

TRUSTEE ACT (NORTHERN IRELAND) 2001

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes relate to the Trustee Act (Northern Ireland) 2001. They have been prepared by the Department of Finance and Personnel in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by the Assembly.
2. The Notes need to be read in conjunction with the Act. They do not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section or Schedule does not seem to require any explanation or comment, none is given.
3. A glossary of technical terms used in these Notes is provided at Annex A.

BACKGROUND AND POLICY OBJECTIVES

4. At present the powers and duties of trustees are governed mainly by the Trustee Act (Northern Ireland) 1958, the Trustee Investments Act 1961, the Trustee (Amendment) Act (Northern Ireland) 1962 and the common law. There is, however, scope for the documents setting up the trust to confer wider powers than the general law would allow as regards the range of assets or securities trustees may invest in and how they are permitted to carry out their various functions. Modern trust deeds invariably take advantage of this freedom. This enables “privileged” trustees operating under professionally-drafted trust deeds to avoid many of the restrictions and inconveniences of the statutory framework and facilitates the proper administration of the trust.
5. The fundamental obligation of all trustees is to act in the best interests of the trust, its present and future beneficiaries, in the exercise of their trustee functions. The investment of trust funds is central to the proper administration of the trust. However, until now the law governing the powers and duties of trustees has not kept pace with social, economic and technological developments, particularly with changes in the conduct of investment business such as the introduction of the CREST system on the London Stock Exchange.

The situation is such that trustees working under trust documents that make no, or no sufficient, provision for handling trust investments have faced obstacles in the way of satisfying that fundamental obligation.

6. It is intended through this Act to enable all trustees to enjoy these wider powers on a default basis; that is to say, the powers will be available to them automatically unless the trust instrument excludes them. At the same time there will be counterbalancing protection for beneficiaries, including a new statutory duty of care.
7. The core feature of the Act is a wider power of investment to replace the present statutory power. This general power of investment is complemented by new powers to appoint agents, nominees and custodians, to purchase land, to insure trust property and to pay professional trustees. These new powers are overseen by a statutory duty of care. There are also powers to appoint or replace trustees in certain circumstances. As under the present law, the new trustee powers will apply only to the extent that the trust instrument permits.

CONSULTATION

8. In May 1996 proposals on reform of the law relating to trustee investment were the subject of a public consultation exercise conducted by HM Treasury in Great Britain and by the Law Reform Advisory Committee for Northern Ireland here. The response to the proposals was very positive. The Office of Law Reform consulted further with interested parties in 1997–1999 as legislation was prepared to implement those proposals on trustee investment and appointment and retirement of trustees. In the meantime, the Law Commission and the Scottish Law Commission re-examined the question of trustee investment along with other associated trustee powers and duties. A comprehensive Draft Trustee Bill for England and Wales was included in Law Commission Report No. 260 (1999) on *Trustee Powers and Duties*. That Bill, with some amendments, enjoyed cross-party support in Parliament and was passed as the Trustee Act 2000.
9. In September 2000 the Office of Law Reform published a Consultation Paper with the aim of investigating whether the introduction of this more comprehensive package of reforms of trustee law would be welcomed in Northern Ireland. Some 200 copies of the Consultation Paper were distributed to individuals and organisations including the Law Reform Advisory Committee, the Law Society, the Bar Council, banks and charities.
10. The response to the Consultation Paper was supportive. Comments were positive, both as regards the underlying approach of the reforms and in point of detail.

OPTIONS CONSIDERED

11. In considering reform of the law relating to trustee powers of investment and in consulting with persons working within the constraints of the present regime it became apparent that conferring a wider power of investment would not of itself meet the needs of trustees and beneficiaries. Representations were made to the Office of Law Reform that the new general power of investment had to be supported by additional powers if all trustees were to have access to the benefits enjoyed by trustees already operating successfully under modern, carefully drafted trust documents. A wider-ranging approach was considered appropriate, with a more comprehensive package of reforms.
12. It was considered that the practice of specialists drafting trust instruments should be taken as a model for what might be needed to facilitate the proper administration of trusts. It was also concluded that the duty of care owed by trustees should be put on a statutory basis, to apply uniformly across a range of trustee functions

OVERVIEW

13. The Act has 46 sections and 4 Schedules. It is divided into 7 Parts:
 - Part I (sections 1-2) introduces a new safeguard for beneficiaries in the form of a statutory duty of care which will apply to trustees in the exercise of various powers. The circumstances in which the duty will apply are listed in Schedule 1.
 - Part II (sections 3-7) sets out the new general power of investment conferred on trustees, giving them the same powers of investment as an absolute owner, with the exception of land transactions. There are certain obligations and restrictions designed to protect beneficiaries
 - Part III (sections 8-10) introduces new powers to acquire land.
 - Part IV (sections 11-27) contains a range of measures. Firstly, sections 11-15 deal with employment of agents. Secondly, sections 16-20 describe powers to appoint nominees and custodians. Then sections 21-23 provide for the review of and liability for agents, nominees and custodians. Lastly, in this part of the Act, sections 24-27 contain supplementary provisions.
 - Part V (sections 28-33) aims to create a better regime for the payment of professional trustees and the reimbursement of trustees' expenses.
 - Part VI (sections 34-36) reforms the law on the appointment and retirement of trustees at the direction of the beneficiaries.

- Part VII (sections 37-46) deals with miscellaneous and supplementary issues, including power to insure trust property and special cases such as personal representatives, pension schemes, unit trusts, common investment schemes for charities and the Crown.

COMMENTARY ON CLAUSES

Part I: The Duty of Care

Sections 1 and 2 form Part I of the Act. The sections create a new uniform statutory duty of care applicable to trustees when carrying out their functions under the Act or equivalent functions derived from the trust instrument or other sources. The new duty will bring certainty and consistency to the standard of competence and behaviour expected of trustees across a range of situations. It will be a safeguard for beneficiaries and so balance the wider powers given to trustees elsewhere in the Act. The duty will apply in addition to the existing fundamental duties of trustees (for example, to act in the best interests of the beneficiaries and to comply with the terms of the trust) but it will exclude any common law duty of care which might otherwise have applied. The duty is a default provision in that it may be excluded or modified by the terms of the trust. In other words, in line with the basic approach of the Act, it will not apply where the person setting up the trust (the settlor) indicates that it is not wanted.

Section 1: The duty of care

Section 1 defines the new statutory duty of care, using familiar words drawn from case law. A trustee must show such care and skill as is reasonable in the circumstances of the case, taking into account any special knowledge, experience or professional status he or she might possess or claim. So there is flexibility built in here and a higher standard may be demanded of an “expert” acting as trustee than a person of “ordinary” talents, depending on the context. In determining what constitutes reasonable care, the nature, composition and purposes of the trust will also be taken into consideration.

Section 2: Application of the duty of care

Section 2 defines the circumstances in which the new duty will apply by reference to Schedule I to the Act. In broad terms, the duty will apply when a trustee is exercising powers of investment, acquisition of land, appointment of agents, nominees and custodians, and certain powers under the Trustee Act (Northern Ireland) 1958, such as the insurance of trust property. The duty of care will not apply where it is excluded or modified by the trust instrument. Subject to that, it can apply to the exercise of relevant powers conferred by this legislation, other statutory provisions, the trust instrument, court orders, or other sources.

Part II: Investment

Sections 3 to 7 form Part II of the Act. This Part of the Act creates and defines a new default power of investment for trustees. This statutory power of investment is in wide terms and it will apply to trustees who do not have specific or conflicting powers of investment under their trust instrument or statute. It is expected to be of most benefit to older trusts and trusts arising under home-made wills or on intestacy because it is mainly those trustees who have to use the present restricted and bureaucratic regime based on the Trustee Investments Act 1961, now to be replaced.

Section 3: General power of investment

Section 3 gives trustees the general power of investment. This means the power to make any kind of investment that they could make if they were absolute owners of the assets rather than holding them on trust for the benefit of others. It should be noted, however, that this does not include the power to invest in land, apart from loans secured on land, but that power to acquire land as an investment is conferred separately by *section 8*. The general power of investment is subject to the safeguards and limitations set out in *sections 3 to 7* of the Bill. In addition, as protection for beneficiaries, the statutory duty of care applies to trustees making investment decisions, unless the trust instrument provides otherwise.

Section 4: Standard investment criteria

Section 4(1) provides that, in exercising any power of investment, whether arising under *section 3* or otherwise, a trustee must have regard to the standard investment criteria. There are two factors to be taken into account, as defined in *section 4(3)*, namely the suitability of the investments and the need for diversification.

Section 4(2) requires a trustee to review the investments from time to time and consider whether, in the light of the standard investment criteria, they should be varied. This accords with the present position at common law where a trustee is obliged to keep investments under review: see *Nestle v National Westminster Bank plc No (2)* [1993] 1 WLR 1260.

Section 4(3) defines the standard investment criteria. The definition is modelled on *section 6(1)* of the Trustee Investments Act 1961 and reflects modern portfolio theory. Firstly, the trustee must consider the suitability to the trust of the kind of investment proposed and also the suitability of the particular investment proposed as an investment of that kind. Secondly, the trustee must consider the need for diversification of investments to the extent that that is appropriate for the trust. Along with the duty of care, attention to the standard investment criteria will be of central importance in protecting beneficiaries.

Section 5: Advice

Section 5 provides another safeguard for beneficiaries. In choosing or reviewing any investments, apart from exceptional cases described below, a trustee must obtain and consider proper advice, bearing in mind the standard investment criteria. For these purposes “proper advice” is defined in *section 5(4)* to mean the advice of a person reasonably believed to be qualified in terms of ability and practical experience in financial or other relevant matters.

Section 5(3) recognises that it would be expensive and wasteful to insist upon trustees seeking advice in even the simplest cases, or in cases where the trustees themselves have the desirable skills and knowledge. Some flexibility is needed. Hence the exception - there is no requirement to seek this kind of advice if the trustee reasonably concludes that in all the circumstances it is unnecessary or inappropriate to do so.

Section 6: Restriction or exclusion of this Part etc.

Section 6 deals with restriction or exclusion of this Part. It should be emphasised that the new general power of investment is a default provision: accordingly, it is to be enjoyed in addition to other powers of investment trustees may have from other sources but subject to any restriction or exclusion imposed by the trust instrument or by any statutory provision.

Section 7: Existing trusts and statutory powers

Section 7 provides for the application of this Part of the Act to trusts in existence at the time these provisions on investment come into force (see *section 45* – on a day to be appointed). *Section 7(1)* provides that these provisions apply to trusts created before or after its commencement. So the date of creation of the trust is not crucial and both old and young trusts can enjoy the new general power of investment. However, there are certain exceptional cases to be noted. By *section 7(2)* the rule laid down in *section 6(b)* that the general power of investment is to be subject to any restriction or exclusion imposed by the trust instrument is not to apply as regards any trust instrument made before 3 August 1961. The significance of that date is that it is when the Trustee Investments Act 1961 came into force. The effect of *section 7(2)* then is to ensure that old limitations on investment which were originally set aside on that date by the Trustee Investments Act 1961 are not now revived or reactivated to frustrate the general power of investment. On the other hand, it is not proposed to override the intentions of persons setting up trusts after that 1961 cut-off date by imposing a general power of investment against their expressed wishes. For example, a settlor may have been motivated by ethical concerns to limit the range of investments available to the trustees and those wishes, if they date from 3 August 1961 onwards, were respected by the 1961 Act in its day and should continue to be respected.

By *section 7(3)* the general power of investment is conferred where a trust instrument is drafted in such a way that the trustees have power to invest in accordance with the Trustee Investment Act 1961. It may be that the instrument says directly that the 1961

Act is to apply or maybe it uses a phrase like “such powers of investment as may for the time being be authorised by law”. In either case *section 7(3)* confers the general power of investment, in effect as an automatic enlargement.

Section 7(4),(5) and *(6)* deal with the situation where bodies have existing powers of investment, derived from Northern Ireland legislation, based on trustee powers although they are not themselves trustees. In a sense this scenario parallels the case of the trustees just mentioned. Typically, a statute might say that a body is to have powers to invest its funds in “trustee investments” or to invest “in any securities in which a trustee is for the time being authorised to invest”. Such bodies are now to have the general power of investment, suitably modified and subject to the requirements of *sections 4* and *5* in relation to standard investment criteria and advice. Essentially, this is a safety net measure, intended to confer the general power of investment on non-trustee bodies which might well have assumed that their “trustee related” investment powers would change as trustee legislation changed. In addition *section 7(6)* gives these bodies the power to acquire land as an investment, alongside their general power of investment. Schedule 2 to the Act contains specific amendments of Northern Ireland legislation which has been identified as being of this nature.

Part III: Acquisition of Land

Sections 8 to 10 form Part III of the Act. These provisions govern acquisition of land by trustees.

Section 8: Power to acquire land

Section 8 confers a power to acquire land as an investment, for occupation by a beneficiary or for any other reason. This helps trustees who want to buy a house for a beneficiary to live in but find they have no power to do so under the current law. As far as buying land as an investment is concerned, the reason for treating this separately from other assets within the general power of investment is to facilitate the making of necessary consequential amendments to other legislation, particularly the Settled Land Acts 1882 to 1890. It should be pointed out that the statutory duty of care applies to a trustee exercising powers to acquire land, as do the obligations to have regard to the standard investment criteria and to obtain and consider proper advice in relation to investment transactions.

Section 9: Restriction or exclusion of this Part, etc.

Section 9 makes it clear that these new powers to acquire land are additional to other powers trustees may have but are subject to any restriction or exclusion imposed by the trust instrument or statute. The powers do not apply in relation to settled land, where extensive provision already exists.

Section 10: Existing trusts

Section 10 specifies that this Part applies to trusts created before or after its commencement.

Part IV: Agents, Nominees and Custodians

Sections 11 to *27* form Part IV of the Act. Firstly, *sections 11* to *15* set out powers of collective delegation – that is powers to appoint agents to act on their behalf - that trustees have in default of wide express powers being conferred by the trust instrument. These new provisions are not concerned with the possibility of delegation by an individual trustee, which continues to be governed by section 26 of the Trustee Act (Northern Ireland) 1958. Secondly, *sections 16* to *20* confer on trustees powers to appoint nominees and custodians in cases where the trust instrument contains no express power to do so. In this context, a nominee is a person nominated to hold trust property in his own name on behalf of the trustees. A custodian is a person who undertakes the safe custody of trust assets or documents. The mechanism of appointing nominees or custodians is valuable because it facilitates dealings with the trust assets. Thirdly, *sections 21* to *23* provide for the review by trustees of the activities of their agents, nominees and custodians and the liability of trustees for their actions. Lastly in this Part of the Act, *sections 24* to *27* deal with supplementary matters.

These powers of delegation and appointment of nominees and custodians are subject to the statutory duty of care (see *section 2* and paragraph 3 of Schedule 1). They will operate as a default provision applicable to all trusts apart from the special cases of pension trusts, authorised unit trusts, and common investment schemes for charities as set out in *sections 39* to *41*.

Under the present law trustees cannot, as a collective body, delegate their dispositive duties to distribute the trust property or their fiduciary discretions (that is powers implying a personal discretion such as the selection of trust investments or the decision whether or not to sell trust property) without express authority in the trust instrument. In view of the increasingly specialised nature of the tasks that have to be undertaken by trustees, some of these restrictions are seen as a serious impediment to the administration of trusts. It is no longer desirable to prohibit delegation of powers of investment and management. In general terms the policy of the Act is that the proper distinction to be drawn for the purpose of ascertaining whether a particular function ought to be delegable or not is between administrative powers (which should be delegable) and distributive powers (which should not be delegable). That approach is reflected in *section 11*.

In relation to charitable trusts different provision is required. The purpose here is to allow charitable trustees to delegate functions relating to the generation of funds but not the carrying out of the charitable purpose of the trust.

Section 11: Power to employ agents

Section 11 governs the functions that may be delegated by trustees. Subject to the provisions of Part IV, trustees may authorise an agent to carry out any or all of their “delegable functions”. As was mentioned above, the scope of delegable functions differs for charitable and non-charitable trusts. *Section 11(2)* provides that a trustee of a non-charitable trust may delegate any function other than those listed. The exceptions or non-delegable functions comprise - (a) a function relating to the distribution of trust assets; (b) a power to allocate trust payments to income or capital; (c) a power to appoint a trustee; and (d) a power to delegate a trust function or to appoint a nominee or custodian.

Section 11(3) sets out the scope of delegable functions for charitable trustees, which is in different terms. The functions which charitable trustees may delegate are (a) functions involving carrying out a decision taken by the trustees – so these are non-discretionary matters; (b) investment matters; (c) raising funds for the charity except in so far as the income is derived from the profits of a trade which is an integral part of carrying out the trust’s charitable purpose; and (d) any other function prescribed by an order made by the Department for Social Development.

Section 11(4) defines the concept of “a trade which is an integral part of carrying out the trust’s charitable purpose”. This covers the situation where the trade is exercised in the course of the actual carrying out of a primary purpose of the trust, or the work in connection with the trade is mainly carried out by beneficiaries of the trust. An example of non-delegable fund raising activities within the scope of this definition would be the charging of fees by a school operating as a charitable trust.

Section 12: Persons who may act as agents

Section 12 defines the persons who may act as agents under this new statutory power. There are few limitations. One or more of the trustees may be authorised to act as agent, but not a beneficiary even if he or she is also a trustee. If more than one person is appointed then they must act jointly. A person who is appointed to act as nominee or custodian may be authorised to act as agent too.

Section 13: Linked functions etc.

Section 13 relates to specific duties or restrictions attached to a function delegated to an agent. That agent is to be subject to the same requirements. For example, if investment functions are delegated to an agent, then that agent will be obliged to have regard to the standard investment criteria laid down in *section 4*. He may also be required to obtain and consider proper advice in accordance with *section 5* – although the usual expectation might be that the chosen agent in that situation would himself be a person reasonably qualified to advise.

Section 14: Terms of agency

Section 14 regulates the terms on which an agent may be appointed. The general rule is that trustees will be free to decide the terms of the appointment of the agent. This is subject to specific constraints set out in *section 14(3)*: trustees may not delegate on terms which permit their agent to appoint a substitute or sub-delegate; they may not agree to terms which restrict the liability of the agent or a substitute; and they may not consent to an agent acting where a conflict of interest may arise. However, these restrictions on the scope of their power to appoint agents will not apply if it is reasonably necessary to delegate on such terms (*section 14(2)*). In practice today it is often advisable to appoint an investment fund manager so relaxation of the traditional rule against delegation is appropriate. In addition, the section recognises the fact that in practice standard form terms of business usually include limits on liability and the freedom to act despite a conflict of interest and trustees would be severely hampered if they were forbidden to accept such terms.

There are additional restrictions in relation to the delegation of asset management functions under *section 15* and remuneration under *sections 29* to *32*. These are discussed below.

Section 15: Asset management: special restrictions

Section 15 imposes special restrictions on the exercise of asset management functions by an agent. This refers to the investment of trust assets and the acquisition, disposal and management of trust property. Where delegation of these particular functions is concerned, there has to be an agreement made or evidenced in writing. In addition, a policy statement must be prepared by the trustees beforehand, again in writing, to give guidance on how the functions should be exercised in the best interests of the trust. The agreement under which the agent is to act must include a term to the effect that he will ensure compliance with the policy statement.

Section 16: Power to appoint nominees

Section 16 confers on trustees a power to appoint a person to act as nominee and then vest the relevant trust assets in that person. This appointment must be made in or evidenced in writing.

Section 17: Power to appoint custodians

Section 17 confers a power to appoint a person to act as custodian undertaking the safe custody of assets of the trusts or documents or records concerning the assets. That definition of a custodian is found in *section 17(2)*. Again, this appointment must be made in or evidenced in writing.

Section 18: Investment in bearer securities

Section 18 governs investment in bearer securities, at present permitted to a limited extent and governed by section 7 of the Trustee Act (Northern Ireland) 1958, a provision repealed by this Act. The new provision allows trustees to invest in securities payable to bearer but they must appoint a person to act as custodian, unless their trust instrument or statute allows otherwise. The appointment of the custodian must be made or evidenced in writing.

Section 19: Persons who may be appointed as nominees or custodians

Section 19 regulates the persons who may be appointed as nominees or custodians. The objective is to protect beneficiaries. *Section 19(2)* provides that the person to be appointed must be someone carrying on a business of that nature, or a body corporate controlled by the trustees, or a body corporate recognised under Article 26A of the Solicitors (Northern Ireland) Order 1976. In the case of a charitable trust, the trustees must comply with guidance from the Department for Social Development as to the selection of nominees and custodians (*section 19(4)*). The trustees may appoint one of their number if that one is a trust corporation, or two or more of their number to act jointly as nominees or custodians. They may appoint the same person as nominee, custodian and agent.

Section 20: Terms of appointment of nominees and custodians

Section 20 governs the terms of appointment of nominees and custodians. This provision has similar effect in relation to the appointment of nominees and custodians as *section 14* has in relation to the appointment of agents.

Section 21: Application of sections 22 and 23

Sections 21 to *23* are concerned with the review of and liability for agents, nominees and custodians. These provisions on review and liability apply where trustees have appointed an agent, nominee or custodian under the new statutory powers. They also apply where trustees have appointed an agent, nominee or custodian under a power conferred by their trust instrument or a statutory provision, but in those cases they may be overridden by inconsistent terms in the instrument or statute.

Section 22: Review of agents, nominees and custodians etc.

Section 22 imposes a duty of review on trustees. The three elements of the basic duty are set out in *section 22(1)*: (a) to keep the arrangements under review; (b) where appropriate, to consider whether there is a need to intervene; and (c) to intervene if necessary. Amongst other possibilities, intervention might take the form of giving directions to the agent, nominee or custodian, or revoking his or her authorisation or appointment. Intervention would be appropriate, for example, if the agent, nominee or custodian is not carrying out his or her functions effectively, or where there is an indication that the person involved is no longer suitable to act in this way. In the case of

an agent exercising asset management functions, there is a particular duty to consider the need to revise or replace the policy statement and assess compliance with it. It may be added that the duty to review does not oblige trustees to examine the situation at specific intervals or in any prescribed way. Rather, there is an ongoing obligation to do what is reasonable in the circumstances. To reinforce this, trustees are subject to the duty of care in carrying this out.

Section 23: Liability for agents, nominees and custodians etc.

Section 23 governs the liability of a trustee for the acts or defaults of the agent, nominee or custodian, or any permitted substitute. This replaces the present unsatisfactory state of affairs under the Trustee Act (Northern Ireland) 1958 where different rules apply depending on the nature of the delegation. The basic approach of the new provision is that the trustee will not be liable unless he has failed to comply with the duty of care when entering into the initial arrangements or when reviewing arrangements. This includes the selection of the person involved, the determination of terms of appointment and the preparation of any policy statement. Similarly, in the case of liability for the acts of a substitute the test is failure to live up to the duty of care in agreeing to the term allowing the appointment of a substitute in the first place or carrying out the duty to keep the situation under review.

Section 24: Effect of trustees exceeding their powers

Sections 24 to *27* are concerned with supplementary matters. *Section 24* provides that a failure by trustees to act within the limits of their powers to authorise delegation or appoint nominees or custodians does not invalidate the authorisation or appointment involved. The consequence is that third parties dealing with the agent, nominee or custodian are facilitated and they do not have to make any inquiries into whether the trustees had complied with the statutory requirements.

Section 25: Sole trustees

Section 25 provides that these new powers in relation to agents, nominees and custodians are to apply to cases where there is a sole trustee. By *section 25(2)* the duty in *section 18* (appointment of a custodian for investment in bearer securities) does not apply to a sole trustee who is a trust corporation.

Section 26: Restriction or exclusion of this Part etc.

Section 26 makes it clear that these powers are additional to powers conferred on trustees from other sources but they can be restricted or excluded by the trust instrument or legislation. In this regard the new powers relating to agents, nominees and custodians are default powers, as are the new powers of investment and acquisition of land.

Section 27: Existing trusts

Section 27 states that this Part is to apply to existing trusts as well as those to be created in the future. This means that these new powers become available to most trustees and beneficiaries.

Part V: Remuneration

Sections 28 to 33 make up Part V of the Act, relating to payment of fees to professional trustees and reimbursement of expenses incurred by trustees. The general rule at present is that trustees should not be paid for carrying out their obligations under the trust, even when they are using their professional expertise. The principle behind this ban on payment of trustee fees is that trustees should not derive any benefit from the trust and any conflict of interest and duty should be avoided. In certain circumstances, however, even under the current law, payment to trustees is permitted, perhaps by a clause in the trust instrument, or by statute or by court order. In practice today most modern trust instruments contain professional charging clauses; without such express clauses allowing payment, many professional practitioners would not be willing to take on the burden of trusteeship. Of course, such clauses can give rise to problems in interpretation and application. For example, these clauses are strictly construed against the trustee, so, unless stated to the contrary, the charging clause only covers services which could not have been provided by a lay trustee. Another drawback is that remuneration under a professional charging clause can sometimes be regarded as a gift or legacy rather than simply an expense of the administration of the trust or estate. These issues are also addressed in this group of provisions.

Section 28: Trustee's entitlement to payment under trust instrument

Section 28 introduces new rules for the construction of express professional charging clauses in favour of trust corporations and trustees acting in a professional capacity. *Section 28(5)* explains that to satisfy the condition that a trustee (other than a trust corporation) is acting in a professional capacity, there must be a close nexus between the profession or business of the trustee and the services actually provided as trustee.

Firstly, a difficulty about remuneration for “ordinary” services that do not demand any special professional expertise is removed. Unless the trust instrument states otherwise, by *section 28(2)*, such a clause is taken to mean that the trustee is entitled to payment even for services that could have been provided by a lay trustee (as defined in *section 28(6)*). This applies also to a trust corporation of a charitable trust but for other charitable trustees to enjoy this benefit they must not be sole trustees and the majority of their fellow trustees must agree that the right of payment should apply. Secondly, two problems arising in the administration of estates are resolved. Payment to trustees is to be treated as remuneration for services and not as a gift for the purposes of Article 8 of the Wills and Administration Proceedings (Northern Ireland) Order 1994: that means that trustees can be paid for work done in connection with trusts set up in a will even where they witness the will in question, without the risk that it will be said that as a witness is receiving a gift, the purported “gift” is rendered void. The same approach

applies to section 30(3) of the Administration of Estates Act (Northern Ireland) 1955, which is concerned with determining the priority of payments due from the deceased's estate.

Section 29: Remuneration of certain trustees

Section 29 creates a new right to reasonable remuneration for certain trustees of non-charitable trusts, in the absence of any provision in the trust instrument or legislation – this is another default provision. In effect, this creates an implied professional charging provision, similar to the express clauses often found in modern trust instruments. This right to remuneration is given automatically to trust corporations, except for charitable trusts (*section 29(1)*). It is also given to any other non-charitable trustee who acts in a professional capacity but is not a sole trustee, provided that all his fellow trustees agree in writing (*section 29(2)*). There may be remuneration even for services that could have been provided by a lay trustee (*section 29(4)*). *Section 29(3)* defines what is meant by “reasonable remuneration”: the amount that is reasonable for the services in the particular circumstances of the case, including relevant bank charges. By *section 29(6)* appointment as an agent, nominee or custodian does not exclude a trustee from this right to remuneration.

Section 30: Remuneration of trustees of charitable trusts

Section 30 deals with the remuneration of charitable trustees. In this area, different considerations apply, so the approach of *section 29* is not considered appropriate without further consultation amongst interested parties. Accordingly, *section 30(1)* gives the Department for Social Development the power to make regulations permitting remuneration for charitable trustees in similar circumstances, should they decide to do so in the future.

Section 31: Trustees' expenses

Section 31 provides for the reimbursement out of trust funds of expenses properly incurred by trustees acting on behalf of the trust. This applies equally where the trustee has been appointed as an agent, nominee or custodian.

Section 32: Remuneration and expenses of agents, nominees and custodians

Section 32 permits the payment of reasonable remuneration to agents, nominees and custodians who are not trustees where their terms of appointment allow. They may also be reimbursed for proper expenses.

Section 33: Application

Section 33 states that these provisions on remuneration and reimbursement apply as regards services provided or expenses incurred after the provisions come into force, no matter when the trust was created. However, they are not to affect the operation of Article 8 of the Wills and Administration Proceedings (Northern Ireland) Order 1994 or

section 30(3) of the Administration of Estates Act (Northern Ireland) 1955 (described above) in relation to deaths occurring before they came into operation.

Part VI: Appointment and Retirement of Trustees

The next group of sections – *sections 34 to 36* - relates to appointment and retirement of trustees in certain circumstances, specifically where there is no one eligible to appoint a new trustee and where a trustee has become incapable of acting because of mental disorder. Under the present law beneficiaries are not entitled to control the appointment of trustees even if they are together as a group absolutely entitled to the trust property and therefore in a position to bring the trust to an end. These reforms now introduce for Northern Ireland provisions corresponding to Part II of the Trusts of Land and Appointment of Trustees Act 1996 which applies to England and Wales.

Section 34: Appointment or retirement of trustee at instance of beneficiaries

Section 34(1) sets out the circumstances in which the beneficiaries are to have this new power. The power is available where there is no person nominated in the trust instrument to appoint new trustees and the trustees are of full age and capacity and, taken together as a group, are absolutely entitled to the trust assets. By *section 34(2)* such beneficiaries have power to direct any trustee to retire from the trust, or to arrange the appointment of a new, named, trustee. In those circumstances, the trustee is required to retire as directed, subject to three conditions being satisfied. Firstly, reasonable arrangements must be made to protect his interests. Secondly, after his retirement there must be a trust corporation or at least two persons left to act as trustees. And thirdly, either the full complement of trustees is to be maintained by the appointment of another person in his place or the continuing trustees consent to his retirement. By *section 34(4)* trustees are required to do whatever is necessary to vest the trust property in the continuing or new trustees following a retirement.

Section 35: Appointment of substitute for incapable trustee

The problem addressed by *section 35* arises where a trustee has become incapable of carrying out his role because of mental disorder but there is no one entitled and willing to appoint a trustee in his place under *section 35(1)* of the Trustee Act (Northern Ireland) 1958. In that situation the beneficiaries are given power by *section 35(1)* to direct the appointment of a specified person as a new trustee in place of the incapable trustee. They may only do so, however, if they are all over 18 years of age and have full legal capacity and, taken together as a group, they are absolutely entitled to the trust property. The direction of the beneficiaries must be in writing and must be given to the appropriate authority, as described in *section 35(2)*: that means, to a controller appointed for the incapable trustee under Article 101 of the Mental Health (Northern Ireland) Order 1986, or an attorney acting for him under a power of attorney created by an instrument registered under article 8 of the Enduring Powers of Attorney (Northern Ireland) Order 1987, or a person authorised for the purpose by the High Court under Part VIII of the Mental Health Order.

Section 36: Provisions supplementary to sections 34 and 35

Supplementary provisions for the effective operation of these powers of direction are contained in *section 36*. The beneficiaries may act separately or with other trustees in directing the appointment or retirement of a trustee. The direction may take the form of a single, joint direction by all the beneficiaries. Alternatively, subject to *section 36(2)*, a direction may be given by each beneficiary individually or jointly with some of the others. A direction may be withdrawn by writing up until the time it has been complied with, but if any beneficiary withdraws, then the necessary unanimity is lost and the direction falls. If there is more than one direction, then they must all specify the same person or persons for appointment or retirement (*section 36(2)*).

It is provided in *section 36(3)* that subsection (7) of section 35 of the Trustee Act (Northern Ireland) 1958 applies to a trustee appointed under these powers as if he were appointed under that section. The effect of subsection (7) is that newly-appointed trustees are to have the same powers, authorities and discretions and may act in all respects as if they had been originally appointed by the instrument creating the trust. Similarly, trustees appointed under these new provisions are to be treated in the same way.

As far as applicability of the new powers is concerned, they apply to existing trusts as well as trusts to be set up in the future, unless they are excluded by expression of contrary intention. To further that policy, there is an opportunity given by *section 36(5)* for persons who have already created trusts to exclude the new powers of direction by executing a deed to that effect. Where the trust was created by one person and he is of full capacity, he may execute the necessary deed himself. In a case where the trust was created by a number of persons, then those still alive and of full capacity may execute the requisite deed to exclude the new powers of direction. A deed executed for the purpose of excluding the new powers is irrevocable. The deed does not affect anything done before its execution to comply with a direction given by beneficiaries, but if a direction has not yet been complied with, then it shall cease to have effect once the deed is executed. The result is that a settlor may stop or prevent a direction becoming effective but may not affect an appointment or retirement which has already become effective.

Part VII: Miscellaneous and Supplementary

Section 37: Power to insure

At present trustees have power to take out insurance cover in respect of trust property under section 19 of the Trustee Act (Northern Ireland) 1958 but that is limited to listed risks. *Section 37* substitutes a new section 19 in the 1958 Act. This permits a trustee to insure trust property against risks of loss or damage due to any event and pay the premiums out of either income or capital funds. This power to insure applies to trusts whether created before or after its commencement.

Section 38: Personal representatives

Section 38 provides that the provisions of the Act will apply to a personal representative administering the estate of a deceased person in the same way as it applies to a trustee, with appropriate modifications. As far as remuneration for personal representatives is concerned, it is made clear in *section 38(3)* that such payments are to be treated as expenses of administering the estate.

Section 39: Pension Schemes

Section 39 governs application to pension schemes, defined as occupational pension schemes under the Pension Schemes (Northern Ireland) Order 1993, established under a trust and subject to the law of Northern Ireland. There is only partial application to such pension schemes because the legislation regulating them directly deals with many of the relevant issues. The duty of care established in Part I of the Act does not apply in relation to powers of investment or acquisition of land. Nor does the duty of care apply as regards authorising an agent to exercise investment functions or appointing a nominee or custodian. In fact, the powers of investment in Part II and powers to acquire land in Part III are not extended to pension scheme trustees. The power to appoint agents in Part IV of the Act applies to only a limited extent, as described in *sections 39(5) to (7)*. They may not appoint an agent to exercise any functions relating to investment and they may not appoint an employer or associate or connected person to act as agent. They are not given the powers to appoint nominees or custodians.

Section 40: Authorised unit trusts

Section 40 directs that the provisions in Parts II to IV do not apply to trustees of authorised unit trusts.

Section 41: Common investment schemes for charities

Section 41 directs similarly that Parts II to IV do not apply to trustees managing a fund under a common investment scheme made under section 25 of the Charities Act (Northern Ireland) 1964, apart from the exceptional situation where the relevant trusts provide that property is not to be transferred to the fund except by or on behalf of a charity the trustees of which are the trustees appointed to manage the fund.

Section 42: The Crown

Section 42 provides that this Act binds the Crown.

Section 43: Interpretation

Several of the definitions used in the Act are set out.

Section 44: Amendments, transitional and saving provisions and repeals

Section 44 gives effect to Schedules 2, 3 and 4 to the Act. Schedule 2 has minor and consequential amendments, Schedule 3 has a number of transitional provisions and savings, and Schedule 4 sets out statutory provisions to be repealed. The Department of Finance and Personnel is given power to make further amendments as appear appropriate in consequence of or in connection with Part II or Part III.

Section 45: Commencement

The commencement date of these provisions is a date or dates to be appointed by order made by the Department of Finance and Personnel. Such an order may contain further transitional provisions and savings.

Schedule 1: Application of duty of care

The first Schedule specifies the circumstances in which the new general duty of care will apply. It should be noted firstly that the duty of care is not confined to the new powers conferred by the Act but applies to a range of powers originating from any source. The listed circumstances are summarised: when exercising a power of investment or of reviewing investments; when acquiring or managing land; when appointing or reviewing the appointment of an agent, nominee or custodian; in the compounding of liabilities; when insuring trust property; when dealing with reversionary interests, valuations and audits.

Paragraph 7 provides that the duty does not apply where it is clear from the trust instrument that it should not.

Schedule 2: Minor and consequential amendments

Consequential amendments are needed to ensure consistency between the regime under this Act and the Settled Land Acts 1882 to 1890 and to reflect the modern approach. The amendments grant to trustees of the settlement the general power of investment for capital money. The rights of the tenant for life are preserved, as regards both investment and delegation.

Consequential and updating amendments are also required in relation to the Trustee Act (Northern Ireland) 1958 and the Trustee Investments Act 1961. In the main, these amendments arise from the fact that the new provisions supersede the old. The application of the 1961 Act will be confined to situations where it is still applied by other legislation. In addition, section 11 of the 1961 Act, dealing with local government common investment schemes, and standing detached from the general thrust of the 1961 Act, remains intact.

Lastly in this Schedule, there are some amendments which extend the general power of investment to bodies already exercising statutory powers of investment, or modify such powers to be compatible with the virtual removal of the Trustee Investment Act 1961.

Examples of bodies affected are Industrial and Provident Societies, Credit Unions, and, in the absence of regulations, local authorities.

Schedule 3: Transitional provisions and savings

Paragraph 1 has transitional provisions and savings to preserve existing rights.

Schedule 4: Repeals

Provisions repealed are listed in this Schedule.

ANNEX A

GLOSSARY OF TERMS

Absolute Owner: a person owning property for his own benefit.

Administration of an estate: the collection of assets, payment of debts, and distribution to the beneficiaries of property in the estate of a deceased person.

Agent: a person appointed by another (the principal) to act on his behalf, often to negotiate a contract between the principal and a third person.

Beneficial Interest: the rights of a beneficiary in respect of property held under a trust for him.

Beneficiary: a person entitled to benefit from a trust.

Capital Money: money arising from certain transactions relating to settled land. It may arise from sale, the granting of certain leases and similar transactions, borrowing on the security of a mortgage, and other circumstances in which the money should be treated as capital of the settlement, for example, the proceeds of a fire insurance claim relating to the land. Generally capital money must be received by the trustees of the settlement, not the beneficiary. When the money is raised or paid for a specific purpose (for example, for improvements authorised by the Settled Land Act 1882) it must be applied for that purpose. Otherwise, it is invested and held by the trustees on the same trusts as the land itself was held.

Charitable Trusts: see “Trusts”.

CREST: a computer based system for the electronic transfer of and settlement of trades in securities replacing the former paper based system of shareholding and transfer with an electronic book entry system. The system operates under the Uncertificated Securities Regulations 1995.

Custodian: is defined as a person who undertakes the safe custody of some or all of the assets of the trust or of any documents or records concerning the assets (see section 17(2) of the Act).

Default power: a power available to trustees in default of or subject to other provision in a trust instrument or regulation. The powers conferred by the Trustee Act (Northern Ireland) 1958 and the Trustee Investments Act 1961 are in general default powers.

Dispositive duty: see dispositive powers under “Power” below.

Execution: describes the way in which a person signs or seals (in the case of a corporation) a document and gives it legal effect.

Fiduciary relationships: the relationship of trustee and beneficiary is but one of a number of relationships generally described as fiduciary. It is a mark of such relationships that one person receives an authority or is entrusted with a job which he is bound to exercise or perform in the best interests of another.

General Power of Investment: see notes to section 3 of the Act.

Instrument: a formal legal document. A trust instrument is the document setting out the terms of the trust.

Interests in land: rights of ownership of or over land are interests in land.

Nominee: in the context of a nominee for trustees, a nominee is a person nominated to hold trust property in his own name on behalf of the trustees. This device is commonly used to facilitate dealings with trust assets.

Personal property (personalty): all property that does not comprise land.

Personal representative: a person entitled to deal with a deceased person's estate in accordance with his will or under the rules relating to intestacy (see section 43(1) of the Act).

Power: in this context, a power is an authority to act in relation to another's property. A power may be administrative or dispositive. An administrative power is a power, the exercise of which does not affect the beneficial interests arising under a trust, such as a power to sell or lease property. In the present context, a dispositive power is a power, the exercise of which does affect the beneficial interests arising under a trust, for instance, a power of advancement and a power of appointment. A trustee's power of investment is a power to invest trust property. A power of advancement is a power given to trustees (whether by statute or by express provision in the trust instrument) to apply some of the capital from the trust property for the benefit of a beneficiary under the trust. For instance, in the case of a gift of capital to A on reaching the age of 30, part of that capital might be used, for instance, to buy him a house at an earlier time. A power of appointment is a power "given under some settlement or trust authorising the donee to make an appointment of some or all of the trust property."

Power of Attorney: a power of attorney is both the authority given by one person ("the donor") to another person ("the donee" or "attorney") to act for the donor in a transaction or a series of transactions or in the management of his affairs and the document by which that authority is given.

Professional charging clause: a provision in a trust instrument authorising the remuneration of a trustee for his care and trouble, often permitting a trustee who is a solicitor, a literary executor or other professional person to charge for professional services (and in some cases business services generally).

Private trust: see “Trusts”.

Public trust: see “Trusts”.

Settled land: land which is the subject of a settlement under the Settled Land Act 1882. In broad terms this means that there is a succession of interests in the land, for example a life tenancy followed on that person’s death by a fee simple for someone else.

Standard investment criteria: see notes on section 4 of the Act.

Tenant for life (life tenant): a person owning land for an equitable interest that subsists for the whole of his life but terminates on his death. The Settled Land Act 1882 lays down the statutory powers of a tenant for life.

Trust and trustee: a trustee is a person who has property or rights (trust property or assets) which he holds or is bound to exercise for or on behalf of another or others, or for the accomplishment of some particular purpose or purposes. He or she is said to hold the property on trust for that other or others, or for that purpose or purposes.

Trust corporation: a trust corporation is one of certain companies with a large paid up capital, or one of certain officials. The most commonly encountered trust corporation is perhaps an executor and trustee company owned by one of the major banks or financial institutions. The term is defined in the Trustee Act (Northern Ireland) 1958, section 67, adopting the definition in Article 9 of the Administration of Estates (Northern Ireland) Order 1979.

Trust Funds: see section 43(1) of the Act.

Trust instrument: the document setting out the terms of the trust.

Trusts: may be private or public (charitable). A private trust is a trust for the benefit of an individual or class, irrespective of any benefit which may be conferred on the public at large. A public trust is a trust whose object is to promote the public welfare, even if it incidentally confers a benefit on an individual or class. Charitable trusts are public trusts solely and exclusively for purposes that the law regards as charitable. In this sense, a purpose is charitable only if it is for the furtherance of religion, for the advancement of education, for the relief of poverty, or for other purposes beneficial to the community. Charitable trust is defined in section 43(1) of the Act.

Ultra vires: an act is ultra vires if it is in excess of the powers of the person doing the act.

Will: a document by which a person (called the testator) appoints executors to administer his estate after his death, and directs the manner in which it is to be distributed to the beneficiaries he specifies.