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# Casework Guidance

**Please note:  throughout this OG series, "the Act" refers to the Trustee Act 2000, not the Charities Act 2011.**

#  A1 Overview of the Act and to whom it applies

## 1. Why the Act came into force and to whom it applies

### 1.1  General background

The statutory powers and duties of trustees have, until now, been largely defined by the Trustee Act 1925 and the Trustee Investments Act 1961. This legislation had not kept pace with the evolving economic and social nature of trusts and, in many cases, no longer gave trustees the powers they needed to administer trusts effectively.

In 1999 The Law Commission and The Scottish Law Commission reported to Parliament about powers and duties of trustees. The report highlighted defects in the existing law governing the way trustees made investments and in what they were allowed to invest. It went on to make recommendations for change. These recommendations form the basis for the Trustee Act 2000 and principally include:

* changes to trustees' powers of investment;
* new powers of delegation;
* new powers for the appointment of agents, nominees and custodians; and
* appropriate safeguards for the operation of the new powers including a duty to take proper advice in relation to investments and a statutory duty of care.

The Act received the Royal Assent on 23 November 2000 and came into force on 1 February 2001.

### 1.2  Charities that already have these powers

Some charities will already have wider powers than those now contained in the Act. These charities may continue to use those constitutional powers rather than looking to the Act. An example of this might be an unincorporated charity, such as a village hall, which has power to appoint nominees to hold property. It is unlikely that such a charity would wish to use the powers of the Act to appoint nominees; so far as is relevant to the present discussion these powers only permit the appointment of a professional nominee who would be expected to be paid for their  services.

### 1.3  How the Act applies to charities

Whilst our interest in the Act is primarily in connection with charities, we should be aware that the legislation provides also for non-charitable trusts such as private trusts, family trusts, pension schemes and other investment funds.

The Act itself is concerned with the actions of trustees and not the organisation they represent. It will not however apply to the trustees of all types of charities.

The Act potentially applies to all charities whose property is held on a trust, except that the provisions relating to investment and land acquisition, to delegation and to the use of nominees and custodians do not apply to common deposit funds, and non-pooling scheme common investment funds. See section 1.4 below. They do, however, apply to pool charities.

The Act does potentially apply to the charity trustees of :

* charitable trusts, including those administered by bodies incorporated under Part 12 of the Charities Act 2011, or its statutory predecessor;
* charitable unincorporated associations; and
* charities governed by charter;
* charities governed by Act of Parliament or other legislation (subject to what is said below about incorporated bodies);
* pool charities.

The powers will be exercised by the charity trustees in all cases.

The Act **does not** apply to the corporate property of charitable companies and other charities incorporated by or under legislation - such property is not held on trust. In some cases it may be difficult to determine whether particular property of such incorporated bodies is held on a trust or is held as corporate property.

**IMPORTANT NOTE**: Legal advice should be taken where this is or may be an issue.

The duties imposed by sections 4 (standard investment criteria including a review duty) and 5 (advice) in relation to investment apply generally to the powers of investment of charities which are affected by Part II of the Act, whether the trustees are exercising the general power of investment under the Act or some other general power of investment or otherwise, and cannot be excluded.

If the powers of delegation, and appointing nominees and custodians, which are conferred by the Act, are actually used rather than separate powers in the governing document, the review duties in section 22 cannot be excluded.

Although the directors of charitable companies will not, in relation to the corporate property of the company, directly acquire the wider powers contained in the Act, their members will be able to change their memoranda and articles of association so as to confer corresponding powers. Our prior consent to changes will be required only where those changes are in effect “regulated alterations” under section 198(2) of the Charities Act 2011.

Regulated alterations are those which require any alteration of:

* the object clause of the company’s memorandum and article of association;
* any provision of its memorandum or articles of association directing the application of property of the company on its dissolution; and
* any provision of its memorandum or article of association where the alteration would provide authorisation for any benefit to be obtained by directors or members of the company or persons connected with them.

There may also be circumstances where a charitable (or other) company itself is the trustee of an unincorporated charity or trust.  In these circumstances the company, as a trustee, becomes subject to the provisions of the Act (except as mentioned above).

### 1.4 Provisions for Schemes under sections 96 and 100 of the Charities Act.

Whilst the Act applies to the trustees of charities whose governing documents are Schemes, not all parts of the Act will apply to Schemes made under sections 96 (other than pooling Schemes) and 100 of the Charities Act 2011 (or under corresponding provisions of the Charities Act 1960). These relate to Common Investment Funds (CIFs) -see OG 49 A1, section 3.2 and Common Deposit Funds (CDFs) - see OG 49 A1, section 6.

The parts of the Act that **do not** apply to the trustees of these charities are:

Part II - Investment;

Part III - Acquisition of Land; and

Part IV - Agents, Nominees and Custodians.

The rest of the Act does apply including the statutory duty of care set out in Part I (which schedule 1 extends to any power of investment).

## 2.  Payments to trustees

### 2.1  Remuneration for professional services

The Act also includes a power for the Secretary of State to make regulations for remuneration of charity trustees.  Such remuneration would extend only to payment for professional services supplied by a trustee.  At present there is no intention to introduce such regulations, and our policy on remuneration remains as set out in our publication CC11 – Trustee Expenses and Payments. Where it is expedient in the interests of the charity - for example where the services might otherwise have to be supplied at greater cost to the charity by an agent who is not a charity trustee - authority should be provided by us, where necessary.

One provision of Part V of the Act will, however, affect charities. Section 28 effectively does away with the common law presumption which had the effect of ensuring that professional trustee charging clauses were always construed narrowly against those seeking to take advantage of them. So, only if such a clause made very explicit provision for payments to extend to charging for services not strictly of a professional nature, could the professional trustee charge for them.  This constructional bias will no longer apply, although, in practice, most professional trustee charging clauses either explicitly allow or explicitly prohibit such charging, so the change will be of limited significance.

In the case of a charity the removal of the bias is subject to the condition in sub-section (3), ie:

* it applies to a trustee of a charitable trust who is not a trust corporation only:
	+ if he is not a sole trustee; and
	+ to the extent that a majority of the other trustees have agreed that it should apply to him.

### 2.2  Payment of administrative expenses

Within the previous statutory provision authority was given for trustees to claim their expenses of administration from the trust fund.  However, this authority was capable of restriction or exclusion by the trust instrument.  Section 31 of the Act gives authority for the trustees to claim expenses, but there is no corresponding provision for those expenses to be restricted or excluded.  The trustees' ability to claim for such expenses, incurred on or from 1 February 2001, therefore becomes a right.

# B1 General power of investment

The general power of investment set out in section 3 of the Trustee Act 2000 (‘the Act’) allows a trustee to invest trust funds in any kind of investment, excluding land, in which they would be allowed to invest if they were the absolute owner of those funds. This is the automatic power that trustees will have where there is no specific provision within the charity's governing document which restricts or excludes the power. The general power of investment applies to a corporate trustee as well as to an individual trustee in these circumstances. Constitutional or statutory limitations on the investment powers of a particular corporate trustee relating to the management of its corporate property do not apply to the management of property it holds on trust. This point is particularly relevant to NHS Trusts, which do have statutory limitations on the way in which they invest their corporate property.

 Although land is excluded from the power in section 3 of the Act, the power to acquire land as an investment is included in section 8 of the Act. Many charities already have a default power to acquire land as an investment under section 6 of the Trusts of Land and Appointment of Trustees Act 1996.

The Commission’s guidance on the investment of charitable funds can be found on our website in the publications:

* CC14 Charities and Investment Matters (CC14); and
* Legal underpinning - Charities and Investment Matters (CC14).

# B2 Power to acquire and dispose of land and insure property

## 1. Basis on which charity land is held

The Trustee Act 2000 confers wide powers to deal with land.  Many of these powers were first introduced by the Trusts of Land and Appointment of Trustees Act 1996 (TLAT). To understand the extent of the powers available, it is necessary to look at TLAT 1996 and TA 2000 together.

### 1.1  "Trust of land"

The Trusts of Land and Appointment of Trustees Act, 1996 (TLAT) which came into force on 1 January 1997, radically altered the statutory basis upon which charity land is acquired, managed and disposed. It substantially repealed s.29 of the Settled Land Act 1925 (“the 1925 Act”) which had provided the statutory framework for the acquisition, management and disposal of charity land generally since 1926.

TLAT applies only to land which is held on trust. It does not apply to land which is part of the corporate property of charitable companies.

Almost all land which is held on charitable, ecclesiastical or public trusts is now subject to a “trust of land”, as the result of TLAT.  This is so, whether the land was held on trust for sale on 31 December 1996, or was deemed then to be settled land by s.29 of the 1925 Act.  Any land which comes to be held on charitable, etc, trusts in the future will also be held as a “trust of land”. (The exception, is land to which the Universities and College Estates Act 1925 applies, but we are unlikely to be concerned with this.)

This therefore means that nearly all charity land (except land which is the corporate property of charitable companies) is subject to a "trust of land" and that TLAT 1996, TA 2000 and other statutes which define the powers and duties in relation to a trust of land are relevant to most charities other than companies.

### 1.2  Abolition of the doctrine of conversion

Except in relation to the estates of people who died before 1 January 1997, TLAT abolishes the doctrine of conversion under which land held on trust for sale was regarded as personal property rather than real property (s.3).

### 1.3  Statutory rights of beneficiaries

Charitable trusts are not regarded as having "beneficiaries" for present purposes, and the occupation and consultation rights which TLAT gives to “beneficiaries” of a trust of land are not relevant to charities.

Some charities may seem to have an identifiable beneficiary - funds for augmenting the stipend of the vicar of X for example.  We may, therefore, expect to receive questions from the public on this point.

 If the view that a charity cannot have a “beneficiary” for present purposes is challenged, you should obtain legal advice.

The trust which arises under s.1 of the Reverter of Sites Act 1987 - see OG 27 -(which becomes a trust of land under TLAT) will usually, of course, have a non-charitable beneficiary.  However TLAT expressly excludes such a beneficiary from the consultation and occupation rights which it gives to other beneficiaries of non-charitable trusts of land (TLAT Schedule 2 paragraph 6).

### 1.4  Equity sharing

The provisions of TLAT affect the trusts created by equity sharing agreements between charities and individuals:

* from 1 January 1997 the trusts created by such arrangements are trusts of land not trusts for sale; and
* the non-charitable beneficiaries of such trusts have certain consultation and occupation rights in relation to the land held in the trust.

For further information on equity sharing arrangements, see OG 547.

## 2.  Statutory powers to acquire land

### 2.1  The powers

Section 8 (1) of the Trustee Act 2000 gives trustees the power to acquire freehold or leasehold land in the United Kingdom:

* as an investment;
* for occupation by beneficiaries; or
* for any other reason.

As indicated in section 1.3, charities do not have “beneficiaries” for present purposes. Charities can acquire land 'for any other reason'  so long as this will be in the interests of the charity.

This power is generally available to charity trustees, unless it has been restricted or excluded by express constitutional provision – section 9(b) of the Act. Subject to this, all trustees of charitable trusts now have a statutory power to buy land for any of the purposes listed above.

The statutory land acquisition powers are not available to charitable companies, except in relation to funds which are held by the company on a trust. However, charitable companies are usually authorised by their governing documents to acquire land.

### 2.2  Statutory duty of care

It is important to remember that the exercise of the statutory powers to acquire land is subject to the duty of care set out in section 1 of the Act and explained in detail in OG 86 B6. Where land is being acquired as an investment, the duties in section 4 (standard investment criteria and review duty) and 5 (advice) apply, because these apply to any power of investment. The statutory duty of care can be modified by express provision in the governing document in relation to the use of the power.

### 2.3  What may be acquired

The powers are wide enough to authorise the acquisition of any estate, interest or charge in, or over, land in the United Kingdom, provided that – if the land is in England and Wales - it is within the meaning of “legal estate” as explained in s.1 of the Law of Property Act 1925. There is a corresponding limitation in relation to land in Scotland or Northern Ireland.

freehold and leasehold land;

* easements;
* rentcharges; and
* charges over land by way of security for money lent by the charity,

are all capable of being within the scope of the power.

Interests which either:

* do not last indefinitely (eg, they are not freehold); or
* are not for a stated fixed period of time (eg, as would be the case in a lease),

cannot be legal estates.

Legal estates must normally be transferred or created formally by deed. If you are asked for a view as to whether the new power will authorise the acquisition of a particular interest in land, and you are doubtful whether that interest will be held as a legal estate, you should obtain legal advice before replying.

### 2.4  What may not be acquired

The powers do not authorise the acquisition of interests in land which are not legal estates. But this may be authorised under the general management power if the acquisition is connected with the management of land which is already held in trust. For example, the acquisition of an option to purchase neighbouring property may be authorised by the general power in this way.

## 3.  Statutory powers to manage / dispose of land

### 3.1  Powers of an absolute owner

Having acquired land a trustee must be able to deal with it effectively. All trustees of land have the powers, for the purpose of exercising trustee functions, of an absolute owner in relation to the land. Powers of an absolute owner include power to borrow money and charge land by way of security for any borrowing, so long as the borrowing is connected with the function of acquiring/managing land. The powers also include power to grants rights over the land, own it jointly with other people and to dispose of it.

The statutory land management and disposal powers apply generally to any trust of land and can, in the case of charities, only be limited or excluded by primary legislation. The object of this limitation on the right of charity founders to exclude or restrict powers of land management and disposal is to prevent them from depriving their trustees of proper powers of management, which is considered to be contrary to public policy.  The wide powers of management can, however, be made exercisable subject to consents (s.8(2) TLAT).

These wide management powers replace the prescriptive statutory powers which were available to charity trustees of land under s.29 of the 1925 Act, or to trustees for sale, as the case may be.  For example, trustees now have a general power to lease the land which they own. The limitations in the leasing powers under the 1925 Act relating to the length of the term of permitted leases, etc (s.41-48 of the 1925 Act) no longer apply.

The new powers may be exercised only in furtherance of the objects of the charity.  For example, if, under the old law, we would have had to make a Scheme to authorise a particular land disposal because that land had been given on trust for use for a specified charitable object, we still have to make a Scheme to authorise such a disposal.

The statutory powers of land management and disposal may, as indicated above, be restricted or excluded by primary legislation.  This means, for example, that the exercise of the new powers of land disposal will remain subject to the controls in Part 7 of the 2011 Act where they apply.

Subject to these points, the new powers of management extend to funds held with the trust of land for the repair, maintenance, etc, of that land.

### 3.2  Statutory duty of care

It is important to remember that the exercise of the land management and disposal powers is subject to the statutory duty of care set out in section 1 of the Act and explained in detail in OG 86 B6.

The powers of management and disposal in the Act and in the TLAT are the same. Only for the following purpose is the distinction relevant.

Where the TLAT powers of management and disposal are used, the statutory duty of care in the Trustee Act 2000 will apply and cannot be excluded.Where Trustee Act 2000 powers of land management and disposal are used, the statutory duty of care will apply, but can be excluded.

The TLAT power will be the only one available:

* where an attempt has been made by the founder of the charity to restrict or exclude the statutory powers;
* where the land was acquired before 1st February 2001.

### 3.3  Borrowing

The wide powers of management will effectively give trustees a power to:

* borrow for any purpose which relates to the repair, maintenance, improvement etc, of the buildings and land which they own, or to the purchase of land; and
* charge the land as security for that borrowing (subject to s.124 of the 2011 Act).

This replaces the limited power in s.71 of the 1925 Act and is applicable both to:

* land already in the ownership of the charity trustees; and
* land which is being bought with the assistance of a loan.

### 3.4  Doubts about borrowing powers

Experience suggests that there will be cases where banks and other lenders will be unconvinced that the new statutory powers do in fact authorise borrowing and the giving of security because of the absence of any explicit reference to it.  However, an “absolute owner” undoubtedly has power to borrow money on the security of his property.  We should refer doubters to paragraph 10.8 of the Law Commission Report on Transfer of Land and Trusts of Land (No 181), published in June 1989. This sets out the policy of the new land management powers.

For more information on this subject, see OG 22 B1, section 8.

If lenders persist in the view that TLAT does not give power to borrow and charge property, you should obtain legal advice.

### 3.5  Charging permanent endowment land

The new powers are wide enough to permit the charging of permanent endowment land to secure the borrowing of funds not only for a “capital” purpose such as improvement but also for an “income” purpose, such as repair and maintenance of the trust property. The requirements of s.124 of the 2011 Act must be complied with in connection with the charging of the property, but it is not necessary for us to make a section 105 Order. The fact that permanent endowment land has been used to secure a borrowing for an income purpose does not alter the fact that the repayment of the borrowing should be funded from income and not from permanent endowment.

### 3.6  Unsecured loans

The power to borrow for any purpose relating to the repair, maintenance, improvement etc of the buildings and land which the charity trustees own also arises in the case of unsecured loans. Our view is that this is within the land management powers.

This view is not accepted by all the corporate lenders which charity trustees may approach for finance. This difference arises from differing interpretation of the law, rather than questioning the financial viability of lending to a charity. NatWest Bank, for example, has indicated that it does not accept that the statutory powers give trustees  a power to borrow on an unsecured basis.  It also takes this view if the loan is secured, using property which does not belong to the charity, such as, for example, the trustees’ personal property. However, it may be prepared to accept in the circumstances of the case that the charity trustees have an implied power to borrow money. See also OG 22 B1 section 5.

In fact, the lender may have legitimate concerns where any proposed loan is not secured on land belonging to the charity. These concerns arise from the supposition that trustees may not have an express power to borrow – whether with or without security – notwithstanding the  new statutory provisions. See OG 22 B1 section 5.  If trustees do not have this power, then they may not be entitled to indemnify themselves out of trust property for the repayment of the loan and the payment of interest.  In that case, the lender would also not have the right, which it normally would have if the trustees were borrowing within their powers, to recover the repayment of the loan and the payment of interest out of the trust property. OG 22 B10 explains in more detail the circumstances in which trustees can properly repay unsecured loans from their charity’s assets.  NatWest Bank have indicated that where they are not prepared to rely on the existence of an implied power to borrow, in order to protect their interests, they will ensure that the charity trustees provide a reasoned argument to us, justifying why we should be prepared to grant an Order to authorise the borrowing. We should be prepared to consider such an approach whatever the identity of the lender.

### 3.7  Circumstances in which we may make an Order

 We are of course reluctant to make an Order authorising a borrowing unnecessarily. If there is any doubt as to whether it is appropriate to grant an Order, you should obtain legal advice.

We should not, however, allow a charity’s interests to be harmed by any difference of view between the charity’s lender and ourselves over the need for an Order. Where the circumstances of the case indicate that the matter is genuinely urgent, we should be prepared to make an Order for the avoidance of doubt if agreement cannot quickly be reached.  If there is persistent disagreement on the issue with a particular lender, caseworkers should consider whether the disagreement should subsequently be raised between the Commission and the lender at a policy level.

### 3.8  Purchaser protection

The purchaser protection regime in TLAT (s.16) does not apply to charity land transactions. The existing regime will continue to apply, that is, ss.122 and 125 of the Charities Act. Where those sections do not apply, the relevant parts of s.29 of the 1925 Act are preserved. (Schedule 1 paragraph 4(1) and (2) of TLAT).

### 3.9  Transfer of property held by nominee

The power in s.29(5) of the 1925 Act for charity trustees to act in the name, and on behalf of, a nominee when disposing of land (including creating leases) is preserved (Schedule 1 paragraph 4(3) of TLAT).

## 4.  Power to insure property

Section 34 of the Act creates a new power to insure property (by amending the existing power in section 19 of the Trustee Act 1925).

The original power in the Trustee Act 1925 was limited to cover against loss or damage by fire and to three-fourths of the full value of the property. TLAT removed the fire limitation, and included a power to insure land and buildings within the general powers of management conferred by the 1996 Act (and as a consequence limited the continuing scope of section 19 to assets other than land and buildings). The new power effectively replaces all these provisions with a clear general default statutory power for all trustees to insure trust property as if they are absolute owners.

The new provisions confer a power to insure but do not impose a duty to do so. However, the trusts of some charities do impose a duty to insure trust property; such a duty is not, of course, overridden by the statutory power. The statutory power is to insure trust property against the risks of damage or loss; it does not authorise the taking out of other forms of insurance eg trustee indemnity insurance.

Additionally, trustees will (subject to any indication to the contrary in the trust instrument) be subject to the statutory duty of care when exercising a power to insure (whether under the Act or when exercising a power in the governing document).This duty will apply to the selection of an insurer and the terms on which the insurance cover is taken out.The statutory duty of care is considered in more detail in OG 86 B6.

# B3 Power to employ agents and delegate functions to them

## 1.  Power to employ agents and functions that may be delegated

### 1.1  The law

Section 11 of the Act sets out the powers that trustees have, in addition to any powers expressly stated within a governing document or otherwise available to trustees, to delegate certain functions to agents.

The functions that may be delegated for charitable trusts are set out in section 11(3). The delegable functions are:

* those which consist of carrying out a decision that the trustees have taken (this reflects the default powers of delegation in section 23 of the Trustee Act 1925 which is repealed);
* those which relate to the investment of assets subject to the trust (including, in the case of land acquired as an investment, managing the land and creating or disposing of an interest in the land);
* those which relate to the raising of funds for the trust otherwise than by means of profits of trade which is an integral part of carrying out the trust's charitable purpose.  In this case "trade" is defined in section 11(4) of the Act as primary purpose trading and trading where the beneficiaries carry out the work of the charity in order to fulfil its charitable purposes; and
* any other function prescribed by an order made by the Secretary of State.

Section 11(3)(d) of the Act allows for the Secretary of State to add to the list of delegable functions. There are no plans at the present time to add to this list.

The power to appoint an agent can be restricted or excluded in the same way as can the general power of investment.

### 1.2  The meaning of delegation

The use of the term "delegate" in this context means someone who is discharging a prescribed function (as bulleted above) on behalf of the trustees as a whole.  In this case the delegate is the agent who is appointed to carry out a specific function. The agent should not be appointed or retained without a specific purpose to undertake. Providing that the power to delegate those functions (and review the delegation) is properly exercised by the trustees in compliance with the duty of care, then the liability for proper discharge of those functions rests with the agent.

### 1.3  Existing discretionary investment management agreements

The most immediate effect of this legislation is that case workers will no longer need to authorise trustees to enter into discretionary investment management agreements, under s 105 of the Charities Act 2011. By these agreements, trustees employ a person or firm to buy and sell investments on behalf of the charity at their discretion, in accordance with a general policy laid down by the trustees.

As most charity trustees will now have a default power to enter into such agreements, there will usually no longer be any need for us to authorise entry into such agreements. However, in entering such agreements the trustees must discharge the statutory duty of care and other provisions stipulated within the Act, as outlined in sections 2, 3 and 4 below.

The effect on those charities who have already been granted authority by Order to enter into a discretionary management agreement will be negligible. Where they wish to continue with the existing agreement they will do so under the terms of the Order. In practice they may, in any future agreement, prefer to rely on the powers in the Act.

Some charities may have entered into discretionary management agreements by virtue of powers contained in their governing documents.  Again, trustees may in any future agreement be able to, and prefer to, rely on the new statutory power, though it may be the case that the explicit constitutional provisions restricts or excludes the statutory power.

### 1.4  Arrangements with fund-raisers

The statutory power to appoint an agent to undertake fund-raising activities has no effect on the provisions for regulating fund-raisers, and their relationship with the charity trustees, contained in Part II of the Charities Act 1992. Guidance on regulation of fund-raising activities can be found in OG 26.

## 2.  Persons who may act as agents

Section 11(1) of the Act provides (subject to the provisions of sections 12 to 14 of the Act) that the trustees may authorise any person to exercise any of their delegable functions as their agent.  A "person" in this context can include an organisation with a legal personality such as a company incorporated under the Companies Acts.

Section 12 considers in more detail those persons who may or may not act as an agent. The trustees may:

* authorise one or more of their number (other than a sole trustee) to act as an agent. However, where two or more people, including trustees, are appointed as agents for the same function they must exercise the function jointly; and
* authorise someone who is also appointed to act as their nominee or custodian to act as an agent.

## 3.  Appointing an agent

### 3.1  Terms under which an agent is appointed

The trustees have the power to decide upon the level of remuneration to be paid to the appointed agent. That power is contained in section 14 of the Act.

However, it is important to remember that whilst a trustee may be appointed as an agent they cannot be paid for this work unless there is an explicit authority to do so, either in the governing document or from us.

Unless it is reasonably necessary to do so, the trustees may not authorise a person to act as their agent on terms which:

* permit the agent to appoint a substitute;
* restrict the liability of the agent or his substitute to the trustees or any beneficiary; or
* permit the agent to act in circumstances capable of giving rise to a conflict of interest.

In practice, trustees will probably find that most investment managers will decline to work for the charity unless the trustees agree to some or all of these terms. If the trustees have to agree to these terms in order to secure the services of their preferred investment manager, we will accept that this test of reasonable necessity in relation to the appointment will have been met. This is provided that the trustees have a good reason for selecting that particular investment manager, rather than some other investment manager, who would not have insisted on the inclusion of any of these terms in his agreement with the trustees.

The statutory duty of care does not apply to agents, only to trustees (although the agent will, of course, be subject to a contractual duty of care) . However, someone who carries out a function as the trustees' appointed agent is subject to the same restrictions as would apply to trustees who were carrying out the function themselves.  For example, a person authorised as an agent under section 11 of the Act to exercise a general power of investment must act in accordance with section 4 in respect of that power. Section 4 lays down the standard investment criteria which include the requirement to review the investments, consider their suitability and consider diversification.

Where the agent is a person from whom the trustees could properly take advice if they were exercising the power themselves, that agent need not seek further advice from another person. An example of this would be where the agent exercises the general power of investment, which is subject to a requirement to take advice. The agent might be a professional investment manager with a level of expertise and ability in finance matters, and a person whom the trustees would have consulted if they had been exercising the investment power themselves. That person would have the ability to exercise the investment power without the need to seek further advice from another expert.

### 3.2  Responsibility for selection of agents

In our view because responsibility for the selection of an agent is  personal to the trustees, the selection of an agent is not itself a delegable function within section 11(3).  Any terms of an agreement with a discretionary investment manager which purports to give the manager the power to select  a successor is not within the scope of the new statutory power to delegate.

## 4.  Special restrictions for agents managing assets

Where delegable functions are also "asset management functions" additional controls apply to their delegation under section 11. The asset management functions of trustees are those relating to:

* the investment of assets subject to the trusts;
* the acquisition of property which is to be subject to the trust; and
* managing property which is subject to the trust and disposing of, or creating and disposing of an interest in, such property.

**There are special restrictions at section 15 of the Act which determine how an agent may operate when dealing with asset management.**

The restrictions stipulate that trustees cannot authorise a person to exercise any of the asset management functions as their agent except by an agreement which is in, or evidenced in, writing.  By this we mean that the agreement itself need not be a written one but there is some written evidence of an agreement being made.  That might be a letter confirming an agreement by telephone to carry out certain functions on certain terms and conditions.  In addition, trustees cannot authorise a person to act as their agent to carry out asset management functions unless:

* they have prepared a statement ("a policy statement") that gives guidance as to how the functions should be carried out; and
* the agreement under which the agent is to act includes a clause to the effect that they, ie the agent, will comply with:
* the policy statement; or
* any revision  or any replacement of the policy statement under section 22.

When preparing the policy statement the trustees must formulate any guidance in a way that ensures that the agent will carry out his functions in the best interests of the charity.  The policy statement must be in writing or evidenced in writing.

The requirement to monitor the actions of agents is considered in OG 86 B5, and specific guidance on the policy statement comprises OG 86 C2.

# B4 Power to employee nominees and custodians

## 1.  What are nominees and custodians?

### 1.1 Nominees

"Nominee" is an expression which is normally used to describe someone who holds title to investments as a "bare trustee", on a valid trust for one or more other persons. Thus, a person may be registered as the owner of certain shares in a company, but may in fact hold them as nominee for a charitable trust.  Here, the trust has a proprietary interest in the property held by the nominee on its behalf. But the expression "nominee" is also sometimes used to describe someone who has no more than a contractual liability to account for the value of the investments which they hold on behalf of the client trust.

A "bare trustee" means someone who is the legal owner of the trust property, but has no personal power to manage that property otherwise than in accordance with the lawful directions of the third party on whose behalf it holds the property, eg, the trustees of the charity. The charity trustees remain responsible for the management of the property.

### 1.2 Property to be held on effective trust by nominee

The Commission's statutory guidance under section 19(4) of the Trustee Act 2000 contemplates that, save in exceptional circumstances, charity trustees should only appoint a nominee in circumstances where the nominee will hold the title to investments on a bare trust for the charity. The charity does not have to be the exclusive beneficiary of the trust; it can be a joint beneficiary of the trust with other clients of the nominee. But there should normally be an effective trust. Charities should not normally appoint a nominee on the basis that they have no proprietary interest in the investments which the nominee holds on their behalf. They would then be left with purely contractual rights against the nominee, which would put them at a disadvantage in the event of the nominee's insolvency.

If the nominee does hold investments on a valid trust for the charity, those investments are not available to the creditors of the nominee if the nominee becomes insolvent - the charity's interests are therefore more secure. Our normal policy is that a nominee should hold property on a valid trust for the charity.

There are some doubts about the validity of a trust declared over a specified number of shares which are part of a larger holding of shares held by the nominee (the remaining part only being intended to be in the beneficial ownership of the nominee). Trustees should consider the need to take legal advice before authorising a nominee to hold investments in which they are interested as part of a larger holding in which the nominee has a beneficial interest.  Further information can be found in CC42.

### 1.3  Custodians

A custodian is defined as a person who undertakes the safe custody of some or all of the assets of the trust or of any documents or records concerning the assets. Appointment of custodians in this context should not be confused with appointment of custodian trustees under the terms of the Public Trustee Act 1906, which is dealt with separately in OG 39 even though "custodian trustee" has the same meaning in both the Public Trustee Act 1906 and in the Trustee Act 2000.

## 2.  Why are they needed?

### 2.1  Benefits of using nominees and custodians

Nominees and custodians can be used in the administration of a charitable trust for the following purposes:

* to eliminate the need to transfer the title of trust property when changes to the trustee body occur, or the subsequent problems that arise where such changes occur but the transfer of title to property does not take place. (This problem will not arise where the trustees are already incorporated, or choose to be incorporated, under the Charitable Trustee Incorporation Act (now repealed) or under section 251 of the Charities Act 2011);
* to facilitate the transfer of trust property into, and out of, the trust. For example, the processes of buying and selling shares may be facilitated if the investments are held in the name of a nominee; and
* to reduce the risk of trust documents showing title to property from being lost.

The Trustee Act facilitates the use of nominees and custodians but with safeguards on their selection and use.

### 2.2  Disadvantages of using a nominee

Safeguards are built into the Act and are also contained in our own guidance - CC42, provided under section 19(4) of the Act, to ensure that the appointment of a nominee will not create any material lessening of the charity's security in relation to its investments.

However, charities should bear in mind that if they use a nominee they may, in practice, lose some of the benefits which they would have enjoyed had the charity or its trustees been registered as members of the company in which shares are held. Examples of this might be:

* the right to receive reports and accounts from the company;
* the ability to vote at company AGMs or other general meetings; and
* the loss of membership benefits because the nominee is the actual member of the company and, on grounds of cost, may not be willing to take the steps necessary to enable the charity trustees to enjoy them. (This may well be an important factor where charities need to consider their ethical stance on issues of public controversy.)

In some instances nominees are willing to pass on company reports and accounts and vote shares as the charity trustees, as beneficial owners of the shares, wish. However, it is likely that the administrative costs of doing this will be passed on to the charity. Charity trustees will therefore need to judge whether or not there is likely to be a problem for their organisation.

## 3.  Powers to appoint nominees and custodians

### 3.1  Use of existing powers

The law requires all trust property to be held collectively by the trustees, in the absence of explicit authority to do otherwise. The new statutory default powers to appoint nominees and custodians are in addition to any constitutional powers, to any existing statutory powers, and to any powers provided by the Court or the Commission, which enable trustees to allow trust property to be held otherwise than by themselves collectively. We are likely to find constitutional powers being used by unincorporated associations, such as village halls, where the governing document might stipulate that property is to be held in the names of two or more individuals or by a corporate body as nominees.  It is unlikely that they would wish to use the Trustee Act powers, which, so far as it is relevant to the present discussion, only enable the appointment of professional nominees who would expect to be paid for their services.

### 3.2  The new powers

The new powers can be found at sections 16 and 17 of the Act, and apply to all charitable trusts except as indicated below. In appointing nominees and custodians trustees are subject to the statutory duty of care, see OG 86 B6 subject to any contrary indication in a trust instrument.

These powers will not apply to:

* trusts established by schemes made under sections 96 and 100 of the Charities Act 2011 (and their statutory predecessors), which are common investment funds and common deposit funds, with the exception of pooling scheme CIFs established under section 96 of the 2011 Act (and its statutory predecessor). (See OG 86 B1 section 3 for a further explanation of a pooling scheme.);
* trusts which have a custodian trustee - the statutory duties of a custodian trustee are not compatible with the appointment of a separate person as nominee or custodian;
* trusts where the specific assets are vested in the Official Custodian for Charities - for the same reason as applies to trusts with a custodian trustee. (However, trustees can appoint nominees and custodians for other assets not vested in the OCC);
* trusts where the governing document provides to the contrary.

In addition, section 18 stipulates that where trustees invest in or retain securities payable to bearer, the trustees must appoint a person to act as a custodian of those securities. Securities payable to bearer are investments where those physically holding the title documents are regarded as their owner, and are entitled to receive any dividends/interest payments due in respect of those securities. Such investments are rare and unlikely to be made by charities. Again, this provision will not apply where the charity has a custodian trustee, where the charity has a sole trustee which is a trust corporation, where securities are held by the OCC or where there is a constitutional or statutory authority to say that such securities can be bought or retained without the requirement for a custodian.

All appointments of nominees and custodians made under sections 16,17 and18 of the Act must be in, or evidenced in, writing.

As indicated above, the new statutory default powers are in addition to any existing powers. Constitutional powers allowing the use of nominees are very common, particularly in the case of charities whose charity trustees are expected to change frequently, like local community groups.  These powers will continue to be used; they are usually less restrictive as regards the identity of who may be appointed than are the new statutory powers – see section 4. But the statutory duty of care will still apply when these constitutional powers are exercised unless there is a contrary indication in the governing instrument.

## 4.  Persons who may be appointed as nominees or custodians

### 4.1 Conditions  governing who may act

Conditions are laid down in section 19 governing who may act as a nominee or custodian. Such conditions are there to aid the protection of beneficiaries. A person may only be appointed into these positions where they:

* carry on a business which consists of or includes acting as a nominee or custodian; or
* are a body corporate recognised under s.9 of the Administration of Justice Act 1985 (a provision which covers solicitors’ nominee companies); or
* are a body corporate which is controlled by the trustees.

In this context, the question whether or not a body corporate is controlled by trustees is determined in accordance with section 840 of the Income and Corporation Taxes Act 1988. This provides that the control in relation to a body corporate, is the power of a person to secure:

* by means of holding of shares or the possession of voting powers in or in relation to that or any other body corporate; or
* by virtue of any powers conferred by the articles of association or other document regulating that or any other body corporate;
* that the affairs of the first mentioned body corporate are conducted in accordance with the wishes of that person. Control may therefore be direct or indirect.

### 4.2  Charity Commission guidance

The Act recognises that charities have particular concerns about the security of their property which may not apply to non-charitable trusts.  Charities operate in the public interest, and without identifiable beneficiaries to look after their own interests in the trust.

Section 19(4) envisages that the Commission will  give its  own guidance on the appointment of nominees and custodians, and requires trustees (other than trustees of exempt charities) to follow any guidance the Commission does give. The guidance we have produced under section 19(4) is contained in leaflet CC42 available to trustees on our web site.

In addition to the requirements of the Act, our own guidance:

* emphasises the importance of ensuring that trust assets held by a nominee/custodian do, in fact, still belong to the charity and that the charity can prove this legally, if necessary;
* draws attention to the particular risks of appointing nominees/custodians who are unregulated or whose business has no connection with the UK;
* emphasises the need for charity trustees to balance the advantages and disadvantages of appointing as nominees and custodians, persons who are independent of each other and of any discretionary investment manager; and
* draws attention to the desirability of ensuring periodic reports from the nominee/custodian to the trustees on the controls put in place to safeguard the charity's property.

### 4.3  Persons who may act

Section 19 (5) provides that those persons who trustees can employ as a nominee or custodian may include:

* one of their own number, if  that one is a trust corporation - but a sole trustee cannot in any case appoint themselves; or
* two (or more) of their own number, if they are to act as joint nominees or custodians.

Of course any person appointed must satisfy the conditions in section 4.1 above. The trustees may also appoint as a nominee a person who is appointed as their custodian or is authorised to carry out functions as their agent. Likewise, they may appoint as a custodian a person who is appointed as their nominee or is authorised to carry out functions as their agent.

There is no objection to the power to appoint a nominee/custodian being delegated by the charity trustees to their discretionary investment manager, but the trustees will still be subject to the statutory supervisory responsibilities in relation to the nominee/custodian selected by the discretionary investment manager on their behalf.

## 5. Terms of appointment of nominees and custodians

Section 20 allows trustees to decide the terms, including any remuneration, on which their nominees and custodians are appointed. However, it is important to remember that where a trustee is appointed as nominee or custodian they cannot be paid for the work that they do unless there is an explicit authority, in the governing document or from the Commission or the Court, to receive such remuneration.

Unless it is reasonably necessary to do so, the trustees may not authorise a person to act as their nominee or custodian on terms which:

* permit the nominee or custodian to appoint a substitute;
* restrict the liability of the nominee or custodian or their substitute to the trustees or any beneficiary;
* permit the nominee or custodian to act in circumstances capable of giving rise to a conflict of interests.

In practice, trustees will probably find that most nominees or custodians will decline to work for the charity unless the trustees agree to some or all of these terms. If the trustees have to agree to these terms in order to secure the services of their preferred nominee/custodian, we will accept that this test of reasonable necessity in relation to the appointment will have been met. This is provided that the trustees have a good reason for selecting that particular nominee/custodian, rather than some other nominee/custodian, who would not have insisted on the inclusion of any of these terms in  their agreement with the trustees.

# B5 The duty to keep the actions of nominees and custodians under review

## 1.  Trustee responsibility for review

Trustees are required to review the actions of agents, nominees and custodians, whether appointed:

under the Act  itself; or

* under a power in the charity's governing document; or
* under any enactment or subordinate legislation.

However, the Act’s requirement to review the actions of agents etc. appointed by the second and third of these methods does not apply if the Act’s review requirements, described in section 2 below, are inconsistent with any provisions of the governing document, enactment or subordinate legislation under which the agent etc. was appointed.

Subordinate legislation means Orders in Council, Orders, rules, regulations, Schemes, warrants, bye laws and other instruments made or to be made under any Act.

The review duty applies in the case of a nominee/custodian even though the nominee/custodian has been selected by the discretionary investment manager on behalf of the trustees.

## 2.  Review of agents, nominees and custodians

### 2.1  General principles

While the agent, nominee or custodian continues to act for the charity, the trustees must meet the general review requirements set out in section 22(1), to which there are three elements as follows.  (See section 3 below for some requirements that apply specifically to trustees’ review of agents who are exercising asset management functions).  The general requirements are that trustees must:

* keep under review the arrangements under which the agent, nominee or custodian acts and how those arrangements are being put into effect;
* if the circumstances are appropriate, consider whether there is a need to exercise any power of intervention that they have; and
* if they consider that there is a need to exercise such power, to do so.

### 2.2  The first element

The first of these elements requires that the trustees must keep under review the terms of the appointment and how the appointed person is performing. This obligation means that the trustees will need to keep under review whether the appointed person remains a suitable person to carry out the function and that the terms of the appointment remain appropriate. In addition the trustees must keep under review the manner in which the appointed person is performing his or her functions.

The duty to "keep under review" does not oblige trustees to review the arrangements at specific intervals or in a particular way. The way in which this duty should be discharged will depend upon what is reasonable in the circumstances.

Circumstances themselves may indicate that the appointed person is not carrying out their functions effectively, or cause the trustees to doubt the suitability of the person appointed. Where this is the case the second element becomes relevant.

### 2.3  The second element

The second of these elements provides that where circumstances make it appropriate to do so, the trustees must consider using any powers of intervention that they have, for instance:

* a power to give direction to the agent, nominee or custodian; and
* a power to revoke the authorisation or appointment.

The Act itself does not give the trustees any powers of intervention, but requires them to consider using any powers of intervention that they have under the written agreement between themselves and their agent, nominee or custodian or under general law.

### 2.4  The third element

The third element provides that where the trustees consider that there is a need to use the powers of intervention, they are under a positive duty to do so.

When carrying out duties under section 22, trustees are subject to the statutory duty of care (subject to any indication to the contrary in a trust instrument).

## 3.  Review where an agent has been authorised to exercise asset management functions

Section 22(2) makes clear that the trustees, when they are reviewing agents authorised to exercise asset management functions, must specifically consider whether:

* the policy statement is being complied with; or
* the policy statement should be revised or replaced.

Where they consider that the policy statement should be revised or replaced they are under a duty to do so. Any revision or replacement of the policy statement must be in, or evidenced in, writing and must be formulated with a view to ensuring that the functions will be managed in the best interests of the trust.

Again, when carrying out these duties, trustees will be subject to the statutory duty of care (subject to any indication to the contrary in a trust instrument).

## 4.  Liability for agents, nominees and custodians

Section 23 clarifies the position of when a trustee will be liable for the acts or defaults of any agent, nominee or custodian or their permitted substitute. The provision enhances the protection of beneficiaries and replaces the unsatisfactory provisions of sections 23 and 30 of the Trustee Act 1925 (as interpreted in Re Vickery [1931] 1 Ch 572)  with the statutory duty of care under section 1.

Section 23 provides that a trustee is not liable for any act or default of the agent, nominee or custodian unless in:

* entering into the arrangements under which the person acts as agent, nominee or custodian; or
* carrying out  the duties of review etc under section 22;

the trustee has failed to comply with the statutory duty of care.

"Entering into arrangements" includes:

* the selection of the person to act;
* determining the terms on which the person is to act; and
* where the person is to exercise asset management functions, the preparation of the policy statement.

Similarly, if the trustee has agreed a term (ie as part of the agreement with the agent, nominee or custodian) under which the agent, nominee or custodian is permitted to appoint a substitute, the trustee is not liable for any act or default of the substitute unless in:

* agreeing that term; or
* carrying out  the duties to review in so far as they relate to a substitute;

the trustee has failed to comply with the statutory duty of care.

## 5.  Effects of trustees exceeding their powers

Section 24 provides that the appointments of agents, nominees and custodians are not invalidated by any failure of the trustees to act within the limits of their powers to make such appointments. This provision will secure dealings of third parties with agents, nominees and custodians, so long as the third party is not aware of  any irregularity. It has the effect that third parties will not need to satisfy themselves that the trustees have complied with the requirements of the Act in making their appointments.

Examples of errors made by trustees might be where trustees appoint as a nominee or custodian someone who does not meet the statutory conditions for the appointment, or perhaps an agent is authorised to carry out a function that is not a delegable function.

This provision does not, of course, relieve trustees of any of their obligations under the Act. They will still be liable for any loss incurred by the trust as a result of an appointment made outside the limits of the trustee powers. Additionally, where a person takes on, as an agent, the discharge of a function which  they know that the trustees are not allowed to delegate then they risk becoming jointly and severally liable with the trustees for any loss incurred by the charity.  Both parties to the appointment therefore have an interest in ensuring that the appointment can be properly made.

# B6  The statutory duty of care

## 1.  The statutory duty of care and its application

Section 1(1) of the Act sets out a duty which it calls the “duty of care” and which in this OG we have referred to as "the statutory duty of care". The statutory duty of  care is the duty to exercise such care and skill as is reasonable in the circumstances having particular regard to:

* any special knowledge or experience that the trustee has or holds themselves out as having; and
* where he or she acts as a trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.

This statutory duty of care applies to a trustee in the circumstances set out in  schedule 1 of the Act (see section 2 below).

It is important to note that the statutory duty of care applies to trustees not only in their exercise of a number of specified powers conferred on them by the Act, but also in their exercise of the same type of power derived from a source other than the Act. For example, the statutory duty of care applies not only when trustees exercise the general investment power conferred on them by s. 3(1) of the Act but also when they exercise any investment powers conferred on them by their governing document or by any other provision.

The statutory duty of care will take effect in addition to the existing fundamental duties of trustees, for example, to act in the best interests of the charity and comply with the terms of the trust.  However, it will exclude any common law duty of care which might otherwise have applied.

The statutory duty of care does not normally apply if and in so far as it appears from the trust instrument that the duty is not meant to apply.  Trustee indemnity clauses in the governing documents of charities are quite common in practice, though the common law imposes a limit on the possible scope of such clauses and the Law Commission are examining whether there should be statutory intervention here (company law generally forbids such provisions).  The duty applies to the manner in which the trustees carry out a discretionary power and not the decision whether to exercise the discretionary power in the first place (although it does cover the requirement that trustees must review the investments of the trust from time to time).

To discharge the duty, a trustee will need to show such skill and care as is reasonable in the circumstances of the case, making allowance for his or her special knowledge, experience or professional status. Thus, in relation to the purchase of stocks and shares, a higher standard may be expected of a trustee who is an investment banker, specialising in equities, than of a trustee who is, for instance, a librarian. This example would be particularly relevant where the investment banker is acting as trustee in the course of his or her investment banking business (for remuneration - assuming this is permitted), where an examination of the skills normally possessed by such persons would also be material.

**IMPORTANT NOTE**: Legal advice should be sought where trustees are seeking to limit their liabilities as trustees, by making changes to the governing document.

## 2.  The areas in which the statutory duty of care applies

The statutory duty of care applies to a trustee in the circumstances set out in schedule 1 to the Act, which specifies a range of powers and duties primarily in the following areas:

* investment (see OG 86 B1);
* acquisition of land (see OG 86 B2);
* appointment of agents, nominees and custodians and review of their performance (see OG 86 B3 and B4); and
* insurance (see OG 86 B2).

It also applies to the exercise of the powers in section 6 of Trusts of Land and Appointment of Trustees Act 1996 (see OG 86 B2).

The  statutory duty of care also applies to trustees who are exercising specified powers under sections 15 and 22 of the Trustee Act 1925.  The powers in section 22 are of no real relevance to charity trustees and are to do with the handling of reversionary interests and with valuation of trust property. However section 15 is frequently relied upon by charity and other trustees, for example, in relation to the compromising of claims. The existing required duty of care is merely one of honesty; the new statutory duty of care does, of course, go beyond this.

## 3.  How the statutory duty of care sits with other legislation or duties

Section 2 above sets out when the statutory duty of care applies in terms of this Act. It is, however, important to see this legislation in the context of other legislation and common law principles that affect charity trustees and their duties to manage charities and look after their assets.

* This Act is concerned only with specific powers and duties. It does not directly affect the duties of care which would apply to the exercise of other powers or the discharge of other duties.  But where those duties of care derive from common law, rather than from the explicit provisions of statute, the new statutory provision could affect how the courts define those duties in the future.  The traditional formulation has been the standard expected of the prudent man of business acting on behalf of someone for whom he felt morally bound to provide, taking into account whether he is receiving payment for his services or not.  Clearly the statutory duty differs from this at least in the element of subjectivity which it introduces: it remains to be seen what other differences there will be.
* The Act has no direct effect on the duties of care of the directors of charitable companies.

It is important to remember therefore that the statutory duty of care extends to the provisions stipulated within this Act and similar provisions contained within governing documents. It will not extend to all functions carried out by all charities

# C1 The effect of governing document provisions on the general power of investments



# C2 Policy statements

## 1.  Overview

We have long considered it good practice that trustees decide on and clearly record in writing a policy for the investment of their charity’s funds.

With the introduction of the Trustee Act 2000 the preparation of written guidance on investment policy - referred to in the Act as a “policy statement”  - has become a legal requirement for trustees before they are able to make use of the powers in the Act to delegate any of their investment functions to agents – s.15 Trustee Act 2000.

The need for a policy statement applies whenever “asset management functions” are delegated to an agent under section 11(3). In practice, investment functions are likely to be the most commonly delegated functions and the text of this guidance reflects this.

## 2.  When must trustees prepare a policy statement?

The requirement for written guidance in a policy statement applies where trustees delegate their discretion in relation to their investment  functions. A policy statement is not required under the Act where the trustees obtain investment advice, but take decisions on investment matters themselves.

However, regulation 7(4)(k)(ii) of the Charities (Accounts and Reports) Regulations 2000 requires trustees to include in the Trustees' Report a statement of the charity's investment policy.

Before trustees are able to authorise a person to carry out any of their investment  functions as their agent, the Act requires that they give in the policy statement written guidance  to the agent as to how they should discharge these functions on their behalf.

Under Section 15 of the Trustee Act 2000:

* Trustees cannot authorise a person to exercise any of their investment  functions as their agent except by way of an agreement which is in, or evidenced in, writing.

The agreement need not be a written one but there must be written evidence of an agreement being made.This might be a letter confirming an agreement by telephone to carry out certain terms and conditions.

and:

* they have prepared a statement ("a policy statement") which is in, or evidenced in writing that gives guidance as to how the functions should be carried out.

Trustees must prepare a policy statement before an investment manager is authorised to act as their agent. The preparation of the statement is the responsibility of the trustees: it cannot be delegated to the investment manager. However, trustees may find it useful to prepare the policy statement with the help of the proposed investment manager.

Although the matter is not free from doubt, it is considered that a policy statement is required whenever discretionary investment management is delegated on or after 1 February 2001, whether the power of delegation relied on is the statutory power, or a power in the governing document of a charity, or an authority from us. However, where the discretionary management agreement was properly entered into before 1 February 2001 (ie there was a valid constitutional power or a power from us), then the statutory requirement for a policy statement does not apply unless or until the agreement between the charity or its trustees and the discretionary investment manager is replaced with a fresh agreement.

## 3.  Why must trustees prepare a written policy statement?

A charity’s policy statement is intended to give guidance to the managers to whom investment management has been delegated. It clarifies the responsibilities and the extent of the authority of the investment managers appointed by the trustees. A charity’s policy statement provides a written framework for a charity’s investment strategy and should contain the principles that will govern the detail of the investment decisions taken by the investment manager. The investment manager's investment decisions must be taken within the parameters of operation set out in the policy statement.

The preparation of a policy statement is the responsibility of the charity trustees and the statutory duty of care under clause 1 of the Trustee Act 2000 applies to its preparation.

Section 22 of the Act places trustees under a duty to keep under review the arrangements under which management of the charity's investments is delegated.  In particular, the trustees are required specifically to consider whether there is any need to revise or replace the policy statement.  If the trustees consider that there is a need to revise or replace the policy statement, they are duty bound to do so. Trustees also have a duty to assess whether the policy statement (as it has effect for the time being) is being complied with.

If appropriate, the trustees must consider whether they should intervene (by directions or revocation of the authority given to the investment manager) - and they must intervene if they consider there is a need to do so.

## 4.  What issues should a charity's policy statement address?

Charities have different investment objectives depending on their size and their activities and it is likely that the content and the complexity of a charity’s policy statement will reflect these differences.

The Trustee Act 2000 does not dictate the content of a policy statement.  However, section 15(3) of the Act states that trustees must formulate any guidance given in the policy statement with a view to ensuring that the functions of the trustees which will be delegated to their investment manager will be carried out in the charity’s best interests.

As a general guide a charity’s investment policy statement might well contain guidance  in the following areas:

### 4.1  The charity's aim in investing its funds

A charity’s policy statement should clearly state what a charity is trying to achieve through the investment of its funds. It should set out the charity’s investment objectives. In considering this, trustees will need to take account of the needs of present and future beneficiaries and how the charity will meet these needs. They will need to consider past patterns of expenditure and the anticipated demand for the charity’s support

### 4.2  The balance between capital growth and income generation

A charity’s policy statement should set out the balance between capital growth and income return that is needed by the charity in order for it to meet its objects.

### 4.3  Consideration of risk

The policy statement should clearly set out the parameters of the degree of risk the charity is willing to take in the investment of its funds.

### 4.4  The timing of returns

The policy statement should set out the degree of liquidity required of the charity’s assets. Trustees will need to consider the charity’s activities and the types of investment that will be needed in order to pursue these. They will also need to consider the nature and the timing of any cash requirements which the charity may have.

### 4.5  Special preferences

The policy statement should set out the charity’s preferences in terms of the investment of its funds.  For example, does the charity have a preference for investing in particular sectors of the market or does it operate under any ethical considerations relevant to the investment of its funds?

### 4.6  Review of the policy statement

The policy statement should clearly set our how often the charity’s investment policy will be reviewed.

### 4.7  The way in which the investment discretions will be exercised

When investment management is delegated, the investment manager takes on the responsibility to ensure that the delegated investment discretion is exercised:

* within the scope of the powers of investment available to the trustees; and
* consistently with the duties in section 4 of the Act (see section 5 of OG 86 B1) which includes the obligation to keep investments under review.

The standard investment criteria include the requirement to consider the suitability to the charity of a particular asset class and of a proposed investment within that class and also to consider the need for diversification in so far as is appropriate to the circumstances of the charity.

The policy statement should be compatible with the obligations in section 4 of the Act and might usefully expand upon the way in which the investment manager should have regard to the standard investment criteria in the circumstances of the particular charity.

## 5.  What is the relationship between the policy statement and the agreement (contract) under which the investment manager is to act?

The policy statement is not itself part of the contract (agreement) between the trustees and their investment manager. However, the contract under which the investment manager is to act must include a clause to the effect that the investment manager will comply with the policy statement (or any revision of the policy statement or any replacement made in accordance with section 22 of the Act). The effect of this requirement is that the investment manager is contractually bound to follow the instructions in the policy statement, unless there is a good reason not to do so.

It is therefore important for both the trustees and the investment manager to ensure that the terms of the policy statement are workable. Should the investment manager find the policy statement (or any revised or replacement policy statement) unworkable, he or she would have no alternative but to decline to enter a contract with the trustees, or to terminate an existing contract, as the case may be.

Under some discretionary fund management agreements the investment manager is obliged to send a "client profile" to the trustees for approval on a regular basis. A "client profile" will usually summarise the key provisions concerning the objectives and restrictions under which investment management is delegated to the investment manager. Where this has been approved by the trustees (or is approved subject to amendments) and confirmed by letter sent to the investment manager, this could constitute a policy statement which satisfies the requirements of section 15. If this process happens sufficiently regularly, it could discharge the obligation of the trustees to keep the policy statement under review.