



Report of the
Charity Commissioners
for England and Wales
for the year 1987

LONDON

HER MAJESTY'S STATIONERY OFFICE

427



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Presented pursuant to the Charities Act 1960, s. 1(5)

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Presented pursuant to the Charities Act 1960, s. 1(5)

Charity Commission
St Alban's House,
57-60 Haymarket,
London SW1Y 4QX
5 April 1988

TO THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Sir,

We, the Charity Commissioners for England and Wales, have the honour to make our report for the year 1987 in pursuance of section 1(5) of the Charities Act 1960.

We have the honour to be,

Sir,

Your obedient servants,

R I L GUTHRIE

C A H PARSONS

J FARQUHARSON

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Introduction

1. During the year two highly significant reports were published affecting the accountability and supervision of charities and our own responsibilities in this respect. The introduction of an improved system of supervision of charities flowing from these reports, together with the promulgation of Recommended Practice on Accounting by Charities agreed by the Accounting Standards Committee in 1988 will, we believe, enhance public confidence in the way in which trustees account for the moneys entrusted to them.

2. We welcomed the National Audit Office Report into the monitoring and control of charities which sought to illuminate the present system of charity law, our lack of resources, and the mistaken ideas held by many people of what our functions and powers are. The Report drew attention, as indeed we have also done in previous reports, to the increasing inaccuracy of some of the information on the Central Register; the failure of many trustees to submit statements of accounts; and the need for computerisation and the implementation of more developed systems of management within the department. The Report made no recommendations but raised important questions, particularly about the present system of supervision and registration of charities. We also warmly welcomed the Government Efficiency Scrutiny of the Supervision of Charities carried out by Sir Philip Woodfield KCB CBE and his team, which examined the state of charity law, the management of the Commission and the Commissioners' powers, and the public perception of our role; suggested a way forward for the future and made positive recommendations for change. The Report found that the essentials of the present framework of supervision are still necessary but in need of extensive reform. In a statement to Parliament on 21 January 1988, the Home Secretary on behalf of the Government warmly welcomed the Scrutiny Report and announced the Government's decision to accept the Report's proposals and to strengthen the Commissioners' powers to deal with abuse.

3. We have sought in recent reports to set out the nature of our functions and responsibilities, to assess their effectiveness and to describe the limitations of our powers and the public misapprehension as to the extent of our responsibilities. We will not repeat this. We have also sought to explain that while there may exist abuse in the charity field and that any abuse is to be deprecated and dealt with, there is no evidence at present available that indicates that abuse is widespread. We are conscious of the Scrutiny Report's conclusion that the large amounts of money now flowing through charities are an increasingly promising field for sharp practice. Certainly charities are not immune from abuse and we are concerned at the incidence of fund-raising frauds in certain areas and of the small but significant number of persons who cynically manipulate the special status of charity to facilitate tax evasion schemes for their own personal benefit. The answer in our view is constant vigilance by the public and trustees alike, an effective system of public accountability by trustees and efficient supervision and, where necessary, quick remedial action on our part. We have in the past drawn attention to our lack both of sufficient resources and adequate powers to act quickly to deal with abuse. The implementation of the Scrutiny Report's recommendations would increase those powers and improve the resource situation by shifting the focus of our work from some existing statutory responsibilities to a greater emphasis on the monitoring of charities and the investigation of abuse. The extent to which we can enhance our supervisory work in advance of legislation is however severely limited.

4. The Report makes recommendations for the strengthening of the management of the department (including the appointment of two additional part-time Commissioners to the Board); the computerisation of the Central Register and an improvement in the information maintained on it; the clarification and strengthening of our powers of investigation and intervention where there has been maladministration; an extension of the monitoring of dubious charities; the amendment of the Charities Act 1985 to increase its use, by extending its application and simplifying its procedures; and the stimulation of local charities through

co-operation with local voluntary organisations. This expansion of our work would, however, be at the cost of a much reduced supervision of charity land transactions where it is believed that new statutory requirements on trustees could provide a sufficient check in the majority of cases (as indeed was foreshadowed in our own report for 1986); and of possibly transferring investments out of the name of the Official Custodian for Charities.

5. We also welcomed the fact that the Scrutiny Report endorsed the need for us to continue what may be described as our court substitution work, principally in making schemes and orders enabling the resources of charities to be applied effectively and in giving advice to trustees concerning the administration of their charities, and did not endorse suggestions that these powers should be used selectively, for example by not dealing with small charities and concentrating solely on tax abuse.

6. The Home Secretary has announced that the Government hopes to put forward proposals for legislation later in the life of this Parliament. In the meanwhile those recommendations concerning our procedures and the internal management are being implemented and we have made some changes in our procedures and organisation allowing for the release of further additional staff for investigation work.

7. In the body of this report we give brief accounts of the work done during the year and comment on the Scrutiny Report's recommendations as they will affect our responsibilities, powers and organisation. In Appendices C and D we mention recent legislation affecting charities and certain decisions of the courts.

Changes in Senior Appointments

8. Mr Denis Peach CB retired in January 1987 having been Chief Commissioner since 1982. He was succeeded by Mr Robin Guthrie, former Director of the Joseph Rowntree Memorial Trust and the first Chief Commissioner to be appointed from outside the Civil Service since the Charities Act 1960.

Organisation and Management

9. The Government have accepted the Scrutiny Report's recommendation to appoint two additional part-time Commissioners and when they have been appointed we look forward to working with them. In the meanwhile we have reorganised our top management structure on the lines recommended by the Report and believe this will enable us better to identify and respond to future needs of both the Commission and the charitable sector, in particular the demands placed on us over the next few years as we devote more resources to our monitoring and investigative function. The newly established Management Board will monitor the Commission's performance and achievement of set objectives through the comprehensive management and financial information systems now being put in place.

Registration of Charities

- (a) **Computerisation**
10. In our report for 1986 we commented on the failure of many trustees to notify us of changes in particulars of their charity recorded in the Central Register of Charities and to forward to us copies of their accounts. We did not, and still do not, have the resources ourselves to elicit this information on a systematic basis. Both the

National Audit Office and Scrutiny Reports noted the present deficient state of the Register, our unsatisfactory powers to secure enforcement of the obligations of trustees concerning registration and the need for its computerisation. We heartily endorse the findings of both studies that — as we have long argued — an up-to-date and computerised Register is essential both for an effective system of supervision and as the source of basic information about charities to which the public should rightfully have access. The Government's acceptance of the Scrutiny Report's proposals now enables us to undertake the computerisation of the Central Register.

(b) Generally 11. During the year we registered 3,672 charities. 198 charities were removed from the Register usually because they had been wound up or ceased to operate. The number of charities registered at 31 December 1987 was 161,376. Much of the work of our Registration Divisions is concerned with giving advice on the wording of draft governing instruments for proposed charities and during the year we considered nearly 3,000 such documents. We have accepted the Scrutiny Report's recommendation that we should prepare model governing instruments for wide general use by persons setting up new charities and we hope to have these available by the middle of 1988. In the meanwhile we have introduced a new leaflet called 'STARTING A CHARITY', CC21 (reproduced at Appendix A1) which explains some of the purposes which the law regards as charitable and suggests various ways in which a new charity may be constituted. It is, however, important in our view for us to find the right balance between assisting the setting up and registration of worthwhile charitable projects and preventing the registration of those projects which are essentially non-charitable or fraudulent. While the use of model governing instruments should lead to increased efficiency and a reduction in our backlog of registration work, it will be essential for us to be on our guard against abuse to which the unmonitored use of models could give rise.

(c) Cases of interest 12. We have commented in previous reports on the ways in which new charities continue to reflect issues of social concern and 1987 was no exception to this pattern. Research and education trusts constitute a particularly significant section of new charitable endeavour and we would mention here four particular cases of interest. *The Parliamentary Human Rights Trust* was set up by the Parliamentary Human Rights Group to undertake, promote and commission research into the maintenance and observance of human rights and to disseminate the results of such research to Governments, Parliamentarians, inter-Governmental organisations and the general public. On a similar theme we registered the *John Galway Foster Human Rights Trust* established to advance research and education of the public concerning human rights and the development of international law and its role in the effective protection and promotion of human rights. An educational association with a very different object was the *Association for the Scientific Study of Anomalous Phenomena* which promotes the advancement of education by obtaining, storing and processing and distributing information concerning those areas of human experience and observed phenomena for which there is no general explanation at present, and conducts research and investigation into such phenomena and disseminates the results. We have also registered the *Centre for Exploitation of Science and Technology*, a body set up, on the advice of the Advisory Council for Applied Research and Development and with Government backing, to provide a Central Forum, to be based at the Manchester Science Park, to identify and investigate those fields of scientific research which are likely to lead to new industrial and commercial opportunities and those changes in society, industry and commerce which are likely to require the application of new technology. The Centre will also foster and promote new and promising aspects of science and technology and their several applications and their exploitation for the public benefit; and will also foster and promote education, understanding, communication and research in matters connected with new and promising aspects of science and technology and will collect, collate and publish relevant information, ideas, data and research. The Centre is currently being developed by a Steering Committee comprising a number of prominent public companies, the Advisory Board for the Research Councils, the Government's Chief Scientific Adviser and the Department of Trade and Industry.

13. A case of particular interest to our Liverpool office was the registration of the Birkenhead Iron Works and CSS Alabama Trust. CSS Alabama was built by Laird & Company of Liverpool in 1862 for the Confederate States Navy. The vessel was launched in the name of Enrica in order to confuse Union spies and sailed with a British captain and crew. Subsequently commissioned as the CSS Alabama this screw steamer barque rigged ship was eventually sunk off the coast of Cherbourg having sailed some 75,000 miles throughout the world and captured 65 Union merchantmen. Great Britain eventually paid the United States 15.5 million dollars for damage inflicted on US merchant ships by Confederate vessels built in Great Britain. The purpose of the Trust is to raise the remains of the CSS Alabama and, if the United States Government waives its rights to the remains, to preserve them in No 4 Dock in Birkenhead where the ship was originally built. The Trust hopes to acquire the Dock and develop it as a museum in conjunction with the Wirral Borough Council.

(d) Promotion of good race relations

14. In paragraph 20 of our report for 1983 we said that in general we were subject to consideration of any objection and any future decisions of the court, prepared to accept that promoting good race relations, endeavouring to eliminate discrimination on grounds of race and encouraging equality of opportunity between persons of different racial groups were charitable purposes. We have now been advised that the Inland Revenue does not propose to challenge this view and will not formally object to the registration of organisations with these objects operating within the United Kingdom.

The Commissioners' decisions on charitable status

15. As a Board we considered an application for registration which we believe raises a point of general interest in relation to the extent to which the promotion of commerce and industry when directed towards the relief of unemployment is a charitable purpose.

Business in the Community (BiC)

16. Business in the Community (BiC) was incorporated as a company limited by guarantee on 2 March 1982. The objects declared in its memorandum of association were not charitable. However, they did not entirely reflect the activities of the company and we were asked to consider whether the activities were capable of being expressed in terms directed to the furtherance of charitable purposes. From the information before us the company appeared to have three principal areas of activity:

- (a) the establishment and support of Enterprise Agencies (independent organisations providing assistance to individuals setting up small businesses);
- (b) the Support of Community Action Programmes (independent organisations which are designed to monitor the local economy and employment prospects and to make recommendations for their improvement to local and central government and which take the form of local partnerships between leading employers, local authorities, the MSC, DTI, CBI and TUC and voluntary and educational agencies); and
- (c) the promotion of corporate and social responsibility policies and activities by companies in order to involve them in local charitable activity.

17. We took the view that the activities of the company were not limited to promoting the charitable purposes of advancing education and training or relieving and preventing poverty by helping to reduce unemployment. They were rather directed to the advancement of commerce and industry which had been held to be a charitable purpose in *Crystal Palace Trustees v Minister of Town and Country Planning* [1951] Ch 132. The question which we had to answer was whether they were directed to that purpose for private or public benefit. Although the literature before us tended to give the impression that members of the company and its

supporters who contributed funds and seconded staff were primarily concerned to promote their own commercial benefit, we were satisfied from the evidence that those statements were designed to enlist support rather than to define the purposes for which BiC was established. Moreover, there was no evidence to show that Enterprise Agencies were primarily directed to the benefit of their members and the information before us supported the view they were established for public benefit. Indeed, Parliament had recognised that Enterprise Agencies are established for the public benefit by enabling any contribution made by a person carrying on a trade, profession or vocation to an approved local Enterprise Agency to be deducted as an expense before tax.

18. We were agreed that on the authority of the unreported decision of Mr Justice Fox in *IRC v Clerkenwell Green Association of Craftsmen* (14 March 1980 see paragraphs 66-73 of our report for 1980) the activities of BiC could be undertaken in furtherance of the charitable object of the promotion of industry and commerce for the public benefit. In that case it was held that an organisation established to promote crafts and craftsmanship for the public benefit and which made workshops and other facilities available to craftsmen at less than commercial rent, was charitable, even though the craftsmen may not be poor and the facilities are provided to enable the craftsmen to carry on business for their own benefit. By analogy a body whose object is to promote industry and commerce for the public benefit and which in furtherance of that object makes available advice, training and support to local bodies which assist individuals setting up businesses, could be accepted as charitable.

19. We advised the company that we would be prepared to register the company with objects directed to the advancement of industry and commerce by promoting or assisting in promoting, opportunities for employment, in particular in areas where involuntary unemployment is causing suffering by reason of poverty or ill-health.

Submission of accounts

(a) **Generally** 20. The Scrutiny Report favoured the continuation of the Central Register of Charities both in order to provide a public record about bodies which collectively are in receipt of large fiscal benefits and to serve as a foundation of a system of supervision. It is essential, however, for those purposes that the information on the Register should be kept up to date and, to that end, that trustees should comply with the statutory obligations to supply the Commissioners with details of any alterations to their charity's registered particulars and with copies of their charity's accounts. The poor level of submission of information and of accounts prevents us from exercising any effective comprehensive oversight even if we had the resources to undertake it, or from providing the public, including social workers and potential beneficiaries, with full information about resources available from charity.

21. We endorse fully the Scrutiny Report's view that the accountability of trustees for the stewardship of the funds for which they are responsible would be enhanced by the regular submission of accounts to us (perhaps on a graded scale according to the income and property of the charity), to members of the public on request, and to local authorities in the case of parochial charities. The Report also recommends that for all but the smallest of charities' accounts should be audited and, in the case of charities with income over £10,000 or assets over £50,000, that the accounts should be professionally audited. We also endorse the Report's recommendation that charity accounts should include a narrative report on the objectives and activities of the charity together with particulars of the trustees and the name and address of the charity's correspondent. The Report, as we do, looks to considerable benefits flowing from the Accounting Standards Committee's Statement of Recommended Practice for Charities: we attach a résumé of the principal points of this recommended practice at Appendix B.

(b) Sanction for non compliance

22. The perennial problem is how to persuade trustees to comply with statutory requirements to supply information for the Central Register and copies of their accounts. We have drawn attention to these requirements in our leaflets but, if persuasion fails, the issue of sanctions for non-compliance must ultimately be considered. The Scrutiny Report, rightly in our view, rejected criminal penalties against trustees or financial penalties affecting the funds of charities where trustees fail to send us accounts. It concluded that, given the value which charities place on registration, deregistration could well prove an effective sanction as striking a blow to the prestige and standing of the charity as well as raising awkward questions which the charity trustees might find difficult to answer. We understand the reasoning behind this proposal but consider that the concept of deregistration should be confined to loss of charitable status in law. The purpose of the recommendation could however still be achieved by a system of earmarking entries on the Register identifying, in a computerised system, those charities where trustees are in default by wider publicity designed to warn the public; and by stronger powers to investigate charity affairs and take remedial action where trustees fail to respond to requests for full accounting information. It may be helpful to explain our thinking more fully.

23. As we have repeatedly emphasised registration under section 4 of the Charities Act 1960 implies nothing about the practical value of the charity to the community nor about the way it is run: it is solely a recognition that the organisation is established for exclusively charitable purposes and subject to the jurisdiction of the High Court of England and Wales. Registration is, however, deemed to be conclusive evidence of an institution's charitable status and is therefore of value to charities in obtaining funds and fiscal reliefs. At present the registration of a charity may be suspended only where an appeal against a decision of ours not to remove an institution from the Register has been brought. A charity can be removed from the Register only if it ceases to be a charity or ceases to exist or does not operate. These are all issues of law or of fact. Removal or suspension is not therefore at present available as a penalty for mismanagement.

24. In our view the introduction of any sanction for the difficult administrative problem of getting in information and accounts from trustees of charities must leave untouched the charitable status of the charity concerned. Our ability to intervene in the affairs of a charity to correct abuse depends upon the charity continuing to be a charity. To remove charitable status would limit our ability to act for the protection of the charity's property. It is the trustees of the charity that are in default and not the charity itself; nor should the beneficiaries be penalised by that default. Even if the removal of the registration number could be separated from the charity's existence as a charity, such a course would pose considerable practical difficulties in ensuring that defaulting trustees did not quote the former number, and in applying penalties for non-compliance. Moreover the action would lend credence to the misconception that registration implies official approval of sound administration and worth. Furthermore, the sanction would not be effective in the case of charities which are exempted from registration or which do not rely on public contributions and for which therefore a registration number is not of particular importance.

25. Since the main purposes of any sanction would be to warn the trustees that they ought to provide a statement of account and encourage them to do so; to alert us to the need to monitor the charities; to warn the Inland Revenue of the possibility that funds are not being properly applied; and to give a general warning to public authorities and private individuals who might be asked to give money to the charity, there seems to us no practical reason why the details shown on the Register should not include a marking that the trustees are in default. We accept that such a default marking would not be enough in itself. Strong follow up action would often be required by us and in those cases in which we are unsuccessful in obtaining the accounts or a convincing explanation we would need to consider whether to institute investigations and take appropriate action. Such action could lead, if we were given the necessary powers by legislation, to the removal of the trustees, the making of a scheme or the transfer of assets to another charity. In the meanwhile a further marking could be added to the registered particulars to indicate that the charity was under investigation.

26. It is fund-raising charities which are most vulnerable to the loss of the right to quote a registration number and from the point of view of the subscribing general public it is of course paramount that they should not be hoodwinked by charities soliciting funds. In our view it would make sense to supplement the other safeguards proposed by the Scrutiny Report by enabling us to make an order prohibiting a charity's trustees from soliciting funds for the charity, directly or indirectly, where the trustees have failed to provide full and sufficient accounting information and to record such an order on the Register.

Investigation and Protection of Charitable Property

27. Both the National Audit Office and the Government Scrutiny were concerned that with the growth in charitable giving (some £12 billion has been estimated to flow through charities annually) and the increase in the number of charities (thought possibly to be one quarter of a million in the United Kingdom) the potential for abuse is considerable. The nature and extent of existing abuse is not however fully known. In paragraph 44 of our report for 1986 we referred to such matters as unconstitutional behaviour, inadequate financial control, weak administration, unduly high administrative or fund-raising costs, factional disputes or personality clashes, political activity, deficiencies in the treatment of beneficiaries, and dubious fund-raising methods. The number of cases of deliberate manipulation for personal gain or fraud coming to our attention was, however, happily small. Of the approximately 1,000 complaints against trustees which we received in the 12 months to 31 July 1987, 18% arose from allegations of dishonesty or fraud on the part of their trustees, their agents or employees or of trustees benefiting improperly from their trust.

28. The Inland Revenue are rightly concerned to ensure that only those entitled to tax relief actually receive it and to recover from charity trustees any tax relief from the receipt of which they have disqualified the charity by a breach of trust. For our part we are concerned to investigate the breach of trust which has given rise to the tax liability and to ensure that the charity's property is not used by the defaulting trustees to meet that liability. The liability to meet any assessment of tax caused by a breach of trust should fall to the defaulting trustees and not upon the charity. The arrangements introduced by section 33 of the Finance Act 1986 whereby the Revenue can pass information to us where it appears that a charity is applying its funds for purposes which are not charitable are, we believe, working well. By the end of the year we were considering 51 cases referred to us by the Inland Revenue and we understand that up to a further 120 cases are in the pipeline. We are also investigating a further 27 cases in which we ourselves have involved the Revenue and we anticipate that more may well come to light when our arrangements for a more effective monitoring of charities are in place. Many of these cases referred to us by the Inland Revenue are concerned with considerable sums of money.

29. While it is for the Inland Revenue to protect the interests of the taxpayers, and while local authorities are similarly concerned with the interests of ratepayers in giving mandatory and discretionary rate relief to charities, the protection of the interests of the public as the direct donors and ultimately as beneficiaries falls to us as a body having responsibility, together with the Attorney General, for the protection of charitable property. The bulk of our effort (given the scarcity of our resources), has been devoted to reacting to and investigating such complaints and information suggesting irregularity and abuse which we have received from the public. In the case of Inland Revenue related inquiries, we benefit from their initial examination of financial records and subsequent inquiries. At present we could not however, other than in a very limited way, undertake a similar routine examination of charity accounts received by us without substantial additional resources.

30. We fully accept the implications of the National Audit Office Report and the recommendations of the Scrutiny Report that there should exist a capacity on our

part to root out malpractice by monitoring the charitable sector as a whole. The Scrutiny Report, quite rightly in our view, recognises that it would not be cost effective or even desirable to seek to monitor or control closely the affairs of each and every charity. Over such a large, diverse and rapidly changing field, no system could provide the public with an absolute guarantee that every instance of abuse would be quickly identified and acted upon. We accept however that effective supervision of charities must incorporate a sustained and properly targeted system of examination of charity accounts if abuse is to be detected and dealt with; inactive trustees are to be stimulated to deal with trust property effectively; potentially wayward trustees are deterred; and the public reassured.

31. Our small Monitoring Unit has in recent months concentrated its efforts on examining the activities of those charities which display certain characteristics common to cases in which deliberate abuse is found: particularly fund-raising and tax evasion schemes designed to benefit trustees or their associated trusts or companies. We are trying to identify these cases at the time of registration and on present returns it is thought that some 5 to 8 per cent of all new registrations may require close supervision in the future. Nevertheless, an effective system of monitoring is dependent upon the receipt of full and up-to-date accounting information; and stronger powers for us to move effectively to protect charitable property by removing or appointing trustees, winding up charities and transferring their assets to other charities; and originating schemes without an application from the trustees in order to secure the proper administration of the charity. We greatly welcome the Scrutiny Report's detailed recommendations for the strengthening of our powers in this respect. We also accept the Report's recommendation that our staff engaged in examining annual accounts and undertaking investigations should be suitably trained and we have taken steps to recruit a qualified accountant to our staff. We also endorse fully the Report's conclusion that an effective system of supervision is dependent on computerisation of the Central Register.

Reports of Inquiries under section 6

32. Two cases are here reported to illustrate our function of investigating abuse and, where necessary taking remedial action. The Wilmslow case is of particular importance in relation to the application of covenanted income.

(a) RECALL Limited 33. RECALL Limited was incorporated on 1 March 1985 "to advance the education of unemployed persons with particular regard to persons over the age of 30 who have managerial qualifications and/or experience by the provision for such persons of appropriate training and guidance with a view to enabling them to find suitable employment". A copy of an audited statement of accounts to 28 February 1986 revealed that the charity had a total income of £956 in its first year and following expenditure on internal administration and fund-raising incurred a net liability of £2,410 at 28 February. The Company had sought publicity for its work, support from famous and influential people and grant aid from the Government and private benefactors. But it was difficult to establish the true nature of the actual activities of the Company and the extent of its assets. We decided therefore to institute a formal inquiry.

34. The inquirers appointed by us reported that the Company appeared to have no Council of Management to administer it following the resignation of all the Council members other than its founder and Director. No evidence had been found to show that members of the Company had appointed further members to the Council or indeed that there were sufficient members of the Company left able to form a quorum to do so. The Company had undertaken no significant activities and had no assets to do so. Claims that the charity had provided a considerable number of jobs at great cost and that prominent politicians supported the charity had not been substantiated. We were satisfied as a result of the report of the inquirers that the

Company should be removed from the Central Register of Charities under section 4(3) of the Charities Act 1960 as a charity which does not operate.

(b) Wilmslow Preparatory School Trust Limited

35. We instituted an inquiry to establish the purposes for which the Wilmslow Preparatory School Trust Limited had received particular income under covenant and had applied that income. In their report the inquirers recorded that between 1979 and 1985 a covenantor had entered into five covenants with the Greater Manchester Charities Aid Fund (GMCAF) to donate money for exclusively charitable purposes. The covenanted funds to a total of £4,960.70 were in fact used to meet the covenantor's personal liabilities in respect of fees for his daughter's attendance at the School run by the Trust. The School generated income by way of fees and had not made an appeal for income by way of covenant.

36. The GMCAF is a registered Friendly Society and a registered charity established to obtain regular annual subscriptions and distribute them to charitable institutions, an object carried out by means of deeds of covenant. Tax is reclaimed from the Inland Revenue and distribution is made on the directions of subscribers. Before January 1986 cheques in favour of all recipient charities had been handed to the subscriber to give to the charity if he so requested, (although following discussions with the Inland Revenue, cheques in respect of educational charities are now only issued directly to the recipient charity following receipt of confirmation from it that the money would not be used to cover school fees). The covenantor in question followed the practice of asking for the cheques to be made out to the School and to be available for him to collect from the Fund's office. He then used these cheques to discharge his personal liabilities for his daughter's school fees.

37. The Commissioners agreed with the inquirers that certain amendments to the forms used by the GMCAF should be adopted as a means of reducing the possibility of future manipulation of the system of covenanted payments for personal benefit. Agency charities making payments to other charitable organisations under a covenant scheme should make it clear to the recipient organisation that the funds donated must be treated as gifts to be applied only for the charitable purposes of those organisations and not applied in discharging the liabilities of any person to make payments to the charity.

38. We decided that the problem should be discussed with the Inland Revenue and that a review of the systems employed by agency charities generally should be undertaken with a view to reducing the ways in which such systems might be improperly used.

Giving advice

(a) Generally

39. It is important that, if trustees are to use charitable resources effectively and properly, they should be aware of their duties and be able to obtain reliable and authoritative advice when problems arise. While it is sufficient that trustees be guided by their professional advisers for many aspects of the administration of their trusts, eg in obtaining the best price when selling land, in other more complex areas (such as the application of the cy pres doctrine) they may need advice on highly technical matters of which only relatively few professional advisers have a working knowledge. We believe we are uniquely qualified to meet this need — as well as in giving general guidance — and we much welcome the recognition in the Scrutiny Report of the value of our advice to trustees and their professional agents.

40. The Report also recognised that we have a general duty to respond to charities seeking advice quite apart from the express provisions in the 1960 Act to give formal advice. The Report noted that our function of giving advice could not efficiently be passed to voluntary organisations and that in any event such organisations could not undertake the work without grants and that their advice would be neither

authoritative nor objective. It should also be recognised that much of the advice we give is directly related to the question whether we should register an organisation as a charity or make some order or scheme to ensure the effective application of charitable property. There are no grounds, however, for complacency in this area. We recognise that our response is often all too slow and that through lack of resources we do not get out to meet trustees as often as we should wish. We have accepted the Scrutiny Report's recommendation to review our objectives and working methods in this area and we shall aim to reassess our priorities in this field and, so far as possible, to take a pragmatic approach in devoting to a task an effort proportional to the importance of the issue and its practical result. We also accepted the Report's recommendation that our range of leaflets should be reviewed both to improve their presentation and to simplify their language and we hope to complete that review by the summer of 1989. We have been engaged on this process for some years. It is noteworthy that during 1987 we issued in response to demand some 45,000 copies of our present range of leaflets.

**(b) Ethical
Investment Policy
by Charity
Trustees**

41. During the year we had occasion to consider the extent to which trustees of charities are legally entitled to adopt an "ethical investment" policy in relation to their trusts. We take it that the terms "ethical investment" and "socially responsible investment" represent investment policies based upon moral, religious or political belief and range in application from a decision not to invest or to "dis-invest" in a particular company or country, to a policy of positive investment in a company either in support of its work or as a means of exerting influence on its policy.

42. In *Cowan v Scargill* [1984] 3 WLR, a case concerning the investment policy of the trustees and of a non-charitable pension fund, the Vice Chancellor Sir Robert Megarry concluded that the trusts of a pension fund were in general governed by the ordinary law relating to trusts (subject to any contrary provisions in the rules governing the trust) and that the paramount duty of the trustees is to do the best that they could do for the present and future beneficiaries bearing in mind that, where the purpose of the trust is to provide financial benefits for the beneficiaries, the best interests of the beneficiaries are normally their best financial interests. On this basis he ruled that the trustees could not refrain from making, for social or political reasons, a particular investment if that investment would be more beneficial financially to the beneficiaries. The issue for us was whether a distinction should be drawn between a charitable and non-charitable trust for the purposes of applying the principles enunciated in the decision in *Cowan v Scargill*: that is, are charity trustees similarly under a duty in formulating their investment policy to consider only furthering the purposes of their charity and not do anything which conflicts with those purposes.

43. We agreed that unlike a private trust the purpose of which is solely to generate funds for its beneficiaries, a charity has a public purpose and object. Consequently, whilst the normal duty of charity trustees in exercising their investment powers is to provide the greatest financial benefits for present and future beneficiaries, financial return is not in all cases the sole consideration which the trustees should bear in mind. Charity trustees should not invest in companies pursuing activities which are directly contrary to the purposes or trusts of their charity and they should have the discretion to decline to invest in companies pursuing activities which are inimical to its purposes. It would, for example, be entirely appropriate for the trustees of cancer relief charities to decline to invest in tobacco companies, for the trustees of charities of the Society of Friends to decline to invest in the arms industry and for trustees of temperance charities to decline to invest in breweries.

44. We thought that it should be possible to determine with reasonable objectivity whether an investment would be directly contrary, or inimical, to a charity's trusts or purposes. We envisaged considerable difficulty however if investment policy were to be placed on more subjective criteria such as that an investment would "undermine" or "be inconsistent with" a charity's purposes. In such cases, because the criteria would be so much a matter of personal opinion, the trustees' own moral or political

views could dictate investment policy in place of an objective assessment. This could leave a charity open to manipulation for political or ethical reasons unconnected with its purposes. This was not to say however that where there was strong and definite evidence that supporters might be alienated with a resulting substantial fall in donations, trustees should not take cognizance of the fact.

45. We also took cognizance of the fact, also recognised in *Cowan v Scargill*, that although charity trustees were under a duty to seek the best investments for their charity, it was open to trustees, given the vast range of investment opportunities available, to select some investments in place of others and that this selection could not be effectively challenged provided that the choice was not detrimental to the charity and was based upon sound investment considerations and not preconceived social and political programmes.

Schemes

(a) **Cy pres schemes** 46. In paragraphs 28 to 31 of our report for 1984 we described the circumstances which give rise to the exercise of our powers to make cy pres schemes to modernise the trusts of charities. We said that it is our practice to be as flexible and imaginative as is open to us and to encourage trustees of defunct charities to look for more adventurous and beneficial uses for their funds. The Scrutiny Report noted that we must as an arm of the Court be bound by the principles of cy pres but they questioned whether our approach was wholly consistent and noted that, since case law appeared to be unclear and the position adopted by us not always understood, local initiatives were sometimes abandoned. We accept the Report's recommendation that further investigation be launched into the possibility of redefining the doctrine in statute. We are consulting widely about possible ways of relaxing the cy pres doctrine and we shall in due course advise the Home Secretary whether legislation would be desirable.

47. During the year we made 708 schemes, some 112 of which provided for the consolidation under common trustees of 525 charities. The following case illustrates how by making a cy pres scheme we can enable the nature of an endowment to be adapted to meet changed circumstances which would otherwise involve an application to the Court.

(b) **Bequest to Highgate School** 48. In 1872 the Victorian philanthropist, Baroness Burdett-Coutts, gave to the Governors of Highgate School in North London 30 Greek manuscripts which had originally come from monasteries in Greece and were each between 300 and 600 years old. The manuscripts had been in the School Library until 1938 after which they had been lodged in the Clerk's office for safekeeping and then entirely forgotten. They came to light in 1986 when the Office of the Clerk and Solicitor to the Governors was preparing to move to new premises. The manuscripts were not suitable for teaching "A" level classical Greek. Since they were valued at approximately £50-60,000 it was considered that the cost of insuring them was too great and that better use could be made of the gift if the manuscripts were sold. We took the view that the manuscripts had been given to the School for teaching and study and not simply for its general purposes. Accordingly, we did not consider that the Governors had power to sell the manuscripts as they were proposing. We however agreed to proceed with a scheme designed to authorise the Governors to sell the manuscripts at auction and to make provision for the proceeds of sale. The Governors had recently incurred considerable expenditure from general funds in converting the former chapel, known as the Tabernacle, for use as a school library. We agreed to make provision in the scheme for up to £25,000 from the proceeds of sale to be used in reimbursing the Governors in respect of part of that expenditure and the remainder to be invested on the basis that income, and at the Governors' discretion capital, should be applicable in providing books and equipment for the School Library. We made the scheme on 5 June 1987. The Greek Government purchased 21 of the manuscripts and the Governors received £102,000 less commission.

Charities Act 1985

49. We noted in paragraph 14 of our report for 1986 that, despite considerable publicity and promotion on our part, the provisions of sections 2 and 3 of the 1985 Act enabling trustees to modernise their objects and to amalgamate with other charities had not been widely used. The response in 1987 has been similarly modest. During the year we received 180 resolutions made under the Act; of these 14 were invalid and we were unable to concur with 9. We received 22 resolutions under section 2 for the amendment of objects and 131 under section 3 for the transfer of property to another charity. Following action by trustees under section 4 of the Act to spend capital as income, we removed 27 charities from the register as having ceased to exist.

50. The Scrutiny Report noted the important complementary role which the provisions of this Act can play in improving the effectiveness of small local charities, but shared our view that an advantageous increase in the use of the Act could be achieved if, by amendment of the statutory provisions, its application was extended, its monetary limits increased and its procedures simplified.

Dealings in land

51. In paragraphs 28-30 of our report for 1986 we considered the merits of the requirements imposed by section 29 of the Charities Act 1960 for our consent to certain transactions in land. We concluded at paragraph 31 that it was open to question whether an order under section 29 of the Act should be required in all cases and suggested that trustees might, for example, have a general power to sell without our consent provided that they complied with certain statutory conditions. The Scrutiny Report reflected this view and suggested that the steps required by us of trustees are for the most part steps which the trustees automatically should have taken in the discharge of their ordinary legal obligation to act in the best interests of the charity. The Report recommended that section 29 should be repealed and replaced by a provision requiring trustees to follow statutory procedures before selling land. Those provisions would require trustees to act on the recommendation of their professional advisers as to value, not to sell to one of their number and other safeguards. It was recognised however that there would be circumstances in which the trustees might not be able to comply with the statutory obligations and in such cases we would retain power to give consent.

52. The Scrutiny Report also recommended that within the existing legislative framework we should make every effort to reduce staff resources currently deployed on Consents work as a means of releasing staff to deal with other aspects of our work where greater resources are required. It was suggested that wider use be made of the power conferred on us by section 29(4) to except by order any charity from the requirement imposed by section 29 to seek our consent. We have acted on this recommendation and by the end of the year we had offered orders conferring a general exception or authority to 91 charities and work has continued to identify other suitable charities. The criteria we have adopted in determining whether it would be appropriate to make such exceptions are that the charity should be engaged in a routine programme of land transactions; the trustees are in receipt of expert qualified professional advice; the sales are subject to full marketing or follow statutory procedures (such as sales under the Leasehold Reform Act); and the trustees have a satisfactory record of handling land transactions. We have not to date taken the view that such authority should extend to land representing permanent endowment which is or has been occupied for the purposes of the charity. Such transactions often extend beyond the mere propriety of the terms of the particular transaction and raise issues central to the administration of the charitable trusts.

53. We did, however, believe it right to extend the use of excepting orders to individual transactions where it is certified by or on behalf of the trustees that they are proceeding on the advice of a qualified surveyor acting exclusively in the interests of the charity; the transaction has been advertised on the open market (other than where such procedure would not be appropriate, for example, grants of easements); the trustees are satisfied that the terms of the transaction are the best that can be reasonably obtained in the interests of the charity and have been advised to that effect by the surveyor; the purchaser is not a trustee of the charity; and there is no business association or family relationship between the purchaser and the charity trustees, employees or professional advisers. By the end of the year we had made 128 orders on this basis.

54. The use of excepting orders either for individual charities or individual transactions does not however lessen the need to supervise land transactions in such a way as to minimise abuse. The additional safeguards which we introduced in 1985 have, we believe, proved effective and have been generally well received and understood by trustees. Of particular benefit has been the ability to seek a second opinion from the District Valuers' Office on the price agreed for a transaction where, in the absence of full marketing of the property, we feel some doubt about its true value. The system for referring cases to the District Valuers' Office has been developed through the year and arrangements agreed with the Chief Valuer's Office which reflect the need to avoid any unnecessary delay in giving our consent have proved effective. Some 266 cases were referred to the District Valuers' Office in 1987 for confirmatory valuations.

55. During the year we made 3,632 orders; more than 80% relating to land transactions. There were 1,575 orders authorising charity trustees to sell property and 902 orders authorising purchases, leases, exchanges, grants of easements, and other dealings in property. 274 orders were made authorising trustees to borrow on the security of charity property and a further 82 orders authorising trustees to release rentcharges. We have revised our leaflet called "SELLING CHARITY LAND" CC28 (reproduced in Appendix A2) to reflect the changes in practice mentioned above.

The Official Custodian for Charities

56. The financial report of the Official Custodian for the year is set out in Appendix E.

57. An essential part of the Scrutiny Report's proposals for changes directed towards fostering a greater realisation of the responsibility of trustees and a corresponding shift in the emphasis of our efforts to root out malpractice, is the recommendation that we should cease to encourage charities, other than in relation to the holding of land, to use the services of the Official Custodian and that we should employ consultants to work out a scheme and programme for returning investments to trustees. The Report also recommended that there should be consultation with the Public Trust Office to establish whether any of the Official Custodian's residual functions could be transferred to the Public Trustee. If however changes proved impractical the Report recommended that recourse should be had to charging for the services of the Official Custodian.

58. We appointed Touche Ross Management Consultants to undertake an initial study to establish the feasibility of abolishing the office of the Official Custodian for Charities and disengaging him from his custodial responsibilities. This phase of the study would examine whether it was practicable to return investments held by him to the trustees of charities or their nominees and to transfer any residual functions regarded as essential or not worth abolishing to the Public Trust Office.

59. Touche Ross reported at the end of the year and that in their view, given the necessary legislation, it would be possible to wind up the functions of the Official Custodian undertaken on behalf of larger charities, but that a number of small charities would remain on the books. Their initial broad estimate of the cost of returning investments to charity trustees was £6.1m over a four year period from the date of the enabling legislation with net annual savings thereafter amounting to £800,000. Included in these estimates were additional running costs of our other divisions and a continuing annual cost to the Inland Revenue who would be faced with a substantial increase in the number of claims for tax refunds from those charities who would no longer receive gross dividend and interest payments from the Official Custodian. This annual cost to the Inland Revenue is in the order of £300,000 representing the need for the Inland Revenue to employ approximately 25 additional staff.

60. The Report concluded that it would not be feasible or desirable for the Official Custodian's residual functions to be transferred to the Public Trustee Office for reasons of economy and administrative convenience.

61. In the course of their study Touche Ross investigated whether any alternative bodies existed in either the public or private sector to provide the services to charities undertaken by the Official Custodian. No such body was identified which would be able or prepared to provide his unique range of services for both the large and small charities currently under his care. The smaller charities in particular would face a serious problem in trying to find an alternative body to hold their investments.

62. Their investigations led Touche Ross to consider, since complete abolition of the Official Custodian was unattainable within a reasonable period, the retention of certain basic services along with an irreducible minimum. This would entail his holding only certain types of investments for charities, restricted to British Government Securities and Common Investment Funds. All other types of investments — the handling of which constitutes the major part of the Official Custodian's day-to-day work and therefore costs — would be returned to trustees unless they opted to reinvest in eligible securities. The Official Custodian would no longer deal with stockbrokers of individual charities and would charge for his services. Touche Ross estimated that this option would involve costs of approximately £5.5m with net annual savings thereafter of £700,000, almost as substantial as those which would result from the more extensive reduction of services.

63. The initial terms of reference under which Touche Ross were appointed envisaged a second stage in which they would, among other things, recommend an appropriate method and structure of charging depending upon whether the office of the Official Custodian would continue in, approximately, its present form. At the time of writing this report, we await the outcome of such a study. In the meanwhile we have accepted the Scrutiny Report's recommendation that we should no longer accept transfers of securities and cash held by charity trustees in their own names, other than when the trusts require it.

The Charities Official Investment Fund

64. In their 1987 Report the trustees refer to the sharp fall in stockmarkets in October which reversed the almost continuous upward trend since 1980. They note the fall took place in the context of steady economic growth worldwide, relatively low inflation and a strong UK economy. The Income Shares, after rising with the market and falling back sharply in October, showed a 2.3% rise in value from 387.76p to 396.79p in the year to 31 December 1987. The dividend was increased in the year by 7.2% from 19.5p to 20.9p per share and the yield at the year end was 5.3%. The Accumulation Share value increased by 6.0% to 1208.02p at 31 December 1987.

65. The number of Income Shares in issue rose from 5.35 million to 5.64 million and their total value increased to £224 million. The number of Accumulation Shares increased from 2.72 million to 2.76 million and their total value at the year end was £33.3 million.

The Charities Deposit Fund

66. The Trustees have reported 50% growth in the Fund in 1987 to a total of over £6.3 million in 3,061 accounts. The average interest rate made during the year was 9.52% (compounded annual rate, 9.87%), higher than the rates paid by comparable money funds throughout the period.

The cost of the Commission and charging

67. The cost of the Commission for the financial year 1987/88 in vote terms was estimated to be £6,117,374 of which £5,759,086 was for wages and salaries and other administrative expenses and £358,288 was for computer facilities. During the year we reorganised our five Charities Divisions and as we record in paragraphs 52 and 53 above secured a small reduction in our consents work. These changes enabled us to transfer an additional five staff to our Investigations team by the end of the year.

68. The Scrutiny Report recognised that many recommendations had resource implications or consequences and that while some were marginal others were substantial in relation to the scale of our staff and budget. It was the broad judgment of the Scrutiny Team that if all their recommendations were implemented in relation to the supervision of charities in England and Wales there would be a neutral effect or a small saving in staff and a modest income from charges. This, however, is dependent upon the total abolition of the Official Custodian and major reduction in our consents work. The Report also recognised that in the period before legislation we would be under increasing pressure and additional staff are likely to be required including some strengthening in the managerial grades, not least for the work needed to implement the Report. Certainly, the need to maintain the Official Custodian's computer systems in the short term (no matter what his ultimate future), and the computerisation of the Central Register and the introduction of other new technology systems, coupled with a renewed impetus in stimulating local reviews of charities and a stepping up of our investigative work, all indicate a need for substantial enhancement of resources both in funding and in manpower.

69. The Scrutiny Report questioned the argument we advanced in paragraphs 86 to 89 of our 1986 report that to introduce charges for our services would be contrary to the longstanding policy of successive Governments that the free service we provide to charities is part of their contribution to the voluntary sector. The Scrutiny recognised that, whereas there might be grounds for concluding that in general charges would be grossly inequitable in their impact, uneconomic to collect or have serious consequences for the good administration of some charities, there was no reason why charges should not be levied on the initial registration of a charity, for residual work in giving consent to property transactions, or for any residual work remaining with the Official Custodian for Charities. At present we have no power to levy charges except for copies of documents and indeed the Official Custodian is expressly prohibited from charging. Legislation would be required to give us power to make the charges recommended but we welcome at this stage the Report's conclusion that a scale of charges for the scheme making and advice services which we provide would be inappropriate and indeed to the disadvantage of charities in discouraging approaches to the Commission.

Malpractice in fund-raising

70. In paragraphs 57 to 64 of our report for 1986 we welcomed the findings of the Working Party set up under the auspices of the National Council for Voluntary Organisations to consider the law and practice relating to charity fund-raising. Those findings have, we believe, received wide acceptance in the charity world and it is not surprising perhaps that the Scrutiny Report commended the findings of the Working Party as a persuasive analysis of the problems which exist and the remedies which might be applied. The Scrutiny Report agreed that it would not be appropriate to introduce wide-ranging legislation to control all types of fund-raising: the resources required for an effective system of licensing would be substantial and the price to pay for guarding against occasional abuse could well be the discouragement of a great deal of honest charitable initiative. The Scrutiny Report endorsed the Working Party's emphasis on "self regulation" by the charitable sector and supported a number of its suggestions for legislative change. In particular they recommended that it should be an offence for a fund-raising practitioner to deduct his remuneration (however calculated) from donations received before paying them to the charity unless he can prove that his intention to do so was made clear to every donor. Where such an offence is committed it should be open to the court in addition to imposing penalties to determine that sums deducted be paid to such charities as the Court may determine. They further recommended that provision should be made that whenever goods or services are advertised or offered for sale with an indication that some of the proceeds are to be devoted to charity, there shall be specified

- (i) the charity or charities that are to benefit (and if more than one in what proportion); and
- (ii) the manner in which the sums they are to receive are to be calculated.

The Scrutiny Report also endorsed the recommendation that a charity should be able in certain circumstances to obtain an injunction against the use of its name by a named person or organisation.

71. The Scrutiny Report called upon us and the Home Office to review the legislation relating to public collections in consultation with representatives of the local authorities and to make representations to the Home Secretary. This we shall do. We do not dissent from the recommendation that the War Charities Act 1940 as extended should be repealed as being virtually a dead letter.

APPENDIX A.1

(Paragraph 11)

STARTING A CHARITY (CC.21)

Introduction

1. This leaflet gives guidance to persons intending to start a charity in England and Wales, explains some of the purposes which the law regards as charitable and suggests various ways in which a new charity may be constituted. Charitable status is, however, a complex subject turning on case law and, unless a recognised model governing instrument which reflects the proposed purposes and organisation is being adopted, it will in most cases be necessary for promoters to seek legal advice. A leaflet giving information about the registration requirements is available from the Commissioners' offices in London and Liverpool.

What is a charity?

2. Not all voluntary organisations—however worthy their activities—are charities. Broadly speaking for an organisation to be a charity it must have purposes which are exclusively charitable by reference to case law. What in law are exclusively “charitable purposes”? There is no single statutory definition. The law defining the legal attributes of a charity is based upon case law developed through court decisions. The case law stems from a list of specific purposes (which were then considered to be charitable) set out in the preamble to a Statute of Elizabeth 1 of 1601. Although the Statute was repealed many years ago, the purposes listed in the preamble still, through case law, have some relevance as a guide to what are considered to be charitable purposes today. The concept of what is legally charitable has been greatly extended and developed in decisions of the courts over the centuries through a process of analogy with the purposes originally set out in the 1601 Statute.

3. In 1891 Lord MacNaghten identified four heads of charity: the relief of poverty; the advancement of education; the advancement of religion; and other purposes beneficial to the community not falling under any of the preceding heads. Because of the lack of a statutory definition of exclusively charitable purposes the law has been free to develop with changing social conditions. The Commissioners in applying the law are anxious to play their part in that development (see paragraphs 4-8 and 24-27 of their Report for 1985) (Appendix A)—but they cannot act contrary to legal principles and decisions laid down by the courts. In paragraphs 5 to 10 some indication is given as to what may be charitable under the MacNaghten heads.

Public benefit

4. A purpose is not charitable unless it is directed to the public or a sufficient section of it. An institution cannot generally be charitable if it is principally established for the benefit of specific individuals. With the single exception of the relief of poverty, a purpose cannot be charitable at law if the beneficiaries are to be selected from a class defined by relationship to a donor or employer or membership of a non-charitable association. The degree of public benefit may however vary between different classes of charity. For example, in the case of a charity for the relief of poverty, a section of the public, more restrictively defined than may be permissible for other charities, may be acceptable as a beneficiary class. It is not, however, possible to lay down any precise definition of what constitutes a sufficient section of the public. Cases must to a large extent be considered on their own merits. No trust can, however, be charitable if its purposes are illegal or against public policy or formed for the financial benefit of its trustees or other specific individuals.

Relief of poverty

5. "Poverty" is a relative term and an individual need not be destitute in order to qualify for relief. Need is relative. The relief of poverty can take the form of direct financial assistance and providing food, clothing or housing as well as supporting those organisations whether in housing, health, education etc which assist the needy.

Advancement of education

6. This head of charity now extends to purposes beyond the mere instruction of the young at schools and universities and includes playgroups, youth organisations such as Boy Scouts, public museums and libraries, institutions for the promotion of culture and fine arts (for example, by means of music and theatre companies) and the advancement of science and research.

7. "Education" is a developing category of charity but it should be noted that it does not include propagandist or political activities. To be legally charitable, an educational charity must normally provide, or provide facilities for, some form of instruction or training involving a study of subjects of educational value. If research is being conducted, except as a means of formal education, the subject matter must be a useful subject of study; of benefit to the public; the research must be objective and the results must be disseminated to the public.

Advancement of religion

8. The advancement of religion has always been an established charitable purpose. Indeed originally all charity was largely dispensed through the Christian church. Today, the advancement of religion includes the building and repair of places of worship, the support of ministers, holding services, and evangelism (whether in the Christian or other religions). To be regarded as a religion, an institution must be founded on a belief in and reverence for a deity or deities and promote spiritual teaching and the maintenance of the doctrines on which its teaching rests and the observances which give it expression and substance. The law does not prefer one religion to another but makes a general presumption that it is good for mankind to have and practice a religion. Where, however, religious benefit is wholly private or the tenets of a particular religion or sect are subversive of morality or adverse to the foundations of all religion, the trust or organisation will not be charitable.

Other purposes beneficial to the community

9. Under the "fourth head" of charity, the purpose must benefit an appreciably important class of the community in a way the law regards as charitable. In general there must be benefit to the community of the United Kingdom although not all purposes which benefit the community are charitable. This class includes a very wide range of charitable purposes from the provision of land and buildings for public purposes (e.g. parks, recreation grounds and community halls), to the provision of services for the general benefit of the community either directly by, for instance, the conservation of the national heritage or through promoting the welfare of individuals (e.g. the resettlement and rehabilitation of offenders and drug abusers), and the relief of the sick, disabled or aged from their disabilities and infirmities). Trusts for animals in need of care and attention are also charitable under this head of charity.

10. The Recreational Charities Act 1958 declares it charitable to provide, or assist in the provision of, facilities for recreation or other leisure-time occupation if the facilities are provided in the interests of social welfare with the object of improving the conditions of life for persons for whom the facilities are primarily intended and those persons have need of such facilities by reason of their youth, age, infirmity or disablement, poverty or social and economic circumstances or the facilities are to be available to the members or female members of the public at large. The Act makes it clear that village halls, community centres, and women's institutes can be charitable. Sports facilities which are open to the general public or which provide social welfare facilities (for example, for the young, aged or the poor) are also charitable; but bodies which are formed or exist to promote individual sports, or excellence or professionalism in sport, or which exist to benefit their members, are not. Most sports clubs are not set up for altruistic motives, but exist to benefit their members rather than the general public or persons who could loosely be described as disadvantaged. They are concerned with the good playing of a game (often in competition with others) rather than the provision of a social welfare facility.

How is a charity set up?

11. The Commissioners can accept an institution for registration only if it is constituted in a manner which brings it within the jurisdiction of the High Court. It is in practice essential that the institution be established by a written trust instrument governing the trusts of the charity. The type of governing instrument which is adopted will depend on the particular circumstances pertaining to the institution proposed and the preference of the promoters or founders. There are agreed model governing instruments for many types of groups and organisations, which have been prepared by co-ordinating bodies (e.g. for village halls, or community associations). In suitable cases the Commissioners will put the promoters of proposed charities in touch with the appropriate body, but the Commissioners cannot undertake the preparation of draft trust instruments: persons who are considering starting a charity are strongly advised to seek legal advice about its format, content and legal sufficiency. Before seeking advice, persons founding a charity must be clear in their own minds as to the purposes of the charity (too often the Commissioners find charities whose declared objects are inappropriate to the intended purposes) and as to the manner in which they wish the charity to be administered. The National Council for Voluntary Organisations of 26 Bedford Square, London, WC1B 3HU, are willing to advise on specific matters to do with forming a charity. Briefly the most common types of structure are:

Trusts: Property can be dedicated to charitable purposes by trust deed or by will. This method is usually chosen by individuals who wish to settle their own property on charitable trusts, or by a number of people who wish to hold specified property upon charitable trusts. The trust instrument should set out the purposes of the trust and include any provisions for the attainment of those purposes and the management of the trust. The trust instrument can also include a power of variation and also a power to wind up the trust if its purposes can no longer be carried out. The trustees of the trust are normally solely responsible for its management and the trust instrument should usually contain provisions for the terms of office of the trustees and for appointment of new trustees unless these are to be regulated strictly by statutory provision.

Unincorporated associations: This format is usually used where a group of people wish to band together to carry out an agreed objective and it is intended that there should be some provision for a continuing membership in relation to the running of the institution. The group adopt a constitution or rules setting out the purposes or objects of the association and how it is to be managed. The constitution should also set out provisions governing the membership and to what other charitable purposes the assets are to be applied on winding up; and also, in appropriate cases, provide for the holding of its property by trustees at the direction of its committee of mana-

gement. It is always advisable to make provision for the alteration of the constitution. Provision is often made for a wide membership to elect officers and committee members at annual general meetings but sometimes the committee is a self-perpetuating body, as in the case of many trusts and its membership is identical to that of the association.

Companies: Charities may be incorporated under the Companies Act 1985 as companies limited by guarantee not having a share capital. Companies have the advantage of being legal persons in their own right so that there is no need for the appointment of trustees to hold land and investments. The main disadvantage is the cost of preparing and filing statutory returns with the Companies Registrar.

12. Whatever structure is chosen, the Commissioners are prepared to comment on the draft of a trust instrument once it has been prepared. (This can often save nugatory work.) If their comments are sought, two copies of the draft should be sent to them since it is their usual practice in many cases to consult the Inland Revenue (Claims Branch) at Bootle so as to avoid the possibility of an objection to registration being made by the Revenue at a later stage. It speeds matters if as much background information as possible is sent about the reasons for setting up the charity and the activities which it intends to pursue. The Commissioners are also prepared to advise informally on whether a proposed institution and its objects would on the face of it fall within the definition of charity.

13. An appeal for funds can in some circumstances have the effect of setting up a new charity. In the absence of a formal trust instrument, the appeal literature or record of a speech or broadcast may in themselves constitute the instrument governing a charity and establish the purposes for which it is founded. Accordingly great care should be given to the wording of any appeal. Where it is intended to raise money for the general purposes of an existing charity, this should be made clear and words suggesting a narrower purpose should be avoided. Where an appeal is for a closely circumscribed purpose, such as meeting the cost of erecting or restoring a building, it should contain provision for the application of the moneys raised in the event of there being insufficient for the purpose and for the application of any surplus moneys should the appeal be over subscribed. Particular care should be taken before an appeal is made to help the victims of a disaster or accident and their families and dependants, affecting a relatively small number of people. If it is intended that specific persons should benefit as of right irrespective of need or that the benefits should be confined to a closed class of beneficiaries then a charity cannot be created, a more general beneficial class is necessary if a charity is to be formed. Promoters are advised to consult the Commissioners at an early stage and to take note of the Attorney General's guidelines (see Appendix B) before launching the appeal.

What should be done after the draft trust instrument has been agreed with the Commissioners?

14. Depending upon the structure which has been chosen, a trust deed should be executed and stamped; a constitution or rules should be formally adopted at a meeting of the members of the group; and a company should be formally incorporated. When properly constituted the charity can then start to operate.

Should the charity be registered?

15. Registration in the Register of Charities maintained by the Commissioners is compulsory for charities in England and Wales although there are some exemptions and exceptions from the requirement. Full details of the exceptions are set out in the

Commissioners' leaflet (RE4). Briefly, the exceptions are in respect of some voluntary schools and small funds of the Scouts and Girl Guides Associations; some charities for the advancement of religion (see leaflet RE4R) and certain charities for the promotion of the efficiency of the armed forces. Places of Worship registered under section 9 of the Places of Worship Registration Act 1855 are not required to be registered nor are societies registered under either the Industrial and Provident Societies Act 1965 or the Friendly Societies Act 1974. Very small charities which have neither

- (a) any permanent endowment (i.e. property which cannot be spent as income); nor
 - (b) income from investments or other property exceeding £15 a year; nor
 - (c) the use and occupation of any land, including buildings,
- need not register.

How to apply for registration

16. If the Commissioners have been asked to comment on a draft trust instrument (and it is helpful if the Commissioners are consulted at the draft stage, rather than after the deed has been executed or a constitution formally adopted) they will send a registration application form with their agreement to the draft. Otherwise, the persons registering the charity (or their solicitors) should write to the Commissioners and ask for a registration application form. After the application has been completed it should be returned together with two copies, certified as correct, of the governing instrument of the charity. In the case of established organisations, the Commissioners also need details of the activities which the organisation carries out in furtherance of its objects and, if it has been founded for more than a year, will require a copy of its latest accounts. The Commissioners will inform trustees as soon as the charity has been registered and will provide them with a copy of the index slip containing the registered particulars of the charity.

Are there any other requirements in connection with registration?

17. Some trustees will receive a questionnaire for completion either at the time their charity is registered or when registration is invited. It would be helpful if this is completed and returned to the Commissioners as it will assist them to carry out their functions under the Charities Acts. It is also the duty of trustees to inform the Commissioners of any changes in the trusts of the charity (unless the change was made by a Scheme of the Commissioners) and of changes in any of the registered particulars such as the name and address of the charity's correspondent. The trustees of some charities must also send a statement of account to the Commissioners each year without request. (See leaflet CC25.) Finally if the charity ceases to exist, the trustees must tell the Commissioners and send them a copy of its final accounts so that it can be removed from the Register.

Appendix A

THE COMMISSIONERS' REPORT FOR 1985

4. There has been a corresponding shift in emphasis and relative importance in our work in relation to the development of new forms of charitable activity, the structure of charities themselves, the nature of the advice sought by trustees, the perceived need for greater accountability by charities to the public and the central and local agencies funding them, and to our own responsibilities for investigating and checking abuses.

5. We have tried to take account of the change in social conditions in our application of charity law and we have always sought to apply the law in a sensible way so as to reflect changes in society emerging from perceived needs. The effect of the 1960 Act, which required us to keep a register of charities for the first time, has been in many cases to make us the arbiters in the first instance of what is a charity in law in England and Wales (subject only to appeal to the High Court). As we discuss the paragraphs 24 to 27 below we believe we are expected to follow the Court in extending the field of charity by analogy from cases already decided; and that we should adopt a generous as opposed to a restrictive view. This we have sought to do in each of the four heads of charity and particularly in the grey area of the “fourth head”—purposes generally beneficial to the community. We have for example decided that providing advice and facilities concerning contraception can be a good charitable purpose by analogy with the preservation and protection of good health; and that family conciliation services formed to persuade the parties to settle differences relating to custody of children, property and other matters by negotiation before judicial hearing instead of burdening the courts with detailed dispute between the parties, were by analogy directed to the administration of the law directly affecting the social wellbeing of the public and families. Similarly we decided that the promotion of good community relations is, within the context of a modern multi-racial and multi-cultural society, a valid charitable purpose by analogy with decided cases concerning the preservation of public order and the prevention of breaches of peace, or the mental and moral improvement of man. The field of unemployment is more difficult, as we explained in paragraphs 12 to 14 of our report for 1983, but we have accepted as charitable many institutions for the training and retraining of the unemployed and for assisting them in various other ways.

6. In recent years public expenditure restraint has stimulated the creation of new volunteer organisations within communities to meet the needs of those who whether by ill-health or misfortune are intolerably burdened. During the last five years we have registered some 45 charities concerned to provide support and assistance through the provision of home care attendance to families responsible for the care of those who are physically or mentally disabled. Over recent years we have also registered an increasing number of charities established to help those who have been the unfortunate victims of criminal assault; some 70 victim support groups have been registered in the last two years. Both these types of support schemes use voluntary helpers from the local community to provide a service of practical care and assistance.

7. In a similar way we have recognised as charitable organisations set up to meet new problems arising from changing social needs, for example: means to help latch key children; intermediary bodies which promote the effectiveness of other charities; parent-teacher associations; hospices (an increasing trend); local community and amenity associations; organisations devoted to the screening and improving of women’s health, particularly cervical screening; various organisations in the field of care of the mentally handicapped; “half-way houses; new ventures in the arts and museums; and help for the young to set up in their own business enterprises.

8. We think it significant that by far the greater number of charities now coming on to the register are charities having objects within the fourth head of charity: of the 3,790 charities registered in 1985 nearly two and a half thousand fell within the fourth head. It is mainly by using the fourth head that we can undertake the task of ensuring that the application of charity law moves with the times.

The Commissioners’ decisions on charitable status

Whether an analogy is necessary

24. As a Board we considered whether, and to what extent, in relation to a novel purpose for public benefit which could be charitable only under the fourth head of the classification laid down in **Re Pemsel** [1891] AC 531, it was necessary before

deciding that the purpose was charitable to find some analogy with the purposes recited in the preamble to the Statute of Elizabeth 1 of 1601 c. 4 or purposes decided by the Courts to be charitable. The point is not academic. We are from time to time pressed to determine charitable an organisation in respect of which it is contended that its purposes are of great benefit and utility to the public even though no reasonable analogy could be found. During the year we considered an application for registration in which the question of analogy was significant.

25. Not all purposes beneficial to the community or of public utility are charitable (re McDuff [1896] 2 Ch 451 and Williams' Trustees v IRC [1947] AC 447). Clearly therefore there must be some criterion for ascertaining on which side of the line the particular purposes fall. Criteria have variously been expressed by the Court as purposes analogous to those set out in the preamble to the Statute of Elizabeth 1, or to purposes which the Courts have accepted as charitable, or purposes falling within the spirit and intendment or intention of the Statute, or purposes within the equity of the Statute, or purposes which are charitable in the same sense as those recited in the preamble, or within the purview of the Statute. But in practice, there is little guidance as to practical application of these concepts. In our report for 1966 at paragraph 29 we had indicated that since Parliament had provided for appeals to the High Court from our decisions on charitable status, it was clear that we must reach our decisions as a matter of law, applying the principles adopted by the Court. In paragraph 33 of that report we anticipated that there might not be a regular flow of appeals to the Court, and that this would mean, if we were to try progressively to meet the evolving needs of society, that our decisions would inevitably move further and further away from cases decided by the Court. In fact there have been few appeals against such decisions and it seemed open to us, given the terms of our earlier views, not to restrict ourselves to close analogies. This was not to say that we could ignore our own earlier decisions or those of the Court; but we should adopt a generous as opposed to a restrictive view.

26. The wider view supported by the approach advocated by Russell L J and followed by his colleagues in the Court of Appeal in the Incorporated Council of Law Reporting for England and Wales v AG [1971] Ch 626 is that where a purpose is clearly beneficial to the community and of general public utility the question to ask in deciding whether that purpose is charitable is whether there are any grounds for holding it to be outside the equity of the Statute. The approach of the Courts since that case has however been to follow the route of precedent and analogy. It seemed to us therefore that in practice we were required, where a novel purpose is to be considered which may seem remote from any purpose which under the law is recognised as charitable, to find some analogy. The question remained as to how strict that analogy should be.

27. We are clear that we should take a constructive approach in adapting the concept of charity to meet the constantly evolving needs of society. We needed to be clear as to charitable intent within the spirit of the preamble, and in looking to our own decisions and those of the Court and taking into account legislation passed by Parliament we should act constructively and imaginatively. It could be argued that in the absence of a suitors' appeal fund it was incumbent upon us to be robust in looking for analogies and to provide the Court with the opportunity to assist where our views were contested by the Inland Revenue, Attorney General or other interested body. This was not to say that we did not need to find a sufficiently close analogy as a means of deciding what was the spirit and intendment of the preamble in a particular context; indeed to do otherwise would be an abuse of power. But it was difficult to envisage a case otherwise suitable for registration where some analogy could not be found, given a generous as opposed to a restrictive view. Our general approach would be to favour charity.

Appendix B

COMMISSIONERS' ANNUAL REPORT FOR 1981

Disaster appeals

Action to set up a public appeal following some tragic accident or disaster or an occasion on which some special misfortune is brought to the public eye is generally taken with little time to prepare the ground. The community may well feel an urgent need to give practical expression to its sorrow and respect; and the response may well exceed expectations.

In these circumstances it is not unnatural that questions should arise over the precise status of appeals after they have been set up; and events following the tragedy of the loss of the Penlee Lifeboat show how much unhappiness can be caused by these questions.

The Attorney General is anxious that doubts about the nature of appeals should be avoided if at all possible, and that those who answer an appeal should know that their generosity will have the results which they intend.

Accordingly, the Attorney General, after consultation, has prepared the following guidelines which might usefully be taken into account by those faced with the responsibility of making appeals in the future.

1. The Making of the Appeal

1. Those who use these guidelines must remember that no two appeals can ever be quite the same, and should do all that they can to ensure that their own appeal is appropriate to the particular circumstances of their case, and runs into no unforeseen difficulties, whether personal, administrative, or fiscal. Amongst the most important and urgent decisions which must be made will be whether or not a charitable appeal is called for, and it may well be desirable to take advice on such questions before the appeal is issued. Generally speaking, the terms of the appeal will be all-important in deciding the status and ultimate application of the fund.
2. Once the terms are agreed, it will generally be desirable to publish the appeal as soon as possible, and as widely as appropriate in the circumstances.
3. Sometimes gifts may be sent before publication of the appeal. If there are more than can be acknowledged individually, the published appeal should indicate that gifts already made will be added to the appeal fund unless the donors notify the organisers (say within ten days) that this is not their wish.

2. Pros and Cons of the Types of Appeal

1. **Charitable funds** attract generous tax relief; donations to them may do so (and in particular will for the most part be exempt from capital transfer tax). But charitable funds, being essentially public in their nature, cannot be used to give individuals benefits over and above those appropriate to their needs; and the operation of a charitable trust will be subject to the scrutiny of the Charity Commissioners.
2. **Non-charitable funds** attract no particular tax reliefs and donations to them are subject to no special tax treatment (and will have to be taken into account for capital transfer tax purposes unless, as is likely to be the case for the bulk of donations, they are within the normal reliefs). But under a non-charitable trust there is no limit on the amount which can be paid to individual beneficiaries if none has been imposed by the appeal; and only the Court acting on behalf of the beneficiaries will have control over the trust, which will not be subject to scrutiny by the Charity Commissioners.

3. The terms of the non-charitable appeal must be prepared with particular care to ensure that there is no doubt who is to benefit, whether or not their benefit is to be at the discretion of the trustees, and whether or not the entire benefit is to go to the beneficiaries, and if not, for example because specific purposes are laid down and the funds may be more than is required for those purposes, or because the beneficiaries are only to take as much as the trustees think appropriate, what is to happen to any surplus. If specific purposes are laid down, and after they have been fulfilled a surplus remains for which no use has been specified, the surplus will belong to the donors, which may lead to expensive and wasteful problems of administration.

3. Forms of Appeal

1. If a **charitable** fund is intended then the appeal could take the following form:—

“This appeal is to set up a charitable fund to relieve distress caused by the accident/disaster at _____ on _____. The aim is to use the funds to relieve those who may be in need of help (whether now or in the future) as a result of this tragedy in accordance with charity law. Any surplus after their needs have been met will be used for charitable purposes designed:—

- (i) To help those who suffer in similar tragedies.
- (ii) To benefit charities with related purposes.
- (iii) To help the locality”.

2. If a **non-charitable** fund is intended and those affected are to take the entirety of the fund in such shares as the trustees think fit the appeal could take the following form:—

“This appeal is to set up a fund, the entire benefit of which will be used for those injured or bereaved in the accident/disaster at _____ on _____ or their families and dependants as the trustees think fit. This fund will not be a charity”.

3. A **non-charitable** fund in which the trustees would have a discretion to give as much as they think fit to those who have suffered with any surplus going to charity could be set up on the basis of the following form:—

“This appeal is to set up a fund for those injured or bereaved in the accident/disaster at _____ on _____ and their families and dependants. The trustees will have a discretion how and to what extent to benefit individual claimants: the fund will not itself be a charity but any surplus will be applied for such charitable purposes as the trustees think most appropriate to commemorate those who died.”

4. Appeals for Individuals

1. It sometimes happens that publicity given to individual suffering moves people to give. In such a case it is particularly desirable for those who make appeals to indicate whether or not the appeal is for a charitable fund. It is also desirable for those who give to say whether their gift is meant for the benefit of the individual, or for charitable purposes including helping the individual so far as that is charitable; if no such intention is stated, then the donation should be acknowledged with an indication how it will be used if the donor does not dissent. Those who make appeals should bear in mind the possibility that generous response may produce more than is appropriate for the needs of the individual, and should be sure to ask themselves what should be done with any surplus.

2. Thus, if a child suffers from a disease, there are two alternatives, to appeal for the benefit of the child, or to appeal for charitable purposes relating to the suffering of the child, such as may help him and others in the same misfortune, for example by helping find a cure. It may be that the child will not live long, and so may not be able to enjoy generosity to him as an individual; alternatively, he may be intended to receive as much as possible, because he faces a lifetime's suffering. Once again, the

pros and cons of setting up a charitable fund or a non-charitable fund should be considered before the appeal is made and the appeal should indicate which alternative is intended; once again, even if a non-charitable appeal is made, it may be thought right to make it on terms that any surplus can be used for charity.

- 5. Generally** The suggestions made in this memorandum are only examples of forms which can be used; and before making an appeal it is always wise to seek advice on what form to use. The Charity Commissioners will always be ready as a matter of urgency to advise on the terms of any intended charitable appeal, or to consider whether a proposed appeal is likely to be charitable, and if so to advise on the likely consequences.

In conclusion, the Attorney General would like to emphasise that those organising an appeal should do all they can to make sure that the purpose of the appeal is clear and that donors know how their gifts will be used. This will do much to reduce the risk of confusion and distress. It is considered undesirable to make a general appeal postponing until the size of the fund is known decisions whether the fund ought to be charitable and whether those affected should take the entire benefit; this can all too easily lead both donors and beneficiaries to form the view that the ultimate result is not what was intended, as well as giving rise to legal problems.

This memorandum is being provided to local authorities' associations, the Law Society and the major banks, amongst other bodies, in the hope that it may become available to all those who may be concerned with making public appeals.

Appendix A.2

(Paragraph 55)

SELLING CHARITY LAND (CC.28)

1. This leaflet describes the duties of charity trustees when selling charity land (including buildings) whether freehold or leasehold; sales which require the Commissioners' consent; and the steps to be taken to obtain consent.

What are the trustees' duties in dealing with charity property?

2. Trustees are individually and jointly responsible for the protection, management and supervision of the charity's property—whether land or buildings. They are under a duty to act solely in the interests of the charity and its beneficiaries. These duties on trustees are a matter of law: not of any capricious policy of the Charity Commissioners. They must act reasonably and prudently, and maintain overall control of the management of the property. When selling property belonging to their charity, they must not leave the matter without supervision in the hands of a single trustee, or a sub-committee of trustees, or to any employee, clerk or advisers (however trusted). A sale is always a matter for the trustees as a whole to consider and decide upon.

What should trustees consider before deciding to sell?

3. Trustees should make sure that a sale is in the best interests of the charity. For example, land and buildings which are used by the charity for its purposes should not

normally be sold unless a better alternative property is to be provided and land which is used to produce income for the charity should not be sold if, in the long term, it would be to the financial benefit of a charity to keep it. Trustees should be influenced only by whether a sale is to the advantage of the charity. Sales may nevertheless arouse hostility — whether from the community, neighbouring landowners, the tenants of investment property or from beneficiaries. Trustees should anticipate such concerns and be prepared to justify their action in the context of what is best for their charity.

4. Trustees must be clear that they have power to sell the land and ascertain whether the trusts impressed on the property limit their powers. The charity's governing instrument (trust deed, constitution, or the like) may contain a specific power of sale but the absence of an express power does not rule out a sale. The Commissioners take the view that section 29(1) of the Settled Land Act 1925 confers a power of sale on the trustees of charities established as trusts subject to such consents as are required by law and also subject to any statutory or other trusts which may prevent a sale (e.g. an award made under an Inclosure Act requiring the property to be used for particular purposes). Even where there are statutory trusts which preclude a sale, the Commissioners may be able to make a Scheme sanctioning a sale; but this inevitably takes some time. It is, therefore, important that trustees should approach the Commissioners as soon as they have decided in principle upon a sale.

5. Trustees do not have a free hand to use the proceeds of sale as they wish. The proceeds must be applied strictly in accordance with the trusts—which may require investment of the capital. If the trusts allow the proceeds to be spent, then the trustees must satisfy themselves that proposed expenditure falls within the terms of the trusts. Advice should be sought from the Commissioners at an early stage if there is any doubt as to the trustee's powers.

When does a sale require the Commissioners' consent?

6. If the charity trustees have a power of sale, property which neither forms part of the charity's permanent endowment, nor has ever been used for its purposes, can be sold without the authority of an order of the Commissioners. But an order is usually required before trustees can sell property forming part of the permanent (non-expendable) endowment of the charity; or sell land or buildings which have been occupied for its purposes. There are some exceptions to this requirement.

- (i) where the authority for the sale is contained in an Act of Parliament, a statutory instrument or scheme of the Court or the Commissioners;
- (ii) where property has been excepted from the requirement either by a specific order made by the Commissioners or by regulations made by the Home Secretary;
- (iii) where property belongs to a charity which is exempt from the Commissioners' jurisdiction*.

In all cases where the Commissioners' consent is required, trustees should not enter into any undertaking or commitment to any purchaser until it is confirmed by the Commissioners that consent will be given.

*Exempt charities are detailed in the Second Schedule to the Charities Act 1960 and are for the most part large institutions for which Parliament has provided other supervision, for example, the principal universities and museums, but they also include any charity which is either a registered society within the meaning of the Industrial and Provident Societies Act 1965 or a registered society or branch within the meaning of the Friendly Societies Act 1974.

Must the trustees obtain the best price?

7. The law does not allow trustees a free hand in disposing of charity land. Trustees must take all reasonable steps to secure the most advantageous terms for their charity. In the Commissioners' experience this would normally mean that trustees must seek to be guided by advice from a qualified surveyor acting solely in the interests of the charity, and that the property must be fully marketed and properly advertised. Moreover, all interested purchasers must not only be given an opportunity to make an offer for the property but must also be given the opportunity to increase that offer until the highest price has been reached. Where the Commissioners' authority needs to be obtained, they will normally require that notices shall be published inviting higher offers, objections or suggestions before they sanction the sale, unless they are satisfied that the trustees are acting on professional advice and that the property has been fully marketed.

8. This means that even where trustees may have had a reasonable offer, and would like to accept it, they must in law seek the best offer by proper marketing. In a case in the High Court in 1984* Sir Robert Megarry explained the position as follows:

'Trustees may even have to act dishonourably (though not illegally) if the interests of their beneficiaries require it. Thus, where trustees for sale had struck a bargain for the sale of trust property but had not bound themselves by a legally enforceable contract, they were held to be under a duty to consider and explore a better offer than they received, and not to carry through the bargain to which they felt in honour bound In other words, the duty of trustees to their beneficiaries may include a duty to 'gazump', however honourable the trustees.'

If the Commissioners' consent is *not* required, do the trustees still have to get the best price?

9. Yes. This is a requirement of law. Trustees must make sure that the best terms are obtained. Where it is proposed to sell at less than the best price in money reasonably obtainable then an order of the Commissioners will be required to allow the trustees to accept this lower price (see paragraph 12 below).

What if the trustees refuse to comply with the duty to obtain the best price?

10. They may be held personally liable for any losses that the charity incurs from their breach of trust.

Does this mean that the trustees must sell by auction?

11. No. Auctions may well be the best way to sell a particular property but sales can be made by private treaty. In sales by private treaty, the Commissioners need to be assured that all those who have made an offer have been given the opportunity to

*Cowan v Scargill [1984] Ch D 501 at page 51

increase it, and that the surveyor is satisfied that the highest price has been achieved through negotiation. Trustees should make sure surveyors

- (i) know that any higher offer must be reported to them;
- (ii) tell all those who have made an offer that
 - (a) the trustees are under a duty in law to obtain the best terms and would have to consider higher offers made before the exchange of legally enforceable contracts; and
 - (b) the Commissioners may require the publication of notices inviting higher offers or representations.

Does the requirement to get the highest price apply even where another charity with similar purposes wishes to purchase

12. The Commissioners have power under section 23 of the Charities Act 1960 to authorise sales which would not otherwise be within the trustees' powers if the Commissioners are satisfied that the proposed action is 'expedient in the interests of the charity'. This power can be used to authorise the trustees of a charity to sell property at less than the best price where the purchaser is another charity which has very similar objects to the vendor charity and the sale can be seen to further the purposes of the charity making the sale.

Could a sale at less than the best price be authorised in order to avoid selling to a purchaser whom the trustees find objectionable?

13. The interests of a charity must take precedence over trustees' personal preferences whether based on moral, ethical or religious belief. The acceptance of a lower offer would need to be demonstrably to the overall advantage and interests of the charity before the Commissioners could sanction it—for example where the terms were ultimately going to be for the benefit of the future operation of the charity or the use to which the purchaser proposed to put the land would be to the detriment of the charity's continuing activities on adjoining land.

Can the trustees impose covenants on land they sell to ensure that it is not used for purposes of which they disapprove?

14. Unless the charity retains ownership of land adjoining that which is sold, a restrictive covenant cannot be enforced against a subsequent purchaser. If land adjacent to that to be sold is to be retained by the charity then it might be proper to impose restrictive covenants for the benefit of that land. Where no such benefit arises the practical result of imposing a restriction would be to depress the selling price and thereby make a gift of part of the value of the land to the purchaser.

What is the procedure for obtaining an order of the Commissioners?

15. The Commissioners should be informed as soon as the trustees have decided in principle to sell. Unless they are prepared to consider excepting the charity from the need to obtain their consent (see paragraphs 18 and 19 below), they will almost invariably require a report on the proposed transaction from a qualified surveyor, acting exclusively in the interests of the charity. The Commissioners will provide detailed guidance notes for his use. Trustees should always make certain that surveyors consider the development potential of the land being sold, particularly if it is undeveloped.

16. If the Commissioners approve the sale in principle, the next step is to offer the property for sale on the open market in accordance with the surveyor's advice. If he advises that the sale should be by private treaty and the trustees decide to proceed in that way, the trustees should be careful to avoid giving any commitment to a particular course or promising the property to a particular purchaser until the Commissioners have agreed to a sale on the terms envisaged. If, as a result of the advice given at paragraphs 7, 8 and 11, the sale by private treaty develops into a 'private auction' the Commissioners should be advised. They will then consider bringing the bidding to a close by inviting the purchasers to submit their best final offer to the Commissioners by a specified date and time. It is not usually necessary to go to these lengths—the highest price usually emerges through negotiations carried out by the charity's surveyor. Where this is the case, trustees should simply inform the Commissioners of the highest offer which has been made and give details—or get their surveyor to give details—of the way in which the property has been marketed. If the Commissioners are satisfied that the sale should be authorised a draft order will be prepared and copies sent to the trustees or their solicitors. The order will normally be sealed after the draft order has been returned to the Commissioners and approved on behalf of the trustees and, where the publication of notices has been required, the final date for higher offers or representations has passed.

Will any further steps be taken to protect the charity property?

17. The Commissioners will ask for the name and address of the purchaser and for the trustees to declare that there is no family or financial relationship between any of the trustees or their employees or agents and the purchasers. If there is such a link the circumstances should be explained. The Commissioners may also refer certain cases to the District Valuer for his confirmation that the sale price and the terms are reasonable. This is to protect charity property and to ensure that the trustees are protected against allegations of abuse or fraud.

When will the Commissioners make an order excepting trustees from the need to obtain consent?

18. The Commissioners will except a charity which frequently sells property from the need to obtain their consent, (or, where the property is vested in the Official Custodian for Charities, authorise the trustees to proceed without the need to obtain consent to such sales), provided they are satisfied that the trustees have a good record of securing the most advantageous terms for the charity. Both the exceptions and authorisation, valid for five years, enable the trustees to sell property without

involving the Commissioners unless it is proposed to sell at less than the best price (see paragraph 12 above).

19. Some charities of course sell property only occasionally. The Commissioners will consider excepting such a charity from the need to obtain their consent to a particular transaction (or, where the property is vested in the Official Custodian for Charities, authorise the trustees to proceed without the need to obtain consent) if the trustees can certify, once the sale has been arranged, that certain conditions have been met. Two of these conditions are that the trustees must be acting on the advice of a qualified surveyor acting exclusively for them and the sale must have been advertised on the open market. If an order of this kind is appropriate the Commissioners will not make any further enquiries about the proposed terms of the sale or need to see a report on the transaction from the charity's surveyor.

Appendix B

(Paragraphs 1 & 21)

ACCOUNTING BY CHARITIES—A RÉSUMÉ

Introduction

The Trustees of a charity are responsible in law for the preparation of the annual report and accounts of the Charity.

After extensive discussion and consultation, in May 1988, the Accounting Standards Committee published a Statement of Recommended Practice on Accounting by Charities ("the SORP"). This statement is appropriate for all charities; accounts drawn up in accordance with its recommendations go beyond the requirements of the Charities Acts 1960 and 1985 and will be suitable for filing with the Charity Commission. The SORP contains detailed recommendations relating to the preparation of charities' annual reports and accounts:

The Charity Commissioners warmly welcome the SORP and expect charities to prepare their annual reports and accounts in the future in accordance with the recommendations of the SORP. At the same time the Accounting Standards Committee has produced a detailed "Companion Guide" intended to assist the small charity implementing the recommendations of the SORP.

The Charity Commissioners recommend that trustees of charities obtain a copy of the SORP and the Companion Guide, copies of which can if wished be obtained from the Publications Department of the Institute of Chartered Accountants in England and Wales, 399 Silbury Boulevard, Witan Gate East, Central Milton Keynes, MK9 2HL.

The price for these is respectively £2.50 and £3.00 but charities may obtain them by post at a specially reduced price of £1 each provided they show their charity registered number or other indications of their charitable status.

The Charity Commissioners consider that the following résumé of the SORP, setting out its principal recommendations will be of assistance to those concerned with the financial administration of charities. Some familiarity with financial terminology and practice is assumed.

Overall recommendation

The overall recommendation is for all charities to prepare annually a report and accounts which together fairly reflect the activities, objectives and achievements of the charity and of its financial position at the end of the accounting period. Although the SORP's recommendations are not mandatory, charities are encouraged to follow them and to state in their annual accounts that they have done so. If charities are unable or unwilling to follow the recommendations in respect of a significant matter, they should disclose such a departure from the recommendations and the reason for it. In such instances the Charity Commissioners recommend that a charity seek appropriate professional advice.

The annual report

The annual report should comprise three elements —

- (a) Legal and administrative details
- (b) A trustees' report
- (c) The accounts and, if the accounts have been audited, the auditors' report. The Charity Commissioners recommend that the accounts of all but the smallest charities should be audited.

The legal and administrative details to be disclosed will usually consist of —

- (a) An indication of the nature of the governing instrument including the charity registration number and of other affiliations.
- (b) The names of the trustees and of the members of the principal committees.
- (c) The principal or registered address.
- (d) Names and addresses of major organisations with whom the charity works.
- (e) Details of any restriction in the way in which the charity may operate.

The trustees' report

The trustees' report is the main narrative section of the annual report. It should contain an explanation of the objectives of the charity and the way it is organised. It should report on the charity's progress and achievements in such a way so as to demonstrate the charity's effectiveness and should contain a review of the charity's transactions and financial position in relation to its future plans and commitments to assist in the interpretation of the annual accounts. It is in this part of the annual report that charity will usually deal with those matters that do not readily lend themselves to financial quantification, for example details of voluntary help, donations in kind and other intangible income.

The annual accounts

The accounts should comprise (1) an income and expenditure account, (2) a balance sheet, (3) normally a statement of source and application of funds, (4) an explanation of the accounting policies used, (5) details in relation to the charity's separately accountable funds and (6) notes in elaboration of the financial information.

Charities will generally hold funds which are restricted and unrestricted funds. Restricted funds (which include permanent endowment funds the capital of which may generally not be spent) are funds subject to restriction imposed by the donor. Unrestricted funds are funds which may be used at the charity's discretion although some of these may have been designated by the charity for specific purposes. It is important that the nature and purpose of each major fund is disclosed, the movements summarised and the assets and liabilities appropriate to each fund disclosed.

With limited exceptions all income of the year including, for example, legacies capable of financial measurement should be dealt with in the income and expenditure account. The exceptions are increases in permanent endowments (which should be dealt with through reserves), profits and losses on investments (which may be dealt with in a separate statement), and grants for the purchase of fixed assets. Income should be included in the accounts as soon as it is received except where it is subject to such onerous restrictions that it is impossible to use the income in the way requested or consists of the receipt of assets whose value cannot be readily determined.

With the exception of expenditure on fixed assets (which, with limited exceptions should be capitalised), all expenditure incurred should also be disclosed in the income and expenditure account which should show separately expenditure relating directly to charitable activities, fund raising expenses, administration expenses and publicity expenses. The SORP does not consider it practicable to produce precise definitions of these expense categories applicable to all charities. Accordingly charities should develop their own principles for fair cost allocation and ensure that they are properly explained and applied consistently.

The purpose of the statement of source and application of funds is to show movements of cash through the charity and would not be needed for small charities who performed their accounting on cash basis.

The assets and liabilities of the charity should be properly analysed in the accounts and depreciation applied to fixed assets.

The accounts should disclose details of the charity's future commitments which should only be recognised in the income and expenditure account when due to be paid.

Where a charity is connected with another through the similarity of its trustees, administration or objectives, the accounts should disclose the fact and give details of the principal transactions between them. Where charities carry out activities through a subsidiary company, the accounts of the subsidiary company should be consolidated with those of the charity except where the subsidiary's activities are fundamentally different from those of the charity. In such a case a summary of the transactions, assets and liabilities of the subsidiary should be included in the notes to the accounts of the charity.

In view of the importance of charities operating to scrupulously high standards, the notes to the accounts should give particulars of contracts or other material arrangements between the trustees or persons (including companies) connected with them with the charity and of the remuneration or expenses reimbursed. If no remuneration is paid or expenses reimbursed, this should be stated.

Conclusion

The annual report and accounts of a charity are those of a public trust and should therefore be prepared so as to respond simply and clearly to the questions that the public may reasonably expect answers to. Copies of the annual accounts should be

filed with the Commission and be available free or at reasonable charge to those who request them.

Appendix C

(Paragraph 7)

LEGISLATION AFFECTING CHARITIES

- (a) Reverter of Sites Act 1987** This Act amends the law where land has been conveyed to trustees subject to a statutory right of reverter under the School Sites Acts, the Literary and Scientific Institutions Act 1854 or the Places of Worship Sites Act 1873 and the land ceases, or has ceased for a specified period, to be used for particular purposes. By virtue of the Act the legal estate now no longer automatically reverts to the reversioner when the reverter provisions take effect but instead the trustees will hold the land on a non-charitable statutory trust for sale for the benefit of the reversioner. Under the trust for sale the trustees are able to manage the land and to sell it without the Commissioners' consent as the trusts are not charitable.

The Act enables the Commissioners, on the application of the trustees of the property subject to the statutory trust for sale, to establish a scheme which extinguishes the rights of the reversioner and provides new charitable trusts for the property. A scheme may be made even if the property was not previously held on charitable trusts.

The charitable purposes specified in the scheme must be as similar in character as the Commissioners think is practicable in all the circumstances to the purposes for which the land was previously held. But the Commissioners may give greater weight to the persons or locality benefited by those purposes than to the nature of the benefit. The scheme must provide that any person who would have been a beneficiary under the trust for sale, who has not consented to the scheme and who notifies a claim to the trustees within five years of the making of the scheme shall be paid an amount equal to the value of his rights at the time of their extinguishment. The Act contains provisions concerning the steps to be taken by trustees to trace the reversioners before applying for a scheme, for the giving of public notice by the Commissioners before and after a scheme is made and for appeals against an order establishing a scheme.

The Act also amends section 2(3) of the Education Act 1973, which concerns voluntary schools with trusts for denominational religious education, and empowers the Secretary of State for Education and Science in certain circumstances to extinguish any rights to which a person is or may become entitled as a beneficiary of a trust arising under the Act provided that he is satisfied that all reasonably practicable steps to trace those persons have been taken. If an application is made to the Secretary of State for an order under the 1973 Act as well as an application to the Commissioners for a scheme under the 1987 Act, the scheme cannot proceed unless the Secretary of State either consents to the application to the Commissioners being considered first or disposes of the application to him without extinguishing the rights of any beneficiary.

- (b) Coal Industry Act 1987** One of the purposes of this Act is to empower any employee organisation in the coal industry whose members or their dependants constitute a substantial proportion of the beneficiaries under a relevant trust and which is not entitled to appoint any of the trustees of that trust, to apply to the Charity Commissioners for a scheme making amendments to the provisions regulating the trust as the Commissioners consider appropriate 'for the purpose of securing fair representation amongst the trustees of those persons who may benefit under the trust'.

An employee organisation is defined in the Act as an organisation with which an agreement has been made under section 46 of the Coal Industry Nationalisation Act 1946 or with which the Charity Commissioners are satisfied that consultations are being or have been held for the purposes of that section. Trusts affected by these provisions are 'any trust for purposes which are exclusively charitable according to the law of England and Wales—

- (a) which is a trust for property wholly or partly representing an application of money from the Miners' Welfare Fund constituted under Section 20 of the Mining Industry Act 1920 or the body known as the Coal Industry Social Welfare Organisation;
- (b) which is a trust expressed to be for the benefit of—
 - (i) persons currently or formerly employed in the coal industry or any class of such persons or their dependants; or
 - (ii) members of the mining community in general or the mining community of a particular area;whether or not any other persons are also beneficiaries; or
- (c) under the terms of which all or a majority of the trustees are appointed by the body mentioned in paragraph (a) above or are appointed by the Corporation and an employee organisation'.

The Act is significant in that it allows the Commissioners to accept an application for a scheme from persons other than the charity trustees.

(c) Landlord and Tenant Act 1987

The Landlord and Tenant Act 1987 which is being brought into effect in stages, is intended to extend the protection afforded to tenants of privately owned blocks of flats. It alters the way in which landlords, including some charities, dispose of their property and may also affect the way in which it is managed.

The Act gives qualifying tenants the collective right of first refusal to buy their landlord's interest if he proposes to dispose of it. This right does not apply, however, where the flats are the functional property of a charity which is being disposed of to another charity for functional purposes, nor where the disposal is by way of gift to another charity, nor where the landlord is a housing trust or a registered housing association.

Where flats which are held as investment property by a charity are to be disposed of, the trustees are required to serve notice on the tenant stating, among other things, the consideration required by the charity. The Act contains provisions for rejection of the landlord's offer, for counter offer by the tenants and for negotiations between the parties.

Either side may withdraw and if agreement is not reached the landlord may, within twelve months, sell the property on the open market at not less than the last figure offered to the tenants during the negotiations. A sale by charity trustees under these new provisions would not need the consent of the Commissioners under section 29 of the Charities Act 1960 because it would be a transaction for which general or special authority had been given by Act of Parliament.

The Act also enables the tenants

- (a) of flats which have been neglected to ask the court to appoint a manager, thus removing the management from the landlord's control;
- (b) in leasehold blocks to apply to the Court for an order to acquire the landlord's interest compulsorily where the landlord has failed to discharge his obligations and the appointment of a manager would not be an adequate remedy.

Neither of these provisions applies to the functional property of charities or where the landlord is a housing trust or a registered housing association.

**(d) The Income Support
(General) Regulations 1987
(SI 1987/1967)**

In Appendix F to our report for 1986 we mentioned that the Social Security Act 1986 introduced two new income-related benefits—Income Support and Family Credit—and made provision for simplifying the existing system of Housing Benefit.

**The Housing Benefit
(General) Regulations 1987
(SI 1987/1971)**

The Income Support (General) Regulations 1987 and The Family Credit (General) Regulations 1987 will have come into force on 11 April 1988 and The Housing Benefit (General) Regulations 1987 will have come fully into force on 4 April 1988.

**The Family Credit
(General) Regulations 1987
(SI 1987/1973)**

The Regulations provide that the maximum amount of any regular payment made by a charity to any person which may be disregarded in assessing the person's entitlement to statutory benefit shall be £5 a week. The figure had previously been £4 a week. The disregard of £5 a week which includes other sources of income as well as regular payments from charities, is the maximum disregard permissible and charity trustees cannot assume that a weekly payment of £5 to each and every beneficiary will be disregarded. If a beneficiary has income from other sources to which the disregard provisions apply the whole or any part of any payment from charitable funds may simply relieve public funds by reducing the recipient's entitlement to statutory benefit. The Department of Health and Social Security suggest that before granting any regular payment trustees should contact the Department's local office to ascertain whether the person concerned is in receipt of any other income all or part of which is already being disregarded.

The Regulations also contain new provisions concerning charitable payments which are not made at regular intervals. Broadly speaking, in the case of income support and housing benefit, the effect of these provisions is to bring the treatment of lump sum payments from charities into line with the treatment of regular payments. The first £250 of any lump sum payments, whether in aggregate or otherwise, made in a specified period of 52 weeks is treated as capital and is disregarded. Any payments in that period in excess of £250 are treated as income of the claimant. Again, trustees are advised to contact the Department of Health and Social Security's local office to ensure that charitable funds will not be applied in relieving public funds.

The Regulations for family credit provide that any lump sum charitable payment shall be treated as capital but shall not affect a person's entitlement to family credit provided that his capital, including any such lump sum payment, does not exceed £3,000. Where a person's capital exceeds £3,000 it is treated as equivalent to a weekly income of £1 for each complete £250 in excess of £3,000. A person ceases to be entitled to benefit if his capital exceeds £6,000. It is accordingly of particular importance for trustees of charities who may make occasional payments to persons eligible for family credit that their eligibility is not affected by the gift.

**(e) The Value Added Tax
(Charities) Order 1987
(SI 1987/437)**

The Value Added Tax (Charities) Order 1987 provides that with effect from 1 April 1987 zero rating extends to:

- the installation or adaptation of any bathroom, washroom or lavatory facilities for the handicapped in charity residential homes;
- drugs and chemicals directly used by a charity in medical research;
- certain vehicles for use by hospices for transporting the terminally ill;
- specialised location and identification equipment for use by charitable rescue and first aid services.

The relief for bathroom, washroom or lavatory facilities encompasses an existing extra-statutory concession for individual facilities in a charity residential home for the handicapped. The Order also gives statutory effect to an existing extra-statutory concession for the export of goods to a charity established for the relief of distress.

(f) Payroll giving

Since 6 April 1987 employees have been able, for the first time, to make tax-free donations of up to £120 a year from their pay to charities of their choice following the introduction of facilities for payroll deduction schemes which we mentioned briefly in Appendix F to our report for 1986.

Employers who wish to set up a scheme for their employees must enter into a contract with an approved agency. Employees wishing to participate in a scheme then authorise their employer to deduct the donations from their pay and nominate the charities which they wish to benefit. The donations are deducted from pay before the PAYE tax due is calculated so that for every £1 donated by an employee he effectively pays only £0.73 at the current* standard rate of income tax. The employer passes the donations to the agency which acts as a clearing house and distributes the donations to the individual charities nominated by the employee.

Every agency must itself be a charity and has to satisfy the Inland Revenue that it can meet all the requirements laid down by The Charities Donations (Approved Schemes) Regulations 1986. A list of approved agencies is available from the Inland Revenue, Charities Division, 1st Floor, St John's House, Merton Road, Bootle, Merseyside L69 9BB.

It is too soon to estimate how effective payroll giving schemes will be in providing a new source of additional funds for charities but potentially they offer all charities dependent upon funding from outside sources the opportunity to expand their activities.

*6 April 1987 – 5 April 1988

Appendix D

(Paragraph 7)

LEGAL DECISIONS AFFECTING CHARITIES

(a) Attorney General v Wright [1988] 1 WLR 164

The Attorney General had commenced proceedings against the trustees of an educational charity seeking inter alia an injunction against Paul Wright a trustee of the charity and headmaster of the school administered by the charity restraining him until trial or further order from disposing of or otherwise dealing with any assets he might have, including

- (a) various bank balances in his name;
- (b) properties in Sussex;
- (c) assets belonging or partly belonging to the charity;

and from removing any such assets from within to outside the court's jurisdiction.

A Receiver and Manager of the property and the affairs of the charity had already been appointed by the Court and the parties had agreed on the terms of the relief to be granted pending a speedy trial. The outstanding issue before the Court was whether it should be a condition of granting the injunction that the Attorney General should give or procure the giving of a cross undertaking in damages.

Mr Justice Hoffmann considered the case of *Hoffmann-La Roche & Co Attorney General v Secretary of State for Trade and Industry* [1975] AC 295 where the House of Lords had decided that, since the Crown Proceedings Act 1947, the former rule or practice whereby the Crown was not required to give an undertaking in damages as a condition of being granted an interim injunction was no longer justified; that in a case where the Crown sought by the injunction to enforce what was on the face of it the law of the land, as opposed to its proprietary rights, the person against whom it sought the injunction was required to show very good reason why the Crown should be required to give the undertaking as a condition of being granted the injunction, and that in determining whether there was such good reason all the circumstances were to be taken into account. Mr Justice Hoffmann said that the exercise by the Attorney General of the Crown's power to act as protector of charity had much in

common with law enforcement proceedings. The Crown was not asserting any proprietary or contractual claim of its own. It was therefore not a case in which cross undertakings would be demanded as a matter of course. On the other hand in the present case the Crown was seeking to recover property alleged to belong or to be owned by a charity. On behalf of the charity, it asserted proprietary rights. Furthermore it was not a case in which there could be any presumption that the defendant had acted unlawfully. There remained serious factual issues to be tried. If the principle of not inhibiting law enforcement tended against requiring a cross undertaking which might put public general funds at risk, there seemed to him to be less reason why the funds of the charity itself should not be used to compensate someone who may have been unjustly damnified by an attempt to protect the charity's interests.

Mr Justice Hoffmann held that it would be undesirable for him to formulate any general kind of rule even qualified by exceptions and that there was no dispute that the Court had a wide discretion in the matter. In the particular circumstances of the case he thought it right to protect the interests of the defendant by a cross undertaking limited to the funds of the charity. There was a difficulty about requiring such an undertaking from the Attorney General since it was by no means clear that he would have the right *ex-officio* to resort to the charity funds for reimbursement of payments made in consequence of a cross undertaking. However a Receiver and Manager had been appointed and therefore he would make the grant of an injunction to the Attorney General conditional on the giving of a cross undertaking by the Receiver, but limited to such amount, if any, as the Receiver was entitled and able to recover by way of indemnity from the funds of the charity.

**(b) Steel v Wellcome
Custodian Trustees Limited
[1988] 1 WLR 167**

This case represents a development in a line of cases concerned with the extension of investment powers relating to charities which began a new direction with the case of the *Trustees of the British Museum* (discussed in paragraphs 79–86 of our report for 1983) and that of the *Special Trustees for University College Hospitals* (discussed at paragraph (d) in Appendix F to our report for 1984). Those two cases enabled us to embark upon many similar schemes for comparable charities. This latest case, concerning the Wellcome Trust, is of less direct application as a precedent in view of the huge size of the fund (which totalled £3,200m) compared with that of other substantial charities, and the extraordinary nexus between the charity and a particular company.

The Wellcome Trust is a well-known charity which supports medical research. It was founded by the will of Sir Henry Solomon Wellcome, who died in 1936 and who endowed the Trust with the entire share capital of his pharmaceutical company, the Wellcome Foundation Limited, with a direction that the shares should never be sold. The Company prospered, but eventually the trustees became concerned about the risks of having nearly all the trust funds invested in one company and in due course we made schemes under which the shares were transferred to a new holding company (Wellcome Plc) still controlled by the trustees. The trustees sold 25% of the shares in Wellcome Plc on the open market, for about £200m, but the value of the shares increased considerably, and at the time of the decision the shares in the Company which were held for the Trust constituted more than 90% of its total assets.

In the unusual circumstances of this case the trustees considered that they needed almost unlimited powers of investment in order to bring about adequate diversification in that part of their investment portfolio which did not consist of shares in Wellcome Plc. Their proposals went far beyond the scope of the powers considered appropriate by the court in the *British Museum* case, but on any basis the scale of the fund was of an entirely different order, and we accordingly authorised the trustees to apply to the court for relief.

The case came before Mr Justice Hoffmann, who put into effect the scheme which had been agreed between the trustees and the Attorney General after careful consideration. The scheme conferred on the trustees very wide powers of investment without, however, specifying the nature of the property which might be acquired as

an investment but laying down certain safeguards prescribing the manner in which the powers might be exercised. The safeguards are concerned mainly with the need to obtain expert investment advice and the arrangements for delegation of investment decisions; the circumstances in which the trustees could become liable for the acts of their delegates; and the requirement to carry out the charity's financial affairs in a manner fitting a charity. There is also a special procedure to be adopted before investment in any newly devised form of investment takes place.

In his judgment Mr Justice Hoffmann recognised that the scheme conferred a wider power than any previously conferred in the exercise of the court's jurisdiction to make schemes for charities. He also took account of the importance attached in the *British Museum* case to the division of the fund in question, confining part to relatively safe investments, but considered that that principle ought not to apply in the present case not only because of the very much greater size of the fund but also because of the special need for flexibility in respect of the 10% available for investment outside Wellcome Plc, and the statistical evidence presented to the court that, in relation to a large diversified fund, gilt-edged stock on past form had been a less safe form of investment than equities and real property, so that a fractional division of the conventional type would not have had the effect of safeguarding the value of the fund.

Mr Justice Hoffmann also mentioned the standard of conduct to be expected of the trustees, bearing in mind that they were – under the terms of the will – paid for their services. He decided that it would not be fair to impose a strict liability on the trustees for the acts of their delegates since delegation was a practical necessity. He considered that the trustees should be obliged, however, to take due care in the choice of their delegates and in fixing or enforcing the terms on which the delegates were engaged.

(c) **Bradshaw v University
College of Wales,
Aberystwyth [1987] 3 All
ER
200**

During her lifetime the founder of a charity had conveyed land to the College to be held on special charitable educational trusts. Subsequently, various disputes arose between the College and the founder which were pursued by her executors after her death. The executors brought an action against the College for an order that it should provide full accounts of its administration of the charitable trust and seeking that, if it should appear that the College had been in breach of trust, then it should be ordered to pay to the trust an appropriate sum and be removed from its trusteeship and replaced by the executors' nominees. The College applied to have the executors' summons struck out on the grounds that it was vexatious and an abuse of the process of the court or, alternatively, that the plaintiffs had no *locus standi* to bring the proceedings.

Mr Justice Hoffmann held that the executors had no interest in the charity, as neither they nor the deceased's estate could in any sense be regarded as beneficiaries under the charitable purposes and the land could not in any circumstances revert to the deceased's estate. He took the view that there was no authority in English law for regarding the founder of a charity as retaining an interest in the charity and, even if the settlor could have had such an interest, he did not consider that that interest could be transmitted to the executors. Accordingly, the executors were not persons "interested in the charity" within section 28 of the Charities Act 1960 and, consequently, the executors had no *locus standi* to bring the action and the summons must be struck out.

(d) **Hipkin v AG
(unreported)**

The trustees of a charity made a *Re Beddoes* application to continue legal proceedings to set aside a lease granted in 1879 on the grounds that it was void because it did not comply with the provisions of certain statutes. Mr Justice Hoffmann, sitting in Chambers, declined to give the trustees leave to continue the proceedings. In reaching his decision he took into account not only weaknesses in the trustees' case but also the facts that it was based on a technical deficiency of longstanding, the defendant was another public body, and the potential costs which would have occurred if the case had come to trial would have been substantial. He did however, indicate that, if the trustees' case had been a very strong one in law, leave would have been given to determine the issue notwithstanding the other factors.

Appendix E

(Paragraph 56)

OFFICIAL CUSTODIAN FOR CHARITIES

- Foreword**
1. The Official Custodian for Charities is a corporation sole created by section 3 of the Charities Act 1960 to act as a trustee for charities in respect of:
 - (i) any charity land or other property vested in him by an Order of the Court or of the Charity Commissioners;
 - (ii) any charity funds, including investments and mortgages, which he agrees may be transferred to him.

The Charity Commissioners designate one of their officers to be the Official Custodian; and he performs his duties in accordance with the directions of the Commissioners.

2. S 3(6) of the Charities Act 1960 provides that the Official Custodian shall keep such books of account and shall prepare such accounts as the Treasury may direct.

3. The Official Custodian has the same powers, duties and liabilities as a custodian trustee appointed under s 4 of the Public Trustee Act 1906, except that he has no power to charge fees for his statutory services. He is expressly precluded from taking any part in the administration of any charity (s 17(1) of the Charities Act 1960). The responsibility for managing charity property held in the name of the Official Custodian remains wholly with the managing trustees.

4. The primary aim of the Official Custodian, in respect of charity funds entrusted to him, is to safeguard those funds. He also provides a number of services to charity trustees whose funds he holds.

5. The Official Custodian buys and sells investments in his name for charities on the instructions of the trustees. Where necessary he uses stockbrokers for this purpose. If trustees wish to use their own investment agents he will allow transactions to be carried out by the agents in his name. In this case, settlement is undertaken between the trustees and their agents and no money passes through the Official Custodian's books. The Official Custodian informs charity trustees whenever an investment held on their behalf becomes due for redemption or eligible for conversion or carries rights which call for a decision; and he acts in accordance with their instructions. The Official Custodian reclaims from the Inland Revenue (in advance) or overseas tax authority all recoverable tax on dividends and interest on investments held by him and remits the gross amounts to charity trustees on or as soon as possible after the due payment dates.

6. The Official Custodian acts as registrar for the Charities Official Investment Fund. Shares in this Fund may be held only in his name.

7. The Official Custodian's Receipts and Payments Account shows receipts and payments of dividends and interest and of cash involved in, or arising from, investment transactions. The major part of the Official Custodian's work in connection with the acquisition, disposal or conversion of investments does not, however, involve the receipt by him or payment to him of cash (Note 4a to the Account). The schedule of acquisitions and disposals of securities (Note 4 to the Account) provides a clearer representation of the investment work carried out by the Official Custodian's office.

R J Crick, Official Custodian for Charities
24 March 1988

OFFICIAL CUSTODIAN FOR CHARITIES

Receipts and Payments Account for the year ended 31 December 1987

	Notes	£,000	£,000	Previous Year £,000
CAPITAL:				
Receipts:				
from trustees for investment (including dividends and interest retained)	2a,c	35,091		27,420
from disposal of investments	2a	42,114		49,558
			77,205	76,978
Deduct Payments:				
Purchase of investments	2a	50,746		46,710
Amounts remitted to trustees	2a	27,689		29,431
			78,435	76,141
	2d		(1,230)	837
DIVIDENDS AND INTEREST:				
From investments held:	2b	90,155		88,236
Deduct amounts remitted to trustees (including amounts retained for investment)	2b,c	88,763		86,840
	2e		1,392	1,396
			162	2,233
OTHER: receipts (payments) net	3		43	(493)
EXCESS: of receipts over payment (payments over receipts)			205	1,740
<i>Statement of balances as at 31 December 1987</i>				
Balance at 1 January 1987			3,029	1,289
Add (deduct) excess of receipts (payments)			205	1,740
Balance at bank at 31 December 1987			3,234	3,029

The Notes numbered 1 to 4 form part of these Accounts.

Notes to the Account

Note 1

In accordance with s.3(6) of the Charities Act, 1960, the Account is drawn up in the form directed by the Treasury.

Note 2—Accounting policies

- a The Official Custodian has no funds of his own and no power to make investment decisions on behalf of charity trustees. In the investment or disinvestment of charity funds, he may act only on, and in accordance with, instructions from the trustees. The proceeds of investment disposals may be reinvested or remitted to the charity trustees. Where capital funds are involved, the Official Custodian will not normally release the funds without taking steps to ensure that the capital is reinvested in his name. Funds expendable for the purposes of the charity may normally be withdrawn at the trustees' discretion.
- b Investments held by the Official Custodian for more than one charity are registered in aggregated holdings in his name. Where an aggregated investment holding is held, the Official Custodian apportions dividends or interest payments received (with the benefit of all recoverable tax) between the charities concerned. Dividend and interest amounts in the Account include recoverable tax.
- c The Official Custodian either remits dividends and interest payments to the charities' bank accounts or retains them for investment in accordance with standing instructions from the trustees. The amount retained for investment in 1987 was £1,041,953.
- d Investment transactions are carried out promptly by the Official Custodian. Unavoidable delays in settlement of investment transactions result in relatively small differences between total receipts and payments over the year.
- e The Official Custodian retains dividend and interest payments under £1 as they are received and remits them once a year or on demand. Dividends and interest due to trustees (£1,392,000) include these accumulated sums, amounts received late in the year, advances of tax from the Inland Revenue and balances held while investment holdings are reconciled with registrars' books.

Note 3—OTHER: Receipts (payments) net

These comprise miscellaneous receipts and payments by way of fractional residues of cash entitlements arising on aggregated holdings and not applicable to individual charities; cash arising from, or paid out of the Departmental Vote as compensation for, errors in cash or investment dealings; miscellaneous commission received not applicable to individual charities, etc.

Note 4—Securities

- a The schedule at 4d. reflects—
- (i) acquisitions and disposals of investments by the Official Custodian acting on the instructions of charity trustees;
 - (ii) purchases and sales carried out in the Official Custodian's name by investment agents acting directly for trustees; and
 - (iii) other transfers of investments to and from the Official Custodian.
- In the case of (ii) and (iii) above, no cash passes through the books of the Official Custodian and the transfers are not reflected in his Receipts and Payments Account.
- b Share and unit holdings, whether with or without a par value, are shown as numbers of shares or units. Holdings of UK stock and foreign debentures are shown as nominal amounts in the relevant currency.
- c Transactions in investments are recorded on the basis of contractual entitlement. Transactions carried out by the Official Custodian are recorded without delay. Where the transaction has been carried out by the trustees' own investment agents, however, there can be a delay before the Official Custodian is notified of the transaction. Transactions occurring in the current year, but notified to the Official Custodian after 31 December, are included in the following year's Account.
- d Total amounts of securities placed to the account of the Official Custodian and transferred therefrom in the year ended 31 December 1987 and the balances standing to the account of the Official Custodian at that date are as follows:

4c. Total amounts of securities placed to the account of the Official Custodian and transferred therefrom in the year ended 31st December 1987 and the balances standing to the account of the Official Custodian at that date.

	Balance on 1 January 1987		Transferred to Official Custodian		Transferred from Official Custodian		Balance on 31 December 1987
<i>British Investments:</i>							
Issued or guaranteed by the Government—							
Dated stocks	£354,574,805		£97,009,734		£77,721,664		£373,862,875
Undated stocks	£22,852,270		£360,186		£1,248,757		£21,963,699
Issued by Local Authorities—							
Dated stocks	£6,325,298		£740,237		£2,865,448		£4,200,087
Undated stocks	£928,973		Nil		£18,487		£910,486
Mortgages and Bonds	£3,924,351		£581,019		£1,092,283		£3,413,087
Temporary Loans	£793,897		£497,000		£546,392		£744,505
Issued by other statutory authorities	£3,759,810		£473,433		£693,449		£3,539,794
Issued by Companies—							
Loan Capital	£46,856,229		£18,459,694		£12,185,108		£53,130,815
Preference Capital	6,949,488 Shares		11,701,537 Shares		4,606,835 Shares		14,044,190 Shares
Ordinary Capital	213,599,236 Shares		108,211,352 Shares		80,251,766 Shares		241,558,822 Shares
Interest-bearing Deposits	£19,817,214		£32,555,779		£26,573,915		£25,799,078
Real Securities	£76,359		£4,000		£727		£79,632
Miscellaneous Shares	21,069 Shares		365,934 Shares		259,060 Shares		127,943 Shares
Currency	£51,873		£375,033		£275,100		£151,806
<i>Annuities</i>	£1,913		Nil		Nil		£1,913
<i>Commonwealth Investments:</i>							
Government, Provincial and other Securities	£2,268,042		£79,933		£440,256		£1,907,719
Foreign Government, Municipal and other Securities	£124,908		Nil		Nil		£124,908
<i>Investments expressed in other Currencies:</i>							
Shares of Commonwealth and foreign undertakings	1,195,189 Shares		1,352,770 Shares		881,063 Shares		1,666,896 Shares
<i>Debentures</i>							
Roubles (Imperial)	93,750 Roubles		Nil		Nil		93,750 Roubles
Irish Punts	59,995 Punts		8,515 Punts		10,000 Punts		58,510 Punts
US Dollars	110,500 Dollars		Nil		7,000 Dollars		103,500 Dollars
<i>Investments not expressed in Currency</i>							
National Savings Certificates	719 Units		Nil		Nil		719 Units
<i>Charitable Investment Funds—</i>							
<i>Charities Official Investment Fund</i>							
	53,533,419 Income Shares		3,590,717 Income Shares		732,086 Income Shares		56,392,050 Income Shares
	2,722,278 Accumulation Shares		114,176 Accumulation Shares		77,961 Accumulation Shares		2,758,493 Accumulation Shares
<i>Other Funds</i>							
	74,228,965 Income Shares		11,195,716 Income Shares		2,778,334 Income Shares		82,646,347 Income Shares
	3,513,086 Accumulation Shares		408,881 Accumulation Shares		292,559 Accumulation Shares		3,629,408 Accumulation Shares
Unit Trusts	96,667,190 Units		35,451,618 Units		25,084,520 Units		107,034,288 Units
Shares of No Par Value	13,433 Shares		2,284 Shares		1,216 Shares		14,501 Shares
Subscription Warrants	465,429 Warrants		423,408 Warrants		207,698 Warrants		681,139 Warrants
Participation Units	452 Units		Nil		Nil		452 Units

Note 4 (continued)

e Local Authority Temporary Loans

The balance at 1st January 1987 exceeds the balance at 31st December 1986 by £39,231. The difference represents manual adjustments made for the purposes of the 1986 Account which were not posted off the Official Custodian's records until 1987.

Ordinary Capital

The balance at 1st January 1987 is 39,225 shares less than the balance at 31st December 1986. The difference represents an incorrect classification of 39,225 Royal Trust Management C.I. Government Securities Trust Units which were re-classified under Unit Trusts in 1987.

Real Securities

The balance at 1st January 1987 exceeds the balance at 31st December 1986 by £35,552. The difference represents transactions not posted to the Official Custodian's records at 31 December 1986.

Unit Trusts

The balance at 1st January 1987 exceeds the balance at 31st December 1986 by 39,225 Units—see Ordinary Capital above.

The Seal of the Official Custodian for Charities was affixed hereto in the presence of

R J Crick
Official Custodian for Charities

24 March 1988

R E Edwards

Authorised under Section 3(4) of the Charities Act 1960. Charity Commission, St Alban's House, 57/60 Haymarket, London SW1Y 4QX.

Certificate and Report of the Comptroller and Auditor General

I certify that I have examined the financial statements on pages 41 to 43 in accordance with s.3(7) of the Charities Act 1960 and the National Audit Office auditing standards.

In my opinion the financial statements properly present the receipts and payments of the Official Custodian for Charities for the year ended 31 December 1987.

I have no observations to make on these financial statements.
NATIONAL AUDIT OFFICE
31 March 1988

JOHN BOURN
Comptroller and Auditor General

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