The Law Commission
and
The Scottish Law Commission

(LAW COM No 260)
(SCOT LAW COM No 172)

TRUSTEES' POWERS AND DUTIES

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This report was approved by the Law Commission and the Scottish Law Commission on 12 May 1999.

The text of this report is available on the Internet at:

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EXECUTIVE SUMMARY

This Report recommends reform of the law in England and Wales and in Scotland governing trustees' powers to invest trust funds in default of the inclusion of express powers of investment in the will or trust instrument. The Report also recommends for England and Wales a range of reforms, intended to facilitate more effective trust administration, on issues including—

- collective delegation by trustees;
- the use of nominees and custodians;
- powers of insurance; and
- remuneration of professional trustees.

WHO WILL BENEFIT FROM THE REFORMS?

The beneficiaries of the proposed reforms would be trusts whose trustees have inadequate express investment and other powers. There are many such trusts (particularly older charitable trusts) in existence. Consequently, the proposed reforms would—

- enable many charitable trusts to acquire and hold investments which are likely to produce a better return for the charity than the investments to which they are presently restricted;
- facilitate the use of modern investment services by such trusts;
- lessen the administrative burden and associated costs of maintaining the regime presently required by the Trustee Investments Act 1961; and
- bring similar benefits for many family trusts, "home-made" trusts and wills and, in England and Wales, trusts arising on intestacy.

WHAT ARE THE PRINCIPAL RECOMMENDATIONS?

- The Trustee Investments Act 1961 (which is widely regarded as out-dated and unduly restrictive) should no longer govern trustees' powers of investment. Instead, trustees should have power to make an investment of any kind as if they were absolutely entitled to the assets of the trust.
- Trustees in England and Wales should have wider powers of collective delegation, new powers to employ nominees and custodians and to insure trust property. There should also be better provision for remunerating professional trustees.
- These powers should be subject to appropriate safeguards, including a duty to take proper advice in relation to investments and, in England and Wales, a statutory duty of care.

LAW COMMISSION
SCOTTISH LAW COMMISSION

TRUSTEES' POWERS AND DUTIES

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To the Right Honourable the Lord Irvine of Lairg, Lord High Chancellor of Great Britain, the Right Honourable Dr John Reid, Secretary of State for Scotland, and Mr Jim Wallace QC MSP, Minister for Justice

PART I
INTRODUCTION

ISSUES — THE MODERN TRUST

1.1 Trust law is of wider application than is perhaps commonly appreciated. Trusts are not confined to the world of wills and family settlements (although they are clearly very important in those contexts). They also have considerable, and increasing, relevance to many commercial enterprises from international financial transactions to the management of pension and other investment funds. Trust law is also of major significance to charities. However, the law governing the powers and duties of trustees has not kept pace with the evolving economic and social nature of trusts — indeed the default powers which trustees have under the present law are generally regarded as seriously restrictive. The nature of trusts and the assets that are characteristically held by them are now very different from what they were when the present legislative provisions were enacted. Those provisions no longer give trustees the powers they need to administer a trust effectively and, unless the instrument creating the trust confers wider powers,[1] make it very difficult for trustees to comply with their paramount duty to act in the best interests of the trust.[2]

1.2 The administration of most trusts is primarily concerned with the investment of the assets of the trust. A number of fundamental changes in the way that investment business is transacted have brought the limitations of the present law into sharp focus, and have made the need for reform a pressing and immediate one. The principal changes that have occurred in this regard[3] are as follows—

(1) the introduction in 1995 of five-day rolling settlement for dealings in shares and securities listed on the London Stock Exchange;

[1] Many trusts (particularly modern, professionally drafted ones) *do* confer wider powers and so avoid many of the constraints of the general law. However, there are many others that do not. See also para 2.3 below.

[2] See para 3.2 below.

[3] Each of which is explained more fully in Part II of the Consultation Paper.

(2) the introduction in 1996 of dematerialised holding and transfer of title to shares and securities listed on the London Stock Exchange under the CREST system;

(3) the use of similar computerised clearing systems in other markets in which trustees may wish to invest; and

(4) the widespread employment of discretionary fund managers to enable full advantage to be taken of the increasingly complex range of investment opportunities.

1.3 It is with such developments as these in mind that this Report examines the implied powers of trustees to invest trust assets (including their powers to purchase land), to employ agents, nominees and custodians, to insure trust property and to remunerate a trustee with professional skills and, in the light of this examination, makes recommendations for reform.

BACKGROUND AND SCOPE

Trustee investment

1.4 In May 1996 HM Treasury published a consultation document[4] ("the Treasury's Consultation Document") on the possible repeal of the Trustee Investments Act 1961.[5] The Law Commission, together with the Scottish Law Commission and the independent Trust Law Committee,[6] had previously provided detailed advice to the Treasury on the applicable law. The Treasury proposed that, instead of the detailed regulation imposed by the 1961 Act, trustees should have all the powers of an absolute owner in relation to the investment of trust assets.

1.5 The Treasury's Consultation Document was the direct result of an earlier consultation exercise carried out by the Treasury in 1995 in relation to a proposal to adjust the proportion of "wider-range" to "narrower-range" investments which trustees are obliged to hold under the 1961 Act in certain circumstances.[7] Although respondents to the initial consultation exercise supported the proposed relaxation in the requirements which the Treasury had proposed,[8] there was a call for more general reform along the lines of that which was later put forward in the Treasury's Consultation Document. This call for reform was in turn reflected in the overwhelmingly positive response which the Consultation Document received.

[4] Investment Powers of Trustees: A Consultation Document by HM Treasury, May 1996.

[5] In the absence of express provision in the instrument creating the trust, this Act governs the powers of trustees to invest the assets of the trust by providing lists of investments in which trustees are permitted to invest. The Act contains provisions requiring trust funds to be split in certain circumstances. These provisions in particular have been much criticised. For a more detailed summary of the Act's provisions, see paras 2.6 *et seq.* below.

[6] The Trust Law Committee is a group of trust practitioners and academics which was formed under the chairmanship of Sir John Vinelott to press for reform of trust law.

[7] See para 2.6 below.

[8] And indeed the required proportion of wider-range to narrower-range investments has now been extended to 75:25.

1.6 It was the former Government's intention that reform of the law of trustee investment would be achieved by means of an Order under section 1 of the Deregulation and Contracting Out Act 1994.[9] The Treasury's Consultation Document was issued prior to the laying of a Deregulation Order, as required by the 1994 Act.[10]

1.7 A draft Deregulation Order was brought forward by the then Government in February 1997. However, for the reasons explained in Part II,[11] the draft Order was less ambitious than had been proposed in the Treasury's Consultation Document, and stopped short of the repeal of the Trustee Investments Act 1961 in its entirety. Although the draft Order was considered by, and met with the approval of, the Delegated Powers Scrutiny Committee (House of Lords), the Order was lost when the 1997 General Election was called.

Trustees' powers and duties

1.8 In November 1995 the Lord Chancellor's Department agreed that Trustees' Powers and Duties should be added to the Law Commission's Trust Law Programme[12] and that the work might be carried out by the Commission in conjunction with the Trust Law Committee. In June 1997 the Commission published a consultation paper entitled "Trustees' Powers and Duties"[13] ("the Consultation Paper"). This was produced in consultation with the Trust Law Committee.

1.9 The principal focus of the Consultation Paper was the extent to which trustees might delegate all or some of their discretions in the absence of any express power to do so in the instrument creating the trust. The Consultation Paper also considered trustees' default powers to employ nominees and custodians; to purchase land for investment, occupation or otherwise; to insure the trust property; and, where they were professionals, to charge for their services to the trust.

1.10 The aspects of trust law that were addressed in the Consultation Paper were those where, in the Law Commission's view, reform was most urgently needed. Furthermore, the first two of them — wider powers to delegate and the power to employ nominees — were directly linked to trustees' investment powers. As will be explained in this Report, trustees would not be able to take full advantage of any wider investment powers if they did not have these additional powers as well.

[9] The 1994 Act confers powers to remove burdens, including restrictions, imposed by any enactment where this can be done without taking away any "necessary protection". What is removed may be replaced by a new form of restriction or regulation, so long as this is no more onerous than the existing enactment. However, the Act does not confer a general power to alter the law.

[10] Section 3(1).

[11] See para 2.21 below.

[12] Item 7 of the Law Commission's Sixth Programme of Law Reform (1995) Law Com No 234, recommended that an examination be made of three specific aspects of the law of trusts and also such others as might from time to time appear to the examining agency and to the Lord Chancellor's Department to require examination.

[13] Consultation Paper No 146.

1.11 The Consultation Paper identified two particular constraints on trustees' powers as being unduly restrictive—

(1) the rule that prohibits them from delegating their fiduciary discretions;[14] and

(2) the requirement that they retain the ownership of trust assets,[15] and are thus precluded from vesting the title to trust property in a nominee.

In the light of its analysis of the current state of the law, the Law Commission provisionally recommended that the default powers of trustees should be extended in a number of respects, but that this should be subject to the imposition of a statutory duty of care which would apply to trustees in the exercise of those powers.

1.12 The approach taken in the Consultation Paper, and the general tone of the Law Commission's provisional recommendations for reform, received a very positive response from a large majority of those who responded to the Consultation Paper.[16] Nearly all agreed that the present law was inadequate, particularly in the context of the administration of a large trust portfolio. The Law Commission's provisional recommendations were welcomed, not only as a means of improving the administration of trusts and estates, but also as a way of reducing the risk of inadvertent breaches of trust by trustees.

Scope of this Report

The subject-matter of the Report

1.13 This Report is concerned both with the question of *what* investments trustees should be permitted to make in the absence of express authority in the instrument creating the trust, and also with that of *how* they should be able to achieve the effective administration of a trust. In this regard the scope of this Report is wider than that of the Consultation Paper (which was restricted to the latter of these issues).[17]

The Law Commission and the Scottish Law Commission

1.14 In relation to trustees' powers of investment, this is a joint Report of the Law Commission and the Scottish Law Commission. The Trustee Investments Act 1961 applies in Scotland as it does in England and Wales. The law on trustees' powers of investment is therefore much the same in the two jurisdictions (as is the case for reform of the law in this regard), and it makes sense for any proposals for such reform to have cross-border application. The joint Report of the two Commissions is therefore comprised in Parts I and II of this publication. The

[14] Considered in Parts III and V of the Consultation Paper.

[15] Considered in Part VII of the Consultation Paper.

[16] A list of the respondents to the Consultation Paper is to be found in Appendix D to this Report.

[17] Although the former was, of course, the subject of detailed consultation in the Treasury's Consultation Document.

Report also includes draft legislation to implement the recommendations which the two Commissions make in these Parts. The draft Bill,[18] which is to be found at Appendix A, would implement those recommendations[19] in England and Wales, although some provisions would apply to the whole of Great Britain. The draft clauses in Appendix B[20] would implement those recommendations in Scotland.[21] The reason for this approach is that, with the coming into being of the new Scottish Parliament, it is probable that the recommendations in this Report would be implemented separately in so far as they apply to Scotland.[22]

1.15 The provisions of the Trustee Investments Act 1961 governing trustees' powers of investment are not directly applicable in Northern Ireland, but are applied by the Trustee Act (Northern Ireland) 1958 and the Trustee (Amendment) Act (Northern Ireland) 1962. None of the recommendations in this Report extend to the law in Northern Ireland, but it is understood that there are proposals for a broadly similar package of reforms of the law relating to trustee investment to be brought before the new Northern Ireland Assembly.

1.16 Although the recommendations in Parts I and II extend to Scotland, all other recommendations in this Report, (namely, those made in Parts III - VII), are concerned only with the law in England and Wales and are the recommendations of the Law Commission alone. In dealing with issues relating to trustee investment in England and Wales together with the issues addressed in the Consultation Paper, the Law Commission seeks to make the most of an opportunity to propose wide-ranging, effective and coherent reform on the most pressing aspects of the law governing the functions of trustees. However, the Consultation Paper was limited to an examination of the law in England and Wales, and a number of different considerations apply to the law governing trustees in Scotland. The Scottish Law Commission intends to examine aspects of the law of trusts in Scotland once the present law reform projects have been completed.[23] This examination will consider, among others, the issues addressed by the Law Commission in its Consultation Paper in so far as they are relevant to Scotland.

DEFECTS IN THE PRESENT LAW AND APPROACH TO REFORM

1.17 In the following Parts of this Report a number of serious defects are identified in the present law relating to trustees' powers and duties. As we have already mentioned,[24] the need for reform in this area has been highlighted by significant changes in the way that investment business is transacted. The principal defects in the present law may be summarised as follows:

[18] Referred to throughout this Report as "the Draft Bill".

[19] Together with the Law Commission's recommendations in Parts III - VII of this Report.

[20] Referred to throughout this Report as "the Draft Clauses for Scotland".

[21] Together with the Scottish Law Commission's recommendations relating to the acquisition of land. Scottish clauses, rather than a Bill, have been drafted because the form of Acts of the Scottish Parliament has still to be settled.

[22] The issues are not reserved matters.

[23] Fifth Programme of Law Reform (Scot Law Com No 159), Item No 7, paras 2.43 - 2.45.

[24] See para 1.2 above.

(1) The Trustee Investments Act 1961 is now out of date. It operates in a way which is needlessly restrictive, particularly in its requirements for "fund-splitting". The application of the Act is frequently excluded in modern trusts but, where the Act applies, it normally does so to the detriment of the trust.[25]

(2) In England and Wales, the rule which prohibits the collective delegation of trustees' fiduciary discretions is also unduly restrictive, and may force trustees to commit breaches of trust in order to achieve the most effective administration of the trust.[26]

(3) Trustees in England and Wales do not have adequate statutory powers to enable them to employ nominees and custodians in connection with a range of modern investment services.[27]

1.18 An overwhelming majority of those who responded to consultation[28] were firmly in favour of the recommended approach to reform of the law on trustee investment and on trustees' powers and duties more generally. That approach forms the basis of the recommendations in this Report.

1.19 However, although the Law Commission and the Scottish Law Commission support the Treasury's view that there is a pressing need for fundamental reform of the law on trustee investment, the two Commissions do not consider that the best way of achieving such reform is by means of an Order under the Deregulation and Contracting Out Act 1994. In concluding its deliberations on the abortive Deregulation Order in 1997, the Delegated Powers Scrutiny Committee commented:

> We have also noted the Law Commission's hope that its current work will lead to new primary legislation on the powers of trustees, and the opportunity that that would provide to codify the reforms set out in the draft Deregulation Order. There is little doubt in our minds that the present proposal is only a first step in the long-overdue reform of trustee investment law, and that other proposals will follow.[29]

As has already been indicated,[30] the opportunity has now arisen to put forward a number of wide-ranging reforms of the law governing trustees.[31] This can only be achieved through primary legislation. Even without the Law Commission's

[25] See para 2.16 *et seq.* below.

[26] See para 4.4 *et seq.* below and Appendix C, Section 1.

[27] See para 5.3 below.

[28] In relation to both the Treasury's Consultation Document and the Law Commission's Consultation Paper.

[29] Twenty-first Report of the Select Committee on Delegated Powers and Deregulation, (1996-97) HL 70, para 78.

[30] See para 1.16 above.

[31] It should also be noted that the Trustee Delegation Bill, which is presently before Parliament, implements previous proposals of the Law Commission concerning trustees' powers (See Law of Trusts — Delegation by Individual Trustees (1994) Law Com No 220).

recommendations for reform of the law in England and Wales on trustees' powers and duties generally, there can be no doubt that the most effective and coherent means of reforming the law on trustee investment is through primary legislation.

APPLICATION OF PROPOSALS FOR REFORM

1.20 It is highly desirable for any proposals on the issues addressed in this Report to apply to all types of trust — including charitable[32] and pension trusts — wherever possible. There must inevitably be exceptions to this principle to cater for situations in which particular trustees[33] require special treatment in respect of certain matters. However, the Law Commission maintains the provisional view stated in the Consultation Paper that the proposed reforms[34] should apply to all trustees, including (where relevant) personal representatives, unless the contrary is stated. The Scottish Law Commission takes the same view in relation to the application to Scotland of the recommendations in Part II. Personal representatives are trustees in Scotland.[35] The Law Commission also provisionally recommended in the Consultation Paper[36] that the new powers should be conferred upon the directors of charitable corporations to the extent that they apply to charity trustees. However, it has become apparent in finalising the recommendations in this Report that there would be considerable technical difficulties in doing so.[37] Accordingly, **it is recommended that the proposals contained in this Report should apply to—**

(1) all trustees; and

(2) personal representatives;

[32] In Scotland charitable trusts are not regarded as a separate class for most trust law purposes. The main division is between private trusts and public trusts; Wilson and Duncan, *Trusts, Trustees and Executors,* (2nd ed) chapter 14. Trusts accepted as charitable in the English law sense by the Inland Revenue under Income and Corporation Taxes Act 1998, s 505, enjoy tax advantages. They are subject to special rules as to their administration and the courts have extra supervisory powers in relation to them (Law Reform (Miscellaneous Provisions)(Scotland) Act 1990, Part I).

[33] Eg, charity trustees and pension trustees.

[34] Including those on trustee investment.

[35] Trusts (Scotland) Act 1921, s 2 (executor nominate); Succession (Scotland) Act 1964, s 20 (executor dative).

[36] At para 1.19.

[37] The directors of a charitable corporation are not trustees, although they clearly hold a position which is closely analogous to that of trustees (see *Re French Protestant Hospital* [1951] Ch 567; *Liverpool & District Hospital for Diseases of the Heart v AG* [1981] Ch 193, 209 *per* Slade J). Trust assets are not vested in the directors, but in the corporation itself, and powers to deal with those assets are powers of the corporation. However, it appears that charitable corporations are not necessarily subject to all the rules applicable to trustees, and it is by no means clear that it would be appropriate for some of the proposed provisions (such as those relating to powers of delegation) to be applied to them. Consequently, a charitable corporation, including (in relation to the recommendations in Part II) a charitable corporation in Scotland, would come within the scope of the proposals in this Report only in so far as it was a trustee of another trust or its investment powers were set out with reference to the powers of trustees or to the Trustee Investments Act 1961.

except where it is otherwise stated or where the context otherwise requires.

OVERVIEW AND STRUCTURE OF REPORT

Introduction

1.21 It has already been explained that—

(1) this is, in part, a joint Report by the Law Commission and the Scottish Law Commission;[38]

(2) the proposals in Part II are joint recommendations of the two Commissions and apply both to England and Wales and to Scotland; but

(3) the proposals in Parts III - VII are recommendations of the Law Commission alone and apply to England and Wales only.

Matters applicable to England, Wales and Scotland

1.22 In Part II the Law Commission and the Scottish Law Commission consider the need for reform of trustees' powers of investment.[39] The present law, which is governed by the Trustee Investments Act 1961, is examined critically. The connected issue of the powers which trustees have (and those which they should have) to purchase land on behalf of the trust is also considered.[40]

Matters applicable to England and Wales only

1.23 In Part III the Law Commission considers the creation of a statutory duty of care as a means of achieving an appropriate balance between the need for wide powers to facilitate effective trust administration in the modern world, and the equally important need to ensure that there are adequate safeguards to protect the interests of beneficiaries and trust objects. The Commission examines the present law on trustees' duties of care, and makes recommendations both as to the ambit of a new statutory duty, and as to the standard of care that should be expected of trustees in the performance of that duty.

1.24 In Part IV the general principles governing collective delegation by trustees are analysed and the problems to which the present law gives rise are explained.[41] In the light of the responses to the Consultation Paper, the Law Commission makes recommendations as to how the law on collective delegation by trustees should be reformed in England and Wales, having regard to both the controls to which such delegation should be subject and the safeguards for beneficiaries.

1.25 Part V contains an examination of the limited circumstances in which trustees may use nominees and custodians.[42] The existing law is criticised as being unduly

[38] See para 1.14 above.

[39] Considered in the Treasury's Consultation Document.

[40] Considered (in relation to England and Wales) in Part VIII of the Consultation Paper.

[41] Considered in Parts III - VI of the Consultation Paper.

[42] Considered in Part VII of the Consultation Paper.

restrictive because nominees and custodians are nowadays widely employed in the conduct of investment business. In the light of these criticisms, recommendations are made for reform.

1.26 In Part VI the powers and duties of trustees to insure the trust property are considered critically.[43] In the light of the deficiencies which are identified in the present law, the Commission makes recommendations for reform.

1.27 In Part VII the Law Commission explores the circumstances in which trustees may be remunerated for professional services in the absence of an express charging clause in the trust instrument.[44] It considers whether such trustees should, in such circumstances, have some right to remuneration, and if so, whether it should be an automatic entitlement, or whether a rather more restrictive scheme should apply. The special considerations which apply in this regard to charity trustees are also examined.

1.28 The recommendations for reform are summarised in Part VIII.

1.29 Appendix A contains a draft Bill (together with explanatory notes) to implement the recommendations for reform in this Report in England and Wales and to some extent in Great Britain.

1.30 Appendix B contains draft clauses (together with explanatory notes) to implement the recommendations in Parts I and II of this Report in Scotland.

1.31 A summary of the present law in England and Wales in relation to the issues considered in Parts III - VII of this Report is set out in Appendix C.

1.32 Appendix D lists those who kindly responded to the Consultation Paper.

SUMMARY OF PRINCIPAL RECOMMENDATIONS

1.33 Although a full summary of recommendations is given in Part VIII of this Report, a short summary of the principal recommendations for reform is set out below. In each case the application of these recommendations would be subject to the expression of any contrary intention in the instrument creating the trust.

(1) In so far as it governs the powers of investment of trustees in England and Wales and in Scotland, the Trustee Investments Act 1961 should be repealed and replaced with a new statutory provision giving trustees power to make an investment of any kind as if they were absolutely (or beneficially) entitled to the assets of the trust. Trustees should also have power to acquire land on behalf of the trust.

(2) In England and Wales, trustees—

[43] Considered in Part IX of the Consultation Paper.

[44] Considered in Part X of the Consultation Paper.

(a) should have power to delegate to agents their powers to administer the trust (other than powers to appoint or dismiss trustees), including their powers of investment and management; but

(b) should have no authority to delegate their powers to distribute the income or capital of the trust for the benefit of its objects.

(3) In England and Wales, trustees should have a power—

(a) to vest trust assets in the name of a nominee; and

(b) to deposit trust documents or trust property with a custodian for safe keeping;

provided that such person acts as a nominee or custodian in the course of its business.

(4) All trustees in England and Wales should have the same power to insure the trust property as they would if they were the absolute owners of it.

(5) In England and Wales, trustees should have power to authorise one (or more) of their number to charge for his or her services on behalf of the trust if he or she is acting in a professional capacity.

(6) In addition to complying with specific conditions which apply to the exercise of some of the powers proposed, a trustee in England and Wales should, when exercising any of those powers, act with such care and skill as is reasonable in the circumstances, having regard in particular to any special knowledge or experience that he or she has, or holds him or herself out as having, and if he or she acts as trustee in the course of a business or profession, to any special knowledge that it is reasonable to expect of a person acting in the course of that kind of business or profession.

ACKNOWLEDGEMENTS

1.34 As always, the Law Commission is very grateful to those who responded to the Consultation Paper.[45] The Commission was particularly fortunate to receive a number of exceptionally full and detailed responses from practitioners with particular expertise in this field. Special thanks are due to the Trust Law Committee for assistance received on various aspects of this project. In particular, Sir John Vinelott, Professor David Hayton and Mr John Dilger, officers of the Trust Law Committee, were kind enough to comment in detail on the Draft Bill. The Society of Trust and Estate Practitioners and, in particular, Mrs Clare Colacicchi, Mr Owen Clutton and Mr James Kessler (of counsel), members of its Technical Committee, also gave unstintingly of their valuable time in this regard. Their comments have been of great assistance in the preparation of the Draft Bill. The Law Commission would also like to record its gratitude to the Chairman of STEP, Mrs Philippa Blake-Roberts, the Charity Commission, Mr Michael Jacobs (Nicholson Graham and Jones), Mr Christopher Jarman (Payne Hicks Beach), Mr

[45] A list of respondents is provided at Appendix D.

David Long (Charles Russell), and Mr Nigel Siederer (Association of Charitable Foundations).

PART II
TRUSTEES' POWERS OF INVESTMENT

INTRODUCTION

2.1 Trusteeship is an increasingly specialised task that often requires professional skills that trustees do not have. This has come about, to a large extent, from changes in the way in which financial markets operate. However, those changes have brought with them greater protection for investors,[1] and increased investment opportunities. Further changes in the financial regulatory system are now taking place. In October 1997 the Government announced the launch of the Financial Services Authority. The Financial Services Authority is already responsible for the supervision of banks, and the Financial Services and Markets Bill which we understand the Government intends to introduce shortly will, when enacted, make it the single statutory regulator of the financial services sector, replacing the existing patchwork of regulators responsible for different parts of the industry.[2]

2.2 Where appropriate trustees should be able to take advantage of the opportunities brought about by the rapid developments in the provision of financial services. It is only in this way that they will be able to manage trust assets most effectively and in the best interests of the trust. In this Part the Law Commission and the Scottish Law Commission consider whether trustees have the powers they need to do this and conclude that they do not. We examine the proposals for reform that were made in the Treasury's Consultation Document of 1996 and, in the light of those proposals, we make recommendations for reform. Most of our proposals apply both to England and Wales and to Scotland. However, where we consider it appropriate for our proposals to differ as between the two jurisdictions, we explain why this is the case. In particular, we make separate proposals in relation to trustees' powers to purchase land in England and Wales and Scotland.[3]

[1] The conduct of investment business in the United Kingdom is now regulated by the Financial Services Act 1986, which is intended to provide a system of protection for all investors and which confers wide powers of intervention. These powers were conferred upon the Securities and Investments Board, but are now exercised by the Financial Services Authority. The rules of the Self-Regulating Organisations that regulate the activities of bodies that may carry on the business of investment management provide a further layer of protection for investors generally.

[2] See Financial Services and Markets Bill: A Consultation Document by HM Treasury, July 1998.

[3] The Law Commission made provisional proposals for reform in this area (in relation to the law in England and Wales) in Part VIII of the Consultation Paper. Although the Consultation Paper did not examine the general principles that govern trustees' powers of investment, the extent to which trustees may purchase land is closely linked to wider issues of investment powers and we think it best to deal with these issues together. It should be noted that both the wider powers of delegation that the Law Commission proposes in Part IV and the powers to employ nominees and custodians are prompted very largely by the need to facilitate investment by trustees.

THE PRESENT LAW

2.3 In practice, the trustees of most modern trusts have adequate powers to invest trust assets in order to maximise their returns. This is because wide investment powers are invariably included in any professionally drawn trust, so that the trustees may make any investment that they could make if they were the absolute owners of the assets. However, this has not always been the case and the trustees of older trusts (including many charities) lack such wide investment powers. In addition, such powers are seldom included in trusts and wills made without professional advice. Nor do they apply to trusts arising on an intestacy in England and Wales. It is the default position that applies to trusts such as these which is the subject of this review. As the law stands, that default position is laid down by the Trustee Investments Act 1961. The investment powers of certain other bodies are tied to those laid down for trustees in the 1961 Act.[4]

Purpose and effect of the Trustee Investments Act 1961

2.4 The Treasury's Consultation Document contains a useful summary of the purpose and effect of the Trustee Investments Act 1961[5] which, for the sake of convenience, is reproduced[6] in paragraphs 2.5 - 2.11 below.

2.5 Before 1961, trustees without a wide express power of investment were limited to the narrow categories of investment set out in the Trustee Act 1925 or the Trusts (Scotland) Act 1921 (principally fixed-interest securities and loans secured over land and buildings). The purpose of the Trustee Investments Act 1961 was to allow trustees to invest in assets with a greater potential for return, in particular in shares, without taking an undue risk with the trust capital. Although investment in shares has historically proved a good measure of protection against inflation, it carries a degree of risk of capital loss, because of the failure of a company, which is not present with assets such as fixed-interest UK government securities. It was therefore considered appropriate, in the absence of express powers, to ensure that trusts contained a core of investments of the latter type. Trust funds which could only be invested in this way came to suffer serious losses in real terms because the value of the investments was severely reduced by inflation.

2.6 The Trustee Investments Act 1961 divides the investments which trustees may make into two main groups—

(1) *narrower-range* investments,[7] which are mainly fixed-interest securities, including those issued or guaranteed by the UK and other EU governments; and

(2) *wider-range* investments,[8] which consist mainly of shares (subject to a number of restrictions), building society shares, and authorised unit trusts.

[4] See Trustee Investments Act 1961, s 7. The bodies include, eg, the Duchies of Lancaster and Cornwall.

[5] At paras 4 – 10.

[6] With minor amendments.

[7] Trustee Investments Act 1961, Schedule 1, Parts I and II.

There are additional rules for investments which are authorised by a special power, for example where the trust deed permits the trustees to purchase a particular investment.

2.7 The central feature of the Trustee Investments Act 1961 is that if trustees wish to invest in wider-range investments, they must first divide the trust fund into two parts.[9] Until recently, these parts had to be of equal value, so that trustees had to invest at least 50% of the fund in narrower-range investments. The fund then remains divided, but there is no need to make adjustments to ensure that the original proportions are maintained. Since wider-range investments have scope for stronger growth than the narrower-range ones, over time the wider-range investments tend to amount to more than their original proportion of the value of the fund as a whole.

2.8 There are rules of some complexity in the Trustee Investments Act 1961 on matters such as property which is added to or withdrawn from the trust fund. Such additions may require transfers between the two parts of the fund. The set ratio of wider-range to narrower-range investments has been extended to 75:25,[10] but the basic rule requiring division of the fund remains.

2.9 The Trustee Investments Act 1961 does not set out the standard of care expected of trustees in making investments, and this remains subject to the rules laid down at common law.[11] It does, however, require that in exercising any power of investment, a trustee must have regard to the need for diversification of investments so far as appropriate to the circumstances of the trust, and to the suitability to the trust of the proposed investment.[12] This requirement applies to all trustees, including those exercising a wider express power of investment.

2.10 The Trustee Investments Act 1961 requires trustees to obtain and consider proper advice about whether an investment is satisfactory, having regard to the need for suitability and diversification mentioned above.[13] This requirement to take advice applies before a trustee makes any wider-range and most narrower-range investments or makes such an investment using a special power. A limited number of narrower-range investments may be made without taking advice. These comprise mainly National Savings Certificates and Bonds, and deposits with the National Savings Bank.

2.11 The statutory requirement to take advice only applies where the trustees are making an investment using the powers given by the Trustee Investments Act 1961. It does not apply where trustees are exercising an express power given to them by a trust deed. Because such trustees must act with reasonable prudence in exercising their powers of investment, in practice they will commonly seek advice.

[8] *Ibid*, Schedule 1, Part III.

[9] *Ibid*, s 2(1).

[10] See para 2.20 below.

[11] See para 2.13 *et seq*. below.

[12] Trustee Investments Act 1961, s 6(1).

[13] *Ibid*, s 6(2).

Where advice is required under the Trustee Investments Act 1961, it must be made or confirmed in writing, and be given by a person whom the trustees reasonably believe to be qualified by his or her ability in, and practical experience of, financial matters.[14] The adviser may be one of the trustees or, for example, an officer or employee of a corporate trustee.[15]

2.12 It should be noted that the Trustee Investments Act 1961 does not define the default powers of investment of *all* trustees. In particular, it has no application to the trustees of occupational pension schemes who have a wide power of investment under section 34(1) of the Pensions Act 1995.[16]

Duty of care at common law

2.13 Subject to their overriding obligation to administer the trust in accordance with its terms, trustees are under a duty to invest trust funds in their hands.[17] Property must be acquired or retained in order to produce a financial return for the trust. The purchase of property for any other purpose, such as occupation by a beneficiary,[18] may not be an investment.[19]

2.14 In performing their duty to invest trust funds, trustees must exercise proper care. The standard is that of the ordinary prudent man of business acting in the management of his own affairs.[20] As Lopes LJ explained in *Re Whiteley*[21]—

> In the selection of investments within the terms of his trust [the trustee] must use the care and caution which an ordinary man of business ... would exercise in the management of his own property.[22]

[14] *Ibid*, s 6(4) and (5).

[15] *Ibid*, s 6(6).

[16] See para 2.25 below.

[17] "It is the duty of a trustee to invest the trust property in proper securities so as to obtain the best return by way of income and capital appreciation, judged in relation to the risks involved." (*Snell's Principles of Equity* (29th ed 1990) p 215). See also *Robinson v Robinson* (1851) 1 De GM&G 247, 42 ER 547; *Stafford v Fiddon* (1857) 23 Beav 386, 53 ER 151. In Scotland, *Melville v Noble's Trs* (1896) 24 R 243.

[18] *Re Power* [1947] Ch 572; *Moss's Trs v King* 1952 SC 523.

[19] But see para 2.42 *et seq.* below.

[20] See *Speight v Gaunt* (1883) 22 ChD 727, 736 *per* Bacon V-C, whose statement of the law was endorsed on appeal ((1883) 22 ChD 727, 754 *per* Jessel MR). When *Speight v Gaunt* came before the House of Lords, Lord Blackburn expressed the duty as follows: "[A] trustee sufficiently discharges his duty if he takes in managing trust affairs all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own." (1883) 9 App Cas 1, 19; *Raes v Meek* (1889) 16R(HL) 31, 33 (also reported *sub nom Rae v Meek* (1889) 14 App Cas 558, 569) *per* Lord Herschell; *Tibbert v McColl* 1994 SLT 1227.

[21] (1886) 33 ChD 347, 358.

[22] See also *Learoyd v Whiteley* (1887) 12 App Cas 727, 737 *per* Lord Fitzgerald; *Re Partington* (1888) 57 LT 654, 657; *Bartlett v Barclays Bank Trust Co Ltd (No 1)* [1980] Ch 515, 531; *Cowan v Scargill* [1985] Ch 270, 289; *Steel v Wellcome Custodian Trustees Ltd* [1988] 1 WLR 167, 171; *Nestle v National Westminster Bank plc* [1993] 1 WLR 1260.

2.15 Prudence requires more than mere honesty, good faith and sincerity.[23] A level of proficiency and competence is expected of a trustee. However, quite what that level is will vary from case to case. As a general principle, it seems that remunerated and professional trustees are expected to meet a higher standard than other trustees,[24] and a trustee which holds itself out as having special expertise beyond that of the ordinary prudent person may be held to account if loss is incurred by the trust as a result of a failure to exercise that level of expertise.[25]

Criticisms of the Trustee Investments Act 1961

2.16 Although the operation of the Trustee Investments Act 1961 has been widely criticised, a number of the principles upon which the Act was based are eminently sensible. It did, in fact, give trustees wider default powers of investment than they had previously enjoyed, (including power to invest in more speculative investments, such as equities), but at the same time endeavoured to ensure that trustees did not take undue risks with trust capital. It requires trustees to have regard to the need for diversification, and to obtain and consider proper advice before investing in more speculative ventures.

2.17 However, the Trustee Investments Act 1961 *has* been severely criticised — in the opinion of the two Commissions, rightly so. When enacted, it was a significant step forward. It has, however, long been out of date, a fact that has been recognised by the courts for many years.[26] Its provisions now operate in a way which is not only needlessly restrictive, but is positively detrimental to most trusts to which it applies. In particular—

(1) The requirement to divide the trust fund into two parts[27] is now regarded as a crude and administratively burdensome attempt to regulate the degree of risk to which trustees may expose the trust.

(2) The definition of "wider-range" investments in the Trustee Investments Act 1961 is in fact quite restrictive. It does not include investments in the purchase of land, for example, and permits trustees to invest only in shares which meet certain qualifying conditions.[28] Trustees may therefore be

[23] *Cowan v Scargill* [1985] Ch 270.

[24] See *National Trustees Co of Australia Ltd v General Finance Co of Australia Ltd* [1905] AC 373; *Speight v Gaunt* (1883) 9 App Cas 1; *Re Waterman's WT* [1951] 2 All ER 1054. But cf *Re Somerset* [1894] 1 Ch 231.

[25] *Bartlett v Barclays Bank Trust Co Ltd (Nos 1 & 2)* [1980] Ch 515.

[26] See *Trustees of the British Museum v Attorney-General* [1984] 1 WLR 418; *University of Glasgow Petrs* 1991 SLT 604.

[27] If investments are made using a special power, the fund must be divided into three parts.

[28] In particular, a company must have paid a dividend on all its shares for each of the immediately preceding five calendar years. This rules out a number of well known public companies and all recent issues, even of investment trusts. In order to avoid this requirement from barring investment under the Trustee Investments Act 1961 in the shares of recently privatised companies, it became common for the legislation paving the way for privatisation to provide that shares in such companies could qualify as authorised investments notwithstanding the fact that the dividend requirement was not met. See, eg, Telecommunications Act 1984, s 71; Gas Act 1986, s 59; Electricity Act 1989, s 83.

precluded from making investments which would be appropriate to the trust, and which appear prudent.

(3) The frequent exclusion of the Trustee Investments Act 1961 in modern trust instruments means that its application is now more the exception than the rule.[29] For more than a decade, the courts have been willing to extend trustees' investment powers because the provisions of the Act are perceived to be inadequate judged by current investment practice.[30] Nevertheless, trustees who lack adequate express powers of investment must go to the trouble and expense of applying to the court or (if a charity in England and Wales) to the Charity Commission[31] if they do not wish to be constrained by the strict provisions of the Trustee Investments Act 1961.

2.18 In addition, the Treasury expressed the view in its Consultation Document[32] that the Trustee Investments Act 1961 imposes unwarranted burdens affecting both beneficiaries and trustees, because—

(1) the assets of a trust increase in value to a lesser extent than they probably would if trustees had freedom to decide in what to invest;[33] and

(2) the need to conform with the requirements of the Trustee Investments Act 1961 increases administrative and dealing costs.

PROPOSALS FOR REFORM

Approach to reform

2.19 It follows from these criticisms that any proposals for reform of this aspect of the law must aim to achieve a balance between two factors—

[29] In its Twenty-third Report, The Powers and Duties of Trustees (1982) Cmnd 8733, the Law Reform Committee stated, at para 3.17, that "the frequent exclusion of the Act rendered it largely irrelevant in current financial conditions".

[30] *Trustees of the British Museum v Attorney-General* [1984] 1 WLR 418; *Steel v Wellcome Custodian Trustees Ltd* [1988] 1 WLR 167, 172; *University of Glasgow Petrs* 1991 SLT 604.

[31] Under Charities Act 1993, s 26, the Charity Commissioners have the power to authorise dealings with charity property which would not otherwise be within the powers of the trustees. As explained later in this Report (see para 4.37 below) this power has been used to enable charity trustees to delegate investment decisions to a discretionary fund manager. However, it is also capable of being used to permit investments which are not authorised by the Trustee Investments Act 1961.

[32] At para 11.

[33] Evidence to support this assertion was provided by some of the respondents to the Treasury's Consultation Document, and was detailed in the Explanatory Memorandum which accompanied the draft Deregulation Order (See paras 1.6 and 1.7 above). One respondent compared the performance of two of its trust funds, one constrained by the Trustee Investments Act 1961 and one which was not. The former showed capital growth of 113% and 334% over ten and twenty years respectively compared with 354% and 666% for the fund which was freely invested. These figures suggest that the effect of the Trustee Investments Act 1961 over the period in question was to reduce the return earned on assets by an average of 5% a year. In addition, the Trust Law Committee produced figures suggesting that if a charity had invested 100% of its capital value in equities in 1963, its capital value in 1994 might have been almost double what it would have been if the original investment had comprised 50% equities and 50% gilts.

(1) the desirability of conferring the widest possible investment powers, so that trustees may invest trust assets in whatever manner is appropriate for the trust; and

(2) the need to ensure that trustees act prudently in safeguarding the capital of the trust.

2.20 The need for reform of the Trustee Investments Act 1961 has been recognised for some time. As has been mentioned,[34] in 1995 the Treasury consulted on a proposal to change the ratio of wider-range to narrower-range investments required by the Act from 50:50 to 75:25. A very positive response was received to that proposal and the change has now been effected.[35] However, it was clear that many respondents thought that more fundamental reform was required and this, of course, led to the publication of the Treasury's Consultation Document in 1996, and to the abortive Order under the Deregulation and Contracting Out Act 1994.[36]

2.21 Although the Treasury's Consultation Document had proposed the repeal of the Trustee Investments Act 1961, the Order which was subsequently laid under the 1994 Act was less ambitious in scope. It would merely have amended the Act to remove the requirement for fund-splitting and the restrictions on making certain investments.[37] In addition, it was proposed to make a separate Order, under section 12 of the Trustee Investments Act 1961, extending the list of possible investments under the Act. However, there was some uncertainty as to how wide any permissible extension made under section 12 might be. For this reason, it seems unlikely that an order would have given trustees the beneficial owner investment powers that had been proposed in the Consultation Document.

2.22 The two Commissions consider that reform can best be achieved by primary legislation on this issue, particularly in the light of concerns about the effectiveness of any order that might be made under section 12 of the Trustee Investments Act 1961, and given the fact that implementation of the Law Commission's recommendations in Parts III - VII of this Report will require primary legislation in any event. We believe that trustees' powers of investment should cease to be governed by the Trustee Investments Act 1961 entirely, and that as much of the Act as possible should be swept away. However, it will not be possible to repeal the Trustee Investments Act 1961 altogether as part of the present reforms. One reason for this is that section 11 of the Trustee Investments Act 1961 empowers certain bodies to invest in accordance with schemes approved by the Treasury. It is not linked to the regime for trustee investments to which the rest of the Act gives effect, and is outside the scope of this Report. Consequently, the Trustee Investments Act 1961 must remain in force to a limited extent.[38] Accordingly, **the**

[34] See para 1.5 above.

[35] In exercise of the power conferred on the Treasury by Trustee Investments Act 1961, s 13.

[36] See paras 1.6 and 1.7 above.

[37] Schedule 1, Part IV would have been repealed.

[38] It should be noted that there are additional reasons why the Trustee Investments Act 1961 cannot be repealed in its entirety. The Act plays a part in the taxation of charities (see Income and Corporation Taxes Act 1988, Sched 20) and will continue to be of relevance

two Commissions recommend that there should be primary legislation to reform the law governing the investment powers of trustees and that, in so far as it is practicable to do so, the Trustee Investments Act 1961 should be repealed.

2.23 The repeal of the provisions of the Trustee Investments Act 1961 concerning trustees' powers of investment will necessitate a number of consequential amendments and repeals of other statutory provisions.[39] In addition to defining the default position for investments by trustees, the provisions of the 1961 Act regulate the investment powers of a range of bodies that are *not* trustees.[40] **The two Commissions recommend that where the statutory investment powers of a particular body are defined (in whatever manner) by reference to the default powers of trustees, those powers should be amended to the effect that, following implementation of our proposals, that body will continue to have the same powers of investment as trustees. Where the body is set up under a Great Britain or United Kingdom statute, the new investment powers would, in the interests of uniformity, be the same throughout the territory in question.**[41]

Proposals applicable to England and Wales and to Scotland

General power of investment

2.24 The Treasury's Consultation Document proposed that trustees would have the same power to make an investment as they would have if they were absolute owners of the trust assets. This proposal received overwhelming support from those who responded to consultation, and the two Commissions agree that it is the right approach.

2.25 In fact, a legislative precedent already exists for a trustee investment power of this kind. Section 34 of the Pensions Act 1995 makes special provision for the

for the purposes of a limited number of other statutes. In addition, the Act will (in the short term at least) continue to regulate the investment powers of certain bodies (see para 2.23 and footnote 41 below).

[39] See Draft Bill, cl 40 and Schedules 2 & 4, and Draft Clauses for Scotland, Schedules 1 and 2.

[40] This situation can arise either because the enactment conferring powers on the body in question did so by specific reference to the powers of trustees under the 1961 Act, or because those powers apply by implication (see Trustee Investments Act 1961, s 7).

[41] The Draft Bill and Draft Clauses for Scotland include consequential amendments to give effect to this recommendation in relation to investment powers in public Acts and Measures (see Draft Bill, Schedule 2; Draft Clauses for Scotland, Schedule 1). However, such powers are also to be found in many private and local Acts and in subordinate legislation. Consequential amendments have *not* been included in respect of these powers (which will therefore continue to be governed by the existing law). It is considered that such powers will need to be reviewed following implementation of our proposals on a case by case basis, in consultation with those who will be affected by any change. The draft legislation does, however, contain powers enabling further consequential amendment of existing enactments without the need for further primary legislation (see Draft Bill, cl 41; Draft Clauses for Scotland, cl 3).

investment powers of the trustees of occupational pension schemes.[42] Section 34(1) states—

> The trustees of a trust scheme have, subject to any restriction imposed by the scheme, the same power to make an investment of any kind as if they were absolutely entitled to the assets of the scheme.

This provision[43] resulted from the 1993 Report of the Pension Law Review Committee,[44] chaired by Professor Goode. That recommended the adoption of widely defined flexible guidelines in relation to investment by trustees of occupational pension schemes to replace the detailed rules laid down in the Trustee Investments Act 1961. Those rules were said to be "widely regarded as excessively rigid and quite unsuited to modern investment needs and practices."[45]

2.26 We consider that the principle encapsulated in section 34(1) of the Pensions Act 1995 should be extended to all trusts, including charitable trusts. It has the recent sanction of Parliament and accords with the formula for conferring express investment powers which is frequently used in modern English trust deeds. Scottish trustees hold full and undivided ownership of the trust estate,[46] so that wider investment powers are usually conferred by deeming them to be beneficial owners.[47] It will also mean that the default investment powers of all trustees are broadly the same.[48] Accordingly, **it is recommended that, subject to the expression of 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.**[49]

2.27 Conferring wide discretionary powers on trustees in the performance of their investment function facilitates the repeal, not only of the prescriptive regime laid down by the Trustee Investments Act 1961, but of other existing provisions relating to the manner in which trustees may invest. In particular, the scheme now proposed will, for trusts in England and Wales, supersede the provisions of Part I of the Trustee Act 1925.[50] Sections 12 to 14 of the Trusts (Scotland) Act 1921

[42] See also para 4.44 below.

[43] Together with those relating to investment principles in s 35 of the Act.

[44] Report of the Pension Law Review Committee, 1993 (CM 2342-1).

[45] *Ibid,* at para 4.9.5.

[46] *Stair Memorial Encyclopaedia*, Vol 18, para 40; *Inland Revenue v Clark's Trs* 1939 SC 11.

[47] Journal of the Law Society of Scotland, Workshop (Oct 1979), p lxxiii; Barr, Biggar, Dalgleish & Stevens, *Drafting Wills in Scotland*, (1994) use the term "absolute beneficial owners", at p 426.

[48] It is also likely to be consistent with the approach to reform which is being taken in Northern Ireland.

[49] See Draft Bill, cl 3(1); Draft Clauses for Scotland, cl 1(2).

[50] Trustee Act 1925, Part I confers a number of powers on trustees which supplement the powers of investment in the Trustee Investments Act 1961 and protect trustees from liability in certain circumstances. Thus, eg, s 2 provides that the fact that an investment is redeemable does not disqualify it as an authorised investment. Section 6 renders second mortgages or charges authorised in certain limited circumstances, and s 8 affords trustees a degree of protection (provided they comply with certain "safe harbour" requirements) against breach of their common law duty in relation to investments in mortgages. These

would also be rendered unnecessary by the recommended wide investment powers.

2.28 An absolute owner does, of course, have the ability to acquire and to hold property jointly or in common with other persons. In England and Wales,[51] trustees, however, do not have the power to do this — because of the rule that trustees are under a duty to take such steps as are reasonable to secure control of the trust property and to keep control of it.[52] The Law Commission considered this issue in the Consultation Paper and provisionally recommended[53] that the rule should be abrogated.[54] This proposal received the support of a majority of those who responded on consultation,[55] and it is implicit in the wide terms in which the new general power of investment is defined by the Draft Bill[56] that trustees of trusts

provisions, which now seem rather out-dated in any event, will not be required under the new regime. The new wide power of investment will encompass the specific cases mentioned in Part I of the 1925 Act. In addition, the somewhat unsatisfactory collection of trustee exemption provisions which it contains will be replaced by the new statutory duty of care (see para 2.35 *et seq.* below). Nevertheless, there is one aspect of Part I of the 1925 Act which will be carried over into the new scheme: this is the requirement in s 7 for investments in the form of bearer securities to be placed with a banker for safekeeping. The Law Commission considers that, in future, trustees should be required to employ a custodian for this purpose (See Draft Bill, cl 18).

51 For the position in Scotland, see the following paragraph.

52 *Webb v Jonas* (1888) 39 ChD 660. See also, W F Fratcher, *Scott on Trusts* (4th ed 1987) § 175; Consultation Paper, para 7.2.

53 At para 7.27.

54 The Consultation Paper did not examine possible reforms of the law relating to trustee investments as such. This particular issue was considered in the context of trustees' powers to employ nominees and custodians, as it rests on the same principle of control that presently precludes the employment of nominees.

55 Although some respondents expressed concern that a consequence of joint ownership may be that trustees fetter the exercise of their discretions, or act in a manner inconsistent with the best interests of the trust, we are not persuaded by such views. Trustees would continue to be required to exercise their discretion in deciding whether to buy, sell or otherwise deal with any investment (joint or otherwise). They could not enter into a joint ownership arrangement which fettered their discretion as to whether to continue their participation. However, the fact that it may be more difficult to terminate such participation than to sell an asset wholly owned by the trust does not mean that discretion has necessarily been fettered. The restrictions associated with joint ownership are matters to be taken into account by the trustees when deciding whether to participate in the first place. Nor does it seem to follow that, because the trust may not be wholly entitled to the property or asset in question, the trustees would be likely to deal with their interest otherwise than in the best interests of the trust.

56 See Draft Bill, cl 3(1). It should be noted that, in common with the approach taken in Pensions Act 1995, s 34, no attempt has been made to define the meaning of "investment" in the draft legislation. Although the concept has, until now, been defined by reference to lists of "authorised" investments in the context of trustees' *statutory* powers, this is certainly not the case when it comes to express powers of investment in trust instruments — wide and unqualified investment powers are common. The notion of what constitutes an investment is an evolving concept, to be interpreted by the courts. Originally, an investment was regarded as something which must not only safeguard capital, but which must produce income (see *Re Somerset* [1894] 1 Ch 231, 247 *per* Kekewich J). In *Re Wragg* [1919] 2 Ch 58 the key characteristic of an investment was said to be an expectation that it would yield some interest or profit. Today, there can be little doubt that "profit" can be in the form of capital appreciation rather than income yield. Trustees might, for example, legitimately

subject to the law of England and Wales would have power to acquire and to hold property for the trust jointly or in common with other persons.

2.29 In Scotland property owned by more than one person is generally held in common. Each proprietor in common has a *pro indiviso* share in the whole property which he or she can dispose of and which does not simply by virtue of common ownership accresce to the other proprietors on his or her death. In property held jointly each proprietor does not have a separate disposable share; title is held by the proprietors as a body. Trustees and the members of an unincorporated association are the only examples of joint proprietors in current practice.[57] There is no rule in Scottish law prohibiting trustees acquiring or holding property in common with other persons. Trustees owning a house in a tenement or square will normally have a *pro indiviso* share with the other proprietors of garden ground at the back of the tenement or in the middle of the square. Executors or testamentary trustees may well acquire and hold the deceased's *pro indiviso* share of property.

Appropriate safeguards

2.30 Notwithstanding the above recommendations, it is clearly important not to lose sight of the fact that trustees are *not* the absolute owners of the assets under their control. Beneficiaries need protection from the risk that the trust funds will be lost or dissipated in unwise investments. Although an absolute owner may, if he or she feels so inclined, invest heavily in some wildly speculative venture, it would seldom (if ever) be appropriate for trustees to do so. The proposals for wider powers of investment, explained above, do not affect the general duties which the law imposes on trustees to act in the best interests of the trust and to avoid any conflict between their duties as trustees and their personal interests. However, the two Commissions consider that the legislation conferring these wider default powers of investment should also set out specific duties which would apply to trustees in the performance of their investment function. We consider that two such duties should be of general application — a duty to have regard to the need for diversification and suitability of investments; and a duty to obtain and consider proper advice where appropriate. The Trustee Investments Act 1961 provides a statutory precedent for both of these safeguards.[58]

invest (depending upon the circumstances of the trust) in antique silver or paintings in the expectation that they will increase in value. In *Harries v Church Commissioners* [1992] 1 WLR 1241, Sir Donald Nicholls V-C said (at 1246) that one reason why trustees hold property is "for the purpose of generating money, whether from income or capital growth, with which to further the work of the trust. In other words, property held by trustees as an investment. Where property is so held, prima facie the purposes of the trust will be best served by the trustees seeking to obtain therefrom the maximum return, whether by way of income or capital growth, which is consistent with commercial prudence".

[57] *Stair Memorial Encyclopaedia*, Vol 18, paras 17 - 36; *Magistrates of Banff v Ruthin Castle Ltd* 1944 SC 36.

[58] See Trustee Investments Act 1961, s 6; also para 2.9 *et seq.* above.

DUTY TO HAVE REGARD TO THE NEED FOR DIVERSIFICATION AND SUITABILITY OF INVESTMENTS

2.31 As has already been noted,[59] the Trustee Investments Act 1961 requires trustees to have regard to the need for diversification of investments of the trust, in so far as is appropriate to the circumstances of the trust, and to the suitability to the trust of proposed investments.[60] In its Consultation Document the Treasury proposed that these requirements of the Trustee Investments Act 1961 should be retained in any new legislation on trustees' investment powers. The two Commissions agree that this is appropriate. Such requirements are in conformity with modern portfolio theory, which emphasises that investments are best managed by balancing risk and return across the portfolio as a whole, rather than by looking at each investment in isolation.[61] Accordingly, **the two Commissions recommend that, in the exercise of their investment powers, trustees should have regard to the need for diversification of investments of the trust, in so far as is appropriate to the circumstances of the trust, and to the suitability to the trust of proposed investments.**[62]

DUTY TO OBTAIN AND CONSIDER PROPER ADVICE

2.32 It is generally accepted that trustees should obtain and consider proper advice in exercising their powers of investment where it is necessary for them to do so if they are to manage the trust fund to best effect. However, it is much more difficult to define the circumstances in which the need for advice arises and the nature of the advice which should be obtained.[63]

2.33 The Trustee Investments Act 1961 avoids these difficult questions by adopting a very cautious approach to the issue. It provides that, if trustees wish to invest in anything other than a very restricted class of narrower-range investments, they must obtain and consider proper advice on whether the investment is satisfactory

[59] See para 2.9 above.

[60] Section 6(1).

[61] For a discussion of modern portfolio theory and its application to trustee investment see John H Langbein, "The Uniform Prudent Investor Act and the Future of Trust Investing" (1996) 81 Iowa LR, 641. See also *Nestle v National Westminster Bank Plc*, decided in 1988 but not reported until (1996) 10 TLI 112. In that case, Hoffmann J commented that "[m]odern trustees acting within their investment powers are entitled to be judged by the standards of current portfolio theory, which emphasises the risk level of the entire portfolio rather than the risk attaching to each investment taken in isolation": *ibid*, at p 115. In a footnote to this passage in the report, it is stated that "[t]his is not to say that losses on investments made in breach of trust can be set off against gains in the rest of the portfolio but only that an investment which in isolation is too risky and therefore in breach of trust may be justified when held in conjunction with other investments".

[62] In the Draft Bill these matters are referred to as "the standard investment criteria", (see cl 4; Draft Clauses for Scotland, cl 2).

[63] This will depend upon a number of variables, including the size, nature and purpose of the particular trust, the composition of its investment portfolio and, of course, the skills and experience of the trustees.

bearing in mind the need for suitability and diversification.[64] That advice must be given or confirmed in writing.[65]

2.34 The fact that we propose to move away from the idea of a list of "safe" investments means that it will no longer be possible to require trustees to seek advice in relation to particular types of investment.[66] However, we consider that to impose an unqualified statutory requirement for trustees to take advice before making *any* investment, however small or secure, would place an unnecessary burden on trustees. There is no such requirement in relation to the exercise of express powers of investment,[67] although there is a duty at common law to "seek advice on matters which the trustee does not understand, such as the making of investments".[68] In its Consultation Document, the Treasury proposed that, notwithstanding this common law duty, any new scheme for trustee investments should include an express duty both to take advice where necessary and to review portfolios.[69] Irrespective of whether such a duty would be implicit in any general duty of care to which trustees are subject,[70] the two Commissions consider that the need for trustees to obtain and consider advice, where appropriate, is of such importance that it should appear on the face of the statute. However, we do not believe that it is necessary to impose specific restrictions on those who should be eligible to give advice.[71] Nor do we think it necessary to retain the present requirement for the advice to be given or confirmed in writing.[72] Accordingly, **it is recommended that—**

(1) before exercising the proposed powers of investment, trustees should obtain and consider proper advice about the way in which those powers should be exercised, having regard to the need for

[64] Trustee Investments Act 1961, s 6(2). See also paras 2.9 and 2.10 above.

[65] Trustee Investments Act 1961, s 6(5).

[66] Even if we thought that approach to be desirable — which we do not.

[67] Modern trust deeds to not generally oblige a trustee to take advice before exercising such a power, however wide.

[68] *Cowan v Scargill* [1985] Ch 270, 289, *per* Megarry V-C; *Martin v City of Edinburgh DC* 1988 SLT 329. The duty extends to making regular reviews of the trust's portfolio (*Nestle v National Westminster Bank plc* [1993] 1 WLR 1260; *Clarke v Clarke's Trs* 1925 SC 693, 711).

[69] Although the subsequent draft Order under the Deregulation and Contracting Out Act 1994 took a different approach to the one originally proposed in the Treasury's Consultation Document, its effect would have been to retain Trustee Investments Act 1961, s 6, but subject to two amendments. First, it would have allowed trustees *not* to seek advice if they reasonably considered that in all the circumstances advice should not be obtained. Secondly, it would have allowed a sole trustee to do likewise where he or she reasonably believed that he or she was a competent person to make the investment decision in question (at present the Trustee Investments Act 1961 only allows a trustee to advise the trust in these matters if he or she is one of two or more trustees).

[70] Whether at common law or imposed by statute. See paras 2.35 - 2.38 below.

[71] The Treasury consulted on this point, and a substantial majority of those who responded on the point thought that the matter should be left to the trustees' discretion.

[72] The Treasury took the view that this is unnecessary given the standards which apply to professional investment advisers, who must be authorised under the Financial Services Act 1986.

diversification of investments of the trust, and the suitability to the trust of the proposed investments;

(2) trustees should review the trust portfolio from time to time and consider whether the investments in the portfolio should be varied, again having regard to the need for diversification and to the suitability of investments;

(3) the requirement to obtain advice in (1) should not apply if the trustees reasonably conclude that in all the circumstances it is unnecessary or inappropriate to do so.

For these purposes proper advice would be the advice of a person who the trustees reasonably believe to be qualified to give it by his ability in and practical experience of financial and other matters relating to the proposed investment.[73]

Additional proposals applicable to England and Wales only

Codification of the common law duty of care

2.35 It has already been explained that, in the performance of their investment function, trustees are under a duty of care at common law.[74] However, the need for a uniform *statutory* duty of care in England and Wales is a thread which runs throughout the proposals made by the Law Commission in Parts III – VII of this Report. This issue is considered in detail in Part III, but given the proposal for a new statutory duty of care to regulate the exercise of other new powers which the Law Commission recommends, it would be desirable for that duty to apply equally to the exercise of trustees' powers of investment, whether they be conferred by statute or expressed in the trust instrument.[75] In fact, it will be explained[76] that the Law Commission's proposals for a new statutory duty of care probably represent no more than a codification of the existing common law duty.

2.36 **The Law Commission recommends that, in England and Wales, the relevant standard of care to determine the liability of trustees for their acts, defaults or neglects in the performance of their investment function should be the same standard as it recommends at paragraph 3.25 below.**[77]

[73] See Draft Bill, cl 4 and 5; Draft Clauses for Scotland, cl 2.

[74] See para 2.14 above.

[75] Unless it appears from the trust instrument that the duty is not meant to apply. This will conform with the present position, as express powers of investment are subject to the common law duty of care in the absence of contrary provision. In practice, trustees are commonly absolved from liability in this regard by an express exclusion clause.

[76] See para 3.22 *et seq.* below.

[77] Namely, that a trustee should act with such care and skill as is reasonable in the circumstances, having regard in particular to any special knowledge or experience that he or she has, or holds him or herself out as having, and if he or she acts as trustee in the course of a business or profession, to any special knowledge that it is reasonable to expect of a person acting in the course of that kind of business or profession.

2.37 In addition, **it is recommended that this standard of care should apply equally to any express power of investment conferred by the instrument creating the trust unless some other standard is expressly or impliedly specified in that instrument.**

2.38 Scottish trustees have a duty of care towards the beneficiaries in relation to the exercise of their functions, including the power of investment. In exercising their functions trustees must use the same degree of diligence as a man of ordinary prudence would in the management of his own affairs.[78] A trustee who is remunerated is said to be held to a higher standard of diligence and knowledge than an unpaid trustee is,[79] but there is no direct Scottish authority on this and doubts have been expressed.[80] The Scottish Law Commission intends to examine the law of trusts in the near future when resources permit. The duty of care and the degree of diligence to be used by trustees in exercising their functions will be among the issues considered. Unlike the Law Commission, the Scottish Law Commission has not consulted on these issues and the Treasury's Consultation Document did not address them nor did any of the Scottish respondents mention them. It would therefore be premature for the Scottish Law Commission to join with the Law Commission in recommending a standard of care in relation to one function only — that of investment. The duty of care and the expected degree of diligence should be the same irrespective of the function in question.

Trustees' powers to purchase land — England and Wales

2.39 In Part VIII of the Consultation Paper the Law Commission summarised the present law governing the powers of trustees in England and Wales to acquire land on behalf of the trust in the following terms:

> In the absence of express authority in the trust instrument, trustees of personal property do not have power either to invest in the purchase of land or to acquire land as a residence or otherwise for the use of any beneficiary. By contrast, where land is held in trust, whether under a trust of land or a settlement under the Settled Land Act 1925, the trustees have power to purchase more land not only by way of investment, but for any other reason.[81]

2.40 In essence, therefore, trustees have a default power to acquire land if they are trustees of the settlement under the Settled Land Act 1925,[82] or in circumstances

[78] *Raes v Meek* (1889) 16R(HL) 31, 34 *per* Lord Herschell; *Buchanan v Eaton* 1911 SC(HL) 40, 45 *per* Lord Atkinson; *Tibbert v McColl* 1994 SLT 1227.

[79] Wilson and Duncan, *Trusts, Trustees and Executors* (2nd ed) para 28-16, citing *Re Waterman's Will Trusts* [1952] 2 All ER 1054.

[80] Norrie and Scobbie, *Trusts*, p 141.

[81] Consultation Paper, para 8.1. The Law Commission explained the present law in more detail at paras 8.2 – 8.9.

[82] Any capital money that arises under the Act may be "invested or otherwise applied" by the trustees of the settlement for one or more purposes specified in s 73. The application will usually be at the direction of the tenant for life. The specified purposes include the "purchase of land in fee simple, or of leasehold land held for sixty years or more unexpired at the time of purchase" (see s 73(1)(xi)).

where either land or the proceeds of sale of land formerly held on a trust of land[83] is or are already comprised in the trust assets.[84] There appears to be no rational justification for this position, and the Law Commission provisionally recommended that a default power should be conferred on trustees who do not already have it[85] to purchase a legal estate in land in England or Wales—

(1) by way of investment;

(2) for occupation by any beneficiary; or

(3) for any other reason.

2.41 This was widely supported on consultation. However, it has, of course, been proposed that trustees should have much wider default powers of investment than they have at present. It follows that if trustees are able to invest trust funds as if they were the absolute owners of those funds, they will in any event have power to purchase land *by way of investment*.[86] However, this may not of itself give trustees power to acquire land for occupation by a beneficiary,[87] and would not permit them to do so for other reasons. On the other hand, there is no territorial limitation on an absolute owner's power to invest in land: he or she would not be limited to the purchase of a legal estate in land in England or Wales. The question therefore arises as to whether the territorial limitation provisionally proposed by the Law Commission should be retained, and the proposed general power of investment qualified accordingly.

2.42 Although settlors may well wish to confer express powers for trustees to acquire land in jurisdictions which are not part of the United Kingdom, the Law Commission does not consider that it would be appropriate to confer such powers as a default position. The concept of the trust is not universally recognised and, even in those jurisdictions that do recognise trusts, the law does not necessarily give effect to the safeguards for the protection of the interests of beneficiaries

[83] See Trusts of Land and Appointment of Trustees Act 1996, ss 6(3), 17(1). Trustees of land have a statutory power to "purchase a legal estate in any land in England or Wales". That power may be exercised "by way of investment, for occupation by any beneficiary, or for any other reason" (see s 6(4)).

[84] In other cases, although mortgages of freehold land or leaseholds having at least 60 years to run are authorised as narrower-range investments under the Trustee Investments Act 1961 (Schedule 1, Part II, para 13), the purchase of freehold land is not, unless it is either expressly sanctioned by the trust instrument or the trust is a pension trust.

[85] Ie, trustees other than trustees of land or trustees of the settlement under the Settled Land Act 1925.

[86] It should be noted that for the purposes of the Draft Bill the "general power of investment" conferred on trustees by cl 3 does *not* extend to investments in land other than in loans secured on land. A separate power to invest in land is conferred by cl 8(1)(a). The principal reason for structuring the Draft Bill in this way is to facilitate consequential amendments to the investment powers of some bodies who, though not trustees, are presently subject to the provisions of the Trustee Investments Act 1961 (see para 2.23 above).

[87] There is doubt as to whether this would constitute an investment because of the decision in *Re Power* [1947] Ch 572. But see also *City of London Building Society v Flegg* [1988] AC 54, 83; and the Consultation Paper, para 8.5.

against the claims of third parties that apply in England and Wales.[88] The proposed territorial limitation on trustees' ability to purchase land mirrors that which already applies to trustees of land under the Trusts of Land and Appointment of Trustees Act 1996.[89] However, the Law Commission considers that the limitation can safely be relaxed to the extent that trustees should be able to acquire land anywhere within the United Kingdom.[90] It should be noted, however, that statute has on occasion conferred powers to acquire land on particular bodies (or types of body) subject to specific conditions or restrictions. It is not proposed that the new broad power to acquire land should override such conditions or restrictions, which were no doubt imposed for good reason in relation to the bodies concerned. Trustees having special statutory powers to acquire land should not, therefore, benefit from the new power unless specific provision is made for them to do so.[91]

2.43 **The Law Commission recommends that—**

(1) In addition to a power to acquire land as an investment, all trustees in England and Wales should have power to acquire land—

(a) for occupation by a beneficiary; or

(b) for any other reason.

[88] As a general rule, the courts have no jurisdiction to entertain an application for the determination of the title to, or the right to possession of, any immovable (which term obviously includes land) situated abroad: *British South Africa Co v Companhia de Moçambique* [1893] AC 602. However, where a court has jurisdiction *in personam* over a defendant, it will enforce a limited range of obligations against him in relation to foreign land: see *Penn v Baltimore* (1750) 1 Ves Sen 444; 27 ER 1132; and the discussion in J H C Morris, *The Conflict of Laws* (3rd ed 1984) pp 339-343. In such circumstances the court may grant a declaration that the defendant holds foreign land as trustee: *Cook Industries Inc v Galliher* [1979] Ch 439. Nevertheless, the courts have always applied the *lex situs* to the essential validity of trusts of immovables and, if the foreign *lex situs* does not recognise trusts of land, the trust will fail: see *Re Pearse's Settlement* [1909] 1 Ch 304 and the discussion in J H C Morris, *The Conflict of Laws* (3rd ed 1984) pp 425-427). The recognition of trusts in a number of states is governed by the Hague Convention on the Law Applicable to Trusts and on their Recognition (incorporated into law in the UK by the Recognition of Trusts Act 1987). Recognition of trusts under the Convention implies *inter alia* that the trust property constitutes a separate fund, and that the personal creditors of the trustee shall have no recourse against the trust assets and that those assets shall not form part of the trustee's estate upon his or her insolvency or bankruptcy, nor part of the matrimonial property of the trustee or his or her spouse nor part of the trustee's estate upon death. However, even in relation to states in which the recognition of trusts is governed by the Convention, protection of beneficiaries' interests cannot be guaranteed. The Convention only applies to trusts created voluntarily and evidenced in writing, and it does not prevent the application of provisions of the local law in so far as those provisions cannot be derogated from by voluntary acts relating, in particular, to matters such as the protection of minors and incapable parties, the personal and proprietary effects of marriage, succession rights, the rights of creditors on insolvency and the protection of third parties acting in good faith (see Articles 15 and 16 of the Convention (and s 1(3) of the 1987 Act)).

[89] Section 6.

[90] The power to acquire land in Trusts of Land and Appointment of Trustees Act 1996, s 6 will be superseded by the new scheme.

[91] Such provision may be made in the Draft Bill (see Schedule 2) or subsequently by a statutory instrument made under cl 41.

(2) The power of trustees to acquire land for whatever reason should be limited to the acquisition of freehold or leasehold land in the United Kingdom.[92]

(3) These provisions would not apply to trustees who, before the new legislation comes into force, have special statutory powers to invest or apply trust funds.[93]

2.44 The Law Commission noted that trustees of *land* are able to purchase land with the aid of a mortgage,[94] but that other trustees do not have an equivalent power unless it has been expressly conferred by the trust instrument. The Commission considered this to be anomalous and provisionally recommended that the power should be extended to all trustees. The proposal received very strong support on consultation. The Commission considers that the best way of implementing this proposal is to follow the approach taken in section 6(1) of the Trusts of Land and Appointment of Trustees Act 1996. Accordingly, **it is recommended that, for the purpose of exercising their functions as trustees, trustees who acquire land under the proposed new power should have all the powers of an absolute owner in relation to the land.**[95]

Trustees' powers to purchase land — Scotland

2.45 In Scotland trustees have no common law power to purchase land, nor do the general powers of trustees set out in section 4 of the Trusts (Scotland) Act 1921 include such a power. Power to purchase land has to be conferred in the trust deed, by the statute regulating the trust[96] or exceptionally by the Court of Session on a petition to the *nobile officium*[97] or under section 1(1) of the Trusts (Scotland) Act 1961.[98] A minor exception to the general rule in the previous sentence concerns the purchase of "any interest in residential accommodation (whether in Scotland or elsewhere) reasonably required to enable the trustees to provide a suitable residence for occupation by any of the beneficiaries". This was added to the statutory powers of trustees set out in section 4 of the Trusts (Scotland) Act 1921 by section 4 of the Trusts (Scotland) Act 1961 as a result of the decision in *Moss's Trs v King*.[99] In that case it was held that, even though the trustees had power to invest as if they were the beneficial owners of the trust estate, a purchase of a house for rent-free occupation by a beneficiary was not an investment.

92 See Draft Bill, cl 8.

93 See Draft Bill, cl 10.

94 This follows from the fact that trustees of land have in relation to the land all the powers of an absolute owner: see Trusts of Land and Appointment of Trustees Act 1996, s 6(1).

95 See Draft Bill, cl 8(3).

96 See, eg, the National Health Service (Scotland) Act 1978, Schedule 6, para 4(b) conferring power on the Scottish Hospital Trust to purchase and lease land.

97 *Wardlaw's Trs* 1902 10 SLT 349; *Anderson's Trs* 1921 SC 315; *Fletcher's Trs* 1949 SC 330.

98 Seeking a variation of the trust by "enlarging the powers of the trustees of managing and administering the trust estate".

99 1952 SC 523.

2.46 A power to invest as if the trustees were the absolute (or beneficial) owners of the trust estate implies a power to purchase land for the purposes of investment.[100] The Scottish Law Commission does not consider there to be a need to restrict the power of Scottish trustees to acquire land to the acquisition of land situated in the United Kingdom. Such trustees already have an express statutory power to purchase a residence anywhere in the world for occupation by a beneficiary, and it would be anomalous to restrict the acquisition of foreign immoveable property to such a use. In addition, trustees are subject to a duty of care at common law in the exercise of their functions. This duty requires them to consider the risks associated with purchasing immovable property in a foreign country that does not recognise trusts (such as claims by personal creditors of the trustees, and rights of succession on their death) in the same way as it requires them to weigh the risks of investing in securities in developing countries, for example, or the more volatile sectors of the British economy.

2.47 Trustees in Scotland with power to purchase land may do so by means of a loan heritably secured over the land or other heritable property in the trust estate. Section 4(1)(d) of the Trusts (Scotland) Act 1921 empowers trustees to borrow on the security of the trust estate, heritable as well as moveable, unless that act would be at variance with the terms or purposes of the trust.

2.48 **The Scottish Law Commission recommends that, in addition to their existing power to purchase a residence (whether in Scotland or elsewhere) for occupation by a beneficiary, trustees of Scottish trusts should have power to purchase land (whether in Scotland or elsewhere) by way of investment or for any other reason.[101]**

Scope and application

2.49 The two Commissions consider that the proposals made above should apply to most trusts, including charitable trusts. However, as has been explained, a statutory regime already exists to govern the investment function of pension trustees,[102] and we do not think that it would be appropriate to replace this with a different scheme. There are, in addition, certain other trust vehicles, known as unit trusts, where statute makes special provision for investment by trustees.[103] Accordingly, **it is recommended that the proposals for reform of the law relating to trustees' powers of investment should apply to all trusts except**

[100] But see footnote 86 above in relation to the Draft Bill.

[101] See Draft Clauses for Scotland, cl 1(2).

[102] See para 2.25 above.

[103] Financial Services Act 1986, s 81 confers power on the Secretary of State to make regulations as to *inter alia* the powers and duties of the managers and trustees of authorised unit trust schemes, including provision for restricting or regulating the investment and borrowing powers exercisable in relation to such schemes. Similar considerations also apply to trustees in England and Wales managing a fund under a common investment scheme or a common deposit scheme made under Charities Act 1993, s 24 or 25 (see Draft Bill, cl 37 and 38).

trusts whose trustees are given special statutory powers of investment by or under other enactments.[104]

2.50 It is also necessary to consider what the position should be in relation to trusts already in existence when the legislation to implement these proposals is brought into force. If the precedent set by the Trustee Investments Act 1961 on this point were to be followed, the new wide power of investment would apply to nearly all existing trusts.[105] However, the two Commissions agree with the view taken by the Treasury in its Consultation Document that this would not be the appropriate course to take now, because it would mean that in some cases the clear wishes of the testator or settlor would be overruled.[106]

2.51 The Trustee Investments Act 1961 swept away investment restrictions (save for restrictions deriving from statute) in trusts created before the Trustee Investments Act 1961 was brought into force.[107] We should clearly avoid "re-activating" such restrictions. However, as regards trusts created after the Trustee Investments Act 1961 was brought into force, it is considered that the trustees should have the benefit of the new wide power of investment unless their powers are expressly restricted by the trust instrument, or by legislative provisions.[108] Obviously, however, restrictions in trust instruments which confine trustees' powers to those set out in the Trustee Investments Act 1961, or those authorised by law, should be overridden.[109]

2.52 **The two Commissions recommend that the proposed wide powers of investment should be exercisable by trustees—**

(1) subject to restrictions on those powers imposed by or under any enactment whenever passed or made; and

(2) only in so far as a contrary intention is not expressed in any trust instrument made after 2 August 1961 — but that a power to invest trust funds in accordance with the Trustee Investments Act 1961, or in any manner authorised by law, conferred on trustees by such an

[104] See Draft Bill, cl 7; Draft Clauses for Scotland, cl 1. It should be noted, however, that there is express provision in the draft legislation for a number of these special statutory powers of investment to be converted into the new general power of investment recommended for trustees (see also para 2.23 above).

[105] See Trustee Investments Act 1961, s 1(3).

[106] This point arises in cases of "ethical investment": the settlor might, for example, have directed the trustees not to invest in the shares of companies engaged in certain industries (such as armaments or tobacco). Another situation that sometimes arises is where a cautious settlor has instructed his or her solicitor on preparing the trust deed to give the trustees restricted investment powers. It would be wrong in principle to override the settlor's clear instructions on such points.

[107] On 3 August 1961.

[108] This view was supported by those who responded to the Treasury's Consultation Document.

[109] These proposals accord with those made in the Treasury's Consultation Document and with the anticipated approach to reform of this aspect of the law in Northern Ireland.

instrument, should not be taken as expressing any such contrary intention.

2.53 In relation to the Law Commission's recommendations to extend the powers of trustees in England and Wales to purchase land, it is likely that many trustees and beneficiaries of existing trusts would welcome these additional powers. This seems to have been confirmed on consultation, as there was strong support in favour of conferring these powers on existing trusts as well as on new ones. The Scottish Law Commission supports this approach. Accordingly, **both Commissions recommend that the proposed powers relating to the purchase of land should apply to all trusts whether they were created before or after any legislation was brought into force, unless a contrary intention was expressed in the instrument creating the trust. Such powers should be in addition to any more limited powers to purchase land that have either been—**

(1) conferred by the instrument creating the trust; or

(2) previously granted by the court or the Charity Commissioners.

PART III
DUTIES OF CARE

INTRODUCTION

3.1 The remaining substantive Parts of this Report[1] concern the law in England and Wales only and contain recommendations of the Law Commission alone. The Commission begins by examining in this Part a central theme which runs throughout its recommendations for reform of the law governing trustees' powers and duties[2] — namely, the desirability of providing a clear statutory duty of care applicable to trustees in the performance of their functions under the new scheme. The present law on trustees' duties is considered in outline, before the Commission explains its approach to reform, the functions to which the new duty of care should apply, and the appropriate standard of care which should govern that duty.

THE PRESENT LAW

Duties of trustees generally

3.2 It is the paramount duty of trustees "to exercise their powers in the best interests of the present and future beneficiaries of the trust".[3] Trustees also have other, more specific, duties.[4] So, for example, trustees are usually under a duty to invest trust funds in their hands.[5] They must not profit from their office or cause loss to the trust as a result of a conflict between their fiduciary duty and self-interest. Trustees obviously have a duty to comply with the terms of the trust and must act impartially between the beneficiaries. They have particular obligations in relation to dealings with trust property as between a tenant for life and remainderman,[6] and as to the treatment of income and capital generally.[7]

3.3 The courts will intervene in the administration of a trust to enforce these duties, but they will not generally interfere with a discretionary power if the trustees are unanimous as to its exercise. The discretion has, after all, been given to the trustees and not to the court. Consequently, the general rule is that the courts will not interfere in the absence of bad faith on the part of the trustees, even though they may take the view that the trustees are not acting judiciously.[8] The courts will

1 That is, Parts III - VII.

2 And which has already been touched upon at paras 2.35 - 2.37 above.

3 *Cowan v Scargill* [1985] Ch 270, 286, 287, *per* Megarry V-C. The same principle applies to trusts for purposes which are either charitable or are within one of the exceptional categories of non-charitable purpose trusts which are valid.

4 See generally, D J Hayton, *Underhill and Hayton: Law of Trusts and Trustees* (15th ed 1995), chapter 11.

5 See para 2.13 above.

6 See D J Hayton, *Underhill and Hayton: Law of Trusts and Trustees* (15th ed 1995), p 522 *et seq*.

7 *Ibid*, p 534 *et seq*.

8 *Gisborne v Gisborne* (1877) 2 App Cas 300.

intervene, however, where the trustees fail or refuse to consider whether or not to exercise a discretionary power,[9] or where they act "capriciously".[10] In *Harris v Lord Shuttleworth*[11] it was held by the Court of Appeal that the courts do have control over trustees to the extent that trustees must—

(1) ask themselves the correct questions;

(2) direct themselves correctly in law and must, in particular, adopt a correct construction of the trust deed; and

(3) not arrive at a perverse decision, that is, one at which no reasonable body of trustees could arrive, taking into account all relevant and no irrelevant factors.

Duties of care

3.4 It was noted in Part II[12] that, in the performance of their duty to invest trust funds—

(1) trustees are already subject to a duty of care at common law;

(2) the standard of care to be expected from them in this regard is that of the ordinary prudent man of business; but

(3) remunerated and professional trustees are expected to meet a higher standard of care than other trustees.

3.5 In Part IV the Law Commission examines the principles which govern trustees' powers of delegation and, in particular, the functions which the trustees may delegate and in what circumstances.[13] What is relevant in the present context is the standard of care which is expected of trustees under the present law when they exercise their power to delegate their functions collectively.

3.6 Prior to 1926 the law was largely clear and uncontroversial. In essence, trustees were required to exercise reasonable prudence both in choosing an agent and in negotiating the terms on which that person was employed.[14] Once appointed,

[9] *Brophy v Bellamy* (1873) 8 Ch App 798.

[10] *Re Manisty's Settlement* [1974] Ch 17, 26.

[11] [1994] ICR 991, 999. Cf *Lee v The Showman's Guild of Great Britain* [1952] 2 QB 329. The principles which govern the control of trustees' discretion are similar to (but are not in all respects identical with) those which apply to the control of discretion in public law: see, eg, *Re Hastings Bass* [1975] Ch 25, 41.

[12] See paras 2.14 and 2.15 above.

[13] The present law in relation to each of these issues is outlined in Section 1 of Appendix C and is the subject of critical analysis in Part IV.

[14] See *Re Weall* (1889) 42 Ch 674. See also *Speight v Gaunt* (1883) 9 App Cas 1.

trustees were expected to exercise, in the supervision of their agents, "that ordinary prudence which a man uses in his own affairs".[15]

3.7 Today, the position is governed by statute and, in particular, by four provisions of the Trustee Act 1925.[16] However, it is apparent that these provisions do not form a coherent whole.[17] In addition, there is a widespread feeling that the standards expected of trustees in relation to the appointment and control of their agents is insufficiently demanding, particularly when contrasted with the law prior to 1926. In particular—

(1) The effect of section 23(1) of the 1925 Act is that trustees are not liable for a loss which results from the appointment of their agents, provided that they act in good faith. On one view at least, there is no longer any requirement (as there was before 1926) that they should act with reasonable prudence in appointing the agent.

(2) Although section 23(3), which gives trustees a specific power to employ a solicitor and/or a banker for certain purposes, preserves the liability of the trustees if they allow trust assets to remain in the hands of such agents longer than is necessary, this proviso does not affect any delegation made under section 23(1). In consequence, no well-advised trustee will ever delegate under section 23(3) as they will be better protected if they appoint under section 23(1).

(3) By virtue of section 30(1), trustees will seldom be liable for loss caused by an agent, unless they are guilty of "wilful default" (which, in this context, has been held to have its literal meaning of a conscious breach of duty or a reckless performance of a duty[18]). However, there are some cases of delegation that are not covered by section 30(1),[19] and in such cases a higher standard of conduct is required of the trustees: they will be liable if

[15] *Mendes v Guedalla* (1862) 2 J & H 259, 277; 70 ER 1054, 1061, *per* Page Wood V-C. It should also be noted that s 31 of Lord St Leonards' Act 1859 introduced a statutory default provision of a kind which was commonly included in trust deeds and which, at least on their face, appeared to limit the liability of trustees for the acts of their agents. Broadly speaking, this provision limited trustees' liability to losses arising as a result of their "wilful default". It seems that wilful default can, in this context, simply be equated to breach of duty (see *Re Chapman* [1896] 2 Ch 763, 776 *per* Lindley LJ). See also Consultation Paper, para 4.6 *et seq*.

[16] Namely, ss 23(1), 23(2), 23(3) and 30(1). See too Charities Act 1993, s 26; Pensions Act 1995, s 34 (discussed at para 4.44 below); and Stock Exchange (Completion of Bargains) Act 1976, s 5 (which protects trustees in certain circumstances who wish to buy or sell securities through a recognised clearing house or its nominee, or the nominee of a recognised investment exchange).

[17] Much criticism has focused on the interpretation given to the provisions in *Re Vickery* [1931] 1 Ch 572 (see Consultation Paper, para 4.32 *et seq.* and para 22 *et seq.* of Appendix C below).

[18] See *Re Vickery*, above.

[19] For example, where an agent is employed simply to transmit trust money or property from one person to another.

they fail to act with reasonable prudence.[20] There may therefore be cases where different standards of care apply to the initial appointment of the agent by the trustees and their subsequent control of him or her, even though there is no clear boundary between the two events.

PROPOSALS FOR REFORM

Approach to reform — a uniform duty of care

3.8 A recurrent theme of this Report is that the default powers which trustees have under the present law in the absence of express provision in the instrument creating the trust are insufficient to enable them to administer their trusts most effectively. However, in devising a scheme to confer wider administrative powers on trustees, an appropriate balance must be struck between extending the powers which trustees have as a matter of law, and the imposition of safeguards in an attempt to ensure that they act properly in exercising those powers.

3.9 A number of specific safeguards are recommended in this Report in relation to some of the particular powers proposed. For example, it has already been recommended in Part II that, in exercising their powers of investment, trustees must have regard to the need for diversification and to the suitability of investments[21] and should, in most cases, obtain and consider proper advice before exercising those powers.[22] However, the Law Commission considers that such safeguards should be underpinned by a general statutory duty of care which should apply to trustees in carrying out the functions examined in this Report. This would be so whether their powers derive from the provisions of the Draft Bill,[23] or (in the absence of contrary provision) from powers expressly conferred by the instrument creating the trust. In this way there would be a clear and accessible statement of the standard of care to be expected from trustees. This would be a uniform duty, with the same standard of care applying in respect of each of the functions to which it applied.

3.10 It will be apparent from the discussion in paragraphs 3.4 - 3.7 above, that there is nothing novel in the idea of imposing a duty of care on trustees in the performance of their functions. They are already subject to such a duty at common law in the performance of their investment function, and are under a statutory duty in exercising their limited powers of collective delegation — although, in this latter case, the applicable standard of care depends upon the particular provision of the Trustee Act 1925 under which the delegation is made and on whether the trustees are entitled to the protection of the indemnity implied by section 30 of that Act.[24] As we have explained,[25] sections 23 and 30 of the Trustee Act 1925 are unsatisfactory, a view that was strongly endorsed on consultation. The

[20] This was the test of liability for trustees in relation to the supervision of their agents prior to 1926.

[21] See para 2.31 above.

[22] See paras 2.32 - 2.34 above.

[23] See Appendix A.

[24] See above, para 3.7.

[25] See above, para 3.7.

Commission considers that it is necessary to replace them with a clearer and more appropriate duty of care that will apply to both the selection and supervision of agents by trustees. The need to replace these provisions provides an opportunity to create a single duty of care, which has obvious advantages, both in terms of clarity and coherence. Accordingly, **the Law Commission recommends that there should be a single statutory duty of care with which trustees must comply when carrying out certain prescribed functions.**[26]

Ambit of the new statutory duty

3.11 Before examining the functions to which any new duty of care should apply, two important preliminary points need to be made. First, the Law Commission's proposals for reform are not intended to detract in any way from the fundamental common law duties mentioned at paragraph 3.2 above. It will, for example, remain the paramount duty of trustees to act in the best interests of the present and future beneficiaries of the trust.[27]

3.12 Secondly, in recommending a new statutory duty of care, the Commission does not intend to alter the principles explained in paragraph 3.3 above relating to the exercise of discretionary powers by trustees. The decision *whether* to exercise a discretion will remain, as it is now, a matter for the trustees to determine.[28] That decision will *not* be subject to the new duty of care. However, once trustees have decided to exercise a discretionary function which is subject to the new duty, the *manner* in which they exercise it will be measured against the appropriate standard of care.[29]

3.13 The functions to which the new duty of care should apply will now be considered in turn.

Powers of investment

3.14 It has already been recommended that the new statutory duty of care should apply to trustees when exercising the general power of investment proposed in Part II or when exercising express powers of investment conferred by the instrument creating the trust.[30]

3.15 In proposing the wide powers of investment in Part II, the Law Commission and the Scottish Law Commission have had regard to the similar investment powers which are now enjoyed by the trustees of occupational pension schemes under

[26] See Draft Bill, cls 1, 2 and Sched 1.

[27] It should be noted that, in conferring powers on trustees of land, the Trusts of Land and Appointment of Trustees Act 1996, s 6(5) expressly provides that, in exercising the powers conferred by s 6 of that Act, trustees shall have regard to the rights of the beneficiaries. The Commission considers that this provision merely clarifies what was already the law in relation to all trustees. For this reason it is considered unnecessary to include a similar provision in the Draft Bill to implement the present proposals.

[28] The courts will intervene only in the circumstances outlined in paragraph 3.3 above.

[29] See para 3.22 *et seq.* below.

[30] See paras 2.35 - 2.37 above.

section 34 of the Pensions Act 1995.[31] However, the common law duty of care in investment matters is no longer of particular significance in relation to such trustees. This is because pension trustees may delegate their discretion to make any decision about investments to an appropriately qualified fund manager[32] and, in practice, are effectively obliged to do so.[33] Provided that they take certain steps in relation to the appointment and supervision of their fund manager, they have no liability for its acts or defaults.[34] Pension trustees are not subject to a statutory duty of care in the exercise of their wide investment powers, but this is clearly unnecessary given that those powers are invariably delegated to a professional fund manager. It should be emphasised, however, that pension trusts are unusual, and are not typical of trusts as a whole. By their very nature, such trusts will commonly require both the formulation of long-term investment strategies and professional investment management advice. As has already been explained, the recommendations in Part II of this Report do not apply to them.[35]

3.16 The position of trusts other than pension trusts — to which the recommendations in Part II of this Report on investment *will* apply — is very different. The nature and size of such trusts does of course vary considerably, but they include many that are modest, that only need to make simple investments (such as in bank or building society accounts) and which certainly do not require the services of discretionary fund managers. While larger trusts will, no doubt, employ discretionary fund managers, it would be wholly inappropriate to subject trusts other than pension trusts to the regime explained in the previous paragraph. In any event, the trustees of trusts other than pension trusts are presently subject to the common law duty of care when exercising their powers of investment. For all these reasons, the Law Commission considers that such trustees should be subject to the new statutory duty of care when exercising their powers to invest and to purchase land. In fact, it will be seen[36] that the standard of care which the Law Commission proposes may represent no more than a codification of the existing common law duty.[37]

3.17 **The Law Commission recommends[38] that, in relation to trusts subject to the law in England and Wales, the statutory duty of care should apply to a trustee—**

(1) when exercising the powers of investment and powers in relation to land proposed in Part II; and

[31] See paras 2.25 and 2.26 above.

[32] Pensions Act 1995, s 34(2). They may not, however, delegate their investment powers in any other way (except under Trustee Act 1925, s 25).

[33] See Financial Services Act 1986, s 191; Schedule 1, para 14.

[34] Pensions Act 1995, s 34(4).

[35] See para 2.49 above.

[36] See paras 3.22 *et seq.* below.

[37] See para 2.14 above.

[38] These recommendations were supported on consultation.

(2) when exercising any power of investment or power to acquire land conferred by the trust instrument (unless it appears from the trust instrument that the duty is not meant to apply).[39]

Powers of collective delegation and powers to employ nominees and custodians

3.18 In Parts IV and V the Law Commission recommends that trustees should be given wider powers to employ agents, nominees and custodians than they have under the present law. The Commission considers that aspects of these powers should be subject to the new duty of care, and that for this purpose it should not matter whether the employment is of an agent, a nominee or a custodian.

3.19 The Commission provisionally recommended in the Consultation Paper that, in determining the aspects of these powers which should be subject to the duty of care, it would be appropriate to follow the model of the Uniform Prudent Investor Act in the USA.[40] So far as relevant, section 9 of the UPIA provides that—

> (a) A trustee may delegate investment and management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:
>
> > (1) selecting an agent;
> >
> > (2) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and
> >
> > (3) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.
>
> (b) ...
>
> (c) A trustee who complies with the requirements of subsection (a) is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated.[41]

3.20 On consultation, there was overwhelming support for the Commission's view. Accordingly, **it is recommended that the statutory duty of care should apply to a trustee, in relation to the exercise of powers of delegation, or powers to employ nominees and custodians:**

[39] See Draft Bill, Schedule 1, paras 1 and 2.

[40] The Uniform Prudent Investor Act ("UPIA") was drafted by the National Conference of Commissioners on Uniform State Laws, and was approved by the American Bar Association in 1995. Although referred to as an "Act" it is of course not so, unless and until a particular state adopts it. Rather, it is declared by the National Conference to be "approved and recommended for enactment in all States". See also Consultation Paper, para 6.19 *et seq.*

[41] Para (b), which relates to the liability of the agent, and para (d), which relates to the jurisdiction of state courts, are omitted.

(1) proposed in Parts IV and V; or

(2) conferred by the trust instrument (unless it appears from the trust instrument that the duty is not meant to apply)

in the following circumstances—

(a) when entering into arrangements under which a person is appointed to act as an agent, nominee or custodian including, in particular—

(i) selecting the person who is to act;

(ii) determining any terms on which he or she is to act; and

(iii) if the person is to exercise asset management functions, the preparation of a policy statement;[42] and

(b) when carrying out his or her duty to keep those arrangements under review.[43]

Powers of insurance

3.21 In Part VI the Law Commission recommends that trustees should be given wider powers to insure trust property than they have under the present law. Although the Commission has concluded that trustees should not be placed under a statutory duty to insure,[44] the new duty of care should apply to the exercise of their *powers* of insurance. Consequently, once trustees have decided to insure trust property, the duty of care should apply to the selection of an insurer and to the terms on which insurance cover is taken out. Accordingly, **it is recommended that the statutory duty of care should apply to a trustee—**

(1) when exercising the power to insure property proposed in Part VI; and

(2) when exercising any corresponding power to insure trust property conferred by the trust instrument (unless it appears from the trust instrument that the duty is not meant to apply).[45]

The standard of care

3.22 In its Consultation Paper,[46] the Law Commission considered five options as possible standards of care by which the conduct of trustees might be judged when

[42] See paras 4.19 *et seq*. below.

[43] See Draft Bill, Schedule 1, para 3.

[44] Nevertheless, a failure to insure may in certain circumstances amount to a breach of the trustees' paramount duty to act in the best interests of the beneficiaries. See para 6.9 *et seq*. below.

[45] See Draft Bill, Schedule 1, para 4.

[46] At para 6.46 *et seq*.

carrying out functions which are to be subject to the statutory duty of care. The Consultation Paper asked whether trustees should be required to—

(1) act in good faith;

(2) be vicariously liable for all the acts and defaults of their agents;

(3) satisfy a series of specified criteria, compliance with which would be a defence to any proceedings;

(4) act with the care of the ordinary prudent person of business; or

(5) act with the care and diligence that may reasonably be expected having regard to the nature, composition and purposes of the particular trust, the skills which the trustees actually have, or if they are employed as professional trustees, those which they either ought to have or hold themselves out as having.

3.23 Options (1) and (2) are at opposite ends of the scale of possible standards of care, and the Commission rejected both of these options as being extreme.[47] Option (3) was also rejected as it is impossible to lay down any useful criteria that could apply to all the functions that are to be subject to the duty of care. Consequently, the Commission recommended that the appropriate standard was either option (4) or option (5).

3.24 This recommendation met with widespread approval on consultation. However, there was no consensus of opinion among respondents as to whether option (4) or option (5) was the better alternative. In fact, the first alternative (namely, option (4)) would be no more than a restatement of the traditional common law rule that "it is the duty of a trustee to conduct the business of the trust with the same care as an ordinary prudent man of business would extend towards his own affairs".[48] As such it has attractions.[49] It is also the standard employed by the UPIA in relation to trustee delegation.[50] However, the Law Commission considers that, in formulating the new statutory duty, express regard should be had to the particular skills and position of the trustees, and to the circumstances of the trust. It has come to this conclusion for the following reasons—

[47] It should be noted that it is not proposed that the new duty of care should apply where an *individual* trustee delegates any of his or her functions under Trustee Act 1925, s 25. In these circumstances the trustee must accept vicarious liability for the acts or defaults of his or her agent. However, this is justified given that s 25 confers wider powers of delegation on individual trustees than the powers of collective delegation proposed in Part IV.

[48] *Bartlett v Barclays Bank Trust Co Ltd (No 1)* [1980] Ch 515, 531, *per* Brightman J. See also para 2.14 above.

[49] It is the standard which is generally applicable to trustees when conducting the business of the trust, and has also been adopted by the Pensions Act 1995, s 34(4) in relation to the delegation of investment decisions to a fund manager.

[50] See para 3.19 above.

(1) As the statutory duty of care will be a key regulator of trustees' conduct in relation to the functions to which it applies, the standard of care must be a robust and, within reason, a demanding one.

(2) The standard must also be flexible. Although the standard to be expected of trustees should require more than good faith alone, it should not be blind to the character of individual trustees. Professional trustees should be held to the high standard of skill and care which befits their qualifications and experience. On the other hand, this does not mean that an incompetent trustee should be absolved from responsibility just because he or she was plainly unsuited to the task.[51] Every trustee should be required to exercise such care and skill as is reasonable in the circumstances. However, the level of care and skill which is reasonable may *increase* if the trustee has special knowledge or skills, (or holds him or herself out as having such knowledge or skills), or if the trustee is acting in the course of a business or profession.

(3) There may, in fact, be little difference between the two alternatives.[52] This is because, in determining whether a trustee has acted prudently, the present law may already recognise a gradation as to the standards expected according to whether the trustee is an unpaid layman, a paid professional, or a professional trustee who holds him or herself out as such.[53] The Commission considers that it is desirable to put the matter beyond doubt by expressing the subjective element of the test on the face of the statute.

(4) There is precedent in other jurisdictions for adopting a standard of care in terms similar to those that are now proposed: there are parallels both with the UPIA and with the Model Trustee Code for Australian States and Territories.[54]

3.25 **The Law Commission recommends that, when carrying out any function to which the statutory duty of care applies, a trustee should be required to exercise such care and skill as is reasonable in the circumstances, having regard in particular—**

(1) to any special knowledge or experience that he or she has or holds him or herself out as having; and

[51] In formulating the new duty of care, the Law Commission has had regard to the suggestion that this may have been the result of option (5) as originally worded.

[52] This may well explain why, on consultation, there was no consensus in favour of either alternative over the other.

[53] See *Re Waterman's Will Trusts* [1952] 2 All ER 1054; and *Bartlett v Barclays Bank Trust Co Ltd (No 1)*, above. See also para 2.15 above.

[54] In addition, the Law Commission and the Scottish Law Commission have recently put forward a test in similar terms as one possible option in relation to the standard of care expected of a director: see Company Directors: Regulating Conflicts of Interests and Formulating a Statement of Duties: A Joint Consultation Paper; Law Commission Consultation Paper No 153; Scottish Law Commission Discussion Paper No 105, paras 15.20 - 15.25. See too *ibid*, Part XIV.

(2) if he or she 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 course of that kind of business or profession.[55]

[55] See Draft Bill, cl 1.

PART IV
TRUSTEES' POWERS OF DELEGATION

INTRODUCTION

4.1 There is an important distinction between delegation of functions by an *individual* trustee, and delegation by trustees as a *collective body*. It is the latter form of delegation which is the concern of this Part of the Report. The law governing delegation by individual trustees[1] is in fact the subject of a Bill presently before Parliament,[2] and which is likely to be enacted as the Trustee Delegation Act 1999, implementing recommendations made by the Law Commission in 1994.[3] In its 1994 Report, the Commission recognised that—

(1) a trust of land was imposed by statute in cases of beneficial co-ownership of land in order to facilitate conveyancing; but

(2) the rules normally applicable to delegation by individual trustees were not wholly appropriate to such trusts.

The new Act will provide that, if a trustee has a beneficial interest in the trust property, he or she may delegate any of his or her functions by power of attorney. The delegate may be his or her co-trustee even if the donor and donee of the power are the only trustees. The Law Commission had also criticised the mis-match between section 25 of the Trustee Act 1925 and section 3(3) of the Enduring Powers of Attorney Act 1985,[4] and the new Act will repeal the latter provision.[5]

4.2 In this Part the Law Commission considers how the law on collective delegation by trustees should be reformed in the light of the responses to the provisional recommendations that were made in the Consultation Paper. The Commission begins by considering the general principles governing collective delegation. It outlines the present law and the problems to which it gives rise. Controls on collective delegation and safeguards for beneficiaries are reviewed, as is the treatment of these issues in the Consultation Paper. This is followed by an examination of a number of specific powers of delegation and the application of the Commission's recommendations for reform. Finally, the special position of charitable trusts and pension trusts is considered.

[1] For a summary of the law relating to delegation by individual trustees see Appendix C, paras 9 - 11. See also, Consultation Paper, para 3.35 *et seq*.

[2] At the time when this Report was approved by Commissioners, the Trustee Delegation Bill was awaiting its Second Reading in the House of Commons, having already completed its passage through the House of Lords.

[3] Law of Trusts: Delegation by Individual Trustees (1994) Law Com No 220.

[4] This provision allows a trustee to choose to delegate his functions by using an enduring power of attorney, which does not involve any of the safeguards for beneficiaries to which delegation under Trustee Act 1925, s 25 is subject.

[5] The new Act will substitute a new and improved version of the present Trustee Act 1925, s 25.

4.3 The Law Commission's recommendations in this Part relate to the law in England and Wales only.

GENERAL POWERS OF COLLECTIVE DELEGATION

The present law

4.4 The present law governing the ability of trustees to delegate their functions is summarised in Section 1 of Appendix C to this Report.[6] It will be evident from that summary that the principle encapsulated in the maxim *delegatus non potest delegare* does not act as an absolute bar on delegation by trustees. What the principle *does* prohibit (in the absence of express authority in the trust instrument or will) is the delegation by trustees of their dispositive duties to distribute the trust property to those entitled to it under the trust, or their fiduciary discretions,[7] such as the selection of trust investments,[8] or the decision whether or not to sell or lease trust property.[9]

4.5 Nevertheless, trustees may delegate their ministerial functions, and this is so whether or not there is any necessity for them to do so.[10] They may employ an agent to transact any business or to do any act that is required to be transacted or done in the administration of the trust or of a deceased's estate, whether or not the matter is one which the trustees could themselves have carried out.[11]

4.6 In the Law Commission's view, the deficiencies in the present law are not as to *when* trustees may delegate, but as to *what* they may delegate. Indeed, the Commission took the same view in the Consultation Paper.[12] Whilst certain limitations on trustees' powers of delegation are wholly appropriate,[13] others now constitute a serious impediment to the administration of trusts. Trusteeship is an increasingly specialised task that often requires professional skills that the trustees may not have. Far from promoting the more conscientious discharge of the obligations of trusteeship, the prohibition on the delegation of fiduciary discretions may force trustees to commit breaches of trust in order to achieve the most effective administration of the trust.

6 A more detailed statement of the present law may be found in Part III of the Consultation Paper.

7 What were described as "powers implying personal discretion": C J W Farwell and F K Archer, *Farwell on Powers* (3rd ed 1916) p 498.

8 See, eg *Rowland v Witherden* (1851) 3 Mac & G 568, 574; 42 ER 379, 381.

9 See on powers of sale: *Clarke v The Royal Panopticon* (1857) 4 Drew 26, 29; 62 ER 10, 12; *Green v Whitehead* [1930] 1 Ch 38 (affirmed on appeal on a different point: (1929) 46 TLR 11); and on powers of leasing: *Robson v Flight* (1865) 4 De G J & S 608, 614; 46 ER 1054, 1056.

10 Trustee Act 1925, s 23(1). See also the comments of Maugham J in *Re Vickery* [1931] 1 Ch 572, 581; but cf the comments of Eve J in *Green v Whitehead* [1930] 1 Ch 38, 45. For the special position of charitable and pension trusts see para 4.37 *et seq*. below.

11 See *Re Vickery*, above, at p 581.

12 See Consultation Paper, para 5.2.

13 Such as the requirement that the act delegated must be one which is "required to be transacted or done": see Trustee Act 1925, s 23(1).

Proposals for reform

4.7 The Consultation Paper criticised the present characterisation of—

(1) powers of investment; and

(2) some powers of management;

as in all respects fiduciary (and therefore wholly non-delegable) as outmoded. An important practical result of this characterisation is that many trustees cannot employ discretionary fund managers.[14] In practice, however, for any trust that has substantial investments, the employment of a discretionary fund manager is a necessity, a fact that has been judicially recognised.[15] In view of this, the Law Commission provisionally proposed[16] that the present distinction between ministerial acts and fiduciary powers should be abandoned.[17] It proposed that the distinction should in future be between trustees' powers to administer the trust and their dispositive powers to distribute trust property for the objects of the trust. The former but not the latter would be delegable by trustees.[18]

4.8 This proposal was strongly supported on consultation.[19] However, consideration of some of the detailed comments received from respondents has led the Commission to conclude that the distinction between administrative powers (which would be delegable) and distributive powers (which would not) would, if left unqualified, enable trustees to delegate in one case where this would be inappropriate, namely in relation to powers to appoint and replace trustees.[20] Although such powers are evidently not "distributive" in nature,[21] it is equally clear that trustees should not be able to delegate their discretions in such matters without express authority in the instrument creating the trust.

4.9 Accordingly, **the Law Commission recommends that, subject to the expression of any contrary intention in the trust instrument, trustees—**

[14] Trustees *may* delegate their trusts and powers collectively (1) in relation to trust property which is situated outside the UK: see Trustee Act 1925, s 23(2); or (2) if they are expressly empowered to do so by the trust instrument.

[15] See *Steel v Wellcome Custodian Trustees Ltd* [1988] 1 WLR 167, 174.

[16] See Consultation Paper, para 6.25.

[17] The Commission noted that the distinction has already been abrogated in relation to pension trusts; see Pensions Act 1995, s 34.

[18] Specific proposals were made in relation to charitable trusts. See para 4.37 *et seq.* below.

[19] Indeed, all bar one of the respondents who addressed the point were in favour of the broad thrust of the proposal.

[20] A statutory power to appoint and replace trustees is given by the Trustee Act 1925, s 36. The power applies to trustees if there is no person nominated for the purpose of appointing new trustees by the trust instrument (or no such person able and willing to act) and enables them to appoint one or more persons as trustee in the place of a trustee who is dead, remains out of the United Kingdom for more than 12 months, desires to be discharged, refuses or is unfit to act, is incapable of doing so, or is aged under 18 (s 36(1)). In addition, provided that there are not more than three trustees (none of them being a trust corporation) the trustees may appoint an additional trustee or trustees, provided that the total number of trustees does not then exceed four (s 36(6)).

[21] They do not relate to the distribution of trust assets.

(1) should have power to delegate to agents their powers to administer the trust (other than powers to appoint or replace trustees), including their powers of investment and management; but

(2) should have no authority to delegate their powers to make decisions as to the distribution of the income or capital of the trust for the benefit of its objects.

The power to delegate under (1) could either be in relation to a specific act or acts, or by way of a general retainer. There should be no requirement that the delegation should be made by power of attorney.[22]

4.10 **It is also recommended that the trustees should, so long as the delegation continues, keep under review the arrangements relating to it and the manner in which those arrangements are implemented.**[23]

4.11 In accordance with the Law Commission's provisional view in the Consultation Paper, **these recommendations should be without prejudice to—**

(1) the power of an individual trustee to delegate all or any of his or her trusts, powers and discretions under section 25 of the Trustee Act 1925; or

(2) the need to comply with any conditions laid down by law or by the instrument creating the trust in relation to the exercise of any power of investment or management.[24]

The exception for foreign property

4.12 Under the present law, the one situation in which trustees do have a statutory power to delegate all or any of their functions — including their fiduciary powers — is in relation to trust property that is situated outside the United Kingdom.[25] In the Consultation Paper the Law Commission proposed that the substance of this provision should be preserved so that trustees would retain a default power to delegate their *distributive* functions in relation to foreign property.

4.13 This proposal was criticised by a number of respondents to consultation and, on reflection, the Commission now considers it to be unnecessary. As one respondent commented, the exception to the non-delegation rule is a relic of an age of slow communication. Now that global communication is instantaneous, and foreign property is much more commonly held by English trusts than it used to be, it would be anomalous to give trustees different powers merely because of the geographical location of the property concerned. **It is therefore recommended that, subject to a saving to protect the validity of delegations made prior to**

[22] See Draft Bill, cl 11(1) and (2).

[23] See Draft Bill, cl 22. At present trustees have a common law duty to keep investments under regular review (see *Nestle v National Westminster Bank Plc* [1993] 1 WLR 1260). The recommendation is in line with that duty.

[24] See Draft Bill, cl 26.

[25] Trustee Act 1925, s 23(2).

the coming into force of any new legislation, the present exception for foreign property should be abolished, so that the geographical location of trust property should no longer have a bearing on the trustees' powers of delegation.

CONTROL OF COLLECTIVE DELEGATION — SAFEGUARDS FOR BENEFICIARIES

4.14 The Law Commission recognised in the Consultation Paper that the width of the proposed power of delegation poses a potential risk to the security of the beneficiaries or other objects of the trust, and that it is therefore necessary to have in place proper safeguards for their protection. A range of such safeguards was advocated. These can be characterised under the headings—

(1) duty of care;

(2) restrictions on the delegation of asset management functions; and

(3) controls on the payment of fees and expenses.

Duty of care

4.15 It has already been recommended in Part III that there should be a new uniform statutory duty of care which should apply to trustees in carrying out the various functions examined in this Report.[26] For the reasons set out in that Part,[27] **the Law Commission recommends that the statutory duty of care should apply to a trustee, in relation to the exercise of powers of delegation:**

(1) proposed in this Part; or

(2) conferred by the trust instrument (unless it appears from the trust instrument that the duty is not meant to apply)

in the following circumstances—

(a) when entering into arrangements under which a person is authorised to exercise functions as an agent including, in particular—

(i) selecting the person who is to act;

(ii) determining any terms on which he or she is to act; and

(iii) if the person is to exercise asset management functions, the preparation of a policy statement;[28] and

[26] See para 3.8 *et seq*. above.

[27] See para 3.18 *et seq*. above.

[28] See paras 4.19 *et seq*. below.

(b) when carrying out his or her duty to keep those arrangements under review.[29]

Restrictions on the delegation of asset management functions

4.16 In addition to the imposition upon trustees of a statutory duty of care in exercising their powers of collective delegation, and to the general limitations on those powers,[30] the Law Commission provisionally recommended in the Consultation Paper that, for the delegation of *certain specific functions*, there should be additional requirements upon the trustees. The functions in question are all ones in respect of which the power to delegate will be conferred on trustees as a default power for the first time, namely functions relating to—

(1) the investment of assets subject to the trust;

(2) the acquisition of property which is to be subject to the trust; and

(3) managing property which is subject to the trust and disposing of, or creating or disposing of an interest in, such property.[31]

4.17 None of these "asset management" functions are ones which should be delegated as a matter of course. Indeed, it is expected that, with the exception of the power to delegate the trustees' power of investment, such functions will tend to be delegated only by larger trusts.[32] Because of the special nature of these functions, therefore, it is appropriate that the law should impose restrictions to ensure that trustees do not take decisions lightly as to their delegation.[33] The Commission considers that by imposing a formal structure on the delegation of asset management functions trustees may be encouraged to follow best practice in arriving at, and carrying through, decisions on these matters.

4.18 The first condition that the Law Commission proposes is that an agreement to delegate any asset management function should be made or evidenced in writing.[34] The general law does not impose formality requirements on the appointment of agents[35] and, for the most part, no such requirements will apply to the appointment of agents under the powers proposed in this Part. However, although certain functions (particularly those relating to purely administrative matters) may

[29] See Draft Bill, Schedule 1, para 3.

[30] See para 4.11 above.

[31] See Draft Bill, cl 15(5).

[32] It should be noted that investment functions may be delegated on a basis which stops short of the appointment of a discretionary fund manager. Trustees may find it expedient to give an investment adviser a power to act on behalf of the trust in urgent cases (perhaps in consultation with the chairman of the trustees).

[33] As was indicated at para 6.30 of the Consultation Paper, trustees would be expected to undertake both some kind of cost-benefit analysis of the proposed delegation and a risk assessment, so as to be sure that it was in the best interests of the trust to act in this way.

[34] See Draft Bill, cl 15(1).

[35] Eg, there is no requirement for the appointment of an agent under Trustee Act 1925, s 23 to be made or evidenced in writing.

be delegated with very little formality, the terms on which asset management functions are delegated should always be spelt out clearly,[36] and this is best achieved by an agreement made or evidenced in writing.

4.19 The Law Commission also considers that trustees who wish to delegate their asset management functions should be required both to have and to enforce a written policy statement which reflects their fiduciary obligations.[37] Such a requirement would be appropriate, bearing in mind that only the trustees of substantial trusts are likely to wish to delegate management and investment *discretions*.[38] The trustees would be under a duty to consider from time to time whether the policy statement needed revision or replacement, and whether their agent was acting in accordance with it.[39]

4.20 Some respondents to the Consultation Paper queried whether there would be any effective mechanism for enforcing such additional requirements.[40] However, the Law Commission considers that they will act as useful safeguards for the protection of beneficiaries and trust objects in the special circumstances in which they will apply. The effectiveness of these requirements does not depend upon the existence of a tailor-made enforcement mechanism. They are not dissimilar in nature to requirements which attach to the exercise of other trustee powers. For example, under the present law, trustees exercising a power of investment are (in the absence of express authorisation in the trust instrument) limited in their selection of investments.[41] If they purchase investments that are "unauthorised", they will be liable for any loss which is incurred by the trust. If no loss is incurred, however, the trustees escape liability notwithstanding their clear breach of trust. On the same basis, trustees who fail to adhere to the restrictions on the delegation of their asset management functions will be liable *if* the trust incurs a loss as a result of that failure.

4.21 **The Law Commission recommends that if trustees wish to delegate their functions relating to—**

(1) the investment of assets subject to the trust;

(2) the acquisition of property which is to be subject to the trust; and

[36] Indeed the trustees would be in breach of the duty of care if this were not the case.

[37] See Draft Bill, cl 15(2)-(4). See also Consultation Paper, paras 6.31 and 6.32.

[38] Although smaller trusts do, of course, engage the services of financial and property professionals, this is more likely to be in an advisory capacity, with the trustees retaining control of the actual management and investment decisions.

[39] The trustees would also be under a duty to keep the arrangements relating to the delegation itself under review (see para 4.10 above and Draft Bill, cl 22).

[40] Cf Pensions Act 1995, ss 3, 10. Pension trustees who fail to adhere to the conditions attached to their power to delegate their investment functions may be fined or disqualified. This enforcement mechanism is policed by the Occupational Pensions Regulatory Authority, and could not be used as a model for a more general enforcement regime, because there would be no authority to oversee it.

[41] Trustee Investments Act 1961. See also para 2.4 *et seq.* above.

(3) managing property which is subject to the trust and disposing of, or creating or disposing of an interest in, such property

they should be required to—

(a) formulate and keep under review a policy statement that gives guidance as to how the functions should be exercised with a view to ensuring that they will be exercised in the best interests of the trust;

(b) secure the agreement of the agent to act in accordance with the policy statement; and

(c) from time to time assess whether he or she is doing so.

4.22 **It is also recommended that trustees should only delegate the functions mentioned in the previous paragraph by an agreement which is in or evidenced in writing.**

Controls on the payment of fees and expenses

4.23 At present trustees have a statutory power to pay their agents[42] and are entitled to be reimbursed out of the trust fund for the expenses they incur in carrying out their duties.[43] As these provisions will be swept away by the proposed reforms, it will be necessary to provide a new statutory provision with similar effect. Although the relevant provisions of the Trustee Act 1925 do not qualify the power to pay agents or the right to reimburse expenses, such a qualification has been introduced by the courts.[44] Accordingly, **it is recommended that the existing statutory provisions that confer powers on trustees to pay agents and to be reimbursed for their own expenses incurred in the execution of their duties should be replaced by a provision that would make it clear that trustees are authorised only to pay the reasonable fees of their agents and to reimburse expenses (whether incurred by an agent or by the trustees themselves) if the expenses are properly incurred.**[45]

SPECIFIC POWERS OF COLLECTIVE DELEGATION

4.24 In the Consultation Paper the Law Commission identified four particular situations where, if delegation were to be permissible, the degree of risk to the trust would be significantly higher than it is in the ordinary case where trustees employ an agent. The four situations would arise if trustees—

(1) appointed an agent and authorised him or her to sub-delegate all or part of the work in question;

[42] Trustee Act 1925, s 23(1).

[43] *Ibid,* s 30(2).

[44] Trustees only have power to pay "proper costs incident to the execution of the trust". See *Holding and Management Ltd v Property Holding and Investment Trust Plc* [1989] 1 WLR 1313, 1324 *per* Nicholls LJ.

[45] See Draft Bill, cl 31 and 32.

(2) contracted with an agent on terms that limited his or her liability;

(3) contracted with an agent on terms which sanctioned conduct which would otherwise have involved a conflict of duty and interest; or

(4) delegated to one or more of their own number.

Sub-delegation and limitation of agents' liability

4.25 As far as situations (1) and (2) are concerned, in the absence of express authority in the trust instrument, trustees may not, under the present law, employ agents on terms which would permit them to sub-delegate (except in relation to trust assets outside the UK).[46] It seems likely (although it is not free from doubt) that trustees *can* properly engage an agent on the basis that he or she will not be liable for negligence in the performance of the agency.[47]

4.26 The Law Commission considers that trustees do need to be able to delegate on terms which permit sub-delegation or which in some way exclude or restrict the agent's liability. If trustees wish to engage the services of a discretionary fund manager, for example, they are only likely to be able to do so by accepting their chosen fund manager's standard terms and conditions of business, which commonly include provision for sub-delegation and may limit the manager's liability.[48] This is a pragmatic approach:[49] the law should recognise that, in practice, trustees often have little option but to delegate on such terms. However, the Commission also takes the view that trustees should only be permitted to do this in cases where it is reasonably necessary for them to do so.[50] Accordingly, **it is recommended that, where it is reasonably necessary for them to do so, trustees should have power—**

(1) to authorise their agents to employ sub-agents; and

(2) to employ agents on terms which limit their liability.

Conflicts of duty and interest

4.27 A similar practical problem is encountered if trustees wish to sanction conflicts of interest on the part of their agents.[51] Again, if trustees wish to employ a discretionary fund manager, for example, they may have little choice but to do so on terms which authorise the fund manager to enter into transactions in which it has a material interest and which may involve a potential conflict with its duty to

[46] See Consultation Paper, para 3.21.

[47] See Consultation Paper, para 3.25.

[48] See Consultation Paper, para 2.20 *et seq*.

[49] And one which received a clear endorsement on consultation.

[50] See Draft Bill, cl 14(2) and (3). Any exercise of the power would, of course, be subject to the new duty of care in addition to the express requirement of reasonable necessity.

[51] Trustees may, for example, wish to allow an agent to reserve contractual rights to sell his or her own property to the trust, to purchase property from the trust; or to receive some additional commission or in some other way profit from the agency.

the customer.[52] Trustees cannot enter into arrangements which conflict with their fiduciary obligations, however, and it is by no means clear that the present law permits them to authorise others to do what they themselves have no power to do.[53]

4.28 In its treatment of this issue in the Consultation Paper, the Law Commission recognised that this situation is inherently undesirable because it has the potential to remove the protection which equity's strict rules on fiduciaries' conduct provide for the objects of a trust. Whilst recognising that there could be some cases where trustees would find it desirable or necessary to contract on such a basis, the Commission refrained from making any provisional recommendation on the point in the Consultation Paper. Instead, it invited views as to whether trustees should be permitted to sanction actual or potential conflicts of interest by their agents in the absence of express authority in the trust instrument and, if so, in what circumstances.

4.29 The responses which were received show that there is a widely held view that trustees *should* be permitted to sanction conflicts of interest by their agents in some circumstances.[54] Having considered those responses, the Commission has concluded that because there may be circumstances in which trustees have no practical choice but to contract on this basis if they wish to employ a particular fund manager, the law should not prevent them from doing so if it is in the best interests of the trust. However, the Commission does not consider that trustees should have an unfettered power to sanction conflicts of interest, given that they are at least as undesirable as sub-delegation or the limitation of agents' liability. Trustees should only be permitted to sanction conflicts of interest therefore in cases where it is reasonably necessary for them to do so. That will only be the case where it is in the best interests of the trust. **The Law Commission therefore recommends that trustees should have power to authorise conflicts of interest by their agents if it is reasonably necessary to do so.**[55]

Delegation to one or more co-trustees

4.30 Trustees can probably already delegate their *ministerial* functions to one or more of their own number as agent of the trust. Under section 25 of the Trustee Act 1925 they may delegate their *fiduciary* powers to two or more co-trustees.[56] In view of the overwhelming support from respondents for the provisional proposal which it made in the Consultation Paper, the Law Commission recommends that trustees

[52] Eg, under the IFMA Terms. Such terms are by no means universal in fund management agreements.

[53] See Consultation Paper, para 3.26 *et seq*.

[54] However, there was no clear consensus as to what those circumstances should be.

[55] See Draft Bill, cl 14(2) and (3).

[56] Section 25 of the Trustee Act 1925 will be replaced by an amended provision under the Trustee Delegation Bill, cl 5 (as explained at para 4.1 above, the Bill implements the Law Commission's report, The Law of Trusts: Delegation by Individual Trustees (1994) Law Com No 220). Once the Bill is enacted and comes into force, the present restriction in s 25(2) will be lifted, so that it will be possible for trustees to delegate their fiduciary powers to just one of their number. A trustee may already delegate to one co-trustee if that trustee is a trust corporation: Trustee Act 1925, s 25(2).

should be permitted to delegate collectively a function to one or more of their own number whenever they might have delegated it to an agent and subject to the same restrictions.[57]

4.31 In putting this forward as a provisional recommendation in the Consultation Paper, however, the Commission thought that trustees should be vicariously liable for the acts and defaults of the trustee(s) to whom they delegate their functions. Having reconsidered this aspect of the proposal in the light of the responses on consultation, the Law Commission has now concluded that it may place too onerous a burden on trustees. The Commission considers that it would suffice if trustees were subject to the same standard of care that should apply generally under the new duty of care when trustees delegate their powers.[58]

4.32 Two justifications were given in the Consultation Paper[59] for the imposition of a higher standard of care in this situation:

(1) Vicarious liability is imposed by section 25 of the Trustee Act 1925 in the case of delegations by individual trustees, and by section 34 of the Pensions Act 1995 where pension trustees collectively delegate their investment discretions to two or more of their own number.

(2) Vicarious liability would act as a curb on "passive delegation" by trustees.

4.33 On consultation, however, a large number of respondents were opposed to the imposition of a higher standard of care in these circumstances, and the Commission has been persuaded by the argument that an adequate deterrent to passive delegation would be provided by the general standard of care: trustees would be required to take care in selecting and appointing their agent, and in keeping the arrangement under review. Provided that they have done so, it should not matter whether the agent is a co-trustee.[60] The Commission also considers that the harmonisation of the standard of care applicable to these different aspects of trustee delegation can be reconciled with both provisions mentioned in paragraph 4.32(1) above. The fact that, under the scheme now proposed, trustees will be subject to a statutory duty of care when delegating to one or more of their own number removes the need for them to accept vicarious liability in such circumstances.[61]

[57] See Draft Bill, cl 12(1).

[58] See para 3.22 *et seq.* above.

[59] At para 6.49.

[60] It was also suggested on consultation that, in a case where a trustee has done enough to meet the general standard of care, he or she would be likely to be granted relief from personal liability anyway under Trustee Act 1925, s 61.

[61] Trustee Act 1925, s 25 imposes vicarious liability because there is no duty of care in the selection or supervision of the agent under that provision, not because the agent is a co-trustee. Similarly, pension trustees are vicariously liable if they delegate investment functions to a sub-committee (Pensions Act 1995, s 34(5)), but have no duty to take care in so doing. They are not vicariously liable for the defaults of a fund manager properly appointed under the Act but, by virtue of section 34(4), they are under a duty of care in selecting and supervising the fund manager.

4.34 The difficult issue of remunerating professional trustees is considered in Part VII of this Report. In the light of the Law Commission's conclusions on that subject, (and in conformity with its recommendations in relation to the payment of fees and expenses[62]), **it is recommended that where trustees delegate to one of their own number, the trustee-agent should be entitled to recover—**

(1) any expenses properly incurred in performing the agency;[63] and

(2) if he or she (not being a trust corporation)—

(a) acts in a professional capacity; and

(b) obtains the authorisation of the trustees to charge for his or her services in performing the agency;

such remuneration as is reasonable in the circumstances for the provision of those services by that trustee.

APPLICATION OF POWERS OF COLLECTIVE DELEGATION

4.35 The Law Commission remains strongly of the view[64] that any new powers of delegation should apply to all trusts, whether or not created before the reforms are brought into force. It is mainly existing trusts which will benefit from the proposed reforms. Nowadays, most professionally drawn trusts expressly confer wide powers of delegation. It is existing trusts that are prejudiced by the narrowness of the present statutory powers of delegation.

4.36 The Commission also considers that the new legislation should contain a provision equivalent to that in section 69(2) of the Trustee Act 1925. This will make the application of the new powers subject to the expression of a contrary intention in the trust instrument. Although section 69(2) has given rise to some litigation in the past, the Commission considers that, to be effective, its proposed reforms must apply both to new trusts and to existing ones, and that the principle embodied in section 69(2) is correct. In addition, the fact that trustees may have previously applied to court or to the Charity Commissioners for additional delegation powers[65] should not operate to the detriment of those trustees when the new statutory powers come into force. Accordingly, **the Law Commission recommends that any new power of delegation should apply to trusts in existence when any legislation is brought into force as well as to trusts created thereafter.[66] Such powers should be in addition to any others that the trustees may have, but should be subject to any restriction or exclusion imposed by the trust instrument or by or under any enactment.[67]**

[62] See para 4.23 above.

[63] See Draft Bill, cl 31(1).

[64] Which it expressed in the Consultation Paper (see para 6.58).

[65] See Consultation Paper, paras 2.42, 3.41.

[66] See Draft Bill, cl 27.

[67] See Draft Bill, cl 26.

CHARITABLE TRUSTS

The need for reform and the problems associated with it

4.37 The present law on trustees' powers of delegation applies to charitable trusts as much as it does to other trusts. However, the Charity Commissioners have a statutory power to authorise dealings with charity property which would not otherwise be within the powers of the trustees.[68] This power can be used to extend the trustees' powers of delegation — particularly in cases where it would be appropriate to employ a discretionary fund manager to deal with investment matters.[69] Where the Charity Commissioners make an order authorising the trustees to employ a discretionary fund manager, the terms of that order will invariably require the trustees to satisfy themselves of the standing of the manager they select and to ensure that he, she or it satisfies certain criteria.[70]

4.38 The fact that a mechanism exists to address the problem caused by the worst failings of the law in this regard does not mean that charities should be excluded from the proposed reforms of trustees' powers of delegation. Sections 23 and 30 of the Trustee Act 1925 are so unsatisfactory that it would not be appropriate to leave them on the statute book solely to regulate the delegation powers of charity trustees. In addition, there is inevitably a degree of cost and inconvenience to charities in making an application for an order of the Charity Commissioners. However, as explained in the Consultation Paper,[71] the Law Commission's proposals for reform of trustees' powers of delegation cannot be applied to charitable trusts without some refinement. It is more difficult to differentiate between those core functions which should be performed by charity trustees personally, and those which should properly be regarded as delegable. Although it may initially appear attractive to replace the differentiation by reference to "distributive" functions which is proposed for other trusts[72] with one focusing on the charitable purposes of the trust, it is clear that the legal concept of "charitable purposes" is much wider than the particular charitable objects for which the trust exists. To prohibit charity trustees from delegating all functions falling under the umbrella of "charitable purposes" would therefore substantially *narrow* their powers, and would impede rather than assist the performance of their functions.

Proposals for reform

4.39 The Law Commission put forward proposals in the Consultation Paper to resolve this problem.[73] These proposals met with the approval of the majority who considered them in their responses to the Consultation Paper. The solution proposed operates by drawing a distinction between those aspects of the

[68] Charities Act 1993, s 26.

[69] See Consultation Paper, para 3.41.

[70] See Consultation paper, para 4.50. The Charity Commission has published a Model Order which is used for these purposes, the terms of which are set out in Appendix A to the Consultation Paper.

[71] At para 6.62 et seq.

[72] See para 4.9 above.

[73] At para 6.65.

management of charitable trusts that relate to the generation of income to finance the trust's charitable purposes, and the execution of those purposes. It would be necessary to list in statute the specific functions which charity trustees should be able to delegate.[74] Essentially, these would be functions relating to investment, fund raising, and ministerial acts concerned with the administration of the charity. However, it would be possible for other functions to be added to the list by statutory instrument should that become necessary.

4.40 Concern was expressed by some respondents on consultation as to whether there would be an adequate distinction between income generation activities carried on directly in pursuit of a trust's charitable purposes[75] and other fund raising activities. However, this distinction is not a new one.[76] Fund raising should be a delegable activity unless the generation of profits arises from the conduct of a trade which is an integral part of carrying out the trust's charitable purpose.[77]

4.41 A further concern was raised in relation to the operation of the proposed powers in the context of dealings with charity land. The Charities Act 1993 imposes limitations and conditions on such dealings[78] and some respondents suggested that this may prevent charity trustees from delegating their discretions in this regard. The Commission does not share these concerns. Although it should not be possible for these limitations and conditions to be circumvented by delegating the functions in question, the 1993 Act does not require them to be complied with by the trustees personally. It is sufficient that they be observed by a properly appointed agent of the trustees.[79] Accordingly, **the Law Commission recommends that—**

(1) charity trustees should have power to delegate matters which relate to income generation even though this entails the delegation of their discretions; but

(2) in relation to the delegation of other matters, charity trustees should have no greater powers than they have at present, so that they can only delegate functions which are purely ministerial.

4.42 In consequence, **the Commission recommends that charity trustees should have power to delegate the following functions—**

[74] See Draft Bill, cl 11(3).

[75] One example given was that of the Incorporated Council for Law Reporting in England and Wales which, although having charitable status, operates as a business providing a public service. Funds are raised by providing law reports at a moderate price, but this is also the charitable purpose.

[76] See, eg, Income and Corporation Taxes Act 1988, s 505(1)(e).

[77] See Draft Bill, cl 11(3)(c) and (4).

[78] Charities Act 1993, ss 36-40 provide that in those cases where charity trustees are permitted to sell, lease or mortgage charity land without an order of the court or of the Charity Commissioners, they must comply with certain conditions, including obtaining and considering proper advice, before committing themselves to a transaction.

[79] Cl 13 of the Draft Bill provides for agents to be subject to any specific restrictions or duties attached to the delegated function.

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

(2) any function relating to the investment of assets subject to the trust (including, in the case of land acquired as an investment, managing the land and creating or disposing of an interest in the land);

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

(4) any other function prescribed by an order made by the Secretary of State.

4.43 There was clear support on consultation for the Law Commission's provisional view that the delegation powers of charity trustees should otherwise be subject to similar provisions as it proposed for delegation by other trustees.[80] Accordingly, **it is recommended that the restrictions and limitations which are proposed in relation to the power at paragraph 4.9 above should apply equally to the delegation powers recommended for charity trustees.**

PENSION TRUSTS

4.44 Trustees of occupational pension schemes are in a special position in that there is already statutory provision, in section 34 of the Pensions Act 1995, for the delegation of their investment functions. Section 34(2) confers on pension trustees a power to delegate their discretion to make any decision about investments to a fund manager who satisfies certain requirements[81] and prohibits the delegation of such matters in any other way except under section 25 of the Trustee Act 1925. The trustees are required to ensure that a written statement of the principles governing investment decisions for the purposes of the pension scheme is prepared, maintained and periodically revised.[82] Pension trustees are also empowered, subject to any restriction imposed by the trust scheme, to delegate their discretions in investment matters to two or more of their own number.[83]

4.45 It was explained in the Consultation Paper that the Law Commission regards these statutory provisions as an important indication of Parliament's attitude to delegation by one particularly significant category of trustees. It is no coincidence therefore that the Commission's recommendations in relation to the delegation of trustees' fiduciary discretions are in some ways similar to those provisions. As regards delegation by pension trustees themselves, however, the Commission does not think that it would be appropriate to reconsider the issues dealt with in the 1995 Act so soon after Parliament has reviewed and redefined them. Nevertheless,

[80] See Consultation Paper, para 6.68.

[81] In practice, pension trustees are effectively obliged to delegate the exercise of their investment powers to a fund manager as a result of the Financial Services Act 1986, s 191; Schedule 1, para 14.

[82] Pensions Act 1995, s 35(1).

[83] *Ibid*, s 34(5). They may also delegate such matters to a fund manager operating outside the United Kingdom as regards overseas investment business: see s 34(5)(b).

the 1995 Act only deals with delegation of *investment matters*, and the ability of pension trustees to delegate functions other than their investment powers is still governed by the general law on trustee delegation. Consequently, the Commission takes the view that, subject to the provisions of the 1995 Act — which should continue to govern the delegation of investment decisions — pension trustees should have the same wide powers of delegation as have been proposed for all other trustees (other than charity trustees).

4.46 There is one caveat to this recommendation, however. In view of the special nature of pension trusts, and in keeping with existing safeguards for the protection of the beneficiaries of such trusts, the Commission considers that the power of delegation should be qualified so that pension trustees may not delegate to the scheme employer or to any person connected or associated with the employer.[84]

4.47 **The Law Commission recommends that, subject to the provisions of the Pensions Act 1995 regarding the delegation of investment decisions, trustees of occupational pension schemes should have the wide powers of delegation proposed at paragraph 4.9, with necessary modifications to take account of the overriding nature of section 34 of the Pensions Act 1995, but that pension trustees should have no power to delegate to the scheme employer or to any person who is connected or associated with the employer.**

[84] The definitions of these expressions in the Insolvency Act 1986, ss 249 and 435 apply for the purposes of the Pensions Act 1995 by virtue of s 123 of the latter Act.

PART V
TRUSTEES' POWERS TO EMPLOY NOMINEES AND CUSTODIANS

INTRODUCTION

5.1 In this Part the Law Commission makes recommendations for reform of the law concerning trustees' powers to employ nominees and custodians to facilitate trust administration. These recommendations relate to the law in England and Wales only.

5.2 The limited circumstances in which trustees may employ nominees and custodians under the present law are outlined in Section 2 of Appendix C to this Report. However, if a trustee places trust property in the hands of a third party when he or she has no power to do so, he or she will commit a breach of trust[1] and will be liable for any loss that is caused as a result. The basis of the general prohibition on trustees employing nominees and custodians lies in the requirement that they must keep the trust assets under their own control. It is for this reason that trustees cannot circumvent this prohibition by employing the nominee or custodian as agent, whether under their existing powers of delegation or under the wider powers that the Law Commission has proposed in Part IV.

5.3 In the Consultation Paper the Law Commission noted that, under the present law, trustees may, and sometimes must, employ nominees and custodians in certain limited circumstances.[2] However, the Commission considered that the law was unduly restrictive to meet the needs of modern trustees. In particular, it did not enable trustees to use nominees—

(1) to provide an administrative service in relation to investments;

(2) to facilitate dealings by a discretionary fund manager;

(3) as one method of using CREST;

(4) in relation to overseas investments which are traded using computerised clearing systems; or

(5) where registered land is held in trust, to obviate the need for regular changes to the register when trustees change.

THE PROPOSED POWERS

5.4 The Law Commission's analysis of the shortcomings of the present law was strongly endorsed on consultation. It has therefore concluded that, in place of the existing rules, trustees should have a statutory default power to vest trust property in nominees and a power to employ custodians. The exercise of these powers

[1] *Browne v Butter* (1857) 24 Beav 159; 53 ER 317.

[2] See Consultation Paper, para 7.5 *et seq*. See also Appendix C, para 32 *et seq*. below.

would not affect the fiduciary relationship which the trustees have to the beneficiaries.[3]

5.5 The Commission is aware that there are drawbacks as well as advantages in the use of nominees and custodians. In particular, there is a risk of fraud[4] and the potential loss of shareholder rights.[5] The first of these drawbacks has been substantially addressed by the Financial Services Act 1986,[6] and will be addressed further in the new Financial Services and Markets Bill which the Government intends to introduce.[7] The second issue, that of shareholder rights, was the subject of a consultative document issued jointly by the Department of Trade and Industry and HM Treasury in 1996.[8] The Law Commission does not consider that either of these disadvantages is a sufficient reason for denying trustees the benefit and convenience that can result from the employment of nominees. Nevertheless, as a safeguard for beneficiaries, it has concluded that trustees should only be able to employ persons or bodies who act as nominees or custodians in the course of their business. Subject to the special position of charities, however,[9] the Commission does not think that there should be other restrictions on the bodies that trustees might employ for these purposes.

5.6 The approach which the Law Commission has adopted was not supported by all those who responded to the Consultation Paper. Some thought that it would be desirable to restrict the choice of nominees and custodians to bodies authorised to conduct investment business under the Financial Services Act 1986. However, as

[3] The Commission noted a concern (at para 7.18 of the Consultation Paper) about the need to avoid the risk that the creation of a bare trust when property vests in a nominee could result in the nominee holding it directly on trust for the beneficiaries, with the original trustees dropping out of the picture. However, the Commission does not consider that this would happen following the exercise of the power in cl 16 of the Draft Bill. For the original trustees to relinquish their functions, the nominee would have to acquire all the functions of the trustees. However, it is clear from cl 11 that the trustees may only delegate certain specified functions. In addition, it is clear from the duty (in cl 22) to keep under review the appointment of a nominee or custodian that the trustees are not meant to be absolved of their responsibilities to the trust.

[4] See Consultation Paper, para 2.14.

[5] *Ibid*, para 2.16.

[6] The custody and administration of investments has been designated investment business under the Act, and is subject to regulation in accordance with its terms (see Financial Services Act 1986, Schedule 1, Part II, para 13A).

[7] The Bill will replace the existing regulatory regime for the financial services sector, and will make "the reduction of financial crime" one of the express objectives of the Financial Services Authority (see draft Financial Services and Markets Bill, clauses 2(2) and 6). The Bill will also provide for the establishment of a compensation scheme for compensating persons in cases where authorised persons or appointed representatives are unable to satisfy claims against them (*ibid*, Part XIII). See also para 2.1 above.

[8] Private Shareholders: Corporate Governance Rights, A Consultative Document (1996). This has not to date led to the announcement of proposals for reform, but the responses to the consultative document are being taken into account as part of the current DTI Company Law Review (see also Modern Company Law for a Competitive Economy: The Strategic Framework, a Consultation Document by the Company Law Review Steering Group (1999)).

[9] See para 5.8 below.

was explained in the Consultation Paper,[10] the regulation of financial services does not extend to all cases in which it might be appropriate for trustees to employ nominees and custodians under the scheme proposed by the Commission. In addition, there would be a danger that any such restriction might create the false impression that compliance would amount to a "safe haven" for trustees and was a substitute for the exercise of proper care in selecting and supervising a nominee or custodian.

5.7 While some respondents thought that the Commission was not providing sufficient safeguards, others considered that its recommendation that trustees should only be able to employ nominees and custodians who acted as such in the course of their business was over-prescriptive. They felt that the matter should be governed entirely by the new statutory duty of care.[11] However, this does not pay sufficient regard to the inherent risks in the employment of nominees and custodians. On balance, therefore, the Commission has concluded that the approach which was provisionally recommended in the Consultation Paper is the correct one.[12]

5.8 In the Consultation Paper the Law Commission asked whether, in the case of charitable trusts, there should be additional statutory restrictions on the choice of nominees to ensure a higher degree of protection for the trust fund.[13] The Commission's concern in this regard stems from the fact that it is the current practice of the Charity Commissioners, in giving charity trustees authority to vest trust property in nominees,[14] to impose certain restrictions on the persons or bodies who may be appointed.[15] In the light of responses to consultation, and having discussed the matter with the Charity Commission, it is not thought that legislation should impose rigid requirements on the use of nominees or custodians by charitable trusts. However, the Law Commission considers that it would be prudent for legislation to provide that the use of nominees by charity trustees should be subject to guidance issued by the Charity Commission.[16]

5.9 Accordingly, **the Law Commission recommends that—**

[10] At paras 7.30 and 7.31.

[11] See Part III.

[12] See Draft Bill, cl 19. Allowance has been made for the possibility that trustees might wish to vest trust property in a body corporate existing solely as a vehicle for nomineeship in connection with the trust, and which does not trade or carry on business within the ordinary meaning of that expression. Such bodies will not be excluded from acting as nominees or custodians provided that they are controlled by the trustees.

[13] Consultation Paper, para 7.33.

[14] The Charity Commissioners have a statutory power to do this under Charities Act 1993, s 26.

[15] It is the Charity Commission's practice to limit the choice of nominees either to corporations that have a place of business in England and Wales so as to be amenable to the jurisdiction of the High Court, or where the nominee is overseas, to impose certain conditions as to regulation and review of the nominee and the manner in which the trust property is held (see Consultation Paper, para 7.13).

[16] See Draft Bill, cl 19(4). The Charity Commission may, for example, wish to issue guidance against the use of nominees in certain states outside the EEA where the procedures for protecting the interests of the trust objects are considered to be inadequate.

(1) trustees should have a power—

(a) to appoint a person to act as their nominee in relation to such of the assets of the trust as they determine,[17] provided that such person carries on a business which consists of or includes acting as a nominee; and

(b) to appoint a person to act as a custodian in relation to such of the assets of the trust as they determine, provided that such person carries on a business which consists of or includes acting as a custodian, this power to be without prejudice to the existing right of trustees to leave trust documents in the custody of one of the trustees;[18]

(2) the trustees of a charitable trust[19] should be required to act in accordance with any guidance given by the Charity Commissioners concerning the selection of a person for appointment as a nominee or custodian, but there should be no other restrictions on the bodies that trustees might employ as nominees or custodians.

5.10 As was explained in the Consultation Paper, some of the issues that have been discussed, both in that Paper and earlier in this Report, in relation to the employment of agents apply equally to the engagement of nominees and custodians. To achieve consistency, the Commission proposes that trustees should have similar powers in relation to the terms of appointment and remuneration of nominees and custodians as they will have as regards agents. Accordingly, **it is recommended that trustees should have power—**

(1) to pay reasonable remuneration to nominees and custodians, and to reimburse expenses properly incurred in the performance of their functions; and

(2) where it is reasonably necessary for them to do so—

(a) to authorise the nominee or custodian to sub-delegate any of its functions to a sub-nominee or sub-custodian;

(b) to employ nominees and custodians on terms which restrict their liability; and

(c) to authorise conflicts of interest by their nominee or custodian.

[17] The power would therefore embrace both choses in action and any legal or equitable property rights that the trust might have.

[18] At present, Trustee Act 1925, s 7(1) imposes a duty upon trustees to place any bearer securities which they may hold with a banker or banking company for safe custody and the collection of income. This provision will be repealed by the Draft Bill (together with the rest of Part I of the 1925 Act). However, the substance of it will be retained: see Draft Bill, cl 18.

[19] Other than a charitable trust which is exempt from the supervisory jurisdiction of the Charity Commission.

5.11 Although the Law Commission recommended in the Consultation Paper that trustees should be permitted to delegate collectively a function to one or more of their own number whenever they might have delegated it to an agent,[20] it provisionally recommended against the creation of a default power for trustees to vest trust property in one or more of their number as nominees. The justification for this was said to be that, in contrast to the situation where trust documents can be in the custody of just one trustee, it is undesirable for one of the trustees (or some of them) to act as nominee, such that title to trust assets vests in that trustee or those trustees alone, as this would involve risks to the beneficiaries.

5.12 Although respondents to the Consultation Paper were divided on this issue, the majority were against the proposed restriction. Some of those who objected pointed to specific instances where they thought that it would have inconvenient consequences — in particular where one of the trustees is a trust corporation.[21] To meet these concerns and, at the same time to minimise the risk of fraud or negligence in relation to the trust assets, the Commission has adopted a safeguard that was employed in the 1925 property legislation in relation to the receipt of capital money. Such money has generally to be paid to at least two trustees or to a trust corporation.[22] The Commission considers that this model should be adopted in relation to the vesting of property in nominees, which is, in some senses, analogous. There would be an additional safeguard. A trustee will only be eligible for appointment as a nominee if it acts as a nominee in the course of its business. This means that only "professional" trustees will be able to hold trust property as nominees. This, coupled with the duty of care to which trustees will be subject in the selection and supervision of the nominee, should, in the Commission's view, provide adequate protection for the beneficiaries. **The Law Commission therefore recommends that trustees should have a power to vest trust property in either—**

(1) one of their number, if that one is a trust corporation; or

(2) two (or more) of their number, if they are to act as joint nominees or joint custodians;

subject to the same conditions that apply to the employment of a nominee that is not a trustee.[23]

5.13 In the limited circumstances in which the present law permits the use of a custodian by trustees,[24] the costs of so doing must be paid out of the *income* of the trust.[25] By contrast, however, any other expenditure incurred by the trustees is

[20] See para 4.30 *et seq.* above.

[21] In such circumstances it may be administratively advantageous for the corporate trustee to hold trust property as nominee.

[22] See, eg, Trustee Act 1925, s 14 (power to give receipts); Law of Property Act 1925, s 2(1) (overreaching).

[23] See Draft Bill, cl 19(5).

[24] See Section 2 of Appendix C.

[25] See Consultation Paper, para 7.25.

charged to *capital*. Given that many nominees and custodians will also be employed as agents by trustees, the present rule, if carried forward to the proposed new powers, could cause obvious difficulties for trustees in allocating the cost of employing such persons. Consequently, **it is recommended that trustees should have a discretion to allocate the costs of employing a nominee or custodian between income and capital.**[26]

PROTECTION FOR BENEFICIARIES

5.14 The Law Commission's recommendation that trustees' choice of nominees and custodians should be restricted to persons who act as such in the course of their business has already been explained. However, the Consultation Paper contained other provisional recommendations for the protection of beneficiaries, including a duty of care and a duty to review any arrangements for the use of nominees or custodians.

5.15 It has been explained that—

(1) the Law Commission considers that the appropriate safeguard for the protection of beneficiaries is the imposition on trustees of a uniform duty of care in the performance of their functions;[27] and

(2) that duty of care should be applied as much to the employment of nominees and custodians as it is to the employment of agents.[28]

5.16 Consistently with this approach, the Commission considers that trustees should be required to keep under review the arrangements relating to the appointment of a nominee or custodian.[29]

5.17 **The Law Commission therefore recommends that—**

(1) trustees should, so long as the appointment of a nominee or custodian continues, keep under review the arrangements relating to it and the manner in which those arrangements are implemented;[30]

(2) the statutory duty of care should apply to a trustee, in relation to the exercise of powers to employ nominees and custodians:

(a) proposed in this Part; or

(b) conferred by the trust instrument (unless it appears from the trust instrument that the duty is not meant to apply)

in the following circumstances—

[26] See Draft Bill, cl 32.

[27] See para 3.9 above.

[28] At para 3.18 above.

[29] Cf. para 4.10 above.

[30] See Draft Bill, cl 22.

(i) when entering into arrangements under which a person is appointed to act as a nominee or custodian including, in particular—

(A) selecting the person who is to act; and

(B) determining any terms on which he or she is to act;

(ii) when carrying out his or her duty to keep those arrangements under review.[31]

5.18 In the Consultation Paper the Commission considered but rejected the possibility that trustees should have a default power to insure against losses caused by their nominees and custodians.[32] This was because—

(1) such insurance may not be readily available at an economic cost;

(2) trustees may feel compelled to insure in circumstances where it was unnecessary; and

trustees may treat insurance as a means of relieving them of their obligations to take proper care in the appointment and supervision of a nominee or custodian.

5.19 For all of these reasons, **the Commission recommends that trustees should not be given a default power to insure against loss caused by the acts, neglects and defaults of any nominee or custodian which they employ.**

APPLICATION OF POWERS TO EMPLOY NOMINEES AND CUSTODIANS

5.20 In accordance with what has already been recommended in relation to powers of delegation,[33] it is considered that the powers proposed in this Part should be of general application. However, there is already adequate statutory provision enabling pension trustees to employ nominees and custodians,[34] and so there is no need for the new powers to apply to pension trusts. Accordingly, **it is recommended that the proposed powers to employ nominees and custodians should apply—**

(1) to trusts in existence when any legislation is brought into force as well as to trusts created thereafter.[35] **Such powers should be in addition to powers conferred on trustees by other means, but**

[31] See Draft Bill, Schedule 1, para 3.

[32] See Consultation Paper, para 7.34.

[33] See para 4.36 above.

[34] Pensions Act 1995, s 47 enables regulations to be made authorising the appointment of professional advisers to carry out "prescribed functions" in relation to the pension scheme. Regulation 2(c) of the Occupational Pension Scheme (Scheme Administration) Regulations 1996 provides that the custody of cash, securities and other assets is a prescribed function for this purpose.

[35] See Draft Bill, cl 27.

should be subject to any restriction or exclusion imposed by the trust instrument or by or under any enactment.[36]

(2) to all types of trust other than occupational pension schemes (but including charitable trusts), subject to the one qualification set out in paragraph 5.9(2) above.

[36] See Draft Bill, cl 26.

PART VI
TRUSTEES' POWERS TO INSURE THE TRUST PROPERTY

6.1 In Part IX of the Consultation Paper the Law Commission criticised the present law governing the powers and duties of trustees to insure trust property. This Part of the Report examines those criticisms and makes recommendations for reform in this area. Those recommendations relate to the law in England and Wales only.

THE PRESENT LAW AND ITS DEFECTS

6.2 The present law is summarised in Section 3 of Appendix C. The essential position, however, is that there appears to be a power (and sometimes even a duty) for trustees to insure at common law,[1] but this is not entirely free from doubt.[2] However, there are also statutory powers of insurance,[3] the nature of which varies according to whether the trust is a trust of land within the meaning of the Trusts of Land and Appointment of Trustees Act 1996 or a trust of personal property.[4]

6.3 The present law was criticised in the Consultation Paper for the following reasons—

(1) the extent of the common law power/duty is uncertain and may be difficult to reconcile with trustees' fundamental duties to act in the best interests of the present and future beneficiaries of the trust[5] and to conduct the business of the trust with the same care as an ordinary prudent man of business would extend towards his own affairs;[6]

(2) it is unsatisfactory that trustees of personal property and trustees of land should have different statutory powers of insurance (and that a tenant for life (or person having the powers of a tenant for life) under the Settled Land Act should have no statutory powers to insure at all); and

(3) the statutory power given to trustees of personal property by section 19 of the Trustee Act 1925 is unsatisfactory because—

[1] In *Re Betty* [1899] 1 Ch 821, 829, North J suggested that at common law trustees ought to insure the trust property "at the expense and for the benefit of the estate".

[2] In *Re McEacharn* (1911) 103 LT 900, Eve J expressed the view that trustees are under no obligation to insure even in circumstances where a reasonable prudent person would do so. However, there must be a real doubt as to whether a court would still adhere to this view. See also the discussion at paras 9.2 - 9.4 of the Consultation Paper.

[3] See Trustee Act 1925, s 19.

[4] By virtue of an apparent oversight in the consequential amendments made by the Trusts of Land and Appointment of Trustees Act 1996, a tenant for life (or person having the powers of a tenant for life) under the Settled Land Act 1925 has no *statutory* powers to insure.

[5] *Cowan v Scargill* [1985] Ch 270, 286, *per* Megarry V-C.

[6] *Bartlett v Barclays Bank Trust Co Ltd (No 1)* [1980] Ch 515, 531, *per* Brightman J.

(a) it does not empower trustees to insure up to market value or full replacement value of the property concerned; and

(b) it has no application to bare trustees.

PROPOSALS FOR REFORM

Power to insure

6.4 The Law Commission considers that there is an overwhelming case for providing a clear statutory power for trustees to insure the trust property as if they were the absolute owners of it. Trustees require such a power to protect adequately the interests of the beneficiaries (or other objects of the trust). This proposal, which was strongly supported on consultation, will bring the powers to insure of all trustees into line with those that are already enjoyed by trustees of land.[7] Although the Commission considers that the statutory power should be couched in broad terms, it should be limited to a power to insure the "trust property". There should not (for example) be a default power for trustees to insure against their own liability for breach of trust.[8] Accordingly, **the Law Commission recommends that trustees should have power to insure any property which is subject to the trust against risks of loss or damage due to any event.**[9]

6.5 Under this proposal, the power to insure will be conferred upon all trustees, including bare trustees.[10] The Commission considers that the fact that property is held on a bare trust should not alter or exclude the trustees' statutory powers of insurance.[11] However, it also takes the view that, where there is either a bare trust or all the beneficiaries are of full age and capacity and, taken together, are absolutely entitled to the trust property, the beneficiaries should be at liberty to direct the trustees *not* to insure the trust property (or not to insure it except in accordance with specified conditions) if that is their unanimous wish.[12] In such circumstances, the beneficiaries should be able to carry out the cost-benefit analysis involved in deciding whether or not to insure in the same way as an absolute owner.[13] Accordingly, **it is recommended that where property is held either—**

[7] Trusts of Land and Appointment of Trustees Act 1996, s 6(1).

[8] This is also consistent with the Commission's proposal that trustees should not have a default power to insure against losses caused by the acts, defaults or neglects of any nominee or custodian that they employ. See para 5.19 above.

[9] It is proposed that this recommendation should be implemented by substituting a new section for the present s 19 of the Trustee Act 1925 (see Draft Bill, cl 34).

[10] Cf Trustee Act 1925, s 19, which expressly excludes bare trustees.

[11] This view is consistent with that taken by the Law Reform Committee in its Twenty-third Report, The Powers and Duties of Trustees (1982) Cmnd 8733.

[12] This power for beneficiaries would relate only to insurance of the trust property. They would have no power, for example, to direct the trustees not to insure against third party liability. Similarly, the power would not apply where some other person has an interest in the property, such as an intending purchaser under a contract with the trustees.

[13] Even if such a power were not conferred as part of the present scheme, beneficiaries who meet these criteria would sometimes be able to achieve much the same result by requiring

(1) on a bare trust for a beneficiary absolutely; or

(2) for beneficiaries who are of full age and capacity and, taken together, are absolutely entitled to the trust property;

then, if they all agree, the beneficiaries should be able to direct the trustees not to insure the trust property (or not to insure it except in accordance with specified conditions).

6.6 Whether trustees must pay insurance premiums out of income or capital when exercising their present powers of insurance depends upon the derivation of the particular power in question.[14] The Law Commission criticised this state of affairs in the Consultation Paper,[15] as had the Law Reform Committee in its Twenty-third Report.[16] It is clearly unsatisfactory, and **the Commission recommends that trustees should have a discretion to apportion the payment of premiums between income and capital as they see fit.**

Duty to insure

6.7 The Law Commission took the view in the Consultation Paper that there are circumstances where trustees should not merely have a power to insure the trust property, but should have an express statutory *duty* to do so. This followed from the fact that trustees are under a paramount duty to act in the best interests of the trust,[17] and there may be situations where a failure to insure would breach this duty. The Commission recommended that such a duty should apply in circumstances where a reasonable person would have insured the property. A number of concerns lay behind this recommendation. In particular, it would ensure that trustees did address the issue of insurance, and that if they did not, the court would be able to direct them to insure (which would not be possible if there was merely a power).

6.8 Although the nature of the common law duties of trustees is such that they may sometimes be under a duty to insure in any event, the Commission's provisional proposal to codify this aspect of the law was not endorsed on consultation. The underlying concern of those who objected to the proposal appears to have been the risk of uncertainty as to when the duty would arise, and the fact that this might lead trustees to insure when it was unnecessary, thereby wasting trust assets. There was also a concern that some trusts might lack the resources to insure, particularly small museums and galleries. In the light of the response to consultation on this issue, the Law Commission does not propose to take forward its original proposals

the trustees to retire and appointing new trustees. However, they would only have this power where there is no person nominated for the purpose of appointing new trustees by the instrument creating the trust (Trusts of Land and Appointment of Trustees Act 1996, s 19).

[14] Under Trustee Act 1925, s 19 (as it stands at present) the trustees may meet the cost of insurance premiums out of income. If they insure under the common law power, however, they may charge the cost of the premiums to capital.

[15] At para 9.26.

[16] Trustees Powers and Duties (1982) Cmnd 8733.

[17] See *Cowan v Scargill* [1985] Ch 270, 286, 287.

for a statutory duty to insure. It should be emphasised that trustees *will* sometimes be under a duty to insure the trust property because they must act in the best interests of the trust. This will be so whether or not that duty is codified in statutory form.

6.9 Although the Law Commission accepts that the circumstances in which trust property is insured should be left to the discretion of the trustees (and to their common law duties), it is considered that, once the trustees have resolved to exercise their powers of insurance, the *manner* in which they do so should be subject to the new statutory duty of care discussed in Part III of this Report. Consequently, the duty of care should apply to the selection of an insurer and to the terms on which insurance cover is taken out. Accordingly, **it is recommended that the statutory duty of care should apply to trustees—**

(1) when exercising the power to insure property proposed in this Part; and

(2) when exercising any power to insure trust property conferred by the trust instrument (unless it appears from the trust instrument that the duty is not meant to apply).

6.10 It was proposed in the Consultation Paper[18] that, where trust property has been vested by trustees in nominees, the trustees should have power to direct the nominees not to insure it. Such a provision was thought to be necessary because nominees would in effect become trustees and would have the powers *and duties* to insure recommended by the Law Commission. Notwithstanding its decision not to recommend a statutory duty to insure, the Commission considers that trustees may still find it valuable to have such a power.[19] Nevertheless, under the scheme now proposed for the employment of nominees, it is unnecessary to make this power explicit, because trustees are to be able to appoint nominees on such terms (including terms relating to the insurance of trust property) as they may determine.[20]

APPLICATION OF POWER TO INSURE

6.11 In conformity with the approach that has been taken to the application of the other new powers proposed, **the Law Commission recommends that the proposed powers of insurance should apply to trusts in existence when any legislation is brought into force as well as to trusts created thereafter.**

[18] At para 9.25.

[19] The trustees may wish to direct a nominee not to insure even in cases where there is no duty to do so but merely a power. Eg, a nominee might, quite reasonably, decide that it would be prudent to insure, but the trustees would not want them to do so if the trustees had already taken out their own insurance.

[20] See Draft Bill, cl 20(1).

PART VII
PROFESSIONAL CHARGING CLAUSES

7.1 In this Part the Law Commission considers whether or not, in the absence of express provision in the will or trust instrument, "professional" trustees should be entitled to charge for their services to the trust. The Commission explains the background to its proposals for reform that were made in the Consultation Paper,[1] which are then considered individually. Once again, the recommendations in this Part relate to the law in England and Wales only.

BACKGROUND TO REFORM

7.2 The present law is summarised in Section 4 of Appendix C. It starts from the premise that "a trustee, executor, or administrator, shall have no allowance for his care and trouble".[2] The reasons that are traditionally given for this rule are twofold—

(1) trustees are not allowed to derive any benefit from trust property;[3] and

(2) to allow trustees to receive payment may give rise to conflicts of duty and interest.[4]

7.3 Although this general rule undoubtedly represents the present law, it is subject to certain exceptions of which the most significant are—

(1) where remuneration is authorised by the trust instrument; and

(2) where remuneration is sanctioned by statute or authorised by the court.[5]

7.4 It is the first of these exceptions which has the greatest practical significance. It has long been the practice to include an express professional charging clause in wills and trust instruments authorising a trustee, who is engaged in any profession or business, to be paid out of the trust fund for all his or her reasonable fees and charges in respect of any business transacted on behalf of the trust, including any business which a non-professional trustee could have undertaken personally.

7.5 The Law Reform Committee considered the issue of professional charging clauses in its Twenty-third Report, The Powers and Duties of Trustees.[6] However, despite both the widespread inclusion of express charging clauses in wills and trust instruments and the view of a substantial majority of those whom it consulted, the

[1] Part X.

[2] *Robinson v Pett* (1734) 3 P Wms 249, 251; 24 ER 1049, *per* Lord Talbot LC.

[3] See, eg, *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 1 WLR 1072, 1075.

[4] See, eg, *Re Barber* (1886) 34 ChD 77.

[5] Consultation Paper, 10.4. See also, Appendix C para 48.

[6] (1982) Cmnd 8733, paras 3.42 - 3.55.

Committee was opposed to the introduction of a general statutory charging clause as a default power for three reasons—

(1) settlors ought to be made aware that a professional trustee would be remunerated and of the terms of that remuneration, but an implied charging clause would not guarantee this;

(2) a default power might be open to abuse; and

(3) it would encroach too far upon the general principle that a trustee should not profit from his or her trust.

For the reasons set out below,[7] the Law Commission has not been persuaded by these arguments. The Law Reform Committee's approach was rejected in the Consultation Paper.

PROPOSALS FOR REFORM

7.6 The principal objection to the remuneration of trustees for their work is not that there is anything inherently wrong in rewarding them for their services,[8] but that they should not derive any *secret* remuneration from their office or some benefit which is not authorised by law or expressly provided for.[9] In fact, it may be advantageous to the beneficiaries or the objects of the trust for there to be a power to remunerate professional trustees under properly controlled conditions, as this will make it easier to employ trustees who have the necessary skills for the complex task of modern trusteeship.[10] The alternative may be to delegate much of the administration of the trust to an agent who, of course, will be paid for his or her services, and who may actually cost the trust more than would have been charged by a professional trustee. Many trusts are already able to benefit from the services of a professional trustee because they contain an express charging clause. However, there are many others[11] that cannot because the trustees do not have such a power.

7.7 In the Consultation Paper the Commission explained why it was desirable to have a statutory default charging clause—

(1) if a trust does not contain a charging clause, no professional trustee is likely to be willing to administer the trust;

[7] See paras 7.6 and 7.7 below.

[8] As the Commission noted in the Consultation Paper, many other fiduciaries (such as agents) are remunerated as a matter of course.

[9] See Consultation Paper, para 10.3. See also the comments of Lord Normand in *Dale v IRC* [1954] AC 11, 27.

[10] A fact which is clearly recognised by the courts in the exercise of their inherent jurisdiction to grant trustees remuneration. See, eg, *Re Duke of Norfolk's Settlement Trusts* [1982] Ch 61.

[11] Such as some home-made wills and trusts, trusts arising on intestacy, and many older trusts.

(2) even if a trustee is appointed who is not a professional, he or she may delegate much of the administration of the trust to and pay a professional agent, and this is so even if the work could be done by the trustee;

(3) it is now common in express professional charging clauses to include provision that any charges shall be reasonable and shall not exceed the normal professional fees that would be charged for that work by that person: there is therefore a yardstick by which professional charges can be measured.

The Commission considers that these factors, together with certain defects in the present law relating to the construction of express charging clauses,[12] justify a different approach. It considers that there is a strong case for the introduction of a statutory professional charging clause. There was overwhelming support for this view on consultation.

Statutory charging clause for professional trustees

Application

7.8 It was provisionally recommended in the Consultation Paper that, in relation to all trusts other than charitable trusts and pension trusts, there should be an implied statutory charging clause which would enable professional trustees to charge for their services in the absence of a direction to the contrary in the will or trust instrument. The proposed clause would apply to existing as well as to future trusts and notwithstanding, but subject to, any previous court order authorising trustee remuneration.

7.9 All of this was strongly endorsed on consultation. However, the Law Commission had also proposed that the implied clause should be inapplicable where some other benefit or remuneration is provided to the trustee in the will or trust instrument. This proved to be much more contentious. Although it was accepted that trustees should not be entitled to charge for their services under a statutory default power if the settlor or testator has made alternative provision to reward him or her for acting as trustee,[13] there was considerable concern that the proposed mechanism for achieving this could operate unfairly in some cases because it failed to distinguish between benefits intended as a reward for acting as a trustee, and benefits intended as a gift to a particular individual. The proposal had the following specific drawbacks—

(1) The testator or settlor might well have intended the gift to stand whether or not the recipient acted as trustee — and consequently might have had no objection to the trustee receiving additional remuneration for his or her services to the trust.

[12] See Consultation Paper, para 10.20 and para 7.19 *et seq.* below.

[13] The possibility of what may in effect be "double remuneration" is obviously something which should be avoided.

(2) The value of the gift might be much less than the amount which the trustee would be able to charge under the implied clause (and the trustee may be unwilling to act as a result).

(3) There might be uncertainty as to what constitutes "some other benefit" (as where a trustee was given a general power of appointment, for example).

7.10 To meet these concerns, the Commission has decided to adopt a modified approach. One option that was put forward in the Consultation Paper, not in relation to trusts generally, but only as regards charitable and pension trusts, was that the trustees collectively should have power to authorise one (or more) of their number to charge for his or her professional services to the trust. The trustees would then have to determine in each case whether it was appropriate to allow any of their number to be remunerated. In doing so they would need to consider all the circumstances — including the nature of any benefit which the testator or settlor had conferred upon the particular trustee or trustees in question. The trustees would not be obliged to apply any rigid rule of construction in making their decision, but would exercise their discretion in the interests of the trust.

7.11 This approach has additional advantages. The Commission considers that, as a matter of principle, in the absence of an express charging clause, trustees should actively consider whether one of their number should be remunerated. Before permitting any trustee to charge for his or her services, the trustees as a whole would have to consider whether this would be to the advantage of the trust. They would need to consider, for example, whether that trustee is the most appropriate person to provide particular services to the trust (and, if so, whether he or she should reasonably be expected to do so free of charge), or whether it would be better to employ an agent. Nevertheless, the Commission does not think that this approach would be suitable where the trustee in question is a trust corporation.[14] In addition, it would not be appropriate in cases where there is a sole trustee which is not a trust corporation, because the safeguard of collective scrutiny of the trustee's actions could not operate.[15]

7.12 Accordingly, **the Law Commission recommends that where there is more than one trustee, they should have power to authorise one or more of their number (not being a trust corporation) to charge for his or her services to the trust, and that the power should apply—**

(1) in relation to all trusts (other than charitable trusts[16]) and to the unadministered estates of all deceased persons, except where provision about the entitlement to remuneration of the trustee or trustees in question has been made in the will or trust instrument or by another enactment;

[14] See para 7.17 below.

[15] The Commission takes the view that the position relating to sole trustees who are not trust corporations should remain unchanged. Such trustees will only be able to charge for their services if there is an express charging clause in the trust instrument.

[16] See para 7.22 *et seq.* below.

(2) whether the trust arose or the deceased person died before or after any legislation is brought into force; and

(3) notwithstanding, but subject to, any previous order by a court which has authorised the trustees or personal representatives to be remunerated for any work.

Scope

7.13 Although the Law Commission expressed the intention in the Consultation Paper that any default power should only authorise trustee remuneration in cases where the trustee is also engaged "in a profession or business", there was evidently some confusion among respondents as to just who would fall within that classification. This was surprising given that the wording of the Commission's provisional recommendation was based on the usual form of express charging clause which is included in trust instruments. The Commission is not aware that this clause has given rise to any problems of interpretation.

7.14 Some respondents asked whether trustees engaged in *any* profession or business would come within the scope of these proposals. That is not the intention.[17] The reason for proposing a statutory charging clause at all is because there are some trustees, or potential trustees, whose professional skills and experience are such that it would be in the interests of the trust for them to act as trustees (and to be paid for so doing) rather than not act because no remuneration is available. There must, therefore, be a close nexus between the particular profession or business of the trustee and the services which he or she provides to the trust *as trustee*.[18] The Draft Bill seeks to put the point beyond doubt by providing that the new provisions for trustee remuneration apply only to a trustee who acts "in a professional capacity" which, in this context, means in the course of a profession or business which consists of or includes the provision of services in connection with the administration or management of trusts or in connection with a particular aspect of the administration or management of trusts.[19]

7.15 Although any statutory charging clause should only apply to trustees who act in a professional capacity,[20] such trustees should be able to charge for all their services to the trust, whether or not these include matters which a trustee acting otherwise than in a professional capacity could have undertaken. At present an express charging clause will not be taken to authorise remuneration in such circumstances unless explicitly stated.[21] However, as was noted in the Consultation Paper, there is

[17] Indeed, if it were the intention, there would be little or no justification for excluding trustees who are *not* engaged in any profession or business from the scope of the statutory charging clause.

[18] Eg, the services which a solicitor or accountant provides in the course of his or her profession are clearly relevant to the functions which may be performed by trustees. The services provided by a builder or a surgeon, however, are not.

[19] See Draft Bill, cl 28(4), 29(2).

[20] See para 7.14 above.

[21] See, eg, *Re Chalinder & Herrington* [1907] 1 Ch 58 and the Consultation Paper, para 10.5. See also Appendix C para 47.

little justification for allowing trustees to employ (and pay) an agent to perform functions (including functions which the trustees could undertake themselves) while prohibiting the remuneration of a professional trustee for carrying out the same work.[22] Indeed, to do so may simply act as a further disincentive for professional trustees to act.

7.16 **The Law Commission recommends that—**

(1) in exercising the power proposed at paragraph 7.12, trustees should be able to permit any trustee or personal representative who is acting in a professional capacity to charge and be paid out of the trust funds for any services that he or she provides on behalf of the trust;[23]

(2) a trustee who has been given such permission should be entitled to receive such remuneration as is reasonable in the circumstances for the provision of those services on behalf of that trust by that trustee;[24] and

(3) where a trustee is authorised to charge, he or she should be able to do so even if the services in question are capable of being provided by a person who does not act in a professional capacity.[25]

The special position of trust corporations

7.17 Where a trust corporation is appointed as trustee, it is not unusual for it to act as a sole trustee. The Commission has already recommended[26] that the new statutory charging clause should not apply to sole trustees. However, this could have inconvenient consequences if the sole trustee is a trust corporation[27] because trust corporations will not act without remuneration. The Commission considers that, unless a contrary intention appears in the trust instrument,[28] a trust corporation should have an automatic right to charge for its services whenever it acts as trustee. Accordingly, **it is recommended that, unless the trust is a charitable trust (or provision about its entitlement to remuneration has been made in the will or trust instrument or by another enactment), a trust corporation should be entitled to receive reasonable remuneration out of the trust funds for any services it provides on behalf of the trust, whether or not it acts as a sole trustee.[29]**

[22] The Law Reform Committee also accepted this point in its Twenty-third Report, The Powers and Duties of Trustees (1982) Cmnd 8733, para 3.45.

[23] See Draft Bill, cl 29(2).

[24] See Draft Bill, cl 29(3).

[25] See Draft Bill, cl 29(4).

[26] See para 7.12 above.

[27] Assuming that the trust instrument does not include an express charging clause entitling the trust corporation to charge for its services to the trust.

[28] In which case the trust corporation will very probably decline to act.

[29] See Draft Bill, cl 29(1).

Other reforms

7.18 It follows from the recommendation that the scope of any statutory charging clause should not be restricted to functions which cannot be performed by a lay trustee,[30] that the same principle should apply to express charging clauses in wills or trust instruments, whenever made, and that the rule that requires such clauses to be strictly construed against trustees should be relaxed.[31] This view was strongly supported by those who responded to the Consultation Paper. Although some respondents were concerned that it might be tantamount to retrospective legislation, the Law Commission is satisfied that this is not the case.[32] The Commission also considers that making the provision subject to the expression of a contrary intention in the will or trust instrument will be adequate protection for the wishes of testators and settlors. **It is therefore recommended that—**

(1) unless it would be inconsistent with the terms of the trust instrument, a professional charging clause should be taken to permit a trustee to charge for services provided by him or her on behalf of the trust even if they are capable of being provided by a person who does not act in a professional capacity;[33] and

(2) this provision should apply to all professional charging clauses in wills and trusts, whenever made.[34]

7.19 At present, payments under professional charging clauses are treated for many (but not all) purposes as a gift or "bounty". As the Commission noted in the Consultation Paper,[35] the reasons for this are largely historical and are closely related to the outmoded view of trustees as "gentlemen amateurs".[36] In reality, such payments are remuneration for services rendered — and should be treated as such. Moreover, the Commission considers that, in relation to the administration of a deceased's estate, the charges should be an expense of the administration, and should therefore have priority over legacies and other debts of the deceased. This proposal would affect the priority of claims, and because of this the Commission recognises that it should not be retrospective.[37] Accordingly, **the Commission recommends that—**

[30] See para 7.16 above.

[31] See the Consultation Paper, para 10.32.

[32] It will not empower trustees to charge for work undertaken before the legislation comes into force.

[33] See Draft Bill, cl 28(1), (2).

[34] See Draft Bill, cl 33(1).

[35] At para 10.20.

[36] A number of problems to which this legal fiction gives rise were identified by the Commission in the Consultation Paper, para 10.6.

[37] If the provision were to be made retrospective, it might divest persons entitled under the deceased's estate of their vested rights, and thus it might conceivably contravene Article 1 of the First Protocol of the European Convention on Human Rights.

(1) sums received pursuant to a charging clause should no longer be regarded as a conditional gift or legacy but as remuneration for services;[38]

(2) any sum due under such a clause should be an expense of administering the estate;[39] **and**

(3) this proposal should only apply to the estates of persons dying after any legislation implementing these recommendations is brought into force.[40]

Pension trusts

7.20 The Law Commission explained in the Consultation Paper[41] that it had special concerns about both pension trusts and charitable trusts. As far as pension trusts are concerned, there has been quite recent detailed legislation on pension trustees in Part I of the Pensions Act 1995. The Commission considered that any reform should affect that legislation as little as possible. A range of options was therefore offered in the Consultation Paper, including that which the Commission has now adopted in relation to trustees generally.[42] On consultation, however, there was overwhelming support for the application to pension trusts of a statutory professional charging clause in some form.[43] In the light of this, the Commission has concluded that there is no reason to treat pension trusts differently from other trusts in relation to trustee remuneration.[44]

Charitable trusts

7.21 The issues are considerably more difficult in relation to charitable trusts. Here again there was considerable support on consultation for the application of a statutory charging clause for the following reasons—

(1) It is clearly in the best interests of charities that those who have the best qualifications and aptitude for trusteeship should be encouraged to act as charity trustees. Nowadays, such persons will commonly be financial services professionals who cannot be expected to work unpaid.

(2) It may be to the economic advantage of a charity for certain specialised functions to be carried out by a trustee who has the necessary expertise (and to allow him or her to charge for so doing) if the alternative is to employ an agent to do so at a greater cost.

[38] See Draft Bill, cl 28(3).

[39] See Draft Bill, cl 35(3).

[40] See Draft Bill, cl 33(2) and cl 35(4).

[41] At para 10.28.

[42] See para 7.10 *et seq.* above.

[43] Less than 10% of those respondents who considered the point took the view that there should be no statutory provision for the remuneration of pension trustees who are professionals.

[44] Pension trusts are included within the scope of the recommendations made above.

(3) There is no justification for making a distinction between charities and other trusts in relation to the remuneration of professional trustees.

7.22 However, strong reservations were also expressed to the effect that charities are a special case, and that no charity trustees should be able to charge for their services to the charity unless this is authorised by its constitution or by the Charity Commissioners. The following views were expressed—

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

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

(3) Providing a universal power for professional trustees to charge for their services might be detrimental to public confidence in the charity sector by undermining its ethos of volunteer management.

7.23 Although the Law Commission appreciates the force of these concerns, it considers that there is still a strong case for including charities within the scope of its proposals, particularly as this would enable a uniform approach to be taken to professional charging clauses, irrespective of the nature of the trust. However, the Commission recognises that further consultation with the charity sector is probably required before the issue can be resolved one way or the other. Nevertheless, if it is ultimately decided that the scheme now proposed for the remuneration of professional trustees generally *should* apply to charities, it would be inconvenient if further primary legislation were required to implement that decision. Consequently, the Draft Bill has been prepared on the basis that the Commission's proposals for a statutory charging clause should not apply to charity trustees unless and until the Secretary of State so orders.

7.24 **The Law Commission recommends that the Secretary of State should have power, exercisable by statutory instrument, to make regulations providing for the remuneration of charity trustees.**[45]

[45] See Draft Bill, cl 30.

PART VIII
SUMMARY OF RECOMMENDATIONS

In this Part the recommendations for reform are summarised.

APPLICATION OF RECOMMENDATIONS

8.1 The Law Commission and the Scottish Law Commission recommend that the proposals contained in this Report should apply to—

(1) all trustees; and

(2) personal representatives;

except where it is otherwise stated or where the context otherwise requires.

(Paragraph 1.20)

TRUSTEES' POWERS OF INVESTMENT

Recommendations under this heading are joint recommendations of the Law Commission and the Scottish Law Commission unless otherwise stated.

8.2 There should be primary legislation to reform the law governing the investment powers of trustees and, in so far as it is practicable to do so, the Trustee Investments Act 1961 should be repealed.

(Paragraph 2.22)

8.3 Where the statutory investment powers of a particular body are defined (in whatever manner) by reference to the default powers of trustees, those powers should be amended to the effect that, following implementation of our proposals, that body will continue to have the same powers of investment as trustees. Where the body is set up under a Great Britain or United Kingdom statute, the new investment powers would, in the interests of uniformity, be the same throughout the territory in question.

(Paragraph 2.23)

8.4 Subject to the expression of 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.

(Paragraph 2.26)

8.5 In the exercise of their investment powers, trustees should have regard to the need for diversification of investments of the trust, in so far as is appropriate to the circumstances of the trust, and to the suitability to the trust of proposed investments.

(Paragraph 2.31)

8.6 The two Commissions recommend that—

(1) before exercising the proposed powers of investment, trustees should obtain and consider proper advice about the way in which those powers should be exercised, having regard to the need for diversification of investments of the trust, and the suitability to the trust of the proposed investments;

(2) trustees should review the trust portfolio from time to time and consider whether the investments in the portfolio should be varied, again having regard to the need for diversification and to the suitability of investments;

(3) the requirement to obtain advice in (1) should not apply if the trustees reasonably conclude that in all the circumstances it is unnecessary or inappropriate to do so.

For these purposes proper advice would be the advice of a person who the trustees reasonably believe to be qualified to give it by his ability in and practical experience of financial and other matters relating to the proposed investment.

(Paragraph 2.34)

8.7 The Law Commission recommends that—

(1) In addition to a power to acquire land as an investment, all trustees in England and Wales should have power to acquire land—

(a) for occupation by a beneficiary; or

(b) for any other reason.

(2) The power of trustees to acquire land for whatever reason should be limited to the acquisition of freehold or leasehold land in the United Kingdom.

(3) These provisions would not apply to trustees who, before the new legislation comes into force, have special statutory powers to invest or apply trust funds.

(Paragraph 2.43)

8.8 The Law Commission further recommends that, for the purpose of exercising their functions as trustees, trustees who acquire land under the proposed new power should have all the powers of an absolute owner in relation to the land.

(Paragraph 2.44)

8.9 The Scottish Law Commission recommends that, in addition to their existing power to purchase a residence (whether in Scotland or elsewhere) for occupation by a beneficiary, trustees of Scottish trusts should have power to purchase land (whether in Scotland or elsewhere) by way of investment or for any other reason.

(Paragraph 2.48)

8.10 The proposals for reform of the law relating to trustees' powers of investment should apply to all trusts except trusts whose trustees are given special statutory powers of investment by or under other enactments.

(Paragraph 2.49)

8.11 The proposed wide powers of investment should be exercisable by trustees—

(1) subject to restrictions on those powers imposed by or under any enactment whenever passed or made; and

(2) only in so far as a contrary intention is not expressed in any trust instrument made after 2 August 1961 — but that a power to invest trust funds in accordance with the Trustee Investments Act 1961, or in any manner authorised by law, conferred on trustees by such an instrument, should not be taken as expressing any such contrary intention.

(Paragraph 2.52)

8.12 The proposed powers relating to the purchase of land should apply to all trusts whether they were created before or after any legislation was brought into force, unless a contrary intention was expressed in the instrument creating the trust. Such powers should be in addition to any more limited powers to purchase land that have either been—

(1) conferred by the instrument creating the trust; or

(2) previously granted by the court or the Charity Commissioners.

(Paragraph 2.53)

DUTIES OF CARE

Recommendations under this heading are recommendations of the Law Commission and relate only to the law in England and Wales.

8.13 There should be a single statutory duty of care which should apply to a trustee—

(1) when exercising the powers of investment and powers in relation to land proposed in Part II; and

(2) when exercising any power of investment or power to acquire land conferred by the trust instrument (unless it appears from the trust instrument that the duty is not meant to apply);

(Paragraph 3.17)

(3) in relation to the exercise of powers of delegation, or powers to employ nominees and custodians:

(a) proposed in Parts IV and V; or

(b) conferred by the trust instrument (unless it appears from the trust instrument that the duty is not meant to apply);

in the following circumstances—

(i) when entering into arrangements under which a person is appointed to act as an agent, nominee or custodian including, in particular—

(A) selecting the person who is to act;

(B) determining any terms on which he or she is to act; and

(C) if the person is to exercise asset management functions, the preparation of a policy statement; and

(ii) when carrying out his or her duty to keep those arrangements under review;

(Paragraph 3.20)

(4) when exercising the power to insure property proposed in Part VI; and

(5) when exercising any corresponding power to insure trust property conferred by the trust instrument (unless it appears from the trust instrument that the duty is not meant to apply).

(Paragraph 3.21)

8.14 When carrying out any function to which the statutory duty of care applies, a trustee should be required to exercise such care and skill as is reasonable in the circumstances, having regard in particular—

(1) to any special knowledge or experience that he or she has or holds him or herself out as having; and

(2) if he or she 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 course of that kind of business or profession.

(Paragraph 3.25)

TRUSTEES' POWERS OF DELEGATION

Recommendations under this heading are recommendations of the Law Commission and relate only to the law in England and Wales.

8.15 Subject to the expression of any contrary intention in the trust instrument, trustees—

(1) should have power to delegate to agents their powers to administer the trust (other than powers to appoint or replace trustees), including their powers of investment and management; but

(2) should have no authority to delegate their powers to make decisions as to the distribution of the income or capital of the trust for the benefit of its objects.

The power to delegate under (1) could either be in relation to a specific act or acts, or by way of a general retainer. There should be no requirement that the delegation should be made by power of attorney.

(Paragraph 4.9)

8.16 Trustees should, so long as the delegation continues, keep under review the arrangements relating to it and the manner in which those arrangements are implemented.

(Paragraph 4.10)

8.17 These recommendations should be without prejudice to—

(1) the power of an individual trustee to delegate all or any of his or her trusts, powers and discretions under section 25 of the Trustee Act 1925; or

(2) the need to comply with any conditions laid down by law or by the instrument creating the trust in relation to the exercise of any power of investment or management.

(Paragraph 4.11)

8.18 Subject to a saving to protect the validity of delegations made prior to the coming into force of any new legislation, the present exception for foreign property should be abolished, so that the geographical location of trust property should no longer have a bearing on the trustees' powers of delegation.

(Paragraph 4.13)

8.19 If trustees wish to delegate their functions relating to—

(1) the investment of assets subject to the trust;

(2) the acquisition of property which is to be subject to the trust; and

(3) managing property which is subject to the trust and disposing of, or creating or disposing of an interest in, such property

they should be required to—

(a) formulate and keep under review a policy statement that gives guidance as to how the functions should be exercised with a view to ensuring that they will be exercised in the best interests of the trust;

(b) secure the agreement of the agent to act in accordance with the policy statement; and

(c) from time to time assess whether he or she is doing so.

(Paragraph 4.21)

8.20 Trustees should only delegate the functions mentioned in the previous paragraph by an agreement which is in or evidenced in writing.

(Paragraph 4.22)

8.21 The existing statutory provisions that confer powers on trustees to pay agents and to be reimbursed for their own expenses incurred in the execution of their duties should be replaced by a provision that would make it clear that trustees are authorised only to pay the reasonable fees of their agents and to reimburse expenses (whether incurred by an agent or by the trustees themselves) if the expenses are properly incurred.

(Paragraph 4.23)

8.22 Where it is reasonably necessary for them to do so, trustees should have power—

(1) to authorise their agents to employ sub-agents;

(2) to employ agents on terms which limit their liability; and

(3) to authorise conflicts of interest by their agents.

(Paragraphs 4.26 and 4.29)

8.23 Where trustees delegate to one of their own number, the trustee-agent should be entitled to recover—

(1) any expenses properly incurred in performing the agency; and

(2) if he or she (not being a trust corporation)—

(a) acts in a professional capacity; and

(b) obtains the authorisation of the trustees to charge for his or her services in performing the agency;

such remuneration as is reasonable in the circumstances for the provision of those services by that trustee.

(Paragraph 4.34)

8.24 Any new power of delegation should apply to trusts in existence when any legislation is brought into force as well as to trusts created thereafter. Such powers should be in addition to powers conferred on trustees by other means, but should be subject to any restriction or exclusion imposed by the trust instrument or by or under any enactment.

(Paragraph 4.36)

8.25 Charity trustees—

(1) should have power to delegate matters which relate to income generation even though this entails the delegation of their discretions; but

(2) in relation to the delegation of other matters, should have no greater powers than they have at present, so that they can only delegate functions which are purely ministerial.

(Paragraph 4.41)

8.26 Charity trustees should therefore have power to delegate the following functions—

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

(2) any function relating to the investment of assets subject to the trust (including, in the case of land acquired as an investment, managing the land and creating or disposing of an interest in the land);

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

(4) any other function prescribed by an order made by the Secretary of State.

(Paragraph 4.42)

8.27 The restrictions and limitations which are proposed in relation to the power at paragraph 8.15 above should apply equally to the delegation powers recommended for charity trustees.

(Paragraph 4.43)

8.28 Subject to the provisions of the Pensions Act 1995 regarding the delegation of investment decisions, trustees of occupational pension schemes should have the wide powers of delegation proposed at paragraph 8.15, with necessary modifications to take account of the overriding nature of section 34 of the Pensions Act 1995, but that pension trustees should have no power to delegate to the scheme employer or to any person who is connected or associated with the employer.

(Paragraph 4.47)

TRUSTEES' POWERS TO EMPLOY NOMINEES AND CUSTODIANS

Recommendations under this heading are recommendations of the Law Commission and relate only to the law in England and Wales.

8.29 Trustees should have a power—

(1) to appoint a person to act as their nominee in relation to such of the assets of the trust as they determine, provided that such person carries on a business which consists of or includes acting as a nominee; and

(2) to appoint a person to act as a custodian in relation to such of the assets of the trust as they determine, provided that such person carries on a business which consists of or includes acting as a custodian, this power to be without prejudice to the existing right of trustees to leave trust documents in the custody of one of the trustees;

(Paragraph 5.9)

8.30 The trustees of a charitable trust should be required to act in accordance with any guidance given by the Charity Commissioners concerning the selection of a person for appointment as a nominee or custodian, but there should be no other restrictions on the bodies that trustees might employ as nominees or custodians.

(Paragraph 5.9)

8.31 Trustees should have power—

(1) to pay reasonable remuneration to nominees and custodians, and to reimburse expenses properly incurred in the performance of their functions; and

(2) where it is reasonably necessary for them to do so—

(a) to authorise the nominee or custodian to sub-delegate any of its functions to a sub-nominee or sub-custodian;

(b) to employ nominees and custodians on terms which restrict their liability; and

(c) to authorise conflicts of interest by their nominee or custodian.

(Paragraph 5.10)

8.32 Trustees should have a power to vest trust property in either—

(1) one of their number, if that one is a trust corporation; or

(2) two (or more) of their number, if they are to act as joint nominees or joint custodians;

subject to the same conditions that apply to the employment of a nominee that is not a trustee.

(Paragraph 5.12)

8.33 Trustees should have a discretion to allocate the costs of employing a nominee or custodian between income and capital.

(Paragraph 5.13)

8.34 Trustees should, so long as the appointment of a nominee or custodian continues, keep under review the arrangements relating to it and the manner in which those arrangements are carried out.

(Paragraph 5.17)

8.35 Trustees should not be given a default power to insure against loss caused by the acts, neglects and defaults of any nominee or custodian which they employ.

(Paragraph 5.19)

8.36 The proposed powers to employ nominees and custodians should apply—

(1) to trusts in existence when any legislation is brought into force as well as to trusts created thereafter. Such powers should be in addition to powers conferred on trustees by other means, but should be subject to any restriction or exclusion imposed by the trust instrument or by or under any enactment.

(2) to all types of trust other than occupational pension schemes (but including charitable trusts), subject to the one qualification set out in paragraph 8.30 above.

(Paragraph 5.20)

TRUSTEES' POWERS TO INSURE THE TRUST PROPERTY

Recommendations under this heading are recommendations of the Law Commission and relate only to the law in England and Wales.

8.37 Trustees should have power to insure any property which is subject to the trust against risks of loss or damage due to any event.

(Paragraph 6.4)

8.38 Where property is held either—

(1) on a bare trust for a beneficiary absolutely; or

(2) for beneficiaries who are of full age and capacity and, taken together, are absolutely entitled to the trust property;

then, if they all agree, the beneficiaries should be able to direct the trustees not to insure the trust property (or not to insure it except in accordance with specified conditions).

(Paragraph 6.5)

8.39 Trustees should have a discretion to apportion the payment of premiums between income and capital as they see fit.

(Paragraph 6.6)

8.40 The proposed powers of insurance should apply to trusts in existence when any legislation is brought into force as well as to trusts created thereafter.

(Paragraph 6.11)

PROFESSIONAL CHARGING CLAUSES

Recommendations under this heading are recommendations of the Law Commission and relate only to the law in England and Wales.

8.41 Where there is more than one trustee, they should have power to authorise one or more of their number (not being a trust corporation) to charge for his or her services to the trust, and the power should apply—

(1) in relation to all trusts (other than charitable trusts) and to the unadministered estates of all deceased persons, except where provision about the entitlement to remuneration of the trustee or trustees in question has been made in the will or trust instrument or by another enactment;

(2) whether the trust arose or the deceased person died before or after any legislation is brought into force; and

(3) notwithstanding, but subject to, any previous order by a court which has authorised the trustees or personal representatives to be remunerated for any work.

(Paragraph 7.12)

8.42 In exercising the power proposed at paragraph 8.41, trustees should be able to permit any trustee or personal representative who is acting in a professional capacity to charge and be paid out of the trust funds for any services that he or she provides on behalf of the trust.

(Paragraph 7.16)

8.43 A trustee who has been given such permission should be entitled to receive such remuneration as is reasonable in the circumstances for the provision of those services on behalf of that trust by that trustee.

(Paragraph 7.16)

8.44 Where a trustee is authorised to charge, he or she should be able to do so even if the services in question are capable of being provided by a person who does not act in a professional capacity.

(Paragraph 7.16)

8.45 Unless the trust is a charitable trust (or provision about its entitlement to remuneration has been made in the will or trust instrument or by another enactment), a trust corporation should be entitled to receive reasonable remuneration out of the trust funds for any services it provides on behalf of the trust, whether or not it acts as a sole trustee.

(Paragraph 7.17)

8.46 Unless it would be inconsistent with the terms of the trust instrument, a professional charging clause should be taken to permit a trustee to charge for services provided by him or her on behalf of the trust even if they are capable of being provided by a person who does not act in a professional capacity

(Paragraph 7.18)

8.47 The above recommendation should apply to all professional charging clauses in wills and trusts, whenever made.

(Paragraph 7.18)

8.48 It is recommended that—

(1) sums received pursuant to a charging clause should no longer be regarded as a conditional gift or legacy but as remuneration for services;

(2) any sum due under such a clause should be an expense of administering the estate; and

(3) this proposal should only apply to the estates of persons dying after any legislation implementing these recommendations is brought into force.

(Paragraph 7.19)

8.49 The Secretary of State should have power, exercisable by statutory instrument, to make regulations providing for the remuneration of charity trustees.

(Paragraph 7.24)

(*Signed*) ROBERT CARNWATH, *Chairman, Law Commission*
ANDREW BURROWS
DIANA FABER
CHARLES HARPUM
STEPHEN SILBER

MICHAEL SAYERS, *Secretary*

BRIAN GILL, *Chairman, Scottish Law Commission*
E M CLIVE
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KENNETH G C REID
N R WHITTY

N RAVEN, *Secretary*
12 May 1999

APPENDIX A - Draft Trustee Bill

ARRANGEMENT OF CLAUSES

PART I

THE DUTY OF CARE

PART II

INVESTMENT

PART III

ACQUISITION OF LAND

PART IV

AGENTS, NOMINEES AND CUSTODIANS

Agents

Nominees and custodians

A

B I L L

TO

Amend the law relating to trustees and persons having the investment powers of trustees; and for connected purposes. A.D. 1999.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I

THE DUTY OF CARE

The duty of care.

1.—(1) Whenever the duty 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 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.

(2) In this Act the duty under subsection (1) is called "the duty of care".

Application of duty of care.

2. Schedule 1 makes provision about when the duty of care applies to a trustee.

PART II

INVESTMENT

General power of investment.

3.—(1) Subject to the provisions of this Part, a trustee may make any kind of investment that he could make if he were absolutely entitled to the assets of the trust.

(2) In this Act the power under subsection (1) is called "the general power of investment".

EXPLANATORY NOTES

Clauses 1 and 2

These clauses, which comprise Part I of the Bill, establish the duty of care applicable to trustees when carrying out their functions under the Bill. The duty of care also applies to trustees when carrying out equivalent functions conferred by the trust instrument (but not if or in so far as it appears from the trust instrument that the duty is not meant to apply). As indicated by *clause 2*, the circumstances in which the duty of care applies are set out in Schedule 1. The standard of care which is to be expected of trustees in those circumstances is defined by *clause 1*. Together, these provisions implement the recommendations in Part III of the Report.

In determining the level of care and skill that it is reasonable in the circumstances to expect a trustee to exercise, regard must be had to all relevant factors including the nature, composition and purposes of the trust and the attributes of the trustee. Thus, in the circumstances contemplated in clause 1(1)(a) and (b), there may be an "uplift" in the standard of care that would otherwise apply.

Clauses 3 — 7

This group of clauses, which comprise Part II of the Bill, implement a new regime for investment by trustees who do not have alternative powers of investment conferred by the trust instrument or by another statute or subordinate legislation. It replaces the present regime in the Trustee Investments Act 1961.

Clause 3 is one of the principal provisions in the Bill, giving effect (in England and Wales) to one of the central recommendations in the Report (see paragraph 2.26). The clause represents a shift from the present position whereby, in the absence of express powers, trustees may only make specified "authorised" investments, to one where trustees may invest as if they were absolutely entitled to the trust assets. As such, it is a widely drawn provision which, for example, enables trustees to hold investments jointly with other persons. This power, which is to be known as "the general power of investment", applies to the extent that the investment powers of the trustees are not expressed in the instrument creating the trust.

PART II

(3) The general power of investment does not permit a trustee to make investments in land other than in loans secured on land (but see also section 8).

(4) A person invests in a loan secured on land if he has rights under any contract under which—

(a) one person provides another with credit, and

(b) the obligation of the borrower to repay is secured on land.

(5) "Credit" includes any cash loan or other financial accommodation.

(6) "Cash" includes money in any form.

Standard investment criteria.

4.—(1) In exercising any power of investment, whether arising under this Part or otherwise, a trustee must have regard to the standard investment criteria.

(2) A trustee must from time to time review the investments of the trust and consider whether, having regard to the standard investment criteria, they should be varied.

(3) The standard investment criteria, in relation to a trust, are—

(a) the suitability to the trust of investments of the same kind as any particular investment proposed to be made or retained and of that particular investment as an investment of that kind, and

(b) the need for diversification of investments of the trust, in so far as is appropriate to the circumstances of the trust.

Advice.

5.—(1) Before exercising any power of investment, whether arising under this Part or otherwise, a trustee must (unless the exception applies) obtain and consider proper advice about the way in which, having regard to the standard investment criteria, the power should be exercised.

(2) When reviewing the investments of the trust, a trustee must (unless the exception applies) obtain and consider proper advice about whether, having regard to the standard investment criteria, the investments should be varied.

(3) The exception is that a trustee need not obtain such advice if he reasonably concludes that in all the circumstances it is unnecessary or inappropriate to do so.

(4) Proper advice is the advice of a person who is reasonably believed by the trustee to be qualified to give it by his ability in and practical experience of financial and other matters relating to the proposed investment.

Restriction or exclusion of this Part etc.

6.—(1) The general power of investment is—

(a) in addition to powers conferred on trustees otherwise than by this Act, but

(b) subject to any restriction or exclusion imposed by the trust instrument or by any enactment or any provision of subordinate legislation.

(2) For the purposes or this Act, an enactment or a provision of subordinate legislation is not to be regarded as being, or as being part of, a trust instrument.

Subsection 3 provides that the general power of investment does not permit a trustee to make investments in land other than in loans secured on land (which expression bears the same definition as in paragraph 23 of Schedule 2 to the draft Financial Services and Markets Bill). Land, therefore, is the one commodity which is excluded from the general power of investment. The concept of an "investment" is not defined in the Bill, and the general power permits trustees to invest in anything (other than land) which is expected to produce an income or a capital return. It should be noted, however, that a separate power for trustees to acquire land, whether as an investment or otherwise, is contained in clause 8. One of the reasons for separating the powers in this way is to facilitate the making of consequential amendments to existing enactments in Schedule 2.

Notwithstanding the wide power conferred by clause 3, the investment powers of trustees are not to be entirely unfettered. Trustees remain subject to various duties at common law, including a duty to act in the best interests of the present and future beneficiaries of the trust. Trustees will also be subject to the duty of care in clause 1 when carrying out their investment function (see Schedule 1, paragraph 1). In addition, specific duties are imposed by clauses 4 and 5. These duties apply to trustees in the exercise of *any* power of investment, whether conferred by the Bill or by the instrument creating the trust.

Clause 4 implements the recommendation in paragraph 2.31 of the Report. Subsection (1) requires a trustee to have regard to "the standard investment criteria" in exercising any power of investment. The definition of this expression in subsection (3) is closely based on the present law in section 6(1) of the Trustee Investments Act 1961, and the requirements imposed by the clause are in line with modern portfolio theory. "Suitability" relates both to the kind of investment proposed and to the particular investment as an investment of that kind. It will include considerations as to the size and risk of the investment and the need to produce an appropriate balance between income and capital growth to meet the needs of the trust. It will also include any relevant ethical considerations as to the kind of investments which it is appropriate for the trust to make.

Subsection (2) requires trustees to review the investments of the trust from time to time and to consider whether, having regard to the standard investment criteria, they should be varied. This provision codifies the common law position, under which "a trustee with a power of investment must undertake periodic reviews of the investments held by the trust": *Nestle v National Westminster Bank plc (No 2)* [1993] 1 WLR 1260, 1282G, *per* Leggatt LJ.

Clause 5 is intended to bolster the duty under clause 4 by imposing a duty on trustees to obtain and consider proper advice in connection with the performance of their investment function. The clause implements the recommendation in paragraph 2.32 of the Report and, although subsection (1) echoes the present law in section 6(2) of the Trustee Investments Act 1961, it applies (subject to the exception in subsection (3)) irrespective of the kind of investment that is proposed. However, the exception in subsection (3) recognises that there are circumstances in which it is unnecessary or inappropriate for trustees to obtain advice before investing, or before varying the investments of the trust. This would be the case, for example, if the proposed investment is small, so that the cost of obtaining advice would be disproportionate to the benefit to be gained from doing so, or where the trustees themselves possess skills and knowledge making separate advice unnecessary.

Subsection (4) defines what is meant by 'proper advice'. This definition is based on that in section 6(4) of the Trustee Investments Act 1961. However, it recognises that there may be circumstances in which a person is qualified to give advice by reason of his or her ability in and practical experience of issues other than financial matters. Although financial expertise will be the primary attribute of an investment adviser, other skills may also be relevant. For example, when an investment in land is proposed, the necessary qualities of the person giving the advice are likely to include expertise in the valuation of land. In addition, if the trustees propose to invest in works of art, they would no doubt require advice from an expert in the relevant field. There is no express requirement for the advice to be given or confirmed in writing, but to do so will no doubt be regarded as best practice in many circumstances, and may be necessary for trustees to comply with the duty of care in clause 1.

Clause 6 makes it clear that those trustees who benefit from limited express powers of investment, will also have the general power of investment under clause 3, unless that power is expressly or impliedly excluded or to the extent that it is compatible with any restriction to which the trustees are subject. Thus, for example, an express power of investment authorising trustees to invest "*only* in government bonds" would be taken to exclude the general power of investment. On the other hand, an express power to invest "in shares quoted on the London Stock Exchange, but not in shares of X plc" would take effect as the general power of investment, subject to the restriction on investing in X plc. (But see also clause 7(5)).

(3) In this Act "subordinate legislation" has the same meaning as in the Interpretation Act 1978. 1978 c. 30.

Existing trusts.

7.—(1) This Part does not confer the general power of investment on trustees who immediately before its commencement have special statutory powers of investment.

(2) Subsection (1) is subject to any provision which is made—

(a) under section 41,

(b) by Schedule 2, or

(c) on or after the commencement of this Part by or under any other enactment,

and which confers the general power of investment on such trustees.

(3) A power of investment is a special statutory power if it is conferred by an enactment or subordinate legislation on trustees of a particular trust or a particular kind of trust.

(4) Subject to subsection (1), this Part applies in relation to trusts whether created before or after its commencement.

(5) No provision relating to the powers of a trustee contained in a trust instrument made before 3rd August 1961 is to be treated (for the purposes of section 6(1)(b)) as restricting or excluding the general power of investment.

(6) A provision contained in a trust instrument made before the commencement of this Part which—

(a) has effect under section 3(2) of the Trustee Investments Act 1961 as a power to invest under that Act, or 1961 c. 62.

(b) confers power to invest under that Act,

is to be treated as conferring the general power of investment on a trustee.

PART III

ACQUISITION OF LAND

Power to acquire freehold and leasehold land.

8.—(1) A trustee may acquire freehold or leasehold land in the United Kingdom—

(a) as an investment,

(b) for occupation by a beneficiary, or

(c) for any other reason.

(2) "Freehold or leasehold land" means—

(a) in relation to England and Wales, a legal estate in land,

(b) in relation to Scotland—

(i) the estate or interest of the proprietor of the dominium utile or, in the case of land not held on feudal tenure, the estate or interest of the owner, or

(ii) a tenancy, and

(c) in relation to Northern Ireland, a legal estate in land, including land held under a fee farm grant.

Clause 7 provides for the application of Part II of the Bill to existing trusts. As a general proposition, Part II applies in relation to trusts whether created before or after the legislation comes into force (subsection (4)). However, subsection (1) specifies an exception in respect of trustees having "special statutory powers of investment" (as defined in subsection (3)). However, as subsection (2) indicates, trustees which have such special powers may still be brought within the ambit of Part II if those powers are amended in Schedule 2 to the Bill, by an order made under clause 41 or by another enactment. It should also be noted that Part II does not apply in respect of pension trusts, authorised unit trusts, or funds established under schemes made under sections 24 or 25 of the Charities Act 1993 (see clauses 36 - 38).

Although the application of the general power of investment is subject to restrictions and exclusions in the trust instrument (see clause 6(1)), subsection (5) of clause 7 prevents the provisions of a trust instrument made before 3 August 1961 from being treated as such a restriction or exclusion. In doing so, it gives effect to the recommendation in paragraph 2.52 of the Report. The Trustee Investments Act 1961 swept away investment restrictions (save for restrictions deriving from statute) in trusts created before the Act was brought into force on 3 August 1961. The Bill avoids "re-activating" those restrictions, whilst enabling restrictions that are currently applicable to continue to have effect. Nevertheless, subsection (6) ensures that express powers of investment which operate by reference to the powers conferred on trustees by the Trustee Investments Act 1961 will, in future, be treated as conferring the general power of investment.

Clauses 8 — 10

This group of clauses, which comprise Part III of the Bill, implement the recommendations in paragraphs 2.43 and 2.44 of the Report in respect of the powers of trustees in England and Wales to acquire land on behalf of the trust.

The general power of investment conferred by clause 3 does not permit trustees to invest in land. However, a power to invest in freehold or leasehold land in the United Kingdom is conferred by *clause 8*. The power conferred by subsection (1) is in similar terms to that which is currently to be found in section 6(3) and (4) of the Trusts of Land and Appointment of Trustees Act 1996, which it will replace. Like the existing power, the new power to acquire land is not limited to acquisitions for investment purposes, but includes power to acquire land for occupation by a beneficiary or for any other purpose. However, as a departure from the present law, exercise of the new power is not restricted to trustees of land, but applies to trustees generally, and is not limited to the acquisition of a legal estate in land in England or Wales.

PART III

(3) For the purpose of exercising his functions as a trustee, a trustee who acquires land under this section has all the powers of an absolute owner in relation to the land.

Restriction or exclusion of this Part etc.

9. The powers conferred by this Part are—

(a) in addition to powers conferred on trustees otherwise than by this Part, but

(b) subject to any restriction or exclusion imposed by the trust instrument or by any enactment or any provision of subordinate legislation.

Existing trusts.

10.—(1) This Part does not confer power to acquire freehold or leasehold land on trustees who immediately before its commencement have special statutory powers to invest or apply trust funds.

(2) Subsection (1) is subject to any provision which is made—

(a) under section 41,

(b) by Schedule 2, or

(c) on or after the commencement of this Part by or under any other enactment,

and which confers the power under this Part to acquire freehold or leasehold land on such trustees.

(3) A power to invest or apply trust funds is a special statutory power if it is conferred by an enactment or subordinate legislation on trustees of a particular trust or a particular kind of trust.

(4) Subject to subsection (1), this Part applies in relation to trusts whether created before or after its commencement.

PART IV

AGENTS, NOMINEES AND CUSTODIANS

Agents

Power to employ agents.

11.—(1) Subject to the provisions of this Part, the trustees of a trust may authorise any person to exercise any or all of their delegable functions as their agent.

(2) In the case of a trust other than a charitable trust, the trustees' delegable functions consist of any function other than—

(a) any function relating to whether or in what way any assets of the trust should be distributed,

(b) any power to decide whether any fees or other payment due to be made out of the trust funds should be made out of income or capital,

(c) any power to appoint a person to be a trustee of the trust, or

(d) any power conferred by any other enactment or the trust instrument which permits the trustees to delegate any of their functions or to appoint a person to act as a nominee or custodian.

Trustees of land have, in relation to the land subject to the trust, all the powers of an absolute owner (see section 6(1) of the Trusts of Land etc. Act 1996). Subsection (3) gives trustees the same powers in relation to land acquired under clause 8. Thus, for example, trustees will have power to hold land jointly with other persons, powers of sale and leasing, and power to grant mortgages in respect of the land. The express duty to have regard to the interests of the beneficiaries in exercising powers under section 6 of the 1996 Act (see section 6(5) of that Act) is not replicated in the Bill. However, that provision merely clarifies what is already the law, and the omission of an equivalent provision is not intended to diminish the obligations of trustees.

When exercising a power to acquire land (whether conferred by clause 8 or by the trust instrument) trustees will be subject to the duty of care under clause 1. Trustees will also be subject to that duty when exercising any power in relation to land so acquired (see Schedule 1, paragraph 2).

Clauses 9 and 10 have a similar effect in relation to the application of the powers conferred by Part III as clauses 6 and 7 have in relation to the powers conferred by Part II. The reference to "special statutory powers to invest or *apply* trust funds" makes it clear that the new power to acquire land does not apply to the trustees of the settlement under the Settled Land Act 1925 or to trustees of trusts subject to the Universities and Colleges Estates Act 1925.

Clauses 11 — 15

This group of clauses sets out the powers of collective delegation that trustees have in default of express powers being conferred by the trust instrument. It does not relate to delegation by individual trustees, which continues to be governed by section 25 of the Trustee Act 1925.

Clause 11 identifies the functions which may be delegated. This depends upon whether or not the trust is a charitable trust. The trustees of non-charitable trusts may delegate any function other than those listed in subsection (2) (as recommended in paragraph 4.9 of the Report). Paragraph (d) of subsection (2) prevents the authorisation of sub-delegation (or delegation of any power to appoint nominees or custodians) except in accordance with clauses 14 and 20.

(3) In the case of a charitable trust, the trustees' delegable functions are—

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

(b) any function relating to the investment of assets subject to the trust (including, in the case of land acquired as an investment, managing the land and creating or disposing of an interest in the land);

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

(d) any other function prescribed by an order made by the Secretary of State.

(4) For the purposes of subsection (3)(c) a trade is an integral part of carrying out a trust's charitable purpose if, whether carried on in the United Kingdom or elsewhere, the profits are applied solely to the purposes of the trust and either—

(a) the trade is exercised in the course of the actual carrying out of a primary purpose of the trust, or

(b) the work in connection with the trade is mainly carried out by beneficiaries of the trust.

(5) The power to make an order under subsection (3)(d) is exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Persons who may act as agents.

12.—(1) Subject to subsection (2), the persons whom the trustees may under section 11 authorise to exercise functions as their agent include one or more of their number.

(2) The trustees may not authorise two (or more) persons to exercise the same function unless they are to exercise the function jointly.

(3) The trustees may not under section 11 authorise a beneficiary to exercise any function as their agent.

(4) The trustees may under section 11 authorise a person to exercise functions as their agent even though he is also appointed to act as their nominee or custodian (whether under section 16, 17 or 18 or any other power).

Linked functions etc.

13.—(1) Subject to subsections (2) and (5), a person who is authorised under section 11 to exercise a function is (whatever the terms of the agency) subject to any specific duties or restrictions attached to the function.

For example, a person who is authorised under section 11 to exercise the general power of investment is subject to the duties under section 4 in relation to that power.

(2) A person who is authorised under section 11 to exercise a power which is subject to a requirement to obtain advice is not subject to the requirement if he is the kind of person from whom it would have been proper for the trustees, in compliance with the requirement, to obtain advice.

(3) Subsections (4) and (5) apply to a trust to which section 11(1) of the Trusts of Land and Appointment of Trustees Act 1996 (duties to consult beneficiaries and give effect to their wishes) applies.

1996 c. 47.

EXPLANATORY NOTES

For the reasons explained in paragraph 4.38 of the Report, it is not possible to apply the provisions of clause 11(2) to charitable trusts directly. However, a similar result is achieved by subsection (3). The functions which may be delegated by charity trustees are restricted to those listed in that subsection (in accordance with the recommendations in paragraphs 4.41 and 4.42 of the Report). Paragraph (a) ensures that functions which are presently delegable under section 23(1) of the Trustee Act 1925 will continue to be so, even if they do not relate to the more specific functions mentioned in the rest of subsection (3). Fund raising is included within the list of delegable functions for charity trustees. However, a distinction is made in subsection (3)(c) (which needs to be read with subsection (4)) between general fund raising activities, and fund raising activities which are an integral part of carrying out the trust's charitable purpose: for example, the charging of fees by a school operating as a charitable trust.

With one exception, the Bill does not place restrictions on the persons whom trustees may appoint as their agents under clause 11. However, subsection (3) of *clause 12* prevents the appointment of a beneficiary as an agent. Trustees of land have power to delegate to beneficiaries under section 9 of the Trusts of Land etc. Act 1996, but delegation under that power is subject to restrictions which do not apply to delegation under clause 11 of the Bill. Subsection (3) prevents the avoidance of those restrictions.

As recommended at paragraph 3.20 of the Report, the duty of care under clause 1 will apply to trustees when entering into arrangements under which a person is authorised to exercise functions as an agent (whether under clause 11 or under any power conferred by the trust instrument). It will also apply to the duty under clause 22 to keep those arrangements under review (see Schedule 1, paragraph 3). However, the application of the duty of care under clause 1 is limited to *trustees*. It does not apply to an agent in the performance of the agency (or to a nominee or custodian in the performance of its duties). Nevertheless, such persons will owe a separate duty of care to the trust under the general law of agency.

Clause 13 makes it clear that, although an agent is not subject to the duty of care under clause 1, the exercise of a delegated function by an agent is subject to any specific duties or restrictions attached to the function. As the example given in subsection (1) suggests, this provision will most commonly apply in cases where the trustees delegate their investment function — the agent will be obliged to have regard to the standard investment criteria in accordance with clause 4. The agent may also be required to obtain and consider proper advice in accordance with clause 5. However, it will usually be the case that the person appointed to exercise the trustees' powers of investment as an agent would be able, if he were a trustee, to utilise the exception in clause 5(3). This fact is recognised by subsection (2) of clause 13. Subsection (1) may apply to the delegation of functions other than in relation to investment, however. For example, sections 36 - 39 of the Charities Act 1993 impose restrictions on dispositions and mortgages of land owned by charities. If charity trustees delegate functions in relation to land under clause 11(3)(b), the agent will be required to comply with the requirements of the 1993 Act in carrying out those functions.

Section 11 of the Trusts of Land etc. Act 1996 imposes a duty upon trustees of land to consult certain beneficiaries in the exercise of their functions in relation to land subject to the trust. Subsections (3) - (5) of clause 13 provide that trustees must ensure that, in delegating any of those functions, they are not prevented from complying with their duties under section 11(1) of the 1996 Act. These duties must be performed by the trustees personally, and may not be delegated to an agent.

PART IV

(4) The trustees may not under section 11 authorise a person to exercise any of their functions on terms that prevent them from complying with section 11(1) of the 1996 Act.

(5) A person who is authorised under section 11 to exercise any function relating to land subject to the trust is not subject to section 11(1) of the 1996 Act.

Terms of agency.

14.—(1) Subject to subsection (2) and sections 15(2) and 29 to 32, the trustees may authorise a person to exercise functions as their agent on such terms as to remuneration and other matters as they may determine.

(2) The trustees may not authorise a person to exercise functions as their agent on any of the terms mentioned in subsection (3) unless it is reasonably necessary for them to do so.

(3) The terms are—

(a) a term permitting the agent to appoint a substitute;

(b) a term restricting the liability of the agent or his substitute to the trustees or any beneficiary;

(c) a term permitting the agent to act in circumstances capable of giving rise to a conflict of interest.

Asset management: special restrictions.

15.—(1) The trustees may not authorise a person to exercise any of their asset management functions as their agent except by an agreement which is in or evidenced in writing.

(2) The trustees may not authorise a person to exercise any of their asset management functions as their agent unless—

(a) they have prepared a statement that gives guidance as to how the functions should be exercised ("a policy statement"), and

(b) the agreement under which the agent is to act includes a term to the effect that he will secure compliance with—

(i) the policy statement, or

(ii) if the policy statement is revised or replaced under section 22, the revised or replacement policy statement.

(3) The trustees must formulate any guidance given in the policy statement with a view to ensuring that the functions will be exercised in the best interests of the trust.

(4) The policy statement must be in or evidenced in writing.

(5) The asset management functions of trustees are their functions relating to—

(a) the investment of assets subject to the trust,

(b) the acquisition of property which is to be subject to the trust, and

(c) managing property which is subject to the trust and disposing of, or creating or disposing of an interest in, such property.

Nominees and custodians

Power to appoint nominees.

16.—(1) Subject to the provisions of this Part, the trustees of a trust may—

EXPLANATORY NOTES

Subject to the provisions of *clauses 14 and 15* (and to the provisions in Part V relating to remuneration and expenses), trustees will be free to agree terms for the appointment of an agent. The basis upon which the agency will have effect will be governed by the general law of agency.

Clause 15, which implements the recommendations in paragraphs 4.21 and 4.22 of the Report, imposes special restrictions on the delegation of the asset management functions of trustees (as defined in subsection (5)). There is no general requirement for the appointment of an agent under clause 11 to be made or evidenced in writing but, by virtue of subsection (1), such a requirement does apply if the agent is to be authorised to exercise asset management functions.

Before trustees may delegate any of their asset management functions they must prepare a policy statement giving guidance as to how the functions should be exercised, with a view to ensuring that the functions will be exercised in the best interests of the trust. For example, if trustees delegate their powers of investment to an agent, they must enter into an agreement with the agent at the outset setting out the investment objectives of the trust. Such an agreement may include considerations as to liquidity of assets to meet the needs of the trust, the desired balance between capital growth and income yield, and any "ethical" considerations relevant to the investment policy of the trust. The policy statement may expand upon the manner in which the duties imposed by clause 4 should be discharged in respect of the trust. In relation to the delegation of functions relating to the acquisition and management of land on behalf of the trust, the policy statement may include considerations as to the value and type of property which may be acquired, and the quality of title required. Where relevant it may also consider the terms upon which land may be let, sold or charged. The requirement for a policy statement only applies where the trustees delegate their discretion in relation to the matters concerned. It does not apply, for example, in cases where the trustees obtain investment advice but take decisions on investment matters themselves.

The duties of trustees with respect to keeping the delegation of functions (and any policy statement) under review are contained in clause 22.

Clauses 16 — 20

This group of clauses governs trustees' powers to appoint nominees and custodians in cases where the trust instrument contains no express powers to do so. They implement a number of the recommendations in Part V of the Report. Powers to appoint nominees and custodians are conferred by *clauses 16 and 17.* These powers are conferred on trustees of all trusts except pension trusts, authorised unit trusts, or funds established under schemes made under sections 24 or 25 of the Charities Act 1993 (see clauses 36 - 38). In addition, for trusts which have a custodian trustee, it would be inappropriate for the managing trustees to have these powers as the trust property will be vested in the custodian trustee (see section 4(2) of the Public Trustee Act 1906).

Notwithstanding the fact that a person appointed to act as a nominee (whether under clause 16 or an express power in the trust instrument) may act as a bare trustee, it is not intended that the appointment of a nominee should affect the fiduciary relationship of the trustees to the beneficiaries of the trust.

(a) appoint a person to act as their nominee in relation to such of the assets of the trust as they determine, and

(b) take such steps as are necessary to secure that those assets are vested in a person so appointed.

(2) An appointment under this section must be in or evidenced in writing.

(3) This section does not apply to any trust having a custodian trustee.

Power to appoint custodians.

17.—(1) Subject to the provisions of this Part, the trustees of a trust may appoint a person to act as a custodian in relation to such of the assets of the trust as they may determine.

(2) For the purposes of this Act a person is a custodian in relation to assets if he undertakes the safe custody of the assets or of any documents or records concerning the assets.

(3) An appointment under this section must be in or evidenced in writing.

(4) This section does not apply to any trust having a custodian trustee.

Investment in bearer securities.

18.—(1) If trustees retain or invest in securities payable to bearer, they must appoint a person to act as a custodian of the securities.

(2) Subsection (1) does not apply if the trust instrument contains provision which (however expressed) permits the trustees to retain or invest in securities payable to bearer without appointing a person to act as a custodian.

(3) An appointment under this section must be in or evidenced in writing.

(4) This section does not apply to any trust having a custodian trustee.

Persons who may be appointed as nominees or custodians.

19.—(1) A person may not be appointed under section 16, 17 or 18 as a nominee or custodian unless one of the relevant conditions is satisfied.

(2) The relevant conditions are that—

(a) the person carries on a business which consists of or includes acting as a nominee or custodian;

(b) the person is a body corporate which is controlled by the trustees.

(3) The question whether a body corporate is controlled by trustees is to be determined in accordance with section 840 of the Income and Corporation Taxes Act 1988. 1988 c. 1.

(4) The trustees of a charitable trust which is not an exempt charity must act in accordance with any guidance given by the Charity Commissioners concerning the selection of a person for appointment as a nominee or custodian under section 16, 17 or 18.

(5) Subject to subsections (1) and (4), the persons whom the trustees may under section 16, 17 or 18 appoint as a nominee or custodian include—

(a) one of their number, if that one is a trust corporation, or

(b) two (or more) of their number, if they are to act as joint nominees or joint custodians.

(6) The trustees may under section 16 appoint a person to act as their nominee even though he is also—

(a) appointed to act as their custodian (whether under section 17 or 18 or any other power), or

Although clause 17 confers a power to appoint custodians, *clause 18* imposes a *duty* to do so in respect of any securities payable to bearer which are held on behalf of the trust. This provision replaces section 7(1) of the Trustee Act 1925. However, the persons who may act as custodians under the Bill may include persons who would not qualify under section 7(1) of the 1925 Act as a "banker or banking company". Clause 18 does not oblige trustees to appoint a person to collect the income from any securities held on behalf of the trust but, to the extent that any person is appointed for that purpose, he or she will be appointed as an agent under clause 11.

As recommended at paragraph 3.20 of the Report, the duty of care under clause 1 will apply to trustees when entering into arrangements under which a person is appointed to act as a nominee or custodian (whether under the provisions in the Bill or under any power conferred by the trust instrument). It will also apply to the duty under clause 22 to keep those arrangements under review (see Schedule 1, paragraph 3).

Clause 19 makes it clear that, to be eligible for appointment as a nominee or custodian, a person must normally carry on a business which consists of or includes acting as a nominee or custodian. However, there is an alternative to this requirement in subsection (2) (which needs to be read with subsection (3)), so that trustees may use special purpose vehicles for nominee or custodianship purposes.

For many trusts, the requirements in subsection (2) will constitute the only restrictions on the eligibility of persons to act as nominees or custodians. However, as recommended in paragraph 5.9 of the Report, subsection (4) provides that charity trustees must, (unless the charity is exempt from the supervisory jurisdiction of the Charity Commission), act in accordance with any guidance given by the Charity Commissioners concerning the selection of nominees or custodians.

PART IV

(b) authorised to exercise functions as their agent (whether under section 11 or any other power).

(7) Likewise, the trustees may under section 17 or 18 appoint a person to act as their custodian even though he is also—

(a) appointed to act as their nominee (whether under section 16 or any other power), or

(b) authorised to exercise functions as their agent (whether under section 11 or any other power).

Terms of appointment of nominees and custodians.

20.—(1) Subject to subsection (2) and sections 29 to 32, the trustees may under section 16, 17 or 18 appoint a person to act as a nominee or custodian on such terms as to remuneration and other matters as they may determine.

(2) The trustees may not under section 16, 17 or 18 appoint a person to act as a nominee or custodian on any of the terms mentioned in subsection (3) unless it is reasonably necessary for them to do so.

(3) The terms are—

(a) a term permitting the nominee or custodian to appoint a substitute;

(b) a term restricting the liability of the nominee or custodian or his substitute to the trustees or to any beneficiary;

(c) a term permitting the nominee or custodian to act in circumstances capable of giving rise to a conflict of interest.

Review of and liability for agents, nominees and custodians etc.

Application of sections 22 and 23.

21.—(1) Sections 22 and 23 apply in a case where trustees have, under section 11, 16, 17 or 18—

(a) authorised a person to exercise functions as their agent, or

(b) appointed a person to act as a nominee or custodian.

(2) Subject to subsection (3), sections 22 and 23 also apply in a case where trustees have, under any power conferred on them by the trust instrument—

(a) authorised a person to exercise functions as their agent, or

(b) appointed a person to act as a nominee or custodian.

(3) If the application of section 22 or 23 is inconsistent with the terms of the trust instrument, the section in question does not apply.

Review of agents, nominees and custodians etc.

22.—(1) While the agent, nominee or custodian continues to act for the trust, the trustees—

(a) must keep under review the arrangements under which the agent, nominee or custodian acts and how those arrangements are being put into effect,

(b) if circumstances make it appropriate to do so, must consider whether there is a need to exercise any power of intervention that they have, and

(c) if they consider that there is a need to exercise such a power, must do so.

Clause 20 has a similar effect in relation to the appointment of nominees and custodians as clause 14 has in relation to the appointment of agents.

Clauses 21 — 23

This group of clauses provides for the review of, and liability for, agents, nominees and custodians. *Clause 21* applies these provisions to the authorisation or appointment of agents, nominees or custodians both under the powers conferred in the Bill and (unless they would be inconsistent with its terms) under any express powers in the trust instrument.

Once an agent, nominee or custodian has been authorised or appointed, the trustees have a duty under *clause 22* to keep under review the arrangements under which that person acts for the trust, and how those arrangements are being implemented. This obligation means that the trustees must keep under review the question of whether the person who has been authorised or appointed to act for the trust is a suitable person to do so, and whether the terms on which that person acts are appropriate. In addition, the trustees must keep under review the manner in which the agent, nominee or custodian is performing his or her functions. The duty to "keep under review" does not oblige trustees to review the arrangements at specific intervals or in a particular way. The manner in which the duty should be discharged will depend upon what is reasonable in the circumstances.

The previous paragraph explains the first part of the duty imposed by subsection (1) of clause 22. However, trustees have a further duty which comes into effect if circumstances make it appropriate. In such circumstances the trustees must consider whether to exercise any power of intervention (within the meaning of subsection (4)) that they have. Circumstances in which it would be appropriate for trustees to do this may arise, for example, where the agent, nominee or custodian is not carrying out his or her functions effectively, or where the trustees have cause to doubt the suitability of the person in question to continue to act for the trust. In addition, if the trustees consider that there is a need to exercise any power of intervention, they are under a positive duty to do so.

(2) If the agent has been authorised to exercise asset management functions, the duty under subsection (1) includes, in particular—

(a) a duty to consider whether there is any need to revise or replace the policy statement made for the purposes of section 15,

(b) if they consider that there is a need to revise or replace the policy statement, a duty to do so, and

(c) a duty to assess whether the policy statement (as it has effect for the time being) is being complied with.

(3) Subsections (3) and (4) of section 15 apply to the revision or replacement of a policy statement under this section as they apply to the making of a policy statement under that section.

(4) "Power of intervention" includes—

(a) a power to give directions to the agent, nominee or custodian;

(b) a power to revoke the authorisation or appointment.

Liability for agents, nominees and custodians etc.

23.—(1) A trustee is not liable for any act or default of the agent, nominee or custodian unless he has failed to comply with the duty of care applicable to him, under paragraph 3 of Schedule 1—

(a) when entering into the arrangements under which the person acts as agent, nominee or custodian, or

(b) when carrying out his duties under section 22.

(2) If a trustee has agreed a term under which the agent, nominee or custodian is permitted to appoint a substitute, the trustee is not liable for any act or default of the substitute unless he has failed to comply with the duty of care applicable to him, under paragraph 3 of Schedule 1—

(a) when agreeing that term, or

(b) when carrying out his duties under section 22 in so far as they relate to the use of the substitute.

Supplementary

Effect of trustees exceeding their powers.

24. A failure by the trustees to act within the limits of the powers conferred by this Part—

(a) in authorising a person to exercise a function of theirs as an agent, or

(b) in appointing a person to act as a nominee or custodian,

does not invalidate the authorisation or appointment.

Sole trustees.

25.—(1) Subject to subsection (2), this Part applies in relation to a trust having a sole trustee as it applies in relation to other trusts (and references in this Part to trustees—except in sections 12(1) and (3) and 19(5)—are to be read accordingly).

(2) Section 18 does not impose a duty on a sole trustee if that trustee is a trust corporation.

Restriction or exclusion of this Part etc.

26. The powers conferred by this Part are—

(a) in addition to powers conferred on trustees otherwise than by this Act, but

Subsection (2) makes it clear that the duty extends to keeping under review (and, where necessary, revising or replacing) any policy statement prepared in connection with the delegation of asset management functions under clause 15.

When carrying out their duties under clause 22, trustees are subject to the duty of care under clause 1 (see Schedule 1, paragraph 3). *Clause 23* makes it clear that a trustee is not liable for the acts or defaults of any agent, nominee or custodian unless the trustee has acted in breach of that duty when entering into the arrangements under which the person acts or when carrying out his or her duties under clause 22. Paragraph 3(2) of Schedule 1 expands upon what is meant by "entering into arrangements" for this purpose.

Subsection (2) governs the liability of trustees for the acts or defaults of any substitute of an agent, nominee or custodian. Under clauses 14(2) and 20(2), trustees may only authorise or appoint an agent, nominee or custodian on terms which permit that person to appoint a substitute where it is reasonably necessary for the trustees to agree to such terms. Trustees are also subject to the duty of care under clause 1 when agreeing the terms on which agents, nominees and custodians are to act, and a trustee is liable for the acts or defaults of a substitute only if he or she has acted in breach of that duty when agreeing the term permitting the appointment of a substitute or when carrying out his or her duties under clause 22 in so far as they relate to the use of the substitute.

Clause 24

Clause 24 facilitates dealings by third parties with agents, nominees and custodians appointed by trustees. Third parties do not need to satisfy themselves that the trustees have complied with the requirements of the Bill in authorising or appointing such persons, because the validity of the authorisation or appointment is not affected by irregularities in this regard. For example, the authorisation of an agent who is a beneficiary of the trust, the authorisation of an agent on terms which contravene clause 13(4), or on any of the terms mentioned in clause 14(3) where it is *not* reasonably necessary for the trustees to agree to such terms, will not invalidate the authorisation. Indeed, even where an agent is authorised to exercise a function which is not a "delegable function" as defined in clause 11, the authorisation will be valid.

Clause 24 does not, of course, relieve trustees of any of their obligations under the Bill. Although the authorisation or appointment of an agent, nominee or custodian in contravention of any of the requirements in the Bill will not invalidate that authorisation or appointment, the trustees will be liable for any loss incurred by the trust as a consequence. In addition, if a person is authorised to exercise a function as an agent, that person may also be liable, as trustee *de son tort*, if the function in question is not properly delegable under clause 11.

Clause 25

The provisions of Part IV of the Bill confer powers which are exercisable by trustees *collectively*. However, *clause 25* makes it clear that, where a trust has a sole trustee, that trustee is still able to exercise those powers.

The duty under clause 18 to appoint a person to act as a custodian in relation to any securities payable to bearer is intended to ensure a high level of security for such assets. This level of security is likely to be provided if the assets are held by a trust corporation, and so subsection (2) disapplies the duty to appoint a custodian in relation to trusts having a sole trustee which is a trust corporation.

PART IV

(b) subject to any restriction or exclusion imposed by the trust instrument or by any enactment or any provision of subordinate legislation.

Existing trusts.

27. This Part applies in relation to trusts whether created before or after its commencement.

PART V

REMUNERATION

Trustee's entitlement to payment under trust instrument.

28.—(1) Subsections (2) and (3) apply to a trustee if—

(a) there is a provision in the trust instrument entitling him to receive payment out of trust funds in respect of services provided by him on behalf of the trust,

(b) the trustee is a trust corporation or is acting in a professional capacity, and

(c) the application of this section is not inconsistent with the terms of the trust instrument.

(2) The trustee is to be treated as entitled under the trust instrument to receive payment in respect of services even if they are services which are capable of being provided by a lay trustee.

(3) Any payments to which the trustee is entitled in respect of services are to be treated as remuneration for services (and not as a gift) for the purposes of—

1837 c. 26.

(a) section 15 of the Wills Act 1837 (gifts to an attesting witness to be void), and

1925 c. 23.

(b) section 34(3) of the Administration of Estates Act 1925 (order in which estate to be paid out).

(4) For the purposes of this Part, a trustee acts in a professional capacity if he acts in the course of a profession or business which consists of or includes the provision of services in connection with—

(a) the management or administration of trusts generally or a particular kind of trust, or

(b) any particular aspect of the management or administration of trusts generally or a particular kind of trust.

(5) For the purposes of this Part, a person acts as a lay trustee if he—

(a) is not a trust corporation, and

(b) does not act in a professional capacity.

Remuneration of certain trustees.

29.—(1) Subject to subsection (5), a trustee who—

(a) is a trust corporation, but

(b) is not a trustee of a charitable trust,

is entitled to receive reasonable remuneration out of the trust funds for any services that the trust corporation provides on behalf of the trust.

(2) Subject to subsection (5), a trustee who—

(a) acts in a professional capacity, but

EXPLANATORY NOTES

Clauses 28 — 33

This group of clauses, which comprise Part V of the Bill, governs the remuneration of trustees by setting down rules of construction for express charging clauses in trust instruments and by providing for the remuneration of certain trustees in default of such express provision in the trust instrument.

Clause 28 (which implements recommendations in paragraph 7.19 of the Report) introduces new rules for the construction of express charging clauses. These rules apply in relation to trusts whenever created provided that their application is not inconsistent with the terms of the trust instrument. Nevertheless, they only apply in relation to services provided on or after the commencement of the legislation. The clause contains two operative provisions. First, subsection (2) reverses the present common law rule which requires an express charging clause to be strictly construed against the trustee, so that, unless the trust instrument contains contrary provision, a professional trustee may only be remunerated for services which could not have been provided by a lay trustee. Where subsection (2) applies, the services for which a trust corporation or a trustee acting in a professional capacity may be entitled to payment include services which are capable of being provided by a lay trustee.

Subsection (3) contains the second operative provision in clause 28. Under the present law, payments under express charging clauses are treated for many purposes as a gift and not as remuneration for services rendered. Subsection (3) reverses this rule of construction for the purposes of section 15 of the Wills Act 1837, enabling trustees to be paid for work done in connection with testamentary trusts even where they witness the will under which the trust arises. In addition, such payments will in future be treated as remuneration for the purposes of section 34(3) of the Administration of Estates Act 1925. Clause 33(2) prevents this provision from having an effect upon priorities in the administration of estates where the death occurred before the legislation comes into force.

Subsection (4) explains what is meant by a condition that the trustee "acts in a professional capacity". To satisfy such a condition there must be a close nexus between the profession or business in the course of which the trustee acts and the services which he or she provides *as trustee*. However, it is not necessary for the trustee to act in the course of a profession or business which has the management or administration of trusts as its primary focus in order for the condition to be met. A solicitor, accountant or banker, for example, would meet the condition.

Clause 29 (which implements the recommendations in paragraphs 7.12, 7.16 and 4.34 of the Report) effectively inserts a charging clause into any trust instrument which does not contain express provision (either for or against) remuneration of the trustee in question and where the entitlement to remuneration of the trustee is not the subject of provision in another statute or subordinate legislation. Clause 29 will apply unless a provision in a trust instrument makes specific provision in relation to the trustees' entitlement to remuneration. A gift or bequest to a trustee will not have this effect unless it is expressed to be given in consideration of the recipient acting as a trustee. The clause applies in relation to services provided on or after the commencement of the legislation on behalf of trusts whenever created. However, it has no application in relation to services provided on behalf of charitable trusts.

The effect of subsection (1) is to confer upon every trust corporation which acts as a trustee the right to receive "reasonable remuneration" (as defined by subsection (3)) for any services that it provides on behalf of the trust unless the right is negated in the circumstances mentioned above. The right applies even if the trust corporation is a sole trustee and, if it is not a sole trustee, irrespective of whether the other trustees have given their consent. In addition, there is no need to show that a trust corporation acts in a professional capacity.

Subsection (2) provides for other trustees to receive reasonable remuneration for any services they provide on behalf of the trust. However, unlike trust corporations, other trustees do not have an automatic entitlement to such remuneration. The entitlement is dependent upon the trustee acting in a professional capacity (see clause 28(4)) and upon the agreement in writing of each of the other trustees. In determining whether to give such agreement, trustees will be subject to their paramount duty at common law to act in the best interests of the present and future beneficiaries of the trust. Because the right to remuneration under clause 29 is conditional upon such agreement, a sole trustee (other than a trust corporation) will only be entitled to remuneration if there is express provision to authorise it in the trust instrument.

(b) is not a trust corporation, a trustee of a charitable trust or a sole trustee,

is entitled to receive reasonable remuneration out of the trust funds for any services that he provides on behalf of the trust if each other trustee has agreed in writing that he may be remunerated for the services.

(3) "Reasonable remuneration" means, in relation to the provision of services by a trustee, such remuneration as is reasonable in the circumstances for the provision of those services on behalf of that trust by that trustee.

(4) A trustee is entitled to remuneration under this section even if the services in question are capable of being provided by a lay trustee.

(5) A trustee is not entitled to remuneration under this section if any provision about his entitlement to remuneration has been made—

(a) by the trust instrument, or

(b) by any enactment or any provision of subordinate legislation.

(6) This section applies to a trustee who has been authorised under a power conferred by Part IV or the trust instrument—

(a) to exercise functions as an agent of the trustees, or

(b) to act as a nominee or custodian,

as it applies to any other trustee.

Remuneration of trustees of charitable trusts.

30.—(1) The Secretary of State may by regulations make provision for the remuneration of trustees of charitable trusts.

(2) The power under subsection (1) includes power to make provision for the remuneration of a trustee who has been authorised under a power conferred by Part IV or the trust instrument—

(a) to exercise functions as an agent of the trustees, or

(b) to act as a nominee or custodian.

(3) Regulations under this section may—

(a) make different provision for different cases;

(b) contain such supplemental, incidental, consequential and transitional provision as the Secretary of State considers appropriate.

(4) The power to make regulations under this section is exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Trustees' expenses.

31.—(1) A trustee is entitled to be reimbursed out of the trust funds for expenses properly incurred when acting on behalf of the trust.

(2) This section applies to a trustee who has been authorised under a power conferred by Part IV or the trust instrument—

(a) to exercise functions as an agent of the trustees, or

(b) to act as a nominee or custodian,

as it applies to any other trustee.

Subsection (3) defines "reasonable remuneration" in relation to the provision of services by a trustee. In determining the level of remuneration that is reasonable in the circumstances, regard must be had not only to the nature of the services provided, but also to the nature of the trust and the attributes of the trustee. Remuneration authorised under clause 29 will, by definition, be regarded as remuneration for services (and not as a gift) for all purposes, and is payable out of the income or capital funds of the trust (see the definition of "trust funds" in clause 39(1)).

Clause 29 does not permit the remuneration of charity trustees. However, *clause 30* confers a power upon the Secretary of State to make provision by statutory instrument for the remuneration of such trustees. Although clause 30 does not constrain the power of the Secretary of State as to the content of regulations made in pursuance of the power, it is likely that any such regulations (if made) would be in similar form to clause 29, with such modifications as may be appropriate. For example, it is likely that the requirement for consent in clause 29(2) would be modified so that only the agreement of a majority of the trustees of a charity would be required to the remuneration of one or more of their number.

Clauses 31 and 32 (which implement recommendations in paragraphs 4.23, 4.34, 5.10 and 5.13 of the Report) make provision for the reimbursement of trustees' expenses and for the payment of remuneration and expenses to agents, nominees and custodians who are not trustees. These provisions apply in relation to services provided, or expenses incurred, on or after the commencement of the legislation on behalf of trusts whenever created. Remuneration and expenses payable under these clauses may be paid out of the income or capital funds of the trust (see the definition of "trust funds" in clause 39(1)).

PART V

Remuneration and expenses of agents, nominees and custodians.

32.—(1) This section applies if, under a power conferred by Part IV or the trust instrument, a person other than a trustee has been—

(a) authorised to exercise functions as an agent of the trustees, or

(b) appointed to act as a nominee or custodian.

(2) The trustees may remunerate the agent, nominee or custodian out of the trust funds for services if—

(a) he is engaged on terms entitling him to be remunerated for those services, and

(b) the amount does not exceed such remuneration as is reasonable in the circumstances for the provision of those services by him on behalf of that trust.

(3) The trustees may reimburse the agent, nominee or custodian out of the trust funds for any expenses properly incurred by him in exercising functions as an agent, nominee or custodian.

Application.

33.—(1) Subject to subsection (2), sections 28, 29, 31 and 32 apply in relation to services provided or (as the case may be) expenses incurred on or after their commencement on behalf of trusts whenever created.

(2) Nothing in section 28 or 29 is to be treated as affecting the operation of—

1837 c. 26. (a) section 15 of the Wills Act 1837, or

1925 c. 23. (b) section 34(3) of the Administration of Estates Act 1925,

in relation to any death occurring before the commencement of section 28 or (as the case may be) section 29.

PART VI

MISCELLANEOUS AND SUPPLEMENTARY

Power to insure. 1925 c. 19.

34.—(1) For section 19 of the Trustee Act 1925 (power to insure) substitute—

"Power to insure.

19.—(1) A trustee may—

(a) insure any property which is subject to the trust against risks of loss or damage due to any event, and

(b) pay the premiums out of the trust funds.

(2) In the case of property held on a bare trust, the power to insure is subject to any direction given by the beneficiary or each of the beneficiaries—

(a) that any property specified in the direction is not to be insured;

(b) that any property specified in the direction is not to be insured except on such conditions as may be so specified.

(3) Property is held on a bare trust if it is held on trust for—

(a) a beneficiary who is of full age and capacity and absolutely entitled to the property subject to the trust, or

EXPLANATORY NOTES

Clause 34

Clause 34 (which implements the recommendations in Part VI of the Report) substitutes a new provision for that which is presently in section 19 of the Trustee Act 1925 (power to insure). Subsection (1) of the new provision confers a power upon all trustees to insure *any* trust property (section 19 of the 1925 Act is presently limited to insuring personal property). Trustees may insure the trust property against such risks as they see fit, and will no longer be restricted as to the amount of cover that may be taken out (section 19 of the 1925 Act presently limits the power to insure to three quarters of the full value of the property insured). Trustees will be able to pay the insurance premiums out of the income or capital funds of the trust.

The new section 19(2) of the Trustee Act 1925 qualifies the power to insure where property is held on a bare trust. Where the beneficiaries are absolutely entitled to the trust property, they have power to bring the trust to an end, and this provision obliges the trustees to comply with certain directions given by such beneficiaries as to insurance of the trust property. To the extent that any such directions are given, the trustees may not delegate their power to insure. This is so that the beneficiaries can ensure compliance with their directions.

The new section 19 confers a *power* to insure. It does not impose a *duty* to do so. However, it is likely that a failure by the trustees to exercise a power to insure (whether under clause 34 or an express power to insure in the trust instrument) in circumstances where a reasonable person would have insured the trust property will constitute a breach of the trustees' paramount duty to act in the best interests of the present and future beneficiaries of the trust. In addition, although clause 34 does not impose a duty to insure, a trustee will be subject to the duty of care under clause 1 when exercising the power under the new section 19 or any corresponding power conferred by the trust instrument (see Schedule 1, paragraph 4). The duty of care will therefore apply, for example, to the selection of an insurer and to the terms on which insurance cover is taken out.

(b) beneficiaries each of whom is of full age and capacity and who (taken together) are absolutely entitled to the property subject to the trust.

(4) If a direction under subsection (2) of this section is given, the power to insure, so far as it is subject to the direction, ceases to be a delegable function for the purposes of section 11 of the Trustee Act 1999 (power to employ agents).

(5) In this section "trust funds" means any income or capital funds of the trust."

(2) In section 20(1) of the Trustee Act 1925 (application of insurance money) omit "whether by fire or otherwise". 1925 c. 19.

(3) The amendments made by this section apply in relation to trusts whether created before or after its commencement.

Personal representatives.

35.—(1) Subject to the following provisions of this section, this Act applies in relation to a personal representative administering an estate according to the law as it applies to a trustee carrying out a trust for beneficiaries.

(2) For this purpose this Act is to be read with the appropriate modifications and in particular—

(a) references to the trust instrument are to be read as references to the will,

(b) references to a beneficiary or to beneficiaries, apart from the reference to a beneficiary in section 8(1)(b), are to be read as references to a person or the persons interested in the due administration of the estate, and

(c) the reference to a beneficiary in section 8(1)(b) is to be read as a reference to a person who under the will of the deceased or under the law relating to intestacy is beneficially interested in the estate.

(3) Remuneration to which a personal representative is entitled under section 28 or 29 is to be treated as an administration expense for the purposes of—

(a) section 34(3) of the Administration of Estates Act 1925 (order in which estate to be paid out), and 1925 c. 23.

(b) any provision giving reasonable administration expenses priority over the preferential debts listed in Schedule 6 to the Insolvency Act 1986. 1986 c. 45.

(4) Nothing in subsection (3) is to be treated as affecting the operation of the provisions mentioned in paragraphs (a) and (b) of that subsection in relation to any death occurring before the commencement of this section.

Pension schemes. 1993 c. 48.

36.—(1) In this section "pension scheme" means an occupational pension scheme (within the meaning of the Pension Schemes Act 1993) established under a trust and subject to the law of England and Wales.

(2) Part I does not apply in so far as it imposes a duty of care in relation to—

(a) the functions described in paragraphs 1 and 2 of Schedule 1, or

EXPLANATORY NOTES

Clause 35

Clause 35 implements the recommendation in paragraph 1.20 of the Report by providing for the application of the Bill to personal representatives. The effect of subsection (1) is that personal representatives have (subject to subsections (2) - (4)) the same powers and duties as trustees under the Bill, including the powers of delegation of trustees (other than charity trustees) under clause 11.

Clause 8(1)(b) confers power for trustees (and personal representatives) to acquire land for occupation by a beneficiary. However, although persons interested in the due administration of the estate (including creditors) are, for most purposes, included within the meaning of "beneficiary" in the Bill, subsection (2) of clause 35 gives that expression a more restricted meaning in clause 8(1)(b).

The effect of subsection (3) is that remuneration paid to a personal representative will in future count as an administration expense for the purposes of section 34(3) of the Administration of Estates Act 1925 and, in the case of insolvent estates, any provision giving such expenses priority over preferential debts. The remuneration of personal representatives will therefore have priority over legacies and other debts of the deceased. Subsection (4) prevents this provision from having an effect upon priorities in the administration of estates where the death occurred before the legislation comes into force.

Clause 36

Clause 36 (which implements recommendations in paras 4.47 and 5.20 of the Report) governs the application of the Bill to occupational pension schemes. The investment powers of the trustees of such schemes are conferred by section 34 of the Pensions Act 1995, and Parts II and III of the Bill do not apply to them. In addition, pension trustees have powers to appoint nominees and custodians as professional advisers under section 47 of the Pensions Act 1995 and so do not have powers in this regard under the Bill. Consequently, the duty of care under clause 1 does not apply to pension trustees when carrying out their investment function. The duty is also inapplicable to the exercise by pension trustees of functions relating to the delegation of their investment powers or the appointment of nominees or custodians.

PART VI

(b) the functions described in paragraph 3 of that Schedule to the extent that they relate to trustees—

(i) authorising a person to exercise their functions with respect to investment, or

(ii) appointing a person to act as their nominee or custodian.

(3) Nothing in Part II or III applies to the trustees of any pension scheme.

(4) Part IV applies to the trustees of a pension scheme subject to the restrictions in subsections (5) to (8).

(5) The trustees of a pension scheme may not under Part IV authorise any person to exercise any functions relating to investment as their agent.

(6) The trustees of a pension scheme may not under Part IV authorise a person who is—

(a) an employer in relation to the scheme, or

(b) connected with or an associate of such an employer,

to exercise any of their functions as their agent.

(7) For the purposes of subsection (6)—

(a) "employer", in relation to a scheme, has the same meaning as in the Pensions Act 1995;

1995 c. 26.

1986 c. 45.

(b) sections 249 and 435 of the Insolvency Act 1986 apply for the purpose of determining whether a person is connected with or an associate of an employer.

(8) Sections 16 to 20 (powers to appoint nominees and custodians) do not apply to the trustees of a pension scheme.

Authorised unit trusts.

37.—(1) Parts II to IV do not apply to trustees of authorised unit trusts.

(2) "Authorised unit trust" means a unit trust scheme in the case of which an order under section 78 of the Financial Services Act 1986 is in force.

1986 c. 60.

Common investment schemes for charities etc.

38. Parts II to IV do not apply to—

(a) trustees managing a fund under a common investment scheme made under section 24 of the Charities Act 1993, or

1993 c. 10.

(b) trustees managing a fund under a common deposit scheme made under section 25 of that Act.

Interpretation.

39.—(1) In this Act—

"asset" includes any right or interest;

"charitable trust" means a trust under which property is held for charitable purposes and "charitable purposes" has the same meaning as in the Charities Act 1993;

1906 c. 55.

"custodian trustee" has the same meaning as in the Public Trustee Act 1906;

"enactment" includes any provision of a Measure of the Church Assembly or of the General Synod of the Church of England;

"exempt charity" has the same meaning as in the Charities Act 1993;

EXPLANATORY NOTES

The effect of subsections (4) - (7) is that Part IV of the Bill does apply to the trustees of an occupational pension scheme to the extent that it authorises trustees to delegate functions which do not relate to investment. Pension trustees may therefore delegate such functions in the same manner as other trustees, and will be subject to the same duty of care when doing so. However, for the protection of pension scheme beneficiaries, pension trustees are expressly prohibited from delegating any function to the scheme employer or to a person who is connected with, or an associate of, the scheme employer.

"functions" includes powers and duties;

"legal mortgage" has the same meaning as in the Law of Property Act 1925; 1925 c. 20.

"personal representative" has the same meaning as in the Trustee Act 1925; 1925 c. 19.

"trust corporation" has the same meaning as in the Trustee Act 1925;

"trust funds" means income or capital funds of the trust.

(2) In this Act the expressions listed below are defined or otherwise explained by the provisions indicated—

asset management functions	section 15(5)
custodian	section 17(2)
the duty of care	section 1(2)
the general power of investment	section 3(2)
lay trustee	section 28(5)
power of intervention	section 22(4);
the standard investment criteria	section 4(3)
subordinate legislation	section 6(3)
trustee acting in a professional capacity	section 28(4)
trust instrument	sections 6(2) and 35(2)(a)

Minor and consequential amendments etc.

40.—(1) Schedule 2 (minor and consequential amendments) shall have effect.

(2) Schedule 3 (transitional provisions and savings) shall have effect.

(3) Schedule 4 (repeals) shall have effect.

Power to amend other Acts.

41.—(1) A Minister of the Crown may by order make such amendments of any Act, including an Act extending to places outside England and Wales, as appear to him appropriate in consequence of or in connection with Part II or III.

(2) Before exercising the power under subsection (1) in relation to a local, personal or private Act, the Minister must consult any person who appears to him to be affected by any proposed amendment.

(3) An order under this section may—

(a) contain such transitional provisions and savings as the Minister thinks fit;

(b) make different provision for different purposes.

(4) The power to make an order under this section is exercisable by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(5) "Minister of the Crown" has the same meaning as in the Ministers of the Crown Act 1975. 1975 c. 26.

Commencement and extent.

42.—(1) Section 41, this section and section 43 shall come into force on the day on which this Act is passed.

EXPLANATORY NOTES

Clause 41

Schedule 2 to the Bill contains consequential amendments to a number of enactments. The need for such amendments arises, in most cases, by virtue of the introduction of the general power of investment in Part II of the Bill and the power to acquire land in Part III. *Clause 41* empowers a Minister of the Crown to make further amendments in consequence of or in connection with Part II or III. The power is exercisable by statutory instrument. However, where it is proposed to exercise the power in relation to a local, personal or private Act, the making of any such instrument must be preceded by consultation with any person who appears to the Minister to be affected by any proposed amendment. It is likely that this power will be exercised, in particular, in respect of local and private legislation containing provisions which operate by reference to the Trustee Investments Act 1961.

NOTES ON SCHEDULE 2 (ON PAGES 128 - 136 FOLLOWING)

The provisions of the Trustee Investments Act 1961 mentioned in paragraph 1(1) are repealed by the Bill, except in so far as they are applied by or under any other enactment. Consequently, where (notwithstanding the provisions in Parts II and III of Schedule 2) an enactment continues to operate by reference to the Trustee Investments Act 1961, its effect is preserved. For this purpose it will still be possible (under section 12 of the 1961 Act) for additions to be made to the list of investments specified in Schedule 1 to that Act.

Paragraphs 7 - 17 make consequential amendments to the Settled Land Act 1925. These fall into a number of broad groups. The amendments in the first group (paragraphs 7 - 9) either grant to trustees of the settlement (in relation to the investment of capital money) the general power of investment in clause 3, or make provision to reflect this widening of investment power.

The second group of amendments (in paragraph 10) operate on section 75 of the 1925 Act. They amend the section so as to make the investment (or other application) of capital money under that Act a matter exclusively for the trustees of the settlement (subject to a requirement to consult and act in accordance with the wishes of the tenant for life so far as practicable) or the court. These amendments permit the trustees to delegate their functions in accordance with Part IV of the Bill, but this is again subject to restrictions designed to safeguard the life tenant's right to be consulted in relation to the investment or application of capital money.

Paragraph 11 inserts a new section 75A into the Settled Land Act 1925. The new provision is closely based on section 10(2) of the Trustee Act 1925 (which is repealed by the Bill), and permits life tenants or statutory owners (with the consent of the trustees of the settlement), when selling land, to act as mortgagee for up to two thirds of the value of the property being sold.

The amendments in the next group (paragraphs 12 - 14) repeal those sections of the Settled Land Act which concern matters which will in future be governed by other provisions in the Bill (such as the remuneration of trustees of the settlement).

Paragraph 16 concerns the role of an assignee for value of a life tenant's estate or interest in the investment of capital money, and the final group of amendments (paragraphs 15 and 17) implement a number of changes to the powers both of trustees of the settlement and life tenants, reflecting some of the changes made to the powers of trustees by the Bill.

Paragraphs 42 - 46 make consequential amendments to the Trusts of Land and Appointment of Trustees Act 1996. Paragraph 42 makes a number of amendments to section 6 of that Act, which include making the exercise of the powers conferred by that section subject to the duty of care in clause 1 of the Bill.

Paragraphs 43 and 44 replace the provision presently in section 9(8) of the 1996 Act with a new section 9A, the effect of which is to modify the duty of care which is applicable to trustees of land in connection with any delegation of their functions under section 9 of the Act. In future, that duty will be the duty of care under clause 1 of the Bill. However, in conformity with the present law in section 9(8) of the Act, the duty of care will apply to trustees of land in deciding whether to delegate any of their functions under clause 9 rather than in the circumstances mentioned in Schedule 1, paragraph 3. The new section also introduces a duty to review any such delegation equivalent to the duty which applies under clause 22 of the Bill. However, this duty of review does not apply where trustees of land delegate functions under section 9 by means of an irrevocable power of attorney.

PART VI

(2) The remaining provisions of this Act shall come into force on such day as the Lord Chancellor may appoint by order made by statutory instrument; and different days may be so appointed for different purposes.

(3) An order under subsection (2) may contain such transitional provisions and savings as the Lord Chancellor considers appropriate in connection with the order.

(4) Subject to section 41(1) and subsection (5), this Act extends to England and Wales only.

(5) An amendment or repeal in Part II or III of Schedule 2 or Part II of Schedule 4 has the same extent as the provision amended or repealed.

Short title.

43. This Act may be cited as the Trustee Act 1999.

SCHEDULES

SCHEDULE 1

Section 2.

APPLICATION OF DUTY OF CARE

Investment

1. The duty of care applies to a trustee—

(a) when exercising the general power of investment or a power of investment conferred on him by the trust instrument;

(b) when carrying out a duty to which he is subject under section 4 or 5 (duties relating to the exercise of a power of investment or to the review of investments).

Acquisition of land

2. The duty of care applies to a trustee—

(a) when exercising the power under section 8 to acquire land;

(b) when exercising any power to acquire land conferred on him by the trust instrument;

(c) when exercising any power in relation to land acquired under a power mentioned in sub-paragraph (a) or (b).

Agents, nominees and custodians

3.—(1) The duty of care applies to a trustee—

(a) when entering into arrangements under which a person is authorised under section 11 to exercise functions as an agent;

(b) when entering into arrangements under which a person is appointed under section 16 to act as a nominee;

(c) when entering into arrangements under which a person is appointed under section 17 or 18 to act as a custodian;

(d) when entering into arrangements under which, under any power conferred by the trust instrument, a person is authorised to exercise functions as an agent or is appointed to act as a nominee or custodian;

(e) when carrying out his duties under section 22 (review of agent, nominee or custodian, etc.).

(2) For the purposes of sub-paragraph (1), entering into arrangements under which a person is authorised to exercise functions or is appointed to act as a nominee or custodian includes, in particular—

(a) selecting the person who is to act,

(b) determining any terms on which he is to act, and

(c) if the person is being authorised to exercise asset management functions, the preparation of a policy statement under section 15.

Insurance

4. The duty of care applies to a trustee—

(a) when exercising the power under section 19 of the Trustee Act 1925 to insure property; 1925 c. 19.

(b) when exercising any corresponding power conferred on him by the trust instrument.

SCH. 1 *Powers under trust instruments*

5. The duty of care does not apply to powers conferred by a trust instrument if or in so far as it appears from the trust instrument that the duty is not meant to apply.

Section 40.

SCHEDULE 2

MINOR AND CONSEQUENTIAL AMENDMENTS

PART I

THE TRUSTEE INVESTMENTS ACT 1961 AND THE CHARITIES ACT 1993

The Trustee Investments Act 1961 (c. 62)

1.—(1) Sections 1, 2, 5, 6, 12, 13 and 15 shall cease to have effect, except in so far as they are applied by or under any other enactment.

(2) Section 3 and Schedules 2 and 3 shall cease to have effect, except in so far as they relate to a trustee having a power of investment conferred on him under an enactment—

(a) which was passed before the passing of the 1961 Act, and

(b) which is not amended by this Schedule.

(3) Omit—

(a) sections 8 and 9,

(b) paragraph 1(1) of Schedule 4, and

(c) section 16(1), in so far as it relates to paragraph 1(1) of Schedule 4.

The Charities Act 1993 (c. 10)

2.—(1) Omit sections 70 and 71.

(2) In section 86(2) in paragraph (a)—

(a) omit "70", and

(b) at the end insert "or".

(3) Omit section 86(2)(b).

PART II

OTHER PUBLIC GENERAL ACTS

The Places of Worship Sites Act 1873 (c. 50)

3. In section 2 (payment of purchase money, etc.) for "shall be invested upon such securities or investments as would for the time being be authorised by statute or the Court of Chancery" substitute "shall be invested under the general power of investment in section 3 of the Trustee Act 1999".

The Technical and Industrial Institutions Act 1892 (c. 29)

4. In section 9 (investment powers relating to proceeds of sale of land acquired under the Act) for subsection (5) substitute—

"(5) Money arising by sale may, until reinvested in the purchase of land, be invested—

(a) in the names of the governing body, in any investments in which trustees may invest under the general power of investment in section 3 of the Trustee Act 1999 (as restricted by sections 4 and 5 of that Act), or

(b) under the general power of investment in section 3 of that Act, by trustees for the governing body or by a person authorised by the trustees under that Act to invest as an agent of the trustees.

(6) Any profits from investments under subsection (5) shall be invested in the same way and added to capital until the capital is reinvested in the purchase of land."

The Duchy of Cornwall Management Act 1893 (c. 20)

5. The 1893 Act is hereby repealed.

The Duchy of Lancaster Act 1920 (c. 51)

6. In section 1 (extension of powers of investment of funds of Duchy of Lancaster) for "in any of the investments specified in paragraph (a) of section one of the Trustees Act 1893 and any enactment amending or extending that paragraph" substitute "under the general power of investment in section 3 of the Trustee Act 1999 (as restricted by sections 4 and 5 of that Act)".

The Settled Land Act 1925 (c. 18)

7. In section 21 (absolute owners subject to certain interests to have the powers of tenant for life), in subsection (1)(d) for "income thereof" substitute "resultant profits".

8. In section 39 (regulations respecting sales), in subsection (2), in the proviso, for the words from "accumulate" to the end of the subsection substitute "accumulate the profits from the capital money by investing them and any resulting profits under the general power of investment in section 3 of the Trustee Act 1999 and shall add the accumulations to capital."

9. In section 73 (modes of investment or application), in subsection (1) for paragraph (i) substitute—

"(i) In investment in securities either under the general power of investment in section 3 of the Trustee Act 1999 or under a power to invest conferred on the trustees of the settlement by the settlement;".

10.—(1) In section 75 (regulations respecting investment, devolution, and income of securities etc.), for subsection (2) substitute—

"(2) Subject to Part IV of the Trustee Act 1999, to section 75A of this Act and to the following provisions of this section—

(a) the investment or other application by the trustees shall be made according to the discretion of the trustees, but subject to any consent required or direction given by the settlement with respect to the investment or other application by the trustees of trust money of the settlement, and

(b) any investment shall be in the names or under the control of the trustees."

(2) For subsection (4) of that section substitute—

"(4) The trustees, in exercising their power to invest or apply capital money, shall—

(a) so far as practicable, consult the tenant for life; and

(b) so far as consistent with the general interest of the settlement, give effect to his wishes.

(4A) Any investment or other application of capital money under the direction of the court shall not during the subsistence of the beneficial interest of the tenant for life be altered without his consent.

(4B) The trustees may not under section 11 of the Trustee Act 1999 authorise a person to exercise their functions with respect to the investment or

SCH. 2

application of capital money on terms that prevent them from complying with subsection (4) of this section.

(4C) A person who is authorised under section 11 of the Trustee Act 1999 to exercise any of their functions with respect to the investment or application of capital money is not subject to subsection (4) of this section."

(3) Nothing in this paragraph affects the operation of section 75 in relation to directions of the tenant for life given, but not acted upon by the trustees, before the commencement of this paragraph.

11. After section 75 insert—

"Power to accept charge as security for part payment for land sold.

75A.—(1) Where—

(a) land subject to the settlement is sold by the tenant for life or statutory owner, for an estate in fee simple or a term having at least five hundred years to run, and

(b) the proceeds of sale are liable to be invested,

the tenant for life or statutory owner may, with the consent of the trustees of the settlement, contract that the payment of any part, not exceeding two-thirds, of the purchase money shall be secured by a charge by way of legal mortgage of the land sold, with or without the security of any other property.

(2) If any buildings are comprised in the property secured by the charge, the charge must contain a covenant by the mortgagor to keep them insured for their full value against loss or damage due to any event.

(3) A person exercising the power under subsection (1) of this section, or giving consent for the purposes of that subsection—

(a) is not required to comply with section 5 of the Trustee Act 1999 before giving his consent, and

(b) is not liable for any loss incurred merely because the security is insufficient at the date of the charge.

(4) The power under subsection (1) of this section is exercisable subject to the consent of any person whose consent to a change of investment is required by the instrument, if any, creating the trust.

(5) Where the sale referred to in subsection (1) of this section is made under the order of the court, the power under that subsection applies only if and as far as the court may by order direct."

12. Omit section 96 (protection of each trustee individually).

13. In section 98 (protection of trustees in particular cases), omit subsections (1) and (2).

14. Omit section 100 (trustees' reimbursements).

15. In section 102 (management of land during minority or pending contingency), in subsection (2) for paragraph (e) substitute—

"(e) to insure against risks of loss or damage due to any event under section 19 of the Trustee Act 1925;".

1925 c. 19.

16.—(1) In section 104 (powers of tenant for life not assignable etc.)—

(a) in subsection (3)(b) omit "authorised by statute for the investment of trust money", and

(b) in subsection (4)(b) for the words from "no investment" to "trust money;" substitute "the consent of the assignee shall be required to an investment of

capital money for the time being affected by the assignment in investments other than securities, and to any application of such capital money;".

(2) Sub-paragraph (1) applies to the determination on or after the commencement of that sub-paragraph of whether an assignee's consent is required to the investment or application of capital money.

17. In section 107 (tenant for life deemed to be in the position and to have the duties and liabilities of a trustee, etc.) after subsection (1) insert—

"(1A) The following provisions apply to the tenant for life as they apply to the trustees of the settlement—

(a) sections 11, 13 to 15 and 21 to 23 of the Trustee Act 1999 (power to employ agents subject to certain restrictions),

(b) section 32 of that Act (remuneration and expenses of agents etc.),

(c) section 19 of the Trustee Act 1925 (power to insure), and 1925 c. 19.

(d) in so far as they relate to the provisions mentioned in paragraphs (a) and (c), Part I of, and Schedule 1 to, the Trustee Act 1999 (the duty of care)."

The Trustee Act 1925 (c. 19)

18. Omit Part I (investments).

19. In section 14 (power of trustees to give receipts) in subsection (1) after "securities," insert "investments".

20. Omit section 21 (deposit of documents for safe custody).

21. Omit section 23 (power to employ agents).

22. Omit section 30 (implied indemnity of trustees).

23. In section 31(2) (power to invest income during minority) for "in the way of compound interest by investing the same and the resulting income thereof" substitute "by investing it, and any profits from so investing it".

The Administration of Estates Act 1925 (c. 23)

24. In section 33, in subsection (3) (investment during minority of beneficiary or the subsistence of a life interest) for the words from "in any investments for the time being authorised by statute" to the end of the subsection substitute "under the Trustee Act 1999."

25. In section 39 (powers of management) after subsection (1) insert—

"(1A) Subsection (1) of this section is without prejudice to the powers conferred on personal representatives by the Trustee Act 1999."

The Universities and College Estates Act 1925 (c. 24)

26. In section 26 (modes of application of capital money) in subsection (1) for paragraph (i) substitute—

"(i) In investments in which trustees may invest under the general power of investment in section 3 of the Trustee Act 1999 (as restricted by sections 4 and 5 of that Act);".

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The Regimental Charitable Funds Act 1935 (c. 11)

27. In section 2(1) (application of funds held on account of regimental charitable funds)—

(a) in paragraph (a) for "in some manner" to "trusts" substitute "under the general power of investment in section 3 of the Trustee Act 1999";

(b) in paragraph (b) after "the income" insert "or the other profits".

The Agricultural Marketing Act 1958 (c. 47)

28.—(1) In section 16 (investment of surplus funds of boards) for paragraph (a) substitute—

"(a) the moneys of the board not for the time being required by them for the purposes of their functions are not, except with the approval of the Minister, invested otherwise than in investments in which trustees may invest under the general power of investment in section 3 of the Trustee Act 1999 (as restricted by sections 4 and 5 of that Act); and".

(2) Any scheme made under the 1958 Act and in effect before the day on which sub-paragraph (1) comes into force shall be treated, in relation to the making of investments on and after that day, as including provision permitting investment by the board in accordance with section 16(a) of the 1958 Act as amended by sub-paragraph (1).

The Horticulture Act 1960 (c. 22)

29. In section 13 (miscellaneous financial powers of organisations promoting home-grown produce) for subsection (3) substitute—

"(3) A relevant organisation may invest any of its surplus money which is not for the time being required for any other purpose in any investments in which trustees may invest under the general power of investment in section 3 of the Trustee Act 1999 (as restricted by sections 4 and 5 of that Act)".

The House of Commons Members' Fund Act 1962 (c. 53)

30.—(1) In section 1 (powers of investment of trustees of House of Commons Members' Fund)—

(a) in subsection (2) omit "Subject to the following provisions of this section";

(b) omit subsections (3) to (5).

(2) In section 2 (interpretation etc.) omit subsection (1).

The Betting, Gaming and Lotteries Act 1963 (c. 2)

31. In section 25(1) (general powers and duties of the Horserace Betting Levy Board) for paragraph (e) substitute—

"(e) to make such other investments as—

(i) they judge desirable for the proper conduct of their affairs, and

(ii) a trustee would be able to make under the general power of investment in section 3 of the Trustee Act 1999 (as restricted by sections 4 and 5 of that Act);".

The Cereals Marketing Act 1965 (c. 14) SCH. 2

32.—(1) In section 18, in subsection (2) (Home-Grown Cereals Authority's power to invest reserve funds) for "in accordance with the next following subsection" substitute "in any investments in which trustees may invest under the general power of investment in section 3 of the Trustee Act 1999 (as restricted by sections 4 and 5 of that Act)."

(2) Omit section 18(3).

The Agriculture Act 1967 (c. 22)

33.—(1) In section 18, in subsection (2) (Meat and Livestock Commission's power to invest reserve fund) for "in accordance with the next following subsection" substitute "in any investments in which trustees may invest under the general power of investment in section 3 of the Trustee Act 1999 (as restricted by sections 4 and 5 of that Act)."

(2) Omit section 18(3).

The Solicitors Act 1974 (c. 47)

34. In Schedule 2, for paragraph 3 (power of Law Society to invest) substitute—

"3. The Society may invest any money which forms part of the fund in any investments in which trustees may invest under the general power of investment in section 3 of the Trustee Act 1999 (as restricted by sections 4 and 5 of that Act)."

The Policyholders Protection Act 1975 (c. 75)

35. In Schedule 1, in paragraph 7, for sub-paragraph (1) (power of Policyholders Protection Board to invest) substitute—

"(1) The Board may invest any funds held by them which appear to them to be surplus to their requirements for the time being—

(a) in any investments in which trustees may invest under the general power of investment in section 3 of the Trustee Act 1999 (as restricted by sections 4 and 5 of that Act); or

(b) in any investment approved for the purpose by the Treasury."

The National Heritage Act 1980 (c. 17)

36. In section 6 for subsection (3) (powers of investment of Trustees of National Heritage Memorial Fund) substitute—

"(3) The Trustees may invest any sums to which subsection (2) does not apply in any investments in which trustees may invest under the general power of investment in section 3 of the Trustee Act 1999 (as restricted by sections 4 and 5 of that Act)."

The Licensing (Alcohol Education and Research) Act 1981 (c. 28)

37. In section 7 (powers of investment of Alcohol Education and Research Council) for subsection (5) substitute—

"(5) Any sums in the Fund which are not immediately required for any other purpose may be invested by the Council in any investments in which trustees may invest under the general power of investment in section 3 of the Trustee Act 1999 (as restricted by sections 4 and 5 of that Act)."

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The Fisheries Act 1981 (c. 29)

38. For section 10 (powers of investment of Sea Fish Industry Authority) substitute—

"Investment of reserve funds.

10. Any money of the Authority which is not immediately required for any other purpose may be invested by the Authority in any investments in which trustees may invest under the general power of investment in section 3 of the Trustee Act 1999 (as restricted by sections 4 and 5 of that Act)".

The Duchy of Cornwall Management Act 1982 (c. 47)

39. For section 1 (powers of investment of Duchy property) substitute—

"Powers of investment of Duchy property.

1. The power of investment conferred by the Duchy of Cornwall Management Act 1863 includes power to invest in any investments in which trustees may invest under the general power of investment in section 3 of the Trustee Act 1999 (as restricted by sections 4 and 5 of that Act)."

40. In—

(a) section 6(3) (Duchy of Cornwall Management Acts extended in relation to banking), and

(b) section 11(2) (collective citation of Duchy of Cornwall Management Acts),

for "Duchy of Cornwall Management Acts 1863 to 1893" substitute "Duchy of Cornwall Management Acts 1863 to 1868".

The Administration of Justice Act 1982 (c. 53)

41. In section 42 (common investment schemes) in subsection (6) for paragraph (a) substitute—

"(a) he may invest trust money in shares in the fund without obtaining and considering advice on whether to make such an investment; and".

The Trusts of Land and Appointment of Trustees Act 1996 (c. 47)

42.—(1) In section 6 (general powers of trustees), in subsection (3) for "purchase a legal estate in any land in England and Wales" substitute "acquire land under the power conferred by section 8 of the Trustee Act 1999."

(2) Omit subsection (4).

(3) After subsection (8) insert—

"(9) The duty of care under section 1 of the Trustee Act 1999 applies to trustees of land when exercising the powers conferred by this section."

43. In section 9 (delegation by trustees) omit subsection (8).

44. After section 9 insert—

"Duties of trustees in connection with delegation etc.

9A.—(1) The duty of care under section 1 of the Trustee Act 1999 applies to trustees of land in deciding whether to delegate any of their functions under section 9.

(2) Subsection (3) applies if the trustees of land—

(a) delegate any of their functions under section 9, and

(b) the delegation is not irrevocable.

(3) While the delegation continues, the trustees—

(a) must keep the delegation under review,

(b) if circumstances make it appropriate to do so, must consider whether there is a need to exercise any power of intervention that they have, and

(c) if they consider that there is a need to exercise such a power, must do so.

(4) "Power of intervention" includes—

(a) a power to give directions to the beneficiary;

(b) a power to revoke the delegation.

(5) The duty of care under section 1 of the 1999 Act applies to trustees in carrying out any duty under subsection (3).

(6) A trustee of land is not liable for any act or default of the beneficiary, or beneficiaries, unless the trustee fails to comply with the duty of care in deciding to delegate any of the trustees' functions under section 9 or in carrying out any duty under subsection (3).

(7) Neither this section nor the repeal of section 9(8) by the Trustee Act 1999 affects the operation after the commencement of this section of any delegation effected before that commencement."

45. Omit section 17(1) (application of section 6(3) in relation to trustees of proceeds of sale of land).

46. In Schedule 3 (consequential amendments) omit paragraph 3(4) (amendment of section 19(1) and (2) of Trustee Act 1925).

PART III

MEASURES

The Ecclesiastical Dilapidations Measure 1923 (No. 3)

47. In section 52, in subsection (5) (investment of sums held in relation to repair of chancels)—

(a) for "in any investment permitted by law for the investment of trust funds, and the yearly income resulting therefrom shall be applied," substitute "in any investments in which trustees may invest under the general power of investment in section 3 of the Trustee Act 1999, and the annual profits from the investments shall be applied"; and

(b) in paragraph (iii) for "any residue of the said income not applied as aforesaid in any year" substitute "any residue of the profits from the investments not applied in any year."

The Diocesan Stipends Funds Measure 1953 (No. 2)

48. In section 4 (application of moneys credited to capital accounts) in subsection (1) for paragraph (bc) substitute—

"(bc) investment in any investments in which trustees may invest under the general power of investment in section 3 of the Trustee Act 1999 (as restricted by sections 4 and 5 of that Act);".

The Church Funds Investment Measure 1958 (No. 1)

49. In the Schedule, in paragraph 21 (range of investments of deposit fund) for paragraphs (a) to (d) of sub-paragraph (1) substitute—

"(aa) In any investments in which trustees may invest under the general power of investment in section 3 of the Trustee Act 1999 (as restricted by sections 4 and 5 of that Act);".

SCH. 2

The Clergy Pensions Measure 1961 (No. 3)

50.—(1) In section 32 (investment powers of Board), in subsection (1), for paragraph (a) substitute—

"(a) in any investments in which trustees may invest under the general power of investment in section 3 of the Trustee Act 1999 (as restricted by sections 4 and 5 of that Act);".

(2) Omit subsection (3) of that section.

The Cathedrals Measure 1963 (No. 2)

51.—(1) In section 21 (investment powers, etc. of capitular bodies), in subsection (1), for paragraph (c) and the words from "and the powers" to the end of the subsection substitute—

"(c) power to invest in any investments in which trustees may invest under the general power of investment in section 3 of the Trustee Act 1999 (as restricted by sections 4 and 5 of that Act);".

(2) In subsection (5) of that section for "subsections (2) and (3) of section six of the Trustee Investments Act 1961" substitute "section 5 of the Trustee Act 1999."

1961 c. 62.

The Repair of Benefice Buildings Measure 1972 (No. 2)

52. In section 17, in subsection (2) (diocesan parsonages fund's power of investment), for "who shall have the same powers of investment as trustees of trust funds:" substitute "who shall have the same power as trustees to invest in any investments in which trustees may invest under the general power of investment in section 3 of the Trustee Act 1999 (as restricted by sections 4 and 5 of that Act)."

The Pastoral Measure 1983 (No. 1)

53. In section 44, for subsection (6) (Redundant Churches Fund's power of investment) substitute—

"(6) The powers to invest any such sums are—

(a) power to invest in investments in which trustees may invest under the general power of investment in section 3 of the Trustee Act 1999 (as restricted by sections 4 and 5 of that Act); and

(b) power to invest in the investments referred to in paragraph 21(1)(e) and (f) of the Schedule to the Church Funds Investment Measure 1958."

The Church of England (Pensions) Measure 1988 (No. 4)

54. Omit section 14(b) (amendment of section 32(3) of the Clergy Pensions Measure 1961).

Section 40.

SCHEDULE 3

TRANSITIONAL PROVISIONS AND SAVINGS

The Trustee Act 1925 (c. 19)

1.—(1) Sub-paragraph (2) applies if, immediately before the day on which Part IV of this Act comes into force, a banker or banking company holds any bearer securities deposited with him under section 7(1) of the 1925 Act (investment in bearer securities).

(2) On and after the day on which Part IV comes into force, the banker or banking company shall be treated as if he had been appointed as custodian of the securities under section 18.

2. The repeal of section 8 of the 1925 Act (loans and investments by trustees not chargeable as breaches of trust) does not affect the operation of that section in relation to loans or investments made before the coming into force of that repeal.

3. The repeal of section 9 of the 1925 Act (liability for loss by reason of improper investment) does not affect the operation of that section in relation to any advance of trust money made before the coming into force of that repeal.

4.—(1) Sub-paragraph (2) applies if, immediately before the day on which Part IV of this Act comes into force, a banker or banking company holds any documents deposited with him under section 21 of the 1925 Act (deposit of documents for safe custody).

(2) On and after the day on which Part IV comes into force, the banker or banking company shall be treated as if he had been appointed as custodian of the documents under section 17.

5.—(1) Sub-paragraph (2) applies if, immediately before the day on which Part IV of this Act comes into force, a person has been appointed to act as or be an agent or attorney under section 23(1) or (3) of the 1925 Act (general power to employ agents etc.).

(2) On and after the day on which Part IV comes into force, the agent shall be treated as if he had been authorised to exercise functions as an agent under section 11 (and, if appropriate, as if he had also been appointed under that Part to act as a custodian or nominee).

6. The repeal of section 23(2) of the 1925 Act (power to employ agents in respect of property outside the United Kingdom) does not affect the operation after the commencement of the repeal of an appointment made before that commencement.

The Trustee Investments Act 1961 (c. 62)

7.—(1) A trustee shall not be liable for breach of trust merely because he continues to hold an investment acquired by virtue of paragraph 14 of Part II of Schedule 1 to the 1961 Act (perpetual rent-charges etc.).

(2) A person who—

(a) is not a trustee,

(b) before the commencement of Part II of this Act had powers to invest in the investments described in paragraph 14 of Part II of Schedule 1 to the 1961 Act, and

(c) on that commencement acquired the general power of investment,

shall not be treated as exceeding his powers of investment merely because he continues to hold an investment acquired by virtue of that paragraph.

SCHEDULE 4

Section 40.

REPEALS

PART I

THE TRUSTEE INVESTMENTS ACT 1961 AND THE CHARITIES ACT 1993

Chapter	Short title	Extent of repeal

SCH. 4

Chapter	Short title	Extent of repeal
1961 c. 62.	The Trustee Investments Act 1961.	Sections 1 to 3, 5, 6, 8, 9, 12, 13, 15 and 16(1). Schedules 2 and 3. In Schedule 4, paragraph 1(1).
1993 c. 10.	The Charities Act 1993.	Sections 70 and 71. In section 86(2) in paragraph (a), "70" and paragraph (b).

Note: the repeals in this Part of this Schedule have effect in accordance with Part I of Schedule 2.

PART II

OTHER REPEALS

Chapter	Short title	Extent of repeal
1893 c. 20.	The Duchy of Cornwall Management Act 1893.	The whole Act.
1925 c. 18.	The Settled Land Act 1925.	Section 96. Section 98(1) and (2). Section 100. In section 104(3)(b) "authorised by statute for the investment of trust money".
1925 c. 19.	The Trustee Act 1925.	Part I. In section 20(1) the words "whether by fire or otherwise". Sections 21, 23 and 30.
1961 No. 3.	The Clergy Pensions Measure 1961.	Section 32(3).
1962 c. 53.	The House of Commons Members' Fund Act 1962.	In section 1, in subsection (2) the words "Subject to the following provisions of this section" and subsections (3) to (5). Section 2(1).
1965 c. 14.	The Cereals Marketing Act 1965.	Section 18(3).
1967 c. 22.	The Agriculture Act 1967.	Section 18(3).
1988 No. 4.	The Church of England (Pensions) Measure 1988.	Section 14(b).
1996 c. 47.	The Trusts of Land and Appointment of Trustees Act 1996.	Section 6(4). Section 9(8). Section 17(1). In Schedule 3, paragraph 3(4).

APPENDIX B

Draft Clauses for Scotland

THE DRAFT CLAUSES FOR SCOTLAND WITH EXPLANATORY NOTES ARE ON THE FOLLOWING PAGES

Extension of general powers of trustees.
1921 c. 58.

1.—(1) Section 4 of the Trusts (Scotland) Act 1921 (general powers of trustees) shall be amended in accordance with this section.

(2) In subsection (1)—

(a) at the beginning insert "Subject to subsections (1A) to (1D) below,";

(b) after paragraph (e) insert—

"(ea) To make any kind of investment of the trust estate (including an investment in land).

(eb) To acquire land for any reason other than investment."; and

(c) paragraph (ee) shall cease to have effect.

(3) After subsection (1) insert—

"(1A) The power to act under subsection (1)(ea) or (eb) above is subject to any restriction or exclusion imposed by or under any enactment.

(1B) The power to act under subsection (1)(ea) or (eb) above is not conferred on any trustees who are—

(a) the trustees of a pension scheme;

(b) the trustees of an authorised unit trust; or

(c) trustees under any other trust who are entitled by or under any other enactment to make investments of the trust estate.

(1C) No term relating to the powers of a trustee contained in a trust deed executed before 3 August 1961 shall be treated as restricting or excluding the power to act under subsection (1)(ea) above.

(1D) No term restricting the powers of investment of a trustee to
1961 c. 62. those conferred by the Trustee Investments Act 1961 contained in a trust deed executed on or after 3 August 1961 shall be treated as restricting or excluding the power to act under subsection (1)(ea) above.

(1E) The reference, in subsection (1D) above, to a trustee does not include a reference to a trustee under a trust constituted by a private or local Act of Parliament; and "trust deed" shall be construed accordingly.

(1F) In this section—

"authorised unit trust" means a unit trust scheme in the case of
1986 c. 60. which an order under section 78 of the Financial Services Act 1986 is in force;

"enactment" includes an enactment contained in subordinate
1978 c. 30. legislation (as defined in section 21(1) of the Interpretation Act 1978); and

"pension scheme" means an occupational pension scheme (within
1993 c. 48. the meaning of the Pension Schemes Act 1993) established under a trust and subject to the law of Scotland.".

EXPLANATORY NOTES

These clauses implement the recommendations in Parts I and II of the Report in so far as they relate to Scotland. Formal provisions, such as the enacting formula, the extent, citation and commencement have been omitted, as the form of Acts of the Scottish Parliament is not yet settled.

Clause 1

Subsections (1) and (2) are the key provisions. Section 4(1) of the Trusts (Scotland) Act 1921 lists various powers which all trustees are deemed to have, except in so far as they are at variance with the terms or purposes of the trust. Subsection (2)(b) adds to this list by inserting a new paragraph (ea) into section 4(1) conferring a new general power of investment in very wide terms. The effect is that trustees will generally have the same powers of investment as if they were the beneficial owners of the trust estate, see the recommendation in paragraph 2.26 of the Report. In particular, trustees are to be entitled to invest in land, see the recommendation in paragraph 2.48 of the Report. The definitions of "trust", "trustee" and "trust deed" in section 2 of the 1921 Act apply automatically. "Land" is defined in Schedule 1 to the Interpretation Act 1978 as including "buildings and other structures, land covered with water, and any estate, easement, servitude or right in or over land". The land may be situated anywhere, not just in Scotland.

Subsection (2)(b) also deals with the acquisition of land for a reason other than investment. Implementing the recommendation in paragraph 2.48 of the Report, this provision inserts a new paragraph (eb) in section 4(1) of the 1921 Act. There is no territorial limitation on the land that might be so acquired. This wide power supersedes the more specific existing power in section 4(1)(ee) to acquire any interest in residential accommodation as a suitable residence for occupation by a beneficiary. Subsection (2)(c) therefore repeals paragraph (ee).

Subsection (3) implements the recommendations in paragraphs 2.49, 2.52 and 2.53 of the Report relating to the scope and application of the proposed reforms in investment and land acquisition powers.

New subsection (1A) deals with the situation where trustees are restricted by statute as to how they may invest. The new power will be subject to any statutory limitations or exclusions.

New subsection (1B) disapplies the new general investment power for certain classes of trustees. Pension fund trustees and trustees of authorised unit trusts have statutory investment powers which they are to retain. Other trustees with statutory powers are also to retain them unless the statute is amended.

New subsection (1C) continues the policy of the Trustee Investments Act 1961 in relation to pre-existing trust deeds. Section 1(3) provided that no term in a private trust deed made before the passing of the Act on 3 August 1961 was to restrict the investment powers granted to trustees by that Act. The new general power conferred by clause 1(2) is similarly not to be restricted.

New subsection (1D) deals with post-1961 Act trust deeds. Where the investment powers contained in the 1961 Act are conferred the trustees are to enjoy the new general powers. But if the trustees in existing post-1961 Act deeds or future deeds are prohibited from making certain investments (in "non-ethical" companies, for example) then these prohibitions will continue to apply. This is because section 4(1) of the 1921 Act, in which the new general investment power is inserted, authorises only acts that are not at variance with the terms and purposes of the trust.

New subsection (1E) restricts subsection (1D) to private trust deeds. Trustees of trusts constituted by local or personal Acts will continue to have the powers set out in their governing statute.

Exercise of power of investment.

2. After section 4 of the Trusts (Scotland) Act 1921 there shall be inserted the following section—

1921 c. 58.

"Exercise of power of investment: duties of trustee.

4A.—(1) Before exercising the power to act under section 4(1)(ea) of this Act, a trustee shall have regard to—

(a) the suitability to the trust of the proposed investment; and

(b) the need for diversification of investments.

(2) Subject to subsection (3) below, a trustee shall—

(a) before exercising the power mentioned in subsection (1) above; and

(b) when reviewing the investments of the trust,

obtain and consider proper advice about the way in which the power should be exercised or, as the case may be, whether the investments should be varied.

(3) If a trustee reasonably concludes that in all the circumstances it is unnecessary or inappropriate to obtain such advice, he need not obtain it.

(4) For the purposes of this section, proper advice is the advice of a person who is reasonably believed by the trustee to be qualified by his ability in and practical experience of financial and other matters relating to the proposed investment.".

EXPLANATORY NOTES

Clause 2

This clause deals with certain duties of trustees in relation to investments. It implements the recommendations in paragraphs 2.31 and 2.34 of the Report. Trustees exercising their powers of investment are subject to the common law duty of care, which requires them to use the same diligence as people of ordinary prudence would use in relation to their own affairs. Trustees are also required to consider the interests of all the beneficiaries, in particular to balance the interests of liferenters and fiars, and to keep the trust investments under review (*Clarke v Clarke's Trs* 1925 SC 693, 711).

When exercising their powers of investment, either as a result of a review of existing investments or in investing new funds, the trustees have to have regard to the matters mentioned in *subsection (1) of new section 4A*. This implements the recommendation in paragraph 2.31 of the Report. "Suitability" relates both to the kind of investment proposed and to the particular investment as an investment of that kind. It will include considerations as to the size and risk of the investment and the need to produce an appropriate balance between income and capital growth for the trust.

Subsections (2) and (3) of new section 4A implement the recommendations in paragraph 2.34 of the Report. They deal with the trustees' duty to obtain and consider advice in reviewing investments and making investments. Trustees need not obtain advice if in all the circumstances it would be unnecessary or inappropriate. For example, if the trust has limited funds it could be inappropriate for the trustees to get advice before placing the money in an interest-bearing account. Where some of the trustees have investment expertise they may reasonably conclude that independent advice is unnecessary.

Subsection (4) deals with the selection of providers of advice. The adviser's expertise should be related to the type of investment under consideration. Thus for investment in shares and other financial instruments, advice would normally be sought from a stockbroker or other professional investment adviser. But trustees running a farm might need advice from an agricultural expert about a proposed acquisition of a herd of cows. There is no longer a requirement that the advice be given or confirmed in writing, as is the case under section 6(5) of the Trustee Investments Act 1961. It would nevertheless be prudent for trustees to continue the practice of obtaining written advice for all but the smallest investments.

Power to amend enactments.

3.—(1) The [Scottish Ministers] may by order make such amendments of any local, personal or private Act as appear to them appropriate in consequence of or in connection with this Act.

(2) Before exercising the power under subsection (1) above, the [Scottish Ministers] shall consult any person who appears to them to be affected by any proposed amendment.

(3) The [Scottish Ministers] may by order make such amendments of any other Act as appear to them appropriate in consequence of or in connection with this Act.

(4) An order under this section may—

(a) contain such savings or transitional provisions as the [Scottish Ministers] think fit;

(b) make different provision for different purposes.

(5) The power to make an order under this section shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of [the Scottish Parliament].

EXPLANATORY NOTES

Clause 3

There are many trusts or bodies that have statutory powers of investment by reference to the Trustee Investments Act 1961. These powers would not be affected by the new general powers of investment and acquisition of land inserted in section 4(1) of the 1921 Act by clause 1(2)(b), because of the qualifications in the new subsections (1A) to (1F). *Clause 3* provides a mechanism for enlarging their powers without recourse to further primary legislation.

Many of the trusts or bodies whose investment powers are conferred by public general Acts have been traced and the legislation amended, see Schedules 1 and 2 of the Draft Clauses for Scotland and Schedules 2 and 4 of the draft Trustee Bill. There are very restricted investment powers in the Entail Powers Act 1836, ss 10 and 18; Fish Teinds (Scotland) Act 1864, s 13; Glebe Lands (Scotland) Act 1868, s 17; Entail Amendment (Scotland) Act 1868, s 9 and Entail (Scotland) Act 1882, ss 19 and 23. These provisions are obsolescent and the entire Acts have been recommended for repeal by the Scottish Law Commission in its *Report on the Abolition of the Feudal System* (Scot Law Com No 168, 1999). No amendments to these investment powers are therefore made in the Draft Clauses.

However, other public general Acts may exist that were not found by the computer-assisted searches of the various statute law databases. *Clause 3(3)* empowers the Scottish Ministers to amend the Acts in question by order, but because of the Scotland Act 1998, only in so far as the statute relates to Scotland and then only in relation to devolved matters. The power is to be exercisable by statutory instrument subject to negative resolution procedure.

No local and personal Scottish Acts setting up trusts and bodies have been investigated. *Clause 3(1) and (2)* empowers the Scottish Ministers to amend the Acts in question by order. The power is to be exercisable by statutory instrument subject to negative resolution procedure.

SCHEDULES

SCHEDULE 1

MINOR AND CONSEQUENTIAL AMENDMENTS

The Judicial Factors Act 1849 (c. 51)

1. In section 5 of the Judicial Factors Act 1849 (judicial factor's duty to lodge in bank money held by him etc.), subsection (4) shall cease to have effect.

The Trusts (Scotland) Act 1921 (c. 58)

2. In the Trusts (Scotland) Act 1921, sections 12 to 14 shall cease to have effect.

The Trusts (Scotland) Act 1961 (c. 57)

3. In section 2(1) of the Trusts (Scotland) Act 1961 (validity of certain transactions by trustees etc.)—

(a) for "(ee)" substitute "(eb)"; and

(b) in the proviso, after "transaction", where it first occurs, insert "(other than a transaction such as is specified in paragraph (ea) of that subsection)".

The Trustee Investments Act 1961 (c. 62)

4.—(1) The Trustee Investments Act 1961 shall be amended in accordance with this paragraph.

(2) Sections 1, 2, 5, 6, 12, 13 and 15 shall cease to have effect, except in so far as they are applied by or under any other enactment.

(3) Section 3 and Schedules 2 and 3 shall cease to have effect, except in so far as they relate to a trustee having a power of investment conferred on him under an enactment—

(a) which was passed before the passing of the Trustee Investments Act 1961; and

(b) which is not amended by this Schedule.

(4) Section 8, paragraph 1(2) of Schedule 4 and, in so far as it relates to that paragraph, section 16(1) shall cease to have effect.

The National Health Service (Scotland) Act 1978 (c. 29)

5.—(1) The National Health Service (Scotland) Act 1978 shall be amended in accordance with this paragraph.

(2) In Schedule 6 (constitution and powers of the Hospital Trust)—

(a) in paragraph 4, sub-paragraph (b); and

(b) the sentence at the end of that paragraph beginning with the words "It is hereby",

shall cease to have effect.

(3) In Schedule 7 (the Research Trust)—

(a) paragraph 4; and

(b) the sentence at the end of that paragraph beginning with the words "It is hereby",

shall cease to have effect.

EXPLANATORY NOTES

NOTES ON SCHEDULE 1

Paragraph 1 Section 5(4) of the Judicial Factors Act 1849 provides that a judicial factor, who is a trustee for the purposes of the Trusts (Scotland) Acts 1921 and 1961 and the Trustee Investments Act 1961, does not need to obtain advice in order to place factory funds in a bank or building society account. This provision would be unnecessary in view of clause 2 which enables trustees to invest without obtaining advice if they consider that advice is unnecessary or inappropriate in the circumstances.

Paragraph 2 Section 12 of the Trusts (Scotland) Act 1921 allows trustees to invest in charges on land under the Land Improvement Acts, while section 13 permits those with power to invest in land to do so notwithstanding the existence of drainage charges. These two sections will be unnecessary once trustees have the new general investment powers. Section 14 is consequential on sections 10 to 14 and falls with sections 12 and 13 as sections 10 and 11 have already been repealed by the Trustee Investments Act 1961.

Paragraph 3 Section 2(1) of the Trusts (Scotland) Act 1961 prevents certain acts of trustees being challenged on the ground that they were at variance with the terms and purposes of the trust. Those transacting with trustees therefore do not need to examine the trust deed to ensure that the transaction is allowed. Sub-paragraph (a) extends the unchallengeable acts to include making investments and the power to acquire land otherwise than for investment. Sub-paragraph (b) prevents judicial factors and others acting under the supervision of the Accountant of Court from having to seek the Accountant's consent for every investment transaction. Consent would be necessary for the acquisition of land otherwise than for investment.

Paragraph 4 The Trustee Investments Act 1961 has to remain in effect to the extent specified because it will continue to have effect for trusts and other bodies on whom statutory investment powers are conferred by reference to the 1961 Act that have not been amended.

Paragraph 5 Schedule 6 to the National Health Service (Scotland) Act 1978 details the powers of the Scottish Hospital Trust. Paragraph 4(a) confers on the Trust in relation to its trust estate the powers trustees have by virtue of section 4(1) of the Trusts (Scotland) Act 1921. Paragraph 4(b) confers power to acquire land and certain limited powers of investment, while there is a declaration at the end of the paragraph that the trust is deemed to have the investment powers of trustees under the Trustee Investments Act 1961. New sub-paragraph (b) repeals the provisions mentioned in the previous sentence. They are unnecessary in view of the new general power of investment and the power to acquire land added to section 4(1) of the 1921 Act by clause 1(2)(b). Schedule 7 to the 1978 Act has similar provisions in relation to the Scottish Hospital Endowments Research Trust, and new sub-paragraph (3) makes similar repeals to those made to Schedule 6 by new sub-paragraph (2).

6. In section 105 of the Education (Scotland) Act 1980 (schemes for reorganisation of educational endowments), subsection (4D) shall cease to have effect.

The Charities Act 1993 (c. 10)

7. In the Charities Act 1993—

(a) sections 70 and 71;

(b) in section 86(2)—

(i) in paragraph (a), the word ", 70"; and

(ii) paragraph (b); and

(c) section 100(5),

shall cease to have effect.

EXPLANATORY NOTES

Paragraph 6 Section 105 of the Education (Scotland) Act 1980 allows education authorities to prepare draft schemes for the management of educational endowments. Subsection (4A) empowers the Court of Session to give effect to the draft schemes. Subsection (4D) provides that nothing in the Trustee Investments Act 1961 shall affect the powers of the Court, so that it may confer wider powers of investment. The introduction of the new general power of investment renders subsection (4D) superfluous.

Paragraph 7 Sections 70 and 71 of the Charities Act 1993 empower the Secretary of State to make orders relaxing the restrictions in the Trustee Investments Act 1961 on wider-range investments and extending the powers of investment respectively. They are unnecessary in the light of the new general power of investment that trustees are to have, and are repealed by new sub-paragraph (a). Sections 86(2) and 100(5) merely refer to sections 70 and 71 and are repealed by new sub-paragraphs (b) and (c).

SCHEDULE 2

REPEALS

Chapter	Short title	Extent of repeal
12 & 13 Vict. c. 51.	The Judicial Factors Act 1849.	Section 5(4).
11 & 12 Geo.5 c. 58.	The Trusts (Scotland) Act 1921.	Sections 12 to 14.
1961 c. 62.	The Trustee Investments Act 1961.	Subject to the exceptions mentioned in paragraph 4(2) and (3) of Schedule 1 to this Act, sections 1 to 3, 5, 6, 12, 13 and 15 and Schedules 2 and 3. Section 8. Section 16(1). In Schedule 4, paragraph 1(2).
1978 c. 29.	The National Health Service (Scotland) Act 1978.	In Schedule 6, in paragraph 4, sub-paragraph (b) and the sentence at the end of that paragraph beginning with the words “It is hereby”. In Schedule 7, paragraph 4 and the sentence at the end of that paragraph beginning with the words “It is hereby”.
1980 c. 44.	The Education (Scotland) Act 1980.	Section 105(4D).
1993 c. 10.	The Charities Act 1993.	Sections 70 and 71. In section 86(2), in paragraph (a), the word “, 70” and paragraph (b). Section 100(5).

APPENDIX C
SUMMARY OF THE PRESENT LAW

1. The Consultation Paper contained a detailed examination of the present law underlying the various issues which it considered. However, a summary of the present law is given in this Appendix for the sake of convenience. Section 1 contains an account of the law governing trustees' powers of delegation. Section 2 sets out the law concerning the employment of nominees and custodians by trustees. Section 3 deals with the law on trustees' powers of insurance, and the law relating to trustee remuneration is explained in Section 4. Part II of this Report contains an examination of the present law on trustees' powers of investment, and on the powers of trustees to purchase land. It is therefore unnecessary to consider those aspects of the present law further in this Appendix.

SECTION 1
TRUSTEES' POWERS OF DELEGATION

The functions that may be delegated

2. The fundamental rule was authoritatively stated in the leading nineteenth century text, *Sugden on Powers*, as follows—

> whenever a power is given..., if the powers repose a personal trust and confidence in the donee of it, to exercise his own judgment and discretion, he cannot refer the power to the execution of another, for *delegatus non potest delegare*.[1]

3. This is not an absolute rule, however. Two exceptions in particular reduce its ambit considerably.

   (1) First, the non-delegation rule merely represents the default position. Where the trust instrument or will provides express authority to do so, a trustee is free to delegate his or her powers.[2]

   (2) Secondly, it is important to note that the rule only prohibits delegation by trustees and personal representatives of their dispositive duties[3] or their fiduciary discretions.[4] It does not preclude the delegation by them of

[1] (8th ed 1861) p 179. Also, C J W Farwell and F K Archer, *Farwell on Powers* (3rd ed 1916) p 499: "[a] power involving the exercise of personal discretion by the donee cannot be delegated". See also *Turner v Corney* (1841) 5 Beav 515, 517; 49 ER 677, 678 *per* Lord Langdale MR; *Speight v Gaunt* (1883) 22 ChD 727, 756 *per* Lindley LJ.

[2] In *Pilkington v IRC* [1964] AC 612, 639, Viscount Radcliffe observed that, "The law is not that trustees cannot delegate: it is that they cannot delegate unless they have authority to do so".

[3] That is to say, their duties to distribute trust property to those entitled to it under the trust.

[4] These include the selection of trust investments (see eg *Rowland v Witherden* (1851) 3 Mac & G 568, 574; 42 ER 379, 381) and the decision whether or not to sell or lease trust property (see eg *Clarke v The Royal Panopticon* (1857) 4 Drew 26, 29; 62 ER 10, 12; and *Robson v Flight* (1865) De G, J & S 608; 46 ER 1054).

> "powers to do acts merely ministerial".[5] The dividing line between (non-delegable) fiduciary powers and (delegable) ministerial powers has not been frequently discussed in the English cases, and attempts in the United States to define the boundary have not met with success.[6]

4. Although it is now regarded as unsatisfactory,[7] the traditional explanation for the non-delegation rule is that trustees cannot delegate their discretions because of the "confidence reposed" in them.[8] However, it might also be noted that the non-delegation rule does not prevent trustees from obtaining the views of the beneficiaries on matters relating to the exercise of the trustees' powers, provided that the ultimate decision is taken by the trustees alone.[9]

The circumstances in which trustees may delegate

5. Even where the function is one that trustees are in principle permitted to delegate, it does not follow that they may always do so. Since 1926 this question has, in the absence of an express power authorising delegation in the will or trust instrument, been entirely governed by statute.[10] The principal default provisions are now to be found in the Trustee Act 1925. They apply in addition to any powers of delegation contained in the trust instrument, and only if and so far as no contrary intention is expressed in that instrument. They will only have effect subject to the terms of the instrument, and the settlor can therefore add to, exclude or vary them.[11] The provisions in question were not conceived of as a single scheme but were enacted at different times. Taken together they do not form a coherent whole.

Collective delegation: Trustee Act 1925, section 23(1) and (2)

6. The principal statutory provision is section 23(1) of the Trustee Act 1925, which allows trustees and personal representatives to—

> employ and pay an agent ... to transact any business or do any act required to be transacted or done in the execution of the trust, or the administration of the testator's or intestate's estate ...

[5] C J W Farwell and F K Archer, *Farwell on Powers* (3rd ed 1916) p 498.

[6] See Consultation Paper, para 3.4.

[7] See Consultation Paper, para 3.5.

[8] *Speight v Gaunt* (1883) 9 App Cas 1, 29 *per* Lord FitzGerald.

[9] *Fraser v Murdoch* (1881) 6 App Cas 855, 864-5, *per* Lord Selborne LC : "It would be extremely dangerous to hold that trustees, having such a discretion to exercise [in that case, a discretion to retain an investment] might not freely discuss with the beneficiaries the reasons for and against a particular decision, without running the risk of being held to act against their own judgment, if they should disregard, in the end, objections to which they had thought it right in the first instance to direct attention".

[10] Before 1926 the position was governed by the common law. The relevant principles are explained at paras 3.8 – 3.15 of the Consultation Paper. Although these common law principles no longer represent the present law, they are very relevant to the modern debate as to what the law on trustees' powers of delegation actually is and what it should be.

[11] See Trustee Act 1925, s 69(2).

This provision entitles trustees to be paid "all charges and expenses so incurred", and provides that they "shall not be responsible for the default of any such agent if employed in good faith".

7. In *Re Vickery*,[12] Maugham J held that section 23(1) abolished the old common law limitation on trustees' powers to delegate their functions only in cases of "moral necessity",[13] an interpretation which is generally considered correct.[14] But although this provision clearly gives powers of delegation to trustees, those powers are of limited applicability and uncertain scope. The principal limitations and uncertainties are as follows—

(1) Section 23(1) authorises trustees to delegate their ministerial powers, but *not* their fiduciary discretions.[15] This fact is readily apparent when the provision is compared with subsection (2).[16]

(2) Section 23(1) does not appear to authorise trustees to confer on any agent they appoint a power to subdelegate.[17]

(3) The subsection clearly states that trustees may only delegate acts which are "required to be transacted or done in the execution of the trust".

(4) There is a doubt as to whether section 23 permits trustees to delegate functions to an agent on a general retainer. It has been suggested that the authority conferred by the provision is confined to the delegation of *specific* acts or *particular* business.[18]

[12] [1931] 1 Ch 572.

[13] His Lordship held that the subsection "revolutionizes the position of a trustee or an executor so far as regards the employment of agents. He is no longer required to do any actual work himself, but he may employ a solicitor or other agent to do it, whether there is any real necessity for the employment or not..."(*Ibid*, p 581).

[14] See, eg Robert D Carswell, *Trustee Acts (Northern Ireland)* (1st ed 1964) p 55 (commenting on Trustee Act (Northern Ireland) 1958, s 24(1), which is similar but not quite identical to Trustee Act 1925, s 23(1)) - the author is currently Lord Chief Justice of Northern Ireland. See too Dennis Paling, "Trusteeship: The Duty to Act Personally" (1975) 125 NLJ 56.

[15] In its Twenty-third Report, The Powers and Duties of Trustees (1982) Cmnd 8733, the Law Reform Committee explained that s 23(1) gives "a power to employ agents to do specified acts and is not a power to authorise agents to decide what acts to do" - see to like effect the Goode Report (Pension Law Reform: The Report of the Pension Law Review Committee CM 2342-1), para 4.9.27.

[16] Section 23(2) gives trustees and personal representatives the power to delegate to an agent the execution or exercise of "any discretion or trust or power vested in them" in relation to any trust property (or property forming part of the deceased's estate) situated outside the UK. The subsection must necessarily qualify s 23(1), since it would be redundant if the latter had been intended to enable trustees to delegate their fiduciary discretions.

[17] Again, s 23(2) expressly provides that where a trustee delegates his or her discretions, he or she may give the agent "a power to appoint substitutes" - the absence of any such provision in subsection (1) suggests that it confers no equivalent power.

[18] This view was, however, doubted at para 3.23 of the Consultation Paper.

(5) There are two particular areas of uncertainty as to the terms on which trustees may employ agents:[19]

(a) Although the matter has not been considered judicially, it seems reasonable to infer from section 23(1) that trustees can properly engage an agent on the basis that he or she will not be liable for negligence in the performance of the agency.[20]

(b) More controversial is the question whether trustees have power to authorise an agent to engage in conduct which the trustees themselves could not. This question does not appear to have been resolved by the authorities.[21]

Collective delegation: Trustee Act 1925, section 23(3)

8. Section 23(3) of the Trustee Act 1925 re-enacts, with amendments, a number of earlier statutory provisions intended to deal with specific practical problems. Thus the effect of section 23(3)(a) is that trustees, when selling land, can, like any other vendor, authorise their solicitor to receive the purchase money and give a good discharge for it. Section 23(3)(c) enables trustees to delegate to a banker or solicitor the power to receive and give a valid discharge for any money payable under an insurance policy. It should be noted, however, that these specific powers to delegate are given "without prejudice to such general power of appointing agents" as is conferred by s 23(1).

Delegation by individual trustees: Trustee Act 1925, section 25

9. Section 25 of the Trustee Act 1925 (as it will appear once the present Trustee Delegation Bill is enacted[22]) permits the delegation, *individually*, by a trustee of "the execution or exercise of all or any of the trusts, powers and discretions vested in him as trustee".[23] It is therefore theoretically possible that all the trustees could choose individually to delegate all or some of their powers[24] to the same person

[19] Indeed the only general consideration of the question appears to be *Re Weall* (1889) 42 ChD 674, 678, where Kekewich J held that trustees had to consider carefully the terms on which they employed agents, and could not simply accept without question the conditions that they were offered. There does not appear to be any other authority on the question on what terms a trustee may employ an agent, and the matter is consequently unclear.

[20] Section 23(1) exempts trustees from liability for the defaults of any agent "if employed in good faith". Those words appear to have been interpreted literally, so that trustees are exempt from liability in the absence of bad faith on their part — it thus seems reasonable to infer that a trustee can agree to an exclusion of liability on the part of any agents whom they employ.

[21] For a full discussion of the issues and authorities, see Consultation Paper, paras 3.26 — 3.33. The conclusion drawn is that there must be a doubt whether the power in question is a default power of trustees. Even if it is, it may still be a breach of trust for trustees to sanction agents to enter into transactions that they themselves could not, at least in relation to certain types of conduct.

[22] It is understood that the new Act is likely to be brought into force shortly after the Bill receives Royal Assent. For an explanation of the law prior to commencement, see para 3.35 of the Consultation Paper. See also, para 4.1 above.

[23] Section 25(1).

[24] Including the fiduciary powers that the trustees, acting collectively, could not delegate.

under section 25, and thereby avoid the prohibition on delegating their fiduciary powers. However, there must be a doubt as to whether such co-ordinated delegation would be an appropriate use of the power under section 25 and, in any event, it has the following distinct disadvantages:

(1) any such delegation is limited to a maximum period of twelve months;[25]

(2) each trustee is vicariously liable for the acts or defaults of his or her delegate,[26] whereas trustees who delegate under section 23(1) are not;

(3) a trustee who makes such a delegation is required to give notice of it within seven days to each of the other trustees and to every person who, under the trust instrument, has a power to appoint new trustees;[27]

(4) unlike section 23(1), there is apparently no power when delegating under section 25 to remunerate the delegate;[28] and

(5) the delegate cannot sub-delegate the powers reposed in him or her.[29]

10. Although these features of section 25 can certainly be regarded as 'impediments' to the use of the section as a means by which trustees might collectively delegate their fiduciary obligations, the object of the provision has always been to enable an *individual* trustee to delegate his or her trusts in circumstances where, for some comparatively short period, it was likely to be difficult or impossible to perform them, but where he or she intended to resume them thereafter. These features are therefore intended not as impediments, but as safeguards for beneficiaries.[30]

11. The Consultation Paper noted[31] that delegation by individual trustees was also possible by means of an enduring power of attorney under section 3(3) of the Enduring Powers of Attorney Act 1985. However, this provision will be repealed when the new Trustee Delegation Act is brought into force. It will then cease to be possible for an enduring power to be used to delegate trust functions under section 25 of the Trustee Act 1925.[32]

[25] Trustee Act 1925, s 25(2)(b).

[26] *Ibid*, s 25(7).

[27] *Ibid*, s 25(4).

[28] Goode Report, para 4.9.28; Law Reform Committee, Twenty-third Report, The Powers and Duties of Trustees (1982) Cmnd 8733, para 4.19.

[29] Trustee Act 1925, s 25(8).

[30] See generally Consultation Paper, para 3.38.

[31] At paras 3.39 and 3.40.

[32] Clause 6 of the Trustee Delegation Bill repeals Enduring Powers of Attorney Act 1985, s 2(8) (which provides that a power of attorney granted under Trustee Act 1925, s 25 cannot be an enduring power) in respect of powers of attorney created after the new Act comes into force.

The position of charitable trusts

12. The provisions explained above apply to charitable and non-charitable trustees equally. However, under section 26 of the Charities Act 1993 the Charity Commissioners have a statutory power to authorise dealings with charity property that would not otherwise be within the powers of the trustees. This power can be used to authorise an extension of charity trustees' powers of delegation.[33]

13. The standard of care expected of trustees when delegating is considered generally below. However, where charity trustees are authorised to employ a discretionary fund manager under section 26 of the Charities Act 1993, specific conditions are invariably imposed[34] which, in effect, amount to a duty upon the trustees to take reasonable care.

The position of pension trusts

14. Section 34 of the Pensions Act 1995 authorises pension trustees to delegate investment decisions. Section 34(2) provides that "any discretion of the trustees of a trust scheme[35] to make any decision about investments" may be delegated to a fund manager who satisfies certain requirements.[36] That discretion cannot be delegated in any other way except by an individual trustee under section 25 of the Trustee Act 1925.[37] The trustees are required to ensure that a written statement of the principles governing investment decisions for the purposes of the pension scheme is prepared, maintained and periodically revised.[38]

15. In addition, under section 34(5) of the 1995 Act, pension trustees are, subject to any restriction imposed by the trust scheme, empowered to delegate the exercise of their discretion to make any decisions about investments to two or more of their number, or to a fund manager operating outside the UK (as regards overseas investment business).

[33] (1994) 2 *Decisions of the Charity Commissioners*, p 29. In particular, the Charity Commissioners are willing to make an order in cases where the value of the charity's investments (which will usually have to be over £100,000) and the frequency of transactions is high enough to warrant their delegation to a discretionary fund manager. The Commissioners have devised a Model Order - containing specific requirements and safeguards - to permit such delegation, the terms of which are set out in Appendix A to the Consultation Paper.

[34] The terms of the Model Order published by the Charity Commission require that the trustees must be satisfied after inquiry that the manager they appoint is a "proper and competent person to act in that capacity", who is either "an individual of repute with at least fifteen years' experience of investment management" and who is an authorised person under Financial Services Act 1986; or "a company or firm of repute which is an authorised or exempted person" within the meaning of the 1986 Act.

[35] Meaning an occupational pension scheme established under a trust: Pensions Act 1995, s 124(1).

[36] See Pensions Act 1995, s 34(3); Financial Services Act 1986, s 191(2).

[37] Pensions Act 1995, s 34(2)(b).

[38] *Ibid*, s 35(1). The statement has to cover certain specified matters including details of the kinds of investment to be held, the balance between different kinds of investments, risk, the expected return on investments and the realisation of investments (see s 35(3) and (4)).

16. It is generally impossible either for pension trustees or a fund manager appointed by them to exclude liability "for breach of an obligation under any rule of law to take care or exercise skill" in the performance of any of their investment functions.[39] However, this principle is qualified in a number of respects.[40]

The standard of care required of trustees in delegating their functions

17. The standard of care that is expected of trustees when appointing and supervising an agent was changed by the provisions of the Trustee Act 1925. The old common law standard of care that applied prior to 1926 was clear and largely uncontroversial: in essence, trustees were required to exercise reasonable prudence both in choosing an agent and in negotiating the terms on which that person was employed.[41] After 1925, however, the standard of care required of trustees in their appointment and subsequent control of agents has been governed by four provisions of the Trustee Act 1925 — sections 23(1), 23(2), 23(3) and 30(1). Taken together, these provisions cannot easily be reconciled into any coherent code, and their interpretation has given rise to problems, which are considered below.

Trustee Act 1925, section 23(1)

18. It has already been explained that this provision extended the circumstances in which trustees might delegate their ministerial functions to cases in which there was no moral necessity. It may also have changed the standard of conduct expected of trustees when delegating: it exempts trustees from liability for the defaults of any agent if that agent was "employed in good faith". The interpretation of this phrase is considered below.[42]

Trustee Act 1925, section 23(2)

19. As regards the delegation of the performance of a trust of foreign property to an agent or attorney under section 23(2), that subsection provides that trustees "shall not, by reason only of their having made such an appointment, be responsible for any loss arising thereby". The subsection does not, however, give any guidance as to the standard of care to be expected of trustees when supervising such an agent or attorney.

[39] *Ibid*, s 33(1).

[40] In particular, provided that they have taken certain precautions, pension trustees are not responsible for acts or defaults of a fund manager authorised under the Financial Services Act 1986 (Pensions Act 1995, s 34(4)). Also, where pension trustees delegate the making of investment decisions to a fund manager outside the UK, their liability may be excluded or restricted in certain circumstances (s 34(6)). However, where pension trustees delegate investment decisions to two or more of their own number, they are vicariously liable for the acts or defaults of those delegated trustees (s 34(5)).

[41] See *Re Weall* (1889) 42 Ch 674; *Speight v Gaunt* (1883) 9 App Cas 1. The old common law rules are explained in more detail in the Consultation Paper at paras 4.2 – 4.19.

[42] See para 23 *et seq*. One related question of importance concerns those cases, not infrequent, where the trust instrument gives wider powers of delegation to trustees than are given by s 23(1), but fails to set down the standard of care to be expected of them in the execution of those wider powers. The question is then whether the standard expected is the statutory standard of "good faith" or the common law standard of "reasonable prudence" (see Consultation Paper, para 4.2 — 4.5). We are not aware of any authority on this question.

Trustee Act 1925, section 23(3)

20. The specific powers which this provision confers to employ solicitors or bankers for certain purposes are subject to a significant proviso, the effect of which is to preserve the equitable obligation on trustees to exercise the care of the reasonable prudent man of business acting in his own affairs.[43]

Trustee Act 1925, section 30(1)

21. Section 30(1) of the Trustee Act 1925 is a statutory indemnity clause which provides that a trustee is not liable for losses occasioned by the defaults of his or her agents, "unless the same happens through his own wilful default".[44]

The interpretation of the statutory provisions — Re Vickery

22. The leading authority on the meaning of these four provisions is the well-known decision of *Re Vickery*.[45] In this case Maugham J gave an exposition of what he regarded as being the interrelationship between sections 23(1), 23(3) and 30(1) of the Trustee Act 1925. It is possible to distil four propositions from the judgment.

PROPOSITION 1

23. Given the terms of section 23(1), trustees were not liable for loss due to the appointment of an agent provided that they had acted in good faith.[46]

24. This proposition has been criticised because it means that a trustee who honestly but negligently delegates some function to an incompetent or dishonest agent will escape liability.[47] However, there is some modern authority which supports the literal subjective approach adopted in *Re Vickery*.[48]

PROPOSITION 2

25. The proviso to the specific powers to authorise certain agents to give a valid discharge for trust monies conferred by section 23(3) had no application to delegations made under section 23(1).[49] The protection afforded by section 23(1)

[43] See Consultation Paper, paras 4.4, 4.5 and 4.26.

[44] Liability under this provision would appear to require deliberate or reckless breach of duty on the part of the trustee (see *Re Munton* [1927] 1 Ch 262).

[45] [1931] 1 Ch 572. This case has provoked strong reactions ever since it was decided. Some writers have taken the view that Maugham J misinterpreted the relevant statutory provisions and could have construed them in such a way as to leave the previous law substantially unchanged. Others have accepted that he construed those provisions correctly, though some go on to criticise the legislation which Maugham J had attempted to rationalise.

[46] Provided that the trustees use their discretion in selecting an agent and only employ an agent to act within the usual course of his or her business, "good faith" was intended to have its ordinary subjective meaning.

[47] Indeed the proposition has been reversed in two Australian states which have enacted provisions similar to Trustee Act 1925, s 23 (see Trusts Act 1973, s 54(1) (Queensland); Trustees Act 1962, s 53(1) (Western Australia)).

[48] See *Steel v Wellcome Custodian Trustees Ltd* [1988] 1 WLR 167, 174 *per* Hoffmann J.

[49] See *Re Vickery* [1931] 1 Ch 572, 581.

to a trustee who appointed an agent in good faith was not spent once the appointment was made, but continued thereafter.

26. If this is correct, section 23(3) would appear to be superfluous, because the power of delegation in section 23(1) is wide enough to encompass the specific powers of delegation set down in section 23(3), and if the former power is *not* subject to the stringent proviso which clearly applies to the latter,[50] trustees will always choose to delegate under section 23(1).[51]

PROPOSITIONS 3 AND 4

27. The third proposition which can be distilled from the judgment in *Re Vickery* is that the statutory indemnity clause in section 30(1) of the Trustee Act 1925 did not apply to protect a trustee in *all* cases where the trust had suffered loss. Having regard to the wording of the subsection, it was confined to losses which arose from—

    (1) a trustee signing receipts for the sake of conformity;

    (2) the wrongful acts or defaults of another trustee;

    (3) the wrongful acts or defaults of a banker, broker or other agent with whom trust money or securities had been deposited;

    (4) the insufficiency or deficiency of securities; or

    (5) any analogous loss.

28. The fourth and final proposition is that the phrase "wilful default" in section 30(1) had the meaning given to it in *Re City Equitable Fire Insurance Co*,[52] namely "either a consciousness of negligence or breach of duty, or a recklessness in the performance of a duty".

29. *Vickery* Propositions 3 and 4 stand together. Proposition 3 defines when the trustee indemnity clause found in section 30(1) applies, while Proposition 4 defines the extent of the exemption from liability that it confers on trustees. It has been argued that Maugham J should not have given the words "wilful default" their literal meaning.[53] Not only is such an interpretation contrary to earlier

[50] Namely, that trustees are liable for breach of trust if they allow any property to remain in the hands or under the control of the agent longer than is reasonably necessary for the agent to transfer it to the trustee.

[51] It is worth noting that in Northern Ireland this particular aspect of the reasoning in *Re Vickery* has been reversed by statute. The Trustee Act (Northern Ireland) 1958, s 24(1) and (5) provide that the equivalents of sections 23(1) and 23(3) of the Trustee Act 1925 are *both* qualified by the proviso that trustees remain liable if they allow an agent to retain trust money or property longer than is reasonably necessary for them to pay or transfer it to the trustees.

[52] [1925] Ch 407.

[53] See para 23 *et seq*. above.

authority which held that those words meant no more than "breach of duty",[54] but it also sets the obligations of trustees at a much lower level than hitherto, and one that is inappropriate.[55] Furthermore, it is not readily apparent why, in relation to the five types of loss to a trust identified by Proposition 3, a lower standard of conduct is expected of trustees than it is in relation to other acts and omissions. Whatever the arguments on the principle of the matter, the validity of Maugham J's interpretation of "wilful default" has recently been placed beyond doubt by the Court of Appeal.[56]

SECTION 2
TRUSTEES' POWERS TO EMPLOY NOMINEES AND CUSTODIANS

The position at common law

30. Three principles underlie the present law governing the ability of the trustees of private trusts[57] to employ nominees and custodians—

(1) "The trustee is under a duty to take such steps as are reasonable to secure control of the trust property and to keep control of it".[58]

(2) Where there are two or more trustees, it is their duty to ensure that the *title* to the trust property is vested in their joint names, so that it can be transferred only with the consent of all.[59]

(3) It is permissible for the *documents* relating to the trust property to be in the custody of just one of the trustees.[60]

31. It follows that, in the absence of an express power in the trust instrument or in statute, trustees can neither vest trust property in nominees nor place trust documents in the custody of a custodian — to do so would result in a breach of trust.[61] Moreover, the requirement that trustees must keep the trust assets under

[54] See, eg, Gareth Jones, "Delegation by Trustees: A Reappraisal" (1959) 22 MLR 381, 392; John E Stannard, "Wilful Default" [1979] Conv 345, 357.

[55] See Sir William Holdsworth (1931) 47 LQR 463, 465; David J Hayton, "Trustees and the New Financial Services Regime" (1989) 10 Co Law 191, 194.

[56] See *Armitage v Nurse* [1998] Ch 241, 252, where Millett LJ commented that "[i]n the context of a trustee exclusion clause… such as section 30 of the Trustee Act 1925, [wilful default] means a deliberate breach of trust: *Re Vickery*. The decision has been criticised, but it is in line with earlier authority. Nothing less than conscious and wilful misconduct is sufficient".

[57] The special position of charity trustees is considered at para 37 *et seq.* below.

[58] W F Fratcher, *Scott on Trusts* (4th ed 1987) § 175. See also *Wyman v Paterson* [1900] AC 271, 288 where Lord Davey described it as being "the first duty of the trustees ... to preserve the trust fund under their own control". One concomitant of this rule is that trustees cannot make an investment jointly with one or more other persons : *Webb v Jonas* (1888) 39 Ch D 660.

[59] See *Re Flower and Metropolitan Board of Works* (1884) 27 ChD 592.

[60] See *Cottam v Eastern Counties Railway Co* (1860) 1 J&H 243; 70 ER 737. The same must presumably be true of any chattels held on trust.

[61] *Browne v Butter* (1857) 24 Beav 159, 161, 162; 53 ER 317, 318, *per* Romilly MR.

their own control is such that it cannot be circumvented by the trustees employing a nominee or custodian as agent under their delegation powers.[62]

Statutory exceptions to the common law rule

32. There are a number of limited statutory exceptions to the common law rule that bars the employment of nominees and custodians by trustees. The most significant of these depend upon whether the trustees act collectively or individually.

Where the trustees act collectively

33. Section 21 of the Trustee Act 1925 empowers trustees to deposit any *documents*[63] held by them relating to the trust, or to the trust property, with any banker or banking company, or any other company[64] whose business includes the undertaking of the safe custody of documents.

34. Under section 7(1) of the same Act, trustees have a statutory duty to deposit bearer securities with a banker or banking company for the purposes of safe custody and the collection of income.[65] There is no similar statutory duty in respect of any other form of trust property.

35. Finally, section 4 of the Public Trustee Act 1906 confers a power to appoint the Public Trustee or certain other bodies corporate[66] to act as a custodian trustee.[67] When such a trustee is appointed, the trust property is transferred to it as if it were sole trustee, but the management of the trust and the exercise of any power or discretion remains vested in the trustees other than the custodian trustee.[68] Custodian trusteeship, however, has not proved to be particularly popular and is used fairly infrequently. Custodian trustees cannot filfil the rôle that nominees are now expected to perform in the sphere of investment.

Where a trustee acts individually

36. The operation of section 25 of the Trustee Act 1925 has already been mentioned.[69] This provision empowers an individual trustee to delegate any of the trusts, powers and discretions vested in him or her, and so it is possible for each of the trustees of

[62] See (1994) 2 *Decisions of the Charity Commissioners*, p 30.

[63] There is no power to vest *trust property* in a nominee.

[64] There is no power to deposit the documents with, eg, a partnership that undertakes the business of custodianship.

[65] By virtue of Truste Act 1925, s7(2), trustees are not liable for any loss incurred by reason of any such deposit.

[66] Including the Treasury Solicitor (See Public Trustee Rules 1912, SR&O 1912 No 348, r 30 (as amended)).

[67] Those who can exercise the power are : the court, on the application of anyone on whose application it could order the appointment of a new trustee; the person who created the trust; or any person having the power to appoint new trustees (this will usually include the trustees).

[68] Public Trustee Act 1906, s 4(2)(a), (b), (d) and (e).

[69] See para 9 above. Section 25 will be amended by the provisions of the Trustee Delegation Bill/Act 1999.

a trust to delegate all or some of their powers to one particular person by power of attorney. However, for the reasons outlined in the Consultation Paper,[70] there is some doubt whether all the trustees could each exercise this power individually to vest trust property in a nominee.

The special position of charitable trusts

37. Certain special provisions apply to charitable trusts, and give charity trustees wider powers to appoint nominees and custodians than are enjoyed by their private trust counterparts.

38. The Official Custodian for charities acts as a custodian trustee,[71] though his functions are being reduced, and the only forms of property that he is now able to hold as nominee for a charity are land and any other property vested in him by virtue of an order of the Charity Commissioners.[72]

39. The Official Custodian was required to divest himself of all other forms of property by 1997 and, where he did so, the charity trustees could nominate a person to hold such property as nominee for the charity.[73]

40. It is the practice of the Charity Commissioners, in appropriate circumstances, to sanction both the appointment and the remuneration of nominees by charity trustees.[74] This authorisation will usually be given on the condition that the proposed nominee is a corporation with a place of business in England or Wales (and is therefore amenable to the jurisdiction of the High Court).

SECTION 3
TRUSTEES' POWERS TO INSURE TRUST PROPERTY

The position at common law

41. The effect of the common law rules governing the powers and duties of trustees to insure trust property is not entirely free from doubt. In *Re Betty*,[75] North J suggested that at common law, trustees ought to insure trust property, "at the expense and for the benefit of the estate". At first sight, this is not easy to reconcile with *Re McEachern*,[76] where Eve J, citing two authorities[77] which actually dealt with rather special facts,[78] held that "the court will not hold an executor or trustee liable

[70] At para 7.11.

[71] See Charities Act 1993, s 2.

[72] Charities Act 1992, s 29(2).

[73] *Ibid*, s 29(5). The nominee must be an individual resident in, or a body corporate having a place of business in, England or Wales.

[74] The Charity Commissioners have power to do this under Charities Act 1993, s 26.

[75] [1899] 1 Ch 821, 829.

[76] (1911) 103 LT 900.

[77] *Bailey v Gould* (1840) 4Y & C Ex 221; 160 ER 987 (there is also a report at 9 LJEx Eq 43 which gives a clearer explanation of the decision in the case); and *Fry v Fry* (1859) 28 LJCh 593 (a better report than 27 Beav 144; 54 ER 56).

[78] See Consultation Paper, para 9.2.

on the footing of wilful default for losses occasioned by fire on premises left uninsured by him".[79] However, the issue before the court was simply that of whether the trustees (who had a statutory *power* to insure, paying the premiums out of *income* of the trust) were under a *duty* to exercise that power. There was no such duty because trustees' powers must be exercised unanimously, and one of the trustees[80] objected. Furthermore, in giving judgment, Eve J stressed that, "I say nothing as to whether the trustees ought to insure the premises at the expense of the estate generally".[81] This suggests that he was mindful of North J's remarks in *Re Betty*, that trustees have a common law obligation to insure trust property, meeting the cost out of *capital* at the expense of the estate.

42. The view that trustees have a common law power (and perhaps even a duty in certain circumstances) to insure trust property seems to have been accepted by Sir Benjamin Cherry, draftsman of the Trustee Act 1925.[82] It has also been expressly endorsed in Ireland[83] and New South Wales.[84] The state of the authorities has led the Law Commission to conclude that trustees do have a power (and in some cases a duty) to insure trust property under English common law.

Statutory powers of insurance

Trustees of land

43. Under the Trusts of Land and Appointment of Trustees Act 1996, trustees of land have in relation to the land subject to the trust "all the powers of an absolute owner".[85] Consequently, the trustees have the same powers to insure as would a beneficial owner. However, as these powers are expressly conferred upon trustees of land "for the purpose of exercising their functions as trustees",[86] they can only be exercised in accordance with the trustees' fundamental obligation to act in the best interests of the trust and to take reasonable care of the trust property.

Trustees of personalty

44. The statutory insuring powers of trustees of personal property are to be found in section 19 of the Trustee Act 1925.[87] Such trustees may insure against "loss or

[79] (1911) 103 LT 900, 902.

[80] Who was the tenant for life — and who would thus have borne the cost of insuring.

[81] (1911) 103 LT 900, 902.

[82] See the comments on Trustee Act 1925, s 19(1) in Sir Benjamin Cherry, D H Parry and J R P Maxwell, *Wolstenholme & Cherry's Conveyancing Statutes* (12th ed 1932) Vol 2, pp 1292, 1293.

[83] *Kingham v Kingham* [1897] 1 IR 170, 174, *per* Chatterton V-C : "I think the trustees are bound to take care that the premises are insured against fire, so as to preserve the property for their *cestuis que trust*..." (suggesting a *duty* to insure).

[84] *Davjoyda Estates Pty Ltd v National Insurance Company of New Zealand Ltd* [1965] NSWR 1257, 1266, *per* Brereton J, citing *Re Betty* : "While a trustee is not bound to insure the trust property, he should do so in the interests of the beneficiaries" (suggesting a *power* to insure).

[85] Section 6(1).

[86] *Ibid*.

[87] As amended by Trusts of Land and Appointment of Trustees Act 1996 s 25(1), (2); Schedule 3, para 3; and Schedule 4.

damage"[88] for up to three quarters of the full value of the property, paying the premiums out of the income derived from it,[89] or from "any other property subject to the same trusts" without obtaining the consent of any person entitled wholly or partly to such income.[90] However, this power does not apply to property held on a bare trust.[91]

Persons having the powers of the tenant for life in respect of a settlement under the Settled Land Act 1925

45. A tenant for life (or person having the powers of a tenant for life) under the Settled Land Act has no *statutory* power to insure. This has been the position since the Trusts of Land and Appointment of Trustees Act 1996 came into force at the beginning of 1997, and appears to have come about as the result of an oversight in preparing the consequential amendments for the 1996 Act. Nevertheless, a tenant for life under the Settled Land Act does, of course, still have a power to insure at common law.

SECTION 4
TRUSTEE REMUNERATION

The general rule against trustee remuneration

46. The general rule is that "a trustee, executor, or administrator, shall have no allowance for his care and trouble",[92] a principle which undoubtedly remains good law.[93] The traditional rationale of the rule is that "a trustee is not allowed to derive a benefit from trust property",[94] and that to allow payment would place a trustee in a position where his or her interest and duty were in conflict.[95]

Express charging clauses

47. This is not to say that a professional trustee may never be remunerated for his or her services to the trust. Indeed, it has been the practice of trust draftsmen for well over a century (and probably much longer) to include an express professional

[88] The power is no longer limited to insuring against loss or damage "by fire".

[89] This differs from the common law power to insure, where premiums must be charged to capital.

[90] Trustee Act 1925, s 19(1).

[91] *Ibid*, s 19(2). The concern seems to be that a beneficiary under a bare trust may not wish the trustees to insure the property. Although such beneficiaries may call for a transfer of the property, they have no power to direct the trustees as to the exercise of their powers (see *Re Brockbank* [1948] Ch 206).

[92] *Robinson v Pett* (1734) 3 P Wms 249, 251; 24 ER 1049, *per* Lord Talbot LC.

[93] See, eg, *Re Barber* (1886) 34 Ch D 77, 80; *Re Gee, dec'd* [1948] Ch 284, 293; *Re Worthington, dec'd* [1954] 1 WLR 526, 528; *Re Orwell's Will Trusts* [1982] 1 WLR 1337, 1340; *Re Duke of Norfolk's Settlement Trusts* [1982] Ch 61.

[94] *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 1 WLR 1072, 1075, *per* Lord Templeman. See too *Re Barber*, above, at 80.

[95] "If it were not the rule, a trust estate might be heavily burdened by reason of business being done by a trustee or executor employing himself as commission agent for the estate" : *Re Barber*, above, at 81, *per* Chitty J.

charging clause as a matter of course in any trust instrument. Such clauses will typically authorise a trustee, who is engaged in any profession or business, to be paid out of the trust for his or her reasonable fees and charges in respect of any business carried out on behalf of the trust, including any business which a non-professional trustee could have undertaken personally. This final point is generally expressly made, because professional charging clauses will be strictly construed against the professional trustee: unless there is express provision authorising it, he or she will be unable to charge for work which could have been undertaken by a lay trustee, and which did not require his or her professional expertise.[96] In addition, a trustee who is remunerated under a professional charging clause will for some (but not all) purposes be regarded as receiving a gift or legacy as a beneficiary under the will or trust in question.[97]

Other exceptions to the general rule

48. Even where there is no express charging clause in the will or trust instrument, a trustee may be remunerated by way of exception to the general rule in a number of situations, of which the following are the most important—

(1) Where remuneration is authorised by statute. There are a number of instances where statute does this, including—

(a) where the court appoints a corporation (other than the Public Trustee) to act as trustee,[98] or appoints a judicial trustee;[99]

(b) where the Public Trustee acts as trustee;[100] and

(c) where the trustee is a custodian trustee.[101]

(2) Where remuneration is authorised by the court under its inherent jurisdiction. The basis of the jurisdiction is to secure "the good

[96] See, eg, *Re Ames* (1883) 25 Ch D 72; *Clarkson v Robinson* [1900] 2 Ch 722; and *Re Chalinder & Herington* [1907] 1 Ch 58.

[97] See, eg, *Re Pooley* (1888) 40 Ch D 1 where the trust arose under a will which the trustee had attested, barring him from receiving any remuneration because a gift to an attesting witness was void under the Wills Act 1837; *Re Thorley* [1891] 2 Ch 613 where payments under a charging clause were regarded as a legacy for the purposes of legislation imposing legacy duty; *Re White* [1898] 2 Ch 217 where the testator's estate was insolvent, and the right to charge was regarded as a general legacy, such that the trustee was not entitled to payment; and *Re Brown* [1918] WN 118 where there were insufficient assets to meet all the legacies the right to charge was regarded as a general legacy and abated proportionately. But see also, *Dale v IRC* [1954] AC 11 where payment under a charging clause was treated as 'earned income' for the purposes of income tax legislation; and *Re Duke of Norfolk's Settlement Trusts* [1982] Ch 61, 78 where the Court of Appeal held that where the court grants a trustee additional remuneration under its inherent jurisdiction, it is not varying a beneficial interest under the trust, but acting to secure the competent administration of trust property.

[98] Trustee Act 1925, s 42.

[99] Judicial Trustees Act 1895, s 1(5); Judicial Trustee Rules (SI 1983 No 370), r 11.A.

[100] Public Trustee Act 1906, s 9.

[101] Public Trustee Act 1906, s 4(3).

administration of trusts",[102] and in exercising it the court will balance the gratuitous nature of trusteeship against the great importance to the beneficiaries that the trust should be well administered. If, on balance, it would be in the beneficiaries' interests to remunerate the trustees, the court will permit such remuneration. Although it has been held that the "jurisdiction should only be exercised sparingly, and in exceptional cases",[103] there are signs that the courts are now more willing than before to allow remuneration.[104]

(3) Where the beneficiaries are of full age and capacity, and between them are absolutely entitled to the trust property, they may contract with the trustees to remunerate them.[105]

[102] *Re Duke of Norfolk's Settlement Trusts* [1982] Ch 61, 79, *per* Fox LJ.

[103] *Re Worthington, dec'd* [1954] 1 WLR 526, 528 *per* Upjohn J.

[104] See *Re Duke of Norfolk's Settlement Trusts*, above; *Foster v Spencer* [1996] 2 All ER 672; N D M Parry, "Remuneration of Trustees" [1984] Conv 275, 276.

[105] It should perhaps be noted, however, that such contracts will only be supported by consideration where an intended trustee declines to act or an acting trustee threatens to resign, unless paid. Such conduct of course gives rise to the possibility of a finding of undue influence or equitable pressure, in consequence of which the contract may be set aside - see Lord Hardwicke's remarks in *Ayliffe v Murray* (1740) 2 Atk 58, 60; 26 ER 433, 434.

APPENDIX D
LIST OF RESPONDENTS TO CONSULTATION PAPER NO 146

Association of British Insurers
Association of Charitable Foundations
The Association of Corporate Trustees
Association of Pension Lawyers
Association of Private Client Investment Managers and Stockbrokers
Judge Paul Baker QC
Colin Bamford, Financial Law Panel
Barclays Bank Plc (Barclays Corporate Trustees)
Barclays Bank Trust Company Limited
Rt Hon Sir Robert Carswell
Chancery Bar Association
The Charity Commission
Charity Law Association
Charles Russell
Clifford Chance
Country Landowners Association
The Crown Estate
The Hon Lord Davidson
Professor Derek Davies
Department of Social Security
Chief Master Dyson
Eaton Hill Therapeutic Community
Stephen Edell
Employee Share Ownership Centre
Farrer & Co
Frere Cholmeley Bischoff
Freshfields
Simon Gardner
The General Council of the Bar
Lord Goodhart QC
Holborn Law Society and City of Westminster Law Society
The Institute of Chartered Accountants
The Institute of Chartered Secretaries and Administrators
The Institute of Legal Executives
Professor John Langbein
Law Reform Advisory Committee for Northern Ireland
The Law Society
The Law Society of Scotland
Lee Bolton & Lee
W A Lee
Lord Chancellor's Department
Morgan Grenfell Asset Management Limited
Roger Morton
National Council for Voluntary Organisations
The National Trust
Nicholson Graham & Jones
Alan Niekirk
Northern Chancery Bar Association
Edward Nugee QC

Occupational Pensions Regulatory Authority
Payne Hicks Beach
N D M Parry
Personal Investment Authority
Peter Pexton, Ernst & Young
The Public Trustee
The Hon Mr Justice Rattee
Richards Butler
Royal Bank of Scotland Plc
P R Saunders
Schroder Investment Management Limited
Scottish Law Commission
Securities and Investments Board
Simmons & Simmons
Society of Pension Consultants
Society of Trust and Estate Practitioners
Robin Towns
Trust Law Committee
David Tweedie, Gregory, Rowcliffe & Milners
Gary Watt