trustee for a stated period, say five years subject to an appeal to the High Court);
• require restitution to be made to the charity of any losses suffered by the charity as a result of the acts or omissions of a trustee, including reversing of transactions made between the charity and a trustee or associated person. (p. 154)

71
We recommend that it should be an offence for any trustee, who has been disqualified, to act as a charitable trustee in breach of such disqualification, and that the Charities Board should be empowered to remove such a trustee by order. (p. 154)

72
In order to afford trustees a realistic level of comfort in the execution of their voluntary work, we recommend that charity trustees should be indemnified by the charity concerned in respect of any liabilities incurred by them in the management of the charity’s business, in the same way that company directors are. In relation to the duties of trustees to keep proper books of account and make annual returns, we recommend that failure to comply with the proposed regulations should not result in a penalty on the charity, but rather in a warning to the trustees. In the event of a second or third warning, the trustees should be replaced or the charity should be de-registered. In relation to other acts or omissions, it should be open to a trustee to seek relief, in similar terms to section 391 of the Companies Act 1963, from liability for any negligence, default, breach of duty or breach of trusts where the trustee has acted honestly and reasonably and it appears to the court that, having regard to all the circumstances, he or she ought fairly to be excused. If successful, the trustee should be entitled to be indemnified by the charity for the costs of such an application, whether the constitution, trusts or Articles under which the charity is established permits such indemnification or not. (p. 155)
We recommend that appeals against decisions or orders of the Charities Registrar or Charities Board should lie to the High Court. (p. 155)

When an application is made to register a new charity or a new trustee, we recommend that each trustee concerned should make a formal declaration that he or she is not disqualified from being a charity trustee. (p. 155)

We recommend that it should be an offence to make a false declaration in this regard, and that any person doing so should be automatically disqualified from being a charity trustee. We recommend that the Charity Registrar should have discretion to set aside the disqualification if the circumstances warrant this, or decline to do so, subject to an appeal to the High Court. (p. 155)

We recommend that the Charities Board should have power, at their discretion, to apply to the High Court to remove a charity trustee on their own motion subject to appropriate grounds for removal. (p. 156)

We recommend that the Charities Office should maintain a register of persons disqualified from being charity trustees. (p. 156)

We recommend that the Charities Office have a specific role in assisting and supporting charities in relation to fulfilling their legal and financial obligations under the proposed legislation and otherwise. (p. 157)

We recommend that the Commissioners for Charitable Donations and Bequests’ facilitative powers should be transferred to the Charities Office to be exercised by the Charities Board as part of the support offered to charities. (p. 160)

We recommend that the Charities Board be empowered to frame cy-près schemes in cases of charities established by statute, and that the need for additional powers to assist charities to achieve their objectives be kept under review. (p. 160)
We recommend that additional trustee powers in relation to the

- power of sale or mortgage;
- power to compromise a claim;
- power to redeem an interest in land;
- power to exploit land (letting, mining, cutting timber, building etc.);
- applying funds cy-près; and
- power to dispose of property at less than market value to another charity
  (another form of cy-près)

be enacted, subject to being brought into force by ministerial regulation which will also stipulate the financial value under which such powers would come into effect. We recommend that the Charities Board keep this matter under review, and recommend that these powers be brought into effect once they are satisfied, in the light of the experience of the Charities Office, that it is appropriate to do so. (p. 160)

We recommend that the Charities Office maintain a database of sources of funding for charities, and provide the expertise necessary to advise charities what assistance they may be eligible for. (p. 161)

We recommend that the support offered by the Charities Office should be regularly reviewed with representatives of users from the charity sector, and should be continually improved in response to perceived shortcomings. Any complaints should initially be dealt with by the Charities Office, but we recommend an independent Charities Ombudsman or complaints body to deal with complaints which cannot be resolved directly. It may be useful to establish a standing representation of the sector to interact with the Charities Office. (p. 161)

**FUNDRAISING**

In relation to a system which minimises the possibility of casual abuse, we recommend that the Charities Office in consultation with the charity sector and the Irish Institute of Fundraisers develop best practice guidelines and a system of certification or self certification. The purpose of this would be for participating organisations to certify their fundraising procedures in the manner of Quality Assurance. (p. 166)
We recommend that the functions and powers outlined in the Costello Committee’s and Advisory Group’s reports for the Fundraising Registration Authority should be vested in the proposed Charities Office. (p. 167)

We believe that in general it is not appropriate for the fine detail of the administration of controls to be included in primary legislation, for the reason that circumstances change and there should be greater flexibility to accommodate this than can be provided through primary legislation. Instead, we recommend that the Minister should make regulations from time to time on the advice of the Charities Office in consultation with the sector. (p. 172)

We recommend that the Charities Office should take responsibility for the granting of permits and licences for fundraising, with appeals to the District Court. (p. 173)

We recommend that a national computerised database be set up and managed by the Charities Office, showing a calendar of all collection permits granted throughout the country by district. (p. 173)

We recommend that the current exclusion from regulation of fundraising by means of charitable street trading should be reviewed. Such fundraising should be made subject to controls as to dates and locations in the interests of the fair sharing of dates and locations between all charities. Such fundraising should also be brought under the same controls of regulation and accountability as street collections in the public interest. The sale of items for charity or promotions in conjunction with charities should clearly state the amount or percentage which is payable to the charity. (p. 173)

We recommend that legislation should also cover the collection of promises of money (for example, standing order forms), as well as money. (p. 173)

We recommend that consideration should be given to donors to telethons being entitled to change their minds in relation to their donations or pledges within seven days of the donation, to allow for a cooling off period. (p. 181)
The Irish Institute of Fundraisers was established in 1996. Its members include both independent consultants and professionals employed directly by charities. We recommend that it and clients of its members should be consulted in the development of regulations in relation to professional fundraisers. (p. 182)

We recommend that in addition to the requirements for professional fundraisers to be registered with the regulatory authority and for written agreements between them and the charities for which they are acting, there should be statutory grounds for charities to injunct professional fundraisers or others from collecting funds in their names where:
- the fundraiser is using methods to which the charity objects; or
- the fundraiser is not a fit and proper person to raise funds for the charity; or
- the charity does not wish to be associated with that fund-raising venture.
(p. 182)

We recommend that in any fundraising effort involving professional fundraisers, that a statement be made available to inform potential donors what proportion of their donations will be used to pay the costs of the fundraiser. (p. 182)

In relation to charity shops, we recommend that they should, as a matter of best practice, display a notice indicating what proportion of their turnover and profit is paid to their parent charity. (p. 182)

We recommend that charities seeking donations on the Internet develop among themselves, perhaps with the assistance of the Charities Office, technical standards to protect their donors in relation to the identity of the charity and transaction security which can be independently certified on their websites. (p. 184)

We recommend that the issues involved in charitable fundraising should also be identified and monitored in the context of the Internet Advisory Board structure. We recommend that the Internet Advisory Board, if sufficiently resourced, or failing this the Charities Office should act as the complaints agency and investigate and process abuses on the Internet along the lines recommended in the Working Group’s report. (p. 185)
We believe that there is an advantage in having a separate vehicle for charities, which would be more specifically attuned to their needs and to the public policy interest of charities, as well as removing the burden of dual registration and regulation. We recommend that the proposals of the UK Department of Trade and Industry be considered, notably:

- that a new form of incorporation called Charitable Incorporated Organisation should be made available to Irish charities;
- that the Charitable Incorporated Organisation be restricted to charities; and
- that the Charitable Incorporated Organisation should be optional for charities and not mandatory. (p. 209)

We recommend that the proposals of the UK Charity Commission in relation to CIOs be considered, particularly as these proposals have been made as a result of their experience and consultation with the charity sector. Any development of a new legal structure for charities along these lines should take into account developments in the UK and the wider European Community. (p. 209)

We recommend that the Charities Office work with the charity sector to develop model forms of governing instruments setting out standard provisions for the governance and management of charities, whether companies, trusts or otherwise. The use of such model forms of governing instruments should not be obligatory but should be available to charitable organisations as precedents, which can be used or adapted as required. These model forms of governing instrument should contain standard provisions in relation to:

- charity names
- objects
- appointment of trustees, terms of office, retirement and removal
- trustee powers and responsibilities, including conflict of interest, payments to trustees
- trustee meetings and proceedings
- acquisition and termination of membership
- membership rights and responsibilities
- annual general meetings of members and related procedures
- auditors, accounts and records
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- power of amendment of the governing instrument
- dissolution and merger of the charity (p. 210)

101
We recommend that legislation be enacted setting out default provisions for the government of charitable organisations, which should apply in the absence of provisions covering these matters in charities’ governing instruments. We recommend that the default provisions should be capable of being revised and updated periodically by ministerial order. (p. 211)

102
We recommend that membership of a charitable company should not be transferable without a special resolution requiring a two thirds majority of the members of that charity. Further, we recommend that membership should cease on the death of a member and that a member should be able to resign at any time but that this resignation should not relieve that member of any existing obligation to the charity. (p. 212)

103
We recommend that there should be a mandatory maximum term of office for trustees, subject to the possibility of their reappointment. (p. 212)

104
We recommend that permitting the conduct of business by telephone and by unanimous written resolution be extended to meetings of other charitable organisations besides charitable companies. (p. 212)

105
We recommend that there should be a statutory requirement that a trustee must disclose to each of his fellow trustees any personal interest which he may have in any matter which is being considered by the trustees. This provision should be broadened to include not only trustees but also members of the charity. Where a trustee has a conflict of interest or personal interest in a matter
- he should declare such an interest;
- he should withdraw from the meeting when the matter is being discussed;
- he should not be counted in the quorum for that part of the meeting;
- he should not have a vote on the matter. (p. 213)

106
We recommend that the existing rules on payments and benefits to trustees 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. (p. 214)

107
We recommend that an obligation should be placed on charity trustees to keep proper records of:
• all proceedings at general meetings;
• all proceedings at meetings of the trustees;
• all reports of any committees or subcommittees; and
• all professional advice obtained. (p. 214)

108
To provide for cases where no power of amendment is included in the governing instrument, we recommend that an implied power of amendment should be legislated for, much as such a power is contained in the Companies Acts. The proposed legislation should provide for the general amendment of the governing instrument by the members of a charity if constituted as a company or unincorporated association. This power of amendment should be by special resolution of the members of the charity and require a two thirds majority. If the proposed amendment concerns a change of the objects of the charity the prior approval of the Charities Office should be required. The amended governing instrument should be forwarded to the Charities Office within 28 days of the resolution, to ensure that the Charities Office will automatically be notified of the amendments to the governing instrument and will have an up to date copy of the governing instrument on file. If the charity is constituted as a trust, the Charities Office should be given a discretionary power to amend the trust instrument by order on the application of at least two thirds of the trustees. We recommend that the Charities Office have discretion to reverse an amendment to the governing instrument if it is of the opinion that it jeopardises the organisation’s charitable status. (p. 216)

109
To provide for cases where no power of dissolution and distribution is included in the governing instrument, we recommend that legislation should provide for the dissolution of a charity and distribution of its property along the lines of the present requirements of the Revenue Commissioners. The proposed legislation should provide for the dissolution of the charity and distribution of its property by the members of a charity if constituted as a company or unincorporated association. This power of dissolution and distribution should be exercisable by special resolution of the members of the charity and require a two thirds majority. The prior approval of the Charities Office should be required. If the charity is
constituted as a trust, 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. We further recommend that the Charities Office should have discretion to reverse or confirm an unauthorised distribution. (p. 216)

110

In order to avoid the necessity for a cy-près scheme in every case and to make the merger of charities easier, we recommend that enabling powers for charities to merge be provided. We 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 proposed Charities Office be sought; and
• the two or more charities have the same or similar objects. (p. 218)

LEGAL REQUIREMENTS FOR CHARITY TRUSTEES

111

We recommend that statutory provision be made in relation to qualifications for charity trustees. We recommend that trustees must:

• be eighteen years of age or over;
• be of sound mind;
• 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. (p. 220)

112

We recommend that screening for a history of offences involving children be required before a person can be appointed as a trustee of a charity working with children and adolescents. (p. 220)

113

We recommend that there should be a statutory requirement for a minimum of two trustees. (p. 221)
We recommend that a charity trustee must vacate his office or resign if he:

- becomes of unsound mind;
- becomes an undischarged bankrupt;
- is convicted of an indictable offence;
- is absent from meetings of the trustees for more than twelve months or is absent from the jurisdiction for twelve months and the remaining trustees resolve that he should vacate his office;
- becomes 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. (p. 224)

We recommend that a trustee of a charity should be able to resign at any time by notice in writing. (p. 224)

We recommend that the proposed Charities Registrar have discretionary power to petition the High Court for the removal of a charity trustee. 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 his 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 his creditors;
- the trustee is a company in liquidation;
- the trustee is incapable of acting by reason of mental disorder;
- the trustee has not acted, and will not declare his willingness or unwillingness to act;
- the trustee is outside the jurisdiction or cannot be found or does not act, and his absence or failure to act impedes the proper administration of the charity. (p. 226)
We recommend that a person should be disqualified from acting as a charity trustee if:

- he has been convicted at any time of an offence involving deception or dishonesty, unless the conviction is legally spent; or
- he is an undischarged bankrupt or he has made a composition with his creditors and has not been discharged; or
- he is of unsound mind; or
- he has at any time been removed by the proposed Charities Office or by the Court from being a trustee because of misconduct; or
- he is disqualified from being a company director. (p. 228)

As discussed above under the heading ‘Regulation’, we recommend 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 his office or employment pending consideration being given to his removal, subject to the initiation of a formal inquiry. (p. 230)

We recommend that a person purporting to act as a charity trustee while disqualified or suspended should be liable to sanctions and suggest that section 63B of the Pensions Act 1990 as amended by the Pensions (Amendment) Act 1996 be used as a model. This provides that where a person is guilty of an offence, he is liable on summary conviction to a fine not exceeding IR£1,500 or to one years imprisonment or both and on conviction on indictment to a fine not exceeding IR£10,000 or to two years imprisonment, or to both. (p. 230)

We recommend that the role, responsibilities and duties of charity trustees should be the same, no matter what form of legal structure or governing instrument is used. (p. 230)

We recommend that trustees of a charity (whether trustees, directors or otherwise) have the following statutory powers provided that these powers are used to further the charitable objects of the charity and are not specifically excluded in the charity’s governing instrument:
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- power to raise funds;
- power to support and administer other charities;
- power to borrow money and give security for loans by way of mortgage or otherwise;
- power to purchase, lease, or hire property of any kind;
- power to sell or lease property of any kind;
- power to provide advice and publish or distribute information;
- power to invest;
- power to delegate the management of investments to a financial expert;
- power to enter into any contracts or arrangement to provide services to or on behalf of any other body, governmental or otherwise;
- power to create or maintain any funds, sinking fund or reserves for any future obligations of the charity;
- power to employ agents, advisors and staff;
- power to provide pensions, gratuities, allowances or charitable aid to any person who served the charity or voluntary association as an employee and to his dependants;
- power to insure the property of the charity;
- power to insure the trustees against the costs of a successful defence to a criminal prosecution brought against the charity trustees or against personal liability incurred in respect of any act or omission which is or is alleged to be a breach of trust or breach of duty;
- power to pay the costs in respect of the formation of the charity;
- power to do all such things as may be within the law which promote or help to promote the objects of the charity;
- power to amend the governing document of the charity but only with the prior permission of the Charities Office when the objects of the charity are being amended. (p. 233)

We recommend that the duty of care owed by trustees or directors of a charity should be a standard one, and should be adhered to whether the charity is an unincorporated association, trust or a company limited by guarantee. We recommend that this duty of care should be statutory. The duty of care required of a charity trustee should reflect any special knowledge, experience or skill which the trustee professes to possess. If the trustee acts as a trustee in the course of his business or profession, his duty of care is to exercise such care and skill as is reasonable to expect of a person in the course of his business or profession. (p. 238)
We recommend that the reasonable costs and expenses of any training required by trustees concerning their duties and responsibilities should be payable from the resources of the charity as a valid expense. (p. 238)

INVESTMENT OF CHARITABLE FUNDS

If retained (see our other recommendations below) we recommend that the list of authorised investments in the Minister’s Order should be revisited. (p. 241)

If retained (see our other recommendations below) we recommend that the list of conditions applying to trustees whose investment in authorised investments is governed by the Minister’s Order should be revisited. (p. 243)

If a list is retained we recommend that the Commissioners’ List is consolidated into a revised Statutory Instrument under the Trustee (Authorised Investments) Act 1958 with a view to creating one list applicable to trustees. The Commissioners’ powers to confer, on application by charity trustees, a power to invest in such manner as the Commissioners think proper should be retained separately but should not give rise to a separate list of charitable authorised investments. (p. 244)

We recommend that the duty owned by charity trustees in the exercise of an investment power should be codified by statute and that the application of that duty to investment powers contained in the Articles of Association of companies limited by guarantee be confirmed. (p. 246)

We recommend that clarification be provided that the equitable principles governing investment decisions concerning property subject to charitable trusts should unambiguously apply to companies as well as to trusts and unincorporated associations. (p. 246)
129
We recommend 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. (p. 247)

130
We recommend that the position on ethical investment should be clarified by a statutory (or ministerial/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. (p. 247)

131
We recommend that the duty of investment and the appropriate standard of care for trustees should be codified in statute consistent with the principles of prudential investment (i.e. suitability, risk, diversity and appropriateness) on the basis that subject to a contrary intention in the instrument creating the trust, trustees should have the same power to make an investment of any kind as if they were absolutely (or beneficially) entitled to the assets of the trust. This duty of investment and standard of care we feel would be preferable to restricting investments to those authorised by the Minister’s Order or the Commissioners’ List. (p. 249)

132
We recommend that a statutory exoneration should apply to lay trustees against any liability for loss due to poor investment performance arising out of the exercise of the statutory power in good faith. (p. 250)

133
We recommend that the determination of appropriate choices for investment decisions could usefully be passed from the High Court to the proposed Charities Office. (p. 250)

CHARITIES AND RATES

134
We recommend that before any debate is embarked upon, it would be helpful to undertake research as to the economic reality of the financial impact on all concerned of removing liability to pay rates from charity shops: the rating authorities, the competing shops and the charities themselves. (p. 268)
INTRODUCTION

The Law Reform Committee of the Law Society of Ireland was established in November 1997 in order to identify and focus upon specific areas of the law in need of update and reform. It aims to contribute towards improving the quality, fairness and effectiveness of Irish legislation in a number of selected areas. It also seeks to represent the views of the Society’s members in relation to a number of legislative initiatives and to enhance the Society’s contribution to the development of Irish law. More generally, it aims to build relationships between the Law Society and others involved in the review of law and policy, including senior policy-makers and the voluntary sector.

To date, the Law Reform Committee has published reports on Domestic Violence (May 1999), Mental Health (July 1999), Adoption law (April 2000) and Nullity of Marriage (October 2001), and continues to monitor developments in these areas and make contributions where appropriate. Work on other areas is ongoing.

As a result of information from members of the Society and other legal practitioners, the law of charities was identified by the Committee as being one of a number of priority areas for reform. The law of charitable and voluntary fundraising has already been the subject of several reports and commentaries, with recommendations for reform published in 1990 and 1996. With the publication of the White Paper “Supporting Voluntary Activity” in September 2000, the debate broadened beyond the requirements of fundraising to embrace issues affecting the whole voluntary sector.

Internationally, the question of the definition, regulation and support of charity and other voluntary activity was and continues to be under discussion. Within the last five years, reports on reform of the law of charity or aspects thereof were published in Canada, Australia, New Zealand and Scotland, and we have been privileged to be able to draw on such a range of current thinking on the subject. We are also fortunate in having a well developed regulatory and support body in a neighbouring jurisdiction, the Charity Commission of England and Wales, who have experience of already putting into practice many of the ideas and concepts arising in the course of the study, and from whom we have been able to learn much.

Footnotes:
Internationally there is greater understanding of the role played by voluntary activity in the building of a strong inclusive ‘civil society’ which in turn contributes to the strengthening of democracy, the building of trust in society and the creation of social capital. The Irish Government’s policy on supporting voluntary activity is informed by this recognition, as well as the traditional good will afforded to such activity. Equally importantly, charities and the voluntary sector have gained the confidence to be more assertive and professional. As their activities become more professional and better organised, they look for equivalent progress on the legislative framework in which they operate.

Our proposals have therefore been developed in a very different legal environment to that which existed in 1990 or 1996. Even since embarking on this project, major tax reforms to benefit charities have been introduced in 2001 and the limit on the cy-près jurisdiction of the Commissioners for Charitable Donations and Bequests has recently been lifted. The intervening years and growing recognition of the social and economic importance of the sector gave the Committee an opportunity to radically review certain aspects of charity law, and take advantage of the common consensus that the sector requires a new legal framework.

In the context of our study we conducted a survey with the assistance of The Wheel in the summer of 2001. Approximately 2300 forms were issued, and we received a response of 265, being 11.5%. The consensus on the need for more transparency and accountability on the part of charities was considerable and there was general agreement with the establishment of a regulatory body and charities’ publication of accounts, fundraising costs and names of those involved. Details of the survey are set out in Appendix 1.

The recommendations of the White Paper have been accepted by the Government, and an Implementation and Advisory Group has been established and is operational. Responsibility for charities was transferred from the Department of Justice, Equality and Law Reform to the Department of Social, Community and Family Affairs. This Department is currently working on a consultation paper on the issue of reform of charity law and fundraising, which it can be expected will be published and circulated in the coming months. This report by the Law Reform Committee of the Law Society is intended to feed into this process.

Footnotes:
6. For example, the Irish Charities Tax Reform Group have made annual budget submissions for the past 10 years and have achieved some of their most important objectives including an advantageous regime for donations from the public and business community.
7. By the Finance Act 2001, s. 145 (tax paid on donations can be reclaimed by the recipient charity) and the Valuation Act 2001 (Charities’ exemption from rates widened and rationalised).
9. On 27 July 2001 by SI 376/2001. At time of writing, responsibility for charities is likely to be devolved to another Department as a result of restructuring being undertaken by the newly formed Government.
In early June 2002 the newly published Programme for Government confirmed (p. 29): “A comprehensive reform of the law of charities will be enacted to ensure accountability and to protect against abuse of charitable status and fraud”

The aspects of charity law discussed in the report include definition of charity, the regulation of the sector, fundraising and issues arising since the publication of the two prior reports, legal structures for charitable organisations, rules for charity trustees, rules for investment of charity funds and the question of rates and charities.

We recognise that much debate, particularly within the charity sector, will be needed in advance of action and we offer our recommendations in that spirit in order to open up such a debate.

This report will be submitted to the Department responsible for charities and other government departments and will be circulated to members of the Oireachtas, the judiciary, both branches of the legal profession and to charities, voluntary organisations and their umbrella bodies. We hope that its findings and recommendations will form a basis on which to proceed and will lead to reform and codification of the law of charity, helping to ensure a new legal framework in which the charities themselves can comfortably operate to the benefit of all.

We would like to acknowledge the assistance we received from a wide range of people and sources including

• Tom Fitzpatrick, Owen Ryan and the staff of the Revenue Commissioners in Nenagh;
• Orla Barry-Murphy, Gillian Gallagher and the Commissioners for Charitable Donations and Bequests for Ireland;
• Tony Fallon and Micheál O’Corcora of the Department of Social, Community and Family Affairs;
• Dr. Kerry O’Halloran of the Centre for Voluntary Action Studies, University of Ulster;
• John Stoker, Chief Commissioner and the staff of the Charity Commission of England and Wales;
• Mark Ryan (for his work in the early stages of this report during 2000);
• the members of charities and religious organisations who met with us and gave us the benefit of their experience and aspirations;
• the various members of our profession and others, such as the investment professionals, who generously gave us their time and expertise to provide us with an insight into the current system of charity law and the practical consequences for the day to day running of charities;
• the Garda Síochána
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• the staff of The Wheel for their assistance in our survey;
• the respondents to our survey;
• the authors of the various comprehensive surveys in their overseas jurisdictions on which we have relied heavily.

We are grateful for the assistance of all of these contributors and many others for all their assistance in highlighting the need for reform in charity law. The responsibility for any errors and omissions remains our own.

The other members of the Charity Law sub committee would like to acknowledge the enormous contribution made by Oonagh Breen and pay special tribute to her leadership and encouragement.

Members of the Law Reform Committee 2001-2002
John Costello, Chair
Keenan Johnson, Vice Chair
Alma Clisssmann, Secretary
Edwin Allen
Brian Gallagher
Alan Gannon
Rosemary Horgan
Hugh O’Neill
Geoffrey Shannon
Martin Sills
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CHAPTER 1

THE DEFINITION OF CHARITY

1. BACKGROUND

Like so many other common law jurisdictions, Ireland at present has no statutory definition of charity. While Irish statutes make frequent reference to ‘charity’ and ‘charitable purposes’, the references are not informative.1 The legal definition of charity has evolved over many centuries, from judicial authorities developed and refined by the courts. Indeed, this legal definition of charity is often far removed from a lay person’s perception of charity. The approach of the courts has been to rely on the House of Lords decision in *Commissioners for Special Purposes of Income Tax v. Pemsel*,2 a tax case from 1891, in which Lord Macnaghten set out a number of guidelines to assist in the determination as to whether a purpose was a charitable purpose. According to Lord Macnaghten, to be charitable a trust must be either for:

- The relief of poverty;
- The advancement of education;
- The advancement of religion; or
- Other purposes beneficial to the community.

In addition to falling within one of the above heads of charity, the purpose must possess sufficient public benefit (i.e., it must benefit the community or an appreciable section of the community) and be exclusively charitable. In laying down these guidelines in *Pemsel*, Lord Macnaghten was not purporting to create a new test but rather to consolidate, in a contemporary fashion, the approaches of earlier cases such as *Morice v Bishop of Durham*3 which had attempted to distil the essence of charity from an Elizabethan statute, the Statute of Charitable Uses 1601. This Statute, passed at the turn of the seventeenth century, represented a concerted effort on behalf of the Crown to reorganise the system of public and private responsibilities for the poor and dependant.4 The purpose of the Elizabethan Statute was to rationalise the administration of private charities by specifying the purposes to which funds could be devoted to charity and to ensure that funds so dedicated were actually applied to the uses specified by the donors. The Statute did not set out to nor did it define ‘charity’. The Preamble to the Statute did, however, set out the purposes for which property might be set aside for charitable purposes and provided an overview of the rich

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Footnotes:
1. The Charities Act 1961 states for instance that a charitable gift means “a gift for charitable purposes” (see s. 2), while s. 208 of the Taxes Consolidation Act 1997 provides that “charity” means any body of persons or trust established for charitable purposes only.
2. [1891] AC 531.
3. (1805) 10 Ves Jr 522.
4. Other related attempts included the passing of the Poor Relief Act of the same year which put municipal authorities in charge of the administration of poor relief.
tapestry which made up English charity at the turn of the seventeenth century. Coming as it did in 1601, after the social and religious turbulence of the sixteenth century, the Statute represented the more secular attitude of Elizabethan England to philanthropy and constituted a step away from the more religiously motivated almsgiving which had dominated the 1500s. Repealed by the Mortmain and Charitable Uses Act in 1888, the ghost of the statute still haunts charity law as the 1888 Act provided that references to ‘charities’ should be construed as references to ‘charities within the meaning, purview and interpretation to the preamble to the Statute’, thus ensuring continuing reference to the Preamble in the context of charitable adjudication, which has continued unabated right up until the present day. Interestingly, an Irish version of the statute of charitable uses was passed in 1634, during the reign of Charles I.5

While the contents of its preamble differed in content from that of its Elizabethan sister, making express provision for gifts for ‘the maintenance of any minister and preacher of the holy word of God’, the judicial view was to the effect that the legislation in both jurisdictions was of similar effect.6 Thus the past four hundred years have seen the evolution of a common law definition of charity, supported by judicial precedent and reliance upon the spirit and intendment of the Elizabethan preamble.

A question which has arisen on a number of occasions in the past and with greater persistence in the last fifty years is whether this definition of charity continues to serve us well. Is the legal concept of charity capable of adaptation to the world of the twenty first century, a world far removed from that of the seventeenth century (when the Statute of Charitable Uses was enacted) and even from that of the nineteenth century (when Lord Macnaghten set out the heads of charity in Pemsel)? Has the time now arrived when it is necessary to modernise the concept or can the limitations which the current framework places on the development of the definition be justified?7

World-wide, there have been numerous reviews of charity law in the past fifty years, many of which have considered the need to update or modernise the definition of charity. It is worthwhile outlining the volume of work that has been done by these reports in the past for two reasons – firstly, it serves to highlight the wealth of material and considered opinion on the definition of charity which is already in existence; and secondly, as many of these reports differ in the recommendations that they make, it indicates the complexity of the issues involved and that difficulty lies not in recognising the elephant/concept of charity but in defining it.

Footnotes:
5. Known as the Statute of Pious Uses, it was repealed by the Statute Law Revision (Ireland) Act 1878.
7. One obvious limitation being the expense involved in litigating a charity case resulting in a certain lack of case law and thus a lack of opportunities for judges to develop the area of charity law in a consistent or contemporary fashion.
Comparative Research

The Nathan Report (1952)

In England, the Nathan Report in 1952 proposed the removal of reference to the Preamble to the Statute of Charitable Uses 1601 and recommended instead a statutory definition of charity to be based on Lord McNaghten’s four heads of charity which would still make use of existing judicial precedent in terms of its interpretation. Little consideration was given to the meaning of ‘public benefit’ by the Committee. Finding that the scope of charity as laid down by the case law was neither too broad nor too narrow, the Report also concluded that there was no cause for altering the content of the legal meaning of charity.

The Goodman Report (1976)

Almost 25 years later, the Goodman Committee was still recommending that the categories of charity be restated in ‘simple and modern language’, holding that the preamble was written in language inappropriate to contemporary concepts and involved ‘mental gymnastics’ in order to include some purposes as charitable under its terms. The Report, while in favour of retaining existing case law, recommended a restatement of charity which would give courts more freedom to reconsider the case law in the context of the new categorisation. To this end, it set out a list of objects which would be deemed to be charitable in Appendix I to its report. In contrast to the Nathan Report, the Goodman Committee considered in more detail the concept of ‘public benefit’ and affirmed its importance. In this vein, it recommended, *inter alia*, the abolition of the ‘poor relations’ and ‘poor employees’ anomalies.

Victorian Legal and Constitutional Committee (1989)

In Australia, the Victorian Legal and Constitutional Committee was charged with the task of inquiring and reporting on the desirability of revising and simplifying the law relating to charitable trusts and commenting on whether a restatement of the law in a single statute written in plain English would be desirable. In its findings, it rejected the approach favoured by the Goodman Committee of introducing a statutory list of charitable purposes on the grounds that this would run the risk of built in obsolescence. Instead, the Committee recommended that specific new purposes be added to the meaning of charity by legislation where there was evidence of clear momentum of community support for its inclusion. In reaffirming the importance of the public benefit test, the Committee recommended that a) any additional purpose which is declared charitable should be
obliged to satisfy the common law requirement of public benefit; and b) any proposal for an ad hoc addition to the meaning of ‘charitable’ be raised at the Standing Committee of Attorneys-General to achieve national uniformity.


The White Paper was published as the UK Government’s response to the Woodfield Report of 1987. That latter report had been commissioned to carry out an efficiency scrutiny of the supervision of charities. It had assumed that there was to be no change in the legal definition of charity. The Government’s response to the report confirmed that opinion, when it stated at page 6 of the White Paper that a codification of the definition of a charity would “put at risk the flexibility of the present law which is both its greatest strength and its most valuable feature.” The White Paper also suggested that there was no reason to expect that a new body of law would be any less complex that the old.


In the mid-nineties the Ontario Law Reform Commission carried out one of the most comprehensive studies of the definition of charity. Its terms of reference were broad asking it to ‘examine the status, the legal form, the sources and the uses of revenue of charitable organisations and the appropriate form of government supervision, and to make recommendations about the appropriate laws to govern charities in modern times.’ Rejecting the need for a statutory definition, the Law Reform Commission found that the common law had provided appropriate flexibility in the past, and it recommended that the common law definition be retained with the courts and administrators addressing the deficiencies of that definition in an incremental fashion instead. It submitted that such decision makers should not feel unduly bound by particular decisions of past decision makers but should feel free to reform the common law as necessary.

The Deakin Report (1996)

Although the report commissioned in the UK by the NCVO was concerned with the wider arena of the voluntary sector, the dominant focus of the Deakin Commission was on the charitable sector. Supporting the retention of the concept of charity and of charitable status, the Deakin Commission

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13. It is interesting to note in this context that those very decision-makers were not so happy with the existing legal position. In the same year as the Ontario Law Reform Commission published its report, the Federal Court of Appeal handed down judgment in the Vancouver Regional Free Net Association case ([1996] 3 CTC 102; 137 DLR (4th) 206) in the course of which Hugessen J made the following comments in respect of the Canadian Income Tax Act:

“Somewhat anomalously, the Act does not provide a useful definition of charity or ‘charitable’ so that the Courts of necessity are thrown back to an obscure corner of England. Judging from the number of times that this court has been called upon in recent years to apply that ancient law to the circumstances of life on the eve of the third millennium, I may be forgiven for expressing the wish that this is an area where some creative legislative intervention would not be out of order.”
favoured retaining a legal test of charitable status based on an organisation’s purposes, rather than its actual activities. It called for an enlargement of the definition of charity by substituting a mere requirement of public benefit for the *Pemsel* classification of charity. This would effectively reverse the current rule that for a purpose which benefits the public to be charitable it must benefit the public in a way contemplated by the terms or spirit of the preamble to the Statute of Charitable Uses 1601 as expounded in the case law. The Deakin Commission further proposed that the test of public benefit be modified. It would suffice that a sufficiently important section of the public benefited and this would embrace any identifiable black and minority groups. The Commission, however, did not elaborate further on what would constitute a requisite section of the public and whether the present law would otherwise apply. In particular it did not make clear how such sections of the public would be distinguished from private or sectional interests, which the Commission considered fell outside the essential altruism of charity.

The Kemp Report (1997)

Set up by the Scottish Council of Voluntary Organisations in 1995, the Kemp Commission was to inquire into the future of the voluntary sector in Scotland. While its recommendations were principally concerned with the need to establish a new regulatory framework, the report did put forward the proposal that there should be a new legal definition of charity based on the concept of public benefit and that this definition should not be narrowly codified but that rather it should reflect the current range of charitable activities. In many respects, the Kemp Report echoed the views of the Deakin Commission, particularly in its calls for a new definition of charity based solely on a test of public benefit.


The Canadian Panel on Accountability and Governance in the Voluntary Sector delivered its review of the Canadian voluntary sector in 1999. The terms of reference of this independent panel, appointed by the Voluntary Sector Roundtable, charged it to examine ways to enhance the effectiveness and the credibility of the sector in light of the significant changes it had undergone in its operating environment. In the context of taxation, the Panel considered the current definition of charity. While claiming not to ‘recast the common law definition of charity’ it did put forward what

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15. Report, op. cit., at para. 3.2.6.
it called a ‘charity plus model’ which would retain the existing definition of charity but would expand it to include a list of other public benefit purposes which would be entitled to federal tax relief. To this end it recommended that a task force be established to develop a modernised concept which parliament should then incorporate as part of the Income Tax Act with a mandatory ten year review of the statutory definition by a joint government and sector representative task force.

Following on from the publication of the Broadbent Report, the Federal Government convened three tables to consider issues relating to charity and the voluntary sector and invited these Tables to make recommendations. The Tables, enjoying both governmental and cross-sectoral representation produced a joint report in September 1999, entitled “Working Together”. In terms of definition, the regulatory table report proposed that the Income Tax Act be amended and that the existing list of “deemed charities” be extended to cover the following activities which failed to qualify for tax relief as the common law definition, as interpreted by both the Federal Courts and CCRA, stood. The extensions related to:

“voluntary organizations that:
(a) are not-for-profit and do not primarily promote their members’ self interest, and
(b) whose activities fall within [certain delineated boundaries]
should receive more public support than they do now…”

The belief here is that Canadians would widely support extending tax advantages to groups that meet these two tests, and that for example:

• promote tolerance and understanding within the community of groups enumerated in the Canadian Human Rights Code;
• promote the provisions of international conventions to which Canada has subscribed;
• promote tolerance and understanding between peoples of various nations;
• promote the culture, language and heritage of Canadians with origins in other countries;
• disseminate information about environmental issues and promote sustainable development;
• promote volunteerism and philanthropy.”

Footnotes:
19. This concept had first been suggested by Arthur Drache and Francis Boyle in a paper entitled, “Charities, Public Benefit and the Canadian Income Tax System”. This paper had been commissioned by the Kahanoff Foundation in 1997 and received wide circulation, partly thanks to its availability on the Internet.
21. Under section 148 of the Canadian Income Tax Act 1985, certain activities are treated as ‘quasi charities’ in that they receive similar tax relief to charities without satisfying the legal test for charitable status as interpreted by the Canadian Customs and Revenue Agency – examples of deemed charities would be registered amateur athletic organisations and certain cultural organisations. Both of these entities and the exception in section 148 are dealt with later on in this chapter.
It is interesting to note that in spite of the above recommendations, the Canadian Government opted in September 2000 to carry out yet another study of the voluntary sector, this time under the auspices of its Privy Council Office. This study, known as the Voluntary Sector Initiative consists of a number of ‘joint tables’, one of which is again a regulatory joint table. However, unlike its predecessor, it has chosen not to consider further the definitional issue, at least officially.23

NCVO Report (2001)
The UK National Council of Voluntary Organisations set up a Charity Law Reform Group to consider whether the definition of charity required amendment to better suit the 21st century.24 The report concluded that it would reduce the flexibility of the law if it were simplified. However, it did recommend that a strengthened public benefit test be introduced which would apply uniformly to all charitable purposes.

This report (known as the McFadden Report) recommended that a Scottish charity should be an organisation whose overriding purpose is for the public benefit; which is non-profit distributing; which is independent and which is non-party political.25 In many ways, this report is of particular interest in that like Ireland, Scotland has no body equivalent to the UK Charity Commissioners. Instead, the Inland Revenue in Scotland is responsible for determining whether a given organisation is eligible for charity tax relief. It has no concern with the wider reform of charity law. As a direct result of this situation, the report states that ‘there is clearly a deficit in Scotland because there has not been, until now, any body to pursue a programme of modernisation of charity law or policy.’26 In light of this unsatisfactory position, the Report recommends that a new body (Charity Scotland) be established to determine charitable status, to regulate the sector and to protect the public interest in Scotland. Open to updating the concept of ‘charity’ the report also notes that ‘a set of principles should be drawn up which align the tests for qualifying as a Scottish Charity more clearly with current thinking.’27

Charities Definition Inquiry (2001)
The terms of reference of the Australian Charities Definition Inquiry required it to provide the Federal Government with options for enhancing the clarity and consistency of the existing
definitions of charitable, religious and community service not-for-profit organisations within Commonwealth law and administrative practice. The report opted for a new statutory definition of charity that would encompass seven heads of charity. This would bring charity law into line with modern perceptions of what constitutes charity but, at the same time, retain the flexibility of the old common law definition by preserving the fourth heading – other purposes beneficial to the community – as a catchall category. Under the new proposals, charitable purposes would have to fall under either: the advancement of health, the advancement of education, the advancement of social and community welfare, the advancement of religion, the advancement of culture, the advancement of the natural environment or other purposes beneficial to the community. The proposals put forward by the CDI Report are considered in more detail throughout this chapter.

Irish Research

In terms of definitional research there is a dearth of domestic reviews in this regard.

The Costello Report (1990)

The terms of reference of the Committee on Fundraising Activities for Charitable and Other Purposes required it to ‘examine the adequacy of the existing statutory controls over fundraising activities for charitable etc. purposes and to make recommendations for any changes considered necessary…’ At the outset of its report, however, the Committee stated that it did not regard itself as competent to recommend a suitable definition of ‘charitable purposes’, pointing to the failure of the UK authors of the White Paper to attempt a definition either.

The Burton Report (1996)

The Burton Report considered the implementation of the recommendations of the Costello Report in relation to reforming the law relating to the administration and regulation of charities. It proposed the setting up of a national fundraising register whereby fundraising by non-registered organisations would be prohibited. In the context of its discussion as to who should be required to register, the report states,

“The sector includes charities, voluntary and non-voluntary organisations. The group discussed the possibility of applying a new definition of “charities”, but returned to a somewhat liberal interpretation of the Pemsel case. (The fact that the matter has been

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addressed, and abandoned, by three Government Committees – one in Ireland and two in Great Britain - did not inspire us.”31


The aim of the White Paper is to describe the current context in which the Community and Voluntary sector operates; to set out a cohesive framework for its support across Government Departments and Agencies and to make recommendations across a number of areas relevant to the support of voluntary activity generally. In defining what constitutes a voluntary or community organisation, the White Paper draws, *inter alia*, on the characteristics set out by the European Commission which provide that voluntary organisations are:

- Distinguished from informal or *ad hoc*, purely social, or familial groupings by having some degree, however vestigial, of formal or institutional existence;
- Non-profit distributing;
- Independent, in particular of Government and other public authorities;
- Must be managed in what is sometimes called a ‘disinterested’ manner - in the Irish context this particularly relates to containing some element of voluntary, unpaid participation;
- Must be active to some degree in the public arena and their activity must be aimed, at least in part, at contributing to the public good.33

It will be noted that to a certain extent these characteristics may equally apply to charities. The White Paper concedes (paras. 2.13 – 2.14) that unlike many of our European counterparts, Ireland has not yet introduced legislation to govern regulation and organisation of the non-profit sector, other than the recognition of charities for tax concession purposes. In this vein, the White Paper proposes the undertaking of a research programme in 2001 with the objective of quantifying the full extent of voluntary activity in Ireland. In particular it states (at para. 2.52) that the research programme “will support work that examines the Irish Community and Voluntary sector in an international context and identifies the best practice abroad in relation to governance and legal issues such as incorporation, registration and charitable status.” Therefore, the question of charity arises only in a peripheral way in the White Paper and the proposed studies to be carried out under it, while the definition of charity does not even make it to the issue paper.

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**Footnotes:**

31. Ibid at p. 3 of the Burton Report.
33. Ibid, at para. 2.43 of the White Paper.
Northern Ireland (2001)

In Northern Ireland the Centre for Voluntary Action Studies at the University of Ulster produced a report on the status of charity in that jurisdiction to mark the 400th anniversary of the Statute of Charitable Uses 1601. It recommended, inter alia, that in the context of a formal review of charity law regard be had to the treatment of definitional matters in reviews in other jurisdictions. However, it was acknowledged that legislative parity with other jurisdictions alone would not necessarily be appropriate in every sphere and that in relation to certain issues “a distinctive jurisdiction specific approach” would be more suitable in that it would enable the legislature to:

“maximise opportunities for rebuilding civil society, by for example providing for peace and reconciliation projects, encouraging community initiatives, allowing for some level of political advocacy in favour of socially excluded minority groups and addressing the problems associated with unemployment and rural deprivation.”

Against this background and in light of comparative research in the common law world, it is timely that Ireland should review its notion of ‘charity’ and consider whether the current definition stemming from the Preamble to the Statute of Charles 1634 is still appropriate for use in modern Ireland.

II. THE NEED FOR REFORM

“Charity in law is a highly technical term. The method employed by the Court is to consider the enumeration of charities in the statute, bearing in mind that the enumeration is not exhaustive. Institutions whose objects are analogous to those mentioned in the statute are admitted to be charities; and again, institutions which are analogous to those already admitted by reported decisions are held to be charities. The pursuit of these analogies obviously requires caution and circumspection. After all the best that can be done is to consider each case as it arises, upon its own special circumstances. To be a charity there must be some public purpose - something tending to the benefit of the community.”

The Need for an Effective and Working Definition of Charity

The objectives of good classification have been put very well by Australian Council of Social

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Footnotes:
35. Ibid, recommendation 10.
Service in its submission to the Charity Definitions Inquiry in Australia, where it stated that,

“The main purpose of a well-designed classification structure for charities and other community organisations is to confer a special status on those organisations that recognises and supports altruistic “public good” activities by:

• giving these organisations a special public status that attracts public support;
• sustaining public support for those organisations (especially charitable organisations) by ensuring they devote their financial resources to the provision of “public goods” and not, for example, to the personal gain of those who control the organisation;
• encouraging private donations to these organisations through tax incentives;
• supporting their work directly through income tax and consumption tax concessions;
• providing the greatest support, in terms of tax expenditures, to organisations assisting the most disadvantaged people (whether directly or by improving public policies and programs relevant to their needs);
• safeguarding the integrity of this special status by ensuring that any special public status is conferred fairly, consistently and transparently;
• safeguarding the integrity of the tax system.”

At present, Ireland lacks a well-designed classification structure for charities and other types of voluntary organisations. It is only when a good classification structure is in place that one can begin to process of regulating a sector – hence the vital importance of developing a good working and user-friendly definition of ‘charity’.

### III. RELIEF OF POVERTY

Most individuals have a clear picture in their minds of what constitutes poverty when the term is mentioned. One tends to think of the sterling work done by such organisations as the Society of St. Vincent de Paul or the Simon Community and we would tend to view those in receipt of such services as being “poor”. How broad is the definition of poverty? What does it encompass? Is it in need of reform?

**The Scope of the Definition**

The first heading of charity, “relief of poverty” has very strong ties with the 1601 Preamble of the...
Statute of Charitable Uses, which made specific reference to the relief of “impotent and poor people”. The case law has made it clear, however, that poverty is a relative concept and does not require the recipient to be destitute or on the breadline; rather it has been described as being satisfied where “needy persons have to go short in the ordinary acceptance of the word, regard being had to their status in life and so forth…”.

**Examples of Valid Charitable Trusts for the Relief of Poverty**

There is a striking absence of case law in this area in comparison with the situation in England, where the courts have had numerous opportunities to examine the boundaries of the concept of poverty. Some issues have been resolved, however. Clearly evidence of poverty is required before a gift can be held to be charitable. In refusing to uphold as charitable a gift to the employees of a firm and their dependants in *Re Cullimore’s Trusts*, Porter M.R. explained what was necessary:

“Mere kindness, generosity, or benevolence on the testator’s part is not enough to constitute a charitable purpose; there must also be an element of poverty or need on the part of the object, or else the gift must be dedicated to some purpose, such as education, religion or the like which the law regards as charitable. There is nothing here to show that the persons whom the testator meant to benefit were to be poor persons.”

On the other hand, once the intention of the donor is to relieve poverty a particular form of words or technical language does not have to be used in order for the trust to be recognised as charitable. As Budd J. explained in *In the Matter of the Trusts of the Will and In the Matter of the Estate of Mona MacCarthy, Deceased*,

“it is not necessary to find that the relief of poverty be expressed in a testator’s will as the object of his gift before the gift can be held charitable; it is sufficient if the Court can find that the relief of poverty was intended by the testator.”

**The Public Benefit Requirement**

Public benefit comes into the matter in two ways: firstly, is there an element of utility about the gift, i.e., does it actually relieve a need attributable to the recipient’s condition? Secondly, does the gift benefit an appreciable section of the community so that one can say that there is a public benefit attached to the gift?

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Footnotes:

38. Per Evershed J. in *Re Coulthurst* [1951] Ch. 661 at 666.
39. (1891) 27 L.R. Ir. 18, at 24.
Utility

The Irish courts, in line with their English counterparts, are insistent about this element of the public benefit test being satisfied in order that a gift may be deemed to be charitable. Porter M.R, explained this in *Browne v. King* where the Court held that a gift for the benefit of tenants’ children under the age of twelve was not charitable:

“There is nothing to guide me in deciding that the gift is for the children of poor persons, or persons in great need. The law imposes on parents the duty of supporting their children and there is nothing to satisfy me that the tenantry … are not able to fulfil that obligation.”

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Similar analogies have been drawn in cases across the water where it has been pointed out that a gift to amuse the poor would not relieve their poverty and thus would not be charitable or in the same vein, a gift of money to the aged millionaires of Mayfair would not relieve a need attributable to their condition and therefore would lack public benefit and fail as a charitable gift.

Emotional or Obligational Distance

Another facet of the public benefit enquiry concerns the issue of whether there is sufficient emotional or obligational distance between the giver and recipient for the gift to be charitable. The idea here is that charity is associated with providing for those less well off or in need of some form of assistance in cases where the donor has no moral or legal duty to provide for the recipient. The general principle, therefore, is that if you provide for your family, for example, by way of a trust, while this may be a worthy thing to do, it will not be charitable. Thus, in normal circumstances a private trust to educate your children will not be charitable as the law will consider that parents should educate their children in any case, whereas a trust to promote education in general (perhaps through the endowment of a chair or the provision of scholarships) will be viewed as having charitable status.

However, the relief of poverty is an exception to that rule in so far as you can set up a trust to relieve the poverty of your own family (known as ‘the poor relations’ cases) or similarly a trust for the benefit of your employees may gain charitable status if its objective is to relieve their poverty (known as ‘the poor employees’ exception). In other words, the Courts are not as insistent upon

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public benefit being proven in these two exceptional cases. The rationale behind these exceptions has been described in various ways, ranging from the altruistic nature of these types of trusts to their illogical but hallowed nature. It is evident that these two exceptions are well established in England and are unlikely to be overturned there by the courts, whatever about by future reform of charity legislation. There has been a distinct lack of case law on this point in Ireland, however.

Proposals in Other Jurisdictions for the Reform of the Relief of Poverty Heading

The United Kingdom

In its recent consultation document, the National Council for Voluntary Organisations in England has recommended that public benefit should no longer be presumed in the case of organisations relieving poverty and that instead the issue should be decided on a case by case basis. In real terms this would require trusts for poor relations or poor employees to exhibit the same level of public benefit as any other type of trust seeking charitable status. The advantage of such a reform, according to the NCVO, would be that,

“this would remove one layer of complexity from the law and re-emphasise public benefit as the over-riding consideration. It would bring ‘legal’ charity closer to the general public perception of what is charitable and make the law easier to understand and explain to the general public.”

Would this reform make it more difficult for charitable status to be obtained? Arguably no. At present, it would appear to be the case that in Ireland (although there are no direct precedents in point) as in England, a trust which relieves poverty can be charitable even if there is a personal connection between the donor and the recipient. As pointed out above, this forms an exception to the general principle in charity law that there cannot be a personal nexus between the parties if the gift is to qualify. Applying the public benefit requirement uniformly across the heads of charity would require each poverty case to show requisite public benefit in the future, rather than

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44. The poor relations exception was recently applied by the English High Court in Re Segelman [1996] 2 WLR 173, while the poor employees exception was placed on a firm footing by the House of Lords in the case of Dingle v. Turner [1972] A.C. 601, where Lord Cross commented at 623 that, ‘The ‘poor members’ and ‘poor employees’ were a natural development of the ‘poor relations’ decisions and to draw a distinction between different sorts of ‘poverty’ trusts would be quite illogical and could certainly not be said to be introducing “greater harmony” into the law of charity. Moreover, though not as old as the ‘poor relations’ trusts, ‘poor employees’ trusts have been recognised as charities for many years; there are now a large number of such trusts in existence; and assuming, as one must, that they are properly administered in the sense that the benefits under are only given to people who can fairly be said to be according to current standards, ‘poor persons’, to treat such trusts as charitable is not open to any practical objection.”


46. Ibid., at para. 3.5 of the report.
just assuming its existence. This would not mean that these types of trust would invariably fall outside the sphere of charity. The consultation document explains:

“Even if the number of potential beneficiaries is smaller, there may be sufficient indirect public benefit from the relief of their poverty to render the cause charitable. Relieving poverty may improve beneficiaries’ prospects in terms of health, employment etc., and it therefore may make a broader social and economic contribution. [The] proposal does not rule out consideration of this indirect public benefit. It merely focuses attention on it by raising the question, in each case, of whether the benefit in question will arise.”

Canada

In Canada the Report on the Law of Charities, produced by the Ontario Law Reform Commission, recommended a different approach in relation to the poor relations/employees anomaly, accepting the altruistic nature of these trusts, it did not advocate their abolition. Instead it recommended that these types of trusts should no longer benefit from tax exemptions on the basis that “the motive to help strangers is weak, the resulting social benefits are minimal, and the opportunity for tax avoidance through income splitting is strong.” This example provides some support for the idea that not every “charitable” gift should benefit from tax exemptions, a point which will be returned to later.

Australia

The inquiry into the Definition of Charities and Related Organisations in Australia received many useful submissions on the definition of poverty during its consultation period. Many of those called for a widening of the scope of the definition of poverty to bring it into line with modern society. Community Aid Abroad-Oxfam Australia in its submission argued that

“Poverty is structural and whether it is based on macro-economic issues like third world debt or the entrenched racism which affects indigenous peoples in many countries, the poor alone cannot overcome it. It is here that people and governments in the developed world – those with the power to address these issues – have a responsibility to work for change. Currently, donations for public advocacy on poverty issues do not enjoy tax-deductibility, despite the fact that such advocacy can be (and often is) far more effective than direct poverty programs.”

Footnotes:

47. Ibid., at para. 4.3.4. of the report.
48. Ontario Law Reform Commission, Report on the Law of Charities (1996, Ontario). The Report notes in Ch. 8 that “given the centrality of the relief of poverty to the meaning of charity, and given there is involved in these types of trusts a well-identified class of people with a strong interest in seeing that these trusts are enforced, there seems to be little reason to abolish them.”
49. Ibid. Ch. 8.
A starker version of the same point has been made by Archbishop Helder Camara of Brazil, who has commented, “If I feed the poor they call me a saint, if I ask why the poor have no food, they call me a Communist.” Thus any redefinition of the concept of charity here in the area of poverty would have to consider the question of permitting charities for the poor to engage in political activity in terms of lobbying or advocating a cause; this would also require some consideration as to whether such a departure from the current law should constitute a new exception solely applicable to the first head of charity or whether there is merit in applying the principle uniformly across the four heads.

Other suggestions for widening the definition of poverty were made by the Australian Council for Social Service which called for a more contemporary interpretation of this head of charity, which it said, “should emphasise the goals of promotion of social inclusion and recognition of social diversity, as well as more traditional purposes such as alleviating hardship and disadvantage.” In this vein, it pointed out the anomaly of granting charitable status to facilities for the elderly under the first heading, while at the same time refusing to recognise childcare services as meriting equal consideration.

In its report, the Charities Definition Inquiry recommended the replacement of the Pemsel heading of ‘relief of poverty’ with the new heading of ‘advancement of social and community welfare’ which:

“without limitation includes:

• the prevention and relief of poverty, distress or disadvantage of individuals or families;
• the care, support and protection of the aged and people with a disability;
• the care, support and protection of children and young people;
• the promotion of community development to enhance social and economic participation;
and
• the care and support of members or former members of the armed forces and the civil defence forces and their families;”

It also recommended that the public benefit does not exist where there is a relationship between the beneficiaries and the donor (including a family or employment relationship); and that this principle extend to the purposes for the relief of poverty, which the common law currently regards as being exempt from the need to demonstrate public benefit. This recommendation followed on
from its decision that there was a need for the concept of public benefit to more explicitly embrace the concept of ‘altruism’ (defined as ‘unselfish concern for the welfare of others’). The strengthening of the public benefit concept by reference to altruism in addition to judicial disquiet over the poor employee and relation anomalies\(^5\) meant the end of the road for these exceptions.

**Relief of poverty as a term has stood the test of time but it is capable of improvement.**

The types of activities encapsulated within the classification of relief of poverty are manifold. In modern parlance, one might speak more today of the socially disadvantaged or caring for the more vulnerable members of society regardless of their age, or whether that relief is of a direct nature (i.e. in the form of perhaps more traditional alms giving) or more indirect in that it enables those most affected to improve their own situations through self empowerment, or through the provision of community capacity building programmes.

We recommend a more modern definition which would make it clear that it covers both direct and indirect aid; that relief of poverty extends beyond social deprivation and covers activities such as social inclusion and community welfare.

The Australian approach of liberalising the definition to cover childcare and youth services under the broader banner of the advancement of social and community welfare might at first glance appear to be a very big step to take. However, there are certain advantages to this approach:

1. By specifically covering these purposes under the first heading, it takes them out of the vaguer category of other purposes beneficial to the community.
2. To be charitable, the activity in question will still have to show that it is exclusively charitable and that it has sufficient public benefit.
3. The strengthening of the public benefit criteria with the addition of the requirement of altruism means that the category now has no anomalies but clearer guidelines as to charitable status.

Even if the definition of relief of poverty is not modernised, we recommend consideration of the strong arguments for applying the public benefit criteria consistently across the heads of charity.

\(^5\) The Inquiry cited the comments of Harman L.J. in *Inland Revenue Commissioners v. Educational Grants Association Ltd* [1967] 2 All ER 983 at 898, where he stated that ‘the poverty cases stick out like a sore thumb from the general rule’ and the views of Jenkins L.J. in *Re Scarisbrick* [1951] 1 Ch 622 at 649 where he commented ‘[t]his exception cannot be accounted for by reference to any principle.’
This would mean that the poor relations’ and poor employees’ anomalies would cease to be automatically charitable, but like the other existing heads of charity would still qualify if they satisfy the public benefit threshold.

**IV. ADVANCEMENT OF EDUCATION**

Under the existing charity and tax legislation in this jurisdiction, a broad definition is given to the concept of education and what it encompasses. Thus, as was pointed out by Lord Hailsham in the case of *Inland Revenue Commissioners v. McMullen*, the courts have refused to limit ‘education’ to formal classroom instruction or to render it devoid of the exercise of skill or pleasure. Accepting that aesthetics or art or culture are just as important expressions of learning has enabled the courts to uphold as charitable gifts to choral groups or gifts supporting drama and the arts in general. In the words of Keane J., as he then was, giving judgment in *Re The Worth Library*,

> “[G]ifts for the advancement of education … would embrace, not merely gifts to schools and universities and the endowment of university chairs and scholarships: ‘education’ has been given a broad meaning so as to encompass gifts for the establishment of theatres, art galleries and museums and the promotion of literature and music. In every case, however, the element of public benefit must be present and, if the benefit extends to a section of the community only, that section must not be numerically negligible.”

The element of public benefit is strictly applied under the second heading of charity unlike in the case of relief of poverty. Where the beneficiaries are numerically negligible, the trust will be held not to be charitable. This was the situation in the cases of *Re McEnery*, where Gavan Duffy J. held that a bequest to enable the testator’s nieces and nephews and their male descendants to obtain professions was too narrow as the testator intended to benefit specific individuals.

**Current Status**

As the law currently stands, advancement of education covers the promotion of learning both in the context of formal education through scholarships, grants, endowment of chairs, and research and...
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the promotion of arts and culture so that entities as diverse as the Dean Crowe Theatre Trust Limited, Westmeath to Belvedere College, Dublin are listed by the Revenue Commissioners as eligible charities under this heading.

Sport
Traditionally, the courts have taken the view that sport per se is not a charitable object. It has been suggested that the rationale behind its exclusion relates back to Victorian scepticism, particularly judicial scepticism, about the merit of play.

England
In England, sport has been recognised as having charitable status if it can be brought under the more general heading of advancement of education. In this way, a gift of sports facilities to a school or the promotion of the playing of a sport within the wider context of formal education has been upheld as charitable. The problems created by judgments such as Re Nottage and McMullen have been abated to a certain extent in that jurisdiction with the passing of the Recreational Charities Act 1958. The practical effect of these provisions in terms of sporting activities is to grant charitable status to sports centres which provide a number of sporting activities and which are open to the general public. In terms of facilities for a single sport, while a swimming pool will qualify, it may be difficult for other sports to satisfy the social welfare element – in particular the ‘social need’ criterion. Indeed, given the level of dissatisfaction expressed with regard to the vague and restrictive language of the 1958 Act as long ago as the 1970s, the Goodman Report recommended that the whole position relating to sport and recreation in relation to clubs be clarified by further legislation.

In 2001 the UK Government gave a commitment in the budget speech to address the concerns of community sports clubs who had argued for many years that the services they provided should have equal recognition alongside other charitable activities. It has since followed up on that commitment by launching a consultation paper with the aim of soliciting the views of interested parties with regard to the provision of limited tax relief for such clubs. In the interim between the budget and the Treasury consultation paper, the Charity Commission itself decided to reconsider its position on

Footnotes:
60. Re Nottage [1895] 2 Ch. 649.
62. There are some broader exceptions, e.g. the English courts have been prepared to uphold as charitable sporting activities which promote the efficiency of the armed forces or the police: see IRC v. Glasgow Police Athletic Association [1953] AC 380; Re Gray [1925] Ch 362.
63. Re Mariette [1915] 2 Ch. 284.
65. According to the Charity Commission for England & Wales, in its commentary on the Scope of the Recreational Charities Act in relation to Sport, Review of the Register, Discussion Document, Annex B, a swimming pool qualifies on the ground that it can be used by a wide range of different people in many different ways.
amateur sports clubs and charitable status. In its consultation paper on the promotion of sport as a charitable purpose, the Charity Commission for England and Wales queried whether it would be possible within the context of existing English charity legislation to accept sport as charitable in cases where it promoted health or fitness. The line which the Commission sought to draw was between the promotion of sport for the sake of competition or as an end in itself (which would not be charitable under existing English legislation) and the promotion of sport as a means of furthering an existing valid charitable purpose. In this vein, the Commission sought submissions on its criteria for determining this matter. The consultation paper proposed that an amateur sports club wishing to achieve charitable status would have to prove:

- that it existed solely for charitable purposes, e.g., the promotion of health and not for the sake of sport or simply facilitating social contact;
- that it would not be sufficient to establish that health or fitness were among the consequences of partaking in the sport in question, rather the applicant would be required to show that the object of the club was the promotion of health.

The Commission, while it felt that charitable status should extend to the physical education of young people not undergoing formal education, was of the considered view (although open to submissions on the point) that the promotion of excellence in sport, outside the context of education of children and young people, would not be a charitable purpose and that neither would it be possible to treat sport as charitable on the ground that it advances physical education in adults or social inclusion or volunteering.

As the consultation proved, while many amateur clubs saw their brief as broader than just promoting their particular sport, very few could claim to exist primarily to promote health. In an attempt to find the balance, the Commissioners have expressed the view that the promotion of community participation in healthy recreation by the provision of facilities for playing particular sports will from now on be viewed as charitable if undertaken by a community amateur sports club. The choice of the word ‘healthy recreation’ over ‘healthy sport’ was a deliberate one, seen as being more inclusive of healthy activities such as walking. To qualify, the entity must be structured in a charitable form and a) the activity be capable of promoting health and fitness and b) its facilities must be genuinely open to all members of the public who wish to use them.

Footnotes:
Canada

Canada, however, has gone one step further and made the leap in accepting that sport should be recognised as being charitable in its own right whether or not it can be brought under the ambit of education. In *Re Laidlaw Foundation*, Southey J. in the Divisional High Court of Ontario affirmed the decision of Judge Dymond at first instance, and held that a foundation which made grants to amateur athletic and sporting organisations for the disabled was established for a charitable purpose. At first instance, Judge Dymond had found that the beneficiaries were charitable on the grounds that the promotion of amateur athletic sport was for the public benefit. The significance of her judgment lies in the fact that she found this public benefit not in the context of education, but rather through the immense value to be gained from sport through the promotion of fitness, health and character. In the course of her judgment she stated that:

“It is my view that an organization, the main object of which is the promotion of an amateur athletic sport which involves the pursuit of physical fitness is prima facie an organization beneficial to the community within the spirit and intendment of the Statute of Elizabeth and may be classified as a charitable organization provided that any other non-charitable object of the organization be incidental or ancillary to the promotion of that amateur sport, provided that the public benefit test be met with respect to the class of persons who will benefit.”

Interestingly, the Ontario High Court of Justice, Divisional Court, took this a step further by stating that in determining whether a gift or activity was charitable under the fourth head, there was no need to show that it fell within the spirit and intendment of the Statute of Elizabeth. It reached this conclusion on the basis of Ontario’s Mortmain and Charitable Uses Act, R.S.O. 1914, ch. 103. which, in replacing earlier legislation omitted to make reference to the requirement that reference to charities referred to charities as adjudged to be within the purview of the Elizabethan Preamble. Southey J., for the court justified this by saying that,

“I think it is highly artificial and of no real value in deciding whether an object is charitable for courts in Ontario today to pay lip service to the preamble of a statute passed in the reign of Elizabeth the First.”

Notably, the Canadian Customs and Revenue Guidelines proffer a divergent view of the matter, stating that:

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Footnotes:
71. Ibid, at 506.
72. At 524.
“The promotion of a sport is not considered charitable at law. However, an organization which has, as its primary purpose and its primary function, the promotion of amateur athletics in Canada on a nation-wide basis, may be registered as a Canadian amateur athletic association. Organizations seeking registration as Canadian amateur athletic associations should obtain Form T1189, Application to Register a Canadian Amateur Athletic Association under the Income Tax Act.”

These criteria emanate from section 248(1) of the Canadian Income Tax Act 1985, which gives registered Canadian amateur athletic associations special “quasi-charity” status. According to the provisions of section 248(1), registered amateur organisations must be “non-profit organizations” which are defined negatively by the Canadian Income Tax Act as being organisations that do not meet the criteria to be registered as charities under section 149(1)(l) Income Tax Act. The concept was introduced in the early 1970s when it was assumed athletic associations could not be charities and prior to the decision in Re Laidlaw Foundation. Thus the divergence between provincial regulation of charity law and federal control of taxation in Canada is highlighted in the case of sports and charitable status. While the Ontario courts are within their rights to hold that an entity is charitable, this does not bind the CCRA. It would, of course, be interesting to know how the CCRA have interpreted ‘amateur athletics’ and whether it covers other amateur sport which would not be strictly defined as athletics. While the judgment focuses on amateur athletics, there would seem to be little reason to limit it to this type of sporting activity.

New Zealand

In New Zealand Re Nottage has been applied in Laing v Commissioner of Stamp Duties [1948] NZLR 154 to the effect that although sport may result in greater physical fitness and the indirect benefits to the public may be more highly valued, the purposes are still not within the analogy of the Charitable Uses Act 1601. However, this problem has been surmounted to a certain extent, as has been the case in England, by the enactment of section 61A of the Charitable Trusts Act 1957

Footnotes:

74. Although not able to issue receipts for gifts, a non-profit organisation does gain certain benefits from being designated non-profit, principally that it does not have to pay income tax on any income it receives. GST, however, does remain collectible, and remittable.
75. Drache in a recent paper, “Hostage to History: The Canadian Struggle to Modernize the Meaning of Charity” (October, 2001 at Charity Law for the Pacific Rim Conference, Brisbane) has commented that the section was introduced in the 1970s prior to the Montreal Olympics in an effort to encourage Canadians to financially sponsor athletes – necessitated by the common law’s narrow definition of ‘charity’.
76. Especially in light of the fact that on a number of occasions through her judgment, Dymond J. uses the term ‘promotion of sport’ interchangeably with ‘promotion of amateur athletics’.

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under which it is charitable to provide, in the interests of social welfare, facilities for recreation or leisure time occupation.

Australia
The Charities Definition Inquiry recommended that the encouragement of sport and recreation to advance health, education, social and community welfare, culture or the environment be a charitable purpose. In other words, sport *per se* would not be charitable but sport in pursuit of a recognised and existing charitable purpose would be.

Prior to these recommendations, the situation in Australia was a mixed one: the Australian Tax Office took an approach very similar to that of the Irish Revenue Commissioners holding sporting (and recreation) purposes to be non-charitable even where those purposes displayed elements of benefit to the community. However, sporting bodies are eligible for income tax exemption under the Income Tax Assessment Act 1997 provided that the body is not-for-profit and has as its main purpose the encouragement of a game or sport. Some States enacted legislation based on the UK Recreational Charities Act 1958 which viewed the provision of facilities for “recreation or other leisure time occupation” as being charitable if those facilities were provided in the interests of social welfare. One State, Tasmania, following the recommendations of its Law Reform Commission, has specifically deemed that a gift to provide facilities for sport is a gift for charitable purposes.

The CDI Report did note, however, that while sporting or recreational purposes may not be charitable even though they have elements of public benefit, nevertheless a sporting or recreational activity that is ‘incidental to dominant charitable purposes’ would not be denied charitable status.

Legislative Options
A number of jurisdictions have chosen to include sport in the list of activities deserving of charitable status. Where it is viewed as either advancing education or improving the conditions of life of participants, Barbados is happy to give statutory recognition to the sport as a charitable purpose. Germany includes the provision of amateur sports in its list of public benefit purposes entitled to tax relief, where it defines public benefit purposes as those purposes which ‘materially,

Footnotes:
77. The High Court of Australia had previously affirmed *Re Nottage in Royal National Agricultural and Industrial Association v. Chester* [1974] ALJR 304.
79. See, for instance, s. 103 of the Queensland Trusts Act 1973, or s. 69C of the South Australia Trustee Act 1936 (as inserted by the Trustee Act 1962).
80. See s. 4(1) of the Variation of Trusts Act 1994.
81. See Ch. 24 of the CDI Report, at p.196.
82. Section 3(e)(v) and section 3(o) of the Barbados Charities Act 1978. The CDI Report records Barbados as being the only common law country to have attempted a major statutory redefinition of the concept of charity.
spiritually, or morally promote the well-being of the public at large as opposed to small and exclusive groups such as the family, co-employees or members of a social club. Former Eastern block and soviet countries have chosen to proceed down the legislative path in terms of enshrining sport in the midst of charitable activities. Most recently South Africa has joined the fold with the publication by the Minister for Finance of a list of public benefit activities, which for the purposes of South Africa’s Income Tax Act 1962 will be deemed to be of the necessary philanthropic or benevolent nature so as to avail of income tax relief. The schedule, published on July 27, 2001, includes sport.

**Ireland**

The position adopted by the Revenue Commissioners in Ireland is that sport is not charitable and a body promoting sport, whether it be an amateur sporting organisation or an entity linked to an educational institute is still not established for charitable purposes. However, the Revenue Commissioners do provide relief from income and corporation tax for certain sporting bodies. Relief from capital gains tax is also available if the proceeds of the gain are reinvested in new assets for the promotion of the game/sport in question.

In order to be eligible for these sporting exemptions, the body must be established and exist for the sole purpose of promoting an athletic or amateur game or sport. Its income must be applied solely in furtherance of this purpose and it must be a not-for-profit member controlled and owned organisation. In addition, it must be legally established within the state, having its centre of control here with the majority of its trustees/directors/officers, as the case may be, resident within the state.

The usual obstacle to granting charitable status is the fact that currently where an entity is considered to be a charity certain tax exemptions flow from this finding. The paradoxical situation that exists in relation to sport is that we are quite prepared to grant sport tax exempt status in any

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**Footnotes:**


84. Hungary’s Act CLVI of 1997 on Public Benefit Organisations (Chapter V) includes "sports, with the exception of sports activities pursued on the basis of employment or commission as defined by civil law" as being a public benefit activity. Similarly the Russian Federation’s Federal law on charity activities and organisations (August 11, 1995, No. 135-FZ) states that "charity activities may have any of the following purposes… promotion of physical fitness and mass sports…" (Section 1, Article 2).

85. Paragraph 9 of Schedule 1 includes, "the administration, development, co-ordination or promotion of sport or recreation in which the participants take part on a non-professional basis as a pastime, where the organisation carrying on such activity takes reasonable steps to provide access to the indigent."


88. See Form G.S. 1, April 2001.
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case, subject to certain criteria, where those criteria would have to be complied with in the case of a charity in any case – i.e. that the entity be not-for-profit and non-professional.

Taking on board the position in Ireland with regard to sport and the position pertaining in other common law jurisdictions, we make the following recommendations.

**We do not recommend that sport per se should be charitable. However, we feel that the existing situation in relation to sport is unsatisfactory and that where the purpose of the sport in question is to further another charitable purpose, as defined below, it too should be viewed as charitable.**

We are of the view that the current position that sport should only be charitable if it advances education is too narrow an approach to take towards the status of sport in light of the jurisprudence and legislation in other common law countries. While sport undertaken for the advancement of education should continue to qualify as charitable, provided other criteria are met, we recommend that this should not be the only basis upon which an amateur sporting organisation should be able to qualify.

In light of the experience of other jurisdictions, we believe that sport should be charitable if it advances any existing charitable purpose, including health and fitness. The existing criteria imposed by the Revenue Commissioners should continue to apply in terms of the organisation being established and existing for the sole purpose of promoting an athletic or amateur game or sport. Its income must be applied solely in furtherance of this purpose and it must be a not-for-profit member controlled and owned organisation. The requirement of public benefit would also have to be satisfied. This latter criterion would be essential in ensuring that the facilities would be available to the community as a whole and not just an elite minority able to pay for the privilege.

We agree with the arguments advanced in Ontario in relation to the benefits of sport from a health and fitness point of view, but we also agree that the term ‘recreation’ as used by the English Charity Commissioners has the benefit of being more inclusive and avoids the need to come up with a definitive list of sports and non-sports.

**Recreation**

In terms of recreation, the usual precedent cited in support of its charitable status in Ireland is the case of *Shillington v. Portadown Urban District Council*, 89 where Barton J. held that a gift under a

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Footnotes:

89. [1911] 1 I.R. 247.
will for ‘the purpose of fostering, encouraging, and providing the means of healthy recreation, including the teaching of singing in classes or choruses for the residents of the town’ and surrounding districts was a charitable bequest. Justifying his decision Barton J. stated:

“Few people who have any acquaintance with urban districts, of which Portadown is a type, will fail to recognise that the testator’s purpose was not merely public but was rational and well directed. To provide a means of healthy recreation for the residents is to supply a want in the social life of these busy communities. To provide music and instruments for a local band is an obvious way of carrying out that purpose. The testator, in my opinion, intended to benefit the local public in ways which are both rational and legal. I think I should be catching at straws if I were to hold that the purpose of any part of this bequest and devise was other than a charitable and public purpose.”

Thus, unlike England and many other commonwealth countries, Ireland has no equivalent legislation to the Recreational Charities Act 1958. If the view is taken that recreation, where it facilitates the attainment of an existing charitable purpose, will be charitable itself, then no act similar to the English Recreational Charities Act would be required in this jurisdiction. Thus, social or recreational activities in and of themselves will not be charitable but where they predominantly further a charitable purpose, the fact that participants derive incidental pleasure or amusement from participation should not prevent the activity or purpose being treated as a charitable one.

We therefore recommend that recreation (within which definition we would include sport) pursued in the advancement of health or fitness should be deemed charitable, where all the other normal criteria are satisfied.

Advancement of Culture

"Like language, the arts are one of the principal means by which a society binds itself together and transmits its beliefs and standards from one generation to another. The arts perform this function when they embody, reinforce and celebrate the values of their society…. In this function the arts play a critically important role. Not only do they provide a kind of social glue, but they also furnish a means by which society can identify and distinguish itself from others."
The traditional approach of the courts towards culture and the arts is that such activities qualify as charitable under the heading ‘advancement of education’ on the basis that a body which raises the artistic state of the nation – whether it be by way of literature, art, music, drama or through the preservation and conservation of our heritage – is established for educational purposes. Support for such a view in this jurisdiction can be found in the decision of Keane J., as he was then, in Re Worth Library. The need to squeeze culture under the umbrella of education has been necessitated to a certain extent by the limitations of the Pemsel categories and any re-evaluation of the definition of charity should consider the merits in the argument of creating a separate or independent heading for the advancement of culture.

This proposal is not without its supporters in other jurisdictions. In the Ontario Report in 1996, the Ontario Law Reform Commission recommended the creation of an independent category for ‘aesthetic experience’ to encompass projects such as museums, art galleries, literature prizes and art councils. It was of the opinion that the continuing inclusion of such activities under the second heading of charity corrupted the meaning of both ‘education’ and ‘aesthetic experience’.

The recent Australian Charitable Definitions Inquiry makes broadly the same recommendation but for different reasons. It notes that participation in arts and cultural activities is strongly related to other forms of civic engagement and social capital, and that cultural programs help strengthen diverse communities and bind them together. Moreover, the arts provide a public benefit, which extends beyond those in attendance at the event in question, by generating ‘positive externalities such as enhanced international prestige’ for a country.92

**Drawing on both of these Reports, we recommend that a separate heading be created for the advancement of culture.** The advantage of this would be two-fold, eliminating the necessity to assess such projects in an artificial manner on the basis of their educational merit, while at the same time increasing transparency for cultural organisations as to which bodies or activities may qualify as being charitable.

In real terms this would not change the law – one need only to refer back to the comments of Keane J., as he then was, in *Re Worth Library* (cited at the commencement of this section) for confirmation of the charitable status accorded to such endeavours at present. However, in the interests of clarity, we are of the opinion that aesthetic experience is sufficiently distinguishable from education to be

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**Footnotes:**

92. CDI Report, Ch. 21.
deserving of its own head and sufficiently tangible in scope not to require inclusion in the catchall fourth category of ‘other purposes beneficial to the community’.

We recommend that the requirement of public benefit should remain a crucial element under this heading in so far as candidates would be required to demonstrate the practical utility of the proposed project.

In other words, the creation of this new category, while clarifying the law relating to the arts, would not result in an expansion of the group or a weakening of the qualification criteria.

Charity in the context of self-evident and underived human goods

In its Report on the Law of Charities, the Ontario Law Reform Commission drew upon the ideas of John Finnis93 in devising a working definition of charity. According to the Report,

“a charitable act is an act whose form, effect and motive are the provision of the means of pursuing a common or universal good (life, knowledge, play, religion, friendship, aesthetic experience and practical reasonableness) to persons who are remote in affection and to whom no moral or legal obligation is owed.”94

In other words, if charity is concerned with ‘doing good’, the McNaghten headings in Pemsel do not provide a definition of charity. One must go behind the list and ask what unites those elements? As the Ontario Report points out, this is not an easy question to answer and indeed it is a question often avoided by judges and textbook writers. Finnis attempts to answer this by taking a more profound look at what he calls his list of self evident and underived human goods. In reasoning from such first principles, an argument can be made both for viewing culture as a separate head of charity in its own right and for accepting that sporting activities can be charitable where they are ancillary to an existing charitable cause.

Footnotes:
93. Finnis, Natural Law and Natural Rights (Oxford, 1980), Ch. 4.
94. Ontario Report, Ch. 6, s. 3
V. ADVANCEMENT OF RELIGION

“There is probably no subject in the world about which opinions differ so much as the nature of religion, and to frame a definition of it which would satisfy everyone must obviously be impossible.”

The third heading of charity has benefited in this jurisdiction from statutory intervention in the form of section 45 of the Charities Act 1961, which provides that public benefit shall be presumed in the case of gifts for the advancement of religion. By advancement of religion is meant an advancement of worship. Thus, to benefit from the this third Pemsel heading, a body while it is not required to demonstrate public benefit, will be required to prove that its purposes fall within the definition of religion.

To qualify as advancing religion, “a religious charity must not only be so constituted as to satisfy the legal definition of religion, including having objects or purposes of a religious nature, but its activities must also advance religion. It is not sufficient that a body adheres to religious purposes, it must actively promote or advance the spiritual teachings or doctrines of that religion.” Thus, in the past the purchase of land to allow resettlement of Jews in the Holy Land has been viewed as falling outside the definition, as have the activities of the Freemasons which although requiring of a faith in God and a belief in good works, were held in United Grand Lodge of Free and Accepted Masons of England and Wales v. Holborn Borough Council not to amount to the advancement of religion.

In the past, the most common types of charitable trust under this heading were bequests for the saying of memorial masses and gifts to enclosed orders, both of which were upheld as charitable

Footnotes:

96. The wording of s. 45 states that: "(1) In determining whether or not a gift for the purpose of the advancement of religion is a valid charitable gift it shall be conclusively presumed that the purpose includes and will occasion public benefit. (2) For the avoidance of the difficulties which arise in giving effect to the intentions of donors of certain gifts for the purpose of the advancement of religion and in order not to frustrate those intentions and notwithstanding that certain gifts for the purpose aforesaid, including gifts for the celebration of Masses, whether in public or in private, are valid charitable gifts, it is hereby enacted that a valid charitable gift for the purpose of the advancement of religion shall have effect and, as respects its having effect, shall be construed in accordance with the laws, canons, ordinances and tenets of the religion concerned." O'Halloran, Charity Law (Roundhall, Sweer & Maxwell, 2000) at p. 151.
98. [1957] 3 All E.R. 281, where Donovan J. stated at 285 that "To advance religion means to promote it, to spread the message ever wider among mankind; to take some positive steps to sustain and increase religious belief; and these things are done in a variety of ways which may be comprehensively described as pastoral and missionary."
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by the courts.100 In terms of physical structure, the upkeep of graves is viewed as charitable under Section 50 of the Charities Act 1961, although the monetary limits imposed by this section are extremely dated.101 The Irish courts have equally upheld gifts for the upkeep of places of worship.102 Provision for the support of retired members of religious orders has also been considered to be charitable by the English courts on the basis that such a gift indirectly advances religion by making the ministry more efficient in so far as it would make it easier for old or infirm members (in this case, priests) to retire thereby opening up opportunities to younger adherents and secondly, it would ‘ease the minds’ of those involved in ministry that they would be looked after upon retirement, such security enabling them to focus wholeheartedly on their mission.103

The Meaning of Religion

One issue which has arisen recently is whether there is a need to modernise our definition of what constitutes ‘religion’. The definition currently in use in Ireland and England stems from the nineteenth century idea of belief in a Supreme Being or personal God/deity. As Dillon L.J. stated in *South Place Ethical Society*:

“It seems to be that two of the essential attributes of religion are faith and worship; faith in a god and worship of that god. This is supported by the definition of religion given in the Oxford English Dictionary (1914), although I appreciate that there are other definitions in other dictionaries and books. The Oxford English Dictionary gives as one of the definitions of religion: ‘A particular system of faith and worship.’” Then: ‘Recognition on the part of man of some higher unseen power as having control of his destiny, and as being entitled to obedience, reverence, and worship.’”104

In other words, it is a definition of religion restricting it to theistic religions, whether they be monotheistic or polytheistic. In contrast, the United States has taken a much broader approach with the courts there holding that belief in God or a Supreme Being is not essential to any legal definition of religion. Instead, it is considered sufficient if a person’s beliefs, sought to be characterised as legally religious, are to him or her of “ultimate concern”.105 More recently, Australia has broadened its definition beyond mere theism. *In Church of the New Faith v. Commissioner of Pay-Roll Tax* (Vic.), the High Court of Australia unanimously overturned a

Footnotes:


101. S. 50 provides that a gift for the maintenance or upkeep of a grave or memorial will be viewed as charitable where it does not exceed “in the case of a gift of income only, sixty pounds a year; in any other case, one thousand pounds in amount or value.”


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decision of the Supreme Court of Victoria and held that Scientology was a religion and therefore, entitled to tax exemption. With regard to the issue of what constitutes ‘religion’, two of the judges, Mason C.J. and Brennan J. rejected the approach of Re South Place Ethical Society as being too narrow a test, stating:

“We hold the test of religious belief to be satisfied by belief in supernatural Things or Principles and not to be limited to belief in God or in a supernatural Being otherwise described.”

Murphy J. while stating that the categories of religion were not closed, was also prepared to take a broad approach which would include not only a body which claimed to believe in a supernatural Being or entity but also any body claiming to be religious and offering a way to find meaning and purpose in life. Looking to the practices of Scientology and in particular those of ‘auditing’ and ‘training’, Murphy J. counselled against judges judging the merits of rituals engaged in by adherents. He stated

“The truth or falsity of religions is not the business of officials or the courts. If each purported religion had to show that its doctrines were true, then all might fail. Administrators and judges must resist the temptation to hold that groups or institutions are not religious because claimed religious beliefs or practices seem absurd, fraudulent, evil or novel; or because the group or institution is new, the number of adherents small, the leaders hypocrites, or because they seek to obtain the financial and other privileges which come with religious status. In the eyes of the law, religions are equal. There is no religious club with a monopoly of State privileges for its members. The policy of the law is ‘one in, all in.’”

Wilson and Deane JJ. attempted to set down the more important indicia of religion. According to them:

“One of the more important indicia of ‘a religion’ is that the particular collection of ideas and/or practices involves belief in the supernatural, that is to say, belief that reality extends beyond that which is capable of perception by the senses. If that be absent, it is unlikely that one has ‘a religion’. Another is that the ideas relate to man’s nature and place in the universe and his relation to things supernatural. A third is that the ideas are accepted by adherents as requiring or encouraging them to observe particular standards

Footnotes:
or codes of conduct or to participate in specific practices having supernatural significance. A fourth is that, however loosely knit and varying in beliefs and practices adherents may be, they constitute an identifiable group or identifiable groups. A fifth, and perhaps more controversial, indicium is that the adherents themselves see the ideas and/or practices as constituting a religion.” 108

Thus the court concluded that a body might be religious for the purposes of charity without necessarily subscribing to a theistic-centred approach.

In contrast to this approach, the Charity Commissioners for England and Wales recently held that Scientology is not a religion for the purposes of English charity law. The Commissioners decided that the definition of religion was characterised by a belief in a Supreme Being and an expression of belief in that Supreme Being through worship; that this concept of a Supreme Being was broader than the theistic concept of a personal creator God, but they were not prepared to go so far as to either reject the concept of theism altogether or to adopt the more abstract concept of the idea of a supernatural thing or principle, as had been accepted by the Australian High Court in the Church of the New Faith case.

Turning to the practice of Scientology itself, the Commissioners found that scientologists believed in a Supreme Being. However, the practices of Scientology, consisting mainly of ‘auditing’ and ‘training’ did not constitute acts of worship. The Commissioners held that ‘the identifying feature of worship in English charity law appeared to be that of reverence for or veneration of a Supreme Being’ and concluded that:

“[This] concept of worship so understood provided objective criteria by which worship can be identified for the purposes of recognising an organisation to be charitable as advancing religion and falling within a distinct third head of English charity, at the same time as being sufficiently broad to allow recognition of a range of belief systems commonly recognised as religions.” 109

The practices of Scientology (namely, auditing and training) according to the Commissioners did
not amount to worship in the English legal sense of reverence and veneration for a Supreme Being and in so concluding the Commissioners considered but rejected the broader foreign definitions of worship, ruling that Scientology was not a religion.

It is interesting to note that while rejecting the Scientologists’ registration application, the Charity Register reveals that the Moonies are a registered charity in the UK. Registered under ‘Sun Myung Moon Foundation’ and ‘The Holy Spirit Association for the Unification of World Christianity’, these bodies list among their objects ‘the advancement of such monotheistic religious and religious thought through the world as are in accordance with the divine principles by which God has been seeking to restore the kingdom of heaven on earth.’ The stated aim of the foundation is to ‘make grants to organisations (includes schools, charities etc.) and to provide buildings, facilities and open space.’ Do these activities constitute acts of worship? When questioned over the inconsistency of registering the Moonies but refusing Scientology, the Commissioners referred to the dates of registration (the Sun Myung Moon Foundation was registered a charity in July 1974, while the Association was first registered in August 1968), as a possible explanation - the necessary implication being that higher standards would apply now.

The issue of public benefit

As previously stated, under Irish law, once an entity can satisfy the court that it is a religion, then under section 45 of the Charities Act 1961, any gift to that body for the purposes of advancing that religion enjoys a statutory presumption that that purpose ‘includes and will occasion public benefit.’ This is an absolute presumption.

England

This contrasts with the position in the United Kingdom, where in order for a gift to be charitable, it must be shown that the public benefit is actually present as a matter of fact. In other words, tangible public benefit is called for. The approach there, according to the Charity Commissioners, is for it to be presumed that a gift for a religious institution or purpose is prima facie a gift for a charitable purpose unless the contrary is shown. The presumption of public benefit in such circumstances can be rebutted in a wide variety of circumstances and factors indicating a lack of

Footnotes:

110. These definitions included worship as being, “any lawful means of formally observing the tenets of the religion” (Church of the New Faith v. Commissioner for Payroll Tax (1983) 154 CLR 120) or “the means by which communication with spiritual reality is sought and ultimately achieved” (Fellowship of Humanity v. County of Alameda (1957) 153 Cal. App. 2d 673).

111. It is interesting to compare the Commission’s decision with the decision of the Court of Appeal in R v Registrar General; Ex p. Segerdal [1970] 3 All ER 886 where it held, affirming the High Court, that the beliefs of the Scientologists were concerned with a philosophy of life and of the spirit of man and did not involve submission to or veneration of a divine or superhuman being, and their meetings and ceremonies therefore did not consist of religious worship.

112. The wording of s. 45(1) refers to it as being "conclusively presumed".

113. See Gilmour v. Coats (1949) AC 426.
public benefit would include, inter alia, evidence that the organisation’s purposes were either adverse to religion or subversive of morality, evidence that the purposes failed to confer recognisable charitable benefits or were focused too narrowly upon its adherents or extended to too limited a beneficial class. Recent English authorities re-emphasise the point that under English charity law a gift could be beneficial and be an advancement of religion and still not be charitable on the grounds that it lacked public benefit.114

While the Nathan Committee (1952) fully supported the Gilmour line,115 the Goodman Committee (1976) conceded that this was one of the most difficult problems it had considered, stating, “on the specific question of whether the decision in Gilmour v. Coats should be abrogated at the present time, the Committee was unable to reach a firm conclusion one way or another.”116 It concluded that a value judgment had to be made in each case as to whether the activities of an enclosed order could provide benefit.

More recently, the NCVO Report on Public Benefit, which recommended that the same standard of public benefit should apply consistently across the four heads of charity, submitted that public benefit consists of both tangible and intangible benefit. Under its proposed test, religious organisations would not necessarily fall foul of the public benefit test if the entity in question could show that it provides ‘an opportunity for the expression of belief and for spiritual and moral development which has the potential to benefit the public.’ The requirement to prove public benefit as a matter of fact, however would still exist as the Group’s proposal would involve removing the existing general presumption in favour of public benefit and requiring each case to be assessed on its individual merits.117

Other jurisdictions, while not going as far as Ireland, have refused to follow the English line on public benefit and the advancement of religion.

Canada

The Ontario Law Reform Commission put forward the view in its 1996 Report that once you are dealing with the question of religion the public benefit criterion will not usually be applicable. The authors of the report were highly critical of the House of Lord’s decision in Gilmour v. Coats and pointed out a number of internal inconsistencies in the speech of Lord Reid.118

Footnotes:
115. Report of the Committee on the Law and Practice relating to Charitable Trusts, p. 34 stating that while the Committee had much sympathy for the view that advancement of religion should include “the advancement of religion by those means which that religion believes and teaches are means by which it does advance it”, it considered that that view ran counter to “a fundamental principle of the law of charitable trusts that Parliament or the Court should alone decide what is and what is not charitable”, and therefore rejected it.
117. Para. 4.3.7 of the NCVO Report.
118. See Ch. 8 of the Ontario Law Reform Commission Report.
Scotland

The Scottish Charity Law Review Commission in its report points out that historically, much charitable work has been carried out through the medium of religious bodies and indeed in Scotland, the Kirk, from the 16th century, was the instigator of, and the means by which, poor relief and education were delivered. This unique position, together with an appreciation that the structures of religious bodies in many cases differ substantially from other charitable bodies, has resulted in their receiving special legislative treatment.

Section 3(1) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 gives Scottish Ministers the power by Order to designate charities as designated religious bodies. The purpose of the designation is to exempt such bodies from various aspects of charity regulation as set out in the 1990 Act.

Australia

In the Charity Definition Inquiry Report, the Committee building on the concept of altruism distinguished between contemplative orders with ‘a public interface’ and those without (i.e., where a closed or contemplative order undertakes meditation or contemplation on its own behalf only). In the case of the former, where members of the order offer prayerful intervention to any members of the faith community who seek it, it was felt that this activity would satisfy the public benefit when viewed against a backdrop of altruism.119

In light of the discussion in other jurisdictions and in order to provide clear guidance for any bodies deciding questions of charitable status, we recommend that it would be advisable to clarify the concept of ‘advancement of religion’ and the constituent elements of worship and whether the legal definition of religion extends beyond Supreme Beings (i.e. a theistic approach) to embrace supernatural things or principles (i.e. a non-theistic approach). The Committee was divided on this issue with some members preferring to restrict the definition of religion to that of worship of a Supreme Being on the basis that extension beyond this would facilitate the flourishment of cults, whereas other members were in favour of a broader definition of religion which would encompass belief in principles or ethics and not merely one based on theism.

Footnotes:

119 Ch. 13 of the CDI Report, recommendation 8.
We recommend that no change be made to section 45 of the Charities Act 1961 which provides *inter alia* that public benefit should be conclusively presumed in relation to any gifts for the advancement of religion.

VI. OTHER PURPOSES BENEFICIAL TO THE COMMUNITY

“The data on bodies granted exemption between 1992 and 1996, inclusive, show that 7 per cent of the applications approved were for religious purposes, 12 per cent were for poverty, 24 per cent for educational purposes and 57 per cent for purposes beneficial to the community. It is significant that most of the recently exempt bodies fall into the “beneficial to the community” category.”

The fourth and final head of charity – other purposes beneficial to the Community – is considered by most commentators to be the vaguest of the four heads and to require a much higher standard of public benefit to be displayed than any of the preceding categories. At the same time, as can be seen from the above quotation, it provides something of a safety net for many aspiring charities who find refuge under its umbrella when they fail to bring themselves within the definitions of either poverty, education or religion. To a certain extent, the undefined nature of the fourth category perpetuates the idea that the *Pemsel* definition of charity is a flexible one, capable of judicial extension to keep pace with contemporary times. On the other hand, this final category of charity is the one that has most undergone a metamorphosis since its inception in the Elizabethan Preamble in 1601. The antecedents of ‘other purposes beneficial to the community’ manifested themselves in the Preamble in the form of mending bridges, causeways and highways; maintaining houses of correction; and marrying off poor maids. Referring to these various exploits in *Morice v. Bishop of Durham*, Romilly M.R. coined the phrase ‘a trust of general public utility’. Lord MacNaghten in *Pemsel* later reinterpreted this as meaning ‘other trusts for the benefit of the community not falling within the preceding heads’. Did this broaden the category beyond those activities mentioned in the Preamble? In *Attorney General v. National Provincial and Union Bank of England Ltd.*, Viscount Cave took the following view:

“Lord Macnaghten did not mean that all trusts beneficial to the community are charitable, but that there were certain charitable trusts which fell within that category; and accordingly to argue that because a trust is for a purpose beneficial to the community it is therefore a charitable trust is to turn round his sentence and to give it a different

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Footnotes:
meaning. So here it is not enough to say that the trust in question is for public purposes beneficial to the community or is for the public welfare; you must also show it to be a charitable trust.”

At present many diverse charities find legal sanctuary within the fourth heading. Organisations which are involved in healthcare or in assisting the elderly, animal welfare groups, and gifts which benefit a particular locality have all been found to be charitable under this heading.

The modern purpose of the fourth category, as re-emphasised in recent reports on charity law, is to allow the definition of charity to keep pace with the changing face of society. If charity is a fluid concept capable of change and adaptation and if as Lord Simonds stated in National Anti-Vivisection Society v. IRC what is charitable in the past may in changing times cease to be viewed by the public as charitable in the future, then it follows, a fortiori, that new categories may spring up which were not within the contemplation of those who drafted the 1601 Preamble but which nevertheless deserve charitable status and recognition today. One might think, for instance, of environmental groups as just one example of such a category.

The difficulty that arises, however, can be simply stated. The breadth and scope of ‘other purposes beneficial to the community’ is clearly capable of expansion. However, this expansion can only occur on foot of judicial interpretation, which requires litigation. This presents a number of problems in terms of policy development, which are borne out by the statistics: firstly, the dearth of cases coming before the High Court has meant there have been very few opportunities for the courts to pronounce on the definition of charity and this to a certain extent has led to stagnation; secondly, even if an appropriate case does present itself, any reform will be piecemeal and may very much be dictated by the way in which the case is argued before the court as to what issues the court can actually address. Thus, in the absence of judicial engagement and given the fact that Ireland has no body similar to the Charity Commissioners of England and Wales (who regularly pronounce on whether a body is charitable or not and make their decisions and reasoning publicly available), we are left with a situation whereby the Revenue Commissioners, in the main, decide on whether or not a body will receive a charity number. Relating as it does to revenue matters,

Footnotes:

123. Normally referred to as gifts to benefit the ‘sick, disabled or aged’ it has been held that these criteria should be read disjunctively (see Rowntree Memorial Trust Housing Association v. Attorney General [1983] Ch 159) so that a gift for a hospital is charitable in nature.
124. See, for example, Re McCarthy’s Will.
125. Ireland has viewed such trusts as charitable as far back as 1890 with the case of Armstrong v. Reeves (1890) 25 LR Ir 325. See also Swift v. Attorney General [1912] 1 IR 133 (gift to the ‘Dublin Home for Starving and Forsaken Cats’ upheld as charitable).
their reasoning for granting or refusing charitable status are not made publicly available which means in effect that there is no information in the public forum with regard to the development of a 21st century definition of charity\textsuperscript{126} – indeed, for the most part, there is a total absence of debate on this question.

How can this issue be tackled? One could follow the line of South Africa and spell out in legislative form the list of specific purposes which should gain charitable status. South Africa’s recent list includes broad headings such as welfare and humanitarian purposes, health care, land and housing, education and development, religion, belief or philosophy, cultural activities, conservation, environment and animal welfare, research and sport. Each of these headings contains either a broad description of the intended area or a further specific list of purposes, amplifying the main heading\textsuperscript{127}.

Another option would be to separate out those areas from the fourth heading which have become well established in their own right and to create individual headings for them, leaving the fourth heading intact to once again act as a catchall category, relieved of the burden of the last four centuries. This approach has been suggested by the Charities Definitional Inquiry in Australia who have recommended that certain areas be weeded out of ‘other purposes beneficial to the community’ and instead be given their own patch of ground. In this way they have recommended the addition of the heads of ‘advancement of health’, the ‘advancement of culture’, the ‘advancement of the natural environment’ and most broadly ‘the advancement of social and community welfare’. These heading are supplemental to the still existing heads of education, religion and other purposes beneficial to the community.

The advantage of this legislative approach is that it circumvents the need for case law to establish the categories but does not pre-empt the courts’ development of the contents. In other words, the provision of a clear framework for charities is beneficial to all – to the charities, to the general public and – in clarifying the new parameters of charity in the 21st century – to the courts as well.

Canada

In contrast to the approach put forward in Australia, the Ontario Law Reform Commission’s Report on Charity Law concluded in Chapter 7 that “statutory definitions would just as likely hinder judicial decision-making as help it. Since the range of objects that can be charitable is so

Footnotes:
\textsuperscript{126} cf. where a decision of the Revenue Commissioners is appealed to the Appeal Commissioners who do give reasoned decisions but do not always publish them. When they do, such decisions are published on their website www.appealcommissioners.ie and their decision may be appealed by the claimant (but not by the Revenue) to the Circuit Court.
incredibly diverse, any statutory definition more specific than the *Pemsel* test would, in all probability, just confuse matters.”128

**Political Activities**

There seems to be global consensus that political activities and acts that contravene public policy will not be entitled to charitable status. While there is no argument in favour of changing the law in relation to the latter, there is a widespread support for a clarification of the scope of the exclusion net in relation to political activities. In the past, many organisations which are not party political bodies have been caught by this caveat and denied charitable status on the basis that their activities are political. The reasoning for this view was very clearly set down by Parker L.J. in *Bowman v. Secular Society Ltd.* when he stated that:

“a trust for the attainment of political objects has always been held invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift.”129

The courts have interpreted this to mean that where a body actively campaigns or lobbies for a change in the law either in this jurisdiction or abroad that this is outside the competence of the court and therefore cannot be for the public benefit.130 However, if a body is engaged in a discussion of political ideals, which are not party political or where a charity uses political means which are ancillary to its charitable purposes, this will be permissible.131

Summarising Ireland’s position in relation to political trusts in 1995, Perri and Randon explained the matter in the following manner:

“In Ireland, the absence of constraints is more accurately described as the absence of any record of constraints having been applied. Restriction is implicit in English pre-

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Footnotes:
128 Ch. 7, s. 2. Cf. the views of the Broadbent Report (above) advocating for a taskforce to be set up to consider a legislative definition.
129 [1917] AC 406 at 442.
131 *Re Koeppler’s Will Trusts* [1896] Ch. 423 (bequest to fund the holding of conferences with political themes charitable as educational). On the latter point, see the comments of Slade J. in *McGovern v. Attorney General* [1982] Ch. 321 where he held that if all the main objects of a trust are exclusively charitable the fact that the trustees have incidental or ancillary powers to employ political means to further these objects will not deprive the trust of its charitable status. This, of course, gives rise to the question as to what are incidental or ancillary powers? O’Halloran in *Charity Law* (Round Hall, Sweet & Maxwell, 2000), p. 211 suggests that it is the difference between informing public opinion by the provision of information and advice (permissible) and engaging in propaganda (which would not be permissible) whereas Delany in *Equity and the Law of Trusts in Ireland* (2nd ed., Dublin 1999), pp. 350-351 expresses the view that organisations which advocate reform of the law would not be charitable under the current regime.
independence case law, which has not been expressly overruled (Delany, 1955), and it is assumed that political objects are recognised as outwith the charity concept, but this has simply never been put to the test by the courts.”132

Australia

Australia’s Charity Definition Inquiry Report has recommended that ‘charities be permitted neither to have purposes that promote a political party or a candidate for political office’, nor to undertake activities that promote either of these ventures.133 Where mere advocacy on behalf of a charity purpose is concerned or where a charity seeks to enter public debate or to change a particular law or policy, then the usual rules applicable to all charities should be applied, namely that the entity’s dominant purpose must be charitable and any other purpose must further or be in aid of the charitable purpose or be ancillary to it.134

Canada

Canada has also provided guidance to charities on what are acceptable political activities. For organisations involved in changing people’s behaviour the ‘key question is most often whether their advocacy takes the form of a well-rounded, reasoned presentation of the facts, or whether it is instead based on slanted, incomplete information, and on an appeal to emotions.’135

The Canadian Income Tax Act allows charities to conduct political activities that are incidental and ancillary to their charitable purpose provided they devote ‘substantially all’ their resources to charitable work, with a rule of thumb that describes ‘substantially all’ as at least 90 per cent of resources.136

This approach has come under some criticism in Canada. A joint government and voluntary sector initiative has said that the 10 per cent ceiling on political activity ‘allows far too narrow a scope’ as a general guidance, and that instead the guidance should be that ‘such activities cannot become predominant.’137 It recommended that the Income Tax Act 1985 be amended so that charities could engage in both certain ‘political activities’ and other forms of advocacy provided that:

a) the activities relate to the charity’s objects and there is a reasonable expectation that they

Footnotes:
133. CDI Report, recommendation 17.
134. CDI Report, Ch. 26 at p. 218.
135. Canada Customs and Revenue Agency, Registered Charities: Education, Advocacy and Political Activities, RC 4107E.
136. According to CCRA’s Circular IC87-1 Reg. Charities - Ancillary/Incidental Political Activities, “Subsections 149.1(1.1), 149.1(6.1) and 149.1(6.2) of the Act permit a registered charity to devote some of its resources to ancillary and incidental political activities of a non-partisan nature provided the charity devotes substantially all of those resources to charitable activities. These relieving provisions take effect for the 1985 and subsequent taxation years and provide the rules under which charities may engage in political activities without jeopardizing their registration status.”
will contribute to the achievement of those objects;

b) the activities:

• are non-partisan;
• do not constitute illegal speech or involve other illegal acts;
• are within the powers of the organization’s directors;
• are not based on information that the group knows, or ought to know, is inaccurate or misleading;
• are based on fact and reasoned argument.”

United States

The US Internal Revenue Code takes a similar approach to Canada, limiting the lobbying expenditures of charities to 20 per cent of their exempt-purpose expenditure. (Exempt-purpose expenditure includes expenditure on programs, administration and lobbying but excludes expenses related to investments or generating unrelated business income or some fundraising costs.)

Lobbying includes:

• direct lobbying to influence legislation through communication with any member or employee of a legislative body, or a government official or employee who participates in formulating legislation where the communication refers to specific legislation and reflects a view on that legislation; and

• grassroots lobbying, or communication with the public which refers to specific legislation, reflects a view on that legislation and contains a call to action.

Under the US Code, other advocacy activities that charities engage in that are not treated as lobbying include: non-partisan analysis; study or research; examinations and discussions of broad social, economic and similar problems; responding to requests for technical advice; and ‘self-defence’ lobbying on legislation or policies that may affect the organisation itself.

Even though excessive political activity will, as in Canada, prevent an organisation from being charitable, there is considerable latitude within the American charitable sector. Many activities which in Canada might be considered political, including “promotion of social welfare ... lessen[ing] neighborhood tensions; ... eliminat[ing] prejudice or discrimination; ... defend[ing]...
human and civil rights ... combat[ing] community deterioration ...” have been expressly approved by the regulatory authorities [Regulations to the Internal Revenue Code]. As well, so long as an organisation stays within the specified spending limits, the lobbying activities need not be “incidental and ancillary” to charitable purposes.140

England
The Charity Commissioners have issued guidelines to enable charities to assess the degree to which they may engage in political activity, with which failure to comply will result in the Commissioners seeking an explanation of the charity and which may ultimately result in the loss of tax relief on the funds applied for that purpose.141 In form the guidelines are similar to the approach adopted in Canada in so far as a charity may engage in ancillary political activities which further its charitable purposes. However, unlike the United States and Canada, the UK has not sought to place any monetary threshold on the amount of money a charity can spend on its political activities, other than to say that the political activities cannot dominate the activities which the charity undertakes to carry out its charitable purposes directly.142 According to the Guidelines, a charity can engage in political activity if:

• “there is a reasonable expectation that the activity concerned will further the stated purposes of the charity, and so benefit its beneficiaries, to an extent justified by the resources devoted to the activity;
• the activity is within the powers which the trustees have to achieve those purposes;
• the activity is consistent with these guidelines; and
• the views expressed are based on a well-founded and reasoned case and are expressed in a responsible way.”143

Thus, lobbying or campaigning is possible provided that the charity engages in reasoned argument and does not rely on emotive or inaccurate material; it avoids propaganda; and steers clear of party politics.

Scotland
The McFadden Report recommended quite a broad approach to political advocacy, recommending that only party political organisations should be automatically excluded from obtaining charitable

Footnotes:
141. Charity Commissioners for England and Wales, Political Activities and Campaigning by Charities (September, 1999), at p. 21.
142. Para. 11 of the Guidelines.
status by virtue of their purpose. While adamant that charities may not be party political organisations, the Report favoured contribution to public debate by charities which would enable them to engage in activities which would secure or oppose changes in the law, policy or decisions of government at home or abroad. This is a break with the current state of the law under McGovern v AG. While the McFadden Report welcomed the UK’s Charity Commission Guidance note RR8 – “Charities and Campaigning”, and “endorses it wholeheartedly” it would favour laying down its own guidelines in this regard which would allow certain activities currently considered to be non-charitable to be considered for charitable status.144

Self Help Groups
The issue of whether self help groups qualify as charities under the fourth heading has been considered in a number of jurisdictions. One’s initial reaction to such entities might be to say that self help groups, as the name implies, are inward looking organisations, set up for the sole benefit of members and therefore lack the necessary element of public benefit to qualify as charitable, regardless of the nature of the activities in which they engage.145 In its recent consultation document, the NCVO recommended no change in policy towards ‘mutual organisations’, stating that while these bodies contributed to society and therefore should be encouraged through the tax system, they should not be granted charitable status. It stated,

“This is not to say that organisations based on the mutual model should not be supported and encouraged, possibly through the tax system, and that their special status and contribution should not be more widely recognised. It is rather to say that attempts to squeeze mutuals into the charitable category would distort it beyond recognition. What is needed is a new legal form, as broad and flexible as charity and with a comparable range of advantages, which serves the mutual sector.”146

Scotland
For its part, the McFadden Report recommended that a self help organisation which confers public benefit may qualify to be a Scottish Charity where the following two criteria are satisfied:
• its membership is open on objective public benefit criteria;
• the governance of that organisation reflects the public benefit culture.

Footnotes:
145. See, for example, Re Hoburn Aero Components Air Raid Distress Fund [1946] Ch 194 where it was held that an emergency fund built up during World War II for the comforts both of ex-employees serving in the armed forces and for employees who suffered distress from air raids was not a charitable fund. 146. NCVO Report at 4.1.3.
also involved in its governance, draws the line in relation to mutual organisations, stating that while they

“fulfil an important role in society…they are different from charities and we believe that it is important to maintain that distinction.”147

Australia

The need for greater certainty with regard to the status of self help organisations was also taken up in Australia’s CDI Report, where many submissions pointed out the net benefit of self help groups to the community in terms of empowering people to take greater responsibility for their problems and the ability of such groups to provide “customised solutions to problems at the local level, which requires flexibility and innovation”.

In terms of self-help or mutual groups, there may be scope for designation as a charity where a body is outward looking and open to all members of the community in that particular situation. Thus, if a broader definition of ‘poverty’ were to be adopted along the lines of the Australian model, there may be cases where a local community organisation involved in capacity building or in regenerating a community by facilitating the residents to solve their own problems (which might currently be categorised as a voluntary organisation) would hereafter be eligible for charitable status, notwithstanding the associated element of self-help or mutuality. This would of course be a matter of degree and would depend upon the all important element of public benefit being satisfied.

‘Other purposes beneficial to the community’ – the fourth head subdivided

We believe there is a strong argument in favour of the Australian approach of hiving off well established fourth heading areas and making them heads of charity in their own right – such as advancement of health, advancement of culture, or protection of the natural environment. We recommend such an approach to any new definition of charity. If objectives such as health and culture, for instance, long recognised as established grounds of charity were given their own heads of charity, this would free up the fourth heading to act more so as a flexible category, dealing with new and novel purposes as they arise.148

Footnotes:
148. The English Charity Commissioner, John Stoker endorsed this approach, in our consultations with him. He stated that given the lack of legislative reform in Ireland since 1973, Irish legislators are in the unique position of starting with a tabula rasa with regard to charity law in this jurisdiction. This would facilitate an expansion of the Pemsel headings of charity without the bureaucratic upheaval that would inevitably follow in countries where an administrative system for registering and regulating charities has existed for many years.
Is reference to the Elizabethan preamble in terms of defining the scope of the fourth heading of charity an acceptable standard in the 21st century? If it is to be replaced, what new standard should replace it?\textsuperscript{149} The answer to this question to a certain extent lies at the heart of the issue. We are of the view that a substantial body of jurisprudence has been established by the courts both in this jurisdiction and further afield as to the definition of charity. The collective wisdom of the common law in this regard is not only of historical value but also of continuing practical use in that it informs the decision makers today of the boundaries of charity. However, we believe that the time has now come when new guidelines should be put forward in relation to the definition of charity which would aid the body charged with making the decision (be it the courts, the Revenue Commissioners or a new statutory body established for this purpose such as the proposed Charities Office). We recommend that while these guidelines should take a statutory form, they would not necessarily constitute a statutory definition in that they would facilitate the decision making body to exercise its discretion in each case. At the same time, while relying on the developed jurisprudence in this area, the guidelines would provide fresh impetus for a contemporary approach to charity and charitable status, removing some of the ‘baggage’ which inevitably accumulates after 400 years of piecemeal development. Having considered the reviews conducted in other jurisdictions, we recommend that the basic proposal put forward by the Charities Definitional Inquiry in Australia be considered here as a good basis from which to adapt a new definition for charity, specific to the needs of this jurisdiction.

Political activities
If it is accepted that sometimes, to be effective, charity must not only provide relief, but must question why the system has failed the donees thereby placing them in the situation of needing assistance in the first place, we recommend that the current absolute prohibition on political advocacy should be reviewed.

Mechanisms will be needed to ensure that charities can engage in public debate on issues about which they have relevant knowledge or that their views can balance the views of business or corporate interests. A number of different approaches utilised by different jurisdictions were considered. These mechanisms applied across the four heads of charity and restricted in a

Footnotes:
\textsuperscript{149} Should the views of the Australian CDI be taken on board here to the effect that, “Many of the purposes thought charitable 400 years ago are either no longer so or are irrelevant to today’s social needs. Some retain their place. But, on the other hand, the community and the judges are left with the uncertainty brought about by attempts, sometimes artificial, to say that a new purpose is somehow analogous to one of the purposes in the Statute or is within its spirit and intention. It seems to us that the Preamble, valuable though it has been, has outlived its usefulness. It is time to move on. We need to ensure that those things relevant and beneficial to today’s circumstances are retained, but they need to find their place in a more modern statute enacted for our time.” At p. 137.
quantifiable way the amount which could be spent on advocacy or lobbying. None of the jurisdictions allowed for the direct support of a political party or person and we are in agreement that such bodies should not benefit from charitable status. Direct support for a political party or person should remain outside the realm of charity. In terms of permissible activities for charities, particularly in the context of lobbying or advocacy, we recommend that the main factor should be that the advocacy is directed at the attainment or furtherance of a charitable purpose and to this extent it would be ancillary to that purpose.

A further question arises as to the extent that charities should be permitted to attempt to change or maintain legislation. We recommend a charity should be able to advocate a change in the law or public policy which can reasonably be expected to help it to achieve its charitable purposes and be allowed to oppose a change in the law or public policy which can reasonably be expected to hinder its ability to do so. Once the basic principles discussed above are respected, it becomes a question of degree as to how far a charity can go in relation to a particular issue. We therefore recommend that the proposed Charities Office draw up guidelines to assist charities in differentiating between subordinate political activities which further the predominant charitable purpose and party political or propaganda activities which are not ancillary to charitable purposes.

These guidelines would essentially be qualitative in nature regarding the types of activities and level of involvement engaged in by a charity. Quantitative guidelines, on the other hand, can be more difficult to apply and police. Their application may disadvantage smaller organisations from getting their message across given the level of sunk costs which are involved in mounting any campaign. Even in relation to larger organisations, the initial funding of political activity is likely to be the greatest and may well exceed an annual threshold figure for that particular year, if a short term, sharp burst of advocacy is necessary to achieve the legitimate concerns of the charity.

Of course, it may be that the Charity Office decides that both qualitative and quantitative thresholds are necessary. As discussed above, quantitative restrictions are currently applied in both the United States and Canada and limit the amount which a charity can spend on permissible political activity in a given financial year.150

Footnotes:

150. As the Ontario Report pointed out in Ch. 12 the Canadian regime limits expenditure on political activities to 10% of resources in addition to restrictions imposed by the dispersement quotas. It recommended a move towards the more flexible US approach which allows for an optional quantitative rule where political expenditure is viewed as a percentage of total expenditure instead.
We recommend that the guiding criteria should be qualitative but that such criteria may include reference to an optional quantitative threshold against which a charity may be asked to justify expenditure over a certain threshold where it is to such a degree that it casts doubt on the ancillary or incidental nature of the political activity to the charity in question. In setting any quantitative threshold further consideration should be given to how these thresholds have operated in the United States, which is viewed by Canada as a better role model in terms of this requirement.

Self Help or Mutual Organisations
We recommend that the position regarding certain self-help organisations be open to reconsideration. If a broader definition of ‘poverty’ were to be adopted along the lines of the Australian model, local community organisations involved in capacity building or in regeneration that facilitate residents in solving their own problems (and which are currently classified as voluntary organisations) may hereafter be eligible for charitable status, notwithstanding the associated element of self-help or mutuality. This would of course be a matter of degree and would depend upon the all-important element of public benefit being satisfied.

VII. THE CONCEPT OF PUBLIC BENEFIT AND THE INTRODUCTION OF ALTRUISM

“The concept of public benefit is intangible and nebulous; its effects can only be represented as variable and unpredictable. Imprecision has resulted in illogical and capricious decisions, sometimes impossible to reconcile.”

The issue of public benefit is viewed as central to the core issue of whether a purpose deserves charitable status. The difficulties which have arisen in relation to this concept have not revolved so much around the necessity of its presence but rather over what test should be used for determining whether sufficient public benefit exists in a given case to warrant recognition as charitable. As pointed out at the start of this chapter, an additional difficulty is that the concept of public benefit has not been applied consistently across the four headings of charity in the past. This has ranged from virtually no requirement of public benefit in the context of relief of poverty cases to quite a strict application of the rules in relation to the fourth heading of other purposes.

Footnotes:
beneficial to the community. Even within the accepted categories of its undoubted application, judicial differences have been expressed as to the correct test for determining its presence.152

In recent times, a number of jurisdictions have considered the need for reform in this area and put forward some interesting proposals in this regard.

Canada

The approach adopted by the Ontario Law Reform Commission has much to recommend it. Chapter 7 puts forward the following suggestion for tackling the public benefit issue:

“Once it has been established that the objects are charitable, that they advance a common or universal good, then the “public benefit” test should consider obligational and emotional distance, and the overall practical utility of the project. It should not ask about size except in so far as size of the beneficiary class may be an indication of the lack of distance or a factor that contributes to the project’s lack of utility. Since ‘benefit’ and ‘public’ are equivocal, however, we suggest that the courts should use these terms carefully or not at all.”

England

In many ways this is similar to the approach suggested by the English NCVO in its consultation paper, “For the Public Benefit”, where it recommended that applying a uniform public benefit test across the heads of charity would bring consistency and would not necessarily be a harsher test in so far as size of class would not immediately rule out charitable status where the class was small or linked to a named individual as the indirect benefits flowing from the gift or purpose would be weighed up against the apparent direct benefits flowing to the beneficiaries.

Indeed the Deakin Report considered that under the current definition of public benefit, community development organisations, enterprise schemes and programmes for the unemployed would not qualify for charitable status either because they lacked sufficient public benefit or because they allowed the recipients too much private benefit.153 It is interesting to note, therefore, that the Charity Commission in the course of its review of the Register and in light of judicial authority in the area,154 has taken the view that organisations for the relief of unemployment can qualify as charities under the fourth heading of Pemsel where sufficient public benefit is shown.

Footnotes:

According to the Commissioners’ Guidelines:

“A charitable organisation which relieves unemployment must satisfy all the following criteria:

• it must be set up for the primary purpose of relieving unemployment for the public benefit;

• its activities must be directed to the relief of unemployment generally or to a significant section of the community in a way which can be demonstrated objectively; and

• any benefit to private interests must be strictly incidental to its primary purpose.” ¹⁵⁵

Australia

In its recent report, the Charities Definition Inquiry recommended that the requirement of public benefit should continue to be an essential feature in determining charitable status. To this end, it suggested that the public benefit of charity would be enhanced if the concept of altruism (defined by the Committee as ‘unselfish concern for the welfare of others’) were to be expressly required. Spelling out the meaning of public benefit it stated in recommendation 6 that:

"the public benefit test, as currently applied under the common law, continue to be applied; that is, to be of public benefit a purpose must:

• be aimed at achieving a universal or common good;

• have practical utility; and

• be directed to the benefit of the general community or a ‘sufficient section of the community’. “¹⁵⁶

To this list it expressly adds the requirement of altruism, on the basis that an entity might well provide a benefit to the public and yet not be deserving of charitable status as it may not be acting altruistically. It illustrates the point with an example:

"Mutual organisations which provide health care services exclusively for paid-up members are providing a public benefit (improved health in the community), but they are not acting altruistically.” This requirement does not mean however that entity must exist only on the efforts of its volunteers as the Committee felt it inappropriate to set ‘a particular level of voluntary effort as the benchmark for being regarded as a charity.’¹⁵⁷
It states that by expressly adopting the concept of altruism it should be easier to categorise certain bodies, such as self help groups, as either being charitable or not. Where the dominant purpose of the body is to achieve a benefit for any person who satisfies the target group criteria, the fact that the organisation facilitating this is a self help organisation will not prevent the attainment of charitable status, as in the words of the report 'the self help approach can be regarded as no more than the chosen means for achieving the dominant purpose.'

We recommend that the concept of public benefit should be redefined so as to include express reference to the concept of ‘altruism’.

VIII. SHOULD CHARITABLE STATUS AND FISCAL EXEMPTION BE TWO SEPARATE QUESTIONS?

"The question whether a trust to further some purpose is so little likely to benefit the public that it ought to be declared invalid and the question whether it is likely to confer such great benefits on the public that it should enjoy fiscal immunity are really two different questions. The logical solution would be to separate them and to say… that only some charities should enjoy fiscal privileges."  

The comments of Lord Cross in Dingle v. Turner have a certain logic to them, although the other Law Lords expressly disassociated themselves from his views on the matter. However, the fact must be faced that the public exchequer has but a finite budget to spend and some causes are more deserving than others are in terms of governmental support. Should it automatically follow that if a body gains charitable status it should be entitled to tax exemption as a matter of course? Tax exemption is simply one of the benefits of charitable status but it would be wrong to conclude that it is the only one. Arguably, credibility in the eyes of the public is every bit as important. Being viewed as a worthwhile organisation deserving of donations and accountable for monies received is surely an advantage which should flow from the acquisition of a CHY number.

The separation of these two issues has been the subject of reports in the past in other jurisdictions. In England the Inland Revenue Commissioners as long ago as 1920, when the Colwyn Commission examined the issue, raised the matter. However, despite the representations of the IRC in favour...
of a more restricted definition of charity for income tax purposes, the Colwyn Report did not recommend any changes. Over thirty years later, the Radcliffe Commission recommended a new definition of charity for the purposes of taxation, when in its final report in 1955 it proposed the following option:

"The relief of poverty, the prevention or relief of distress, the advancement of education, learning and research, the advancement of religion." 162

However, the British Government did not implement this proposal.

One problem associated with the current uniform definition for both charitable status and tax exemption is that there can be a tendency, although it is denied by some courts, to put the cart before the horse and to hold that unless the court views the body as being deserving of tax exemption, to find that it is not charitable in law. In the words of Bright,

"[T]here are signs that because entitlement to fiscal privileges has not been separated from the question of charitable status the development of the concept of charity has been unnecessarily distorted by courts concerned at the access to fiscal privileges of certain purpose trusts."163

Therefore, we are faced with two possible choices – first we can adopt a more liberal definition of charity and leave intact the current situation whereby tax exemptions are an automatic consequence of charitable status. This would have the advantage that at least the legal definition of charity would be more in line with the layperson’s perception of charity. However, there would be an attendant cost implication in terms of the extension of tax exemptions to a wider grouping. The other choice would involve separating the two issues of charitable status and taxation so that achievement of the former would not automatically guarantee exemption from the latter. This clearly would not make the issue any easier to resolve, but it would at least clarify the issue as being not a question of legal definition (is this a charity or not?) but rather a political question of resource allocation (does this body deserve preferential treatment in light of the net benefits it bestows on society?). 164

In practical terms, such a system could be implemented by the award of a CHY number to a body

Footnotes:

164. Ibid.
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deserving of charitable status, whereas a charity also entitled to tax exemption from the Revenue Commissioners could be signified simply by the addition of the letter ‘R’ after its charity registration number. This would result in the involvement of two different bodies (i.e. the Registrar of Charities and the Revenue Commissioners) and the application of two different tests (perhaps a more liberal test by the former and a more restrictive test by the latter) in the issue of the definition of charity.

At present in Ireland, the Revenue Commissioners are in reality the closest body this jurisdiction has to a watchdog in terms of charities. This, however, is not a desirable position as the Revenue are not equipped, nor should their role be, to monitor the activities of charities outside of the realm of taxation. As Minister McCreevy noted in the Dáil,

"[The Revenue Commissioners’] role in relation to charities is solely to deal with claims for exemption from tax in accordance with statutory conditions. As part of this procedure they request bodies approved by them as charities for the purposes of tax exemption to submit audited accounts within 18 months of receiving their charitable exemption. In addition, they carry out random checking of bodies to confirm continuing entitlement to exemption. However, they have no function in supervising the activities of such bodies and it would not be desirable or practical for the Revenue to undertake the supervision of charities. The main role of the Revenue Commissioners is the collection of taxes."

The downside of the separation approach would be the consequent duplication of applications as applications would be considered by separate bodies under separate tests and the inevitable complexity that this would introduce into the systems for charities and the general public. It would also result in the creation of a super-league of charities entitled to preferential treatment. This situation has existed in Australia since the mid-1920s through the concept of the 'public benevolent institute' (PBI). The argument has been advanced that it has yet to be proved that the development of charitable status has been hindered by the automatic award of fiscal privileges to all charities. 165 Indeed, Warburton has cogently argued the converse – that the way to encourage philanthropy is to make it as simple as possible for donors and charities to operate. 166 Differentiation of the tests, she argues, will complicate the matter unnecessarily such that the retention of one definition of charity for all purposes is the only viable option. While the Australian CDI Report confirms her first point, in respect of PBIs, pointing out that the line between them and charities had become blurred and it was not easy for the public to comprehend, it does not go so far as to support a total abolition of a

Footnotes:
166 Ibid.
two tiered system of tax relief for charitable entities. Instead it recommends the retention of a redefined concept, to be called a benevolent charity which will be entitled to greater relief, and redevelopment of an entity, to be known as ‘altruistic community organisations,’ which would be broader than charities.

Scotland

In the recent McFadden Report, the Commission recommended the introduction of a new definition for Scottish charities, which would be underpinned in legislation. Given that the definition of charity for taxation purposes is determined on a nation-wide basis since the decision in Pemsel, it would inevitably follow from this that adoption of the McFadden proposals would lead to the creation of two different tests: one for charitable status to be determined by a new regulatory body, CharityScotland, and a separate test for income tax purposes to be applied by the Inland Revenue Commissioners. Explaining the practical implications of this bifurcation, the Commission states that it would envisage a situation whereby “CharityScotland [would] work closely with the Inland Revenue to ensure that there is as seamless a process as possible in determining both eligibility to be a Scottish Charity according to the principles which we have already identified, and eligibility for tax benefits.”

While these recommendations have not been welcomed with open arms by those outside Scotland, it is hard to deny the merit of the McFadden Commission’s arguments in relation to setting its own agenda for charitable status. The Commission states that:

"In the small minority of cases where there is some degree of dubiety over whether the organisation would meet the tax criteria, we anticipate that CharityScotland would actively involve Inland Revenue and inform the applicant what is happening. This will not affect an organisation’s status as a Scottish Charity, but may affect whether or not it is eligible to receive the tax benefits associated with charitable status."

Footnotes:

167. Replacing the term ‘community service organisations’, which had particular application in commonwealth revenue statutes.
168. See Recommendations 17 and 19 of the McFadden Report.
169. Ibid, at para. 3.15.
170. Ibid, at para. 3.16.
171. See for instance the Response on behalf of the Charity Law Association to the Report of the Commission on the Reform of Scottish Charity Law, which states, "the prospect of introducing two separate kinds of charitable status, distinguishable only by experts but treated very differently for tax purposes is frankly appalling." While it accepts that one body will have to possess the power to determine charitable status, it is not convinced that this body should necessarily be CharityScotland, particularly if the IRC will continue to perform its own test as regards charitable status for tax purposes, albeit according to different criteria.
definition of charity in Scotland has effectively been changed following decisions taken in England. Scotland has been unable to set the agenda for change. Tax reliefs are clearly important to a number of charities, but they are by no means the only reason why many organisations seek charitable status. Taking these factors together, we concluded that it would be appropriate for a new organisation to be established to determine charitable status, to regulate the sector and to protect the public interest in Scotland. We also concluded that a set of principles should be drawn up which align the tests for qualifying as a Scottish Charity more clearly with current thinking.” 172

In light of the foregoing comments, we recommend that tax relief should continue to be an automatic consequence of obtaining charitable status, subject to the Revenue Commissioners’ right of appeal to the High Court.

We recommend that the option of tiered tax relief depending on the type of charitable purpose being undertaken, should be given further consideration, particularly as it might allow for the possibility of according voluntary organisations with tax exemptions, while reserving the full gamut of relief to those organisations qualifying as charities.

IX. THE DISTINCTION BETWEEN VOLUNTARY, NON-PROFIT ORGANISATIONS AND CHARITIES

This classification of voluntary bodies has received much coverage and is the subject of legislation in many other jurisdictions. To date the issue has not been fully debated here partly flowing from the fact that there is an absence of statutory regulation in the voluntary sector as a whole, although this is something which the Government has promised to redress and to a certain extent has begun the consultation process in respect of this in the form of the White Paper on a Framework for Supporting Voluntary Activity and Developing the Relationship between the State and the Community and Voluntary Sector.173 The differentiation between these classes usually manifests itself in terms of the tax exemptions granted to the body in question and the compliance procedures imposed on those bodies in return. Thus, the general class may consist of voluntary bodies which in turn will be subdivided into non-profit organisations, public or private foundations and charities.

Footnotes:
In some jurisdictions, such as Australia, there may be a further subdivision within this latter class separating charities per se from what are known as ‘public benevolent institutions’. In addition, the legislature may grant special tax exemptions to bodies that do not fit neatly within the current framework but are viewed by the government as worthy of special support.174

While this can be a difficult question to answer, the differentiation between non-profit entities and charities is an important question to consider in attempting to redefine what constitutes a charity. It can also lead on to a related and equally important issue: should some classifications of voluntary organisations, even within the charity subclass, be entitled to preferential treatment?

The proposed classification in Australia

The Australian CDI Report has recommended a new classification for the voluntary sector which from the largest general class to the smallest most specific subclass would comprise of the following: (1) not-for-profit entities; (2) altruistic community organisations; (3) charities and (4) benevolent charities.

1. Not-for-Profit Entities

These bodies may be membership based and therefore would focus on assisting their own members and their respective interests. While acknowledging their ‘clear and positive role in contemporary Australia’, the report makes the point that any benefit to the community flowing from these bodies is incidental to their main non-altruistic purpose. Examples of such bodies would include: trade unions, professional associations, friendly societies, mutual health bodies and sporting clubs.

2. Altruistic Community Organisations

This is a new classification proposed by the report. It would consist of not-for-profit entities that have an altruistic main purpose. This category would be wider than the charity sector however (although it would include all charities) in that entities within its remit could have ancillary non-altruistic purposes.175

3. Charities

would have to meet all the tests laid out in the report.

Footnotes:

174. See for example the special exemptions granted to sporting organisations under the Taxes Consolidation Act 1997.

175. So, as the CDI Report points out at p. 270, bodies within this classification might fail to qualify as charities either because their purposes, although altruistic, were not charitable or because they have secondary non-altruistic purposes (i.e., are not exclusively charitable).
4. Benevolent charities

This new concept would replace the currently existing Australian concept of the ‘public benevolent institution’. It would function as a subset of charities and its main purpose would be to benefit the disadvantaged. Defined in recommendation 21 of the report as ‘a charity whose dominant purpose is to benefit, directly or indirectly, those whose disadvantage prevents them from meeting their needs’, entities within this subclass of charity would benefit from more favourable taxation treatment. The recommendations of the CDI follow on very much from the submissions made by the Australian Council of Social Service which highlighted in its submission to the Commission the difficulties experienced with the current concept of public benevolent institution.176

The current classification in Canada

In Canada, the voluntary sector is broken down into three distinct sections: (1) non-profit organisations, (2) Registered Charities which consists of three subclasses: (a) charitable organisations, (b) public foundations and (c) private foundations and finally (3) other types of organisations having equivalent status. Again the compliance requirements for each section as well as the tax exemptions on offer vary according to the class.177

1. Non-Profit Organisations

They are organisations that do not meet the criteria to be registered as charities. Although not able to issue receipts for gifts, an organisation does gain certain benefits from being designated non-profit, principally that it does not have to pay income tax on any income it receives. GST, however, does remain collectible, and remittable. It should be noted, however that there are differences in treatment between the federal and provincial government of Canada which can result in an entity being considered a charity at one level of government while being viewed merely as a non-profit entity at another level. This can sometimes lead to inequitable treatment.

2. Registered Charities

(a) Charitable Organisations

According to Canada’s Voluntary Sector Roundtable, the majority of registered charities fall under this heading. The technical requirements for a charitable organisation under section 149(1)(1) of the Canadian Income Tax Act are:

Footnotes:

1. It must devote all of its resources to charitable activities which it carries on itself.
2. It must not pay any of its income to the personal benefit of an interested person.
3. More than half of its officials must be at “arm’s length”, in other words, unrelated.
4. It can not have received more than half of its capital from a single person or group, other than governments, other charitable organisations, public foundations and certain other non-profit organisations.

(b) Public Foundations
According to section 149(1)(1) of the Income Tax Act a public foundation must:
1. be constituted and operated exclusively for charitable purposes;
2. be a corporation or trust;
3. not pay any of its income to the personal benefit of an interested person;
4. not be a charitable organisation;
5. have more than half of its officials who are unrelated; and
6. not have received more than half of its capital from a single person or group, other than governments, charitable organisations, other public foundations and certain other non-profit organisations (or 75% in the case of older foundations without exceptions).

(c) Private foundations
A private foundation is a foundation which does not meet the tests (items (5) and (6) above) for independence of officials and sources of funds necessary for a public foundation. Private foundations are subject to the same restrictions as public foundations on acquiring corporations, incurring debt and political activity. Their disbursement quotas are slightly different. The major additional restriction on private foundations is that they are prohibited from carrying on any business.

Other Classifications having equivalent status
This basically consists of sporting bodies, which has been dealt with earlier in this chapter, and national art service organisations. This latter concept is a relatively recent addition, making its first appearance in the Income Tax Act of 1991 and to date there are only a handful of registered bodies. Like athletic associations, arts service organisations are subject to a regulatory scheme similar to charities. To be registered, an organisation must comply with section 149(1) of the Income Tax Act 1985 and:

Footnotes:
178. According to Boyle, in 1997 there were 11, of which some were no longer in existence.
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1. have as its exclusive purpose and function the promotion of the arts on a nation-wide basis; and
2. been designated by the Canadian Heritage Department (rather than by Canadian Customs and Revenue Agency), and met the department’s conditions for registration. These conditions include operating nationwide and in both of Canada’s official languages.

Thus, although the arts organisations are brought into the CCRA system for registration and compliance purposes, the Heritage Department determines their initial status. Once registered, a national arts service organisation is made subject to most of the requirements and rights of a registered charitable organisation by being “deemed” to be one for these purposes. Thus, it must meet all of the requirements for charitable organisations.

The current classification in England and Wales

Under the consolidated charity legislation in England and Wales, charities are divided into a) registered charities, b) exempt charities and c) excepted charities. Exempt charities are those bodies listed in Schedule 2 of the Charities Act 1993. It covers a range of bodies such as major universities, grant aided schools, higher and further education authorities, major museums and galleries, any institution administered by a church commissioner and friendly and industrial societies. Apart from the advantage of exclusion from registration requirements, exempt charities also benefit from less stringent duties in relation to the keeping of accounts, and are not obliged to transmit documents to the Charity Commissioners. Moreover, application to the Attorney General is necessary before the Charity Commission can exercise its powers under section 18 to remove a trustee of an exempt charity.

Excepted charities are charities, other than exempt charities which are excepted by regulation or order,179 and include non-exempt universities, boy scouts, and religious institutions such as ecclesiastical charities where provision for obtaining the necessary information already exists. In addition, the 1993 Act also excepts charities which neither have permanent endowments nor the use or occupation of land or income in excess of £1000 p.a. While an excepted charity is excepted from the requirement of registration and therefore falls outside the Charity Commissioners’ monitoring programme, it may be entered on the register at its own request.180 While the Charity Commissioners in conjunction with the Home Office have begun a review of the basis on which

Footnotes:
179. See for example, S.I. 1825 of 1964 (Religious charities); S.I. 1044 of 1961 (Boy scouts and girl guides); and S.I. 1056 of 1965 (Armed forces).
180. Though even if it remains unregistered, it will be obliged to send its accounts to the Charity Commission if it specifically requests it to do so.
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Charities should be excepted from compulsory registration in the future,181 this review has been suspended pending the outcome of the Performance Initiative Unit’s ‘Consultation on the Legal and Regulatory Framework for Charities and the Voluntary Sector.’

Outside of this categorisation, non-charitable bodies may take many other forms such as friendly societies, industrial and improvident societies or housing associations.182

Conclusion

In conclusion, the voluntary sector which includes charities is subject to diverse and complex legal arrangements which differ according to the various countries. Much comparative research remains to be done in this area. In Ireland, aside from legal charities there is an array of entities engaged in not-for-profit activity which is beneficial to the community at large. These entities exist in a variety of forms: associations, companies limited by guarantee, foundations and trusts. The lack of legislation in this area in terms of recognition of these bodies and in terms of regulation needs to be addressed. To date, the only attempt at legislative recognition has been in relation to charities, and as explained in the preceding sections, this has been by way of common law jurisprudence and not by way of legislative action. Having said this the Committee acknowledges the recent attempts by the Government in this regard and takes note of the new definition of ‘charitable organisation’ provided in section 3 of the Valuation Act 2001. It states that:

“‘charitable organisation’ means a company or other body corporate or an unincorporated body of persons which complies with the following conditions—

(a) in the case of a body corporate which is not a company, or of an unincorporated body of persons, there exists a constitution or deed of trust in relation to it that—

(i) states the full name of the body,

(ii) provides who are to be its trustees or who are to be the members of its governing board or committee,

(iii) states, as its main object or objects, a charitable purpose and specifies the purpose of any secondary objects for which provision is made to be the attainment of the main object or objects,

(iv) states its powers,

(v) provides for rules governing its membership and procedures to be followed in relation to meetings and the discharge generally of its business,

Footnotes:

181. See the Annual Report of the Charity Commissioners for England and Wales 2000-2001, at p.10. This review will have significant effects and in light of it many regulations granting exceptions to charities which were due to expire on March 1 2001, were extended to 30 September 2002. If these regulations are not further renewed, many charities will be obliged to register for the first time, including 25,000 religious charities.

(vi) provides for the keeping of accounts and the auditing thereof on an annual basis,

(vii) (I) provides for the application of its income, assets or surplus towards its main object or objects,

(II) prohibits the distribution of any of its income, assets or surplus to its members, and

(III) prohibits the payment of remuneration (other than reasonable out-of-pocket expenses) to its trustees or the members of its governing board or committee or any other officer of it (other than an officer who is an employee of it),

(viii) makes provision for its winding up, and

(ix) provides for the disposal of any surplus property arising on its being wound up to another charitable organisation (within the meaning of this Act), the main object or objects of which is or are similar to its main object or objects or, if the body receives a substantial proportion of its financial resources from a Department of State or an office or agency (whether established under an enactment or otherwise) of the State, to such a Department, office or agency,

and

(b) in the case of a company-

(i) the memorandum of association or articles of association, as appropriate, of the company comply with the conditions specified in subparagraphs (iii) and (vii) of paragraph (a) of this definition (and, for this purpose, the reference in clause (III) of that subparagraph (vii) to trustees or other persons shall be construed as a reference to the directors or any other officer of the company), and

(ii) there is contained in that memorandum or those articles a provision, with respect to a case of its being wound up, that is similar to the condition specified in paragraph (a)(ix) of this definition."

This is certainly commendable in so far as it goes. However, proper regulation of the charitable sector can only be brought about by first defining, or at least laying down the guidelines to enable the courts define in light of modern society, the entities which fall within the remit of charity. While there is undoubtedly a core body of case law in place, a revision of the concept of charity is now necessary for the reasons outlined above. At the end of the day, this is a policy decision, as was recognised as long ago as 1601. It behoves the Government therefore to bite the bullet and provide legislative guidance (as opposed to a statutory definition, which would prove too rigid) as to the meaning of charity in the twenty-first century. In undertaking such a task, it may very well be that the lines between the different concepts of charity, not for profit and voluntary organisations will become more clearly defined and the relative relief allowed to each category will become more transparent and hopefully justifiable.
There is no legal framework for the registration of charities in Ireland, as such. As noted by Dr. O’Halloran,

“In the charity law of this jurisdiction, the single component most conspicuously absent is a regulatory system for facilitating transparency, monitoring effectiveness and ensuring public accountability in relation to the activities of charities, whatever their legal form.”

Different administrative agencies keep registers of organisations, some of which may be charities, for their various purposes. The Revenue Commissioners keep a register of organisations entitled to tax exemptions because they are charities. The Companies Office registers companies which include charities which are incorporated under the Companies Acts. The Registrar of Friendly Societies keeps a register of the relatively small number of Friendly Societies and Industrial and Provident Societies. Both the Companies Office and the Registrar of Friendly Societies already have a regulatory function and require annual returns to be filed, and make them available to the public. In contrast, the charitable sector in Ireland has operated “off the radar” of official notice to a large degree. It is only when a charitable organisation seeks a tax exemption or a government grant or contract that it comes to official notice.

There are however good reasons for maintaining a comprehensive register of charities:

- Information on the sector, and specific charities operating within it, would be available to all the organisations operating within the sector. This could have various benefits, including synergistic cooperation between different organisations, sharing of resources and information and rationalisation of activities.

- Information on specific charities would be available to the general public, who could use it to identify organisations in which they are interested, to verify claims being made in the context of fundraising and for the avoidance of fraud.

- Information on the sector would be accessible to planners and government. Information on the size, strengths and weaknesses of the sector could be collected in this way, and policy and programmes could be developed based upon the information gained, to the good of the sector, the State and the public.

Footnotes:
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• Information on a register, or lack of it, could be used in the regulation of the charitable sector, to ensure it is accountable to funders, governmental agencies, the public and the authorities.

• A registration body could be the structure around which support and services for charitable organisations are built up over time.

Some organisations will be so small or local, so transient or so informal that requiring them to register would be a disproportionate burden. Some organisations will always operate away from official notice. There is a good case to be made, however, for requiring registration if an organisation seeks tax relief, raises funds from the public, or otherwise seeks to avail of the privileges of charitable status.

In relation to how a register would work in practice, to the information which should be available to the public and what other uses a register would have, we can review the legislative framework already existing here, and existing proposals for reform, and in that context look to the experience of other jurisdictions.

II. THE EXISTING LEGISLATIVE FRAMEWORK

Ireland shares a history of similar legislation with England and Wales. The Statutes of Charitable Uses 1601 (in England and Wales) and of Pious Uses 1634 (in Ireland) were construed in Ireland as having the same effect. The Court of Appeal ruling in Commissioners for Special Purposes of Income Tax v. Pemsel, which classified charities under four heads, continues to be followed in this jurisdiction. The Charitable Donations and Bequests (Ireland) Acts 1844, 1867 and 1871 established the Commissioners for Charitable Donations and Bequests as a body to deal with charity law issues in response to requests from the public. In England, the Charitable Trustees Act 1853 to 1939 established and updated the powers of Charity Commissioners with much the same function. The major divergence from this similar legislative structure came in 1960 with the enactment of the Charities Act 1960 in England and Wales.

The Commissioners for Charitable Donations and Bequests

The main legislative provision in Ireland dealing with charities is the Charities Act 1961 as amended by the Charities Act 1973. Since 27th July 2001, any responsibilities held in relation to these Acts by the Department or Minister of Justice, Equality and Law Reform were transferred to the Department or Minister of Social, Community and Family Affairs. There is no legislation enabling the Department to register charities. The Attorney General has a role among his other

Footnotes:
3. [1891] AC 531. The four heads are: relief of poverty, advancement of education, advancement of education and other purposes beneficial to the community.
4. Charities and Street and House to House Collections (Transfer of Departmental Administration and Ministerial Functions) Order, 2001, SI 376/01. The order also transfers functions under the Educational Endowments (Ireland) Act 1885 and the Street and House to House Collections Act 1962. It appears likely that responsibility for charities will be transferred to another Government Department as a result of the current restructuring taking place on the formation of a new Government.
duties in the protection of charities and he may enforce charitable trusts, as is made clear by section 26 of the Charities Act 1961. Sections 23 and 51 of that Act also give the Attorney General a background role in relation to giving approval to court proceedings.

The main purpose of the legislation is to restate and update the powers and functions of the Commissioners for Charitable Donations and Bequests, referred to collectively as the Board. In existence now for over 150 years, they continue to enable and facilitate many of the legal aspects of running a charity. The legislation gives them powers rather than duties and their role is facilitative rather than regulatory. As described by Dr. O’Halloran, they “operate mainly as an advisory body with limited statutory powers to protect and preserve charity funds.”6 In practice they are reactive, and respond to requests from charitable trustees or their solicitors mainly to assist in completing transactions in relation to trust property or facilitating the management of charities, for example by enabling the appointment of new trustees.7 If they did not exist, applications would have to be made to the courts with added delays and expense.

In practice, the Commissioners require applicant organisations to have a charity reference number before dealing with their queries. To that extent they rely upon the Revenue Commissioners to decide the preliminary question of charitable status.

They consist of up to 11 government-appointed Commissioners, unpaid, and a small support staff funded by government.8 Charity trustees may apply for advice in relation to the administration of a charity and the Board may give an opinion or advice, under seal. If the trustees follow this advice, they are considered to have acted in accordance with their trust and are free of any personal liability.9 Trustees may seek the approval of the Board for a compromise of a claim by or against a charity, and following the Board’s approval, no action lies in respect of the claim.10 The Board may frame cy-près schemes for charitable gifts and charity funds.11 The Board may accept transfers of property from existing trustees, subject to the original trusts, and may appoint one or more persons to administer, distribute or apply the property.12 On the application of trustees of any charity, the Board may frame a scheme establishing the trustees as a body corporate and vesting the property of the charity in the new company.13

The Board may approve the sale, mortgage or other disposition of charity land,14 including to another charity at less than market value. They may approve redemption of a charge either by a

Footnotes:
5. Power to sue for recovery of charitable gifts improperly withheld, concealed or misapplied, and power to apply to the High Court for directions.
7. They publish an annual report which gives an outline of their activities.
8. Since July 2001, by the Minister for Social, Community and Family Affairs. Prior to that date the responsibility of the Minister for Justice, Equality and Law Reform. This looks set to change shortly as a result of the current restructuring.
9. Charities Act 1961, s. 21
10. Charities Act 1961, s. 22
11. Ibis s.29, as amended by s. 52, Courts and Courts Officers Act 1995 and s. 16 Social Welfare (Miscellaneous Provisions) Act 2002. Cy-près means a near alternative allocation of a charitable gift or fund in the event for example, of the original object failing.
12. Ibid, s. 31
13. Ss. 2 and 3 of the Charities Act, 1973. In practice the Board stipulates that the new corporation must furnish accounts and other information whenever required to do so by the Board. However, this does not mean that the Board monitors or investigates these organisations.
charity or from a charity\textsuperscript{15}, and may authorise the exploitation and management of charitable land.\textsuperscript{16} Section 40 provides that all transactions authorised by the Board under this Act are to have the same effect as if they were authorised by the express terms of the trust affecting the charity. Section 41 enables the Board to give a receipt or discharge for payments to be made for charitable purposes, in default of a competent person. Section 43 as amended enables the Board to appoint new trustees and vest property in them. The Board may establish a repository for charity deeds or muniments and trustees may deposit them there.\textsuperscript{17}

**Investment of charitable funds**

Sections 32 and 33 as amended\textsuperscript{18} deal with investment powers for trustees and give the courts power to override trust instruments in relation to investment of funds held on charitable trusts, and the Board are granted a similar power in relation to any funds held by the Board. The Board also may by order enable trustees, either generally or in a particular instance, to invest trust funds in such a manner as the Board considers proper, even if not authorised by the trust instrument or by law, except in cases where the charity fund is held subject to a prior limited interest. This power was last used in November 1994, when the Board issued a list of authorised investments. Section 46 enables the Board or the High Court to establish common investment funds which may also hold money on deposit.

**Potentially regulatory powers**

The Board has other powers which are potentially regulatory, although not used pro-actively. Without a system in place to monitor and investigate charities, it is usually only by chance that the Board becomes aware that the use of its powers may be necessary. Section 23 provides that the Board may, with the prior approval of the Attorney General, sue for recovery of any charitable gift which is improperly withheld, concealed or misapplied, at the charity’s expense. Without a system to pick up instances of such wrongdoing, the Board is unlikely to know that it should act. If any sum is due to a charity, the Board, or the trustees with the Board’s consent, may sue to recover it as a simple contract debt without the consent of the Attorney General.\textsuperscript{19} If the Board decides that proceedings should be taken with respect to any charity by any person, other than the Attorney General, the Board may authorise or direct legal proceedings to be instituted and give directions in relation thereto.\textsuperscript{20} In practice, the Board is more likely to simply advise the solicitors acting for a charity. The Board also has power to certify cases to the Attorney General, where it believes that proceedings should be taken by the Attorney General, and he may use his discretion to institute

\textsuperscript{15} S. 35, Charities Act 1961 as amended by s. 12 of the Charities Act 1973  
\textsuperscript{16} S. 37, Charities Act 1961 as amended by s. 13 of the Charities Act 1973  
\textsuperscript{17} S. 54, Charities Act 1961  
\textsuperscript{18} Amended by ss. 9 and 10 of the Charities Act 1973  
\textsuperscript{19} S. 24, Charities Act 1961  
\textsuperscript{20} Ibid s. 25
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proceedings, or otherwise. 21 If there is tardiness in the conduct of a suit for the administration of a charitable gift by a personal representative, the Board may apply to the court on the ground of delay to take over the conduct of the suit. 22 Section 42 enables the Board to require copies of public documents relating to charities, and to examine and search records. The Board or, if permitted by the Attorney General, anyone else, may apply to the High Court for a direction or order, in case of a breach or supposed breach of trust, and the court may frame a cy-près scheme if the circumstances require it. 23 Section 52 as amended enables the Board to require a personal representative to show proof that a charitable devise or bequest has been transferred or notified to the intended recipient. According to the Commissioners’ report for 1998, 24 around one in twelve wills is checked where a cash charitable bequest is involved. The Commissioners stated that following up on summary forms provided by the Probate Office requires effective systems, which were then at the planning stage. This is an unusual instance of the Commissioners undertaking a regulatory role.

Powers and duties for others
Section 47 sets out the circumstances in which property may be applied cy-près and imposes a duty on trustees to see it is so applied, if appropriate. Section 53 provides that before any legal proceedings in relation to any charity are commenced, except by the Attorney General or under direction of the Board, the Board must be notified. Section 55 gives power to two thirds of trustees to deal with any charity property, and section 56 permits a corporation to act as sole trustee despite other requirements in a trust. Section 58 provides that the Probate Officer is to make an annual return to the Board containing particulars of every charitable devise or bequest contained in any will entered in the probate system, with the name of the testator, the name of the person appointed to administer the will, the date of the will and the date of the grant of probate and administration.

Public service in the administration of charities
The work of the Commissioners for Charitable Donations and Bequests is described in their annual reports. They have a heavy workload for their monthly meetings and sub committees. In the light of their small support staff and own voluntary time they perform an extremely useful service, free of charge. They have neither the mandate nor the resources to set up a registration and regulation system for charities. They do however perform an essential service at minimal cost to facilitate the orderly administration of charities.

Taxation of charities and the Revenue Commissioners
Tax relief for charities has been available for two centuries, and the leading Pemsel case 25, in which

Footnotes:
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the categories of charity were authoritatively set out, was a taxation case. For most charities the main importance of obtaining charitable status is the entitlement to tax relief which depends upon it. Organisations whose objects come within the definition of charitable purposes are entitled to tax exemptions on income tax, corporation tax, capital gains tax, deposit interest retention tax, stamp duty on property sold, capital acquisitions tax, probate tax and most recently rates. Value added tax (VAT), being a European Community tax, remains payable in most cases.26

The Revenue Commissioners determine applications for tax exemption, decide to withdraw exemption as appropriate, and issue charity reference numbers to eligible organisations. At present, over 5,000 organisations are estimated to be active. The Revenue Commissioners do not, however, keep an up to date register of charities, only a list of organisations granted charitable exemption.27 A charitable organisation wishing to avail of these tax exemptions applies to the Revenue Commissioners with a copy of its governing instrument, or if the organisation is not yet established, a draft. Other information which must be submitted is the name of the organisation, any other (e.g. trading) name, address, tax reference number if already allocated and the charitable activity identified under one or more of the charitable categories – relief of poverty, advancement of education, advancement of religion and benefit to the community. The applicant must submit a statement of activities to date and activities proposed which gives a full description of the operation of the applicant organisation, relating this to the charitable objects set out in the governing instrument. Any publications such as brochures must also be submitted. A financial statement of the organisation is required, which usually includes statements of Income & Expenditure and Assets & Liabilities for the most recent accounting period (if already established). Audited accounts are required if the organisation’s income exceeds €50,000 per year. If the organisation is not yet established, estimates and projections covering every aspect of the organisation are required instead.

In order to assist with good administration of the exemptions, and to reduce the possibilities of misapplication or misappropriation of charitable property, the Revenue Commissioners stipulate certain conditions for the grant of charitable status. They are:

- The first year’s accounts and a report on activities must be submitted within 18 months of registration. The Revenue Commissioners may do spot checks to confirm that the charity’s income continues to be properly applied. Accounts and statements of activity for subsequent years may be filed with the Revenue on a voluntary basis.

Footnotes:

27. The list is available to the public on the Revenue Commissioners’ website.

http://www.revenue.ie/publications/chart.html
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• Any changes proposed to be made to the governing instrument must be notified in advance to the Revenue Commissioners for approval.
• The governing instrument must provide that on winding up any funds or property remaining will be transferred to another charity with similar objects, or failing that, another charity. On winding up, the trustees must notify the Revenue Commissioners, and forward a final set of accounts showing how any residue of funds or property was disposed of.
• The trustees must obtain the prior permission of the Revenue Commissioners to accumulate funds for more than two years, and must specify the reasons for the accumulation.
• No director, trustee or officer may be paid any remuneration or benefit, but reimbursement of expenses is allowed.
• The Revenue Commissioners reserve the right to give out the name and address of any charity which has been granted tax relief.

When approved for taxation exemption, a charity obtains a charity reference number known as a CHY number. The information furnished to the Revenue Commissioners, apart from the names and addresses of the registered charities, is confidential and not open to public scrutiny.

Charities, just like any other person or organisation, are of course subject to a Revenue audit at any time. In practice, such audits are usually undertaken on foot of a complaint or other indication that all may not be well.

The Costello Report 1990

A Committee under the chairmanship of the Hon. Mr. Justice Declan Costello was appointed by the then Minister for Justice, Gerard Collins, in 1989 to examine the existing statutory controls on fundraising, and make recommendations. It published a report28 which dealt primarily with fundraising, and in that context recommended a system of registration with annual reporting and accounting (in relation to charities’ fundraising), the register being open to public inspection, and statutory supervisory powers to deter and detect fraud and malpractice. It recommended two registering authorities, being Chief Superintendents of the Gardaí throughout the country for most organisations, and for bigger organisations raising over IRE50,000, the Commissioners for Charitable Donations and Bequests. It was proposed that the Commissioners would maintain a computerized register of all registered charities, fed with information from the local Chief Superintendents. Organisations raising less than IRE10,000 with volunteer fundraisers should be exempt from registration, as well as religious bodies and persons. The main investigative role was envisaged to fall to the Commissioners for Charitable Donations and Bequests, who would have

Footnotes:
extensive investigative powers, set standards of expenditure for fundraising and have power to require remedial steps to be taken, failing which such remedial steps could be enforced on application to the High Court. Failure to comply with registration and annual filing requirements would result in de-registration, and loss thereby of the right to raise funds from the public.

The report did not envisage systematic examination of all returns filed, but instead proposed reliance on spot checks, public availability of accounting information, and the deterrent of the possibility of direct investigations arising either from specific complaints or the local knowledge of Gardaí.

The report suggested that consideration be given to a requirement for different forms of accounts depending on the organisation’s income, that professional auditing of accounts be required only in cases of higher income, for example over IR£20,000, and that there should be a separate statement showing the level of expenses incurred in raising funds as a percentage of revenue raised.

In the context of proposed legislation, the Costello report was reviewed by an Advisory Group including representatives of the charities sector set up by Minister of State Joan Burton TD, which reported in 1996. 29

The Burton Report

The Advisory Group specifically stated that they did not wish to "revisit Costello but to build on that very valuable work and apprise the Minister of State on the practical application of the fundamental recommendations, particularly in view of the changes in the sector since the time of the Costello Report".30 They endorsed the recommendation of a system of registration, and proposed widening the requirement for registration to exclude any exceptions (and therefore include religious bodies and ministers). They recommended that all organisations which solicit funds from the public and from funding agencies be obliged to register.31

The Group considered different structures for a registration authority, and recommended a structure similar to the Companies Registration Office, being a separate body under the aegis of the Minister, assisted by an Advisory Board with the function of providing a consultative forum for advice and information on policy issues and from which some members would constitute an Appeal Board where necessary, to appeal decisions including decisions in relation to charitable status, suspension of registration and de-registration. Decisions as to tax exemption status would continue to be made by the Revenue Commissioners, but if they proposed to refuse tax exemption status to a registered

Footnotes:
30. At p. 2.
31. At p. 4.
organisation authorised to fundraise, they would be required to consult with the Advisory Board before a final determination.

The Group also considered reporting requirements for charitable companies, and recommended that the UK Statement of Recommended Practice (SORP) incorporating a trustees’ or directors’ report be adopted as the standard reporting requirement, as well as the Companies Acts requirements. It recommended that the Minister should be empowered to make accounting regulations.

Further recommendations were made by the Group in relation to fundraising, lotteries, telethons and professional fundraisers. In relation to supervision and investigation, the Group considered that these questions were operational matters for decision by the registration authority.

The Existing Legislative Framework - conclusion
Between the Commissioners for Charitable Donations and Bequests and the Revenue Commissioners, most charities do come to official notice and are subject to basic rules and controls. Particularly in the administration of tax exemptions, there are the bones of a registration and regulation system. Although very little used, the Charitable Commissioners have some powers which would allow them to take the initiative in regulating charities. However, in practice the controls are loose, the administrative resources are already stretched and each body prioritises what is required to achieve its own objectives. There is no policy to set up and maintain a register of charities for regulation and other purposes in its own right.

III. NORTHERN IRELAND
The legislative framework in Northern Ireland is similar in many ways to that in the Republic. There is of course a common basis of the earlier legislation empowering the Commissioners for Charitable Donations and Bequests, and caselaw. The main legislation currently in force is the Charities Act (Northern Ireland) 1964 and the Charities (Northern Ireland) Order 1987. As in the Republic, the objective of the legislation is to facilitate charities rather than regulate them.32

The tax relief imperative leads organisations to apply for recognition of charitable status from the Inland Revenue, although they have no obligation to register with them or any other body. Applications for recognition must include a copy of the applicant’s governing instrument and a report on its activities. On acceptance of an application, the organisation gets a reference number

Footnotes:
32. The similarity of the legislation may be explained by the fact that in both jurisdictions it is based on the recommendations of the Nathan Committee (Report of the Committee on the Law and Practice relating to Charitable Trusts, London, HMSO, 1952, CMD. 8710, on which the government White Paper Government Policy on Charitable Trusts in England and Wales was based, and later the 1960 Charities Act).
and a letter confirming charitable status. This entitles the organisation to the tax reliefs available to charities, and may be used in support of applications for street and house to house collection licences.

Charities needing advice or administrative assistance can apply to the Charities Branch of the Voluntary Activity Unit, which acts in a role similar to that of the Commissioners for Charitable Donations and Bequests in the Republic. Like that body, it can assist with giving consent to the disposal of property in the absence of a power of sale for the trustees. It or a court can also frame cy-près schemes when the original objects of a charity have become obsolete.\footnote{Ss. 13, 22 to 24 of the Charities Act NI 1964} It is frequently called upon by trustees or their solicitors to give informal advice and assistance. Many of its discretionary administrative decisions are subject to notification or the approval of the Attorney General.

It has limited regulatory powers:
- it may certify that legal proceedings should be considered in relation to a charity to the Attorney General, who may decide to act, or not;\footnote{Ibid. s. 2}
- if it has reasonable grounds to believe that any charity property may have been concealed, misapplied or withheld it may, with the Attorney General’s consent, by order require copies of documentation;\footnote{Ibid. s. 3}
- it may apply to the court, subject to notice to the Attorney General, if there is a suspected breach of trust or if directions are required.\footnote{Ibid. s. 29}

There is no register and no policy of systematic regulation. A discussion paper was circulated by the Charities Branch in 1995 but in the face of general opposition, the proposals were withdrawn. The question of reform of the law however continues to be under active consideration.\footnote{O’Halloran and Breen, “Charity Law in Ireland and Northern Ireland – Registration and Regulation”, (2000) ILT, 6 at 14}

\section*{IV. ENGLAND AND WALES}

\textbf{Charity Commission}

The Charity Commission is an independent statutory body similar to the Inland Revenue, in that it is a government department without a minister. The Treasury sets the terms and conditions of employment for its employees, who are civil servants. The Home Secretary appoints up to five Commissioners, and tables their annual report in Parliament. The Charity Commission was set up

\footnotesize{Footnotes:\n\footnotetext{33. Ss. 13, 22 to 24 of the Charities Act NI 1964\footnotetext{34. Ibid. s. 2}\footnotetext{35. Ibid. s. 3}\footnotetext{36. Ibid. s. 29}\footnotetext{37. O’Halloran and Breen, “Charity Law in Ireland and Northern Ireland – Registration and Regulation”, (2000) ILT, 6 at 14}
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in England and Wales forty years ago and has developed a sophisticated registration, support and regulation service in the period since then. Section 1 of the Charities Act 1960 describes its role as follows:

“(3) The Commissioners shall (without prejudice to their specific powers and duties under other enactments) have the general function of promoting the effective use of charitable resources by encouraging the development of better methods of administration, by giving charity trustees information or advice on any matter affecting the charity and by investigating abuses.

(4) It shall be the general object of the Commissioners so to act in the case of any charity (unless it is a matter of altering its purposes) as best to promote and make effective the work of the charity in meeting the needs designated by its trusts; but the Commissioners shall not themselves have power to act in the administration of a charity.”

With it came the establishment of a register of charities and a corresponding duty on the part of trustees to register their charitable organisations and make annual returns comprising accounts and reports of activities. In contrast to the current position here and in Canada, Australia and New Zealand, the Charities Act 1960 dealt with charities and their proper administration and regulation, and not charities purely as beneficiaries of tax exemptions.

As in this jurisdiction, the Charity Commissioners in England and Wales had come into existence in the previous century, and had enabling powers along the lines of the Commissioners for Charitable Donations and Bequests in Ireland. The innovation was to graft onto this system a quid pro quo of duties as well as privileges. In exchange for administrative support, the credibility of being a registered charity and the benefit of tax exemptions arising from charitable status, charities were required to register, to submit to basic disciplines, and to make basic information available to the public. It is a balance that has worked well in practice, and is viewed as a model throughout the common law world.

Role of the Charity Commission

In its annual report for 1999-2000, the Commission states as its aim “to give the public confidence in the integrity of charity” and it details this in three parts:

Footnotes:

38. Now re-enacted as the Charities Act 1993, s. 1
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- to ensure that charities are able to operate for their proper purposes within an effective legal, accounting and governance framework;
- to improve the governance, accountability, efficiency and effectiveness of charities; and
- to identify and deal with abuse and poor practices.

The first two roles involve support, assistance, and guidance for charities. Only the last role relates to policing. While its Investigation Division employs only 8% of its staff using formal enquiry powers, approximately one third of its staff work on support and remedial matters, to prevent poor practices and mismanagement reaching the stage where a formal inquiry needs to be opened.

From its three offices in London, Liverpool and Taunton, the Commission acts in many respects as a resource centre for charities. It maintains a comprehensive and informative website and publishes a series of handbooks for the assistance of trustees. It is available to advise trustees individually, and to assist them in keeping their documentation up to date in a modern environment and in authorising transactions which are in the interests of charities in much the same way as the Commissioners for Charitable Donations and Bequests do here.

Register of charities

At the core of the Charity Commission is the register of charities. The trustees of unexempted and unexcepted charities are under a legal obligation to register the names of their charities and any other information required by the Commission. If trustees of an unexempted or unexcepted charity do not register, they may be required to do so by order. In practice, applicants must complete an application form which includes the names and addresses of the trustees, sign a trustees’ declaration, provide a copy of the governing instrument and supply supporting information about the proposed and past activities (if any) of the organisation. The Commission uses this to decide if an organisation qualifies for charitable status, that it has a workable governing instrument and that it meets certain basic standards of governance. The Commission tries to ensure that trustees understand their duties and responsibilities, and the related financial implications. The Commission has developed the concept of registration as “a gateway” to an ongoing relationship with the charity, in the event that it needs guidance on governance and administration. The chosen name of an applicant charity may be refused or withdrawn within the first year of registration, for listed reasons, though not if the charity is an exempted or unexcepted charity.

Registered charities are directly notified to the Inland Revenue and are therefore automatically eligible for tax exemptions. If the Inland Revenue are directly applied to for tax exemptions by an organisation which is not registered by the Charity Commissions, they refer them to the Charity

Footnotes:
39. S. 6 Charities Act 1993
Commission, as there is an obligation for charities to register under the 1993 Act.

Certain charities are exempted and are not required to register, in accordance with section 3 (5) of the Charities Act 1993. They are exempted charities listed in the second schedule to the Act (including many educational institutions). Other charities are excepted by order or regulation and charities with an income under £1,000 per annum and without a permanent endowment are excepted by the same section. Further, no charity is required to be registered in respect of any registered place of worship. Their charitable status is however registered with the Inland Revenue, so that they can claim any appropriate tax reliefs.

Decisions on charitable status

The way in which the Commission deals with questions of charitable status is particularly interesting. If an application does not fall into an already well recognised category within the four heads of charity set out in the Pemsel case,40 the Commission engages in a consultative process which includes the Inland Revenue, the applicant organisation and organisations or individuals who may have an interest. In some cases the Commission issues a consultation paper inviting comments from the public. The decision on charitable status is carefully reasoned and published. The legislation allows for an appeal to the High Court by the Attorney General, by the trustees and by any person who is or who may be affected, but such appeals are rare. In part this is because decisions have been arrived at on a consensual basis. Further, they are well reasoned and thus more difficult to challenge. The High Court has taken the view that the onus of proof in an appeal against a Commission decision falls on the person or body taking the appeal. They proceed on the presumption that Commission decisions on charitable status, and statements on correct practice for charities, will be accepted as correct unless they can be shown to be otherwise. The Commission is not a party to an appeal, just as a court is not. Thus its decisions have a quasi-judicial effect. A final reason to explain the small number of appeals is the high cost. While smaller organisations will be less likely to consider the risk of losing worthwhile, the Inland Revenue can be influenced by the likely cost of foregone revenue in the future and decide that an appeal is worth the investment.

The Commission also publishes consultation papers on an ongoing basis on general matters, and publishes a report of the findings, and guidance arising from them. Thus for example, the 1999-2000 Annual Report listed six ongoing consultations.41 Three of them concerned potential additional categories of charity: provision of recreational facilities, promotion of community

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Footnotes:

41. At 3.3.
development and preservation and conservation.

This discursive, consultative and consensual approach is considered successful because it has the effect of continually updating the common law understanding of charitable purposes at minimal cost. The only way the common law definition can be developed in this jurisdiction (Ireland) is by testing decisions in the courts, at prohibitively high cost. This has resulted in a stagnation of the definition of charitable purposes. The Revenue Commissioners in this country apply the law as it stands, and feel ill-equipped to interpret existing decisions or practice to take account of changing social circumstances.

The legislation in England and Wales does not specifically empower the Commission to extend the definition of charity, and in fact there is no explicit statutory basis for the Commission’s assumed role in developing the definition of charitable status. The Commission uses analogy with existing charities, and comes to closely argued decisions. The absence of a statutory definition gives this scope to the Commission and the common law. Thus the definition of charity is not static, it is an ongoing process which allows it to flexibly keep up with societal expectations of what a charity should be. This is not without difficulties, as earlier decisions by judicial authorities may block change and the Commission does not have authority to overrule them. Much will depend on the arguments which the Commission can put forward in relation to the actual facts of decided cases, the circumstances of the time, the seniority of the courts deciding them and the correct interpretations to be put on them. Only if a clear case can be made that a previous decision does not apply will the Commission feel free to diverge from it.

Registration gives rise to a conclusive presumption that such charity is in fact a charity for the period during which it appeared on the register. Registration is thus sufficient proof of charitable status for taxation purposes also, and is accepted as such by the Inland Revenue and rating authorities.

As part of the registration process, the Commission can alert prospective charities to the existence of other organisations with similar objectives. There is a public perception that there are too many charities, and that there is scope for collaborative working or mergers to make better use of resources and simplify and rationalise delivery of services.

Footnotes:

42. Charities Act 1993, s. 4(1)
43. Rates are payable in England and Wales in accordance with the Local Government Finance Act 1988. Briefly, charities can be affected in three different ways: firstly, some premises used for public religious meetings are exempt. Secondly, the Secretary of State may exempt other premises in whole or in part if an exemption was previously enjoyed in practice. Thirdly, maximum amounts (one fifth of normal commercial rates) are payable with discretionary reductions.
Annual returns
Trustees of charities which are over the ‘monitoring threshold’, (currently those with income or expenditure of over £10,000) are required to make annual returns including independently examined or audited accounts to keep the register up to date. These returns are subject to checks.

Cessation of a charity
It is also the duty of trustees to notify the Commission when a charity is wound up or ceases to operate. Every year the Commission sends every charity a separate form containing pre-printed extracts from the register, which assists the charities in returning information. The accuracy of the information held in the register is considered to be critical for charities’ accountability, and the Commission regularly checks organisations which have not filed annual returns for a period or where there is other reason to suspect that they may be dormant or defunct. Defunct organisations are de-registered. Dormant organisations may be assisted to take appropriate action such as appointment of new trustees or merger with another charity. The Commissioners may appoint a receiver and manager to take over the affairs and property of the charity, or may appoint additional charity trustees. By the removal and appointment of trustees the Commissioners can take control of a charity and wind it up, transferring its property to another charity by means of a cy-près scheme. If the charity is a company under the Companies Acts or incorporated by themselves, they have powers to act in its winding up.

Voluntary registration
It is possible for charities to register on a voluntary basis where there is no obligation to register because they are exempted on grounds of size or category. Charities may choose to do this to avail of the credibility which registration with the Commission confers.

Display of charity registration number
Section 5 of the Charities Act 1993 requires registered charities (other than those with an income of under £5,000) to state their registered status in all notices, advertisements and other documents, on cheques, bills, invoices, receipts and letters of credit. The publication of the charity registration number in this way enables members of the public to follow up and verify the existence and good standing of any charities which they encounter.

Public access to register
The register is available to examination by the public, and in recent years much information has

Footnotes:
45. S. 3 (7)(b) Charities Act 1993
46. Ibid, s. 3(4)
47. Ibid, s. 18(1)
48. Ibid, ss. 63 (2) and 61
been made available on the Commission’s website. Copies of governing documents and accounts may be obtained. In addition to straightforward searches by members of the public, Commission staff will assist with tailored searches to match individual requirements.

Investigation and intervention powers
Part III of the Charities Act 1993 deals with “Commissioners’ Information Powers”. Sections 8 and 9 give the Commissioners extensive powers to institute inquiries into any but exempt charities and investigate them. Publication of their findings is mandated. Section 10 provides the circumstances under which information may be shared with the Commissioners by other bodies, such as Inland Revenue, and vice versa. Section 18 gives powers to act to protect charities in the event that misconduct or mismanagement has taken place, or if it is necessary to protect charity property and its correct application. They include quasi judicial powers:

- to suspend a trustee or other person connected with the charity if his removal is under consideration (for up to 12 months);
- to appoint additional trustees;
- to vest charity property in the official custodian;
- to freeze charity property;
- to freeze payments of money due to a charity;
- to restrict transactions;
- to appoint a receiver and manager;
- to remove a trustee; and
- by order to establish a scheme for the administration of a charity.

Section 18 further specifies that the Commissioners may remove a trustee “by order made of their own motion” in certain circumstances, including having been adjudged bankrupt within the previous five years, where the trustee has not acted and refuses to declare his willingness or unwillingness to act, or where the trustee is outside England and Wales or cannot be found or does not act, and this impedes the proper administration of the charity.

According to its 1999-2000 Annual Report, “inquiries are primarily the means to put services to charity beneficiaries back on track where, owing to accident or design, things have gone wrong”. They stress that a formal inquiry is only instituted in the absence of co-operation from trustees, and where there may be a need for intervention such as the suspension or dismissal of trustees or the freezing of accounts. However, an inquiry is likely to be opened, and a report published, where there is prima facie evidence of fraud, serious or wilful maladministration or deliberate abuse.
Powers to assist with administration
In addition to its registration and regulatory work, the Charity Commission has comprehensive powers to assist in the proper administration of charities, along similar lines to the powers of the Commissioners for Charitable Donations and Bequests in Ireland. They include powers to apply charitable property cy-près, make schemes for the administration or reorganisation of charities, establish common investment funds, authorise dealings in charity property, give directions in relation to dormant bank accounts, make arrangements for the preservation and safe keeping of charity documents, approve disposal of charity land and mortgages, and incorporate charity trustees.

The size of the charity sector in England and Wales can be quantified, thanks to the charity register, at 185,000 registered charities, of which 159,000 are main charities, the remainder being subsidiaries, branches or constituents of group charities. A further 100,000 are estimated to exist outside the requirement for registration. Their gross income is around Stg £24 billion. This is a large and significant sector in economic and social terms. The Charity Commission which supports and regulates it has done so for 40 years, and has built up considerable administrative expertise and experience. It also has the resources to do so: in 2000/2001 it spent over Stg £21 million and employed 540 people.

No other jurisdiction which we have studied has an organisation similar to it, nor offers the same level of support and systematic regulation. As such, it is the leading model of what a charity commission can achieve, and is the experience we have had most in mind in undertaking our research and developing our conclusions.

IV. SCOTLAND

Scotland is not subject to the legislation on charities which is in force in England and Wales. Prior to 1990 the imperative to gain recognition of charitable status came from the tax exemptions available to charities. The Claims Branch of the Inland Revenue decided whether a body should be recognised as one whose income was applied exclusively for charitable purposes and could therefore avail of the exemption from income and corporation taxes. The definition of charitable purposes used by the Inland Revenue was the same as that used in the rest of the UK, so that for recognition and definition purposes, there was no difference between English and Scottish law. Registration of charities by the Inland Revenue was for tax purposes only. The information held by the Inland Revenue was not available to the public or other bodies because of the statutory

Footnotes:
49 Charity Commission Annual Report 1999-2000, 4.5
requirement of confidentiality. Even information on whether an organisation had charitable status for tax purposes was not available. The position in Scotland at that time was less open than the current position in Ireland, where the Revenue publish lists of registered charities, and contact addresses are available.

The Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, which came into force on 27 July 1992, introduced a new regulatory system to provide for access to information on registered charities and thereby to increase public accountability by charities. Information from the Inland Revenue’s register of charities is now available to the public as to charitable status, name and address of the charity’s contact and date of last contact. The Inland Revenue continues to be the body granting or refusing recognition of charitable status for tax purposes, and checking charities’ accounts to ensure that monies are spent solely on charitable purposes. Requirements for charities’ accounts are set out in the Charities Accounts (Scotland) Regulations 1992. The Act does not require charities to file accounts, but in practice accounts are required when charities seek to reclaim tax. The Inland Revenue publishes some guidance booklets and has a helpline. Charities may request visits by the Inland Revenue to assist with account keeping procedures. Charities, like any other bodies, may be inspected and those reclaiming tax are likely to be visited at some point in order to check that proper records are being kept which can substantiate claims for refunds of tax in respect of deeds of covenant and gift tax.

Under section 2 of the 1990 Act, the Lord Advocate, the equivalent of the Attorney General in our jurisdiction, may apply to the court to prevent a body which is not registered in Scotland or in England and Wales, or is not an exempted charity in England and Wales, from representing itself as a charity.

Powers of investigation are granted by section 6 of the 1990 Act to the Lord Advocate, to investigate misconduct or mismanagement of registered charities or organisations claiming to be charities. He may act on his own volition and may undertake both systematic and specific investigations. This is done through the Scottish Charities Office, which was established as a division of the Crown Office to implement this legislation. He or his nominated officers have powers to elicit information and documentation in relation to a charitable organisation, and non-

Footnotes:

50. According to information obtained by telephone in November 2001, there are currently nearly 30,000 organisations registered as Scottish charities with the Inland Revenue. They suspect many are defunct or dormant. As there is no requirement to file an annual return, there is no systematic way of keeping the Scottish Charities Index up to date.

51. There is no directly similar power in England and Wales, where the focus is on fundraising. In that jurisdiction it is an offence to solicit funds for a bogus “registered charity”, see Part II of the Charities Act 1992, s. 63, as amended, and such cases are passed to the police, or if the offender is running a “charity” shop for private profit, to the Trading Standards authorities. It is possible of course to collect funds as an exempt charity, for example if the organisation comes under the income threshold. If funds are at risk, the Commission can impose a restraining order. It can also require registration, and institute an investigation to establish that the organisation is in fact exempt.
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compliance carries criminal penalties. He may suspend anyone in management or control of a charity for 28 days, and he may appoint someone to prepare accounts if they are not forthcoming. The Scottish Charities Office has legal, accountancy and investigative staff. In practice, the Lord Advocate and his office are reactive and do not initiate investigations or undertake systematic monitoring. However, they adopt a constructive approach to dealing with failings on the part of charities’ administrators, on the basis that many problems are the result of ignorance, inexperience and inefficiency and are amenable to resolution with help and support. The Scottish Charities Office is a source of useful guidance and advice to charity trustees, although there is no provision for an advisory role in the legislation.52

Trustees already have well defined duties and responsibilities if their charities are incorporated as companies limited by guarantee, or set up as a trust, but less so if they are unincorporated organisations. With trusts and unincorporated organisations, trustees can commonly be exposed to personal liability as employers, organisers of events and financial managers, as is the case in Ireland. The precise terms of the charity’s constitution is of importance in this context in clarifying the allocation of responsibilities between members of the organisation and the managing group and within the managing group. The 1990 Act imposed two additional duties on trustees: to furnish information including copies of accounts to members of the public and the Charities Office when requested to do so, and a duty to keep proper books of account in accordance with sections 4 and 5.

Regulations made under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 53 set out the form and content of charities’ accounts which are not incorporated. The accounts prepared by incorporated charities in accordance with the Companies legislation are acceptable to the Inland Revenue, and are subject to directions by the Lord Advocate. The SORP 2000 may be used, but any additional information required by the regulations must also be supplied. Members of the public are entitled to see the most recent accounts of any charity.

Section 7 continues with the powers of the Court of Session (equivalent to the High Court in Ireland), on the Lord Advocate’s application, to intervene in cases of mismanagement of charities. It includes powers to injunct organisations from representing themselves as charities, to suspend or remove “persons in management and control”, to appoint a manager, to freeze bank accounts, to restrict transactions and payments, to appoint trustees and to approve a scheme put forward by the Lord Advocate to transfer a charity’s assets to another charity. Provision is specifically made for

Footnotes:
52. Moody, Barker & Elliot, “The Legal Regulation of Scottish Charities”, (1995) JLSS 460
obtaining information from the Charity Commissioners of England and Wales in relation to charities which are based in that jurisdiction, and which may be subject to freezing orders in relation to money or property held by others in Scotland. (The Lord Advocate may also investigate non-Scottish charities operating or having property in Scotland). Expenses or costs may be awarded against the people concerned in the misconduct or mismanagement rather than against the charity itself.

Section 8 lists classes of person disqualified from being involved in the management and control of a charity registered with the Inland Revenue. They are persons convicted of an offence involving dishonesty, undischarged bankrupts, persons removed under section 7, or disqualified to act as a company director. Breach of this provision is an offence, which may be prosecuted up to three years after its committal. The Lord Advocate may grant a waiver in writing.

Other provisions of the 1990 Act are enabling: the Act also provides for the reorganisation of public trusts by the Court of Session, the winding up or amalgamation of small trusts, expenditure of small amounts of capital, dormant charities, appointment of trustees and alteration of purposes and winding up of charitable companies. A distinctive feature of Scottish charity law is the designation of certain religious bodies under section 3 of the 1990 Act. The Secretary of State may designate religious bodies on certain conditions, one of them being that the body has been established in Scotland for over 10 years, and another being "that the internal organisation of the body is such that one or more authorities in Scotland exercise supervisory and disciplinary functions in respect of" the body and that the body is subject to equivalent accounting and auditing obligations. This effectual exemption from some of the requirements of the Act is justified by the special position of the Kirk and certain other religious bodies in Scotland, and the equivalence of controls already in place. Another factor is that religious organisations are in many ways substantially different from lay charities in their organisation and controls.

There is no central body in Scotland responsible for driving policy in relation to charities. There is no one source of definitive information and advice for trustees and managers. There is no central body responsible for maintaining an up to date register of charities with basic information available to the public, and there is no one body responsible for charity operation and regulation. In many ways this minimalist regime in Scotland is similar to our own in this jurisdiction, as much by reason of the elements lacking as by the elements in common.

The McFadden Report
The future of charity law is the subject of a report, (the McFadden Report) published in May 2001 by the Scottish Charity Law Review Commission, which was set up to look at the future of charity
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law in the light of Scottish devolution, and the new powers of the Scottish Parliament to legislate in this matter.\textsuperscript{54} The report makes numerous recommendations, concluding that there is a need for a new organisation to decide on questions of charitable status, to regulate the sector and to protect the public and government\textsuperscript{55} interest. The report also identifies the need for principles to be drawn up which would align tests for qualifying as a charity more closely with current thinking. In general, the Review Commission was of the opinion that the current definition and practice is not sufficiently inclusive.

The findings of the McFadden report on charitable status are covered in more detail in the previous section. They stress the independence of charities, particularly in the context of government funding, and they propose that if more than one third of trustees are appointed by government, charitable status should not be accorded.

The report envisages an integrated system of Scottish charity supervision governing registration, regulation, reorganisation powers and fundraising. Such an organisation would also take on a role in support and assistance to charities, and would provide a one stop shop.

In certain respects their proposals differ from the Charity Commission regime, as operated in England and Wales. First, decisions as to charitable status would be taken by the new body, but could be appealed to an independent \textit{ad hoc} tribunal established by the government. Second, such determination would not be conclusive for tax exemption, although they envisage close collaboration with the Inland Revenue. This is because of the separation of powers of the Scottish Parliament, which can only change tax laws in a very limited way, and the UK Parliament. They propose that all organisations operating in Scotland should register, but that those already registered elsewhere should have a simplified registration procedure.

The McFadden Report has much to offer, dealing as it does with a situation similar in many ways to the current situation in this jurisdiction.\textsuperscript{56}

Footnotes:

\textsuperscript{54} The report is available from the Charity Review website at http://www.charityreview.com
\textsuperscript{55} As government is the largest funder of charities, after the public.
\textsuperscript{56} An interesting response to the report was prepared on behalf of the Charity Law Association by a working group chaired by Francesca Quint on 27 September 2001.
VI. CANADA, AUSTRALIA AND NEW ZEALAND

Canada

Canada is a federation of provinces, and responsibility for charity registration and regulation is divided between the central federal authorities, with responsibility for deciding charitable status so as to qualify charities for tax privileges, and the provinces, which are largely responsible for the proper administration of charities, fund raising and all other matters. The Charities Directorate of Canada Customs and Revenue Agency (CCRA) is empowered to decide which organisations qualify for income tax exemption and gift deductibility purposes, and in the context of protecting the integrity of the taxation system, to regulate, monitor and audit the financial management and related activities of charities. Provincial regulation of charities varies in the different provinces, but for example in Ontario, which is one of the more prosperous provinces with a well developed charity sector, there are laws governing the creation and conduct of charitable trusts, licensing of charitable casinos, lotteries and other fund raising ventures, and registration of charities by the Office of the Public Trustee.

Taxation and therefore tax exemption for charities is a federal matter, whereas jurisdiction over charities otherwise belongs to the individual provinces. This has resulted in a considerable fragmentation of charity law, and its underdevelopment. There is no central authority like the English Charity Commission to develop and consult on a coherent development of the definition of charity. The mandate of the tax officials who make decisions on charitable status is primarily to prevent fraud and enforce compliance, but their decisions define the nature and scope of charitable activity in Canada. Charity is not defined in the Income Tax legislation, and its definition is based on existing caselaw, current practice in the CCRA and the results of occasional appeals to the courts. Non-profit organisations form an additional category in Canada which entitles them to exemption from income tax, but they may not issue tax receipts for donations. The CCRA also decides whether applicant organisations should be charities or non-profit organisations.

The point is persuasively made that while revenue officials may have the authority to adapt the law of charities to novel applications, they lack the legitimacy to do so, and thus remain dependent on infrequent and sometimes indeterminate judicial pronouncements.

To apply to the CCRA for charitable registration, applicants are required to file a standard form accompanied by certified copies of all founding documents, a statement containing full details of

Footnotes:
57. Previously Revenue Canada.
60. Ibid.
Charities are required to file the same annual returns regardless of size and resources. They are a “private” and a “public” return. The “private” return must include financial statements which show the charity’s sources of income and nature of disbursements and expenses. The penalty for not doing this is de-registration, which is not always rigorously applied because it is considered too drastic under some circumstances. However, inconsistent application of the law undermines public confidence in the system. The solution for this in England and Wales is graduated standards for charities of different size.

After the Broadbent Report, 1999

The issues arising for charities and non-profit organisations were examined in 1999 in the Broadbent Report, and as a result of their recommendations the Canadian government and the voluntary sector held a series of “Round Tables” to examine issues in relation to a number of areas including a regulatory framework. Three options were settled on and released for public comment:

- Retain the status quo, make the process more open, leave all power with the CCRA, which would be assisted by a committee of knowledgeable persons;
- Create an Agency to complement the CCRA’s role by offering advice and support to charities and voluntary organisations, and providing information to the public (along the lines recommended by Broadbent);
- Create a quasi judicial Commission, similar to the Charity Commission in England and Wales, which would take over the CCRA role and give authoritative advice to the voluntary sector.

The Round Table Report indicated that the third model was favoured by the voluntary sector members, while the government members believed that any of the three models would work. Drache and Hunter comment: “It is our belief that the fact that the Commission concept was unanimously embraced by the voluntary sector representatives of the Tables while the civil servants remained neutral amongst the three options simply shows that the sector people have been living with the issues and problems for a much longer time than have the bureaucrats”.

Footnotes:

61. "Building on Strength: Improving Governance and Accountability in the Voluntary Sector", by the Panel on Accountability and Governance in the Voluntary Sector, a non-governmental group chaired by Ed Broadbent. It is available on the internet from http://www.ccp.ca/information/
Australia

Australia63, like Canada, is a federation of states and as such shares jurisdiction over charities between the federal government (the Commonwealth), and the member States. The main legislative framework impacting on charities at a federal level is the tax system, which contains varied concessions open to charities and three other types of organisation: public benevolent institutions, religious institutions and community service organisations. The tax concessions include income tax exemption, fringe benefit tax exemption or rebate, and a goods and services tax concession. Further, donors can claim a tax deduction in respect of gifts made to deductible gift recipients, and charities typically seek to have themselves “endorsed” by the Australian Tax Office (ATO) as such.

“Endorsement” by the ATO is not necessary for all tax concessions, some of which may be self assessed and self applied. Thus, charities do not need to be endorsed for goods and services tax concessions, and public benevolent institutions do not need to be endorsed for fringe benefits tax. Even when endorsement is required, it is a once off assessment, and apart from a requirement that the organisation advise the ATO of any material change in its circumstances, there is no requirement to provide financial or activity reports on a regular basis. As with any other organisation, a charity may be audited as part of the tax enforcement regime. In this, there are strong similarities to the situation in Ireland.

Certain environmental and cultural organisations are required to provide statistical information on gifts which they receive to appropriate government departments, and environmental organisations are required to provide government with information on their financial affairs, an obligation which is not shared with other deductible gift recipients.

Company law requires charities availing of corporate status to be registered and comply with company registration and reporting requirements, and of course any charities acting as service providers to arms of government will have contractual arrangements which will commonly include reporting and financial transparency.

There is however no Commonwealth agency with statutory responsibility for the overall administration, governance or behaviour of charities.

The States which make up the Commonwealth also have jurisdiction in relation to charities, and

Footnotes:
63. We are indebted for much of this information to the Report of the Charities Definition Inquiry, June 2001.

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offer further tax concessions, which generally require application to the relevant State agency to be availed of. Some States accept ATO endorsement as evidence of charitable status, but there is no Commonwealth/State protocol which provides a streamlined and authoritative process for determining charitable status for all purposes, a lack which is keenly felt by organisations having to prove their charitable status separately to different state agencies.

The States generally have legislation relating to the supervision of charitable trustees, and in many cases the Attorney General has powers to require disclosure and order investigations. This however does not amount to a regime of regulation requiring regular reporting to government agencies, and as a tool is used *ad hoc* rather than systematically.

In relation to charitable fundraising, charities are required to be registered with the relevant State agency to be authorised to conduct fundraising activities. The New South Wales Charitable Fundraising Act 1991 is a good example. It requires registration (with some exceptions) and charities are subject to accounting and audit requirements and inspection. Not only charities but also benevolent, philanthropic and patriotic organisations are covered. Section 4 regulates the remuneration of nonprofit fiduciaries (trustees). According to the Report of the Charities Definition Inquiry, at the time of publication in June 2001 a working party was working on uniform requirements to apply throughout the Commonwealth.

States also have differing requirements for not for profit organisations which are “incorporated associations”. Some require annual audited accounts to be filed after presentation at the organisation’s AGM, and available for public inspection. Others have no requirement even for proper accounting records to be kept, let alone audited.

Finally, a number of the larger and older charitable organisations are incorporated by their own Acts of Parliament, which can contain widely varied reporting requirements.

New Zealand

The current system of tax relief for charities, their definition and registration is the subject of debate in New Zealand and has resulted in the publication of a report in June 2001 on Tax and Charities.64

In New Zealand, there is no formal process for registering charities. While it is normal practice for charitable organisations to submit their founding documents to the Inland Revenue for approval of charitable status for tax purposes, this is not required, and the Revenue view is not binding unless

Footnotes:

a binding ruling is obtained. Charitable status is ultimately a matter for the courts. It is possible for a charitable organisation to exist and derive untaxed income without the government being aware of this.

The Institute of Chartered Accountants sets the standard for charitable and non profit organisations in accordance with its generally accepted accounting principles. There are no specific accounting standards for charities such as the Statement of Recommended Practice for Accounting and Reporting by Charities used in England (SORP).

Several provisions of the Tax Administration Act 1994 potentially apply to charities:

- Under section 32 all gift exempt bodies must keep records sufficient to enable the Inland Revenue to determine both the sources of the donations and their application.
- The Inland Revenue may require gift exempt bodies to furnish returns showing the sources and application of donations (section 58).
- Under section 80 the Inland Revenue have a general power to require any person or body, whether a tax payer or not, to furnish any return they deem necessary for the purposes of the Tax Administration Act or the Income Tax Act.
- Under section 89, if the Inland Revenue believe that the funds of a gift exempt body are being misapplied, they will inform the Minister.

The Charitable Trusts Act 1957, section 58 gives the Attorney General full discretionary powers “to examine and inquire into all and any charities in New Zealand . . . and to inquire into the nature and objects, administration management and results thereof, and the value, condition, management and application of property . . .” The Attorney General may delegate these powers. In the conduct of such an inquiry, he may require production of any documents relating to the charity and may apply to the court for an appropriate order in cases of breach of trust. Under section 60, any person can sue to enforce the charitable purposes of a trust.

As in Ireland, these powers are not much used in practice because there is no routine way in which information relating to charities and their administration comes to the attention of the Attorney General. His approval may be sought for a scheme of reorganisation. Otherwise, it needs a trustee or a member of the public to make a complaint before an investigation is made.

Report on Tax and Charities, June 2001
The current debate on tax and charities is concerned with the effectiveness of the tax exemptions

Footnotes:
65. Bodies other than charities can be gift exempt. They include any organisation "the funds of which are applied wholly or principally for any charitable, benevolent, philanthropic or cultural purposes in New Zealand".
66. S. 53
currently enjoyed by charitable organisations, and the need for a means of measuring them and rendering the charitable sector, its costs and outputs, more transparent. In this context the Tax and Charities report considers a system whereby charitable status would have to be approved before eligibility for tax concessions would arise. The reports states:

“8.12 Essentially, approved registration would involve an assessment of whether the purposes for which the entity was established were charitable, and would likely be binding on both the charity and Inland Revenue. Because of the binding nature of the decision, it would have to be administered by an independent body.”67

Charities would file annual accounts (audited when appropriate) and, possibly, tax returns. The names of charities and their annual accounts would be publicly available. The activities of charities would be regularly monitored (by either the Inland Revenue or an independent body) to ensure that the charitable objects for which their tax exemption was granted were, in fact, being pursued. The sanction of de-registration would be available in the event of failure to pursue its charitable purposes, or if other requirements were not met. Such a system would give the government information as to the cost and uses of the tax forgone through charitable tax concessions, as well as serving to build public confidence in the sector and its regulation. The report suggests a possible threshold for smaller charities, below which they would only have to produce a simple income and assets statement.68 In addition to annual accounts, the report considers a requirement for tax returns to include:

- income – amounts and sources;
- expenditure – including details of amounts distributed to charitable purposes (including amounts distributed overseas)
- assets and liabilities, and perhaps
- remuneration bands for senior staff.69

The perceived advantage in requiring charities to file tax returns as well as annual accounts is that it would provide more accurate information about the amount of tax forgone by the Inland Revenue, and the burden on charities of making these returns would be less than the burden on the tax authorities trying to analyse annual accounts, as the charities would be filing annual accounts anyway.

Footnotes:

68. At 8.17
69. At 8.18
VII. REGISTRATION

In surveying the developments and current thinking in the countries we have looked at, including the proposals put forward in this jurisdiction, there is unanimity on the desirability of a system of registration and regulation of charities for the reasons given at the beginning of this chapter. The existing system of registration operated by the Revenue Commissioners provides a basis on which to build, as does the existing body of charity law contained in the Charities Act 1961 and 1973, the institution of the Commissioners of Charitable Donations and Bequests and the role of the Attorney General as representative of the public interest in relation to charities.

These recommendations are designed to give confidence to the public that the charitable sector is well regulated and supported. They should not be taken as implying that the sector has major problems of management or control. Many volunteers and voluntary financial contributions go to make the work of charities possible, and it is in the interest of these contributors as well as the interest of the beneficiaries of charities that evidence should be collected showing how the contributions of the public and volunteers are spent and used. Our survey found overwhelming support for more accountability, transparency and openness on the part of the charity sector.70

One registering and regulatory body – the Charities Registrar, the Charities Board and the Charities Office

We believe that it is desirable to have one agency to deal with charitable matters insofar as this is possible, and that such an organisation be responsible for supporting and regulating charities. We envisage an organisation with significant supervisory and quasi-judicial powers and it is therefore important that it have the confidence of the public and of the charity sector and that it should be seen to be independent of Government and of the charity sector itself. We recommend that an independent statutory office be created, to be known as the Registrar of Charities. In agreement with the Burton Report, the Registrar should be assisted by an Advisory Board in relation to policy matters, issues of charitable status and development of standards. We recommend, subject to consultation with that body, that the Commissioners for Charitable Donations and Bequests be reconstituted as an advisory board under the title of the Charities Board. Recognising their already heavy workload, it will be necessary to make additional support staff available to enable them to take on these extra responsibilities. In order to ensure that the Charities Board has experience of the charity sector as well as including legal and financial expertise, it may be necessary to make some new appointments. We recommend that the Charities Registrar be a member of the Board ex officio.

Footnotes:
70. See Appendix 1.
We recommend that both the Registrar and the Board should be supported by a Charities Office. Like the Companies Registrar, the Charities Registrar should operate independently under the auspices of a Minister responsible for charities.\textsuperscript{71}

We propose the titles “Registrar of Charities”, “Charities Board” and “Charities Office” ahead of the longer but more comprehensive “Voluntary Sector” Registrar, Board and Office despite the blurring of the distinction between charities and other non-charitable but important elements of the voluntary sector. The term “charity” has acquired an unfavourable connotation in some circumstances because of the implied patronage and inequality between those running a benevolent organisation and its clients. Significant funding by the state to contract out the provision of services to established charities, and conversion of volunteer help to paid staff, have arguably converted some charities to “non-profits”. The development of a strong self-help or community involvement in charitable activities can blur the distinction between charity, in the traditional sense, and self-help, mutual or community organisations. Nevertheless the technical term of “charity” involving disinterested altruism is a useful legal concept to which specially favourable conditions can be attached because of the strict standards of public benefit and altruism demanded. The choice of “Voluntary Sector” Registrar, Board or Office for the title of the registering and regulating body is premature at this stage, as there is no specific legal code, body of law or tax concessions for non-profit or voluntary non-charitable associations. However, if this should change, the role of the Charities Registrar, Board and Office can be expanded to encompass regulation of the wider voluntary sector, and the titles can be changed to reflect this. For the time being, the titles “Charities Registrar”, “Charities Board” and “Charities Office” should be sufficient and appropriate.

We recommend that the Charities Office (as we shall call the Registrar, Board and Office together) should have a role encompassing

- the decision of issues of charitable status;
- the maintenance of a register of charities;
- the public accountability of charities;
- the regulation of charities and monitoring them on an ongoing basis;
- the provisions of a support service for charities, particularly in relation to compliance with registration and other legal requirements; and
- the protection of the public interest by monitoring and investigating possible abuses.

The Charity Commission of England and Wales has as its stated function “the general

Footnotes:
\textsuperscript{71} The terms under which the Director of Corporate Enforcement acts could serve as a model, see the Corporate Enforcement Act 2001 (no. 28).
function of promoting the effective use of charitable resources by encouraging the
development of better methods of administration, by giving charity trustees information and
advice and by investigating and checking abuses’. We recommend that a similar role be given
to the Charities Office, providing a focus for charities in Ireland and developments in the
charity sector in the future.

Role of the Attorney General

The AG holds the residual power of the state to act in the protection of charities. He may bring
proceedings in defence of charities such as

- proceedings for the restitution of charity property;
- claim for damages and interest for breaches of trust;
- injunctive relief to prevent a breach of trust or its repetition;
- appointment or removal of trustees or officers;
- appointment of a receiver or manager; and
- establishment of a scheme or determination.

The AG also has a role in proceedings brought by others in relation to charities or affecting them. He is generally required to be notified, and may be joined to represent the interests of the charity, the beneficiaries or the public interest, for example, if a charity is being sued, a gift to a charity is being disputed or an insufficiently specific gift to “charity” is made which requires decisions as to where it should be applied.

The AG also has a background role in relation to some of the powers of the Commissioners for Charitable Donations and Bequests. Section 23 of the Charities Act 1961 requires that he give his prior consent to the Commissioners suing for the recovery of a charitable gift, and section 26 of the same Act provides that the Commissioners may certify a case to the AG if they think it desirable that legal proceedings should be taken. The AG must be notified if any proceedings are being taken which will affect a charity or charities in general, and he will generally be joined in the proceedings to represent the interest of beneficiaries.

The question arises as to whether it is useful to preserve the role of the AG in relation to charities in the context of a new administrative and regulatory body, the Charities Office, which we recommend should be established to do essentially the same job, and more. In favour of preserving the AG’s powers and role alongside that of the Charities Office is the argument that concurrence of powers is a useful balance which can prevent arbitrary action or lack of action at the discretion of

Footnotes:

72 Part 9 of the Schedule to the Ministers and Secretaries Act 1924. See further O’Halloran, Charity Law, (Round Hall Sweet & Maxwell, 2000) at p. 48
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one organisation which has a monopoly of power. The AG has power to institute and maintain proceedings on his own motion, and unless his powers are explicitly transferred to the Charities Office, he will be able to perform a potentially important alternative role in acting on behalf of charities or beneficiaries.

Against preserving a role for the AG is the argument that a specialist administration is being set up to effectively assume his role, but with more resources, a regulatory regime and related powers, and that it is unrealistic to imagine that a real alternative is desirable or in practice will continue to be available. If a charity requires representing or defending, it is better that there should be one clear office charged with this task.

We have considered the model used in Part 2 of the National Treasury Management Agency (Amendment) Act 2000. It establishes a State Claims Agency as part of the NTMA's functions to which can be delegated the management of claims and counterclaims made against Ministers, the Taoiseach, the State, the Attorney General and any other State authority. The management of individual claims or classes of claims may be delegated by the Government, and such delegation may also be revoked. Responsibility and concurrent power to act remain vested in the original Minister or body responsible, but may only be used if the Minister gives a direction for the Agency to cease to manage any delegated claim. The Minister may do this only under certain conditions: at the request of the Taoiseach in relation to claims against the State or the AG, or at the request of a relevant Minister of the Government and after consultation with the AG in relation to all other claims, and if the Minister is of the opinion that it is in the interests of the State to do so. Following such a direction, the claim concerned may not be managed or further managed by the Agency. The Government has the last say, and may by order amend or revoke any direction given under this section by a Minister.

This model could be used for the relationship between the proposed Charities Office and the AG as follows. The powers of protection of charities traditionally held by the AG could be delegated to the Charities Office. Under certain conditions, after consultation with the Minister responsible for charities and the Charities Board, the trustees or any important stakeholder(s), the AG could make an order directing the Charities Office to desist from dealing with the charity except in relation to its usual registration function. In order to make such an order, the AG would have to have reasonable grounds for believing that this was in the best interests of the charity. The power of the AG to act on behalf of charities would continue concurrently with the delegation to the Charities Office, but would only be exercised when the Charities Office’s power was suspended.

Footnotes:
74. No. 39 of 2000
75. S. 9 (1) and (3)
76. S. 9 (3) (e) and (f)
77. S. 9 (4)
78. S. 9 (5)
We believe that such a model would retain the traditional *parens patriae* jurisdiction of the Crown in the AG, but would devolve it to a specialised body, the Charities Office, on a routine basis. If it were ever felt to be necessary, the AG could reclaim his traditional powers in relation to specific cases or a class of cases. The AG will thereby have scope to develop a role for his office in monitoring the activities of the Charities Office, advising and intervening in those occasional instances where a charity or its beneficiaries require his intervention, whether by way of appeal from a Charities Office decision to the High Court, or in deciding to pursue a case where the Charities Office has decided not to do so.

We recommend that the primary representative of the public interest in relation to charities should be the Charities Office. We recommend that the traditional powers of the AG in relation to charities should be retained by the AG concurrently with the new powers vested in the Charities Office, but not used unless a formal order is made by the AG to suspend the regulatory powers of the Charities Office after consultation with the Minister responsible for charities and the Charities Office, the trustees of the charity or charities concerned or any other important stakeholders, and where the AG has reasonable grounds for believing that this is in the best interests of the charity.

Ministerial responsibility

We envisage that a Minister will have political responsibility for the Charities Office, that the Board will report to the Minister and that the annual report of the Board will be laid before the Houses of the Oireachtas by the Minister. The Minister will also be responsible for making any necessary regulations under legislation establishing the Charities Office and its functions.

User Panel

The independence of the Charities Board must mean that Board members cannot be seen to be representative of the charity sector. However, as the main users of the system, the charity sector should have some formal way of interacting and making representations to the Charities Office. We recommend the institution of a User Panel to fulfil this role. Its constitution and membership is primarily a matter for the sector, but there should be statutory provision for a representative and consultative role. We recognize that representation of the sector is likely to be difficult, as it is so fragmented at present. However, such a user panel may in fact be helpful in providing a body around which interested charities can coalesce.

Charitable status

We recommend that questions of charitable status should be decided by the Charities Board,
and that their authority should be given a statutory basis. We see many advantages in the
approach adopted by the English Charity Commissioners in relation to specific and general
questions of charitable status. We recommend that following the English example,
controversial issues in relation to charitable status should be approached by the Board
consulting with the Revenue Commissioners and other interested parties, inviting comment
from the public if that is appropriate, and arriving at reasoned decisions which are published.
Charity Board decisions, subject to appeal, should be binding on the Revenue Commissioners and
others including rating authorities. We consider it inappropriate that questions of charitable status
should be decided by the taxation authorities, as happens at present. Their role is to collect taxes
in accordance with the law. While tax concessions are important for many charities, the issue of
charitable status has implications wider than taxation exemption and extends to public standing, the
ability to attract the public’s goodwill and the credibility to perform an advocacy role. Many
charities are too small to benefit from tax privileges. Questions of policy in relation to charities are
more properly dealt with by a specialist body concerned with driving the development of the charity
sector in a progressive and coherent manner, and our proposals for a Charities Office are designed
to supply this role. We recommend an integrated system of registration, regulation (including
regulation of fundraising), supervision and support of the sector as a whole, to be legislated
for in comprehensive new legislation.

Suitors’ fund
In addition to the proposed power of the Charities Board to make decisions on charitable status, we
recommend that a suitors’ fund be established to help finance cases involving important
points of law in the High Court. The lack of charity cases before the courts in the past decades
is a result of the reluctance of charities to engage in litigation because of the perceived risks and
the known expense. The availability of a suitors’ fund would enable important points to be brought
before the courts. The money for this fund will most likely have to come from the State, and its
size, criteria for use and replenishment will have to be worked out carefully between the sector, the
Charities Office and the Government.

The advantage of having High Court decisions in some circumstances is that the High Court is not
constrained by administrative or cost considerations in the way in which an administrative body
may be. Further, there may be issues of principle between charities and the Charities Office which
need to be resolved on appeal. Unless there is a means of funding such cases, the likelihood is that
they will not be taken and the development of the law will be stultified and it will fail to serve the

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Registration

Our survey indicated that there is very high support (94%) among charities for the establishment of an Irish Charities Register on which all Irish Charities would be registered. 80

We recommend a general requirement for all charities operating in the Republic to register with the Charities Office, subject to an exemption for small charities which do not fundraise. In England and Wales the exemption relates to a charity’s income, and currently charities with an income of under Stg £1,000 are not required to register. We recommend that a similar threshold be chosen here, set perhaps at an income of €2,000 or under or assets of €10,000 or under. In general, we see the advantages of having standards and rules similar to those in adjoining jurisdictions, so as to avoid register shopping by dubious organisations for registration in a less regulated jurisdiction. While small, non fundraising charities should not be required to register, they should be free to do so and avail of the credibility of registration.

We believe that all larger charities, being those with an income over €2,000 or assets over €10,000, should be required to register because of the tax and fundraising advantages which being a charity confers. If trustees fail to register after notification by the Registrar to do so, we recommend that the Registrar should have power to bring the matter to the Circuit Court for a mandatory order. It is in the public’s interest to know of the existence of charities operating in its midst, to have the confidence that they are properly regulated and accountable for the resources provided through public goodwill, and to have access to basic information about them. We recommend that no organisation over a certain size, as outlined above, should be entitled to call itself a charity or a registered charity without being registered as such.

While in principle we believe that every charity over a certain size should register and be regulated by the new Charities Office, we do not exclude the possibility that there may be occasions when charitable organisations are effectively registered and regulated by other organisations, and that the relevant information is available to the public. Some hospitals and universities could come within this category. In order to avoid a duplicated burden of registration and regulation, we recommend that the Charities Office should have discretion to grant exemptions in such cases or categories of cases. The Charities Office would of course have to ensure that sufficient information was available to it and to the public to give the same standard of accountability as is

Footnotes:

79. We are indebted for this suggestion to Blake Bromley, the distinguished Canadian voluntary sector lawyer, as well as the Charity Law Association response to the Report of the Commission on the Reform of Scottish Charity Law, 27 September 2001.

80. Appendix 1, 5.6
required of other charities. This may well involve working closely with the other regulating authority to develop formats and information sharing procedures.

We recommend that the new Charities Office develop its own requirements as to the information to be provided on registration. As a minimum, we suggest that the information currently sought by the Revenue Commissioners be required. In developing its requirements, the Charities Office will need to balance the public’s legitimate interest in information relating to a new charity seeking registration, against the administrative burden placed on organisations which often rely on volunteers and therefore have limited time, energy and administrative expertise. The survey revealed 87% support for publication of details of directors, management and places of operation, although there were reservations in relation to the need for respect for the personal lives and privacy of those concerned.81 The survey also revealed 77% support for the annual reporting of balance sheets and income and expenditure accounts to the Registrar, and 53% for their publication.82

As is already the case with registered companies, charities should be subject to some control in relation to the names chosen by them for registration. It is important that a name should not be misleading and should not cause confusion with another charity or organisation. We recommend that the Charities Office should have powers similar to the Companies Registration Office to refuse registration of a name or require a change of name where

- it is identical or similar to a name already used by another charity, company or organisation;
- it is potentially misleading;
- it is offensive; or
- it may incorrectly imply state sponsorship.

Under the Charities Act 1993 (England and Wales) the Charity Commissioners can require a charity to change its name within one year of registration.

Transitional arrangements will have to be made for all those existing charities which already have charitable status with the Revenue Commissioners, to assist them in registering with the Charities Office as soon as possible. This is a matter which we recommend should be left to the new Charities Office in consultation with the charity sector.

Annual reports and accounts
As noted above there are currently no formal accounting requirements for Irish charities.83 Of the

Footnotes:
81. Ibid., 5.7
82. Ibid., 5.8
Charities surveyed for the purposes of this report, 19% of those replying to this question confirmed that they comply with many or all of the requirements of the UK Statement of Accounting Practice 2000. It is desirable that charities above a certain size, particularly those involved in fundraising, should provide fully transparent annual reports and accounts. This enables the donating public to be reassured as to the proper application of the funds donated for the stated charitable objects of the body to whom the funds are given. There are many merits in adopting a SORP that is already recognised to varying degrees in the three nearest neighbouring jurisdictions.

We therefore recommend that registered charities, unless exempted because of size, be required to file annual reports and accounts, using a version of the Statement of Recommended Practice in relation to Accounting and Reporting by Charities, 2000 (SORP). This statement was revised in 2000 under the auspices of the England and Wales Charity Commission, and was approved by the Accounting Standards Board (ASB) as having been developed in accordance with the ASB’s code of practice. It is stated specifically to apply to all charities in the United Kingdom and the Republic of Ireland, and as such is already being used by accountants in their preparation of charities’ accounts in this jurisdiction. It sets out comprehensive requirements for both the preparation of trustees’ or directors’ reports and charities’ accounts.

Despite the statement contained therein that it applies to charities in the Republic of Ireland, the SORP has not in fact been endorsed by the Institute of Chartered Accountants in Ireland or any other Irish body, and therefore may require review to ensure that it meets with specifically Irish requirements, and may also require review from time to time to reflect changing requirements. We recommend that the Charities Office work with the Institute of Chartered Accountants and representatives of the charitable sector to review the SORP initially to ensure its suitability for Irish conditions, and then periodically to ensure it reflects changing requirements.

The main aim of the SORP 2000 is that the accounts should include all the money and other assets entrusted to the charity and show how that money is expended and the balance deployed. The Statement of Financial Affairs is not to demonstrate the charity’s efficiency or future needs but to show how a charity receives and applies its resources to meet its objectives.

In looking at how to develop an Irish model and whether to vary the requirements of SORP 2000, it would be prudent to consider the original experience of England and Wales. The Charity Commission published a consultation paper on the 1995 Regulations and the original SORP. In particular it had been found that a breakdown of income by reference to the strict legal nature of

Footnotes:
84. Appendix 1, 7.3
85. Available from the Charity
86. SORP 2000, paras 10 and 11.
the resources restricted the presentation of accounts in a meaningful manner. In this area the requirements of the SORP were made more flexible. At the same time other aspects such as the disclosure of institutional and individual grants were made more stringent.

It is possible that the first attempt at the reporting requirements will be capable of improvement and we recommend that the Minister or the Charities Office be enabled to change the reporting requirements without the need for changes to the primary legislation.

In our survey of charities the view was held by only 24% of those responding to this question that lesser reporting and accounting standards should be required of smaller organisations. The majority of 61% were of the opinion that all charities should prepare full accounts regardless of size, and 15% were undecided. We recognize that the SORP may impose too high a standard of reporting on smaller charities and recommend that in the case of charities with an annual income below say €25,000 or assets valued at below say €125,000, and not employing any staff, simplified reports and accounts such as an income and expenditure account and balance sheet would be acceptable. A form for this purpose could be developed by the new Charities Office. Further, we recommend that the accounts for such smaller charities need not be professionally audited or independently certified, but instead should be signed off by two or more named trustees.

We recommend that larger charities' accounts, perhaps involving an income of up to €125,000 or assets of up to €650,000, be professionally audited or independently certified, and that the accounts of the largest charities, those with incomes over €125,000 or assets of over €650,000 be professionally audited. We recommend that these thresholds should be reviewed regularly, and be adjustable by the Charities Office or ministerial order and not dependent on primary legislation.

There is at present no outside body to whom auditors are obliged to report if anything of concern is found in the course of their audits, unless the charity concerned also happens to be a company and is therefore covered by company law on the matter. Their only existing duty is to bring such matters to the attention of the trustees. We recommend that auditors and others certifying accounts be placed under a duty to report any matter of concern to the new Charities Office, as well as to the trustees of the charity concerned.

Footnotes:
87. See paragraphs 23-27 of the Charity Commission consultation paper on Charity Reports and Accounts.
89. Appendix 1, 7.4 (2)
Payment for registration

The response from our survey of charities on this question was 15% in favour of paying a registration fee, 65% against and 20% undecided. The argument against payment of a fee to register is that this is not a proper application of charitable funds, and that the cost of maintaining the Register and the Charities Office should be paid from central funds. We acknowledge the merit of this view and we recommend that the main cost of running the Charities Office and its work should be born by central funds. If a registration fee is charged, it should be modest so as not to deter the many charities whose work does not involve the collection and spending of significant sums of money. We recommend that a registration fee, if any, should be set from time to time by the Charities Office or by ministerial order in consultation with the Charities Office.

Need for sufficient funding

A strong point was made to us in the course of our consultations with charities in the preparation of this report. It was to the effect that proper funding for a new registration and regulation system will be of vital importance to ensure that it is comprehensive and achieves credibility in the eyes of the public. In this way it will confer credibility on the charity sector, giving the public confidence that it is well regulated and supported. If sufficient funding is not made available and the new Charities Office fails to gain public credence, the charity sector risks being left with the worst of both worlds – the burden of reporting to and regulation by the Charities Office, without the public confidence which it is designed to confer. We recommend that the proposed Charities Office and related activities should be properly funded.

Accessibility of Register information

Accessibility of Register information is a key factor in achieving the credibility, transparency and accountability of the sector and individual organisations. It enables the public to assist in the regulation of the sector. Any member of the public who is curious, suspicious or in doubt about an organisation must be able to readily access information held on the register as a first step to checking its status.

We recommend that the information held on the register be readily available to the public, including by means of a website, and important decisions, standards and processes should also be published, assisting charities in understanding the principles to which the Charities Office is working, and also making the public aware of the Charities Office and its work.

Footnotes:

90. Ibid., 5.5
91. This in any event is a statutory obligation on public bodies under s. 16 of the Freedom of Information Act 1997.
We recommend that the Charities Office publish a comprehensive and timely annual report, to be laid before the Oireachtas by the Minister responsible for charities.

Co-ordination role
The lack of co-ordination between voluntary organisations is an ongoing concern to those involved, because of the potential for duplication of effort, waste of resources and confusion of clients. There is a public perception in England and Wales which could well be shared here that there are too many small charities which would benefit from merging to make larger, more effective organisations. The process of registration can serve as a contact point between existing charities and applicant charities, and the Charities Office will be well placed to put charities with something in common in touch with each other. This may result in fewer new charities being registered, or in existing charities being merged, as people learn of the existence of charities already operating in fields in which they are interested. The potential advantages of avoiding duplication or charitable work in the same field and of economies of scale, such as reducing administration overheads, are obvious. However, nothing should prevent a new charity being registered if this is really what the applicants want, as denial of registration risks to stifle diversity, innovation and civic involvement. We recommend that as part of the registration process the Charities Office should inform applicant charities about existing organisations where there is a possibility of overlap of interest.

The survey replies indicate interest on the part of charities in having access to the information available from a register. In reply to the question ‘Do you think all charities should be registered on a central register?’ one of the reasons given for the 94% positive response was the advantage to other charities in having access to this information and being able to network.

Reduction of duplicated reporting
Some charities will already have obligations to make annual returns with accounting information to other regulatory bodies. As noted above, all incorporated charities come within this category because of their legal obligation to make annual returns to the Companies Office. It is obviously desirable to reduce the administrative burden on charities where possible by standardising the reporting requirement. We therefore recommend that the Charities Office work with other...
organisations to standardise the reporting requirements where possible, and agree protocols for sharing or forwarding information so that charities only have to file this information once.

In order to satisfy the intended aim that the regulatory burden operates independently of the underlying legal structure, there is a method which at first sight from a theoretical angle appears to be the simplest resolution to issues of dual reporting burdens. It is to exempt companies which are registered charities and which have complied with the charitable reporting requirements, from compliance with Companies Office requirements. This could be achieved by means of a simple return to be forwarded to the Companies Office confirming compliance with the requirements of and submission of the necessary annual reports to the charity regulatory body. Amending legislation to the Companies Acts 1963 – 2001 would be required.

This would not affect the reporting requirements of those charitable organisations which do not seek registration.

**Registration of foreign registered charities**

With the advent of the Euro, the increasing flow of people between different countries and the possibilities opened up by easier communication both in person and electronically, transnational activity by charitable groups can be expected to increase. The issue will increasingly arise as to the registration of foreign registered charities. For example, a charity may be registered in England and Wales, and have a small operation in Ireland. Should it be necessary for such an organisation to register afresh with the Irish authorities, given the comprehensive registration and regulation to which it is already subject?

We recommend that the registration in Ireland of foreign registered charities should be an operational decision left to the Charities Office, but that in general where the foreign registration and regulation is of at least a similar standard to that obtaining here, and the relevant details are available to the public, a simplified form of registration should be permitted to reduce the administrative burden on the charity concerned. Registration and regulation of non-Irish charities could be limited to any activities which they carry out in this jurisdiction, for example, fundraising. A difference in the CHY or other registration number could be made to indicate to the public that the charity concerned is a foreign registered one.

We recommend that in due course the proposed Charities Office enter into dialogue with charity registration authorities in neighbouring jurisdictions, starting with the Inland Revenue in the North, to agree reciprocal recognition and registration arrangements. These discussions should also address the question of criteria for deciding where an organisation
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should register. We recommend that there should be consultation with the authorities in Northern Ireland with a view to harmonising processes both in the North and the Republic as much as possible, as the Northern Irish law on registration is also in a state of development and there is an exceptional opportunity to coordinate the two systems. There may even be scope for a cross border institution, a registration body common both parts of the Ireland. In such a case, while the registration aspect would be in common, the regulatory aspect could be carried out, where it differed, by two separate offices.

Clearly there are advantages in having similar standards and controls to assist in avoiding fraudulent or badly managed charities seeking out the jurisdiction with least regulation in which to operate, and to use as a base for operations in other more regulated jurisdictions. There is anecdotal evidence from the Charities Commission that this is already happening in relation to English-based charities moving to the less regulated jurisdiction of Northern Ireland.

In relation to most tax exemptions, a charitable organisation must be established in Ireland in order to qualify for them. Such establishment may be a subsidiary operation of a foreign based charity, provided there is an “activities base” in this jurisdiction. The exception is Capital Acquisitions Tax. From July 1987, gifts for charitable or public purposes are exempt from CAT to the extent that the Revenue Commissioners are satisfied that they are charitable or public in accordance with the laws of the State. Charitable gifts may be applied within or outside the State. “Public” is not defined, but it would seem from the context of the wording to mean something different from “charitable”. A gift for a charitable purpose which is in accordance with the law of the State does not mean that the charity itself must be established in the State, and this provision opens the way for gifts and bequests to foreign charities.

If foreign registered charities are recognised here by the Charities Office, the question of their eligibility for tax exemptions (other than CAT) will still depend upon whether they have an “activities base” in the State. In most cases, foreign charities operating here have this. If it should arise that there is a growing number of foreign charities who wish to operate here, but do not have an “activities base”, it will be a matter for the legislature to review the requirement of establishment, in consultation with all concerned. Work is ongoing in the Commission of the European Community on promoting voluntary organisations and foundations across borders.

We recommend that all charities over a certain size operating in this jurisdiction be registered

Footnotes:

96. Revenue Commissioners v Sisters of Charity of the Incarnate Word [1998] 2 IR 553
97. S. 54(2) of the Capital Acquisitions Tax Act 1976 as amended by s. 50 of the Finance Act 1987
98. EU Commission “Promoting the Role of Voluntary Organisations and Foundations in Europe”, 1997
and be subject to supervision and monitoring by a principal regulator, whether the Charities Office or an equivalent body abroad.

Review of changes to constituting documents
The Revenue Commissioners currently require that any change to the objects of a charitable company or the terms of a charitable trust be notified to them, and that all constituting documents contain a term to the effect that no change to their terms is valid until notified to the Revenue Commissioners. **We recommend that the new Charities Registrar be empowered to require all changes to a charity’s constituting documents to be approved by the Charities Office before becoming effective.** This is designed to avoid changes which may remove an organisation’s entitlement to charitable status unbeknownst to the Charities Office, thereby allowing it to remain registered as a charity and avail of the benefits of that status including tax exemption, and to avoid changes in purpose which may jeopardise charitable assets by allowing them to be used for non-charitable purposes.99

Review of the Register and dormant accounts
**We recommend that the Charities Office undertake periodic or rolling reviews of the Register, to ensure that dormant charities are revitalised or appropriately wound up and de-registered.**

We note the provisions of the Dormant Accounts Act 2001, which came into effect on 1st January 2002.100 The Act establishes a system whereby financial institutions are required to annually contact account holders and/or advertise the existence of dormant accounts, and where they are not reactivated, to transfer the balances in the accounts annually to a Dormant Accounts Fund, to be managed by the National Treasury Management Agency. Accounts are considered dormant where there has been no owner-initiated activity on the account for fifteen years. They are expressly defined as including charitable accounts. This legislation may result in the reactivation of many older and defunct charities and the redeployment of their funds, whether by the charities themselves or in the case of defunct charities being wound up, other similar charities to which they might pass on the funds. Interestingly, so much of the Dormant Accounts Fund not set aside against future obligations is to be spent by a Disbursements Board on essentially charitable and community objects:

“(a) programmes or projects that are designed to assist the personal, educational and social development of persons who are economically, educationally or socially disadvantaged or

Footnotes:
99. See also chapter on Legal Structures, Default provisions for governing documents.
100. SI 593/01
persons with a disability . . . and, in particular, programmes or projects that are designed to assist primary school students with learning difficulties;”

We welcome this solution to the issue of dormant charity accounts, and we recommend that the 15 year dormancy period be reviewed in the light of experience, with a view to reducing it to five years. In the case of many charities, five years is a long time for activity to have ceased. A longer period than this makes it more likely that any charity concerned will have lost not only its momentum but most or all of those involved in its management. It is our view that the likelihood of the account being reactivated and the charity revived will reduce quickly after the first five years.

VIII. REGULATION

Registration of charities will give the public and the government information about charities and the sector as a whole, but it has another primary purpose: to provide the basis for the regulation of the sector, ensuring that it is accountable to the public for the many benefits accorded to charitable status. A system of accountability requires a regulatory authority, as is eloquently explained by Dr. O’Halloran:

“By accountability is meant the obligation resting on the recipient of charitable donations and related tax exemptions to satisfy a public interest that the use of privileged funds complies with the highest standards of ethical and fiscal probity. It must be demonstrably evident that charities and all charitable activities honour the trust of donors and remain constantly governed by the public benefit principle. Accountability requires systems to provide the means whereby charities, their activities and outcomes, can be identified, monitored and measured against agreed standards. It implies the existence of a specific body, vested with regulating authority, to which charities are accountable, which differentiates between acceptable and non-acceptable activity and imposes sanctions in respect of the latter.”

We recommend that all charities, including those exempted from registration, should be accountable to the Charities Office as the primary regulatory authority of the sector.

Regulation must be capable of being applied uniformly, regardless of the legal structure used by any organisation; for example, unincorporated organisations governed by rules or a constitution,

Footnotes:

101. S. 41 (1) of the Dormant Accounts Act 2001
102. S. 28 of the England and Wales Charities Act 1993 gives powers to the Charity Commission to deal with dormant accounts, which are there defined as being dormant for five years or more.
103. O’Halloran, Charity Law, (Round Hall Sweet & Maxwell 2000), p. 239
trusts governed by a trust document or companies governed by their Memoranda and Articles. It should make no difference to the accountability of the officers of a charitable organisation whether they are described in law as directors of a company or trustees of a trust. This is very much the approach which has been adopted by the Charity Commission in England and Wales in relation to the criteria they apply for registration with regard to the bona fides of the officers of a registered charity. This must clearly be the approach to avoid any pressure (even if purely financial) on existing charities to change legal structure to benefit from a less onerous regulatory regime.\(^{104}\)

We recommend that regulation be applied uniformly, regardless of the legal structure used by any organisation.

**Development of guidelines and standards**

At present there are no formal standards to which charities must adhere in relation to the amount of money they must spend on their charitable objectives, the proportion of their income spent on management and administration, the amount it is appropriate to accumulate by way of reserves and so on. In response to our survey, 46% of respondents stated that their organisations have a policy that a minimum amount of income must be spent on the purpose for which they are established, and 54% do not. 44% of respondents stated that they thought it would be good to have such quantitative standards set by the Registrar, 38% were undecided and 18% were against this.\(^{105}\)

We anticipate that with the furnishing of annual accounts patterns will begin to emerge as to what is normal for the sector or parts of the sector. **We recommend that the Charities Office in consultation with the sector should develop standards for expenditure on charitable objects and administration, fundraising costs in relation to funds raised, returns on investment, and so on.** Recognising the diversity of the sector and the activities undertaken by it, we do not suggest that such standards be rigidly imposed. However, we believe that their existence will serve as a guideline for many organisations, and a standard measure against which significant deviations can be measured and explained. We believe that the most effective way of ensuring accountability is to publish and justify accounts. Standards can provide a tool with which to assess them.

The concept of an ‘annual effectiveness audit’ should also be considered by the Charities Office and the sector itself, which could find it useful as a type of quality mark.\(^{106}\)

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**Footnotes:**

104. See also chapter on Legal Structures
105. Appendix 1, 7.7 and 7.8.
Foundations

Standards will also be useful in dealing with a special sort of charitable organisation known as a foundation. The Ireland Funds is an example. It differs from other charities in that its main function is to fund charities which are directly involved in charitable activities. Foundations facilitate the movement of capital into the charity sector, while postponing decisions as to how it is to be spent for future occasions. As a result, the foundation is a very valuable concept in overcoming the psychological reluctance of donors to the making of irrevocable decisions. Special tax provisions and rules for foundations have developed particularly in the US and Canada, where the tax codes have long encouraged charitable giving and where as a result there are many grant giving foundations.107 They are perceived to be specially vulnerable to certain abuses:

• Because they are often funded by one or only several large donors, a family, or a corporation, there can be a specially close and influential relationship between the donor(s) and the foundation. As a result the concept of a “proscribed class” has been developed, and any transactions involving members of the class and the foundation must be carefully noted and reported, and may be prohibited or taxed. In particular, there is concern that foundations should not afford tame capital to be invested in other enterprises of the proscribed class, and this is done by restricting percentages of capital which can be invested in any one company, and by insisting on disbursement of a percentage of capital each year, regardless of whether this has been earned or not – thereby giving an incentive to ensure that the foundation’s funds are profitably invested.

• Because of the temptation to host influential parties and accumulate capital, prestige and nice offices, disbursement quotas have been instituted to ensure that foundations actually practice charity.

The special characteristics of charitable foundations, and the possible abuses associated with them should also be recognised and provided for in guidelines and standards developed to cater for their grant giving activities, for example, in setting disbursement standards, and making guidelines for the relationship between foundations and donors and related “proscribed” persons. Their importance for good should also be recognized by regular reviews as to how to make them more attractive to donors, easier to donate to, and by including donor interests in consultations for all initiatives and developments in the field of charity law and regulation.108

The Revenue Commissioners currently have a disbursement rule which requires that funds raised

Footnotes:
be disposed of within two years. There does not appear to be any statutory ground for this requirement, and it has the disadvantage of restricting capital development and larger projects. In particular, it can cause difficulties for religious congregations who must make provision for their members in the longer term and into retirement. In practice, it is not rigidly applied and special cases can be made and are accepted. The operation of this principle should be examined with the charity sector and brought within agreed standards and guidelines.

Consultation with the charity sector and donors

In developing guidelines and standards, we recommend that the Charities Office should consult widely and work with the charity sector and representatives of donors. It is likely that the role of large donors will continue to grow in importance in the future. It is therefore important to include them in the consultation process also. Such collaboration may assist with the development of a representative body for the charity sector, the lack of which has already been felt in relation to the participation of the sector in the Implementation and Advisory Group on the White Paper. The clear existence of a need for a representative body to consult with the Charities Office on an ongoing basis in relation to guidelines and standards may assist the sector in developing such a representative body. The same may apply in the case of donor and foundation interests. The existence of a register of charities should also be of assistance, in identifying the sector to itself.

Monitoring registered charities

We recommend that the Charities Office monitor the annual reports and accounts received from registered charities to identify

- charities which are no longer functioning and are defunct, and may need assistance in being wound up,
- charities which are in need of assistance in complying with the requirements for reporting and accounting,
- charities which are in need of assistance in relation to some aspect of their operations, for example, lack of trustees, and
- charities which are the subject of mismanagement or fraud.

It is the experience of the Revenue Commissioners and of the Charity Commission in England and Wales that most difficulties with charities arise not from deliberate mismanagement or fraud, but from lack of expertise and know how and shortage of time. This reality is reflected in the England and Wales Charities Act 1993 in section 1 (3) which states: “The Commissioners shall (without prejudice to their specific powers and duties under other enactments) have the general function of promoting the effective use of charitable resources by encouraging the development of better methods of administration, by giving charity trustees information or advice on any matter affecting
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the charity and by investigating and checking abuses”. Investigating and checking abuses comes last. The section recognises the importance of encouraging, supporting and advising charities as a preventive measure.

The Revenue Commissioners currently monitor charities for the first year to 18 months after registration, but after that period they do not have the resources or the mandate to continue, except by way of occasional spot checks. If a charity is in need of guidance, advice or assistance, the help they can offer is limited. The Commissioners for Charitable Donations and Bequests likewise are not equipped to and do not perform this role in the normal way.

Charities which make no returns at all, or inadequate ones, will be easy to identify. Systematic and preventive monitoring will go a long way to identify problems before they result in demise of the charity, its running down, mismanagement or abuse. We therefore recommend that the Charities Office use the annual reports and accounts filed by charities to undertake systematic and preventative monitoring.

Inadequate reporting as trigger for review
If a charity is late in making an annual return, or files a return which is incomplete or below a reasonable standard of reporting, we recommend that the Charities Office use this information to trigger a review of the organisation. Contact with the organisation in question may be sufficient to find out what the problem is and lead to a solution. If not, the Charities Office may find it necessary to institute a formal review of the organisation, seeking information from the trustees and working with them to arrive at an agreed plan for remedying the problem. In some circumstances, an inspection or audit may be indicated and the Charities Office should have power to audit the organisation, or appoint an outside auditor to undertake the job on their behalf. In the event that this is not sufficient, the Charities Office will have to have recourse its proposed powers to initiate an investigation.

Complaints procedure for the public
The public is another important source of information in relation to organisations giving cause for concern, and it is important that the public should have confidence that information of this kind is acted upon and followed up. We recommend that information from the public should be systematically investigated, and the results of investigations should be published. This will serve to reassure the public and vindicate charities which have been wrongly suspected of wrongdoing.
Random and periodic inspections and audits

Reports and accounts can look totally plausible on paper, but in fact be misleading and incorrect. If the Charities Office does not check and verify at least some annual returns, there will be no deterrent to potentially dishonest trustees making fraudulent returns. **We recommend that the Charities Office should undertake inspections and audits on a random basis, in addition to any investigations it initiates on the basis of the triggers built into the monitoring system.** It would also be desirable that every charity be inspected and audited on a periodic basis, just as VAT inspections are periodically carried out, and the resources to make this possible should be made available to the Charities Office. **We recommend that every charity be inspected at least once every five years.** This will involve employing an adequate inspection team. On the basis that there are approximately 5,000 charities registered, and inspections take an average of 2 days for each charity, a team of 8 to 9 inspectors will be necessary to cover the 1,000 annual inspections recommended. If the average inspection time is shorter, say one day for each charity, then 4 to 5 inspectors will be needed.

Investigative powers

Complaints may be made by members of the public, or concerns warranting investigation may turn up as a result of the monitoring system. It will be necessary for the Charities Registrar to be able to call upon investigative powers in order to ensure that charity trustees are fulfilling their public trust and are not misusing or mismanaging charity resources.

As already noted, in many cases the trustees concerned are likely to be co-operative, and a formal investigation will not need to be launched. The experience in England and Wales and Scotland is that the majority of preliminary investigations are resolved by working with the trustees. But in a minority of cases formal investigative powers will have to be invoked to deal with charities giving rise for concern. If criminal offences are suspected, the Gardaí may become involved. In less clear cut cases, we see the need for a specialist investigative resource, familiar with the running of charitable organisations, to take on the task of investigating charities where there is suspected mismanagement, misconduct, or commission of offences.

As noted above, the Commissioners for Charitable Donations and Bequests have certain limited investigative powers:

- to require copies of public documents relating to charities and to examine and search records;\(^{109}\)
- to require a personal representative to show proof that a devise or bequest has been

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Footnotes:

109. Charities Act 1961, s. 42
transferred to the charity specified in the will within certain time limits, or that the trustees of the charity are aware of the gift, or to publish particulars of the gift according to the directions of the Board. Failure to comply is a summary offence (punishable by a small fine) which may be prosecuted by the Board.\textsuperscript{110}

The Commissioners do not have the resources or systems to assume an investigative role using these powers, and they have been used very rarely.\textsuperscript{111}

More detailed investigative powers have been worked out in the England and Wales charities legislation,\textsuperscript{112} and have also been developed in the context of Irish company law, for the regulation of companies.\textsuperscript{113} The essential elements include powers to require production of documents, information and assistance from:

- the organisation under investigation, its officers and employees;
- other organisations, related or unrelated;
- other persons.

The information may include computerized information and the passwords to make it accessible. Assistance may include assistance to convert computerized information into readable hard copy. Persons assisting may be required to give evidence in person and under oath, or by way of sworn statement. Obstruction or non-co-operation may be a summary or indictable offence, and co-operation may be enforced by a court order as well as sanctionable by contempt of court.

We have considered the system for conducting investigations under Irish Companies legislation and compared it to the simpler system set out in the England and Wales Charities Act 1993. Companies can be difficult to investigate, because of their associations with other related companies, their many commercial transactions and even the rules relating to the payment of directors, which do not arise in the case of charity trustees. On balance, because charities are likely to be less complicated in their dealings and outside associations with other organisations, we have opted to recommend leaving the decision to institute an investigation with the Charities Registrar, as opposed to with a court. This would make our recommendation similar to the procedure in England and Wales, and would obviate the need to make court applications for the appointment of an inspector, and the supervision of the inspector by the Court.

In relation to companies, an investigation cannot be embarked upon without reasons, and may be requested by all the shareholders or if there is no share capital, at least one fifth of the members,
the company itself or a creditor. Under company legislation, grounds for an investigation can include
• suspicion of fraud, dishonesty or illegal purpose,
• unfairness to some members of the company,
• formation of the company for an illegal purpose,
• any persons connected with the company being guilty of fraud, misfeasance or other
  misconduct, or
• the members of a company being denied information.
Many of these grounds are appropriate to charities also, either as they stand or slightly adapted. Unfairness to members of the company can be adapted to unfairness to one or more trustees or
beneficiaries, and denial of information to members of a company can be adapted to denial of
information to trustees or beneficiaries. They amount to suspicion of actual or planned breach of
trust.

We recommend that the Charities Registrar be empowered to institute an investigation on
grounds of suspected fraud, dishonesty or illegal purpose, formation of an organisation for an
illegal purpose, involvement of trustees or charity directors who are suspected of being guilty
of fraud, misfeasance or other misconduct, or serious past, ongoing or planned future breach of
trust.

We also recommend that other persons should also have standing to apply to the Charities
Registrar or the Circuit or High Court (which would have concurrent jurisdiction) for an order
to institute an investigation, including the trustees of a charity or a majority of them, creditors,
significant donors or grant makers and beneficiaries or potential beneficiaries. In each case, the
applicant would have to make a sufficient case to the Registrar or the court for an investigation to be
instituted. If appropriate, the court could require a contribution towards costs to be made by the
applicant, although we envisage that in the majority of cases the costs would be born by the Charities
Office, as the proper management of charities is in the public interest.

We recommend that the Charities Registrar be empowered to either conduct an investigation
through the Charities Office or to appoint a person to conduct it and report to him. The
Charities Office or person appointed should have power to direct a trustee or member of the
charity concerned or any other person
“(a) to furnish accounts and statements in writing with respect to any matter in question at
the inquiry, being a matter on which he has or can reasonably obtain information, or
to return answers in writing to any questions or inquiries addressed to him on any such
matter, and to verify any such accounts, statements or answers by statutory
declaration;
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(b) to furnish copies of documents in his custody or under his control which relate to any matter in question at the inquiry, and to verify any such copies by statutory declaration;

(c) to attend at a specified time and place and give evidence or produce any such documents."\(^\text{114}\)

The Registrar should also have power to require any person to furnish him or the person conducting the inquiry with any information in his possession or any document or copy thereof which relates to any charity and is relevant to the discharge of the functions of the Charities Office.

Section 10 of the England and Wales Charities Act 1993 permits sharing of information, with some safeguards, with other administrative agencies or bodies or persons with functions of a public nature. We recommend that the Charities Office be empowered to seek and give information from and to other administrative agencies in carrying out its functions, with due account being taken of the Data Protection legislation.

In the event that a person knowingly or recklessly provides false or misleading information, in circumstances where that person knows that an investigation is being undertaken, or that it is needed for the discharge by the Charities Office of its functions, we recommend that such a person should be guilty of an offence on summary conviction or on indictment. If a person refuses to co-operate in the course of an inquiry, the Charities Office should be empowered to refer this refusal to the Circuit Court, which should be empowered to make an order as it sees fit, non-compliance with which would result in the person concerned being held in contempt of court.

Care will have to be taken in the course of an investigation to ensure that the constitutional rights of any persons involved are not infringed. The same goes for the publication of a report on the investigation. While such findings are not judicial, their publication can be a difficult and sensitive matter. A report into an investigation will contain only one person’s opinion of the facts as found, and this will not be a judicial finding. However, if published, a report is likely to have credibility and could be damaging to the reputations of persons involved. We recommend that the same principles be followed as are applicable in the conduct of investigations and publication of reports into company investigations.\(^\text{115}\) In general, interviews with witnesses should not be in public, and persons whose actions may be criticised must be given an opportunity of answering allegations or

Footnotes:

114. Section 8 (3) of the Charities Act 1993, England and Wales
findings made against them. If oral hearings are held, witnesses should be afforded the usual safeguards: being heard in their own defence, given an opportunity to cross-examine witnesses, an adjournment to enable them to prepare their cases and legal representation if the seriousness of the matter in issue or the consequences for the person concerned seems to warrant it. In some cases, they may be entitled to see documents obtained by the person conducting the inquiry.

In relation to publication, we recommend that this be done at the discretion of the Registrar. The same considerations apply as in the case of reports into companies, and we recommend a similar approach. The Charities Registrar should furnish a copy to concerned parties on payment of a prescribed fee. Concerned parties should include:

- any member or trustee of the charity concerned;
- the head office of the charity concerned;
- any person whose conduct is referred to in the report;
- the auditors of the charity;
- the applicants for the investigation; and
- any other person, including employees and creditors, whose financial interests appear to be affected.

The Charities Registrar should have discretion to direct omission of certain sections for publication, or for sending to any party, in the interests of not unnecessarily damaging the financial or other interests of anyone involved. Publication should be privileged. The report should be admissible in legal proceedings as evidence of the facts set out therein, without further proof unless the contrary is shown, and of the opinion of the person conducting the inquiry in relation to any matter contained in the report.

It is possible that further information may be requested and granted, depending on the circumstances, under the Freedom of Information Act 1997. Assuming that the Charities Office is a public body within the terms of that Act, any record held by the Charities Office relating to an individual will as a general rule be required to be made available to him or her, on request. Under section 18 of the same Act, a person who is affected by an act of the body (the Charities Office) and has a material interest in a matter affected by the act or to which it relates, is entitled to a statement of the reasons for the act and of any findings on any material issues of fact made for the purposes of the Act. Subsection 6 provides that an “act” of a body includes a decision made by it. The entitlement under section 18 is qualified by subsequent sections, which deal with certain exemptions from granting requests under the Act, including if they involve the deliberations,
functions and negotiations of public bodies, information entitled to legal professional privilege, information which would compromise law enforcement and public safety, information obtained in confidence or information which is commercially sensitive.

**Powers of intervention by the Charities Office and the court**

The main objective of an investigation will be to ascertain if intervention on behalf of the charity is necessary. Even before an investigation establishes this conclusively, we recommend that interim powers to secure any property of the charity should be made available to the Charities Office. If the Charities Registrar is satisfied that there is or has been any misconduct or mismanagement in the administration of a charity, or if he is satisfied that it is necessary or desirable to protect the charity’s property or ensure its correct application, we recommend that he should be empowered to make orders including those listed in section 18 of the England and Wales Charities Act 1993:

• to prevent an organisation holding itself out as a registered charity;
• to apply to the High Court for the suspension of one or more trustees, officers, agents or employees;
• to appoint one or more trustees as he considers necessary for the proper administration of the charity;
• to order any person holding property on behalf of a charity not to part with it without the approval of the Charities Office;
• to order any debtor of the charity in question not to make payment of monies due without approval of the Charities Office;
• to restrict payments it can make or receive and contracts it can enter into;
• to freeze its bank accounts and other assets; and
• to appoint a manager to manage the charity on an interim basis.

We further recommend that if at any time after an inquiry has been instituted it appears to the Charities Registrar that there has been misconduct or mismanagement in the administration of the charity, and that one or more trustees, officers, agents or employees have been implicated, the Registrar should be empowered to apply to the High Court to suspend such person or persons and by order establish a scheme for the administration of the charity. In section 18 (3) of the Charities Act 1993 of England and Wales misconduct and mismanagement are specifically defined as

“(notwithstanding anything in the trusts of the charity), extend[ing] to the employment for the remuneration or reward of persons acting in the affairs of the charity, or for other administrative purposes, of sums which are excessive in relation to the property which is or is likely to be applied or applicable for the purposes of the charity.”

We recommend that excessive payments by way of remuneration or contracts should be
explicitly included in the definition of misconduct and mismanagement.

On completion of an investigation we recommend that the Board should have power, on its own motion to

- wind up the charity and apply its resources cy-près;
- establish a scheme for the future administration of the charity;
- remove the charity from the register;
- appoint one or more new trustees;
- apply to the High Court for disqualification for one or more persons from acting as charity trustees, for such period as the Court sees fit;\(^{118}\)
- refer the report on the inquiry to the DPP;
- impose lesser sanctions such as a reprimand or personal fine on a trustee who has acted improperly (a system of lesser sanctions could provide that they are recorded for a limited period on the register and that a number of them, say three, disqualifies the trustee from acting as a charity trustee for a stated period, say five years subject to an appeal to the High Court);
- require restitution to be made to the charity of any losses suffered by the charity as a result of the acts or omissions of a trustee, including reversing of transactions made between the charity and a trustee or associated person.

We recommend that it should be an offence for any trustee, who has been disqualified, to act as a charitable trustee in breach of such disqualification, and that the Charities Board should be empowered to remove such a trustee by order.

We do not think it appropriate to penalise the charity itself for breaches of the law, including requirements as to filing of annual returns, as this will result only in fewer resources being available to the charity. Where breaches arise, those at fault are the trustees, not the charity itself. However, there is a balance to be struck here between this consideration, and the fact that if trustees acting in good faith make mistakes and are then expected to pay for them, this will discourage good candidates from volunteering to act as trustees. In company law, directors are afforded some relief from liability as directors.\(^{119}\) Directors are entitled to be indemnified by the company in respect of any liabilities incurred by them in the management of the company’s business, and it is common to find further indemnification of directors in the Articles of Association in respect of losses sustained by the company unless they are the result of dishonesty or “wilful default”. However, such further indemnification is largely invalidated by section 200 of the 1963 Companies Act, which allows it only in very limited circumstances.\(^{120}\) One of these circumstances is a successful application under

Footnotes:
118. See also chapter on Charity Trustees.
120. The circumstances include a liability incurred by the director in successfully defending criminal or civil proceedings, or in connection with a successful application under S.391 of the Companies Act, 1963.
section 391 of the 1963 Act, which permits the court on application by an officer or auditor to relieve such applicant from liability for any negligence, default, breach of duty or breach of trusts where the officer or auditor has acted honestly and reasonably and it appears to the court that, having regard to all the circumstances, he or she ought fairly to be excused.

In order to afford trustees a realistic level of comfort in the execution of their voluntary work, we recommend that charity trustees should be indemnified by the charity concerned in respect of any liabilities incurred by them in the management of the charity’s business, in the same way that company directors are. In relation to the duties of trustees to keep proper books of account and make annual returns, we recommend that failure to comply with the proposed regulations should not result in a penalty on the charity, but rather in a warning to the trustees. In the event of a second warning, the trustees should be replaced or the charity should be de-registered. In relation to other acts or omissions, it should be open to a trustee to seek relief, in similar terms to section 391 of the Companies Act 1963, from liability for any negligence, default, breach of duty or breach of trusts where the trustee has acted honestly and reasonably and it appears to the court that, having regard to all the circumstances, he or she ought fairly to be excused. If successful, the trustee should be entitled to be indemnified by the charity for the costs of such an application, whether the constitution, trusts or Articles under which the charity is established permits such indemnification or not.

We recommend that appeals against decisions or orders of the Charities Registrar or Charities Board should lie to the High Court.

Disqualification and removal of charity trustees

When an application is made to register a new charity or a new trustee, we recommend that each trustee concerned should make a formal declaration that he or she is not disqualified from being a charity trustee.121

It may also be appropriate for the Charities Registrar to require other information to be declared, for example, in relation to charities involving children, that a proposed trustee has not been convicted of offences regarding children. We recommend that it should be an offence to make a false declaration in this regard, and that any person doing so should be automatically disqualified from being a charity trustee. We recommend that the Charity Registrar should have discretion to set aside the disqualification if the circumstances warrant this or decline to do so, subject to an appeal to the High Court.

Footnotes:

121. For grounds of disqualification, see the chapter on Charity Trustees.
We recommend that the Charities Board should have power, at their discretion, to apply to the High Court to remove a charity trustee on their own motion subject to appropriate grounds for removal.122

We recommend that the Charities Office should maintain a register of persons disqualified from being charity trustees. Our survey revealed that 86% of respondents were in favour.123 This list should be available to the public, and used internally in the Charities Office to ensure that disqualified persons are not acting as trustees.

IX. THE CHARITIES OFFICE AND SUPPORT OF CHARITIES

The wording of the England and Wales Charities Act 1993 expresses the delicate balance between supporting charities and checking abuses:

“S. 1 (3) The Commissioners shall . . . have the general function of promoting the effective use of charitable resources by encouraging the development of better methods of administration, by giving charity trustees information or advice on any matter affecting the charity and by investigating and checking abuses”.

“Investigating and checking abuses” comes last, after “encouraging the development of better methods of administration” and the giving of “information and advice.” It is a last resort which may be prevented by the timely application of appropriate support.

In the event, the Charity Commission spends significant resources on support of charities, and has the experience that most cases where charitable funds may be at risk arise from a lack of management skills and know how, rather than intended abuse. In most cases, the charity trustees are willing to work with the Commission to remedy any situations where effective use is not being made of charity resources.

There is at present no one obvious source in this jurisdiction for people seeking information and assistance in relation to charities. In our survey, organisations obtained advice from a wide range of sources:124

- the Revenue Commissioners
- networks and contacts, umbrella organisations
- solicitors
- accountants

Footnotes:
122. For grounds for removal, see the chapter on Charity Trustees. 123. Appendix 1, 5.12
124. Ibid., 8.1
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• government departments and agencies
• published information
• the Internet
• the Companies Office
• the Gardaí

About two thirds of it was free, but legal and financial advice was commonly paid for. Around three quarters of organisations who replied to this question stated that they were able to get the information and advice that they needed, but that in many cases it was not easy or straightforward. 74% were in favour of a one stop shop for all matters relating to charities, around 11% were undecided, and only 5% were against.\textsuperscript{125}

General guidance and support

There clearly are benefits to charities in having a primary specialised source of information to which they can turn, and we are of the view that such a resource should be available to charities. We recommend that the Charities Office should assume primary responsibility for providing a source of information, guidance and support to the charity sector, in particular in relation to compliance with the law. As regards other matters, it may be that the charity sector will decide that this is a function which it should take on independently. If at some time in the future the guidance and support function of the Charities Office is superseded by an equivalent initiated and maintained by the sector itself, it may at that point reconsider its service and if appropriate apply its resources elsewhere.

Guidance and support in relation to regulatory compliance

We have proposed a process of registration, annual returns, monitoring of the annual returns and investigative powers in cases of suspected abuse or maladministration. In negotiating these requirements it is clear that many organisations will seek guidance and assistance from the Charities Office. Most charities are run by people on a voluntary basis and do not have the resources or skills to achieve optimum administration of their organisations. It is therefore desirable that they should be able to obtain advice and assistance in relation to their interactions with the Charities Office.

We therefore recommend that the Charities Office have a specific role in assisting and supporting charities in relation to fulfilling their legal and financial obligations under the proposed legislation and otherwise. For this there is an excellent model in the England and Wales

Footnotes:
\textsuperscript{125} Ibid., 8
Charity Commission. It may be done in part by the publication on a website or elsewhere of guidance and advice on different questions much along the lines of the existing Revenue Commissioners’ publication “Trading by Charities - Exemption from Tax”. Where general advice does not meet the need of charities, we envisage the need for some individual hand-holding of charities, and follow up to ensure satisfactory outcomes.

Support during registration
At the registration stage there is a once-off opportunity for the Charities Office to assist new organisations to set up on a proper footing. The Charities Office should seek to make sure that the founding documents will function to achieve the objectives of the organisation, that the trustees understand their duties and responsibilities and the financial implications of their organisations’ work.

It is in the interests of the charity also that the trustees should be trustworthy and of good character, and not disqualified in some way, and this can be established during registration with the assistance of the Charities Office.

It should not however be the job of the Charities Office to assist applicant organisations to make it possible for them to register if they are clearly adapting their objectives for the sake of registration only. There will be applicant organisations which will say “Tell us what to put down that will be charitable, and we will put it down”, when their intention is to achieve charitable registration, and then proceed with whatever they intended to do from the beginning. Assisting registration for the sake of it should not be the function of the Charities Office. At the same time, the registration process should permit of clarification and genuine re-orientation of applications if this is done in good faith by the applicants.

Support as a result of monitoring
If it appears at the registration stage that a charity may have difficulty in achieving its objectives, this can be referred to the monitoring section for follow up. The Charities Office can monitor the progress of the organisation in achieving its objectives, and intervene to offer guidance or assistance if this is useful. Such timely intervention may avoid more serious problems developing, provided that the charity in question is prepared to work with the Charities Office to deal with the problems arising. We also envisage that the need for advice and assistance may become apparent through the monitoring of annual returns and accounts. In this connection the

Footnotes:
126. The extensive advice and guidance offered by the Charity Commission may be seen on their website at www.charity-commission.gov.uk
127. The Charity Commission’s Annual Report 2000 – 2001, at 3.3 reports that 12% of cases where guidance was given on charity governance or administration arose at the Commission’s instigation.
advantage of an accounting and reporting standard such as the SORP 2000, which stipulates the information to be reported, the format and the rules involved, becomes clear. Standardised forms, accounts and reports addressing standardised questions will enable the monitoring section to identify organisations needing preventive and remedial advice and support, or possibly investigation.

Analysis of the registration and monitoring process will by degrees show the problem areas which most commonly arise. As an example, the three most commonly arising problems which show up as a result of the registration and monitoring process in England and Wales are

- fundraising,
- trustees’ benefits,
- charities’ relationships with trading subsidiaries.  

This information can feed back into ensuring that the right support is available and that the right questions are put on forms. It can also be used to feed into outreach activities such as training, and the development of Charities Office policy.

Support in relation to reorganisation and authorisation of actions

It can happen that the passage of time makes the objectives of older charities no longer so relevant or achievable, and that it is desirable to reorganise them to be more relevant to the needs of the present. The cy-près principle applies and stipulates that any changes to a charity’s objects should keep faith with the spirit of its original trusts.

The Commissioners for Charitable Donations and Bequests already offer charities considerable support in relation to reorganisation and restructuring of charitable organisations, and authorisation of actions which are not within trustees’ powers but are in the interests of charities. Their powers are set out in Part II, Chapter II of the Charities Act 1961 as amended by the Charities Act 1973. The legislation is largely enabling of the Commissioners (the Board) to facilitate and assist charities, and imposes no duties, only powers. In some cases, the power to assist is reserved to the High Court. Their powers include the ability to make schemes for the redirection of charitable funds cy-près, that is, to another charity with similar objectives. They have power to frame schemes for the incorporation of trusts including those established or regulated by statute or charter. They can give advice and if it is followed, the trustees concerned are protected against any actions for breach of trust or exceeding their powers. They can approve the compromise of a claim by or against a charity, and no action then lies in respect of the claim. The High Court

Footnotes:

129. S.29 gave the Board power to frame cy-près schemes for charitable gifts within a value of £250,000 (as amended by section 52 of the Court and Court Officers Act 1995). The Board also has powers to alter schemes in relation to the Educational Endowments (Ireland) Act 1885, set out in s. 30. This has been amended by the Social Welfare (Miscellaneous Provisions) Act 2002, s. 16 and Part II of the Schedule to remove the value limit of £250,000, so that the Board has power to frame cy-près schemes to an unlimited value, brought into effect by SI 132/2002.
130. Ss. 2 and 4 Charities Act 1973.
131. S. 21 Charities Act 1961
can override trust instruments in relation to investment of funds, and the Board may also enable trustees, either generally or in a particular instance, to make investments on terms the Board thinks proper, unless the charity fund is held subject to a prior limited interest.133

We recommend that these facilitative powers should be transferred to the Charities Office to be exercised by the Charities Board as part of the support offered to charities. We envisage significant savings in costs to charities where reorganizations and restructuring are required, resulting from the removal of the ceiling of a value of IR£250,000 in relation to schemes which can be made by the Board.134

In their 1997 report,135 the Commissioners noted that they were not able to deal with an application for a cy-près scheme in the case of charity established by statute, and that they had made application to the Department of Justice, Equality and Law Reform for amending legislation to enable them to deal with such cases. We recommend that the Charities Board be empowered to frame cy-près schemes in cases of charities established by statute, and that the need for additional powers to assist charities to achieve their objectives be kept under review.

It has been suggested that additional powers should be given to trustees, to avoid applications in small matters being made to the Charities Office or the courts. This could apply also to cy-près schemes up to a certain value, for example, IR£10,000 or €12,500, with clear guidelines drawn up by the Charities Office. This matter was considered in the Nathan report 1952,136 and the committee came down in favour of a strict interpretation of the original trusts and against the idea of any discretion on the part of the trustees.137 We recognise that the there would be a general expectation on the part of the public that the Charities Office should be there to control and regulate, and that leaving some discretion with trustees could be perceived to be inviting laxity. We do not necessarily agree, if the rigorous reporting requirements entailed in the SORP are enforced and monitored. There is a further consideration, which is that many trustees will want the comfort of having decisions endorsed by the Charities Office, thereby affording them immunity. However, as trustees become more confident and limited additional powers come to be accepted, this could change.

We therefore recommend that additional trustee powers in relation to

Footnotes:
132. Ibid s. 22
133. Ibid s. 32, as replaced by s. 9 of the Charities Act 1973.
134. See above. With the value of property now so high, any charity holding property was likely to exceed the previous cy-près jurisdiction of the Commissioners, thereby saving the considerable costs of a High Court application, which are swollen by the need to involve the Attorney General and to pay the costs of his intervention in addition to those of the charity.
135. At p. 4
137. In the case of Doyle v AG (unrep) HC 22 Feb 1995, Carroll J rejected the proposed scheme of expenditure for a surplus fund of IR£76,000, on the ground that the proposed objects were not sufficiently close to the purposes for which the money was collected, and alternative objects were identified.
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- power of sale or mortgage;
- power to compromise a claim;
- power to redeem an interest in land;
- power to exploit land (letting, mining, cutting timber, building etc.);
- applying funds cy-près; and
- power to dispose of property at less than market value to another charity (another form of cy-près)

be enacted, subject to being brought into force by ministerial regulation which will also stipulate the financial value under which such powers would come into effect. We recommend that the Charities Board keep this matter under review, and recommend that these powers be brought into effect once they are satisfied, in the light of the experience of the Charities Office, that it is appropriate to do so. One of the considerations which the Charities Board can take into account when considering this is the cost of administering the service to charities, as against the likelihood of abuse of the powers on the part of trustees, and the value of the property at stake.

We make a recommendation in relation to merger of charities in the chapter on legal structures.

Support in relation to funding information

Our survey threw up the difficulties of some charities in getting information in relation to funding for which they may be eligible. There are many schemes sponsored by different government departments, local authorities and development bodies, as well as a number of grant giving foundations. We believe that it would be advantageous to all concerned to have a central deposit of this information. For charities, it would be a single source of information in one place, enabling them to devote their energies to seeking the funds rather than using them initially to seek the source of the funds. For the funding organisations, it would be a valuable resource in co-ordinating schemes and offers of funding to avoid duplication and increase targeting where it may most be needed. We recommend that the Charities Office maintain a database of sources of funding for charities, and provide the expertise necessary to advise charities what assistance they may be eligible for.

Interaction with the Charity Sector in relation to support

We recommend that the support offered by the Charities Office should be regularly reviewed with representatives of users from the charity sector, and should be continually improved in response to perceived shortcomings. Any complaints should initially be dealt with by the Charities Office, but we recommend an independent Charities Ombudsman or complaint body to deal with complaints which cannot be resolved directly. It may be useful to establish a standing representation of the sector to interact with the Charities Office.
Capacity building
As a progression from guidance and support, we believe that capacity building in the sector will become an increasingly important issue in the future, and will naturally be a task which the sector will wish to drive and to which the Charities Office may be able to contribute.
CHAPTER 3

FUNDRAISING

I. BACKGROUND

Charitable and voluntary activities have long enjoyed widespread public support in Ireland with numerous types of fundraising techniques being employed at any one time. Collections and flag days, lotteries, sales of goods and services, fundraising social events and appeals through the mass media have raised millions of pounds or euros for charities and voluntary organisations. Targeted soliciting of gifts from individuals and businesses is also important. In 1994, total charitable donations in this jurisdiction were estimated to range up to IR£251 m. A survey conducted in 1997/98 of the support of charities through individual donations estimated that 87% of respondents gave to charity, to an annual total of IR£240.5 m, which combined with corporate giving and grants from foundations was together estimated at around IR£301 m. Not all of this money is the fruit of street collections or local lotteries, as much is raised by way of larger individual donations. Nevertheless, such money as is raised from unknown donors by means of traditional fundraising activities plays an important part in funding organisations, and allowing most members of the public to participate in charitable activity by giving it their financial support.

According to the report Reaching Out,

“The most frequent channel for making donations is the church gate collection, with 43% of respondents having given in this way in the month prior to interview. In second place is the street collection/flag day (30%), followed closely by raffle tickets/lines (29%). These three long-established channels of giving were also the ones most frequently used in the 1992 and 1994 surveys.

“Five further means of giving were used by at least 15% of respondents: charity lottery (20%), buying a flower/token (20%); sponsorship of an event (18%); door to door collection (16%); and collection box (15%). These five means of giving were again in the top eight in the 1994 survey. The least frequent channels of giving, used by less than 5% of respondents, include: buying in a charity shop (4%); postal appeal (3%); buying in a jumble sale (3%); appeal in print (2%); radio/TV appeal (1%); and telethon-type event (0.3%). The low levels of donating through broadcast and print appeals and through

Footnotes:

1. (€318,704,258) Gaming and Lotteries (Amendment) Bill 1996 – Explanatory Memorandum
4. The average of donations in 1997/98 was over IR£8 per month per donor. See the reference in footnote 3 above at
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jumble sales was also evident in the 1994 survey.5

Half the respondents (52%) in this 1997/98 survey perceived charities to be honest, but around one third (35%) were not sure about this. 31% were concerned about the accountability of such organisations, while 37% believed them to be accountable. Respondents felt that 20p in the pound (£) was an acceptable level of administration costs but they believed that in the case of home-based organisations only 50p of each pound (£) donated goes to the cause while in the case of overseas organisations it is believed that only 40p gets to the cause.6

In the light of these concerns, and the amounts of money involved, the question of a legal regime for regulating charitable activity and fundraising has already received government attention. Fundraising for and by charities in Ireland is the subject matter of two government sponsored reports:

- Report of the Committee on Fundraising Activities for Charitable and Other Purposes, 1990, otherwise known as the Costello Report after its Chairman, Mr. Justice Declan Costello (referred to here as the Committee).


We broadly agree with the recommendations of the three reports, the thrust of which have been accepted by government. Work is in progress in the Department of Social, Community and Family Affairs in relation to implementing them. (This work is likely to be transferred shortly to another Department, as a result of the current restructuring). We summarise below the present legal situation as regards fundraising, and the main changes proposed in the three reports, and conclude by making a small number of supplementary recommendations. We also discuss the new phenomenon of fundraising on the Internet, which is poised to have an increasing impact.

General recommendations

Organisations which are charities within the current definition, and which wish to raise funds for

Footnotes:
6. Ibid, at pp. xi, 90, 97
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Charitable purposes may do so privately from donors, may invite donations through the media or on the Internet, or in compliance with two pieces of regulatory legislation: the Street and House to House Collections Act 1962 and the Gaming and Lotteries Act 1956. It is possible to be a charity whose purpose is to raise funds for other charities.\(^7\) Funds raised must be intended to be applied for charitable purposes only.

The Costello report states in its introduction:

> “Statutory controls on fundraising activities are, for a variety of reasons, necessary. But great care must be taken in fashioning them to ensure that controls are a help rather than a hindrance and legislation must be so drafted as not to hinder unduly the efforts of those dedicated and unselfish people who, in a multitude of different ways, are helping to raise funds for organizations which benefit so many people.”\(^8\)

This sentiment is strongly felt by the sector, and we believe it is a good guiding principle for the development of new laws and procedures, for example, by the omission from primary legislation of too much detail and its relegation to secondary regulations which can be more easily updated as required in changing circumstances.

Many of the recommendations made below contain the elements of accountability, public confidence and minimalising administrative burden which are grounded in the common reasoning behind other recommendations in this report. Fundraising is where members of the public most commonly are brought into contact with charities, and where their unease at the ways in which their money may be spent is most immediate. For many charities and members of the public, fundraising is seen as the most pressing area for reform.

It also presents the greatest difficulties in reassuring people that in fact money is not misapplied, embezzled or wasted. There are two ways in which legislators can protect the integrity of giving and receiving. The first is to ensure that the recipients are trustworthy people and organisations, genuinely imbued with a commitment towards charitable purposes and therefore trustworthy custodians of their donations. The second is to require charities collecting money to do so in compliance with systems and processes which minimise the opportunities for misapplication, fraud or waste, in other words, to make them as accountable as possible without deterring them by unduly burdensome administrative rules. Obviously, not every collection box or local lottery can be

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Footnotes:

8. At p. 3

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checked by independent inspectors of the Charities Office or the Gardaí, but sufficient checks should be built in to the systems and processes to discourage casual and opportunistic abuse. Deliberate fraud should be deterred by the realistic possibility of getting caught, as well as consequent punishment.

It is our belief that an efficient system of charity registration and monitoring should accomplish much of the first approach, that is, ensuring that people involved in fundraising are trustworthy. This is one of the primary purposes of a registration and regulation system.

In relation to a system which minimises the possibility of casual abuse, we recommend that the Charities Office in consultation with the charity sector and the Irish Institute of Fundraisers develop best practice guidelines and a system of certification or self certification. The purpose of this would be for participating organisations to certify their fundraising procedures in the manner of Quality Assurance. Members of the public approached for a donation by participating organisations would have the assurance that a certain standard and procedure is adhered to in the handling of their donations. This could well give such organisations an edge over uncertified organisations, leading to greater numbers participating in the certification process, and generally higher standards.9

The present legislation covers other organisations as well as charities, and to the extent that they will not be registered in the Charities Office as charitable organisations, the protection to the public afforded by the registration and monitoring system will be lacking for these organisations. It may be possible to work out a way whereby such non-charitable organisations can also register with the Charities Office or elsewhere, perhaps in a register for Voluntary Sector organisations, and be subject to the same disciplines and controls as charities insofar as they relate to fundraising.

A regulatory authority
As previously referred to, one of the most important recommendations of the Costello Committee’s Report was the establishment of two regulatory systems, one managed by Chief Superintendents of the Gardaí at local level, and the other to function at national level in respect of organisations raising over IR£50,000 per annum. The Commissioners of Charitable Donations and Bequests, designated as the national registering authority, would also maintain an Index of Registered Fundraising Organisations with the names, addresses and local registers at which each organisation was registered, supplied by the Chief Superintendents. The Committee stated that these proposals should not necessarily apply to all charities (as this question was outside their terms of reference),

Footnotes:
9. This recommendation is also one of a number made in Giving without Strings, SCVO, October 2000 at p. 41.
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only to those seeking to raise funds, and in relation to financial reporting, to the extent of funds raised.\textsuperscript{10} It recommended that any organisation over a certain size raising over IR£10,000 per annum for charitable purposes would be obliged to register either locally or centrally.\textsuperscript{11} A system of registration of charities would take care of the problem that there is no single source of information available to the public as to the existence, management and activities of charities, which makes the systematic enforcement of the regulatory fundraising legislation impractical.

This was accepted by the Advisory Group which recommended that all organisations, including smaller organisations and religious organisations and ministers of religion collecting for religious purposes, should be required to register, and no solicitation of funds from the public or from funding agencies should be permitted to any organisation which was not registered. Any organisation, whether charitable or not, was included in its recommendation, apart from those governed by the proposed Electoral Act. The Fundraising Registration Authority adopted from the Costello Committee’s Report would pass on registrations to the Revenue Commissioners if requested to do so. If the Revenue Commissioners proposed to refuse granting tax exemption, they would be obliged to consult with the Authority before a final determination.\textsuperscript{12}

Our recommendations in relation to a regulatory authority

We recommend that a comprehensive registration and regulatory authority be established, to be known as the Charities Office. Our detailed proposals are set out in the chapter on Registration and Regulation. We recommend that the functions and powers outlined in the Costello Committee’s and Advisory Group’s reports for the Fundraising Registration Authority should be vested in the proposed Charities Office.

We agree with the Advisory Group in recommending that all organisations including churches and religious who solicit funds should be obliged to register. This has the merit of simplicity in allowing of no exceptions. If the sums collected bring the organisation’s income over the annual reporting exemption threshold, the annual accounting and reporting requirements will give the organisation an opportunity to account to the public as to the application of their funds.

II. COLLECTIONS

The Street and House to House Collections Act 1962

Section 2 (5) of this Act excludes its application to collections for charitable objects under the control of a religion recognised by the State under Article 44 of the Constitution, and held in

Footnotes:
\textsuperscript{10} Report of the Committee on Fundraising Activities for Charitable and Other Purposes (Government Publications, Dublin 1990) (Costello Report), para 5.7, Annual Returns
\textsuperscript{11} Ibid. at 5.4
\textsuperscript{12} Report of the Advisory Group on Charities/Fundraising Legislation 1996, at 1.7
accordance with the laws, canons and ordinances of the religion concerned. Sections 3 and 4 make it an offence for anyone to be involved in an unauthorised collection, or to knowingly permit a collection being the owner of a public place at which an event is taking place or to which the public have access on payment. Authorisation is obtained from the Garda Chief Superintendent for the locality where the collection is to take place. This can make it very awkward for organisations which wish to hold collections in more than one locality, requiring them to make multiple applications.

A Chief Superintendent may attach conditions to a collection permit, such as are necessary or desirable for the maintenance of public order and the prevention of annoyance to the public, and such conditions may include limiting the areas where the collection may be held, limiting the number of collectors, prohibiting the wearing of fancy dress, masks or disguises by the collectors and prohibiting collections from vehicles.13

A Chief Superintendent must refuse to grant a permit if he is of opinion that various conditions would be met, including

- the prejudice of public order,
- the proceeds benefiting an unlawful object, an object contrary to public morality or for the benefit of an illegal organisation,
- encouraging the commission of an unlawful act,
- diversion of monies collected from the ostensible purpose of the collection, or
- that persons concerned would derive personal profit from the proceeds, other than reasonable commission for the collectors.14

Anyone convicted of a crime involving fraud or dishonesty or any other offence which would be facilitated by the grant of a collection permit, or an offence under the Act, must also be refused,15 as must anyone who held a permit previously but failed to ensure the proper management of the collection.16 A Chief Superintendent may revoke a permit if information of unsuitability comes to him after he has granted it.17 In practice very few applications are refused.18

Appeals lie to the District Court of the area concerned either in respect of a refusal, or a condition attached to a permit, or a revocation. The Court must disallow an appeal if a member of the Gardaí not below the rank of inspector states on oath that he believes on reasonable grounds that the proceeds of a collection would be used for illegal purposes.19

Footnotes:

13. S. 8
14. S. 9
15. S. 10
16. S. 11
17. S. 12
18. See the Costello Report at 4.6. More up to date figures are not collected systematically by the Gardaí and are not available.
19. S. 13
Section 14 provides that collectors must have written authorisations, and section 15 that children under 14 are prohibited from collecting, and to allow them to do so constitutes an offence. It is also an offence to be a collector in an unauthorised collection, or to refuse to produce an authorisation if requested to do so, or to use a collection box without the name of the object being collected for being prominently displayed on it, or to refuse to give any Garda requesting it, the collector’s name and address. Under certain circumstances, a member of the Gardaí may seize collection boxes, and any money involved may be forfeit to the Minister.

Section 21 gives permit holders and collectors some protection, by providing that unlawful interference with them constitutes an offence. Any permit holder who fails to comply with any condition or mismanages the collection may also be guilty of an offence, although it is a good defence to show that he took all reasonable steps to prevent the contravention charged.

Section 23 deals with information about the proceeds of collections. Under limited circumstances the Chief Superintendent can apply to the District Court for a direction that a statement in writing of the total amount collected, and how the money was applied and disposed of, should be made to the Chief Superintendent, and to permit a member of the Gardaí to inspect the accounts of the collection and any receipts and vouchers related to it. Failure to comply is an offence. For the purposes of inspecting the accounts, members of the Gardaí may at all reasonable times enter and have free access to any premises where any accounts are kept, and may take copies or extracts. However, this does not apply to collections under the control of religious personnel.

The penalties for offences under the Act are, on summary conviction, a IR£50 fine or six months’ imprisonment or both. Persons behind the commission of an offence by a body corporate may be personally liable.

**Shortcomings in the legislation**

While the Act creates many offences, it omits to provide for any systematic way of checking abuses. The penalties for offences are very small in terms of the sums which can be collected in successful collections. The regulations made under the Act require applicants to provide only minimal information about themselves and their organisations: some names and addresses, details of the time, place and manner of the collection, maximum number of collectors and the object which the collection is to benefit. Enforcement is left to the initiative of the local Gardaí, and is not monitored or reviewed on a countrywide basis. There is no provision requiring the permit holder...
to account for the funds collected, unless the permit is granted subject to such a condition, or the Chief Superintendent applies to the District Court for an order to that effect under section 23. Members of the public have no right to inspect the accounts of the collection. There is no requirement to clarify if any of the collectors are to be paid for their work, and if so at what rate. There is no requirement that the percentage of funds going to the charity should be disclosed on collection boxes or goods sold (for example, daffodil pins for the Cancer Society, or first aid boxes for the Red Cross).

Recommendations of the Costello Committee in relation to collections

The Committee gave four reasons for its recommendations:

• to strengthen controls against fraud and malpractice;
• to improve the administration of the Act and regulations;
• to protect the public against excessive importuning; and
• to regulate fundraising by public collections in as equitable a way as possible.

With these aims, the Committee made recommendations in relation to matters which were not covered by the Act: the sale of articles for charity from house to house, the street sale of flowers for charity, collection boxes left on premises for longer periods, collection of sponsorship contributions house to house and collections held in church grounds but not for religious purposes.

The Committee identified the shortcomings of the current system, recommending that the granting of collection permits should remain with the Gardaí, but making much more information available to them. If it appears that the profit from a collection is disproportionately small, this should be a ground for refusal.30

In relation to applicants, the Committee recommended that only organisations, not individuals, should be granted permits. While recognising the inconvenience of having to apply in separate districts, the Committee opted to retain the current position.31 Collectors should be required to wear badges displaying the Chief Superintendent’s official stamp on an authorisation, and collection boxes should be sealed, and should display the organisation’s name as well as the object being collected for.32

The Committee recommended that there should be an obligation to keep accounts of each

Footnotes:

31. Ibid., para 5.22  
32. Ibid., para 5.23
collection, which should be submitted to the relevant Chief Superintendent within a month of the
collection, and that these accounts should also be available for public inspection. Powers of
inspection were recommended for the Gardaí to enable inspection of books and records of
collecting organisations.33 In relation to commission for collectors, the Act does not give guidance
on what is “a reasonable commission for their services”.34 The Committee recommended that
collectors on commission should be prohibited, as allowing paid collectors identified by badges to
collect alongside unpaid volunteers would be difficult to enforce, as well as undermining the image
of charity in the mind of the public.35

The Committee recommended that the Minister, as opposed to the Garda Commissioner, should be
empowered to make any necessary regulations.

Recommendations of the Advisory Group in relation to collections

The Advisory Group dealt with the question of collections in the third section of their report. They
identified the main problems as:

• nuisance callers;
• doubts as to the bona fides of collectors;
• the swamping of local collections by the arrival of outsiders collecting for a national
collection; and
• transfer of proceeds to the recipient organisation.

They acknowledged the reality that it is impossible to make provision in legislation for all kinds of
fraud.

They recommended that any nuisance factor in collections should be included in the criteria to be
considered in relation to the awarding of permits.

Other recommendations were that the overall monitoring system should be the responsibility of the
registration authority, and that the award of permits should be shared between Chief
Superintendents in relation to local collections, and the proposed registration authority in relation
to national collections. The registration authority would be charged with developing rules in
relation to badges and standards for the conduct of collections, as well as appoint field inspectors
to check legal compliance during collections.

Footnotes:
33. Ibid., para 5.24
34. Street and House to House Collections
Act 1962, s. 9 (f)
35. Report of the Committee on
Fundraising Activities for Charitable
and Other Purposes (Government
Publications, Dublin 1990), para 5.26
(Costello Report)
Developments since 1996 in relation to certain street collections
Two significant developments have taken place since 1996. The first goes directly to the application of the 1962 Act to street collections. On advice from the Attorney General’s office, the Gardaí no longer require collection permits from charities which fundraise by “selling” a token for a price, provided that their collectors are not paid a fee or commission. Under the Casual Trading Act 1995 section 2 (2), casual trading does not include

“(c) selling in respect of which it is shown by the seller –
   (i) that any profits therefrom are for use for charitable purposes or for other purposes from which no private profit is derived, and
   (ii) that no remuneration, emolument, gain or profit will accrue to the seller or his servants or agents therefrom.”

Therefore charitable fundraisers using the guise of selling something (a happy heart, a daffodil pin, a sprig of holly) do not require a permit, and their activities are unregulated. This has the effect of saturating certain areas such as Grafton Street with collectors in competition with permit holders for that area. It also means that these fundraising activities, which represent a large proportion of street collections, are currently unregulated.

The second development relates to the collection of promises of money such as standing orders, as opposed to money in the form of coins and notes. On advice from the Attorney General’s office, permits are not required for the collection of promises of money under the 1962 Act.

Our recommendations in relation to collections
We believe that in general it is not appropriate for the fine detail of the administration of controls to be included in primary legislation, for the reason that circumstances change and there should be greater flexibility to accommodate this than can be provided through primary legislation. Instead, we recommend that the Minister should make regulations from time to time on the advice of the Charities Office in consultation with the sector.

We also question whether it is practical to require the granting of permits and licences for collections and lotteries and other fundraising events to be processed by the Gardaí and the District Courts. The reason for devolving this power to the Gardaí appears to have been the belief that the Gardaí with their local knowledge would be best placed to judge the credibility of applicants. We believe that the Charities Office if properly resourced and constituted will be equally well equipped

Footnotes:
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to deal with such matters, in consultation with local Gardaí if required. We recommend that the Charities Office should take responsibility for the granting of permits and licences for fundraising, with appeals to the District Court.

In relation to the allocation of collection dates at local and national level, we recommend a technological solution outlined in the Scottish McFadden Report. Whether the recommendations of the Advisory Group are followed and applications for local collections continue to be handled by the Gardaí, or whether that task is devolved to the Charities Office as recommended by us, we recommend that a national computerised database be set up and managed by the Charities Office, showing a calendar of all collection permits granted throughout the country by district. If the Gardaí continue to be involved, this system should be accessible over the Internet by Garda Superintendents’ offices, who would be able to consult the calendar and apply for dates, or even allocate dates themselves, so as to prevent an excess of collections on any one date in any one area. Such a computerised calender would allow nationwide and local collections to be matched and balanced, so that each organisation gets a fair opportunity to collect. We envisage that the Charities Office would co-ordinate the allocation of collection dates in consultation with the Gardaí. Training of course will be necessary both in the Charities Office and in the Garda Síochána if they are involved to ensure that the system is used effectively.

This calendar database could also be used to hold details of the results of all collections, assuming a duty to report results as recommended in the Costello Committee’s Report. The availability of this information to the Charities Office will be of use in the regulation of charities. The publication of such results however is likely to be resisted by the organisations raising funds, as important competitive information may be revealed in this way.

We recommend that the current exclusion from regulation of fundraising by means of charitable street trading should be reviewed. Such fundraising should be made subject to controls as to dates and locations in the interests of the fair sharing of dates and locations between all charities. Such fundraising should also be brought under the same controls of regulation and accountability as street collections in the public interest. The sale of items for charity or promotions in conjunction with charities should clearly state the amount or percentage which is payable to the charity.

We recommend that legislation should also cover the collection of promises of money (for

Footnotes:

example, standing order forms), as well as money.

III. LOTTERIES

The Gaming and Lotteries Acts 1956 to 1979

Part IV of the 1956 Act deals with lotteries. Lotteries are not defined but are stated to “include all competitions for money or money’s worth involving guesses or estimates at future events or of past events the results of which are not yet ascertained or not yet generally known”. A competition involving any level of skill, even if very basic, is not a lottery.

The Act contains a general prohibition against lotteries, with four kinds of lottery excepted.

1. Private lotteries involving members of a closed society not established for gambling or people who share a common workplace are excepted, and there is no need for a permit nor is there a limit on the value of prizes.

2. Lotteries may be held at dances and concerts and circuses and carnivals under conditions which limit them to the events, and the cost of tickets and value of prizes must be extremely low. No personal profit may be made by the organizers.

3. Occasional lotteries may be conducted in accordance with permits or licences issued by Garda Superintendents. The maximum value of the prizes is €3,000, and permits may be granted only once every 6 months. A permit may be given for multiple lotteries in one week, with the same cap on the total value of the prizes. The promoter may make no personal profit.

4. Finally, District Courts may give licences for up to a year for periodical lotteries, if they are for some charitable or philanthropic purpose(s). The promoter may make no personal profit, the total value of the prizes on any one occasion may not exceed €10,000 or €10,000 per week. No more than 40% of the gross proceeds can be spent on promotional costs including commissions.

The promoter must give the local Garda Superintendent 28 days’ notice of an application.

Regulations were made in 1961 under section 50 of the 1956 Act, which impose detailed record keeping and reporting obligations on the promoters.

Footnotes:

39. Gaming and Lotteries Act 1956, s. 2
40. AG v Healy [1972] IR 393
41. Ibid. s. 23
42. Ibid. s. 24
43. Ibid. s. 25
44. Ibid. s. 26
45. Increased from €300 by SI 72/1987
46. Gaming and Lotteries Act 1956, s. 28
47. Increased from €50 per week by SI 71/1987
Recommendations of the Costello Committee in relation to lotteries

The Committee identified numerous shortcomings in the legislation, detailed on pages 43 to 46 of its report. It made the following recommendations in relation to lotteries:

- The definition should be tightened to avoid an abuse whereby a competition requiring minimal skill gives access to a large scale, widely advertised lottery for which the promoters are not accountable.

- Abuses in relation to larger private lotteries should be avoided by requiring pre-notified lists of members to be notified to the local Garda Superintendent and the prize winners to be notified subsequently, and a ban on advertising.

- Lotteries at dances and concerts and circuses and carnivals should have the value of prizes increased, and the draw should be required to take place at the event where the lottery is promoted.

- Sale of lottery tickets on the street or from house to house should require a permit under the Street and House to House Collections legislation.

- In relation to occasional lotteries, administrative controls should be put in place in relation to lotteries held under a permit including the application for the permit to state how many tickets are to be printed, the price of each ticket, the date and place of the draw and a statement of the estimated distribution of the proceeds. The application for the permit should be made within 6 months of the date of the lottery, and should not be granted more often than every 6 months to any one beneficiary. Details of the lottery should be printed on each ticket including the name and address of the permit holder and the granting Superintendent. The expenses of the lottery should not exceed 20% of the proceeds, with no personal profit for the promoter. The draw should be open to the public, and within 3 months the promoter should make a return to the Superintendent certified by a qualified accountant as to the details of the lottery, and publicize the results and prizes.

- In relation to periodical lotteries, the Committee recommended that a periodical licence granted by the District Court should operate only in the Court district granting the licence, and not countrywide as at present, and multiple applications to different District Courts should be permitted. In order to provide for countrywide lotteries, the Committee recommended that periodic lotteries be licensed by the Charity Commissioners in
accordance with a scheme which the promoters would submit, as provided by new ministerial regulations, and subject to the usual conditions as to suitability of the promoters, the number of other schemes and so on. Proper records and accounts would have to be kept by persons identified as being responsible, and would have to be submitted to the Charity Commissioners and made available for public inspection. Schemes could be approved subject to conditions, and there would be penalties for breaches of a registered scheme. Tickets would only be sold through authorised agents, and the Charity Commissioners could appoint scrutineers to control the administration of the lotteries.

- The Committee noted that it was difficult to enforce limits on prize money within a period, and recommended that if limits were to be maintained, that an average of prize money over a number of draws would be the answer.

- The Committee recommended more efficient controls over periodic lotteries, including notification of intention to apply for a licence, details to be made available to the court, a rule that not more than 35% of the proceeds should be used to cover expenses, with the Minister stipulating by regulations what proportions should be used for prizes and the beneficiary organisations. Applicant organisations would have to be registered and have filed up to date returns with the Charity Commissioners and the Companies Office. Tickets should carry full details, and the draw should be open to the public and published in the press. The licence holder would be required to prepare professionally audited accounts in accordance with ministerial prescription, and submit them to the Chief Superintendent of the area in which the licence was granted. Licences could be granted for up to 12 months, with applications supported where appropriate by audited accounts of lotteries held under a previous licence. Records should be kept for at least 3 years, and should be subject to examination by the Charity Commissioners and the Gardaí.

- The Committee noted that the 1961 regulations made under the 1956 Act were unworkable in relation to scratch card lotteries, and recommended interim amendment of the regulations in relation to the keeping of accounts (for 2 years) and records (for 3 years), and furnishing of information to the district Garda Superintendent.

**Recommendations of the Advisory Group in relation to lotteries**

In relation to private lotteries, the Advisory Group agreed with the recommendations of the Committee, except that the limit for prize funds should be substantially increased.

In relation to occasional lotteries, the Advisory Group accepted the recommendations of the
Committee except in relation to the limit of 20% for promotional expenses, and the prohibition on sale in the street, and the requirement of a permit for sale of tickets house to house. They felt that the detail of any regulations should be left to the registration authority and not incorporated into primary legislation. They recommended that there should be no limit on the proportion of expenses, but that there should be full disclosure of expenses in the accounts.

In relation to periodical lotteries, they agreed that the present regulations were extremely burdensome on voluntary organisations. They felt that any capping of the prize limits was inappropriate with the competition of the National Lottery, and that compliance with the Statement of Recommended Practice (SORP) in Charity accounts would give information to identify imbalances between income and expenditure, and that the registration authority would have a role to play in promoting good practice. They recommended that the registration authority should handle applications for periodical licences, that the cap on prize funds should be removed, that there should be no prescribed limit on expenses, but full disclosure in the accounts. The necessary regulations should be the responsibility of the registration authority.


Much of the Review Group’s report deals with gaming, but there are several interesting conclusions in the context of fundraising for charities.

The Review Group were positive about the current situation:

“In considering the overall situation regarding lotteries and the various submissions received from the charitable, philanthropic and other interests, the Review Group concluded that, in general, the current arrangements are working reasonably well. A number of the provisions of the 1956 Act relating to lotteries . . . do, however, require attention.”

In relation to private lotteries, the Review Group noted their abuse by the sale of tickets far outnumbering the persons in a club or society, and the raffling of property.

In relation to lotteries at dances, concerts, circuses and similar events, the Review Group noted the unrealistically low prize limits, and questioned the need to make special provision for this type of lottery.

In relation to occasional lotteries, the Review Group were of the opinion that these worked well,
and only questioned the merit of Garda involvement.

In relation to periodical lotteries, the Review Group noted that in the year ending July 1998, 1,636 permits had been granted for such lotteries, which included traditional lotteries, scratch card lotteries and bingo where the prize level was over IR£3,000. They observed: “It is now the case that many of the larger operators use professional sellers, commission or other agents to promote, sell tickets or in some instances, actually operate the lottery or bingo sessions.” The Review Group noted calls for removal of the prize cap of IR£10,000, the fact that this would be likely to generate competition for the National Lottery, and also that a number of the larger charitable fundraisers benefit from the National Lottery via the Charitable Lotteries Fund.50

Their conclusions are set out in Chapter 7 of the report. They proposed four new categories with different licence/permit requirements attached to each:

“Category 1 Lotteries
Recommendation 32. Lottery schemes (including bingo) with a maximum prize fund of IR£15,000 per week, or IR£50,000 per month, operated under a licence issued by the Gaming and Lotteries Authority.

“Category 2 Lotteries
Recommendation 33. Lotteries (including bingo) with a maximum prize fund of IR£3,000 per three month period, operated under a permit to be issued by the Gaming and Lotteries Authority.

“Category 3 Lotteries
Recommendation 34. Lotteries with a maximum prize fund of IR£500, limited to one lottery per month, without the requirement for a permit or licence but complying with requirements as set out in regulations by the Gaming and Lotteries Authority.

“The beneficial interest in the above lotteries should rest with philanthropic, charitable or other similar interests, and no personal gain should accrue to the operators/promoters.

“Category 4 Lotteries
Recommendation 35. Lotteries operated in conjunction with, or as part of, sales or fund-raising, at the perceived unfair competition presented by the National Lottery.

Footnotes:
50. This fund was established in 1997 in response to protests from established charities which were dependent to some degree on lotteries for fundraising, at the perceived unfair competition presented by the National Lottery.
marketing promotions. The lottery element of such enterprises should not involve any personal gain for the promoters/operators. A permit should be obtained from the Gaming and Lotteries Authority on application in a prescribed form.”

As an interim measure, they also recommended that the limit of IR£10,000 prize money for periodical lotteries should be increased immediately to IR£15,000 per week. They were in favour of the retention of a cap on prize money as a means of preventing competition with the National Lottery, which they felt would not be in the interests of the State or of the charitable fundraising sector as a whole. A further factor they took into account was the IR£6m to be disbursed to qualifying charities from the National Lottery fund in 2000.

The Review Group proposed that appropriate fees should be paid to the Authority for lottery licences, permits, registrations and so on. The promotion of foreign lotteries in the State should continue to be prohibited.51

Proposed EU regulation of sales promotions
A draft regulation to permit sales promotions is under consideration in the European Union institutions and is targeted for implementation in the first half of 2003.52 The intention is to require member states to remove any prohibition on instant win games and promotions. In order that consumers should not be unduly or unfairly encouraged to buy products purely in the hope of winning a prize, the draft regulation provides that certain details must be published on the promotional pack, including the value and nature of the prize, any associated costs other than buying the promoted product which are involved in participating in the game or contest, and the actual or estimated odds of winning the prize. The adoption of this regulation as currently drafted will entail a removal of the blanket prohibition on lotteries in the 1956 legislation, or the addition of another exception to the existing four. It will mean that commercial enterprises will be able to conduct instant win games without the involvement of charities, where their involvement has been needed heretofore in order to get a lottery license.

Our recommendations in relation to lotteries
We agree with the approach of the Advisory Group, that rather than having a fixed percentage of funds raised allowable as costs, there should be transparent accounting and reporting. We feel that this is the better way in relation to most matters. However, this does not lessen the value of guidelines and standards, against which monies raised and expenses incurred can be measured and

Footnotes:
51. Recommendations 36 and 38
52. Lynn Sheehan, "EU regulation on sales promotions in the internal market" Law Society Gazette, May 2002, p.46
evaluated.

The recommendations of the Review Group are more about restructuring the kinds of lotteries to be legally available to organizations than the detailed conditions to be complied with for proper regulation. We agree in general with their proposals, though suggest that the value of the permissible total prize funds be increased. We acknowledge that the charity sector may have very different views and concerns.

The Review Group’s recommendation that lotteries should be regulated by a new Gaming and Lotteries Authority throws up a conflict with the proposed Charities Office as the regulatory authority for charitable fundraising by means of lotteries. We have no particular brief for the job of regulation of charitable lotteries being kept within the proposed Charities Office. It may be that a Gaming and Lotteries Authority would have more expertise and resources to regulate these activities. Against that, it can be argued that the Charities Office would have the necessary expertise in dealing with charities and all facets of their fundraising and accounts. In the event that regulation of lotteries is entrusted to a new Gaming and Lotteries Authority, it is clear that close liaison between that body and the Charities Office will be necessary and advantageous. The need to avoid double accountability on the part of charities should be a guiding concern in deciding which body should have regulatory responsibility, and how such regulation should be carried out.

IV. TELETHONS

Telethons – Costello Committee and Advisory Group recommendations
Telethons did not exist at the time of the 1956 and 1962 Acts, and take place outside any statutory control. The Committee proposed that Telethon organisers should establish a committee to manage and control the event, and work out a scheme to be submitted to the Charity Commissioners. Grounds for refusal would include the number of approved schemes already existing and the unavailability of dates. Designated people would be responsible for local collections and the keeping of accounts, which would be open to public view. The Charity Commissioners could impose amendments on the scheme, and have investigative powers to ensure compliance with the scheme as approved. The Scheme would state the charities to be benefited, the dates of collections and measures to prevent unauthorised collections. When the scheme is registered, it would avoid the requirement to comply with other controls in the Act. In relation to telethons organised outside the State, the Committee recommended that no collections should be allowed unless an organising committee were established in the State.

The Advisory Group agreed that telethon organisers should be obliged to register a scheme, and return accounts and records to the registration authority, which should have investigative powers in
Our recommendations in relation to telethons

We agree with the recommendations above in relation to telethons. In addition, we recommend that consideration should be given to donors to telethons being entitled to change their minds in relation to their donations or pledges within seven days of the donation, to allow for a cooling off period. We are not directly aware of problems arising from impulsive giving during the hype generated during these events, but we have hearsay anecdotal evidence of people making imprudent pledges which they cannot fulfill. Statutory recognition of this could be helpful to clarify the issue for all concerned.

V. PROFESSIONAL FUNDRAISERS

Professional fundraisers – Costello Committee and Advisory Group recommendations

The Committee’s report recommended the annual registration and regulation of professional fundraisers, including clearance by the Gardaí and payment of a bond. Registration should be capable of being cancelled, subject to an appeal to the High Court. Contracts between charities and fundraisers should be in writing in a form prescribed by ministerial regulation to deal with remuneration, expenses, services contracted for, sub-contractors, estimated receipts and so on. Contracts should be void until registered with the registration authority. As a general rule, remuneration should be by fees, not commission, and all monies raised should be paid directly to the charity without any deductions of remuneration or expenses. Accounts in relation to promotions should be furnished within three months to both the local Gardaí where the charity is registered, and the regulatory authority, and should be open to the public. The Committee also recommended that the regulatory authority should have power, if satisfied that there has been abuse or mismanagement, to require the return of money as appropriate, and if necessary apply to the High Court for an order for payment in accordance with its terms.

In relation to co-ventures, which is the term given to commercial ventures which in return for use of a charity’s name give a share of price or profit to the charity, the Committee recommended that the public should know exactly which organization(s) are to benefit from any promotion and how they are to benefit.

The Advisory Group agreed in principle that professional independent fundraisers should be required to register with the registration authority, that employees of registered organisations should not, but other independent fundraisers should, be required to register, and independent fundraisers should be obliged to show proof of registration to the voluntary organisation employing...
them. If the Charities Office makes its Register available on the Internet, this should not be an issue. Remuneration would be discernible from SORP based accounts, and the registrar’s annual report could highlight such issues for the benefit of the public. They recommended that children under 14 should not be paid for fundraising and that the question of a deposit or bond should be a matter for the regulatory authority. They were in general agreement with the other recommendations of the Committee.

Our recommendations in relation to professional fundraisers

The Irish Institute of Fundraisers was established in 1996. Its members include both independent consultants and professionals employed directly by charities. We recommend that it and clients of its members should be consulted in the development of regulations in relation to professional fundraisers.

We recommend that in addition to the requirements for professional fundraisers to be registered with the regulatory authority and for written agreements between them and the charities for which they are acting, there should be statutory grounds for charities to injunct professional fundraisers or others from collecting funds in their names where:

- the fundraiser is using methods to which the charity objects; or
- the fundraiser is not a fit and proper person to raise funds for the charity; or
- the charity does not wish to be associated with that fund-raising venture.

We recommend that in any fundraising effort involving professional fundraisers, a statement be made available to inform potential donors what proportion of their donations will be used to pay the costs of the fundraiser.

In relation to charity shops, we recommend that they should, as a matter of best practice, display a notice indicating what proportion of their turnover and profit is paid to their parent charity.

VI. FUNDRAISING ON THE INTERNET

There are indications that fundraising over the Internet may become at least as important as any of traditional ways of fundraising mentioned above. Recent experience in the UK suggests that large sums of money can be raised online more quickly and easily than in any other way. Oxfam GB raised over £100,000 in 2000, Comic Relief raised £330,000 in seven hours in March 1999, QXL.com raised £350,556 in 2000 and Oxfam GB raised £160,000 in their Pete Townsend guitar auction in May 2000. In Ireland, according to the same source of information, many charities

Footnotes:

54. This is based on the Charities Act 1992
55. This information is taken from a presentation by Howard Lake.
already accept online donations including Amnesty International, Trocaire, Focus Ireland, Co-operation Ireland and the Chernobyl Children’s Project. 10% of those signing up for Concern’s 24 hour fast in 2000 did so over the Internet.

Fundraising on the Internet generally involves a charity establishing a website and inviting donations, including membership subscriptions, which can be made by cheque, credit transfer or credit card payment, interactively on the website or by email or post. The invitation to donate may be supported by a media campaign to draw attention to the website. Many successful websites include regularly updated news and features, involving browsers and supporters in an ongoing relationship with the charity.

Legal issues of course arise for the owners of websites, and charities have an obligation to respect their obligations in creating and maintaining them. Obligations arise under the E-commerce Act 2000 and the Data Protection legislation, for example.56

The existing legislation in relation to fundraising was designed before the Internet came into existence. The Street and House to House Collections Act 1962 defines “collection” as a collection of money from the public in any public place or places or by house to house visits for the benefit (actual, alleged or implied) of a particular object . . . ” In order to solicit funds on the Internet, the prospective donor must have a computer, and it is not done in a public place, or house to house. Internet fundraising therefore falls outside the terms of the 1962 Act.

The Gaming and Lotteries Act 1956 enacts a general prohibition on lotteries in section 21, other than those lotteries declared not to be unlawful. This prohibition therefore applies to lotteries on the Internet as elsewhere. Taking part in a lottery outside the state is prohibited by section 34, for which the penalty is a fine of £100 or three months’ imprisonment or both.57 The problem with lotteries and other gambling on the Internet, as identified by the Review Group, is the difficulties which arise in regulating them and protecting the gambling public.58 The Review Group concluded “Overall, the group felt unable to make specific recommendations with regard to the regulatory environment which should apply to any future Internet gaming and lottery activities, other than to point out that any such activity should be in conformity with national legislation.”59

Footnotes:
56. Data Protection Act 1988, European Communities (Data Protection) Regulations, 2001, SI 626/01. A new Data Protection Bill 2002 has been published and will also be relevant when enacted.
57. S. 44. This was questioned by the EU on the grounds of infringement of the free market, but not pursued.
59. Ibid, p. 52
They continued

“It is suggested in view of the complex financial, revenue, legal and technical issues involved, that a special group with appropriate competencies, outside that contained in the present Review Group, could be established to examine this area.”

We do not seek to underestimate the challenges which must be faced in seeking to regulate transactions on the Internet. We would emphasize the advantages which the credibility of registration and regulation can give to charities on the Internet as elsewhere. We recommend that charities develop among themselves, perhaps with the assistance of the Charities Office, technical standards to protect their donors in relation to the identity of the charity and transaction security which can be independently certified on their websites. It is clearly in the interests of charities to secure any donations which are intended for them, and to protect the financial security of donors and donations.

The issue of regulation of the Internet was the subject of the first report of the Working Group on Illegal and Harmful Use of the Internet. This report recommended “a package of strategic measures” to assist in the avoidance of abuse of the Internet (in this report, specifically focused on the question of child pornography). The package recommended had four elements:

- The introduction of a system of self-regulation by the Internet service provider industry to include common codes of practice and common acceptable usage conditions. The Internet Service Providers’ Association of Ireland committed themselves to developing codes of practice in the context of the Working Group’s deliberations. Codes of Practice were agreed in February 2002.

- The establishment of a complaints hotline and agency to investigate and process complaints about illegal material on the Internet. A hotline was set up in November 1999 and continues to operate.

- The establishment of an Advisory Body to co-ordinate measures so as to ensure a safe Internet environment within the self-regulatory framework. The Advisory Body was envisaged as a forum for the partners of Government, the industry and others concerned including the Gardaí, the Censor’s office and users, to develop policy for the complaints agency and the service providers. In March 2000 a non-statutory Internet Advisory Board was established by the Minister for Justice, Equality and Law Reform, and a Cybercrime

Footnotes:

60. Ibid.
62. At p. 60
63. Available on the Internet Advisory Board’s website at http://www.iab.ie
subgroup has also been established. The work of these two bodies is ongoing. Internet research was published in mid 2001.64

• The development of awareness programmes for users which will empower them to protect themselves, or others in their care, from the illegal or harmful material on the Internet. Awareness campaigns for parents in relation to child pornography have been run during 2001.65

We recommend that the issues involved in charitable fundraising on the Internet should also be identified and monitored in the context of the Internet Advisory Board structure. We recommend that the Internet Advisory Board, if sufficiently resourced, or failing this the Charities Office should act as the complaints agency and investigate and process complaints of abuses on the Internet along the lines recommended in the Working Group’s report.

Footnotes:

64. "Research of Internet Downside Issues" commissioned from Amarach Consultants, published October 2001, and available on the Internet Advisory Board’s website at http://www.iab.ie
CHAPTER 4

LEGAL STRUCTURES FOR CHARITABLE ORGANISATIONS

I. INTRODUCTION

The purpose of this chapter of the report is to discuss the different legal structures available to frame the activities of charities. At present, there are three main legal structures available to charities but there are different requirements and conditions set down by both the legislation and the regulatory bodies responsible for overseeing the charity depending on the mode of legal structure chosen.

The role and responsibilities of those who are entrusted with the management of charities whether they are committees, trustees or directors also vary according to the type of legal structure chosen. However, one aspect that all modern charities have in common is that they must fulfil the requirements of the Revenue Commissioners by including the Revenue Commissioners’ requisite clauses in their governing instruments to avail of the tax exemptions granted to charities.

There are advantages and disadvantages with each of the various legal structures that is available to charities. An overall shortcoming is that different regulatory bodies are responsible for the regulation of different legal structures. There is no uniformity in their requirements, save for those of the Revenue Commissioners, which are discussed later in this chapter.

It is desirable that regardless of the legal structure involved, charity trustees should be required to adhere to the same standards of trusteeship and the same duty of care. It is desirable that any regulatory body such as the proposed Charities Office should be responsible for overseeing all charities and set down standard requirements to be fulfilled by all charities.¹

II. ESTABLISHING A CHARITY

There are certain prerequisites to establishing a charity: firstly, the aims or purposes of the charity must fall under one or more of the four *Pemsel*² heads, or objects, that is

- the relief of poverty;
- the advancement of education;
- the advancement of religion; or
- other purposes beneficial to the community.

¹ See also chapter on Registration and Regulation, section on regulation. ² *Commissioners for Special Purposes of Income Tax v. Pemsel* [1891] AC 531.
Secondly, the charity must decide what form of legal structure would best suit and facilitate its activities, and adopt an appropriate governing instrument. In the words of Cairns:

“A charity may be established by the completion of a formal governing instrument (declaration of trust, company Memorandum and Articles of Association or constitution), under the terms of a will or by publishing an appeal for funds.”

Thirdly, the charity must comply with the provisions of the legislation and any conditions set by the regulatory body (if any) responsible for overseeing the legal structure or governing instrument chosen by the charity to frame its activities, whether it be the Companies Registration Office or the Registrar of Friendly Societies. There is no regulatory body for unincorporated associations or trusts.

Fourthly, in order to avail of the tax exemptions granted to charities under the legislation, the charity must fulfil the requirements of the Revenue Commissioners and include the clauses required by the Revenue Commissioners within its governing instrument.

The Revenue Commissioners

The Revenue Commissioners have a specific but narrow role to play in relation to charities. They are responsible for considering applications from organisations, trusts and groups claiming exemption from tax on the basis that they are charities. In the year 2000 the sole source of information available to the Government as to the number of charities in Ireland was by reference to the CHY identification numbers that had been issued by the Revenue Commissioners.

The Revenue Commissioners will rule on whether or not the document outlining the purposes and activities of an organisation is such as to warrant its recognition as a charity for tax exemption. On a selective basis, the Revenue Commissioners check that the income of the charity has, in fact been applied for charitable purposes, and that the charity is not merely accumulating assets.

The Revenue Commissioners do not have a positive regulatory role, but can withdraw recognition and remove the tax exemptions where it appears that the objects or purposes of the charity are no

Footnotes:

3. In the recent White Paper on a Framework for Supporting Voluntary Activity for Developing the Relationship between the State and the Community and the Voluntary Sector. September 2000, p. 39, it was "strongly recommended that Community and Voluntary Organisations should adopt an appropriate legal framework."
6. The Revenue Commissioners require that a clause be inserted in the governing instrument providing that the charity has the power "to accumulate capital for any purpose of the charity, and to appropriate any of the charity’s assets to specific purposes, either conditionally or unconditionally. Prior permission must be obtained from Revenue where it is intended to accumulate funds for a period in excess of two (2) years."
longer exclusively charitable, or where the main objects of the charity have been amended or altered without their approval, or where the activities of the charity no longer correspond to the objects or activities in the charity’s governing document.

The Revenue Commissioners assess the eligibility of a charity for tax exemptions on the basis that the charity fulfils the following requirements:

- the objects of the charity must be exclusively charitable and fall under one of the four heads of the *Pemsel* case;\(^7\)
- the funds/property of the charity must be used for exclusively charitable purposes;
- the charity must be established in Ireland, which means that the charity must have at least a main branch located in Ireland. It does not mean that the charity’s funds may only be applied within the jurisdiction. Many charities claiming tax exemptions apply their funds for charitable purposes in the developing world.

If these requirements are fulfilled, charitable tax exemption will be given in the form of a reference number with the letters CHY followed by a number of digits.

**Applying for exemption from tax**

The Revenue Commissioners have an application form that must be completed by the applicant charity and the charity must submit its formal governing instrument for examination. When applying to the Revenue Commissioners for tax exemptions, other information such as details of the charity’s members, trustees and/or directors, accounts (if available), projections (if no accounts) and present and past activities or plans may be required and should be included in the application.

A governing instrument may take the form of a constitution, trust deed, or a Memorandum and Articles of Association and should set out the following information:

- the name of the charity;
- the main objects of the charity which objects should fall under one of the above four *Pemsel* headings;\(^8\)
- the powers of the charity; (not explicitly connected with the objects of the charity but which allow the charity to carry out its objects, such as the power to fundraise or hold property);
- details of its geographic range of operation whether it be Ireland and/or abroad;
- its rules, which should cover membership, appointments and dismissals, executive committees, meetings, and any other rules required for the proper conduct of the organisation.

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Footnotes:

7. Relief of poverty, advancement of education, advancement of religion and other purposes beneficial to the community.

8. Ibid.
There are certain clauses required by the Revenue Commissioners to be included in the governing instrument:

- the non-distribution of income, assets or profits to the members of the charity;
- the keeping of annual accounts\(^9\) and making them available to the Revenue Commissioners on request;
- the prohibition of the payment of fees or salaries (other than out of pocket expenses) to officers or directors for services rendered in that capacity. Thus a director cannot be a paid employee of the charity nor may directors receive payment for any services rendered to the charity. This is to ensure that no conflicts of interest can arise and is intended to protect the charity;\(^{10}\)
- in the event that the charity is wound up, that the assets are transferred to some other charitable body having similar objects to itself, or failing that, to some other charitable body;
- a stipulation that approval will be obtained from the Revenue Commissioners prior to making any amendments to the governing instrument. This allows the Revenue Commissioners to assess whether the exemption should continue in light of the proposed amendment and it also protects the charity. In the event that the charity amends its governing instrument and does not inform the Revenue Commissioners, it runs the risk of acting *ultra vires* the exemption granted and incurring a liability to tax, including arrears, once the fact that it has acted *ultra vires* is discovered.

These clauses will usually be found in governing instruments of modern charities.

**Legal Structures**

As outlined previously, all charitable organisations require a legal structure and a governing instrument or document. The form best suited to the function of any charity depends very much on the charitable purposes, the planned activities of the charity and how it is proposed to fund these activities.

Charitable organisations now mainly take one of three legal forms:

- an unincorporated association;
- a charitable trust;
- a company.

There are other legal forms, which are used by a minority of charitable organisations, such as the

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Footnotes:

9. The accounts will have to be audited if the charity is incorporated under the Companies Acts 1963-2001.
10. However, in certain circumstances the Revenue Commissioners will waive this prohibition.
Friendly Societies and Industrial and Provident Societies. There are also some charities which exist as corporations, and some established by statute (such as universities), others by Royal Charter.

The following governing instruments are used to establish the different types of organisations:

- Constitution or rules for an unincorporated association;
- Trust deed or declaration of trust for a charitable trust; and
- Memorandum and Articles of Association for a company limited by guarantee without share capital.

The main differences between these structures is that of legal status and “whether it constitutes a collective and separate legal status which is more than the sum of its parts, or whether it does not have such a separate legal status but is dependant upon individual agreements reached between its members.”¹¹

The legal form of a charitable organisation will either be:

- distinct and a separate entity from its members and will have a legal status of its own in the form of a company limited by guarantee; or
- one which does not constitute a legal entity distinct from its members such as an unincorporated association or trust.

Whether or not the charity is a separate legal entity has implications for accountability. If a separate legal entity exists, the members of the charity are not held individually responsible for the charity’s activities but where it does not exist each member is individually responsible for the charity should any difficulty or conflict arise, for example, liability for employees’ entitlements in the event of the charity going into liquidation or receivership.

Thus it is important to note that the provisions in the charity’s governing document will differ depending on the type of structure chosen. Charities would benefit from having standard provisions required to be included or implied in their governing instruments regardless of the legal structure involved in addition to those currently stipulated by the Revenue Commissioners, and such standard provisions are discussed later in this chapter.

Footnotes:

III. LEGAL STRUCTURES: UNINCORPORATED ASSOCIATIONS

Many charitable organisations are constituted as unincorporated associations and are usually governed by a set of rules in the form of a constitution. An unincorporated association has been defined as:

“... an association of persons bound together by identifiable rules and having an identifiable membership.”

Such organisations are like clubs, consisting of people bound together by mutual agreement, who meet on a regular basis to pursue a common interest. Many smaller charitable organisations are formed this way, particularly where, as noted by the Charity Commissioners13 in the UK:

• the charitable activities are in the short term;
• the charitable activities are locally based;
• the charitable organisation is relatively small in terms of assets;
• the organisation is to be a local branch of a national charity, and a standard constitution exists for branches;
• it has membership;
• the charity trustees are elected or appointed to hold office for a fixed period of time, usually one year;
• the charity trustees are to be elected by the members;
• the views of local residents, local councils and other bodies need to be represented through membership, or as users of the facilities; and
• the objects of the organisation are to be carried out wholly or partly by, or through the members (i.e. where the members undertake office or voluntary work on behalf of the organisation).

Legal requirements

There are no formal requirements for unincorporated associations. If charitable status for tax exemption is sought, the Revenue Commissioners’ clauses must be included in the governing instrument, usually a constitution or set of rules.

The Constitution

There are no specific rules as to what must be included in a written constitution. It is desirable to have some form of written evidence or document setting out the nature of the agreement of the

Footnotes:
charity’s members and this is usually done by way of a constitution which however normally sets out the following:

- the name of the association;
- its aims and objectives which should fall under one of the definitions under the *Pemsel* decision;\(^{14}\)
- details of its membership and/or its management committee and the eligibility for same;
- the role, function and the contractual arrangement of the members of the board of management;
- the appointment of the members of the board of management;
- the terms of office of the members of the board of management; and
- the powers and duties of the board, and meetings of the board.

The members of an unincorporated association are governed by a contractual arrangement setting out the purpose of the organisation and its operations but the charitable organisation has no separate legal status. An unincorporated association is not a separate legal entity. An unincorporated association will not have limited liability or a legal personality of its own.

The constitution is a contract or binding agreement between the members of the organisation to abide by the terms of the agreement, which is to achieve the aims or objects as set out in the constitution, and to carry out the activities in accordance with the terms of the constitution. However while the constitution is binding between the members of organisation, it has no legal effect in relation to non-members. Therefore, anything done by the organisation is done by all the members of the organisation and the members of the organisation are responsible for all the activities of the organisation. As the organisation has no personality of its own or no legal status, this means that it cannot enter into contracts or own properties. This feature of unincorporated associations raises particular difficulties in relation to the ownership of property and the rights and liabilities of the organisation in contract and tort and its ability to sue and be sued.

In unincorporated associations, the internal decisions of members are governed by the contractual arrangement entered into when the association was established. However all external decisions which bind the association in relation to third parties are governed by normal contract law.

It should be noted that any debts incurred by an unincorporated association, or any contractual obligations entered into as a result of decisions taken by the board or ordinary members without proper authority can result in the members or the board being made personally liable for these debts.

\(^{14}\) Relief of poverty, advancement of education, advancement of religion and other purposes beneficial to the community.
or obligations and may be a disincentive for establishing a charity in this form.

The governing committee, members of the board, or trustees (referred to as “trustees”) are bound by the objects of the charity and they are under a duty not to do anything that is outside the scope of the objects of the charity. If they do so, they risk being in breach of trust and being made personally liable for any loss to the charity funds or if the funds are misapplied.

The trustees act as agents for the members of the charity and are normally authorised under the constitution to enter into contracts and arrangements that are necessary for the purposes or activities of the charity. Once the trustees act within their authority for furthering the purposes of the charity, then their decisions will be binding upon the members. The trustees may be liable for the repayment of any debts that they have incurred on behalf of the charity, and such debts can be met from the charitable organisation’s own funds unless the trustees have not acted prudently, lawfully and in accordance with the charitable organisation’s governing instrument.

Advantages of an unincorporated association

Charitable organisations often commence as unincorporated associations and become incorporated as they grow in size or acquire assets. There are no legal requirements for an unincorporated association, as it depends on the contractual relationship between its members. The biggest advantage of an unincorporated association is that it is easy and inexpensive to set up. It will also have considerable discretion in the manner of its operation and administration and therefore appeals to small voluntary groups.

An unincorporated association also has the advantage that it does not have to be registered with any governmental body except where it requires the taxation exemptions and would therefore have to include the Revenue Commissioners’ requisite clauses in its constitution.

Disadvantages of an unincorporated association

The biggest disadvantage of such unincorporated associations is that the members are not entitled to limited liability, making them personally liable for their actions including financial failures of the charitable organisation.

IV. LEGAL STRUCTURES: TRUSTS

It can be said that equity and the law of trusts provides the foundation for modern charity law both in Ireland and the UK. Charitable trusts have distinctive characteristics, which may be found both in the trust deeds of charitable trusts established over one hundred years ago and those charitable organisations now being established in the 21st century.
Over the years, numerous attempts have been made to define the nature, terms, rights and obligations of a trust and Keeton and Sheridan give the most comprehensive definition of a trust:

"A trust is the relationship which arises whenever a person (called the trustee) is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit accrues, not to the trustee, but to the beneficiaries or other objects of the trust.”15

According to the Charity Commissioners16 in England and Wales, a trust is suitable for organisations where:

• the organisation is to be run by a small group of people;
• there is no time limit on how long the trustees will be in office (although they can be appointed for a specific period of time if necessary);
• new trustees will be appointed by the continuing trustees;
• the organisation does not rely on membership for any part of its administration;
• the administration of the organisation is going to be simple;
• lands and buildings are to be held on trust for permanent use for the purposes of the charity;
• the organisation is going to be a grant making body only;
• there is to be a restriction on spending capital.

According to O’Halloran:

“There are two principal types of charitable trusts. Firstly, there are those established by a benefactor, and perpetuated by investment generated income, which give effect to their objects by means of grants provided at trustee’s discretion. These are often associated with families, the Rowntree charitable trust being a good example. Secondly, there are charitable trusts established as service delivery agencies for a specified client group such as the elderly, disabled or mentally ill, which although established by philanthropic gift have become to depend upon contracts or grants provided by government bodies.”17

Legal requirements

To establish a charitable trust, the requirements common to all trusts must be adhered to and all the formalities, such as the three certainties (i.e. certainty of intention, certainty of subject matter and

Footnotes:

certainty of objects), must be satisfied.\textsuperscript{18} The legislation governing the technical requirements for creating trusts in general has an equal application to charitable trusts. Charitable trusts must adhere to the provisions of the Trustee Act 1893 and the Charities Acts 1961 and 1973 and the trustees must abide by the duties and responsibilities set out in these statutes.

**Trust deed**

The trust deed sets out the key matters of the trust such as:

- the appointment of trustees;
- the removal of trustees;
- the objectives of the trust;
- the powers of the trustees; and
- the power to amend the trust deed.

The internal relationships of a trust, like those of unincorporated associations, are established by the terms of the governing instrument, be it a trust deed or a declaration of trust. However, the trustees conduct all external relationships in a contractual capacity. A trustee is a person who derives his or her appointment and responsibilities from the terms of a trust.

The principle distinction between trusts and other legal forms is that their raison d’être lies in the protection and use of designated property rather than in setting the rules for how individuals may be best organised to act collectively.

**Advantages of a trust**

The advantages of charitable trusts were usefully summarised by P.J. Ford:\textsuperscript{19}

“It is not a suitable form for a charitable body which is intended to become a members’ organisation, nor for one likely to engage in providing services or to employ substantial members of staff. On the other hand, it is well adapted to the management of assets held for charitable purposes either as a grant-making trust or as a trust ancillary to a service-providing charity constituted in another form. The trust is perhaps at its best as a ‘charity vehicle’ where the tasks to be performed are the management of substantial assets and the distribution of cash grants and where the administration of the trust will be undertaken by a small body of experienced trustees with ready access to professional advice.”

Footnotes:

\textsuperscript{18} It should be noted that one of the features of charitable trusts is that they do not need to fulfil the requirement in relation to certainty of objects and the objects may be purposes and individuals.

\textsuperscript{19} Barker, Ford, Moody and Elliot, *Charity Law in Scotland* (Green, Sweet & Maxwell, Edinburgh, 1996), p.83.
The main advantages of setting up a trust as opposed to other legal forms is the relative speed, simplicity and lack of cost involved.

Disadvantages of a trust

A trust however can be quite cumbersome and undemocratic in that the trustees, once appointed, are difficult to remove and therefore the group or charitable association only has indirect control over its own property. In addition, the trust is only of relevance to the specific property covered by the trust. It does not provide a legal personality for the general work of the charitable organisation and the members would still be individually responsible for any activities of the charitable organisation.

Trustees have no limited liability and can be sued in their personal capacity for breach of trust and can be held personally liable for third party debts.

Trustees have general control of the administration and assets of the trust but they only have the powers as set out in the trust deed. They have legal responsibilities and duties that are set out in the Trustee Act 1893 and these duties cannot be delegated unless this is permitted in the trust deed. There are far greater restrictions placed on the trustees of a trust than on directors of a company.

The alteration or change of trustees is a complex matter and usually requires the formal retirement of a trustee and the completion of a formal deed of resignation and a further formal deed of appointment of a new trustee. This process can be very cumbersome especially where some of the trustees have died, or are not based in the same country or where the necessary power to appoint a new trustee is not included in the trust deed.20

The trustees have no power to alter or amend the trust deed unless the trust deed specifically provides such authority. This can be a significant drawback, where the objects of the charitable trust have become defunct or outdated. The absence of the necessary authority to alter or amend the trust deed can leave the trustees in a difficult position and often with no alternative but to wind up the trust or make a cy-près application to the Commissioners for Charitable Donations and Bequests21 or apply to the High Court for direction.22

A charitable trust and its trustees must abide by the Trustee Act 1893, the Charities Acts 1961 and 1973 and also the equitable maxims such as “he who seeks equity must do equity”, and “he who

Footnotes:

20. However the Commissioners for Charitable Donations and Bequests may appoint new trustees at the request of a charity in place of or in addition to any existing trustee or trustees under s. 43 of the Charities Act 1961. There are also provisions for the appointment of new trustees under ss. 10 and 25 of the Trustee Act 1893.


22. Under s. 51 of the Charities Act 1961, any person may apply to the High Court for directions.
comes to equity must come with clean hands.”

Unfortunately, the concept of a trust or charitable trust is limited to Common Law jurisdictions. It is not generally recognised by other Civil Law jurisdictions, notably those based on Napoleonic Law in Europe, as a mode of legal structure and this can lead to problems if a charity is seeking recognition in other European jurisdictions.

V. LEGAL STRUCTURES: COMPANIES LIMITED BY GUARANTEE AND NOT HAVING A SHARE CAPITAL

A company is an association of persons formed for the purpose of some business or undertaking carried on in the name of the association.

One of the advantages of a company structure is that it enjoys limited liability and perpetual succession, as it is the company that will sue and be sued, and any assets of the charity will be registered in the name of the company and not individuals. A company is a separate legal entity and exists separately or independently of its members.

There are various types of company, but the type of company mostly commonly utilised by charitable organisations is the company limited by guarantee and not having a share capital. The reason for this is due to the fact that in a company limited by guarantee, there are no shares and therefore no proprietary interest in the company, which reflects the fact that the company’s property is held and applied for the charitable purposes of the company as stated in its objects clause. In such a company, each member

“gains a stake in the company by means of guaranteeing a set sum of money (usually the nominal amount of £1.00) to the company. The sum is fixed so there is no possibility of profit by the members by means of selling their stake. The maximum liability of the members is the amount of their guarantee.” 23

In the recent White Paper, 24 it was recommended that community and voluntary organisations should adopt an appropriate legal structure, and it was noted that most cases would suit registering as a company limited by guarantee and not having a share capital. It was also proposed that the Companies Registration Office would provide guidelines. At present, however, in practice, it is the Revenue Commissioners who provide a standard set of Memorandum and Articles of Association for charities, which are used by a number of charities.

Footnotes:
24. White Paper on a Framework for Supporting Voluntary Activity for Developing the Relationship between the State and the Community and the Voluntary Sector, September 2000 at p. 39
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The company limited by guarantee is often the structure most suitable for charitable activities. Its use is eased by the availability of the standard model of Memorandum and Articles of Association as prepared by the Revenue Commissioners, and therefore automatic compliance with the Revenue Commissioners’ requirements in seeking the usual exemptions from tax. Another advantage is that where a charity is applying for funding from a governmental agency, it is the mode of legal structure preferred by nearly all governmental agencies where state funding is being sought.

It may be appropriate to establish a company where some or all of the following apply:
- the unincorporated association has grown in size and organisational activity;
- the organisation is to be quite large;
- it will employ staff;
- it will deliver charitable services under contractual agreements;
- it will regularly enter into contracts; and
- it will be an owner of freehold or leasehold land or other property.

Legal requirements for companies

The law governing the requirements of companies is found in the Companies Acts 1963 - 2001 (“the Companies Acts”) and applies generally to all forms of companies, including charitable companies. The body responsible for overseeing the operation of the Companies Acts is the Companies Registration Office. The Companies Registration Office is responsible for ensuring that applications for registration as a company comply with the requirements of the Companies Acts, which include making annual returns, and the submission of annual accounts.

The basic requirements which apply to charities incorporated under the Companies Acts, are as follows:
- to keep a register of members and directors;
- to keep minutes of all meetings;\textsuperscript{25}
- to hold an annual general meeting within 18 months of incorporation and at least every 15 months thereafter;
- to make an annual return to the Companies Registration Office within 28 days of the company’s Annual Return Date;\textsuperscript{26}
- to notify the Companies Office of any special resolutions and of any changes to the Memorandum and Articles of Association;
- to notify the Companies Office of any changes in the directors, secretary, the auditors or the

Footnotes:
\textsuperscript{25} Companies Acts 1963 – 2001, s. 145.
\textsuperscript{26} Company Law Enforcement Act 2000, ss. 59 and 60.
registered office within 14 days of the changes and of any change in the name; and

• to keep proper accounts and submit audited accounts with the annual return.

Under the legislation, a company limited by guarantee is required to have a minimum of seven members and a maximum of fifty. A company limited by guarantee is required to have a minimum of two directors, one of whom must be resident in the State.\(^{27}\)

There are other provisions in the Companies Acts which specifically apply to charitable companies:

• Under section 24 of the Companies Acts 1963 – 2001, charitable companies may be permitted to exclude the work “Limited” or such derivatives as “Ltd.” from their names and letter headings by applying to the Minister for Enterprise, Trade and Employment. However in order to obtain such approval, the objects of the company must be “promotion of commerce, art, science, religion, charity or any other useful object” and the organisation must be non-profit distributing.

• A charitable company may not alter its objects without the consent of the Minister for Finance and it must seek the prior approval of the Revenue Commissioners.

• Under section 18 of the Companies (Amendment) Act 1986, most companies must file their annual accounts with the Companies Office. However the 1986 Act does not apply to a company without a share capital, whose objects are charitable and under the control of a religion recognised by the State under Article 44 of the Constitution and which exercises its functions in accordance with the laws, canons and ordinances of the religion concerned is exempted.\(^{28}\)

The Memorandum and Articles of Association

The rules and regulations of a company are set out in the Memorandum and Articles of Association, which effectively are the constitution and governing instruments of the company. The Memorandum of Association sets out the objects of the company while the Articles of Association set out the rules and regulations of the company and are usually based on the model form found in Table C of the First Schedule of the Companies Acts 1963 – 2001.\(^{29}\)

A charitable company is one whose objects as stated in the Memorandum of Association are exclusively charitable and should fall under one or more of the four categories as stated in the

Footnotes:

27. Companies Act 1999, s. 43

28. This provision was initially included under s. 128 of the Companies Act 1963 and is now continued in s. 2 of the 1986 Act.

29. In the First Report of the Company Law Review Group, December 2001, p. 15, it is recommended that for private companies limited by shares, the current two document company constitution composed of the Memorandum and Articles of Association should be replaced by a one document constitution in order to simplify company law, to make it clear and more accessible to meet the needs of smaller private companies.
The Memorandum of Association

The Companies Act 1963 - 2001 provide that in the case of each category of company which may be registered, the Memorandum of Association must be in the form set out in the appropriate table in the First Schedule of the Companies Act 1963 – 2001 “or as near thereto as circumstances admit”.31

The Memorandum of Association must state the following:

• the name of the company;
• the main objects of the company;
• the limited liability clause;
• the capital clause;32 and
• the association clause.

The main or principal object(s) of the company must be specified in the Memorandum of Association. The main objects will normally specify the primary place or jurisdiction in which the charitable activity is to be carried out. Further ancillary clauses frequently refer to the discharge of the charitable works in a greater geographic area. These subsidiary clauses may also contain clauses that provide for the maintenance and support of those providing charitable works, for example, religious congregations.

The powers of the company are then listed and specify in detail the powers available to the directors in carrying out the principal object(s) of the company. The Companies Acts 1963 – 2001 govern the remaining clauses in the Memorandum of Association and in the event that charitable approval is sought for the company, the clauses stipulated by the Revenue Commissioners must be included. These clauses are in relation to the following:

• the limited liability of the members of the company;
• that no member, director or officer of the company may profit from his position;
• that the Memorandum and Articles of Association of the company will not be altered or amended without the prior approval of the Revenue Commissioners; and

Footnotes:

30. Relief of poverty, advancement of education, advancement of religion and other purposes beneficial to the community.
32. In the case of companies limited by shares, the Memorandum of Association must contain a clause stating the amount of the nominal capital, the number of shares into which it is divided and the amount of each share. However this clause is not required in a company limited by guarantee and not having a share capital as it does not have a share capital.
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• that annual audited accounts will be kept and made available to the Revenue Commissioners.33

The Articles of Association

The Articles of Association are the regulations by which a company is to be governed and managed and set out the internal management of the company and the particular areas covered will include:

• members of the company;
• annual general meeting and extraordinary general meetings;
• board of directors;
• appointment and removal of the directors;
• meeting of the directors;
• chairperson/vice-chairperson/company secretary;
• minutes of meeting;
• company seal; and
• accounts and audits.

Table C of the First Schedule of the Companies Acts 1963 – 2001 sets out the model form of Articles of Association for companies limited by guarantee and not having a share capital. This model form Articles of Association will apply to a company limited by guarantee and not having a share capital unless they are amended or substituted by the charity’s own Articles of Association.34

Advantages of a company

Cairns states the main advantages of incorporation for a charity are:

“(i) the power to alter the Memorandum and Articles;
(ii) the protection of limited liability;
(iii) the machinery for involving the members in the running of the charity; and
(iv) the corporate identity”.35

There are other advantages to a company structure for charitable activities:

• A company is a legal entity and is distinct from its members and enjoys perpetual succession as a corporate body and will continue to exist despite changes in its membership. It ensures continuity of ownership regardless of changes in individual circumstances such as changes at membership level.
• Once the company is incorporated, assets may be transferred to the company, by donation

Footnotes:
33. In this case, the annual accounts will be audited as the charities are companies and will therefore need to comply with the provisions of the Companies Acts 1963 – 2001.
34. Companies Act 1963 – 2001, section 13A provides that a company limited by guarantee and not having a share capital may adopt all or any of the regulations contained in Table C.
or purchase, and will be held in the name of the company rather than in the name of an individual. The company can hold property and enter into contracts in its own name.

• A company can enter into legal agreements in respect of its assets.
• The company can do all things specified in the objects clause of the Memorandum of Association and all things that are ancillary to the objects of the company.
• The overall control of the company is with the members of the company. The Board of Directors are responsible for the general management of the company and can sign all necessary documentation in relation to the company.
• The company structure provides a good management format for charities particularly the larger ones and provides a degree of transparency and accountability.

This form of legal structure is recognised by other European jurisdictions and also in the United States, Canada and Australia, where such incorporated associations for charities already exist.

**Disadvantages of a company**

• The costs of formation of a company as opposed to establishing a trust are marginally higher and there are also recurring administration costs to do with audits, membership maintenance and filing annual returns.
• The annual return and accounts of the company must be filed in the Companies Registration Office every year and therefore become available to the general public, which can cause some charities concern. In the event that our proposals to require filing and publication of the accounts of all but the smallest charities are followed, transparency of accounts will become the norm for all types of charities.
• The organisation of a company is more complicated and imposes a regime of legal requirements and procedures for meetings of the company which must also at all times adhere to the complex provisions of the Companies Acts 1963 – 2001.

In the event that our proposals to establish a Charities Office to oversee charities are followed, charities will have to fulfil the requirements, (such as the filing of accounts and annual returns) of two different regulatory bodies, both the Companies Registration Office and the proposed Charities Office, unless arrangements can be made to avoid duplication.
VI. LEGAL STRUCTURES: INCORPORATED SCHEMES UNDER THE CHARITIES ACTS 1961-1973

A further legal structure available to charities can be found under Section 2 of the Charities Act 1973. The Commissioners for Charitable Donations and Bequests can incorporate charitable trusts and thereby grant them separate legal status. This has the effect of vesting all the property of the trust in the new body corporate. The method of incorporation is by a scheme drawn up by the Commissioners of Charitable Donations and Bequests, and the provisions for such schemes are set out in Section 2(2) and (3) of the Charities Act 1973. At present there are approximately 25 schemes incorporated under the Charities Act 1972, which accounts for less than 0.5% of charities established in the State.

VII. LEGAL STRUCTURES: CHARITABLE INCORPORATED ORGANISATION (CIO)

As we have seen, anyone wishing to establish a charity is faced with a variety of legal or informal structures from which to choose, none of which is specifically designed for charities and all of which have legal and practical problems. Trusts and unincorporated associations lack the limitation of liability. While companies limited by guarantee offer some advantages to charitable organisations, they are not necessarily ideal.

Companies are subject to a burdensome regime as charities established by way of companies limited by guarantee face dual registration and regulation requirements with both the Revenue Commissioners and the Companies Registration Office. The Companies Acts 1963 - 2001 are designed primarily to meet the practicalities of the commercial sector rather than the different ethos of the charity sector, for example in the rules of corporate governance and in the underlying assumption that members have a financial interest in the company.

There have been discussions in the UK about the need for a new incorporated legal structure for charities for the past decade. In 1994, the National Council for Voluntary Organisations, the Charity Law Association and the University of Liverpool in the UK launched a joint project. The aims of the project were:

• to carry out comparative research into constitutional models of charities and other non profit organisations in other jurisdictions;
• to carry out a survey of constitutional problems experienced by charities in the UK; and
• to make recommendations to government, drawing on the results of the research.
The working party carried out studies on charities in Australia, New Zealand, France and Germany and revealed interesting models from both common and civil law jurisdictions and a number of common features emerged:

- it was necessary to have a legal structure specifically designed for not for profit organisations, which had an independent legal personality;
- limited liability for those running and involved in the organisation; and
- the ability to amend the constitution and dissolve the charity voluntarily.

The working party developed recommendations and draft skeleton instructions for the drafting of an Act, and regulations for a Charitable Incorporated Organisation were produced.

The Reports of the Deakin and Kemp Commissions on the future of the voluntary sector also proposed that there should be a separate vehicle for incorporating charities.

The Department of Trade and Industry (DTI) in the UK recently produced proposals for the reform of company law and Chapter 9 of this consultation paper puts forward proposals for a new corporate structure for charities and included alternative vehicles and access to limited liability. The paper posed four specific questions:

- whether there should be a separate form of incorporation for charities;
- whether it should be restricted to charities;
- whether bodies eligible for incorporation under the new structure should be restricted from incorporation under the Companies Act; and
- whether companies currently registered under the Act should be required to register under the new regime.

The majority of the responses supported a separate form of incorporation for charities and that this new legal form should be restricted to charities on the basis that:

- charities already covered a wide range of organisations which was itself a sufficient challenge;
- a new form ideally suited for charities would not be suited to non charities;
- the Charity Commissioners should be the registration authority with registration having the effect of both incorporating the body and giving legal recognition as a charity.

Footnotes:

36. In the above mentioned countries as well as Canada, the form of not for profit corporation has been in existence for a number of years, so much so, that many of the above countries or their respective States are now reviewing their own legislation for non profit organisations as is evidenced in the Ontario Report, Ch. 15.


A question was posed as to whether the company form should continue to be available to new charities seeking incorporation, and the majority was opposed to charities having such a choice between the company structure and the new form of incorporation and felt that any new charities should be required to adopt the new model of charitable incorporated association.

The Charity Law Association opposed the compulsion to register under the new model on the basis that the new structure would be a completely new form of entity and that it would take time for confidence to develop in the commercial world and that charities should not be prejudiced by such compulsion. The Charity Law Association also considered that there could be initial practical or administrative difficulties in operating the new form and it would be contrary to the nature of charities to introduce such an element of compulsion into a charity’s internal organisation.

Those supporting the idea of compulsory registration did so on the basis that the addition of another incorporated form for charities without closing the company route could lead to confusion and lack of transparency.

Following the DTI consultation, the Charity Commissioners in the UK set up an advisory group to consider the proposals for a new form of incorporation for charities and welcomed the recommendation of the consultation paper that there should be a new form of incorporated body specifically for charities.\textsuperscript{41} The advisory group were of the view that the basic requirements of the new form of incorporated body specifically for charities were:

- that the legislation should provide for a new form of legal entity, known as the Charitable Incorporated Organisation ("CIO");
- that the legislation should provide that the CIO would be a body corporate, with a separate legal personality distinct from its members;
- that the members’ liability should be limited to making a contribution to the settlement (in the amount of the guarantee contained in the constitution) of the liabilities of the CIO on being wound up; and
- that the new CIO would not be mandatory.

The advisory group considered the context of the primary legislation, which included the formal requirements for the creation of the CIO and the matters to be dealt with in its constitution and whether the legislation should prescribe the form of constitution or whether it should merely specify the fundamental elements to be included.

\textsuperscript{41} Charity Commissioners, Charitable Incorporated Organisation – Report from the Advisory Group to the Charity Commission, Spring 2001.
The advisory group recommended that the approach set out in “Modern Company Law for a Competitive Economy: Completing the Structure” be followed, being that the basic principles and architecture for the CIO should be set out in primary legislation with the more detailed requirements in secondary legislation.

Basic principles and requirements of the Charitable Incorporated Organisation

The advisory group set out the basic principles and requirements of the CIO in their Report and suggested that any new legal structure should take into account the diverse nature of the charity sector in terms of the size of the charitable organisations and purposes. The Report advises that the new legal entity needs to recognise this diversity and “beyond basic requirements for existence and operation, be as flexible as possible.” The Report recommends that the flexibility would need to extend to governance, operational and membership provisions if the new legal entity is to be used as the preferred structure of charities in the future.

The Report makes various proposals for the primary legislation and the most notable recommendations are as follows:

1. The Charity Commissioners would be the regulatory body of all CIOs and would have authority in respect of the registration and cancellation of CIOs. The legislation should provide for charitable companies limited by guarantee to be converted to CIOs by special resolution or written resolution of its members and that the process of converting a charity to a CIO should be fast and cheap.

2. The CIO would be a more effective structure if all organisations were required to have a full written constitution. The Report recommended that the constitution should be in one of two prescribed forms or as near to the relevant form as possible and the forms would provide a “basic but detailed” constitutional structure in non legal language.

The two forms that are proposed are:

• the Foundation Model, where the only members are trustees;
• the Association Model, where there is a wider membership.

The above models correspond to the unincorporated structures of the trust and the unincorporated association. At present there is no distinction made between the two incorporated models in the UK, though in practice they operate in very different ways. In
civil law countries there are usually two distinct forms, governed by separate legislation and it was thought that there would be merit in adopting the two distinct constitutional models.

3. The prescribed forms of the two types of constitutions would cover all the standard provisions, including lists of standard administrative powers, provisions in relation to delegation, governance provisions, duty of loyalty and distribution of assets on winding up. It was suggested that the primary legislation should also contain one general managerial default power expressed so as to enable the charity trustees to have all the powers of absolute owner, which would embrace specific powers such as investment and borrowing.45

4. An interesting recommendation that is made in the Report is in relation to the issue of public accountability (which we have previously discussed in this report and consider to be of great importance). The Report recommends that any penalty for failure to provide annual accounts and reports should fall on the charity trustees and not the charity itself, as to impose a penalty on the charity merely deprives the beneficiaries of the charity.46

5. The Report also recommends that the legislation should require both the members and the trustees to act in the best interest of the charity and exercise their powers and their duties solely in the interest of the CIO, but that the imposition of these duties should not by itself have the effect of making the members shadow trustees.

6. The Report recommends that the legislation should require that each charity trustee of a CIO should, in the exercise of his powers and the discharge of his duties in relation to the CIO, apply such care and skill as is reasonable in the circumstances, having regard in particular-
(a) to any special knowledge or experience that he has or holds himself out as having, and
(b) if he acts as a trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.47

7. It was also recommended that the legislation should require any charity trustee to disclose to each of his fellow trustees any personal interest which he may have in any matter which is being considered by the trustees.

8. Interestingly, the Report recommended that members of a charity should be given the power to

Footnotes:
45. The advisory group envisages ‘co-ordinating bodies’ preparing model constitutions, based on the prescribed form.
46. This point is also raised in the Ontario Law Reform Commission Report on the Law of Charities, (December 1996), Ch. 15.
47. This is the duty of care that is set out in section 1 of the Trustee Act 2000.
amend the constitution of the CIO by resolution of a 75% majority of those present or by unanimous written resolution. However the Charity Commissioners’ prior written consent would be required if there was to be any change in the objects of the CIO or in the provisions with regard to the use or application of the property of the CIO after it has been dissolved.

9. The Report recommended that the CIO and its trustees should be in the same position as a charitable company and its directors. This would clarify the exact nature of the charity trustees’ fiduciary duties to the CIO, which has to date been ambiguous in the UK (and also in Ireland and elsewhere) especially in relation to charitable companies where the directors are charity trustees, as defined under the Charities Act 1993, but are not subject to all trustee legislation.

We believe that there is an advantage in having a separate vehicle for charities, which would be more specifically attuned to their needs and to the public policy interest of charities, as well as removing the burden of dual registration and regulation.

We recommend that the proposals of the DTI be considered, notably:
• that a new form of incorporation called Charitable Incorporated Organisation should be made available to Irish charities;
• that the Charitable Incorporated Organisation be restricted to charities; and
• that the Charitable Incorporated Organisation should be optional for charities and not mandatory.

We further recommend that the proposals of the UK Charity Commission in relation to CIOs be considered, specifically as these proposals have been made as a result of their experience and consultation with the charity sector. Any development of a new legal structure for charities along these lines should take into account developments in the UK and the wider European Community.

VIII. ADMINISTRATIVE PROVISIONS IN THE GOVERNING INSTRUMENT

There are no standard legal requirements or provisions that are applicable to all charities save for those set down by the Revenue Commissioners, which have been previously discussed. However, each charity must adhere to the legislation and established law that is applicable to the mode of legal structure chosen and governing instrument that is adopted by the charity when it is established.

Footnotes:

48. The Report of the Scottish Charity Law Commission, Charity Scotland (May 2001), p. 24 recommended that the Scottish Executive should work closely with the DTI and that their recommendations be adopted in full.
Even if a charity has a governing instrument, and has the necessary prerequisite clauses in order to obtain tax exemptions granted by the Revenue Commissioners, this does not necessarily mean that the charitable organisation will have the structure to promote either good governance or management.

Insofar as the governance and management of a charity can be legislated for, they will largely depend on the type of legal structure chosen to frame the activities of the charity, the legislative requirements specific to that legal structure, and the provisions (if any) of the governing instrument. There are currently no standard provisions laid down in legislation as to what should be provided for in a governing instrument and there are no standard default provisions which apply if a governing instrument fails to deal with any issues. For example, a trust deed may omit to deal with removal of trustees. The Trustee Act 1893, section 25 enables the High Court to remove and replace a trustee on evidence of refusal or unfitness to act. In relation to wilful obstruction and conflict of interest the remedy lies with the traditional equitable jurisdiction of the High Court. The Commissioners for Charitable Donations and Bequests have no authority to remove a trustee. A default provision could specify powers for a majority of trustees to act, subject to appeal to the Commissioners or the High Court and in most cases this would be a more efficient and cheaper solution.

Model form documents

Under the provisions of the UK Charity Act 1993, the Charity Commissioners in the UK have an obligation to encourage the development of better methods of administration. They provide model forms of governing instruments to charities in the UK as follows:

- model constitution for a charitable unincorporated association;
- model declaration of trust for a charitable trust;
- model Memorandum and Articles of Association for a charitable company.

These model form documents provide for standard clauses and provisions in respect of membership, meetings, appointment and removal of charity trustees and can be adapted or used even where the charity is preparing its own governing instrument.49

We recommend that the Charities Office work with the charity sector to develop model forms of governing instruments setting out standard provisions for the governance and management of charities, whether companies, trusts or otherwise. The use of such model

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49. We were told by a representative of the Charity Commissioners in the UK that approximately 90% of charities did not use these model form documents in their entirety but adapted the standard provisions to suit their own requirements and needs.
forms of governing instruments should not be obligatory but should be available to charitable organisations as precedents, which can be used or adapted as required. These model forms of governing instrument should contain standard provisions in relation to:

- charity names
- objects
- appointment of trustees, terms of office, retirement and removal
- trustee powers and responsibilities, including conflict of interest, payments to trustees
- trustee meetings and proceedings
- acquisition and termination of membership
- membership rights and responsibilities
- annual general meetings of members and related procedures
- auditors, accounts and records
- power of amendment of the governing instrument
- dissolution and merger of the charity

The availability of model form documents will assist in ensuring that organisations have good governing instruments. In addition, there is a strong case to be made for default powers and procedures to complement any legal structures which fail to provide for all the powers and procedures necessary.\(^{50}\)

We recommend that legislation be enacted setting out default provisions for the management of charitable organisations, which should apply in the absence of provisions covering these matters in charities’ governing instruments. We recommend that the default provisions should be capable of being revised and updated periodically by ministerial order.

Aside from the changes which can be effected by legislation, charities themselves and their legal advisors can deal with many of the issues by ensuring that their governing instruments contain the necessary provisions. For discussion of some of the issues arising see Appendix 2.

**IX. STANDARD RULES FOR CHARITABLE LEGAL STRUCTURES**

Certain proposals for reform suggest themselves in relation to the standard terms of charitable legal structures.

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Footnotes:

Membership of charitable companies

At present, a question arises as to whether membership of a charity should be transferable or not and this usually depends on the provisions of the governing instrument of the charity. Due to the fact that company law is conceived in terms of ownership, it is not always suited to charitable organisations where ownership of shares is not the issue, and it is not intended that shares in the charity should be transferable along with related voting rights.

We recommend that membership of a charitable company should not be transferable without a special resolution requiring a two thirds majority of the members of that charity. Further, we recommend that membership should cease on the death of a member and that a member should be able to resign at any time but that this resignation should not relieve that member of any existing obligation to the charity.

Term of office of trustees

Difficulties can arise with permanent trustees, who unless appointed for a finite term can remain on indefinitely. This can be undesirable in some cases. We recommend that there should be a mandatory maximum term of office for trustees, subject to the possibility of their reappointment.

Meetings and proceedings of charity trustees

We endorse the recommendations of the Company Law Review Group in their first report that written resolutions of directors under Regulation 109 of Table A ought to be possible by separate pieces of paper signed separately and that meetings of directors of all companies ought, by statute, to be capable of being held by telephone or by other suitable electronic means whereby all directors can hear and be heard unless the Articles of Association of the company specifically provide otherwise. We recommend that permitting the conduct of business by telephone and by unanimous written resolution be extended to meetings of other charitable organisations besides charitable companies.

Personal interest and/or conflicts of interest

It is a well-established legal principal that a trustee of a trust, charitable or otherwise, should not be placed in a position where any personal interest might conflict with his duties as a trustee. There are also provisions to this effect in the Companies Acts 1963 – 2001 and most legislation with respect to companies, which requires, at a minimum, disclosure by a director or shareholder of any

Footnotes:

51. Ibid., Ch. 15, p. 25 also supports this view except that it differentiates between mutual benefit corporations and religious and charitable corporations.
52. Ibid., also discussed in Ch. 15 at p. 26.
55. Companies Act 1963, s. 194
personal interest in a contract being entered into by a company where the director or shareholder has a material interest in the outcome of the contract. A charity trustee and member should be in no different position.

We recommend that there should be a statutory requirement that a trustee must disclose to each of his fellow trustees any personal interest which he may have in any matter which is being considered by the trustees. This provision should be broadened to include not only trustees but also members of the charity. Where a trustee has a conflict of interest or personal interest in a matter

• he should declare such an interest;
• he should withdraw from the meeting when the matter is being discussed;
• he should not be counted in the quorum for that part of the meeting;
• he should not have a vote on the matter.

Benefit or payment to members or trustees

As mentioned above, a trustee cannot benefit from his position as trustee of a trust, charitable or otherwise. The assets of the charity are treated as though they are being held on trust for the main objects of the charity as opposed to belonging to the members as in the case of a non-charitable company.

At present the Revenue Commissioners require a clause to be included in the governing instrument, which provides that:

• the income and property of the charity or voluntary association be applied solely towards the promotion of the main objects of the charity;
• no portion of the charity’s income and property may be paid or transferred directly or indirectly by way of dividend, bonus or otherwise to the members of the charity; and
• no trustee or director shall be paid a salary or fee or receive any remuneration or other benefit form the charity.

However payment can be made by the charity to a member, directors or trustee for:

• any reasonable and proper out of pocket expenses incurred by any director or member;
• any services rendered to the charity by a member, officer or servant (not being a director/trustee);
• any monies lent by a director, trustee or members but at an interest rate not exceeding 5% per annum;

Footnotes:

56. As do the Charity Commissioners in the UK.
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• any rent for premises demised and let by the member or director to the charity;
• any fees, remuneration or other benefit in money’s worth to any company of which a director or trustee may be a member holding not more than one hundredth part of the issued capital of such company.

We recommend that the existing rules on payments and benefits to trustees 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.

Records

Under the Companies Acts 1963 – 2001, all companies are required to make and keep minutes of the proceedings of all general meetings of the company and minutes must be kept of the proceedings and meeting of directors.57 Companies are also required to keep a Register of members, directors and secretaries.58 All companies are required to keep proper books of accounts on a “continuous and consistent basis”.59 These requirements obviously only apply to charities that have been incorporated as companies limited by guarantee.

However, charities established under a constitution or deed of trust have no such specific requirements but will often keep such records as a matter of good practice.

Since the introduction of the Freedom of Information Act in Ireland in 1998, there has been an ever widening interpretation of the intentions and interpretation of the Act and its operation within organisations and bodies funded by the State. There is a legitimate viewpoint that any body which is in receipt of tax exemptions from the State should, in general, be subject to the Freedom of Information Act thus necessitating the keeping of accurate records on all proceedings.

Notwithstanding the discussion regarding the possible obligations of a charity under this Act, we consider that the broad purpose of maintaining public support for charities will best be served by the maintenance of good records and the publication of an annual report by each charity. Once again this practice has been adopted within the Pensions Act 1990 as amended by the Pensions (Amendment) Act 1996 as a method of ensuring public accountability.

We recommend that an obligation should be placed on charity trustees to keep proper records of:
• all proceedings at general meetings;
• all proceedings at meetings of the trustees;

Footnotes:
57. Companies Acts 1963, s. 145.
58. Companies Act 1963, s. 195 as amended by s. 51 of the 1990 Act and s. 47 of the 1999 (No.2) Act.
59. Companies Act 1963, s. 147 as amended by the Companies Act 1990, s. 202.
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- all reports of any committees or subcommittees; and
- all professional advice obtained.

These records should be kept at the main office or registered office of the charity.

Amendment of the governing instrument

The Revenue Commissioners require organisations seeking recognition of charitable status to include a provision as follows:

“No addition, alteration or amendment shall be made to or in the provisions of this Constitution, Trust Deed or Memorandum of Association (as the case may be) for the time being in force unless same shall have been previously approved in writing by the Revenue Commissioners.”

Thus permission to amend or alter the governing instrument must be sought from the Revenue Commissioners. This provision is required to ensure that the Revenue Commissioners are informed of any amendments or alterations to the governing instrument of a charity and also to ensure that the proposed amendment does not alter the objects of the charity, which could result in it losing its charitable status.

Whether a charity can amend its governing instrument will firstly depend on whether or not the governing instrument itself provides the power to amend the governing instrument.60 It is desirable that a governing instrument include a procedure by which amendments may be made to it for two reasons:

- The Revenue Commissioners or, in the future, the proposed Charities Office may require changes to a governing instrument in order to accord charitable status for tax or general purposes. In such a case it is self evident that there should be provision in the governing document for amendment by either the members or the trustees. If there are no provisions to amend the governing document, then the only option might be to wind up the charity, and prepare a new governing instrument. This is clearly unsatisfactory.
- Once a charity has been registered and is up and running, there may be circumstances whereby some provisions in the governing document will require to be amended to take account of new conditions or even changes in legislation.

Footnotes:

60. It should be noted that in relation to a company, the power of amendment will not need to be included in the Memorandum and Articles of Association as the Companies Acts 1963 – 2001, ss. 10 and 15 allows for the Memorandum and Articles of Association to be amended by the members of the company.
To provide for cases where no power of amendment is included in the governing instrument, we recommend that an implied power of amendment should be legislated for, much as such a power is contained in the Companies Acts. The proposed legislation should provide for the general amendment of the governing instrument by the members of a charity if constituted as a company or unincorporated association. This power of amendment should be by special resolution of the members of the charity and require a two thirds majority. If the proposed amendment concerns a change of the objects of the charity the prior approval of the Charities Office should be required. The amended governing instrument should be forwarded to the Charities Office within 28 days of the resolution, to ensure that the Charities Office will automatically be notified of the amendments to the governing instrument and will have an up to date copy of the governing instrument on file. If the charity is constituted as a trust, the Charities Office should be given a discretionary power to amend the trust instrument by order on the application of at least two thirds of the trustees.

We recommend that the Charities Office have discretion to reverse an amendment to the governing instrument if it is of the opinion that it jeopardises the organisation’s charitable status.

Power of dissolution

A charity constituted as an unincorporated association, trust or company should have powers and rules for the winding up of the charitable organisation and distribution of the surplus assets.

At present the Revenue Commissioners require that a clause be inserted in the governing document providing that on the winding up or dissolution of 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, and such charity to be determined by the members at or before dissolution. In circumstances where effect cannot be given to this provision, such property shall be given to some charitable object.

To provide for cases where no power of dissolution and distribution is included in the governing instrument, we recommend that legislation should provide for the dissolution of a charity and distribution of its property along the lines of the present requirements of the Revenue Commissioners. The proposed legislation should provide for the dissolution of the charity and distribution of its property by the members of a charity if constituted as a
company or unincorporated association. This power of dissolution and distribution should be
exercisable by special resolution of the members of the charity and require a two thirds
majority. The prior approval of the Charities Office should be required. If the charity is
constituted as a trust, 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.

We further recommend that the Charities Office should have discretion to reverse or confirm
an unauthorised distribution.

Mergers

There are no provisions for the merger of charities under the present Charities Acts 1961 and
1973.62 Some charities which are companies limited by guarantee overcome this problem by
providing for the necessary power to merge with other charities with similar charitable objects.

The closest alternative available under existing law is the traditional power of the High Court, also
extended to the Commissioners for Charitable Donations and Bequests, to frame cy-près schemes
to resettle charity property. The cy-près powers of the Commissioners for Charitable Donations and
Bequests were defined by the 1961 Act and subsequent amendments,63 and section 47 of the 1961
Act sets out further circumstances in which property may be applied cy-près and imposes a duty on
trustees “where the case permits and requires the property . . . to be applied cy- près to secure its
effective use for charity by taking steps to enable it to be so applied.”

The traditional grounds for a cy-près scheme are listed by Dr. O’Halloran as circumstances where
the mode designated to give effect to a donor’s charitable intentions was either impossible or
impracticable for reasons of

• insufficient funds,
• no available or suitable site,
• the gift was illegal or against public policy,
• there was an impracticable condition or
• the charity was deprived of objects.64

Footnotes:
62. Under Ss. 74 and 75 of the Charities Act 1993 (England and Wales), trustees of small charities (with a gross income of under £5,000 and which do not hold any land on trusts which stipulate that the land is to be used for a specific purpose) may amalgamate their charity with another.
63. S. 29 of the 1961 Act as amended by s. 8 of the 1973 Act, s. 52 of the Courts and Court Officers Act 1995 and s.16 of the Social Welfare (Miscellaneous Provisions) Act 2002, which increased the property value limit from £25,000 to £250,000 and then removed any limit. This last amendment was brought into force by SI 132/02.
64. O’Halloran, Charity Law, (Round Hall, Sweet & Maxwell, 2000) at p. 279
The circumstances listed in section 47 considerably widen the previous rule that cy-près schemes were only to be used where it was either impossible or impracticable to give effect to a donor’s gift, and include provisions for more effective use of charity property in conjunction with other property as a ground for a cy-près scheme, regard being had to the spirit of the gift, as well as other grounds which also may be good reasons for merger. The grounds in section 47 include where the original purposes are

- already fulfilled;
- cannot be carried out according to the directions given and to the spirit of the gift;
- provide a use for part only of the property available by virtue of the gift;
- where charitable property can be more effectively used in conjunction with other property; regard being had to the spirit of the gift (this provides for the possibility of using the cy-près procedure to merge two or more small charities);
- where the original purposes refer to an area or class which has ceased to be suitable or practical;
- the original purposes are adequately provided for;
- cease to be charitable; or
- cease in any other way to be suitable or effective.65

In order to avoid the necessity for a cy-près scheme in every case and to make the merger of charities easier, we recommend that enabling powers for charities to merge be provided.

We 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 proposed Charities Office be sought; and
- the two or more charities have the same or similar objects.

Footnotes:

65. Ibid at p. 283
CHAPTER 5

LEGAL REQUIREMENTS FOR CHARITY TRUSTEES

The Trustee Act of 1893 is still the main legislative provision for trustees and their duties. In this section we look at the position of charity trustees under the law and make proposals for reform of the law as it applies to them, except with regard to investment issues which are dealt with in the next chapter. Clearly, in many cases similar reforms will be desirable for non-charity trustees, and reforms may properly be made in the context of the reform of trust law and the law of trustees in general. The reform of the law as it relates to trusts is overdue, and is presently included in the programme of the Law Reform Commission which will include review of the law of charities. We hope our proposals will feed into their considerations.

I. WHO MAY ACT AS A TRUSTEE

The Charity Commissioners in the UK advise that:

“Trustees must be selected for what they can contribute to the charity. They should not be appointed for their status or position in the community alone; this is the function of patrons. Trustees must be able – and willing – to give time to the efficient administration of the charity and the fulfilment of its trusts. They should be selected on the basis of their relevant experience and skills and must be prepared to take an active part in the running of the charity.”

Trustee Act 1893

There are no legislative provisions under the Trustee Act 1893 setting out who actually can be a trustee or what sort of qualifications they should have.

In Ireland, any person can be appointed a trustee, even a minor. In practice it is desirable to appoint someone who will be capable of carrying out the duties and obligations that are required of the trustee. A corporation may act as a trustee provided that its Memorandum and Articles of Association give the express authority to carry out this role. It is preferable that the trustees reside in the jurisdiction but exceptions can be made.

There are circumstances where a person will be ineligible to be appointed a trustee which are based on case law and not set down in the legislation. For example, if a person does not have or does not exercise the degree of competence that is required due to the fact that the trustee is a minor or a...

Footnotes:
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A person who is a lunatic, then he will be unsuitable for appointment. A person who is an undischarged bankrupt, or has previous convictions for fraud or theft or one who has been disqualified from acting as trustee or a company director will also be ineligible for appointment.

Charities Act 1961 and 1973

There are no provisions in the Charities Acts 1961 and 1973 as to who can or cannot be a trustee of a charity.

Companies Acts 1963 – 2001

Under the Companies Acts 1963 – 2001, there are provisions as to who can become a director of a company. Any person may become a director of a company provided that he has not been disqualified under Part VII of the Companies Act 1990. A company cannot have a body corporate as a director.

We recommend that statutory provision be made in relation to qualifications for charity trustees. We recommend that trustees must:

- be eighteen years of age or over;
- be of sound mind;
- 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.

We also recommend that screening for a history of offences involving children be required before a person can be appointed as a trustee of a charity working with children and adolescents.

Footnotes:

2. A lunatic (a technical legal term requiring legislative reform) is "incapable of acting": Re Lemann, 22 Ch. D. 633.
3. Re Adams, 12 ib.634.
4. In the First Report of the Company Law Review Group, December 2001, p. 15, it is advised that any purported appointment of an individual under the age of 18 should be ineffective and void as between the company and the individual under 18 years.
6. In the First Report of the Company Law Review Group, December 2001, p. 28, it is recommended that the existing prohibition on corporate directors should be retained.
II. NUMBER OF TRUSTEES

Trustee Act 1893

There is generally no requirement under the Trustee Act 1893 as to the minimum number of trustees\(^7\) and one trustee will suffice except where legislation provides otherwise,\(^8\) although for practical reasons, it is desirable to have two or more. There is no upper limit on the number of trustees who may be appointed but clearly a large number may make the operation of the trust cumbersome and unwieldy. A company or body corporate may act as a trustee.

It should be noted that the Revenue Commissioners require that there be a minimum of three trustees, the majority of whom should be residing in Ireland.


There are no specific requirements in the Charities Acts 1961 – 1973 as to the maximum or minimum number of trustees. However the Acts refer to “trustees” as opposed to “trustee” which would indicate that there should be at least two trustees. There are provisions under sections 56 and 57 of the Charities Act 1961 in respect of bodies corporate acting as sole trustee in certain cases.

Companies Acts 1963 - 2001

Every company must have at least two directors,\(^9\) however a body corporate cannot be a director.\(^10\) While there is a statutory minimum number of directors, there is no statutory maximum. The number of directors may usually be increased or decreased by special resolution.\(^11\)

The Revenue Commissioners require that there be at least three\(^12\) directors if the company is seeking the tax exemptions granted to charitable organisations. Under Section 43 of the Companies Amendment (No. 2) Act, 1999 at least one of the directors has to be resident in Ireland, except in specified circumstances.

We recommend that there should be a statutory requirement for a minimum of two trustees.

Footnotes:

7. Under s. 11 of the Trustees Act 1893, there is reference to two or more trustees, which infers that there should be a minimum of two trustees.
8. Under s. 38(1) of the Settled Land Act 1883, two trustees are required to give a receipt for capital money.
10. Ibid, s. 76.
11. The First Report of the Company Law Review Group, December 2001, at p. 29 recommends that it should be possible for private companies limited by shares to have one director only, with the requirement that there be a separate company secretary who is not the sole director.
12. The Report on the Law of Charities, Ontario Law Reform Commission December 1996, Ch. 15, at p. 21 recommends that religious and charitable corporations should be required to maintain from the outset a minimum of three directors and that failing to do should be a loss of limited liability protection for the remaining directors.
III. APPOINTMENT OF ADDITIONAL OR NEW TRUSTEES

Trustee Act 1893

The power to appoint new trustees is usually set out in the trust deed and will usually be exercised by the person nominated in the trust deed.

In addition to any express power in the trust deed, a statutory power of appointment of new trustees is contained in section 10 of the Trustees Act 1893 but this is restricted to the appointment of replacement trustees. This statutory power must be exercised in writing and in practice it is desirable that it is exercised by deed to facilitate the application of section 12 of the Trustee Act 1893 which provides for the vesting of trust property in new or continuing trustees.

Section 10 provides that the power to appoint new trustees can be exercised “by the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person or no such person is available and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representative of the last surviving or continuing trustee.” This power can be exercised where a trustee:

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

In addition, section 25 of the Trustee Act 1893 confers a power on the court to appoint additional or new trustees whenever it is expedient to do so and it would be “inexpedient, difficult or impractical to do so without the assistance of the court”.

Charities Acts 1961 and 1973

The Commissioners for Charitable Donations and Bequests may appoint trustees, at the charity’s request, in place of or in addition to any existing trustee or trustees or where there are no existing trustees. A trustee appointed under section 43 has the “same powers, authorities and discretions, and may in all respects act as if he had been originally appointed a trustee by the instruments (if any) creating the trust.”

Companies Acts 1963 - 2001

The first directors of the company must be named in a statement delivered to the Registrar of the

Footnotes:
Companies Registration Office pursuant to section 3 of the Companies (Amendment) Act 1982. The Articles of Association of a company invariably provide for the method of appointment of directors or additional directors. If no method of appointment is prescribed, the members of the company in general meeting must elect them.

The existing powers of the Commissioners for Charitable Donations and Bequests and the High Court are sufficient and we make no additional recommendation in relation to appointment of trustees.

IV. RETIREMENT OF TRUSTEES

Trustee Act 1893

Once a trustee has agreed to act as a trustee or has failed to disclaim or refuse his appointment within a reasonable time, he can only retire in special circumstances unless there are provisions with regard to the retirement or removal of trustees in the trust deed. A trustee may retire if there is an express clause in the trust deed/instrument permitting him to do so.

Under Section 11 of the Trustee Act 1893, a trustee may retire without replacement provided that there are at least two trustees left to administer the trust, and the remaining trustees consent to his retiring. Alternatively, an existing trustee may retire as a result of the exercise of the statutory power to appoint new trustees provided in section 10 of the Trustees Act 1893 as discussed above. A trustee may seek a court order under section 25 of the Trustee Act 1893 which provides that the court may appoint new trustees for existing ones whenever it is expedient, difficult or impractical to do so without the Court’s assistance.

Charities Acts 1961 and 1973

There are no provisions under the Charities Acts 1961 and 1973 with regard to the retirement of trustees.

Companies Acts 1963-2001

The Articles of Association usually provide for the automatic vacation by a director of his office on the happening of certain events, such as at the end of his term of office. Article 39 of Table C of the First Schedule of the Companies Acts 1963-2001 provides that a director is to vacate office if he:

• without the consent of the company in general meeting holds any other office or place of
profit under the company; or
• is adjudged a bankrupt in the State or in Northern Ireland or in Great Britain or makes any
  arrangements with his creditors generally; or
• becomes prohibited from being a director by reason of any order made under section 184 of
  the Companies Acts 1963 – 2001; or
• becomes of unsound mind; or
• resigns his office by notice in writing to the company; or
• is convicted of an indictable offence unless the other directors otherwise determine; or
• is directly or indirectly interested in any contract with the company and fails to declare the
  nature of his interest in the manner required by section 194 of the Companies Acts 1963 –

We recommend that a charity trustee must vacate his office or resign if he
• becomes of unsound mind;
• becomes an undischarged bankrupt;
• is convicted of an indictable offence;
• is absent from meetings of the trustees for more than twelve months or is absent from
  the jurisdiction for twelve months and the remaining trustees resolve that he should
  vacate his office;
• becomes 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.

We also recommend that a trustee of a charity should be able to resign at any time by notice
in writing.

V. REMOVAL OF TRUSTEES

Trustee Act 1893
A trustee may be removed from office where there is an express power given in the trust deed or
governing instrument.

A trustee may also be removed where the court exercises its power under section 25 of the Trustee
Act 1893 to appoint a new trustee where an existing trustee refuses or is unfit to act. The court has
the power to remove a trustee where he acts dishonestly, incompetently or even where is conduct
is deliberately obstructive.16 The court also has the power to remove a trustee where it is clear that

Footnotes:
16. Arnott v. Arnott (1924) 58 ILTR 145
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there is a conflict of interest between the trustee’s duties to the trust and his own personal interests.\footnote{Moore v McGlynn [1894] 1 IR 74.}

Charities Acts 1961 and 1973

The Charities Act 1961 provides that where there is “a breach or supposed breach of any trust for charitable purposes or whenever the direction or order of the High Court is considered necessary for the administration of any trust for charitable purposes, the Board or, with the consent of the Attorney General, any person may apply to the Court for such relief as the nature of the case may require and the Court may make such order thereon as the Court thinks fit.”\footnote{Charities Act 1961, s. 51}

Companies Acts 1963 – 2001

The directors of a company may be removed at any time by ordinary resolution of the company in general meeting. This crucial power is given by section 182 of the Companies Acts 1963-2001 and cannot be removed or abridged or amended by the Articles of Association.

Pensions Act 1990 as amended by the Pensions (Amendment) Act 1996

The Pensions Act 1990, section 63 as amended by the section 26 of the Pensions (Amendment) Act 1996 provides for the appointment and removal of trustees by the High Court on application to it by the Pensions Board by petition. The High Court may “make an order for the appointment of one or more new trustees of a scheme in substitution for the existing trustees of a scheme”\footnote{Pensions Act 1990 s. 63(1) as amended by the Pensions Act 1996, s. 26.} where it considers:

\begin{itemize}
\item[(a)] That any of the trustees have failed to carry out any of the duties imposed on them by law (including this Act), or
\item[(b)] that the scheme is being or has been administered in such a manner as to jeopardise the rights and interest thereunder of the members of the scheme.
\end{itemize}

Any new trustee of a scheme appointed under this section shall “have the same powers, authorities and discretions and may in all respects act as if he had been originally appointed a trustee by the rules of the scheme.”\footnote{Pensions Act 1990, s. 63(4).}

The Pensions Board, under section 64 of the Pensions Act 1990, also has the power to appoint and remove trustees of a scheme in circumstances where “there are no trustees or the trustees cannot be found.”\footnote{Pensions Act 1990, s. 64 (1).} The Pensions Board does not have the power to remove a trustee in the circumstances as set out in section 63 (2)(a) and (b) of the Pensions Act 1990 and must apply to the High Court.
Charities Act 1993 (England and Wales)

The Charities Act 1993 gives the Charity Commissioners a number of powers to act for the protection of charities. Under section 18(2) of the Charities Act 1993, where the Charity Commissioners are satisfied –

“(a) that there is or has been any misconduct or mismanagement in the administration of the charity; and
(b) that it is necessary or desirable to act for the purpose of protecting the property of the charity or securing a proper application for the purposes of the charity of that property or of property coming to the charity,”

the Commissioners may of their own motion do either or both of the following –

“(i) by order remove any trustee, a charity trustee, officer, agent or employee of the charity who has been responsible for or privy to the misconduct or mismanagement or has by his conduct contributed to it or facilitated it;”

(ii) by order establish a scheme for the administration of the charity.”

However the Charity Commissioners can only exercise this power if an inquiry under section 8 of the Charities Act 1993 has been instituted; and they are satisfied both that there has been misconduct or mismanagement in the administration of the charity and that the course proposed is necessary to protect the property of the charity, and that before exercising this power, they have served notice on the charity trustees.

We recommend that the proposed Charities Registrar have discretionary powers to petition the High Court for the removal of a charity trustee. 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 his 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;

Footnotes:

22. Under the Charities Act 1993 (England and Wales), s. 8 the Charity Commissioners have the power “to institute enquiries with regard to charities or a particular charity or a class of charities, either generally or for particular purposes…”
within the previous five years, the trustee has been discharged from bankruptcy or an arrangement with his creditors;
• the trustee is a company in liquidation;
• the trustee is incapable of acting by reason of mental disorder;
• the trustee has not acted, and will not declare his willingness or unwillingness to act;
• the trustee is outside the jurisdiction or cannot be found or does not act, and his absence or failure to act impedes the proper administration of the charity.

Any trustee who is threatened with being removed should be told the grounds on which his removal is sought and have a right to present his reasons for opposing his removal to the body seeking to remove him, whether the members of the charity or the Charities Office.

VI. DISQUALIFICATION OF TRUSTEES

Trustee Act 1893

Under the Trustee Act 1893 there are no provisions to disqualify any persons from being trustees.

Charities Acts 1961 and 1973

Again, there are no provisions to disqualify any persons from being trustees under the Charities Acts 1961 and 1973.

Companies Acts 1963 - 2001

Under the Companies Acts 1963 – 2001, the following are disqualified from acting as company directors:
• bodies corporate;
• undischarged bankrupts;
• auditors to a company;
• those who are expressly prohibited from acting as company directors by court order made after they were found guilty of fraud or dishonesty;
• directors of insolvent companies which are wound up, are prohibited from acting as directors for five years unless they can prove to the court that their actions were honest and reasonable.

Footnotes:
23. These latter provisions are taken from s. 18 (4) of the Charities Act 1993, England and Wales.
26. Companies Act 1990, part VII.
Pensions Act 1990 as amended by the Pensions (Amendment) Act 1996

Under this legislation, there is the power to remove trustees of a scheme as discussed above but there is no power for either the Court or the Pensions Board to disqualify certain persons from being trustees of a scheme. There is such a power in the UK Pensions Act 1995 and Pensions (NI) Order 1995.

Charities Act 1993 (England and Wales)

Under Section 72(1) of the Charities Act 1993, a person is disqualified from acting as a charity trustee if:

- he has been convicted at any time of an offence involving deception or dishonesty, unless the conviction is legally spent; or
- he is an undischarged bankrupt; or
- he has made a composition with his creditors and has not been discharged; or
- he has at any time been removed by the Charity Commissioners or by the Court in England, Wales or Scotland from being a trustee because of misconduct; or
- he is disqualified from being a company director; or
- he is subject to an order made under s. 429 (2)(b) of the Insolvency Act 1986.

The disqualification of a charity trustee is automatic unless the Charity Commissioners exercise their power of waiver under section 72(4). It should also be noted that section 73 of the Charities Act 1993 imposes penalties for acting as a trustee while disqualified which penalties include a term of imprisonment or a fine or both and the Charity Commissioners may order a person who has acted as a trustee while disqualified, to repay to the charity any sums which he may have received by way of remuneration or expenses.

We recommend that a person should be disqualified from acting as a charity trustee if:

- he has been convicted at any time of an offence involving deception or dishonesty, unless the conviction is legally spent; or
- he is an undischarged bankrupt or he has made a composition with his creditors and has not been discharged; or
- he is of unsound mind; or
- he has at any time been removed by the Court from being a trustee because of misconduct; or
- he is disqualified from being a company director.
VII. SUSPENSION OF TRUSTEES


There are no provisions in the Trustee Act 1893, the Charities Acts 1961 and 1973 or the Companies Acts 1963 - 2001 to suspend trustees or directors.

Pensions Act 1990 as amended by the Pensions (Amendment) Act 1996

Section 27 of the Pensions (Amendment) Act 1996 inserted section 63A into the Pensions Act 1990, which provides that the High Court, on application to it by the Pensions Board may make an order to suspend a trustee of a scheme where:

- there is an investigation (by or on behalf of the Pension Board) pending into the state and conduct of the scheme;
- proceedings have been instituted against a trustee for an offence involving dishonesty or deception but the proceedings have yet to be concluded;
- a petition has been presented to the Court for an order adjudging him a bankrupt, but the proceedings have still to be concluded;
- the trustee is a company and a petition for the winding up of the company has been made, but the proceedings have still to be concluded;
- an application has been made to disqualify the trustee under Part VII of the Companies Act 1990.

If an order is made, a trustee may be suspended for a period of twelve months (which may be extended) or where there are proceedings pending, until the proceedings are determined.

The power to suspend trustees under the Pensions Act 1990 as amended by the Pensions (Amendment) Act 1996 provides the Pensions Board, through the High Court, with protective measures where investigations are taking place with regard to the management and administration of a pensions scheme, or where proceedings have been instituted against a trustee. This allows the Court to take action to protect the pension scheme pending the determination of either the proceedings or investigation, specifically where the outcome of the proceedings or investigation is still undecided, and where the actual removal of the trustee may be unwarranted.

Charities Act 1993 (England and Wales)

In similar fashion to the Pensions Acts, the Charity Commissioners may “by order suspend any trustee, charity trustee, officer, agent, or employee of the charity from the exercise of his office or employment pending consideration being given to his removal (whether under this section or
otherwise).”27 This power can only come into play once the Charity Commissioners have instituted an enquiry under section 8 of the Act.

As discussed above under the heading ‘Regulation’, we recommend 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 his office or employment pending consideration being given to his removal, subject to the initiation of a formal inquiry.

We also recommend that a person purporting to act as a charity trustee while disqualified or suspended should be liable to sanctions and suggest that section 63B of the Pensions Act 1990 as amended by the Pensions (Amendment) Act 1996 be used as a model. This provides that where a person is guilty of an offence, he is liable on summary conviction to a fine not exceeding IR£1,500 or to one year’s imprisonment or both and on conviction on indictment to a fine not exceeding IR£10,000 or to two years imprisonment, or to both.

VIII. DIRECTORS OF CHARITABLE COMPANIES AS TRUSTEES

There is a lot of ambiguity in respect of the relationship between trust law and company law specifically when looking at the powers and duties of directors of charitable companies. The powers and duties of trustees of charities differ considerably depending on whether the charity is established by trust or Memorandum and Articles of Association. However, there are underlying principals common to both, such as the fiduciary duties of the trustees of a trust and the directors of a company, which are based primarily on trust law.

The principal cause of confusion is the fact that the law of charity in the past was based on the principles of trust law and is equitable in origin. However, most modern charities are organised as companies limited by guarantee and are therefore subject to company law. It is difficult to impose some of the fundamental principals of trust law on charities established under the Companies Acts 1963 - 2001. What has happened is that the Courts have applied trust law to define the fiduciary obligations of directors of a company and correct the deficiencies apparent or real in the law governing charitable companies, specifically in relation to the lack of provisions in company law controlling the disposition of property belonging to a charitable company on the reorganisation or dissolution of the charity.

We recommend that the role, responsibilities and duties of charity trustees should be the same, no matter what form of legal structure or governing instrument is used.

Footnotes:
27. Charities Act 1993 (England and Wales) s. 18(1).
IX. POWERS OF TRUSTEES

The powers of trustees depend solely on what powers are given to them under their governing instrument whether it be a constitution, trust deed or Memorandum and Articles of Association. Although trustees of a trust are given statutory powers under the Trustee Act 1893 and the Charities Act 1961 and 1973, these powers are limited.

Trustee Act 1893

The trust deed sets out the main powers of trustees. Under sections 10-24 of the Trustee Act 1893, the trustees are given basic powers such as:

• to give receipts for money or other personal property; 29
• to insure trust property against loss or damage by fire; 30
• to enter into arrangements with debtors for payment of debts; 31
• to renew leaseholds of property of the trust. 32

These powers were originally intended to augment the powers conferred in the trust deed or instrument which always determines the precise extent of a trustee’s powers. It is important when drafting a trust deed or trust instrument to ensure that the trustees are given sufficient powers and authority to carry out both the objects and management of the trust.

Charities Acts 1961 and 1973

Certain powers are also given to the trustees under the provisions of the Charities Act 1961. Under section 55 of the Charities Act 1961, the power to deal in charity property is conferred on a two-thirds majority of the trustees in attendance at a properly constituted meeting.

O’Halloran advises that “the powers of trustees are very limited and that trustees do not have powers, for example, in respect of the following:

• there is no power available to the trustees of a local charity for the relief of poverty which enables them to alter its objects, when circumstances suggest that this would be advisable;
• there is no legal mechanism available to trustees of a charity which has a low annual income enabling them to transfer its assets to a similar charity;
• similarly, the trustees of a charity with non-economic annual income are unable to liquidate its assets;

Footnotes:

28. Whether they be the trustees or members of the committee of an unincorporated association, the trustees of a charitable trust or the directors of a company limited by guarantee
29. Trustee Act 1893, s. 20.
30. Ibid, s. 18.
31. Ibid, s. 21.
32. Ibid, s. 19.
33. O’Halloran. Charity Law (Round Hall Sweet & Maxwell 2000), at p. 93
there is no means whereby trustees can alter the Memorandum of their charity, so that it ceases to be charitable, while ensuring that its property remains available for its original objects.”

Companies Acts 1963 - 2001

The powers of the directors are derived from the collective will of the company members as expressed in the company’s Memorandum and Articles of Association and asserted in General Meetings. The powers of a company and its directors can differ greatly depending on what exact powers are set out in the Memorandum of Association of the company, and it is only these powers that can be delegated to the directors of a company.

The Articles of Association usually provide that the directors may exercise all the powers of the company which are not by the Companies Acts or the Articles required to be exercised by the company in General Meetings. The delegation is unrestricted and the directors can do whatever the company can do. However the directors cannot do anything which is illegal or ultra vires, nor, of course can a company in General Meeting.

Although the company delegates powers to the directors, this does not mean that the company, through its members, cannot control the directors. The Memorandum and Articles of Association may always be amended by special resolution to limit the powers of the directors in any way it thinks fit and the company may also remove all or any of the directors.34 This crucial power of ultimate control under section 182 of the Companies Acts 1963 – 2001 cannot be removed or abridged by the Articles of Association of the company.

It should be noted that the First Report of the Company Law Review Group35 recommends that private companies limited by shares should be granted the legal capacity of a natural person36 with the consequent effect that the doctrine of ultra vires would no longer apply to companies limited by shares. However the Report recommends that companies limited by guarantee should be required to retain objects and continue to be subject to the ultra vires doctrine and we would agree with this recommendation.

The provision of certain statutory powers would avoid trustees having to amend the governing instrument, which is often cumbersome, expensive and time consuming and would allow the

Footnotes:
36. It should be noted that in the Report on the Law of Charity by the Ontario Law Reform Commission, Ch. 15, p. 12 it is recommended that the old approach to regulatory issues, such as restricting the powers of the corporation or of the directors of the corporation should be abandoned and that non profit corporations should be deemed to have the same capacity and powers as a natural person.
trustees to have basic powers necessary to manage and administer the charity.

We recommend that trustees of a charity whether trustees, directors or otherwise have the following statutory powers provided that these powers are used to further the charitable objects of the charity and are not specifically excluded in the charity’s governing instrument:

- power to raise funds;
- power to support and administer other charities;
- power to borrow money and give security for loans by way of mortgage or otherwise;
- power to purchase, lease, or hire property of any kind;
- power to sell or lease property of any kind;
- power to provide advice and publish or distribute information;
- power to invest;
- power to delegate the management of investments to a financial expert;
- power to enter into any contracts or arrangement to provide services to or on behalf of any other body, governmental or otherwise;
- power to create or maintain any funds, sinking fund or reserves for any future obligations of the charity;
- power to employ agents, advisors and staff;
- power to provide pensions, gratuities, allowances or charitable aid to any person who served the charity or voluntary association as an employee and to his dependants;
- power to insure the property of the charity;
- power to insure the trustees against the costs of a successful defence to a criminal prosecution brought against the charity trustees or against personal liability incurred in respect of any act or omission which is or is alleged to be a breach of trust or breach of duty;
- power to pay the costs in respect of the formation of the charity;
- power to do all such things as may be within the law which promote or help to promote the objects of the charity;
- power to amend the governing document of the charity but only with the prior permission of the Charities Office when the objects of the charity are being amended.

Footnotes:
37. These suggested powers come from the model form Memorandum and Articles of association for a charity supplied by the Revenue Commissioners in Ireland together with the model form constitution, trust deed and Memorandum and Articles of Association supplied by the Charity Commissioners and Charity Law Association in England and Wales.
Charity Law: The case for reform

X. THE DUTIES OF TRUSTEES

The Trustee Act 1893

Trustees of a trust whether it be charitable or otherwise are required to carry out duties and obligations which can often be complex and require a high degree of skill, honesty and integrity. Wylie states

“the position of a trustee is an extremely onerous one and all too frequently a thankless one.”38

The duties of a charity trustee and those of an ordinary trustee are essentially similar but there are some notable differences. Firstly, every trustee whether a charity trustee or not should ensure that he has read and understood the terms, obligations and conditions of the trust instrument. The trustee’s main duty is to honour the terms of the trust and see that its objects are carried out. It has been said:

“the primary duty of a trustee of a charitable trust, as of other trustees, is to carry out the trust according to the instructions of the founder so long as they are capable of fulfilment.”39

The following can be said to be the main duties of trustees:

• To manage trust assets – the trustee should exercise good stewardship in respect of the funds or assets of the trust. The trustee should gather in and account for all the trust property, check the relevant documentation and ensure that it is in order and the property of the trust is secure. A trustee should be proactive as soon as he takes up the position of trustee.

• To maintain proper records – there is no explicit statutory duty to maintain records or accounts, nor do the Commissioners for Charitable Donations and Bequests have the power to compel a charity to do so.40 However the courts have recognised that the legal obligation to maintain accounts rests with the trustees.41

• To apply trust assets for the benefit of the beneficiaries. The trustees must apply the assets or funds of the trust as specified by the trust deed or instrument. The distribution of the assets or the funds must be in keeping with the intention of the donor and in accordance with the law.

Footnotes:
40. If the charitable trust has tax exemptions granted to charitable organisations, the Revenue Commissioners require that accounts be kept and submitted on request. The accounts do not necessarily have to be audited.
41. Crawford v Crawford (1897) L.R.1 Eq 438.
Not to profit – it is long established that the trustees of a trust, whether charitable or otherwise, are seen to hold a fiduciary position or office and therefore must not acquire or seek to acquire any personal gain or advantage in the course of holding the position of trustee. There is a duty on a trustee not to place himself in a position where a conflict of interest may arise between his personal interests and those of the trust.

Not to delegate – delegatus non potest delegare. The general rule is that trustees may not delegate though in certain very limited circumstances, section 17 of the Trustee Act 1893 provides that delegation may take place where expert assistance is required. Delany points out that this principle is not inflexible and the courts have conceded that delegation may occur in circumstances of “legal necessity” or “moral necessity”. Delegation may occur where the trustees employ an agent such as a stockbroker, solicitor or estate agent to give expert advice. The trust deed or governing instrument may even provide a power to delegate. It should be noted however that in appointing an agent, the trustees must act in good faith, and ensure that the agent has the appropriate skills, competence and honesty.

Trustees are only entitled to be paid for their work if the trust instrument itself makes provisions for remuneration. Charity trustees are not entitled to be paid for the work that they do on behalf of the charity as trustees, and are only entitled to be paid for out of pocket expenses.

As stated by O’Halloran:

“Two broad principles govern all trustees’ duties. In executing the terms of the trust the trustee is required to demonstrate both loyalty to the objects as set out in the governing instrument and impartiality when negotiating between the interests of the trust beneficiaries.”

Companies Acts 1963 - 2001

A director is an executive officer of the company and as such is responsible for the day to day running of its affairs.

At common law, the principal duty of company directors is to exercise due skill and care. The duty owed by directors is a fiduciary one, which means that directors must act in good faith and in the

Footnotes:
42. Bray v Ford [1896] A.C. 44
44. Ex parte Bulchier (1754) Amb.218.
45. O’Halloran, Charity Law (Round Hall Sweet & Maxwell 2000), p. 96
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interest of the company as a whole.\textsuperscript{46} It has been suggested that this involves the following:\textsuperscript{47}

- they must exercise their powers for the benefit of the organisation and in good faith;
- they must not appropriate to themselves an opportunity which rightfully belongs to the organisation; and
- they must not put themselves in a position where their interests conflict or may conflict with those of the company.

The basic obligation requires company directors to conduct themselves with honesty when dealing with the company’s internal and external affairs. A director also has a duty to act with diligence when conducting business on behalf of the company.

The liability of a director of a company, operating within the legal structure of a company, is also governed by the Companies Acts and therefore a layer of statutory responsibilities arises and liability for fraudulent and reckless trading\textsuperscript{48} is added to a director’s common law obligations.

Thus as can be seen from the foregoing, there are no standard duties for charitable trustees or directors, except that they both hold fiduciary positions with regard to their respective trusts or companies. Nor are there any provisions in either the Trustee Act 1893 or the Companies Acts 1963 – 2001 with regard to the standard of care that is owed by the trustee or director. The duty of care currently owed by the trustees or directors is the result of case law and not legislation.

In the First Report of the Company Law Review Group\textsuperscript{49} it is recommended

“that the fiduciary duties of a director to his company primarily as identified by the Irish courts should be stated in statute law. This statement should be in general rather than specific terms, derived from principles established by the courts and on the basis that the statement is not exhaustive. Ultimately, in the consolidated Companies Acts, the statement of the directors’ fiduciary duties should introduce other provisions of the Companies Acts touching on directors’ fiduciary responsibilities, such as the provisions at present found in ss.186 to 198 of the 1963 Act and Part III of the 1990 Act.”

It is also recommended that when the Companies Registration Office is notified of the appointment of a director, whether on a Form A1 or a Form B10, that below the signature of the director the

Footnotes:

\textsuperscript{46} Clark v Workman [1920] 1 IR 107.
\textsuperscript{47} See Lynch, “Types of Directors; Eligibility for Appointment; Basic Legal Duties; Removal” (Paper presented to the Irish Centre for Commercial Studies, University College Dublin, November 29, 1990)
\textsuperscript{49} First Report, Company Law Review Group (December 2001), at p. 28 and discussed in detail in Chapter 11 of the Report.
The following statement should appear:

“...I acknowledge that, as a director, I have legal duties and obligation imposed by the Companies Acts, other statutes and at common law.”

**Trustee Act 2000 (UK)**

New legislation in the UK has set out to clarify the duty of care owed by trustees. Section 1 of the Trustee Act 2000, states:

“1(1) Whenever the duty of care under this subsection applies to a trustee, he must exercise such care and skill as is reasonable in the circumstances, having regard in particular-

(a) to any special knowledge or experience that he has or holds himself out as having; and

(b) if he acts as trustee in the course of business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.”

Schedule 1 of the Trustee Act 2000 provides that this duty of care applies in the following circumstances:

- when exercising the general power of investment;
- when exercising the power to acquire land or when exercising any power in relation to land;
- when entering into arrangements with agents, nominees and custodians;
- when exercising the power to insure properties; and
- when exercising the power in relation to reversionary interests, valuations and audits.

**Pensions Act 1990 as amended by the Pensions (Amendment) Act 1996**

It should also be noted that section 59 of the Pensions Act, 1990, provides that

“59.- Without prejudice to the duties of trustees generally and in addition to complying with the other requirements of this Act, the duties of trustees of schemes shall include the following:

(a) to ensure, in so far as is reasonable, that the contribution payable by the employer and the members of the scheme, where appropriate, are received;”

**Footnotes:**

50. The Report from the Advisory Group to the Charity Commission – Charitable Incorporated Organisation (Spring 2001) recommends that each charity trustee of a charitable incorporated organisation should be subject to the duty of care and skill as set out in section 1 of the Trustee Act 2000 and which would result in clarifying the exact nature of their fiduciary duty. 51. Under the Trustees Act 2000 (UK), s. 1(2), the duty referred to under subsection (1) is called “the duty of care.”
(b) to provide for the investment of the resources of the scheme in accordance with the rules of the scheme;

(c) where appropriate, to make arrangements for the payments of the benefits as provided for under the rules of the scheme as they become due;

(d) to ensure that proper membership and financial records are kept.\(^{53}\)

One of the interesting provisions of the Pensions (Amendment) Act 1996 is that under section 23, the trustees of a scheme “may meet reasonable costs and expenses incurred in receiving appropriate training in their duties and responsibilities as such trustees from the resources of the scheme.”

Section 23 underlines the importance of the duties and responsibilities of trustees. It states that trustees should be made aware of their responsibilities and duties, and if the trustees do not possess the particular skills and knowledge, that the cost of appropriate training may be incurred by the scheme.

We recommend that the duty of care owed by trustees or directors of a charity should be a standard one, and should be adhered to whether the charity is an unincorporated association, trust or a company limited by guarantee. We recommend that this duty of care should be statutory.

The duty of care required of a charity trustee should reflect any special knowledge, experience or skill which the trustee professes to possess. If the trustee acts as a trustee in the course of his business or profession, his duty of care is to exercise such care and skill as is reasonable to expect of a person in the course of his business or profession.

The duty of care should arise when the trustee of a charity exercises any of his powers, whether provided by statute or in the governing instrument.

We further recommend that the reasonable costs and expenses of any training required by trustees concerning their duties and responsibilities should be payable from the resources of the charity as a valid expense.

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Footnotes:

53. See for also the Companies Acts 1963 – 2001, s. 52 where the directors have a duty to have regard to the interests of the company’s employees in general as well as the interests of the members.
CHAPTER 6

INVESTMENT OF CHARITABLE FUNDS

I. INTRODUCTION

Equity has always required trustees of charitable trusts (whether in Ireland or other Common Law jurisdictions) to manage funds properly. This is one of the fundamental aspects of trusteeship. This is an aspect of equity in which while the principles are very similar in England and Ireland there are some nuances of detail in the decided cases which have led commentators to conclude that there may be slight differences in the approach taken by the courts (in determining for example the boundaries of the obligations imposed by the “prudent man” test).¹

The duty of charity trustees to invest trust assets properly arises under general equitable principles as derived from case law. This general duty may be supplemented by express provisions under the terms of the governing document and/or under the relevant statutory provisions. These aspects are covered in this section of our report along with a summary of the changes that have taken place in England and Wales.

Although there have been relatively recent² changes to the authorised investment regime under the Trustee (Authorised Investments) Act 1958, practical problems still remain particularly for charities and these are discussed along with our recommendations for change. We are aware that the Law Reform Commission is looking at the issue of reform of the law relating to trusts and would draw this point of overlap to their attention hoping that they will also consider the points raised here.

Our main recommendation with regard to investment issues is that, in line with the recent changes in England and Wales, the restrictive approach to investments should be relaxed in favour of an approach based on underlying principles of risk, suitability, diversity and appropriateness.

The discussion below considers:

• The current statutory default investment power for trustees generally

• The conditions currently attaching to this power

• The alternative default investment power for charity trustees

Footnotes:
1. See below – Investment duties - How the power is exercised.
2. By charity law development standards.
Charity Law: The case for reform

• Investment duties – how the power is exercised
• Investment duties and company law
• Delegation of the power of investment
• Ethical investment
• Breach of trust - exoneration and indemnity

Following the discussion of the above points with particular reference to charities there are some comments on recent developments overseas in relation to these issues.

II. CURRENT POSITION IN IRELAND - INVESTMENT POWERS

Express investment powers
In the case of modern charities, the investment powers and duties of charity trustees (or directors) are usually set out in the governing documentation. In such circumstances the investment power is usually expressed to be as wide as possible to provide maximum freedom in selecting investment strategy for the charity. Such powers have been judicially approved.3

The issues relating to investment therefore concern charities which in the main do not have express provisions in their governing documentation.

Default statutory investment power
Not all charities have modern documentation. Indeed some smaller charities and a small number of historic charities have no documentation or at least none which addresses the legal issues such as the power of investment. In such cases the trustees or directors are obliged to fall back on the general law. There is no implied power of investment under general trust law, therefore where there is no investment power in the governing documentation trustees are restricted to investments authorised by the statutory scheme set out in Part I of the Trustee Act 1893 as amended by the Trustee (Authorised Investments) Act 1958.

Section 3 of the Act of 1893 provides that the statutory power is exercisable at the discretion of the Trustees. Section 2 of the Act of 1958 provides that the Minister for Finance is empowered to amend by statutory instrument the list of authorised investments for the purposes of the statutory scheme.

Footnotes:
3. Re Harari's Settlement Trusts [1949] 1 All ER 430
The Minister relatively recently\(^4\) substantially updated the list of authorised investments by order (S.I. 28 of 1998) (“the Minister’s Order”) such that it now includes most of the more modern investment vehicles that might be expected to be amongst a prudent trustee’s portfolio including certain unit trusts, collective investment schemes, Irish listed equities etc. The flexibility to invest in equities was introduced, albeit indirectly, for the first time in 1990\(^5\) by the inclusion of unit trusts in the Minister’s list of authorised investments.

The Minister’s Order represented a major change. It listed categories of investment rather than identifying the investments themselves and the range of categories was significantly wider than had previously been the case. In order to provide some protection following this major relaxation the opening up of the list of investments was accompanied by the imposition of certain conditions (see below) including that trustees who invest in Irish equities are required to review the performance of those investments at least every six months.\(^6\)

Although the 1998 list of authorised investments is in itself a major departure from the previous position, the list is nevertheless becoming dated as investment houses (and governments) create new investment products and vehicles. It is also fixed in time and is therefore contains inherent inflexibility which will, over time, create difficulties for trustees dealing with day to day decisions unless there is a mechanism to update the list easily. Given the long term nature of charitable trusts and the general lack of resources in the sector it would be preferable if the list could be flexibly drafted and only reviewed relatively infrequently, say every 5-10 years. This might assist charities (and other affected trustees) to deal with the changes.

If the list of authorised investments contained in the Minister’s Order is to be retained it may well benefit from some (albeit minor) revision following the adoption of the Euro and the impact which that change has had on investment vehicles and strategies.

**If retained (see our other recommendations below) we recommend that the list of authorised investments in the Ministers Order should be revisited.**

**Conditions attaching to the statutory investment power**

A trustee investing under the Minister’s Order and Part I of the Act of 1893 is obliged to comply with the conditions set out in the second schedule to the Order. It would appear that, if retained, these conditions would also benefit from revision.\(^7\)

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Footnotes:

5. There has been a sequence of orders from S.I. 285 of 1967 onward. Investment in units other than in fixed interest unit trusts was introduced in S.I. 327 of 1990 and the range of unit trust investments was expanded by S.I. 75 of 1992.
6. In accordance with para. 4 of the second schedule to the Minister’s Order which contains the conditions referred to in the Order.
7. Discussion with investment managers held by the Committee at the offices of Eugene F. Collins on 13 February 2001.
It may be helpful to set out the current restrictions in the Second Schedule to the Minister’s Order in full in order to discuss the difficulties that arise in working with the conditions. It is relevant to consider that this list was developed a very short time ago in trust terms and is already problematic.

The conditions applied by the Minister’s Order are:

- A trustee shall not invest in instruments denominated in a currency other than the currency of the State if, immediately after the investment, the proportion of the trust funds invested in currencies other than the currency of the State would exceed 40 per cent of those funds.

- A trustee shall not invest in a relevant collective investment scheme or in a life assurance contract of the class specified in paragraph 1(10) of the First Schedule to this Order if immediately after the investment, the proportion of the trust funds invested in that particular scheme or, as may be appropriate, that particular contract would, exceed one third of those funds.

- A Trustee shall not invest in the equity of a company if, immediately after the investment the proportion of the trust funds invested in that equity would exceed 10 per cent of those funds. Nothing in this paragraph shall prevent a trustee from taking up a bonus issue of shares, or a rights issue of shares, accruing to an investment of the trust funds in the equity of a company.

- Where any part of the trust funds is invested in equities, the trustees shall review those investments at intervals of not more than six months.

Looking at the conditions in turn:

Currency: The currency restriction pre-dates the final implementation of the Eurozone (although it may have had the creation of the Euro in mind.) Given that currency markets are far from predictable (the fate of the Japanese Yen and the recent weakness of the Euro being examples) it may be appropriate to revisit this condition. Notwithstanding economic factors this condition may cause asset or liability mismatches for charities (particularly for those raising funds or providing assistance overseas) creating currency management and asset/liability matching difficulties.

Footnotes:

8. Paragraph 1(10) of the First Schedule refers to: “Life assurance contracts specified at Class III of Annex I to the Life Assurance Regulations the European Communities (Life Assurance) Framework Regulations, 1994 (S.I. No. 360 of 1994) issued by an authorised insurance undertaking and linked to investment funds where an amount of those funds equal to not less than 90 per cent of the net asset value thereof is held in cash deposits or in instruments that are listed on a recognised exchange.”
Collective investments: The substantial and relatively recent development in pooled investments both under life assurance “wrappers” and in unit trusts within the Eurozone means that this condition may also benefit from a review.

Equity Investments: Given some of the substantial mergers and acquisitions which have taken place (Glaxo and Wellcome; Glaxo Wellcome and Smith Kline Beecham) it may be helpful to clarify that a charity is not obliged to sell immediately a 10% holding which arises from a merger.

Six-monthly review: The last condition provides that where any part of the fund is invested in equities the trustees should review those investments at intervals of not more than six months. It appears that this condition applies only to direct investments in equities. Given that a directly invested portfolio is likely to have a professional investment manager who is required to report quarterly by Central Bank of Ireland requirements this seems an arbitrary period.

The condition also appears to take no account of pooled funds. Many smaller charities gain exposure to stock markets through pooled funds. Whilst it is true that such pooled investments are professionally managed with regard to their internal structure, this does not mean that the choice of a particular unit trust is either a good one or an appropriate one for the changing circumstances of a trust or charity. It may be worth revisiting whether smaller charities should not also be required to effect the same degree of monitoring where they hold indirect investments in equities.

If retained (see our other recommendations below) we recommend that the list of conditions applying to trustees whose investment in authorised investments is governed by the Minister’s Order should be revisited.

Charity investment powers under the Charities Act 1961 and the Commissioners’ list

In addition to any applicable trust law requirements, charity investments are also governed by section 32 of the Charities Act 1961 as substituted by section 9 of the Charities Act 1973. This provides that charity trustees may invest in the instruments approved from time to time by the Commissioners of Charitable Donations and Bequests for Ireland (“the Commissioners’ List”).

Unfortunately the Commissioners’ List does not coincide with the list contained in the Minister’s Order refered to above. While the two lists clearly have similar aims in mind, the way in which the Commissioners’ List cross-refers to the Minister’s List creates circularities which lead to
confusion. It would appear that the Commissioners’ List would benefit from being up-dated. In any event it is not clear why charity trustees are significantly different from any other type of trustee such that two lists are required.

If a list is retained we recommend that the Commissioners’ List is consolidated into a revised Statutory Instrument under the Trustee (Authorised Investments) Act 1958 with a view to creating one list applicable to trustees. The Commissioners’ powers to confer, on application by charity trustees, a power to invest in such manner as the Commissioners think proper should be retained separately but should not give rise to a separate list of charitable authorised investments.

Investment duties – how the power is exercised

Having determined the power of investment and its origin the trustees are obliged to exercise that power with the appropriate degree of skill and care. The standard of care and prudence is the so-called “prudent man of business” test and the most frequently quoted reference for this test is the case of Learoyd v Whiteley in which the Court of Appeal in England and Wales held that with regard to investment decisions a trustee was obliged to take:

“such care as an ordinary prudent man of business would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide”.

There have been developments in this fundamental approach to investment duty and in considering its elements but in essence the duty is the same today.

This is one area on which there is Irish jurisprudence in the case of Stacey v Branch. Murphy J. held that the wide express provision in the trust deed which empowered the trustee to deal with property “as he in his absolute discretion shall think fit” did not necessarily exclude the normal duty to exercise reasonable care and prudence. On the facts it was held that the exercise of the discretion had been valid. Murphy J. helpfully summarized the position referred to in the Learoyd formula alongside other principles at common law.

He then went on to quote again from Learoyd noting that businessmen of ordinary prudence may select investments of a speculative nature . . . “but it is the duty of a trustee to confine himself not

Footnotes:

9. For example, item 1 of the Commissioners’ List permits “the whole or any part” of the fund to be invested in authorised investments under the Minister’s List. The Minister’s List allows the entire fund to be invested in a mix (not more than 10% of fund per stock) of Irish listed equities with a market capitalisation of greater than € 1.27m for each of the last three years. The Commissioners’ List provides at item 3 that only 25% of the fund in total may be invested in a mix (not more than 5% of fund per stock) of Irish equities provided market capitalisation is greater than € 514k on the date of investment. Does priority 1 in the Commissioners’ List override priority 3?

10. Under s. 32 Charities Act 1963 (as amended by s. 9 of the Charities Act 1973)

11. (1886) 33 Ch. D 347, 355

12. [1995] 2 ILRM 136

13. Such as the obligation to have regard to the express provisions of the trust and the obligation to consider both those interested in the income and those interested in the remaining capital.
only to the class of investments which are permitted by the settlement or statute; but to avoid all such investments of that class as are attended with hazard.”

As noted by Hilary Delany14 the degree of care required of a prudent man has altered notwithstanding the summary in Stacey. Recent New Zealand cases have contemplated a flexible standard of care which changes with economic conditions.15 Risk in the context of overall investment portfolio policy is now something that courts would not necessarily dismiss although this would in Ireland at least require some degree of express wording in the trust deed as the law currently stands.

Learoyd v Whiteley16 was also discussed in the Bartlett v Barclays Bank case17 and endorsed in Nestlé v National Westminster Bank.18 In Bartlett Brightman J. stated his opinion that a higher duty of care is expected of a professional trustee carrying on the profession of trust management for a fee. Brightman J. concluded that a professional trustee is liable for loss arising “because it neglects to exercise the special care and skill which it professes to have”.

The position in England and Wales was confused by the case of Nestlé v National Westminster Bank as the Court of Appeal again went back to the “prudent man” test for the profession of trustee apparently ignoring the Bartlett decision. In Nestlé the professional trustee had not taken any initiative as a result of which the investments languished. Essentially the court held that an absence of activity from a trustee did not necessarily amount to a breach of trust. It appears that in these circumstances in the past at least it has been difficult to persuade an English court that a breach of trust has occurred.

The position has now changed following the introduction of the Trustee Act 2000 (see Developments Overseas below) with a specific statutory codification of the investment duty of care. Exactly how this is to be interpreted in cases remains to be seen but a clear statutory restatement of the law will no doubt assist both draftsmen and courts.

**Investment powers and company law**

It is unlikely that a charity established as a company limited by guarantee would not have a general power of investment amongst its objects. For this reason the issue of the absence of an unrestricted investment power in the context of charities usually relates to unincorporated associations and trusts. However the duty owed by the directors of that company in the exercise of any such power

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Footnotes:
16. (1886) 33 Ch. D 347, 355
17. (1980) Ch 515
Charity Law: The case for reform

is a matter for corporate law.

In the case of a company limited by guarantee the duty is owed primarily to the shareholders (rather than to beneficiaries under the objects). If the company accepts property on trust then that property is subject to trusts which may be separate and additional to both objects of the company and the general powers of directors in the Articles of Association. If the objects of the company involve charitable trusts then it would appear that equitable principles may apply to the exercise of some of the relevant powers in the Articles of Association.

The Charity Commission in England and Wales has noted a fundamental distinction between corporate property of charitable companies and property held by such bodies on charitable trusts. The extent of this distinction and how it operates in practice is not clear. It is possible for a company to hold property on trust and for a company to be obliged to take fiduciary decisions.

The distinction may perhaps be between trading companies or property associated with ancillary activities. On the other hand it may be more fundamental being a distinction between property subject to the Articles (corporate property) and property subject to external trusts (trust property).

The exercise of a power of investment over external trust property would be subject to the equitable principles espoused in Learoyd v Whiteley. The directors of the corporate trustee would be obliged to follow the principles laid down in that case. The actions of the directors in exercising powers under the Articles of Association are not necessarily subject to the same principles as the interaction between statutory corporate law and equitable principles is not clear.

It appears that the English Charity Commission operates a distinction in certain cases and in considering and developing any reform in this area it would be necessary to investigate further the distinctions noted in England and Wales between corporate and trust property.

We recommend that the duty owed by charity trustees in the exercise of an investment power should be codified in statute and that the application of that duty to investment powers contained in the Articles of Association of companies limited by guarantee be confirmed.

We recommend that clarification be provided that the equitable principles governing investment decisions concerning property subject to charitable trusts should unambiguously apply to companies as well as to trusts and unincorporated associations.

Footnotes:
Delegation of the power of investment

Delegation of trust powers has as a matter of fundamental equitable principle been outlawed except where provided for by the settlor of a charitable trust on the basis that a trust power is primarily a personal power. The principle was that the power had been settled on the trustee by reason of the settlor’s personal knowledge and selection of the trustee to carry out the power.

This restrictive approach has now been overridden in England and Wales subject to certain conditions. The more flexible approach in England and Wales now provides for the delegation of investment powers acknowledging the fact that modern portfolios of stocks cannot be managed on a day to day basis by trustees. The main condition for the delegation of investment powers is that there are investment plans or statements to guide the investment managers to whom the power is delegated.

We recommend 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.

Ethical investment

Investment strategies of charities generally are becoming more sophisticated as the sector becomes more aware of the issues and the investment business becomes both more regulated and transparent (with the introduction by the Central Bank of Ireland’s requirement that investment managers should ensure where possible that all investment management business is documented in writing). Charities’ investment strategies are increasingly taking into account issues such as shareholder engagement to improve corporate governance and the issue in the charitable sector of ethical investment.

The issue arises as to whether ethical investment is permitted or whether, on the contrary, it would constitute a breach of trust. Ethical investment can involve either positive or negative criteria and there are increasingly a number of indices available to indicate how such investments fare in purely financial terms.

The primary investment duty as outlined above is to the beneficiaries of a trust. However, unlike a pension scheme (where the issue began to be debated\(^\text{20}\)) the interests of beneficiaries of charitable trusts are not necessarily purely financial. While in the UK the English cases indicate that ethical

Footnotes:

investment is possible, the full range of possibilities has yet to be explored. The Scottish case of *Martin v City of Edinburgh District Council* served as a reminder that in reaching decisions trustees must not allow personal views or bias (i.e. as to appropriate ethical criteria) to overcome their decision making as trustees.

The current position is essentially that it may be appropriate in the circumstances of a particular case for ethical considerations to override financial concerns. Charitable trusts are essentially purpose trusts applying funds for the promotion of charitable objects. The ethical direction of any investments may directly promote those objects albeit that it does not yield the best financial return (an example of positive selection criteria): on the other hand a charity may select between otherwise comparable stocks on the basis that (as a cancer charity for example) it does not want to facilitate the business of organisations which it opposes in principle (e.g. tobacco manufacturers).

We recommend that the position on ethical investment should be clarified by a statutory (or ministerial/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.

**Breach of trust through poor investment decisions – exoneration and indemnity**

It would appear that in Ireland any delegation of investment power to professional investment managers is, in the absence of an express power of delegation or a modern investment clause, a breach of trust. Furthermore, as there is no Irish equivalent of the English 1961 Trustee Act, a trustee may be liable for a breach of trust even though acting reasonably and honestly.

The issue of exoneration and indemnity is one which is fraught with technical difficulties in part through the somewhat infrequent series of cases all of which turn on the particular drafting of the clauses concerned. It is also the case that while the draftsman has frequently endeavoured to take account of the latest jurisprudence, the English courts at least until recent times were reluctant to take at face value as valid an attempt by the settlor to exclude the scope of personal liability on the part of a trustee. The application of the *contra proferentem* principle has also led to a strenuous testing of the drafting of such clauses.

More recently, there have been developments in the field of pensions law with the cases of *Re*...

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**Footnotes:**

22. The English Trustee Act 1961 provides in section 61: "If it appears to the court that a trustee . . . is or may be personally liable for any breach of trust, . . . but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve him either wholly or partly from personal liability for the same."

23. The following phrases have all been the subject of judicial determination in the context of exoneration or indemnity cases: "wilful default" – *Re Vickery* [1931] 1 Ch 572, "fraud" – *Armitage v Nurse* [1998] Ch 241, "knowingly and wrongfully committed" – *Federated Pensions Services* [1996] PLR 179
In this latter case the Court of Appeal in England and Wales accepted that a clause can exempt a trustee for anything except dishonest or reckless breaches of trust and that such a clause was not contrary to public policy. However the Court went on to caution that exemption clauses should not be held to be valid in excluding liability for negligence in the case of remunerated professional trustees.

The approach in Armitage has been followed in Walker v Stone dealing with a discretionary family trust and the extent to which solicitor-trustees were entitled to be protected from liability by an exemption clause. The case to some degree blurs the distinction between what constitutes a dishonest and an honest breach of trust and negligence.

The way in which these cases would be contrasted with Stacey v Branch referred to above is not clear. At first glance Stacey seems to require that an absolute and wide discretionary power is necessary in order to succeed in achieving a successful exoneration or indemnity. However, it might be submitted that Stacey could be viewed as a case which did not involve exoneration or indemnity since the original power was so widely framed. Stacey does not contradict the later English cases – rather it considers a different point. Stacey may assist in considering how an ethical investment case might be determined in Ireland – certainly it would appear to be helpful were there a wide discretionary power. On the other hand the statements regarding the avoidance of investments “attended with hazard” may prove to be unhelpful.

In order to address the points raised above and to take something of the lottery (as to the phrases chosen by the draftsman) out of the position it is recommended that the statutory power of investment be accompanied by a statutory exoneration and indemnity subject to certain restrictions. Such restrictions could, whilst requiring compliance with a statutory duty of care, take account of ethical investment considerations for entities which have been registered as charities.

We recommend that the duty of investment and the appropriate standard of care for trustees should be codified in statute consistent with the principles of prudential investment (i.e. suitability, risk, diversity and appropriateness) on the basis that subject to a contrary intention in the instrument creating the trust, trustees should have the same power to make an investment of any kind as if they were absolutely (or beneficially) entitled to the assets of the trust. This duty of investment and standard of care we feel would be preferable to restricting investments to those authorised by the Minister’s Order or the Commissioners’ list.

Footnotes:
24. [1997] 2 All ER 105
25. [2000] 4 All ER 412
26. [1995] 2 ILRM 136
A statutory exoneration should apply to lay trustees against any liability for loss due to poor investment performance arising out of the exercise of the statutory power in good faith.

We recommend that the determinations of appropriate choices for investment decisions could usefully be passed from the High Court to the proposed Charities Office.

III. DEVELOPMENTS IN OTHER JURISDICTIONS

Northern Ireland

Northern Ireland like the Republic of Ireland is still operating under the outdated Trustee Act (Northern Ireland) 1958 and the Trustee (Amendment) Act (Northern Ireland) 1962. It was noted in the English and Scottish Law Commissions’ Report 27 that proposals similar to those contained in that Report were to be brought before the Northern Ireland Assembly. It would appear that this has yet to happen.

England and Wales

The position for trustees has developed substantially over the last few years following an extensive joint investigation by the English and Scottish Law Reform Commissions. A general investment power for pension scheme trustees predated the general review of trust law28 and was first codified in these jurisdictions as part of the government’s response to the Maxwell/Mirror pensions fraud.

The powers and duties of trustees have been thoroughly overhauled in the Trustee Act 2000. This contains a codified general duty of care in Part I and an investment duty of care in Part II. The Act also contains a general power of investment29 and standard investment “criteria” or considerations for the trustees.

Paragraph 1 of Schedule 1 to the Act provides that the previous “prudent man” duty of care no longer applies and the statutory duty must now be applied.

The new test in section 1(1) simply requires a trustees to:

“… exercise such skill and care as is reasonable in the circumstances, having regard in particular -

(a) to any special knowledge or experience that he has or holds himself out as having, and

(b) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the

Footnotes:
course of that kind of business or profession.”

The investment criteria in section 4(3) concern the suitability of the investments, the need for diversification appropriate to the trust and require the trustee to obtain and consider proper advice.

The general power of investment is in addition to other powers but subject to restrictions or exclusions contained in the governing documentation or other legislation.

The new power does not apply to all charity trustees but does apply to many. It does not apply to endowed charities (which are a separate category of charity under the English Charities Acts to which special powers apply) and other special categories of charity. There is no immediate equivalent of the endowed charities and many others among the charities to whom the Act does not apply. Many of the special distinctions in the Act would simply not be relevant in Ireland.27

A quasi-judicial definition of investment?

The Charity Commission in England and Wales plays a quasi-judicial role in relation to investment. It determines to what extent a disbursement of funds constitutes an application of fund assets in promotion of the objects as opposed to an investment consistent with bringing a return consistent with the promotion of the charity’s objects. The Charity Commission’s paper28 on these and related issues provides a helpful insight into the practical issues which can face trustees and addresses matters such as the following.

The Charity Commission assists with the meaning of “investment” for the purposes of the Trustee Act 2000. The term “investment” is not defined in the Act. The Charity Commission concludes in its paper that investment is the process of acquiring an asset with the aim of obtaining a financial return (whether from income or capital growth) from that asset.

For an asset to be regarded as an investment, funds must at some stage have been provided by an investor to an investee who agreed to provide some form of benefit in return for the use of these funds. The Charity Commission gives as examples of investment assets; company shares, land which is let to produce rental income, tradeable debt, non-tradeable debt and units in common investment schemes, whether income or accumulation. The view of the Commission is that there must be an investee for an investment. Thus commodities, works of art, premium bonds and derivatives are not investment assets.

The Commission also advises on its policy on the use of derivatives in charity investment. It had previously been the view of the Commission that the purchase of derivatives could not be within the scope of a power of investment, regardless of reasons that the trustees had for making the

Footnotes:
27. See Charity Commission Operational Guidance note OG 86 A1 (for the classes of trustees to whom the Act is likely to apply) and OG 83 A1 (for the slightly different approach which applies to endowed charities).
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purchase. The Commission now considers that the purchase of derivatives can be regarded as within the scope of general investment where the purchase is in support of the investment process. This is a significant change in policy and is intended to assist trustees in achieving efficient investment management.

The Charity Commission also provides advice as to what can be considered a “restriction or exclusion” to the general power of investment and advice on the preparation and content of an investment policy statement.29

Scotland

The McFadden report confirms that Scotland too is subject to basic powers of investment of trustees which derive from the Trustee Investments Act 1961. The McFadden Committee concluded that it would be important that trustees throughout Great Britain should have similar powers, duties and responsibilities.30 It appears therefore to welcome the adoption of the new English approach.

Further developments - Myners review of institutional investment

England and Wales have seen substantial criticism of the investment process adopted by non-professional trustees of pension funds. The Myners’ Report31 proposed a number of radical changes to the approach to investment by pension fund trustees.32

The Report suggested ten principles which themselves contain a considerable degree of detail and have significant implications for pension fund trustees in the UK. The principles are set out overleaf and envisage amongst other things expert trustees, paid trustees and various other means of “improving” the quality of investment decisions made by pension fund trustees (many of whom are lay people).

Footnotes:

29. Trustee Act 2000 (s. 15 (2)) provides that trustees may not authorise a person to exercise any of their asset management functions as their agent unless they have prepared a statement that gives guidance as to how the functions should be exercised (a policy statement) and the agreement with the agent includes a term that the agent will secure compliance with the policy statement.


32. As UK pension funds own a significant percentage of the London Stock Market one of Paul Myners basic premises was that too much investment capital was being inefficiently managed with a corresponding deleterious effect on the UK economy. Myners’ more radical proposals are controversial and it remains to be seen how implementation of his report will
THE PRINCIPLES WHICH AROSE FROM PAUL MYNERS’ ANALYSIS OF UK INSTITUTIONAL INVESTMENT

1 EFFECTIVE DECISION MAKING
- Decisions should be taken only by persons or organisations with the skills, information and resources necessary to take them effectively.
- Trustees should also be paid, unless there are specific reasons to the contrary. [This is arguably the most controversial of the proposals].
- Trustees should assess whether they have the right set of skills, both individually and collectively, and the right structures and processes to carry out their role effectively.

2 CLEAR OBJECTIVES
Trustees should set out an overall objective for the fund that:
- represents their best judgement of what is necessary to meet the pension fund’s liabilities;
- and
- takes account of their attitude to risk, specifically their willingness to accept underperformance due to market conditions.

3 FOCUS ON ASSET ALLOCATION
- Strategic asset allocation decisions should receive a level of attention (and, where relevant, advisory or management fees) that fully reflect the contribution they can make towards achieving the investment objectives. Decision-makers should consider a full range of investment opportunities, not excluding from consideration any major asset class, including private equity.

4 SEPARATE OR COMBINED CONTRACTS
- Contracts for investment advice should be opened to separate competition.

5 EXPLICIT MANDATES
Trustees should agree with both internal and external investment managers an explicit written mandate covering:
- an objective, benchmark(s) and risk parameters;
- the manager’s approach in attempting to achieve the objective; and
- clear timescales(s) of measurement and evaluation.
ACTIVISM
- The investment mandate should incorporate the principle of the US Department of Labor Interpretative Bulletin on activism. Trustees should also ensure that managers have an explicit strategy, elucidating the circumstances in which they will intervene in a company.

APPROPRIATE BENCHMARKS
- Trustees should consider, in consultation with their investment manager(s), whether the index benchmarks they have selected are appropriate; and whether active or passive management would be more appropriate given the efficiency, liquidity and level of transaction costs in the market concerned.

PERFORMANCE MEASUREMENT
- Trustees should arrange for measurement of the performance for the fund and make formal assessment of their own procedures and decisions as trustees.

TRANSPARENCY
A Statement of Investment Principles should set out:
- who is taking which decisions;
- the fund’s investment objective;
- the fund’s planned asset allocation strategy, including projected investment returns on each asset class;
- the mandates given to all advisers and managers; and
- the nature of the fee structures in place for all advisers and managers.

REGULAR REPORTING
- Trustees should publish their Statement of Investment Principles and the results of their monitoring of advisers and managers.
After some considerable initial criticism it appears that some (if not all) principles are being taken on board to varying degrees. In particular the principles regarding explicit mandates and activism are being promoted within the charitable sector in Ireland by the Central Bank of Ireland and the sector itself. In this regard the Mylers’ principles in some respects represent a distillation of common sense and good practice. It remains to be seen whether the principles will be more widely extended outside the pensions arena to trustees generally.

The English review culminating in the Trustee Act 2000 also concluded that in order to take advantage of a revision in the general duties regarding investment, trustees would need additional corollary powers, namely: a power to employ nominees and custodians; and a power to delegate fiduciary discretions to investment managers.

New Zealand, Australia and Canada

While Australia and New Zealand have been examining several aspects of the not-for-profit, non-governmental sector including charities, none of the reports addresses directly the issue of powers of investment.

Ontario on the other hand has recently amended its legislation to adopt a “prudent investor” approach very much like that adopted in England and Wales. The Ontario legislation provides that a trustee:

“must exercise the care, skill, diligence and judgment that a prudent investor would exercise in making investments” (section 27(1) of the Trustee Act 2000 (Ontario) as amended)

and provided that this standard of care is met:

“may invest trust property in any form of property in which a prudent investor might invest” (section 27(3)).

There are standard investment criteria and requirements for Investment Plans where the power is to be delegated. For a very helpful summary of the position see Terrance S. Carter’s article in Charity Law Bulletin No. 8.

The Ontario report has also concluded that the same regulatory standards should apply to charitable entities and their trustees as to other trustees.

Footnotes:

33. See the Broadbent Report (Canada), the Australian Definitional Inquiry, and the various New Zealand reports.
IV. SUMMARY

The neighbouring common law jurisdictions are moving on from a very restricted view of investment to a more flexible approach. It would not be desirable for Ireland to be left with an inefficient and outdated set of trustee investment powers.

A failure to update the law would be to leave trustees including charity trustees in Ireland subject to a potentially greater exposure for personal liability than charity trustees in the neighbouring jurisdictions.

It seems likely also that with the change to a different base from which to view investment powers and duties the jurisprudence in the form of case law will be less applicable. This will create problems of interpretation for trustees and their advisers given the relatively infrequent occurrence of trust cases in the Irish courts.

In summary the immediate concerns in Ireland are:

• the confusion caused by two lists of authorised investments applicable to trustees of charitable funds;

• the lack of a clear and up-to-date duty of investment for trustees (including charity trustees);

• the lack of a clear view as to the extent to which trustees operating under the statutory power of investment are acting appropriately in delegating that power to professional investment managers;

• a potential for confusion as to the effect that incorporation has on a power of investment;

• to ensure protection of lay trustees from personal liability for unfortunate investment decisions made in good faith; and

• a lack of clarity as to the extent to which ethical investment is permitted under the existing law as it applies to Irish charities.
CHAPTER 7
CHARITIES AND RATES

Legislative reform in 2001

The restrictive and complex exemptions allowed to charities and public undertakings under the previous rates legislation\(^1\) have been removed by the Valuation Act 2001,\(^2\) which came into effect on 2\(^{nd}\) May 2002.\(^3\) The new legislation sets out all relevant property not rateable in the fourth schedule:\(^4\)

7. Any land, building or part of a building used exclusively for the purposes of public religious worship.

8. Any land, building or part of a building used by a body for the purposes of caring for sick persons, for the treatment of illnesses or as a maternity hospital, being either –
   a) a body which is not established and the affairs of which are not conducted for the purpose of making a private profit from an activity as aforesaid, or
   b) a body the expenses incurred by which in carrying on an activity as aforesaid are defrayed wholly or mainly out of moneys provided by the Exchequer and the care or treatment provided by which is made available to the general public (whether with or without a charge being made therefor).

9. Any burial ground or crematorium which is not established or operated for the purposes of making a private profit and the income derived from the operation of which is used wholly to defray the expenses (including expenses of a capital nature) incurred in its operation.

10. Any land, building or part of a building occupied by a school, college, university, institute of technology or any other educational institution and used exclusively by it for the provision of the educational services referred to subsequently in this paragraph and otherwise than for private profit, being a school, college, university, institute of technology or other educational institution as respects which the following conditions are complied with-
   (a) (i) it is not established and the affairs of it are not conducted for the purposes of making a private profit, or
   (ii) the expenses incurred by it in providing the educational services concerned are defrayed wholly or mainly out of moneys provided by the Exchequer,

Footnotes:

1. The Poor Law (Relief) Act 1838, s. 63
2. No. 13 of 2001
3. SI 131/2002
4. S. 15 (2)
and
(b) in either case it makes the educational services concerned available to the
general public (whether with or without a charge being made therefor).

11. Any art gallery, museum, library, park or national monument which is normally open
to the general public and which is not established or maintained for the purpose of
making a private profit.

12. Property (whether falling within paragraph 11 or not) occupied by-
(a) the National Museum of Ireland,
(b) the National Library of Ireland,
(c) the National Gallery of Ireland,
(d) the Irish Museum of Modern Art Company,
(e) the Arts Council,
(f) the Heritage Council,
(g) the National Concert Hall Company,
(h) the Chester Beatty Library, or
(i) the National Theatre Society Limited.

13. . . .

14. Any land, building or part of a building occupied for the purpose of caring for
elderly, handicapped or disabled persons by a body, being either-
(a) a body which is not established and the affairs of which are not conducted for the
purpose of making a private profit from an activity as aforesaid, or
(b) a body the expenses incurred by which in carrying on an activity as aforesaid are
defrayed wholly or mainly out of moneys provided by the Exchequer.

15. Any building or part of a building used exclusively as a community hall.5

16. Any land, building or part of a building which is occupied by a body, being either-
(a) a charitable organisation that uses the land, building or part exclusively for
charitable purposes and otherwise than for private profit, or
(b) a body which is not established and the affairs of which are not conducted for
the purpose of making a private profit and-
(i) the principal activity of which is the conservation of the natural and built
endowments of the State, and
(ii) the land, building or part is used exclusively by it for the purpose of that
activity and otherwise than for private profit.

Footnotes:
5. “Community hall” is defined in s. 3 as
"a hall or a similar building, other than
the premises of a club for the time
being registered under the Registration
of Clubs (Ireland) Act, 1904, which –
(a) is not used primarily for profit or
gain, and
(b) is occupied by a person who
ordinarily uses it, or ordinarily permits
it to be used, for purposes which-
(i) involve the participation by
inhabitants of the locality generally,
and
(ii) are recreational or otherwise of a
social nature".
17. Any land, building or part of a building occupied by a society established for the advancement of science, literature or the fine arts and which is used exclusively for that purpose and otherwise than for private profit.”

This range of property includes many which are not charitable as such, but which serve a public interest: parks, national monuments, community halls and conservation organisations, for example.

“Charitable organisation” is defined in section 3 of the Valuation Act 2001 as an incorporated or unincorporated body of persons which complies with certain conditions. In the case of a body corporate which is not a company, or of an unincorporated body of persons, there must be a constitution or trust deed which fulfils certain minimum requirements. They include:

- a name;
- provision as to who are to be its trustees or members of its governing board or committee;
- its main objects must be charitable, and any secondary objects must be the attainment of the main objects;
- a statement of its powers;
- rules governing membership and procedures to be followed in relation to meetings and the discharge generally of its business;
- provision for the keeping of accounts and annual auditing;
- provision for the application of its income, assets and surplus towards its main objectives, prohibition on distribution to its members and remuneration for its trustees or board or committee or any other officer, except for officers who are employees;
- provision for its winding up, and disposal of any surplus property to another charitable organisation with similar objects, or if substantially funded by the State, office or agency of the State, to that body.

In the case of a company, the provisions are similar, but adapted for company structures.

Previous law
These provisions represent a fresh and radical approach to the exemption from rates enjoyed by charities. The charitable exemption is redefined free of the history of the earlier legislative framework which goes back to the Poor Relief (Ireland) Act 1838 and the Valuation (Ireland) Acts 1852 and 1854, which the Valuation Act 2001 repeals. A useful summary of the history and
interpretation of this legislation is set out in Chapter 18 of Dr. O’Halloran’s *Charity Law*. The judicial interpretation of the legislation in Ireland, arising from numerous cases, was more restrictive than that in England and Wales. This may have been due to the local authorities’ pressing need for funds to alleviate poverty, the original purpose of rates. Under the old law, the general rule was that any charitable purpose seeking to avail of the rates exemption must be for the benefit of the poor only. Education or healthcare which benefited others besides the poor or the near-poor did not qualify. Absence of the profit motive was not enough, so for example fee-paying schools and hospitals were generally liable to rates, although it was held in *Clancy v Commissioners of Valuation*\(^7\) that charging money within the charitable object did not necessarily mean that the charitable user was compromised.

**Exclusive user**

It remains to be seen if some of the existing caselaw can be of assistance in the interpretation of the new statute. Under the old law, the *provisio* to section 63 of the 1838 Act gave exemption from rates to “any infirmary, hospital, charity school, or other building used exclusively for charitable purposes”. The phrase “used exclusively” has been the subject of interpretation by the courts. For example, in the *Good Shepherd Nuns* case,\(^8\) the nuns’ residence was held not to be exclusively charitable because their activities included running a non-charitable laundry as well as a school and an asylum, which were charitable.\(^9\) In *Brendan Mary v Commissioner of Valuation*,\(^10\) nuns who ran a primary and secondary school for poor girls which was rated as charitable did not succeed in their appeal to have their convent and oratory so rated, even though they were extensively used for education.\(^11\) Exclusive user is a concept which arises in Schedule 4 of the new Act in relation to educational establishments, community halls, charitable organisations, conservation organisations, and science, literature or fine arts societies.\(^12\) The existing caselaw can still be relevant in this context, to provide guidance as to what constitutes exclusive user.

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Footnotes:

6. Round Hall Sweet & Maxwell 2000
7. [1911] 2 IR 173, confirmed in *Barrington’s Hospital v Commissioners of Valuation* [1957] IR 299. See also Pembroke UDC v Commissioner of Valuation [1904] 2 IR 429, where it was held that a technical college charging modest fees was used exclusively for public purposes, and was therefore exempt from rates.
8. [1930] IR 646
9. We suggest that this decision would have a different outcome under the new legislation. Judging by their activities, the objectives of the Good Shepherd Nuns were related to the advancement of religion, the advancement of education and other charitable objects. The use of their residence as their home is a legitimate charitable object, as the upkeep of religious personnel is charitable. It certainly is not use for profit within para. 16. The fact that the laundry was run for profit should not change anything, as under the definition in s. 3, a charitable organisation may have secondary objects as long as they are to contribute to the attainment of the primary object. The profits of the laundry would of course have to contribute to the charitable purposes.
10. [1969] IR 202
11. We suggest that this case would also be decided differently under the Valuation Act 2001, as advancement of religion, presumably one of the purposes of the nuns, would now be a charitable purpose under the new definition of charitable organisation in s. 3, and the upkeep and maintenance of religious personnel is a charitable purpose under that head.
12. Para. 10
13. Para. 15
14. Para. 16
15. Ibid.
16. Para. 17
Exemption for societies instituted for the purposes of science, literature or the fine arts exclusively

Two recent decisions have dealt with section 1 of the Scientific Societies Act 1843, referred to in section 2 of the Valuation (Ireland) Act 1854, which reads as follows:

“No person or persons shall be assessed or rated, or liable to be assessed or rated, or liable to pay, to any county, borough, parochial, or other local rates or cesses, in respect of any land, houses, or buildings, or parts of houses or buildings, belonging to any society instituted for the purposes of science, literature or the fine arts exclusively, either as tenant or owner, and occupied by it for the transaction of its business, and for carrying into effect its purposes, provided that such society shall be supported wholly or in part by annual voluntary contributions, and shall not, and by its laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members, and provided also that such society shall obtain the certificate of the Barrister at Law or Lord Advocate, as hereinafter mentioned”.

_Gurteen College v. Registrar of Friendly Societies_18 concerned an agricultural college established as a trust by the Methodist Church in 1948. It was a non-profit making body which ran agricultural science courses in conjunction with Teagasc, the Agriculture and Food Development Authority. The courses involved theory and applied science in relation to farming. The college also engaged in research projects, field trials and experiments. Although the trust deed provided that one of the objects of the trust was instruction in the Christian religion, there was no longer any formal religious instruction, only occasional pastoral visits from clergy of different denominations.

Several aspects excluded the college from the benefit of the rates exemption, in the opinion of the Respondent. Firstly, in his opinion the college was primarily an educational establishment. Secondly, under the terms of the trust deed the college was not exclusively concerned with the purpose of science, as religious instruction was also one of its purposes. And thirdly, he questioned whether the college came within the terms of the 1843 Act which stipulated that it should be supported wholly or in part by voluntary contributions.

McGuinness J. held that the fact that the college was a teaching institution did not in itself disqualify it from being exclusively instituted for the purpose of science, and she cited an English authority_19 to the effect that the purposes of science include not only the advancement of knowledge by research work, but also the dissemination of it by lectures, teaching and writing. The new

Footnotes:
18. [1999] 2 ILRM 535
Charity Law: The case for reform

Valuation Act 2001 includes both educational establishments and scientific societies in the exempted category, and so the exact scope of what is purely scientific and what is educational will no longer give difficulties for rates purposes. However, this decision and the English authority show the recent willingness of the courts to look to the spirit of the legislation rather than the letter. In relation to the second issue, McGuinness J. also took a practical view and declined to follow an English authority, preferring to look at the factual evidence of the current activities and purposes of the college, as opposed to the formal terms of its trust deed. She held that any religious involvement taking place was purely ancillary to the other activities of the college. This approach will remain relevant to the interpretation of the new legislation.

In relation to the third point, McGuinness J. looked at the history of donations over the period of the existence of the college, and concluded that 8% of the college’s income in the years 1983 – 1997 inclusive came from private sources, not including scholarships or the considerable voluntary time and effort invested by the management committee and trustees. She held that government and EU grants could not be regarded as voluntary donations, but that “it is clear that from the beginning the college has been seen to some degree as a charitable institution and has benefited in particular from gifts of land whether given directly or sold to the college at very much of an undervalue.” She held that the level of voluntary subscriptions were sufficient to bring it within the 1843 Act. While the decision is no longer directly applicable to the wording of the new Act, McGuinness J.’s willingness to look at the charitable origins and circumstances of the college and to avoid literalness in her interpretation of the legislation is significant.

This case was followed by Transport Museum Society of Ireland Ltd. v Registrar of Friendly Societies, a decision of Geoghegan J. The Museum Society had as its objectives to establish and maintain a transport museum for scientific and literary purposes and to provide related education for the public benefit. The Registrar of Friendly Societies contended that the society had not been instituted exclusively for the purposes of science, literature and the fine arts as education was also an objective.

Geoghegan J. held that the phrase “any society instituted for the purposes of science, literature and the fine arts” in section 1 of the Scientific Societies Act 1843 should be read to mean “any society instituted for the purposes of higher knowledge”. He agreed with McGuinness J. in the Gurteen case that “science” as used in section 1 should be given a broad interpretation and agreed with her decision. He held that the transport museum was not a workshop for repairing vehicles nor was its purpose to provide education or entertainment to the public. Its purpose was “to engage in what
can only correctly be called the difficult science and indeed art of restoration of vehicles . . .”22 He also decided that the reference in the memorandum of the appellant company to education did not mean that the activities of the society were not exclusively scientific: “. . .’exclusively’ must be given its ordinary meaning but it should not be given an artificially literal meaning that would have been almost certainly contrary to the intentions of parliament.”23 He held that any educational aspect of the museum was purely incidental.

The practical and common sense approach taken in these two recent cases contrasts favourably with the narrow and limiting interpretations of many older rates cases. The liberal spirit of the new legislation would tend to reinforce this approach.

Apportionment between charitable and non-charitable activity

Rehab Lotteries Ltd. v Commissioner of Valuation24 marked a new approach to the treatment of charitable activity and non-charitable activity taking place on the same premises. It was accepted that the non-charitable sale of lottery tickets was a minor use of the premises which was however not quantified. The Tribunal held that the non-charitable user should be quantified and an apportionment of rates made accordingly.

Extent of premises covered

The caselaw may also be useful in clarifying how to judge whether the use of a property is charitable or too remote from a charitable activity to qualify. Issues have arisen as to the liability for rates of staff accommodation in hospitals, for example. In Clonmel Mental Hospital v Commissioner of Valuation25, the hospital was exempted, and the question arose as the rateability of a nurses’ home adjoining the hospital. The nurses were obliged under their contracts of employment to live there, and were on call to the hospital. Davitt P. on appeal in the High Court took the view that the test was not only what took place on the premises in question (merely accommodation), but how necessary it was to the charitable activity. The object and purpose of the user was relevant. He declined to follow a Northern Irish decision Commissioner of Valuation for Northern Ireland v Fermanagh County Hospital Committee26 which rested on the location of the accommodation outside the hospital’s curtilage. On appeal in the Supreme Court, Lavery J. giving the judgment of the court held that the hospital was entitled as a whole, and not on the basis of the nurses’ residence being within or outside the curtilage of the hospital buildings.

“A hospital . . . is a complex organisation. It comprises wards and rooms for patients, recreation halls and so on for convalescents – operation theatres, laboratories for

Footnotes:
22. At p. 269
23. At p. 270
25. [1958] IR 381
26. [1947] NI 125
radiological and pathological and other work and many other facilities and staff accommodation, living room – refreshment rooms and so on”.27

He noted that there was no suggestion of a private benefit for the nurses.

**Primary user must be charitable**

The extent of charitable user was examined in *Powerhouse Bolton Trust Enterprise v Commissioner of Valuation*,28 a decision of the Valuation Tribunal in 1995. The ESB and the IDA had jointly funded and refurbished the former Pigeon House Hotel to create business incubator units with a view to reducing unemployment by encouraging new businesses to create jobs. The Trust provided subsidized accommodation to selected small businesses at a small rent for a maximum of three years, and business consultancy services were provided free of charge by the Dublin Institute of Technology. The Trust was non-profit making and had charitable status with the Revenue Commissioners. The appeal was on the basis that the premises were used for charitable and/or public and/or educational purposes, but was rejected because

- the educational services were available only to the occupants of the units, and were therefore not available to the poor in general.
- Further, the premises and facilities were not available to the public at large, only to those businesses selected by competition and
- on the facts, it was held that the purpose of the Trust was not exclusively charitable as its primary objective was to develop successful businesses, and not to reduce unemployment.

In the light of the new legislation, this decision would be different in relation to the education and public elements, but would still be open to argument that the user was not in fact charitable as the objective was not primarily the reduction of unemployment, but the creation of successful businesses. It is a subtle point of difference, but valid. There is a difference between directly reducing unemployment, for example, by subsidizing jobs, and indirectly reducing unemployment, by fostering companies which may provide jobs. The definition of charitable organisation in the 2001 Act permits of secondary purposes provided they contribute to achievement of the primary purpose. The fostering of companies could be argued to be an ancillary activity to the reduction of unemployment and creation of jobs. However, the case makes the point that to qualify as a charitable organisation, the primary user of the premises must be charitable, under the standard *Pemsel* definition of charity.29

In *Cork City Partnership Ltd. v Commissioner of Valuation*,30 the exemption was granted on the ground of relief of poverty, but not on the ground of education of the poor which had also been

Footnotes:

27. Lavery J. at p. 398  
28. Appeal no. VA94/3071, 4 December 1995  
29. See chapter on Definition of Charity above  
30. Appeal VA97/5/011, 15 March 1999
argued. In *Limerick Youth Service Board v. Commissioner of Valuation*31 the exemption was granted even though the appellant engaged in trading as a means of giving its trainees work experience. In *Northside Community Enterprises Ltd. v Commissioner of Valuation*,32 the appellants argued that the primary object of their charity was to train and equip the unemployed for employment. This appeal was rejected on the grounds of education of the poor, but allowed on the ground of relief of poverty.

In *Rehab Lotteries Ltd. v Commissioner of Valuation*33 the appellants employed staff on the premises which were used for organising and promoting lotteries for different charities. The appeal was allowed even though the charitable activity was fundraising on behalf of others, which it was argued was not a charitable purpose in itself. The decision to recognize fundraising for other charities as a charitable purpose is in line with the policy of the Revenue Commissioners, as illustrated by the Revenue decision in the case of C.H.Y. 10195.34

### Occupation

The existing caselaw on occupation and user will continue to be of assistance in assessing the eligibility for rates exemption.35 Occupation must be actual, exclusive, of benefit and not transient.

### Issues for Reform

It will take some time for the Valuation Act 2001 to be applied before any shortcomings become known. We believe that the reforms introduced by the new legislation are timely and useful, and remedy the main shortcomings of the previous position by using the same definition of “charitable” as elsewhere in the law. This has greatly simplified the position of charities and has given them access to wider exemption from rates than in the past, and greater certainty. Because of the reforms effected by the new legislation, we have no recommendations for reform of rates law in relation to charities.

### Charity Shops

It is the policy of the Commissioner of Valuation to rate retail shops run by charities to raise funds, and this policy was endorsed by the Tribunal in the *Rehab Lotteries* case above. The Irish Charities Tax Reform Group has lobbied to have this liability for rates removed, although so far without success. Differences may arise in the legal structures used and the activities of the shops:

- shops which are owned and run directly by the charity, and are not separate legal entities
- shops which are owned by a charity but are separate legal entities, donating their profits to the parent charity;
- shops which sell only donated goods;

Footnotes:

31. Appeal VA90/3/003
32. Appeal VA97/5/027, 15 March 1999
33. Appeal no. VA89/220, 10 April 1991
34. Referred to in O’Halloran, *Charity Law* (Roundhall, Sweet & Maxwell 2000) p. 298
35. Ibid, p. 360
Charity Law: The case for reform

- shops which sell bought-in goods as well as donated goods.

In relation to the first type of shop, one argument made is that commercial shops can set off their rates as a business expense against profits. As charity shops directly run by charities have no taxable profits, they get no tax advantage. The position is the same in the case of charity shops owned by charities but run independently as commercial ventures. They can set off rates against profits, which can be donated to their parent charities without the gift being taxable. However, the rates do reduce the profits and as all profits can be donated, the charity suffers the loss of the cost of the rates.

It is debatable whether there is a real difference in competitive and economic terms between shops which sell only donated goods and those which trade. There is a concern on the part of neighbouring shops that rates exemption may give the charity shops an unfair competitive advantage.36

We recommend that before any debate is embarked upon, it would be helpful to undertake research as to the economic reality of the financial impact on all concerned of removing liability to pay rates from charity shops: the rating authorities, the competing shops and the charities themselves.

Proposed Local Government (Rates) Bill

Heads of a proposed bill to consolidate and reform Rates legislation (as opposed to Valuation legislation) were circulated by the Department of the Environment and local Government in 2001. The document largely deals with reform in the area of collection of rates. Under Head 15 it is proposed that local authorities be enabled to grant discretionary relief by waiving all or a portion of the rates due by classes of ratepayers, which would be specified by ministerial regulation. The note attached to this head of the bill states that the classes of ratepayers to be covered are non profit making (non-commercial) organisations concerned with community service, social welfare, educational or philanthropic matters.

A similar provision already exists under section 2 of the Local Government (Rates) Act 1970. We understand that half the rates payable on charity shops in the Dublin City Council area are waived under this provision.

While not directly concerning charities, which are already exempted, this provision reflects the general goodwill towards charitable and voluntary organisations and the perceived need to support them in their work by relieving them of financial burdens. Borderline cases between charities and non-charities, such as charity shops, will stand to benefit from this provision subject to local decision making on the part of the local authority.

Footnotes:
36. According to "Giving without Strings", 2000, SCVO, at p. 34, "The only systematic look at this question by the former City of Edinburgh District Council disproved this assertion" i.e. unfair competition.
APPENDICES
APPENDIX 1

INTRODUCTION

As part of the research for this report the Law Society Law Reform Committee commissioned The Wheel to send out a questionnaire. We would like to sincerely thank all the people who took the time and trouble to respond to the survey and their organisations, listed at the end of this appendix.

The survey was sent to approximately 2,300 charities and voluntary organisations and around 265 responses were received, being a response rate of 11.5%. The responses are self-selecting and not all respondents chose to answer all questions. It is difficult to draw conclusive statistics from this information, but the replies do provide an overview of the issues of concern to the many bodies in the sector.

It can be seen that there is considerable consistency of opinion on the major issues and the following points can be summarised as areas on which the sector is strongly in favour or against. This list is followed by areas on which the position seems to be more fluid.

Areas on which the sector has decisive opinions:

- registration and regulation
- a central register for charities, public access to relevant information
- filing of annual accounts
- a register of trustees and managers of charities
- a register of those disqualified from being trustees or managers of charities
- usefulness of a register for various purposes
- disclosure of fundraising costs
- benefit of official registration in Ireland and abroad

Areas on which the sector has a wider range of opinions:

- definition of charity for purposes of charitable status
- publication of charity accounts
- standards in relation to minimum expenditure on charitable purposes
- fundraising regulation
- investment powers in relation to charitable funds
SURVEY OF CHARITIES AND VOLUNTARY ORGANIZATIONS, SUMMER 2001

Below are set out the relevant questions and their answers. Percentages below relate to the numbers of replies to a particular question.

<table>
<thead>
<tr>
<th>yes</th>
<th>no</th>
<th>undecided</th>
</tr>
</thead>
</table>

SECTION 4 – DEFINITION OF CHARITY

4.1a Are there organisations that you think should be charities that are currently not?
YES 45%, NO 55%

This has implications for the definition of charitable status and probably relates to the blurring of the boundary between charities and other voluntary or non profit organisations.

4.1b Are there organizations which operate as charities which you think should not be?
YES 33%, NO 67%

Unfortunately, respondents were generally too careful to give examples. One example was given informally on the telephone of a charity which the caller believed should not be one: a gallery selling works of art created in a Creative Centre in the south west of the country.

SECTION 5A – CURRENT REGISTRATION AND REGULATION POSITION

5.1 Do you think the structure in Ireland works effectively?
YES 10%, NO 47%, UNDECIDED 43%

5.2 Do you think an Irish Charities Register should be established?
YES 94%, NO 1%, UNDECIDED 5%

5.3 Do you think that the organisation and regulation (policing) roles should be carried out by the same organisation?
YES 57%, NO 19%, UNDECIDED 24%
5.4 Would you be in favour of a ‘one stop shop’ for all matters relating to charities?
YES 81%, NO 6%, UNDECIDED 13%

5.5 Should charities/voluntary organizations have to pay to register?
YES 15%, NO 66%, UNDECIDED 19%

SECTION 5B - CENTRAL REGISTER FOR CHARITIES
5.6 Do you think all charities should be registered on a central register?
YES 94%, NO 1%, UNDECIDED 5%

The reasons and number of times given included:
• accountability and transparency (57)
• good government and public administration (28)
• information for the public and other charities (27)
• validation of charities and enhancement of their credibility (15)
• prevention of abuses (10)
• to enable networking with other charities (5)
• equality of treatment and fairness (2)
• good practice (2)
• help for charities, through the provision of a “one stop shop” (2)
• smaller charities should not have to register (2)
• identification of duplication of services (1)

Some replies gave several reasons. The numbers relate to the numbers of replies in the different categories. Obviously, many of the reasons overlap with each other, for example, accountability and transparency can be for the benefit of the donors, the clients, the management and the State, and thereby overlaps with ‘good government and public administration’.

5.7 Do you think the Registrar should publish details of directors, management and places of operation?
YES 87%, NO 11%, UNDECIDED 2%.

The reasons and number of times given included:
• accountability, transparency and openness (68)
• information for the public and other charities (18)
• confidentiality, right to privacy would be infringed by registration and publication of this information (15)
• good government and public administration (9)
• prevention of abuses (5)
• validation of charities and enhancement of their credibility (4)
• good practice (3)
• cost to charities of making this information available (1)

The remarks in reply to this category give some useful insights into the concerns of charities. The need for privacy and confidentiality was dominant in the negative replies, and many pointed out that this was necessary in some circumstances for the protection of volunteers, and that publication would put people off volunteering. One respondent made a distinction between publication of names and of personal details such as addresses. Others were happy to have this information registered, but not published, only available on request for a good reason. One respondent gave “avoidance of conflict of interest” as a reason for agreeing with publication.

5.8 Do you think all charities should send details of their balance sheets and income/expenditure to the Registrar on an annual basis?

YES 77%, NO 21%, UNDECIDED 2%.

The reasons and number of times given included:
• accountability, transparency and openness (108)
• good government and public administration (16)
• negative answer because this should depend on the size of the charity (8)
• negative answer because confidentiality, right to privacy would be infringed by registration and publication of this information (7). Making it available to the Registrar on request would be acceptable (1)
• concern about cost to charities of making this information available (7)
• prevention of abuses (6)
• validation of charities and enhancement of their credibility (5)
• information for the public and other charities (4)
• good practice (3)
• negative answer because accounts already opened to funders or statutory body (3)
• accounts information can be misinterpreted (2)
• to ensure equality and fairness (2)
• negative answer because this information is not relevant (1)

Data protection was an issue raised by one respondent. An advantage seen by another respondent is that it would guarantee that any body filing this information is active. The point was made that donors were entitled to have their anonymity protected.
5.9 Do you think the Registrar should publish such accounts, including balance sheets showing assets held, on an annual basis?

YES 53%, NO 41%, UNDECIDED 6%

The reasons given break down as follows:

- accountability, transparency and openness (58)
- limited access to accounts would be acceptable e.g. available on application to the Registrar (28)
- negative answer because confidentiality, right to privacy would be infringed (12)
- negative answer or concern because accounts information can be misinterpreted (10)
- concern about cost to charities of making this information available (8)
- good government and public administration (5)
- negative answer because this information is not relevant or necessary (5)
- negative answer because this should depend on the size of the charity (4)
- validation of charities and enhancement of their credibility (3)
- information for the public and other charities (4)
- negative answer because accounts already available in Companies Office (3)
- prevention of abuses (1)
- good practice (1)
- to ensure equality and fairness (1)

Two organizations were of the view that it should be the responsibility of each organization to publish its own accounts. Another was concerned that publication might cause difficulties in fundraising. Several replies suggested it would be costly and a waste of the Registrar’s resources, perhaps conceiving of paper rather than electronic publication, or ‘publishing’ by having the accounts available for inspection in a Registry Office.

SECTION 5C – USE OF THE REGISTRY

5.11 Do you think there should be a register of those involved in the running of charities (trustees, directors and executives?)

YES 82%, NO 4%, UNDECIDED 14%

5.12 Do you think there should be a register of people disqualified from running charities?

YES 86%, NO 3%, UNDECIDED 11%
5.13 Would you use the Charities Register if it provided information services regarding:
(a) governing documentation and the establishment of charities?
   YES 98%, NO 2%

(b) financial queries?
   YES 96%, NO 4%

(c) duties and responsibilities of trustees/charity directors?
   YES 96%, NO 4%

SECTION 7 – ACCOUNTING REQUIREMENTS AND ACCOUNTS
7.2 Does your organisation prepare annual accounts?
   YES 98%, NO 2%

7.3 Do you complete your reports in accordance with the UK SORP for charities?
   YES 19%, NO 81%

7.4 Should all charities prepare full accounts, irrespective of
(a) their legal form?
   YES 71%, NO 17%, UNDECIDED 12%

(b) their size?
   YES 61%, NO 24%, UNDECIDED 15%

7.5 Should all charities, irrespective of their size, be required to send annual accounts and/or reports to a central office?
   YES 81%, NO 7%, UNDECIDED 11%

7.6 Does your organization have a policy that a minimum amount of income must be spent on the purpose for which you are established?
   YES 46%, NO 54%
7.7 Do you think it would be good to have such quantitative standards set by the Registrar?
YES 44%, NO 18%, UNDECIDED 38%.

SECTION 8 – ADVICE
8.1 Have you tried to get advice and information in the last two years in relation to a charity?
YES 33%, NO 67%

The following is a breakdown of the sources of advice:
• Revenue Commissioners (18)
• network and contacts (16)
• solicitors (15)
• accountants (13)
• government department or agency (6)
• published information (5)
• Internet (3)
• Companies Registration Office (3)
• Gardaí (1)
• IBEC (1)

From this it can be seen that the Charities Branch of the Revenue Commissioners already fulfil a role in providing information and advice, a role which a new registration body would naturally assume.

8.2 Have you been unable to get advice or information that you needed?
YES 21%, NO 79%

Advice was reported as difficult to get in relation to the following:
• confirmation of charitable status
• advantages of charitable status
• advice on applying for charitable status
• guidelines on corporate donations and tax exemptions
• list of Irish charities and trusts, profile of charities by size and activity
• availability and eligibility for grants, what State monies are received, funding levels for services
• getting advice takes time, ‘one stop shop’ would be a good idea
8.3 Do you currently pay for advice that you get?
YES 26%, NO 74%

SECTION 9 – FUNDRAISING
9.3 Do you think the current legislation for authorising and monitoring public collections is adequate?
YES 14%, NO 44%, UNDECIDED 42%
The reasons given break down as follows:
• insufficient control, regulation (40)
• lack of transparency in application of funds (7)
• bogus collectors, organizations (7)
• multiplicity of organizations collecting (5)
• conflict between local and national collections, difficulties in getting dates (5)
• system is burdensome, complicated, slow (3)
• no distinction made between paid collectors and unpaid volunteers (1)

Other comments were “we are local, we know each other”, “it favours established ‘safe’ and conservative bodies, it is arbitrary” and, realistically, “Public collections can never be monitored, all cash, no receipts”.

9.4 Do you think charities should be required to disclose expenditure on fund raising, including the costs of professional fundraisers?
YES 82%, NO 5%, UNDECIDED 13%
Reasons given break down as follows:
• accountability, transparency, openness, appreciation to donors (65)
• donors and public should have access to this information (22)
• good practice (9)
• public interest, good government (3)
• for credibility of charities (2)

Reasons for a negative response included that this is confidential information, organizations have their own specific methods, that this information might militate against them with other grantors, costs depend on the nature of the activity (and by implication, like cannot be compared with like) and that disclosure would impact very negatively on smaller charities, as the percentage overall cost is much higher for them. Reasons for a positive response included to curtail the too high costs of professional fundraisers, to avoid favouritism in employing consultants, to highlight the possible waste of money, and
because people are unhappy about the amount spent on administration.

One respondent pointed out that professional fundraisers are themselves not regulated.

SECTION 10 – INVESTMENTS

10.1 Trustees of charities are quite limited in the investments which they can make.
Do you think they should have wider investment and administration powers?
YES 19%, NO 25%, UNDECIDED 56%

10.2 Does your organization invest substantial sums?
YES 10%, NO 90%

10.3 If yes, is your organization restricted by law in the types of investments it makes?
YES 24%, NO 76%

10.4 Are your investments held in a separate bank account or by a custodian or investment manager?
YES 38%, NO 62%

SECTION 11 – MISCELLANEOUS

11.1 Have you had any dealings with the Commissioners for Charitable Donations and Bequests? (not the Charities Branch of the Revenue Commissioners)
YES 9%, NO 91%

11.2 If yes, in your experience were the Commissioners
• Easy to contact? YES 89%, NO 11%
• Helpful? YES 84%, NO 16%
• Expensive to deal with YES 7%, NO 93%

11.3 Do you also work and/or fundraise in
• Northern Ireland? YES 13%, NO 87%
• UK? YES 11%, NO 89%
• Overseas? YES 10%, NO 90%
11.4 Does the lack of any formal charitable status in Ireland cause you difficulties in any dealings in Ireland or overseas?

YES 12%, NO 88%

11.5 Do you think that a formal Registry of Charities in Ireland would be of benefit in this regard?

YES 91%, NO 9%

RESPONDENTS TO CHARITIES LAW QUESTIONNAIRE

LAW SOCIETY OF IRELAND - LAW REFORM COMMITTEE

- A Volunteers Perspective
- Accord - Catholic Marriage Care Service
- ACCORD Marriage Counselling
- Active Retirement association
- ADAPT
- Adelaide Hospital Society
- Age Action Ireland Ltd
- AIM Family Services
- Aislinn Wexford Ltd
- Aislinn Treatment Centre - Cahirciveen
- Aislinn Treatment Centre
- Alan J. Mitchell - Chartered Accountant
- Allbeg Function C F Scheme
- Allenwood Community Development Association Ltd
- Altrusa Literacy Scheme
- Amnesty International
- An Caisleen Guild/CA
- Aontas
- Aras Mhuire Housing Ltd
- Association Ltd
- ARC Cancer Support Centre
- Arupe Society Ltd
- Arthritis Foundation of Ireland
- Mayo Branch
- Arts Resource and Training Services
- Association of Parents & Friends of the mentally handicapped
- Asthma Society of Ireland
- Athlone Community Services Council
- Athlone Youth Enterprise Workshop Ltd
- Athy Citizens Information Centre
- Athy Community Development Project
- Atanaght Residents Association
- Baldyboye Family Resource Service Ltd
- Ballinakill Active Age Club
- Ballinatwon Development Association
- Ballybane Traveller Youth Projects M.C.
- Ballycommon Organisation for Local Development Ltd
- Ballycullish Social Services Offaly
- Ballymahon Community Group Ltd
- Ballymena House
- Barna Carroll Voluntary Social
- Barnardos
- Bindweed
- Blackpool Community
- Co-operative Service Centre Ltd
- Bodyways
- Brainwave, The Irish Epilepsy Association
- Camphill Community Ballybay
- Care Alliance Ireland
- Carl Foundation
- Carmichael Centre for voluntary groups
- Caste Forgartha an Mhama
- Catholic Youth Care
- Cenacle Charity Incorp (Ireland)
- Centre for Independent Living Carlow
- Childminding Ireland
- Children in Hospital Ireland
- Citizens Information call centre
- Civil Forum
- Clonberne Community Development
- Cnesta
- Co Longford Citizens
- Information Service Company LTD
- Co Westmeath Citizens
- Information centre
- Co Wexford Branch of the Alzheimer Society of Ireland
- Co. Offaly VEC - Adult Education Service
- Comhar na Muninteoiri Gaeilge
- Comhdhaí Naíseananta Na Gaeilge
- Community Action Network
- Community Childcare Project
- Community Connections Ltd
- Community Family Training Agency
- Community Radio Castlebar
- Concern
- Connacht Rural Women's Group
- Cootehill Widows Association
- Corey Youth Needs Group
- Corofin Day Centre
- Council for the West
- County Carlow Community Network
- CRIW LTD
- Croy Community Mental Health
- Cuan Mhuire Teo
- D.F.T. Community Services Ltd
- Daishouse Housing Association
- Dara Residential Services
- Daughters of Charity Child & Family Services
- DergFinn Partnership
- Derradda Community Council
- Devlin Parish
- Diabetes Federation of Ireland
- Disabled People of Longford Ltd
- Disocian of Elphin - Priests welfare foundation
- Drogheda Disability Interest Group
- Drogheda Partnership
- Drogheda Senior Citizens Interest Group
- Dubcit Community Arts Project
- Dundalk Employment Partnership Ltd
- Dundalk Social Service Council
- East Clare Heritage Centre
- Eastside Women's Group
- Ennis and Clare Branch of Samaritans
- Ennis West Partners
- Family Life Centre Boyle
- Farney Community Development Group Ltd
- Federation of Voluntary Bodies
- Filemore Parents Council
- Fingal Tidy Towns Anti-Litter Association
- Finsklin Housing Association Ltd
- Foroige - Youth Development Organisation
- Fr Peyton Voluntary Housing Co Ltd
- Francis St. Community
- Education Centre
- Fundraising Institute of Ireland
- Galway One World Centre
- Galway Youth Federation
- Geesala Community Council Development Group
- Good Shepherd Centre Kilkenny Ltd
- Good Shepherd Services Ltd
- Heart Children Ireland
- Housing Association for Integrated Living Ltd
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- Inishbofin Development Co. Ltd
- Inishowen Partnership Company
- Inner City Enterprise (ICE)
- IPPA, the Early Childhood Organisation
- Ireland Chapter America
- Foundation for Suicide Prevention
- Irish Association of Older People
- Irish Heart Foundation
- Irish Refugee Council
- JUST Forests
- JVC Volunteers
- KANE
- Kenagh Community co-op Society Ltd
- Kerry Action for Development Education
- Kerry Counselling Centre
- Killbarrack Community Development Project
- Kilcoremac Development Association
- Kilkenny Citizens Information Centre
- Killkenny Community Action Network
- Kilkeel Community Council Ltd
- Kilwalla Social Club
- Kinvara Credit Union
- Knochmacarra Active Retirement Association
- Laois Centre for Independent Living Ltd
- Laois Leader rural development Ltd
- Laois Mabs Ltd
- Lifestyle Dev. Group Ltd
- Limerick Social Service Council
- Lisacul Community Development Ltd
- Lisgoold Educational Foundation
- Lockes Distillery Museum
- Longford Women's Centre
- Loughboy Area Resource Centre
- Lower Glenamaddy Road Residence Association
- Maaim Childrens Playscheme
- Marist rehabilitation Centre Athlone
- Mayofield Community Development Project Ltd
- Mayo/Roscommon Hospice Foundation
- Meath Women’s Refuge
- Men Overcoming Violence -MOVE
- Mental Health Waterford
- Migraine Association of Ireland
- Monastevin Community Council
- Money Advice & Budgeting Service
- Mount Belfoe Social Services
- Mountnugent Community Development Association
- Mullingar Community action network Ltd
- Murrst Development Association
- National Adult Literacy Agency
- National Association for Parent Support
- National Association Ovulation Method Ireland - N.A.O.M.I.
- National Council for the Blind (NCBI) Mayo Branch
- National Women's Council
- NEHB Family Support Manager Community Services
- Newbridge Community Development Ltd
- Newcastle west community council
- Norin Portna Rosbeg Community Development Organisation Ltd
- North Connemara Voluntary Housing association
- North Tipperary Community Services
- North West Community Volunteers
- North West hospice
- North West Inner City Area Network
- O’Callaghan - McAuley Association
- "O’Dwyer Cheshire Home - Cheshire Foundations in Ireland
- Oak Partners
- Offaly Centre for Independence Ltd
- Order of Malta Training Centre
- P.A.C.E. Passage West, Co. Cork
- Parish Social Service Council
- Parkside C.D.P
- Paul Partnership
- People in Need Trust
- Portlaoise Community Action Project
- Portumna Special Services
- Positive Age Ltd
- Presentation Family Centre, Listowel, Co Kerry
- Protestant Aid
- Rahoon Family Centre
- Rath Mhuire resource Centre
- RCCN Ballyhouna Ltd
- Religious Sacred Heart of Mary
- Ringsend Action Project
- Roscommon Partnership company Ltd
- Royal British Legion
- Rural Resettlement Ireland
- Schizophrenia Ireland
- Schizophrenia Ireland
- School St. and TCB Community Development Project
- SEED Ltd
- Sherkin Island Development Society Ltd
- Sligo Social Service Council Ltd
- Social Service Council (Co Mayo)
- Society of St. Vincent De Paul
- Sonas Senior Citizens Moycullen
- South Inner City Community Development Association
- South West Mayo Development Company
- Southhill Community Development Project
- Southhill Community Services Board Ltd
- St Christopher's Services Ltd
- St Colmans Nursing Unit, Kerl, Co Mayo
- St Dominics Community Council
- St Fiaccs House for the Elderly
- St Ronans Resource Centre
- St Steans Social Service Foynes Co Limerick
- St. Canices Community Action
- St. Hilda's Services for the Mentally Handicapped
- St. John Ambulance Brigade of Ireland
- St. Michael's Family Life Centre
- St. Vincent De Paul, Ballina Co Mayo
- Sunflower Recycling
- Tallaght Volunteer Bureau
- Tallaght Artsguard
- The Cheshire Foundation in Ireland
- The Children's Medical & Research Foundation
- The Company Barabas
- The Dun Laoghaire Borough Old Folks Association
- The Foundation for investing in Communities
- The Galway Association
- The Limerick Resource Centre for the Unemployed
- The M.S. Society of Ireland
- The National Head Injuries Association - HEADWAY IRELAND
- The Rehab Group
- The Samaritans
- The Village
- Threshold
- Tipperary Centre for Independent Living
- Tourette Syndrome Association of Ireland
- Tower Programme, North Clondalkin Probation Project Ltd
- Transactional Analysis in Ireland
- Treble R Industries Ltd
- Trevor
- Trust
- Tuam Social Service Council
- Tullacnongan Resource Centre Ltd
- Tusk Parish Services
- Victim Support
- Victim Support
- Volunteer Resource Centre
- Carmichael Centre for Voluntary Groups
- Waterford Association for mentally handicapped
- WCDRC-Wideside community Development Centre
- West Limerick Independent Living Ltd
- Western Women's Link
- White Horse Development Project
- Women Together Tallaght Network Ltd
- Women's Aid
- World Vision Ireland
- Worth Meath Disability Group
- Youth Action Project, Westside
APPENDIX 2

CONSIDERATIONS FOR STANDARD PROVISIONS IN MODEL FORM GOVERNING INSTRUMENTS FOR CHARITABLE ORGANISATIONS

What follows is based on the model form governing documents published by the Charity Commission of England and Wales and the Charity Law Association (UK). They are not a comprehensive list of standard provisions, for which see the chapter on Legal Structures.

Charity Name

The name of the charity is fundamental to the identity of the charity and should be chosen with care. Enquiries should be made to see if there is another charity with a same or similar name. The name should not be misleading and should not cause confusion with other charities or companies. It should not be offensive, misleading or suggest state or other sponsorship if not justified.

Objects

The objects of a charity set out what the charity is intended to do and should be exclusively charitable under Irish law. The objects should clearly reflect the true purposes of the charity and should not be ambiguous. If the organisation is intended to benefit a specific section of the public or if the objects are confined to a particular geographic area, this should be stated in the objects clause.

Powers

All charities require powers to assist them in carrying out the objects of the charity, such as the power to raise funds, the power to buy or sell property and the power to invest or borrow money. Each charity will need to consider exactly what powers the trustees might reasonably be expected to need, at present or in the future, to carry out the objects of the charity and should include them in the governing document. This will avoid the need to amend the governing document at a later stage.

Footnotes:

1. If the charity is a company, enquiries can be made in the Companies Registration Office on the Names Register to see if another company has the same or similar name.
2. Under Sections 6 and 7 of the Charities Act 1993 (England and Wales), the Charity Commissioners can require a charity to change its name.
3. In the Ontario Law Reform Commission’s Report on the Law of Charities, December 1996, Ch. 15 at p. 28 it is recommended that charitable corporations in Ontario should be required to identify themselves as such in their names and in the Report from the Advisory Group to the Charity Commission in England and Wales on the proposed new Charitable Incorporated Organisation, it is recommended that the name of any proposed CIO should include the words “Charitable Incorporated Organisation” or “CIO”. However, we are not aware of a perceived need for such identification of charities in Ireland.
stage when it appears that the charity trustees do not possess the necessary power to take some particular action.

Default statutory powers are discussed in the Legal Structures chapter of the report.

Membership

If the charity intends to have members, the governing document should set out who can be a member, whether individuals, individuals and organisations, or representatives from different aspects of society or the community. 4

The governing instrument should set out the following:

- how to apply for membership, and who can be a member and the criteria for membership.
  (membership of a charity should generally be open to individuals over the age of 18, or any corporate body or unincorporated associations)
- whether any subscription is payable;
- whether the members will have any voting rights or any reserved powers;
- in the case of companies, that membership is non-transferable;
- the minimum5 and maximum6 number of members.7

At present for companies, there is a minimum and maximum number of members that a company must have and there is an obligation to obtain this minimum number of members. However, the question arises as to whether this obligation should apply more to the directors or trustees of a charity, as it is the directors as opposed to the members who have a fiduciary relationship.

The First Report of the Company Law Review Group (December 2001) recommends that private companies can be formed with one or more members and that public companies can be formed with two or more members.8 We agree with this recommendation as the requirement for seven members in companies limited by guarantee can be cumbersome especially for smaller charities.

Termination of membership

The governing instrument should provide that membership of the charity will determine (automatically cease) on the happening of certain events such as:

Footnotes:

4. The costs of running a membership organisation should also be considered. In the Report on the Law of Charities, Ontario Law Reform Commission, December 1996 Ch. 15, p. 24, it is recommended that members should not be required for non-profit corporations due to the fact that many organisations are currently run as de facto self perpetuating boards and that this fact should be recognised. It also suggests that for practical reasons, such recognition would permit these organisations to dispense with the many cumbersome legal formalities associated with the existence of membership.

5. The Report of the Advisory Group to the Charity Commission – Charitable Incorporated Organisation (Spring 2001) p. 2 recommends that any one or more persons should be authorised to form a CIO.


7. Under the Companies Act 1963 - 2001, a company limited by guarantee must have a minimum number of seven members and a maximum of fifty members.

8. At p. 20.
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• resignation by notice in writing to a specified person or persons;
• death or becoming of unsound mind;
• removal from membership by one or more named persons or by resolution of the members/trustees on the grounds that the member’s continued membership is harmful to the charity, subject to the principals of natural justice.  

Annual general meeting

If the charity is to have members the governing instrument should provide for an annual general meeting and the calling of an extraordinary meeting in special circumstances.

There should also be provisions for the proceedings at such meetings, which should include the following:

• quorum for such meetings;
• decisions should be taken on a majority vote with the possible exception of decisions regarding disposal or purchase of property, which may require a specified higher percentage of member support e.g. two-thirds majority;
• appointment of a chairperson, who would have a casting vote;
• notice period for the calling of the annual general meeting, usually 21 days;
• the taking of minutes and voting;
• that a unanimous written resolution of all the members will suffice in place of a resolution passed by a majority of the members at the annual general meeting or an extraordinary written resolution.

Appointment of charity trustees

The governing document should set out clearly how the trustees of the charity are to be appointed, and if they are to consist of representatives from different sections of society or the community.

It should be for each organisation to decide which method or combination of methods of appointing trustees is the most appropriate. We would advise that the maximum number of trustees be specified in the governing instrument (for example 12), as if there are too many trustees, proceedings can be unwieldy and make it difficult for trustees to meet and arrive at decisions.

There should be a minimum of two trustees and provision should be included that if necessary, steps are taken immediately to appoint new trustees.

Footnotes:

9. In such a case the member should be notified in writing and be given an opportunity to make representations on his own behalf.
10. In the First Report of the Company Law Review Group (December 2001), p. 18 it is suggested that for companies other than Plc’s, it should be permissible in law for such companies’ members to dispense with the need to hold an annual general meeting. It also suggests that any resolution required to be passed at any general meeting in any company (including the AGM) should be able to be achieved by unanimous written resolution.
Appointment and retirement of trustees

Even if default provisions are put in place in relation to the appointment and retirement of trustees, the drafters of a governing instrument should consider making explicit provision for these events, suitable to the organisation concerned.

Term of office of trustees

Provisions should be included in the governing document as to the term of office of the trustees. We recommend that the term of office of trustees should be finite, subject to reappointment. This is to prevent a charity trustee who is no longer effective continuing in office, as otherwise the trustee can remain as a trustee until he/she chooses to resign. The terms of office of the trustees should be staggered to ensure continuity of administration and knowledge of the charity.

Meetings and proceedings of charity trustees

The governing instrument should provide the basic framework for the meetings and proceedings of the charity trustees. We recommend that the following provisions be included in the governing instrument:

• there should be a minimum number of trustee meetings in each year, and we recommend that there be at least two meetings a year for very small charities and four meetings a year for larger charities;
• there should be provisions on how to call a special or emergency meeting and who may do so;
• there should be provisions on how charity trustee meetings are to be conducted;
• there should be provisions for the appointment of a chairperson of the trustees, who will have a second or casting vote when the numbers of charity trustees voting for and against a resolution are equal;
• there should be provision for the quorum of meetings of the trustees, that is of how many trustees need to be present if the meeting is to be valid. The number of the quorum should not be too high as it may lead to difficulties in arranging meetings which a number of people can attend;
• there should be provisions as to how a decision is to be made, such as on a majority of votes;
• there should be provisions that a unanimous written resolution of all the trustees will suffice in the place of a resolution passed by a majority of the trustees at a meeting of the trustees.12

Footnotes:

11. In the First Report of the Company Law Review Group (December 2001) p. 20, it is recommended that written resolutions of directors under Regulation 109 of Table A ought to be possible by separate pieces of paper signed separately.
12. In the First Report of the Company Law Review Group (December 2001), p. 20, it is recommended that meetings of directors of all companies ought, by statute, to be capable of being held by telephone or by other suitable electronic means whereby all directors can hear and be heard unless the articles of association of the company specifically provide otherwise.
Powers of trustees

We have previously recommended (in the chapter on Charity Trustees) that trustees of a charity have certain statutory powers. However further provisions should be included in the governing instrument to provide for

• the establishment of subcommittees (if necessary) of the trustees;
• the delegation of all or some of their function to such subcommittees;
• the appointment of a chairperson, secretary or treasurer as the case may be and the respective powers of such offices;
• the making of rules or regulations as required provided that they are consistent with the governing instrument of the charity and are subject to the members’ right of confirmation at the next meeting.

Benefit or payment to members or trustees, conflicts of interest

The Revenue Commissioners require a clause to be inserted in a charity’s governing instrument prohibiting benefits or payments to trustees. However, as mentioned in the main text as mentioned in the chapter on legal studies, certain payments are permitted, and they may be listed in a charity’s governing instrument.

Any trustee must avoid a conflict of his own interest with the interest of the trust. While this is a clear rule of law, an explicit provision in a governing instrument serves as a reminder.

Accounts and auditors

Default provision for the production of accounts and appointment and duties of auditors already exist in relation to companies. It is advisable for all organisations, however, to have governing instruments which set out the rules concerning these matters.

Records

Charitable companies are required to keep records in accordance with the Companies Acts 1963 – 2001 including a record of members, directors and secretaries, accounts, minutes of meetings of directors and the members. However, charities established under a constitution or deed of trust have no such specific requirements but will often keep such records as a matter of good practice. Appropriate records should be kept at the main office or registered office of the charity to include records of:

• all proceedings at general meetings;
• all proceedings at meetings of the trustees;
• all reports of any committees or subcommittees; and
• all professional advice obtained.
Notices

Provision should be included in the governing instrument of a charity with regard to the notices of the annual general meeting, any extraordinary general meeting or special meetings that are required to be served on any member of the charity and how and when such notices are to be served.

Bank accounts

Every governing document should provide for the setting up of bank or building society accounts, and make adequate provision for the control of such accounts and the authorising of the signing of cheques.

Amendment of a governing instrument and dissolution

Even in the event that statutory default provisions are introduced for amendment of the governing instrument and dissolution of the organisation, it will be advisable to consider making specific provision for these two events to suit the particular circumstances of the organisation concerned.

Footnotes:

13. In the First Report of the Company Law Review Group (December 2001), p. 19, it is recommended “the Companies Acts should specify precisely what are to be the periods of notice for meetings, rather than delegating it to provisions in the articles of association. The periods of notice should be 21 days for an annual general meeting, meetings to pass a special resolution and meetings convened under s. 201 of the 1963 Act. The period of notice for an extraordinary general meeting should be 7 days, except in the case of a public limited company where it should be kept at 14 days. Companies would be entitled to increase these periods of notice”.

14. The First Report of the Company Law Review Group (December 2001) also recommends that “a notice, whether of a meeting or of any other matter and any other document, once posted to the registered address of a member should be deemed to be received 24 hours following posting.”