

TRUSTEE ACT 2000

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: The duty of care

11. **Sections 1 and 2** form Part I of the Act. Together they implement the recommendations in Part III of the Report. The sections create a new precisely defined statutory duty of care applicable to trustees when carrying out their functions under the Act or equivalent functions under the trust instrument. As in the law generally, the phrase “duty of care” signifies a duty to take care to avoid causing injury or loss. The new duty will bring certainty and consistency to the standard of competence and behaviour expected of trustees. It will be a safeguard for beneficiaries and thereby balance the wider powers given to trustees elsewhere in the Act. The duty will take effect in addition to the existing fundamental duties of trustees (for example, to act in the best interests of the beneficiaries and to comply with the terms of the trust) but will exclude any common law duty of care which might otherwise have applied.

The duty is a default provision. It may be excluded or modified by the terms of the trust. This new duty will apply to the manner of the exercise by trustees of a discretionary power. It will not apply to a decision by the trustees as to whether to exercise that discretionary power in the first place.

12. In relation to the investment of trust funds the new duty makes statutorily explicit the present common law duty which measures the behaviour of the trustees against that expected of the ordinary prudent man of business. This test includes a subjective element to allow for the particular skills and experience of the trustee in question. The new duty of care puts this beyond doubt. In relation to collective delegation by the body of trustees the new duty will however replace the unsatisfactory and insufficiently demanding provisions of sections 23 and 30 of the Trustee Act 1925.

Section 1: The duty of care

13. **Section 1** defines the new uniform statutory duty of care for trustees. The circumstances where the duty will apply are defined in Schedule 1 to the Act, which is introduced by section 2. The duty will not apply outside those circumstances. To comply with the new duty a trustee must 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 (section 1(1)(a) and (b)). 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 a beekeeper, particularly if the investment banker is acting as a trustee in the course of his or her investment banking business. The new duty will therefore provide a standard against which the manner of the exercise of a power by trustees can be measured in the particular circumstances of the case. In determining what constitutes reasonable care consideration would also be given to the nature, composition and purposes of the trust being administered.

Section 2: Application of duty of care

14. **Section 2** introduces Schedule 1 to the Act, which defines when the new duty will apply. In general terms the new duty will apply to any exercise by a trustee of a power to invest trust property or to acquire land; to appoint agents, nominees and custodians; or to insure trust property.

Part II: Investment

15. **Sections 3 to 7** form Part II of the Act. This Part creates and defines a new default power of investment for trustees who do not have specific powers of investment under the trust instrument or legislation or whose trust instruments do not make provision which would be contrary to the new powers. Section 3 creates the general power of investment. Sections 4 and 5 create additional duties on the trustees to consider standard investment criteria and to take proper advice in exercising any power of investment. Section 6 provides that the general power of investment is a default power. Section 7 defines the trusts to which the new power and duties will apply.
16. Under the present law the powers of a trustee are defined by the trust instrument or by legislation. Most modern trust instruments expressly confer wide investment powers. Older trust instruments frequently do not. In the absence of express powers under the trust instrument the trustees must look to legislation to define their powers. Some trustees, such as occupational pension trustees, have wide statutory powers of investment (Pensions Act 1995 section 34(1)) but most do not. These trustees are restricted to the powers contained in the Trustee Investments Act 1961. These powers, although a generous provision when enacted, are now generally considered too narrow. The 1961 Act divides the investments which trustees may make into narrower and wider range investments. Typically, narrower range investments are fixed-interest securities and wider range investments are shares.
17. Under the new provisions trustees able to take advantage of the new default powers will no longer be restricted to specified “authorised investments” and will be able to invest in the same range of investments as an absolute owner. Coupled with the new duty of care (section 1) the new power is intended to confer the widest possible investment powers whilst ensuring that trustees act prudently in safeguarding the capital of the trust.
18. The new power will be a default power. That is, it will apply to the extent that the investment powers of the trustees are not expressed in the instrument creating the trust or any relevant legislation. The new power is expected to be most beneficial in relation to older trusts (including many charities), trusts arising under “home made” wills and on intestacy.
19. The provisions of Part II do not apply to occupational pension schemes, authorised unit trusts or certain schemes under the Charities Act 1993 (see sections 36-38) which are governed by their own statutory rules.

Section 3: General powers of investment

20. **Section 3(1)** will implement the Law Commission’s recommendation in relation to investment powers by giving trustees, subject to the safeguards and limitations in sections 3-7 of the Act, the same power to invest trust assets as if they owned the assets outright rather than holding them on trust. This new power will enable trustees to hold investments jointly or in common with other persons thereby reversing the present rule.
21. The new power is however not entirely general. It does not extend to investments in land other than by way of loans secured on land (subsections (3) – (5)). The effect of this limitation is reduced by section 8 which confers a power to acquire land for any purpose including as an investment. Separating the powers of investment in relation to land and other assets in this way has facilitated the making of consequential amendments to other legislation (see Schedule 2 to the Act). The new power is not entirely unfettered. First,

trustees will remain subject to their fundamental duties (for example, the duty to act in the best interests of the present and future beneficiaries and to avoid any conflict between their duties as trustees and their personal interests). Second, the new duty of care created in Part I of the Act will apply (Schedule 1 paragraph 1(a)). At present, investment under the Trustee Investments Act 1961 is subject to the common law duty of care. Third, sections 4 and 5 impose specific duties to have regard to the need for diversification and suitability of investments and to obtain and consider proper advice where appropriate. These duties will apply to trustees in the exercise of a power of investment. Under the present law there is a general duty to have regard to the need for diversification so far as appropriate to the circumstances of the trust and to the suitability to the trust of the proposed investment and, where exercising certain statutory powers to invest, to take advice before making the investment (Trustee Investments Act 1961 section 6).

22. The term “asset” is defined in section 39(1) as including any right or interest. “Investment” is not defined in the Act. The general power of investment permits trustees to invest assets in a way which is expected to produce an income or capital return. “Land” is also not defined in the Act but is defined in Schedule 1 to the Interpretation Act 1978 as including buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land.

Section 4: Standard investment criteria

23. **Section 4(1)** provides that in exercising a power of investment, whether under section 3 or otherwise, a trustee must have regard to the suitability to the trust of the investment and, secondly, to the extent that it is appropriate in the circumstances, to the need for diversification of the trust’s investments. These factors are defined in the Act (section 4(3)) as the standard investment criteria. “Suitability” relates both to the kind of investment proposed and to the particular investment as an investment of that kind. It will include considerations as to the size and risk of the investment and the need to produce an appropriate balance between income and capital growth to meet the needs of the trust. It will also include any relevant ethical considerations as to the kind of investments which it is appropriate for the trust to make.
24. **Section 4(2)** requires a trustee to keep the investments of the trust under review and to consider whether, in the light of the standard investment criteria, they should be varied. This provision codifies the common law position, under which “a trustee with a power of investment must undertake periodic reviews of the investments held by the trust”: *Nestle v National Westminster Bank plc (No 2)* [1993] 1 WLR 1260, 1282G, per Leggatt LJ.
25. The definition of the standard investment criteria in section 4(3) is closely modelled on section 6(1) of the Trustee Investments Act 1961 and accords with modern portfolio theory. The general duty of care applies in relation to the application of the standard investment criteria by a trustee (Schedule 1 paragraph 1(b)). As the exercise of a power of investment is subject to the duty of care in section 1, trustees may need to have regard to other matters in addition to the standard investment criteria, as defined. However, the standard investment criteria will be of central importance in every case.

Section 5: Advice

26. **Section 5** introduces a safeguard for beneficiaries in relation to powers of investment under section 3 or otherwise. The new safeguard is that a trustee, when considering the exercise of a power of investment or carrying out a review of the investments of the trust, must obtain and consider proper advice about how, in view of the standard investment criteria (see note on section 4), the power to invest should be exercised or the investments of the trust be varied (section 5(1) and (2)). However, as the imposition of an unqualified duty to take and consider advice before making any investment or change in investments would be unnecessarily burdensome, section 5(3)

provides that the new duties to obtain advice will not apply if the trustee reasonably concludes that it is unnecessary or inappropriate to do so. This would be the case, for example, if the proposed investment is small, so that the cost of obtaining advice would be disproportionate to the benefit to be gained from doing so, or where the trustees themselves possess skills and knowledge making separate advice unnecessary. These provisions are at once more extensive and more flexible than the obligation to take advice in relation to most narrower and all wider range investments under the Trustee Investments Act 1961 section 6. Where the 1961 Act does not apply at present, the obligation of a trustee to take advice (if any) is dependent upon the application of the rule that trustees must act with reasonable prudence in exercising powers of investment.

27. “Proper advice” is defined in section 5(4). This definition is based on that in section 6(4) of the Trustee Investments Act 1961 and recognises that there may be circumstances in which a person is qualified to give advice by reason of his or her ability in and practical experience of issues other than financial matters. Although financial expertise will be the primary attribute of an investment adviser, other skills may also be relevant. For example, when an investment in land is proposed, the necessary qualities of the person giving the advice are likely to include expertise in the valuation of land. In addition, if the trustees propose to invest in works of art, they would no doubt require advice from an expert in the relevant field.
28. **Section 5(1)** builds upon and extends the present duty on trustees wishing to invest in anything other than a very restricted class of investments (for example, National Savings Certificates and Bonds) to obtain and consider proper advice (such advice to be given or confirmed in writing) as to whether the investment is satisfactory bearing in mind the need for suitability and diversification (Trustee Investments Act 1961 section 6(2) and (5)). There is no express requirement in section 5 for the advice to be given or confirmed in writing, but to do so will no doubt be regarded as best practice in many circumstances, and may be necessary for trustees to show compliance with the general duty of care in section 1.
29. The new general statutory duty of care is to apply in relation to the exercise of the duty to obtain and consider proper advice under section 5 (Schedule 1 paragraph 1(b)).
30. Subject to sections 36-38, which exclude the provisions of Part II from occupational pension schemes, authorised unit trusts or certain schemes under the Charities Act 1993 sections 6 and 7 define the trusts to which the new power of investment will apply.

Section 6: Restriction or exclusions of this part etc.

31. **Section 6** provides that the new general power of investment (defined in section 3(2)) is a default provision. It specifies that subject to the provisions of section 7 relating to trusts in existence when the Act is brought into force, the new power will be available to all trustees in addition to any limited express power of investment vested in them, but subject to any limitation imposed by the trust instrument or by primary or subordinate legislation (section 6(1)). This provision follows the precedent of section 69(2) of the Trustee Act 1925 in relation to the powers conferred by that Act.
32. “Subordinate legislation” is defined in section 6(3) by reference to the Interpretation Act 1978 to mean Orders in Council, orders, rules, regulations, schemes, warrants, byelaws and other instruments made or to be made under any Act (Interpretation Act 1978 section 21(1)).

Section 7: Existing trusts

33. **Section 7** provides for the application of Part II of the Act to trusts in existence when Part II comes into force (see section 42 as to commencement). The general rule is that Part II applies to all trusts irrespective of the date of their creation (section 7(1)). This rule is however subject to certain exceptions. First, Part II does not apply to pension trusts, authorised unit trusts or funds established under schemes made under sections 24 or 25

of the Charities Act 1993 (see sections 36-38). Second, the effect of the rule that the new general power of investment is subject to any restriction or exclusion imposed by the trust instrument (section 6(1)(b)) is not to apply to any trust instrument made before 3 August 1961 (section 7(2)). This will ensure that old restrictions overcome by the 1961 Act do not revive to restrict the benefits of the new general power of investment. Such restrictions pre-date a general statutory power. Fourth, section 7(3)(a) provides that where a trust instrument gives the powers of investment equivalent to the default powers for the time being authorised by law, the trustees should have the general power of investment. This provision ensures that an intention of a settlor to provide ample powers of investment is not frustrated by this liberalisation of the general law. It continues the policy underlying section 3 of the Trustee Investments Act 1961 which provided that any power of investment to invest property in any investment for the time being authorised by law for the investment of trust property, conferred before the passing of the 1961 Act, was to confer the same power to invest as sections 1 and 2 of that Act. Section 7(3)(b) makes similar provision for trust instruments made after the 1961 Act was passed.

34. It may be helpful to give an example of how sections 6 and 7 will operate.
35. Take, for example, an express power of investment in a post 2 August 1961 trust instrument authorising trustees to invest “*only in government bonds*”. This power would be taken to exclude the general power of investment (section 6(1)(b)). On the other hand, an express power in another instrument of the same date to invest “in shares quoted on the London Stock Exchange, but not in shares of X plc” would take effect as the general power of investment, subject to the restriction on investing in X plc (section 6(1)). Had the trust instruments pre-dated 3 August 1961, the general power of investment would have applied free of either limitation (section 7(2)) as would the new statutory powers conferred under the 1961 Act when it came into force (Trustee Investments Act 1961 section 1(3)).
36. Had the trust instrument merely stated that the trustees were to have such powers of investment as may for the time being be authorised by law (or words to that effect), the Act would confer the general power of investment (section 7(3)).

Part III: Acquisition of Land

37. [Sections 8 to 10](#) form Part III of the Act. They create a new power for trustees to acquire and deal with land on behalf of the trust. Part III does not apply to occupational pension schemes, authorised unit trusts and certain schemes under the Charities Act 1993 (see sections 36-38) or to trusts where, before Part III is brought into force, the trustees already have power to invest or apply trust funds by virtue of primary or subordinate legislation (defined in section 6(2)): for example, under the Settled Land Act 1925.
38. At present, although trustees of land and Settled Land Act trustees have power to buy land (with or without the aid of a mortgage in the case of trustees of land) in England and Wales for any reason (not just for investment), trustees of personal property only have power to acquire land if expressly authorised to do so in the trust instrument.
39. The new general power of investment introduced by section 3 of the Act has only limited application to land (see section 3(3)) and is in any event restricted to investment. The Act therefore makes separate provision to remedy the disparity between the powers of different types of trustees in relation to the purchase of land.

Section 8: Power to acquire freehold and leasehold land

40. [Section 8\(1\)](#) gives trustees the power to acquire freehold or leasehold land in the United Kingdom as an investment, for occupation by the beneficiaries or for any other reason. This provision is broadly modelled on section 6(3) and (4) of the Trusts of Land and Appointment of Trustees Act 1996. The express duty to have regard to the interests of the beneficiaries in exercising powers under section 6(5) of the 1996 Act

is not replicated in the Act. However that provision merely clarifies what is already the law and the omission of an equivalent provision is not intended to diminish the obligations of trustees.

41. The phrase “freehold or leasehold land” is defined in section 8(2). In England and Wales it means a legal estate in land. The only estates in land which are capable of being legal estates are an estate in fee simple absolute in possession and an estate for a term of years absolute. These estates correspond to freehold and leasehold respectively (Law of Property Act 1925 section 1(1)). Trustees may also acquire the equivalent interests in land in Scotland and Northern Ireland.
42. Having acquired land a trustee must be able to deal with it effectively. Following the precedent of section 6(1) of the Trusts of Land and Appointment of Trustees Act 1996, section 8(3) gives trustees who acquire land the powers, for the purpose of exercising his or her trustee functions, of an absolute owner in relation to the land. For example, trustees will have the power to hold land jointly with other persons, have powers of sale and leasing, and power to grant mortgages in respect of land.
43. [Sections 9](#) and [10](#) have a similar effect in relation to the application of Part III of the Act as sections 6(1) and 7(1)-(3) respectively in relation to Part II.

Section 9: Restriction or exclusion of this Part etc.

44. [Section 9](#) makes it clear that the power to acquire land is in addition to trustees’ other powers but is subject to any restrictions or exclusions laid down in the trust instrument or by any enactment or subordinate legislation (defined in section 6(2)). The new power is therefore a default provision.

Section 10: Existing trusts

45. [Section 10](#) provides that the power to acquire and deal with land created in Part III applies to all trustees, whenever the relevant trust was created. The new power does not apply to the trustees of a settlement under the Settled Land Act 1925 or to trustees of trusts subject to the Universities and Colleges Estates Act 1925.
46. The general duty of care imposed by section 1 of the Act applies to the exercise of the new statutory power to acquire land under section 8; to the exercise of any power to acquire land under the trust instrument and, in both cases, when exercising any power in relation to the land acquired (Schedule 1 paragraph 2).
47. By virtue of paragraph 45(1) of Schedule 2 to the Act the present restriction on the scope of the powers of trustees of land in section 6 of the Trusts of Land and Appointment of Trustees Act 1996 to land in England and Wales is removed so that trustees of land will have the same powers in relation to the acquisition, management and disposal of land will be applicable as other trustees.

Part IV: Agents, Nominees and Custodians

48. [Sections 11 - 15](#) set out the powers of collective delegation that trustees have in default of wide express powers being conferred by the trust instrument. They do not relate to delegation by individual trustees, which continues to be governed by section 25 of the Trustee Act 1925 and section 1 of the Trustee Delegation Act 1999. Sections 16 - 20 govern trustees’ powers to appoint nominees and custodians in cases where the trust instrument contains no express powers to do so. Sections 21 - 23 provide for the review by trustees of, and liability of trustees for, their agents, nominees and custodians. Sections 24 - 27 deal with supplementary matters.
49. These powers of delegation and appointment are subject to the duty of care created by section 1 (Schedule 1 paragraph 3) and will take effect as a default provision applicable to all trusts except pension trusts, authorised unit trusts, or funds established under schemes made under sections 24 or 25 of the Charities Act 1993 (see sections 36 - 38).

50. Under the present law the trustees of a trust cannot, as a collective body, delegate their dispositive duties to distribute the trust property to those entitled to it under the trust, or their fiduciary discretions (that is powers implying a personal discretion such as the selection of trust investments or the decision whether or not to sell or lease trust property) without express authority in the trust instrument. The Law Commission considered that in view of the increasingly specialised nature of the tasks required to be undertaken by trustees, some of the restrictions on trustees were now a serious impediment to the administration of trusts and that far “from promoting the more conscientious discharge of the obligations of trusteeship, the prohibition on the delegation of fiduciary discretions may force trustees to commit breaches of trust in order to achieve the most effective administration of the trust.”. The Law Commission concluded that in relation to trusts which were not charitable trusts the characterisation of powers of investment and some powers of management as in all respects fiduciary and therefore non-delegable was outmoded and that in general terms the proper distinction to be drawn in a modern law of trusts for the purpose of ascertaining whether a particular function ought to be delegable was between administrative powers (which would be delegable) and distributive powers (which would not).
51. In relation to charitable trusts the failings of the present law are mitigated by the power of the Charity Commissioners to authorise dealings with trust property which would not otherwise be within the powers of the trustees (Charities Act 1993 section 26) but the underlying problems of the law remain. Unfortunately the Commission’s proposals for trusts generally cannot be applied to charities without some refinement. This is because the concept of charitable purposes is much wider than the particular charitable objects for which the trust exists. A prohibition on the delegation of distributive functions, that is functions relating to charitable purposes, would narrow the powers to delegate of charitable trustees. The appropriate distinction in relation to charitable trusts is between the functions which relate to the generation of income to finance the charitable purposes of the trust and the carrying out of those purposes. Different provision is therefore made in the Act for charitable and non-charitable trusts.

Section 11: Power to employ agents

52. **Section 11(1)** provides that, subject to the provisions of Part IV, trustees may delegate any or all of their “delegable functions” to an agent. For the reason already given, the nature of the functions which may be delegated will in part be governed by whether the trust is charitable or not. In the case of non-charitable trusts to which section 11 applies, the trustees may delegate any function except (a) a function relating to the distribution of the trust assets; (b) a power to allocate fees or other payments to capital or income; (c) a power to appoint a trustee; and (d) a power conferred by the trust instrument or an enactment (i) to delegate a trustee function or (ii) to appoint a nominee or custodian.
53. **Section 11(3)** sets out the functions that a trustee of a charitable trust may delegate. Paragraph (a) ensures that non-discretionary (as opposed to discretionary) functions that can now be delegated under section 23(1) of the Trustee Act 1925 will continue to be delegable. Paragraphs (b) and (c) provide for income generating activities to be delegated except in so far as the income is derived from profits of a “trade which is an integral part of the carrying out the trust’s charitable purpose”. Fund raising activities which are an integral part of carrying out the trust’s charitable purpose would therefore not be delegable. The concept of a “trade which is an integral part of the carrying out the trust’s charitable purpose” is defined in section 11(4).
54. Examples of fund raising activities which are not delegable would include the charging of fees by a school operating as a charitable trust. Paragraph (d) enables further functions to be made delegable by order made by the Secretary of State (defined in the Interpretation Act 1978 Schedule 1, as one of Her Majesty’s principal Secretaries of State). Section 11(5) provides that the order will be made subject to a negative resolution procedure.

Section 12: Persons who may act as agents

55. Section 12 defines the persons who may act as agents for the trustees under section 11. Subject to the prohibition on the appointment of beneficiaries (section 12(3)) and to the requirement that if two or more persons are appointed they must exercise the function delegated jointly, there are no restrictions on the persons whom trustees may appoint as their agents under section 11. Thus, the trustees may delegate to one of their number or to their nominee or custodian (section 12(1) and (4)). The prohibition on the appointment of a beneficiary as an agent for the trustees (even if the beneficiary is also a trustee) will prevent the use of section 11 to avoid the restrictions on delegation by trustees of land to a beneficiary under section 9 of the Trusts of Land and Appointment of Trustees Act 1996. Under that section the delegation of a trustee function relating to land to a beneficiary is permitted if the beneficiary is of full age and beneficially entitled to an interest in possession in the trust land. Such delegation must be by power of attorney granted jointly by all the trustees and the beneficiary is subject to the same duties and liabilities as the trustees. Delegation of any function to a beneficiary continues to be possible under section 25 of the Trustee Act 1925, but again this is subject to restrictions which do not apply to delegation under section 11 of the Act.

Section 13: Linked functions etc

56. Section 13 provides that, subject to the exceptions specified below, an agent authorised to act under section 11 is subject to any specific duties or restrictions attached to the function delegated. The reference to specific duties does not include the duty of care imposed by section 1 of the Act. That duty is limited to *trustees* and does not apply to an agent in the performance of the agency. Nevertheless, agents will owe a separate duty of care to the trustees under the general law of agency.
57. As the example given in subsection (1) of section 13 suggests, the obligation to comply with specific duties and restrictions attached to the trustee function delegated under section 11 will most commonly apply in cases where the trustees delegate their investment function. In these cases the agent will be obliged to have regard to the standard investment criteria in accordance with section 4. The agent may also be required to obtain and consider proper advice in accordance with section 5. However, it will usually be the case that the person appointed to exercise the trustees' powers of investment as an agent would be able, if he were a trustee, to utilise the exception in section 5(3). This fact is recognised by section 13(2). Section 13(1) is, however, not restricted to investment. For example, sections 36 - 39 of the Charities Act 1993 impose restrictions on dispositions and mortgages of land owned by charities. If charity trustees delegate functions in relation to land under section 11(3)(b), the agent will be required to comply with the requirements of the 1993 Act in carrying out those functions.
58. Section 13(3), (4) and (5) relate to the duties imposed by section 11(1) of the Trusts of Land and Appointment of Trustees Act 1996. These duties require some trustees of land, in the exercise of their functions in relation to trust land, so far as practicable, to consult certain beneficiaries and, so far as consistent with the general interest of the trust, to give effect to their wishes. The beneficiaries are those of full age and beneficially entitled to an interest in possession in the land (Trusts of Land and Appointment of Trustees Act 1996 section 11(1)). This duty can be excluded and does not apply to trusts of land created or arising under a will made before the 1996 Act came into force (Trusts of Land and Appointment of Trustees Act 1996 section 11(2) and (3)).
59. The duty to consult beneficiaries under section 11(1) of the 1996 Act is not delegable. Delegation under section 11 is therefore only permitted on terms that allow the trustees to consult and give effect to the wishes of the beneficiaries (section 13(4)). Consistently with this, an agent under section 11 is not obliged to consult under section 11(1) (section 13(5)).

Section 14: Terms of agency

60. **Section 14** relates to delegation generally and section 15 imposes special restrictions in relation to the delegation of asset management functions. Trustees who fail to comply with these requirements will be liable for breach of trust. The general rule in relation to delegation under section 11 is that trustees will be free to decide the terms of the appointment of the agent (section 14(1)). The basis upon which the agency will have effect will be governed by the general law of agency. This freedom is however subject to various restraints. First, the exercise of the power to delegate under section 11 or the trust instrument will be subject to the duty of care (section 1 and Schedule 1 paragraph 3(1)(a) and (d)). Second, there are some specific restrictions: trustees may not delegate on terms which permit the agent to appoint a substitute; which restrict the liability of the agent or his substitute to the trustees or any beneficiary; or which permit the agent to act where a conflict of interest may arise. However, these restrictions will not apply if it is reasonably necessary to delegate on such terms (section 14(2)). Third, in the case of asset management functions and remuneration, the provisions of sections 15(2) and 29 to 32 respectively apply. The restraints in the first and third categories of restriction are described in relation to the relevant sections.
61. The second is a pragmatic response to the realities of modern fund management which nonetheless ensures that adequate protection is given to beneficiaries by imposing a test of reasonable necessity on the trustees. Under the present law, subject to an exception for property abroad under section 23(2) of the Trustee Act 1925, trustees may only allow sub-delegation by their agent if authorised to do so under the trust instrument. This is no longer appropriate in modern conditions where the appointment of a fund manager will often be essential to the efficient and effective management of the assets of the trust. Section 14(3)(a) flows from this. As the standard terms of business of fund managers generally require limits on liability and the ability to act despite a conflict of interest, the ability to appoint a manager would amount to little in practice if trustees were unable to accept such terms (see section 14(3)(b) and (c)).

Section 15: Asset management: special restrictions

62. **Section 15** places special requirements on trustees in relation to the delegation of their asset management functions; that is, their functions relating to the investment of trust assets and the acquisition, disposal and management of trust property (section 15(5)). First, although there is no requirement of writing in relation to agency agreements generally, the terms of an agreement authorising the agent to exercise asset management functions on behalf of the trustees must be in writing or evidenced in writing (section 15(1)) and must require the agent to secure compliance with the trustees' guidance as to how the functions are to be exercised for the time being (section 15(2)). This guidance must be in writing or evidenced in writing (section 15(4)) and must be framed with a view to ensuring the functions will be exercised in the best interests of the trust (section 15(3)). The document containing or evidencing the guidance is referred to in the Act as a "policy statement" (section 15(2)(a)). The policy statement must be prepared before the agent is authorised to act, but can be revised or replaced (section 15(2)(a) and (b)(ii)). The duty of care under section 1 applies to the preparation of a policy statement (Schedule 1 paragraph 3(2)(c)). The policy statement need not be in any particular form, provided that it constitutes a record of the trustees' policy on how the functions in question should be exercised.
63. For example, if trustees delegate their powers of investment to an agent, they must enter into an agreement with the agent at the outset setting out the investment objectives of the trust. Such an agreement may include considerations as to liquidity of assets to meet the needs of the trust, the desired balance between capital growth and income yield, and any "ethical" considerations relevant to the investment policy of the trust. The policy statement may expand upon the manner in which the duties imposed by section 4 (duty to invest and to review investments having regard to the standard investment criterion) should be discharged in respect of the trust. In relation to the delegation of

functions relating to the acquisition and management of land on behalf of the trust, the policy statement may include considerations as to the value and type of property that may be acquired, and the quality of title required. Where relevant it may also consider the terms upon which land may be let, sold or charged. The requirement for a policy statement only applies where the trustees delegate their discretion in relation to the matters concerned. It does not apply, for example, in cases where the trustees obtain investment advice but take decisions on investment matters themselves.

64. The duties of trustees with respect to keeping the delegation of functions (and any policy statement) under review are contained in section 22.

Section 16: Power to appoint nominees

65. Sections 16 to 20 govern the powers of trustees to appoint nominees and custodians in cases where the trust instrument contains no, or insufficient, express powers to do so.

66. In this context a nominee is a person appointed by the trustees to hold trust property in his or her own name. 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 trust. 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 (section 17(2)).

67. The powers to appoint nominees and custodians are conferred by sections 16 and 17. These powers are conferred on trustees of all trusts except pension trusts, authorised unit trusts, or funds established under schemes made under sections 24 or 25 of the Charities Act 1993 (see sections 36 - 38). In addition, these powers do not apply to trusts which have a custodian trustee as the trust property will be vested in the custodian trustee (sections 16(3) and 17(4); see section 4(2) of the Public Trustee Act 1906), or where relevant assets are vested in the official custodian for charities. Nor do the powers apply if the trust instrument or legislation provides to the contrary (section 26(b)).

68. Under the present law the ability of trustees of private trusts to employ nominees and custodians is largely governed by two common law principles. The first is that a trustee is under a duty to take such steps as are reasonable to secure control of the trust property and to keep control of it. This prevents trustees from placing assets in the name of nominees or custodians and from using powers of delegation to disguise the appointment of a nominee or custodian. Second, where there are two or more trustees they have a duty to ensure that the title to the trust property is in their joint names so that it can only be transferred with the consent of all. It follows that in the absence of express authority in the trust instrument or statute trustees can neither vest property in nominees nor place trust documents in the custody of a custodian. To do so would result in breach of trust. The Law Commission considered that the present law was unduly restrictive. In particular it did not enable trustees to use nominees (a) to provide an administrative service in relation to investments; (b) to facilitate dealings by a discretionary fund manager; (c) as a method of using CREST; and (d) in relation to overseas investments traded by a computerised clearing system. In short the present law prevented many trustees from participating in the benefits of modern investment management.

69. The duty of care (section 1) will apply to the appointment of a nominee or custodian under sections 16 and 17 or the trust instrument (Schedule 1 paragraph 3(1)(b), (c) and (d)).

70. Notwithstanding the fact that a person appointed to act as a nominee (whether under section 16 or an express power in the trust instrument) may act as a bare trustee, it is not intended that the appointment of a nominee should affect the fiduciary relationship of the trustees to the beneficiaries of the trust.

71. Subject to the provisions of Part IV of the Act (sections 11-27) section 16(1) gives trustees power to appoint a person to act as their nominee and to vest the relevant assets

in the nominee provided that the appointment is in writing or evidenced in writing (section 16(2)) and the trust does not have a custodian trustee or relevant assets are not vested in the official custodian for charities (section 16(3)).

Section 17: Power to appoint custodians

72. **Section 17(1)** makes similar provision for trustees to appoint a person as a custodian. As mentioned section 17(2) defines “custodian”.

Section 18: Investment in bearer securities

73. Although section 17 confers a power to appoint a custodian, there is one situation in which a custodian must be appointed. Under section 18(1) trustees (other than sole trustees who are trust corporations (section 25(2)) who retain or invest in securities payable to bearer must appoint a custodian of those securities unless the trust instrument provides to the contrary (section 18(2)). This provision replaces section 7(1) of the Trustee Act 1925 but does not replicate the requirement in that section that the custodian must be a “banker or banking company”. Paragraph 1(2) of Schedule 3 to the Act provides that any banker or banking company holding any bearer securities deposited with him under section 7(1) will be deemed to be a custodian appointed under section 18.

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

74. For the better protection of the beneficiaries section 19 restricts the persons who may be appointed nominee or custodian under sections 16, 17 and 18 to persons who are either carrying on business as a nominee or custodian (whether with or without other activities), are a body corporate controlled (see below) by the appointing trustees, or a solicitors’ nominee company recognised under section 9 of the Administration of Justice Act 1985, (section 19(1), (2) and (3)). It is intended that the use of such bodies corporate will allow trustees to use special purpose vehicles for nominee or custodianship purposes. In addition, trustees of charitable trusts (other than exempt charities) must comply with any guidance about the selection of a nominee or custodian issued by the Charity Commissioners (section 19(4)). Subject to these constraints, a trustee which is a trust corporation may be appointed a nominee or custodian as may two or more trustees (whether or not trust corporations) if they are to act jointly. However, a single trustee other than a trust corporation may not be appointed (section 19(5)). Section 19(6) provides that a person appointed as custodian or agent may also be appointed nominee by the trustees. Section 19(7) makes similar provision in relation to appointments of custodians. These provisions replicate the effect of section 12(4) in relation to the appointment of agents.
75. The terms “charitable trust” and “exempt charity” are defined in section 39(1) of the Act.
76. The test for determining whether a body corporate is controlled by trustees for the purpose of section 19(2)(b) is defined in section 840 of the Income and Corporation Taxes Act 1988 (see section 19(3)). This section provides that “control” in relation to a body corporate means the power of a person to secure (a) by means of the holding of shares or the possession of voting power in or in relation to that or any other body corporate; or (b) 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.

Section 20: Terms of appointment of nominees and custodians

77. **Section 20** has a similar effect in relation to the appointment of nominees and custodians as section 14 has in relation to the appointment of agents.

Section 21: Application of sections 22 and 23

78. Sections 21 to 23 provide for the review by trustees of the appointments of agents, nominees and custodians (section 22) and the liability of the trustees for such persons (section 23). Section 21 defines when sections 22 and 23 respectively will apply. That is, where trustees have appointed an agent, nominee or custodian under sections 11, 16, 17 or 18 or under the trust instrument or under any enactment or subordinate legislation: provided that in the case of a trust instrument, the terms of the trust instrument are consistent with section 22 or 23 (as the case may be) (section 21(2) and (3)).

Section 22: Review of agents, nominees and custodians

79. Where it applies section 22(1) imposes a single duty with three elements on trustees during any agency, nomineehip or custodianship. First, they must keep under review the terms of the appointment and how the person appointed is performing. This obligation means that the trustees must keep under review the question of whether the person who has been appointed to act for the trust is a suitable person to do so, and whether the terms on which that person acts are appropriate. In addition, the trustees must keep under review the manner in which the agent, nominee or custodian is performing his or her functions. The duty to “keep under review” does not oblige trustees to review the arrangements at specific intervals or in a particular way. The manner in which the duty should be discharged will depend upon what is reasonable in the circumstances. Second, if circumstances make it appropriate, the trustees must consider whether to exercise any power of intervention (defined in section 22(4)) that they have: for example, to give directions or to revoke the appointment. Circumstances in which it would be appropriate for trustees to do this may arise, for example, where the agent, nominee or custodian is not carrying out his or her functions effectively, or where the trustees have cause to doubt the suitability of the person in question to continue to act for the trust. Finally, if the trustees consider that there is a need to exercise a power of intervention, they must do so.
80. Section 22(2) makes specific provision in relation to agents authorised to exercise “asset management functions” (see section 15(5)). In these cases the duty under section 22(1) includes consideration of whether the current policy statement (see section 15) is being complied with; whether it should be revised or replaced and, if so, to revise or replace it accordingly (section 22(2)). Any revision or replacement 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 (section 15(3) and (4) as applied by section 22(3)).
81. When carrying out their duties under section 22, trustees are subject to the duty of care under section 1 (see Schedule 1, paragraph 3(e)).

Section 23: Liability for agents, nominees and custodians

82. Section 23 defines when a trustee will be liable for the acts or defaults of any agent, nominee or custodian or his or her permitted substitute. This provision will enhance the protection of beneficiaries by replacing the unsatisfactory provisions of section 23 and section 30 of the Trustee Act 1925 (as interpreted in *Re Vickery* [1931] 1 Ch 572) with the standard duty of care under section 1. These sections are to be repealed by the Act.
83. Under the present law, in the absence of express provision in the trust instrument, the liability of trustees for the actions of their agents is governed by statute. The principal provisions are sections 23(1), 23(2), 23(3) and 30(1) of the Trustee Act 1925. However, despite their common provenance, these provisions do not form a coherent whole and are considered by many not to require a sufficiently high standard in relation to the appointment and control of agents by trustees. Section 23(1) exonerates trustees who acted in good faith from loss resulting from the appointment of their agents. It is uncertain whether trustees are still required to act with reasonable prudence in appointing an agent. Section 23(2) has a limited application to agents appointed

to deal with trust property abroad. Section 23(3) gives trustees a limited power to appoint certain agents and preserves the liability of trustees if assets are left in the hands of the agents longer than is necessary. However, the provision is a dead letter as the delegation can be effected under section 23(1) without the said liability. Under section 30(1) a trustee is chargeable only for moneys and securities actually received by him or her. The trustee is not liable for any loss caused by the act or default of anyone else unless it is caused by his own wilful default (i.e. a conscious breach, or reckless performance, of duty). Trustees will therefore seldom be liable for loss caused by an agent. However, in cases where section 30 does not apply (for example where an agent is employed simply to transmit trust money or property from one person to another) a higher standard is required of the trustees. They will be liable if they fail to act with reasonable prudence. The provisions of section 30 in particular have been the subject of much criticism and comment. (All references to sections 23 and 30 in this paragraph refer to the Trustee Act 1925.)

84. **Section 23(1)** of this Act makes clear that a trustee who satisfies the duty of care (section 1 and Schedule 1 paragraph 3) in relation to the appointment and review of the appointment (section 22) of an agent, nominee or custodian will not be liable for the acts and defaults of the appointee.
85. “Entering into arrangements” includes the selection of the agent, nominee or custodian, the determination of the terms of the appointment and, if applicable, the preparation of a policy statement under section 15(2) (Schedule 1 paragraph 3(2)).
86. **Section 23(2)** governs the liability of trustees for the acts or defaults of any permitted substitute of an agent, nominee or custodian. Under sections 14(2)(a) and 20(2)(a), trustees may only authorise or appoint an agent, nominee or custodian on terms that permit the appointment of a substitute where it is reasonably necessary for the trustees to agree to such terms. Having agreed such a term, the trustees will only be liable for the acts or defaults of a substitute agent, nominee or custodian if they failed to comply with the duty of care under section 1 when agreeing that a substitute could be appointed or when carrying out their duties of review under section 22 in so far as they relate to the use of the substitute.
87. **Sections 24 to 27** make certain supplementary general provisions in relation to the use of agents, nominees and custodians by trustees.

Section 24: Effects of trustees exceeding their powers

88. **Section 24** provides that appointments of agents, nominees or custodians under Part IV are not invalidated by any failure of the trustees to respect the limits of their powers. This provision will facilitate dealings by third parties with agents, nominees and custodians appointed by trustees. It will have the effect that third parties will not need to satisfy themselves that the trustees have complied with the requirements of the Act. Examples of the kinds of mistakes which trustees might make include: the appointment under section 11 of a person as an agent who is in fact a beneficiary of the trust contrary to section 12(3); the authorisation of an agent on terms which prevent the trustees as trustees of land from consulting with the relevant beneficiaries under section 11(1) of the Trusts of Land and Appointment of Trustees Act 1996 (section 13(4)); or an appointment on terms which permit the agent to appoint a substitute where that is not reasonably necessary. Indeed, even where an agent is authorised to exercise a function which is not a “delegable function” as defined in section 11, the authorisation will be valid.
89. **Section 24** 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 consequence of an *ultra vires* appointment. In addition, if a person is authorised to exercise a function as an agent, that person may also be liable, as trustee *de son tort*, if the function in question is not properly delegable under section 11. Both parties to the appointment have therefore an interest in ensuring that the appointment can properly be made.

Section 25: Sole trustees

90. The powers of delegation conferred by Part IV are exercisable by the trustees collectively. Section 25 makes clear that with one exception Part IV of the Act applies equally to a trust with a sole trustee as to a trust with a body of trustees. The exception is that a trust corporation which is a sole trustee need not appoint a custodian of any securities payable to bearer forming part of the trust property (section 18). References to the trustees are therefore to be taken to include sole trustees except in sections 12(1) and (3) and 19(5).
91. [Section 12\(1\)](#) authorises the appointment under section 11 of one of a number of trustees as agent. Section 19(5) permits the appointment of a trustee which is a trust corporation or two or more trustees as nominees or custodians under sections 16, 17 or 18. These exceptions also make clear that a sole trustee cannot be his or her own agent, nominee or custodian. Section 12(3) prohibits the appointment of a beneficiary as an agent under section 11.

Section 26: Restriction or exclusion of this Part etc.

92. [Section 26](#) provides that the powers to appoint agents, nominees and custodians conferred by Part IV are in addition to any other powers vested in the trustees but are subject to any limitations in the trust instrument or legislation. In short, the powers are general default provisions which will not override specific provision. “Subordinate legislation” is defined in section 6(2). Section 26 is to the same effect in relation to Part IV as are sections 6 and 9 in relation to Part II and III respectively.

Section 27: Existing trusts

93. [Section 27](#) provides that Part IV applies irrespective of the date of creation of the trust. This will bring the benefit of the new powers to the greatest possible number of trustees and beneficiaries. Part IV, like Parts II and III, does not apply to authorised unit trusts or schemes under sections 24 and 25 of the Charities Act 1993 (sections 37 – 38). However, Part IV does apply with modifications to occupational pension trusts (see section 36(4) – (8)).

Part V: Remuneration

94. These sections relate to professional charging clauses and the reimbursement of expenses incurred by trustees. The provisions of the Act will govern the remuneration of “professional” trustees in two ways: first, by setting down rules of construction for express professional charging clauses in trust instruments; and secondly, by providing for the remuneration of certain trustees when there is no express professional charging clause in the trust instrument. The new provisions will, in general terms, apply to all services provided after Part V comes into force irrespective of the date of creation of the trust (see section 33 below). The creation of an implied professional charging provision is likely to be of the greatest benefit to old trusts, informally created trusts and trusts arising on intestacy whilst the new rules of construction will benefit all professional trustees.
95. The general rule under the present law is that trustees should not be paid for acting as such. This rule is founded on the principles that trustees are not allowed to derive any benefit from trust property and that to allow them to be paid might give rise to conflicts of interest and duty. Despite the general rule, the present law does permit trustees to be remunerated in certain circumstances. The three most significant of these are where the trust instrument so provides; where payment is authorised by statute (for example, Trustee Act 1925 section 42, Judicial Trustee Act 1895 section 1(5); Public Trustee Act 1906 sections 4(3) and 9) and when ordered by the court under its inherent jurisdiction to secure the good administration of trusts. Modern trust instruments will almost invariably contain an express professional charging clause. The absence of such a clause would make it unlikely that a professional trustee would accept office in relation

to the trust but would not prevent the trustees delegating administrative functions to the professional as an agent. However, the mere presence of an express charging clause may not itself be sufficient to reward a professional trustee properly. First, such clauses are strictly construed against the professional trustee. Thus, unless the trust instrument provides to the contrary (as modern trust instruments will usually do) the professional trustee with the benefit of a charging clause will only be able to be paid for services which could not have been provided by a lay trustee. Second, remuneration under a professional charging clause is in some cases regarded as a gift or legacy rather than an expense of the administration.

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

96. **Section 28** introduces the new rules of construction of express professional charging clauses in trust instruments. Section 28(1) provides that the new rules will apply in favour of trust corporations and trustees acting in a professional capacity. Subsection (5) explains that to satisfy the condition that a trustee (other than a trust corporation) must be acting in a professional capacity, there must be a close nexus between the profession or business in the course of which the trustee acts and the services which he or she provides as trustee.
97. The new rules for the interpretation of professional charging clauses are set out in sections 28(2), and (4). These new rules will apply in relation to trusts whenever created provided that the application of the new rules is not inconsistent with the terms of the trust instrument. Nevertheless, the new rules only apply in relation to services provided on or after the commencement of section 28.
98. **Section 28(2)** reverses the present common law rule which requires an express charging clause to be strictly construed against the trustee, so that, unless the trust instrument contains contrary provision, a professional trustee, who has the benefit of such a clause, may only be remunerated for services which could not have been provided by a lay trustee. Where section 28(2) applies, the services for which a trust corporation or a trustee acting in a professional capacity may be entitled to payment include services which are capable of being provided by a lay trustee (that is, a person who is not a trust corporation and who does not act in a professional capacity as provided by section 28(6)).
99. **Section 28(3)** provides for restrictions on the operation of the clause in respect of charitable trustees.
100. **Section 28(4)** contains the second new rule of construction of express charging clauses. Under the present law, payments under express charging clauses are treated for many purposes as a gift and not as remuneration for services rendered. The new rule reverses this rule of construction for the purposes of section 15 of the Wills Act 1837 (which renders void gifts made in a will to a witness to the will and gifts to the spouse of such a person). The change will enable trustees to be paid for work done in connection with testamentary trusts even where they witness the will under which the trust arises.
101. In addition, by virtue of section 28(4)(b) such payments will in future be treated as remuneration for services for the purposes of determining their priority as against other payments due from the deceased's estate (Administration of Estates Act 1925 section 34(3)). Thus, in relation to the administration of the estate, the trustee's charges will become an expense of the administration. Section 33(2) prevents this provision from having an effect upon priorities in the administration of estates where the death occurred before section 28 comes into force.

Section 29: Remuneration of certain trustees

102. In general terms section 29 creates an implied professional charging clause applicable to all non-charitable trusts which do not make provision for remuneration of professional trustees. The remuneration of charitable trustees is dealt with in section 30.

103. **Section 29(1)** confers upon every trust corporation which acts as a trustee the right to receive “reasonable remuneration” (as defined by section 29(3)) from the trust funds (defined in section 39(1)) for any services that it provides to or on behalf of the trust unless the right is negated in the circumstances mentioned below. The right applies even if the trust corporation is a sole trustee, but does not apply if the trust corporation is a trustee of a charitable trust (section 29(1)(b)).
104. **Section 29(2)** provides, subject to certain conditions and exceptions, for all other trustees of non-charitable trusts to receive reasonable remuneration for any services they provide on behalf of the trust. However, unlike trust corporations under section 28, other trustees do not have an automatic entitlement to such remuneration. The entitlement is not available to sole trustees or to trust corporations and is dependent upon the trustee acting in a professional capacity (see section 28(5)) and upon the agreement in writing of each of the other trustees. In determining whether to give such agreement, trustees will be subject to their paramount duty at common law to act in the best interests of the present and future beneficiaries of the trust.
105. **Section 29 (3)** defines “reasonable remuneration” in relation to the provision of services by a trustee. It also makes it clear that a trust corporation which is a recognised provider of banking services may make any reasonable charges for the provision of such services in the course of, or incidental to, the performance of its functions as a trustee. In determining the level of remuneration that is reasonable in the circumstances, regard must be had not only to the nature of the services provided, but also to the nature of the trust and the attributes of the trustee. Remuneration authorised under section 29 will, by definition, be regarded as remuneration for services (and not as a gift) for all purposes, and will be payable out of the income or capital funds of the trust (see the definition of “trust funds” in section 39(1)).
106. **Section 29(4)** provides that remuneration may be paid even if the services provided could have been provided by a lay person (that is, a person who is not a trust corporation and who does not act in a professional capacity - see section 28(5)).
107. **Section 29(5)** specifies that the new power of remuneration will be excluded by any provision about the trustee’s entitlement to remuneration in the trust instrument or in legislation. The right to be remunerated in section 29 is therefore in the nature of a default provision. The phrase “subordinate legislation” is defined in section 6(3).
108. **Section 29(6)** makes clear that appointment as an agent, nominee or custodian does not exclude a trustee from section 29.

Section 30: Remuneration of charitable trustees

109. **Section 30** makes provision for the remuneration of charitable trustees. As mentioned, section 29 does not permit the remuneration of charity trustees (section 29(1) and (2)). Although the Law Commission concluded that there was a strong case for including charitable trustees within the scope of section 29, it recognised that further consultation was probably necessary before a decision could be taken. If the outcome of such a consultation were to be that charitable trustees should be able to be paid in like manner to trustees generally, it would be inconvenient if primary legislation was necessary. Accordingly, section 30 confers a power upon the Secretary of State to make provision by statutory instrument, subject to an affirmative resolution procedure (section 30(4)), for the remuneration of charitable trustees.
110. The provisions of sections 28 and 29 apply in relation to services provided when those clauses are in force whenever the trust was created (section 33(1)). Remuneration payable under these clauses may be paid out of the income or capital funds of the trust (see the definition of “trust funds” in section 39(1)).
111. Under the present law trustees have power to pay agents and to be reimbursed out of the trust fund for the expenses they incur in carrying out their duties (Trustee Act 1925

sections 23(1) and 30(2)). This power is subject to the general rule that trustees only have power to pay proper costs incident to the execution of the trust (*Holding and Management Ltd v Property Holding and Investment Trust Plc* [1989] 1 WLR 1313, 1324). Sections 31 and 32 will clarify the law by bringing together the existing statutory power and the common law qualification. Sections 23 and 30 of the Trustee Act 1925 will be repealed by the Act (section 40 and Schedule 3).

Section 31: Trustees' expenses

112. **Section 31** makes provision for the reimbursement of trustees' proper expenses. Section 31(2) makes clear that appointment as an agent, nominee or custodian does not exclude a trustee from section 31.

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

113. **Section 32** makes provision for the payment of reasonable remuneration and proper expenses to agents, nominees and custodians who are not trustees.

Section 33: Application

114. The provisions will not apply until they are in force. When the provisions are in force, they will apply in relation to trusts whenever created. The services to which the provisions will apply are services provided either before or after the commencement of the provisions, but the only expenses to which the provisions will apply are expenses incurred after (not before) the commencement of the provisions. They do not affect the operation of either section 15 of the Wills Act 1837 or section 34(3) of the Administration of Estates Act 1925 in relation to deaths occurring before they come into force (section 33(2)). See the notes to section 28(4) for a description of sections 15 and 34(3).
115. Remuneration and expenses payable under these clauses may be paid out of the income or capital funds of the trust (see the definition of "trust funds" in section 39(1)).

PART VI: Miscellaneous and Supplementary

Section 34: Power to insure

116. **Section 34** creates a new power to insure. Under the present law there is probably a common law power (and sometimes even a duty) to insure trust property, but this is not entirely certain. In addition, there are different statutory powers to insure under the Trustee Act 1925 section 19 and the Trusts of Land and Appointment of Trustees Act 1996 section 6(1). The power under section 19 is limited to three-fourths of the full value of the property and does not apply to bare trustees. The new power will replace these disparate, unsatisfactory and, in places, uncertain provisions with a clear general default statutory power for trustees to insure trust property as if they were absolute owners. The new provision is based upon the provisions which now apply to trustees of land by virtue of section 6(1) of the 1996 Act.
117. **Section 34(1)** does this by inserting a new power to insure into the Trustee Act 1925 in substitution for the existing section 19. Subsection (1) of the new section 19 confers a power upon all trustees to insure any trust property (whether land or personal property) against such risks and in such sums as they see fit. Trustees will be able to pay the insurance premiums out of the income or capital funds of the trust (see new section 19(5)).
118. Trustees will be subject to the new statutory duty of care under section 1 when exercising the power to insure under the new section 19 or any corresponding power conferred by the trust instrument (see Schedule 1, paragraph 4). The duty of care will therefore apply, for example, to the selection of an insurer and to the terms on which insurance cover is taken out.

119. The new power to insure will apply to all trustees including bare trustees irrespective of when the trust was created (section 34(3)) but will only be a default power (as is the case in relation to the existing section 19 of the Trustee Act 1925 by virtue of Trustee Act 1925 section 69(2)).
120. The exercise of the power by bare trustees (defined for these purposes in new section 19(3)) will however be subject to the qualification in the new section 19(2). This provides that bare trustees must comply with any direction from the sole beneficiary or all the beneficiaries (as the case may be) that any trust property is not to be insured or is only be insured on certain conditions. The rationale for this qualification is that where the beneficiaries are together absolutely entitled to the trust property, they have power under the general law of trusts to bring the trust to an end (*Saunders v Vautier* (1841) 4 Beav 115; 49 ER 282). To the extent that any such directions are given, the trustees may not delegate their power to insure. This is so that the beneficiaries can ensure compliance with the directions they have given (see new section 19(4)). The concept of a “delegable function” referred to in new section 19(4) is defined in section 11(2) of the Act.
121. **Section 34(2)** makes a minor consequential drafting amendment to section 20(1) of the Trustee Act 1925. Section 20(1) provides that insurance monies received by trustees against loss or damage of trust property are capital monies.

Section 35: Personal representatives

122. **Section 35** applies the Act to personal representatives. The effect of section 35(1) is that in relation to the matters contained within the Act personal representatives have (subject to section 35(2) - (4)) the same powers and duties in relation to the administration of an estate of a deceased person as trustees have in relation to a trust. This is consistent with the policy of the Trustee Act 1925 (see section 68(1)(17)).
123. **Section 35(2)** provides the necessary textual adjustments to achieve this end. Section 8(1)(b) requires special treatment (section 35(2)(b) and (c)) because it confers power to acquire land for occupation by a beneficiary. The general provision (section 35(2)(b)) equating beneficiaries with persons interested in the estate of the deceased would therefore be too wide for the purposes of occupation of trust property because it would include creditors. Section 35(2)(c) therefore gives that expression a more restricted meaning in relation to section 8(1)(b).
124. The effect of section 35(3) is that remuneration paid to a personal representative will in future count as an administration expense for the purposes: (a) of section 34(3) of the Administration of Estates Act 1925 (see notes to section 28(3) above); and (b) of, in the case of insolvent estates, any provision giving reasonable administration expenses priority over preferential debts. The categories of preferential debts listed in Schedule 6 to the Insolvency Act 1986 are (in ascending numerical order of priority): debts due to the Inland Revenue; to customs and excise; social security contributions; contributions to occupational pension schemes; remuneration of employees; and levies on coal and steel production. The remuneration of personal representatives will therefore have priority over legacies and other debts of the deceased. Section 35(4) prevents subsection (3) from having an effect upon priorities in the administration of estates where the death occurred before the clause comes into force (see section 42).

Section 36: Pension schemes

125. **Section 36** governs the application of the Act to occupational pension schemes established as trusts under the law of England and Wales (section 36(1)). An occupational pension scheme for these purposes is a scheme which has, or is capable of having, effect in relation to a description or category of employment so as to provide benefits payable on termination of service, death or retirement or in respect of earners with qualifying service in an employment of any such description or category (Pension Schemes Act 1993 section 1).

126. Trustees of occupational pension schemes are in a special position. The investment powers of the trustees of such schemes and related powers of delegation are conferred by section 34 of the Pensions Act 1995. Section 34(2) confers on pension trustees a power to delegate their discretion to make any decision about investments to a fund manager who satisfies certain requirements and prohibits the delegation of such matters in any other way except under section 25 of the Trustee Act 1925 (delegation by individual trustees). By virtue of section 47 of the Pensions Act 1995, occupational pension trustees are required, where the assets of the scheme include investments, to appoint a fund manager and can appoint nominees and custodians ([Occupational Pension Scheme \(Scheme Administration\) Regulations 1996 \(SI 1996/1715 r 2\(c\)\)](#)). Consequently, Parts I, II and III of the Act do not apply to such occupational pension trustees when carrying out their investment functions; nor does Part IV in so far as it confers power to appoint nominees and custodians or, in relation to investment functions, an agent (section 36(3)(5) and (8)). Conversely, the new general duty of care may apply to the trustees of occupational pension trusts in relation to matters other than investment, agency for investment purposes and the appointment of a nominee or custodian (section 36(2)) and such trustees may delegate non-investment functions under Part IV (section 36(5)). However, for the protection of pension scheme beneficiaries, pension trustees are expressly prohibited from delegating any function to the scheme employer or to a person who is connected with, or an associate of, the scheme employer (section 36(6)). “Employer” is defined by virtue of section 36(7)(a) as the employer of persons in the description or category of employment to which the scheme in question relates and, if regulations so provide, persons who have been the employer in relation to the scheme (Pensions Act 1995 sections 124(1) and 125(3)). Persons are connected with a company if they are a director or shadow director or an associate of such a person or the company (Insolvency Act 1986 section 249). Whether or not a person is an associate is determined by the application of section 435 of the Insolvency Act 1986. This section is lengthy but spouses and close relatives are associates, as are business partners and their respective spouses and employers and employees.

Section 37: Authorised unit trusts

127. [Section 37\(1\)](#) provides that the new statutory powers of investment, acquisition of land and to appoint agents, nominees and custodians in Parts II – IV of the Act do not apply to trustees of authorised unit trusts. An authorised unit trust is a unit trust scheme declared by order of the Secretary of State to be such for the purposes of the Financial Services Act 1986 (Financial Services Act 1986 section 207(1)). A unit trust scheme is a collective investment scheme under which the property in question is held on trust for the participants (Financial Services Act 1986 section 75(8)). A collective investment scheme is broadly speaking an arrangement with respect to any property which is intended to enable the persons taking part to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income (Financial Services Act 1986 section 75(1)). The Secretary of State will only issue an order declaring a unit trust to be an authorised unit trust if he is satisfied that the scheme and, in particular, the trust deed complies with the requirements of regulations made as to – amongst other matters – the powers and duties of the manager and the trustee of the scheme (Financial Services Act 1986 sections 78 and 81). Authorised unit trusts therefore have no need of the new powers conferred by Parts II – IV of the Act. An authorisation order under section 78 of the Financial Services Act 1986 Act can be revoked under section 79 of that Act.

Section 38: Common investment schemes for charities etc

128. [Section 38](#) provides that trustees managing common investment and common deposit schemes under the Charities Act 1993 do not have the powers conferred by Parts II-IV of the Act with the exception of trustees managing pooling schemes made under section 24 of that Act. Common investment and common deposit funds enable different charities

to pool resources for investment purposes. The funds may only be established by order of the court or the Charity Commissioners under sections 24 and 25 of the Charities Act 1993 respectively. Such schemes may make specific detailed provision for all matters connected with the fund. The powers conferred by Parts II-IV are therefore unnecessary, with the exception noted above.

Section 39: Interpretation

129. **Section 39** sets out several of the definitions used in the Act.

Section 40: Minor and consequential amendments etc

130. **Section 40** gives effect to Schedules 2, 3 and 4 to the Act. Schedule 2 to the Act contains consequential amendments to a number of enactments. The need for such amendments arises, in most cases, by virtue of the introduction of the general power of investment in Part II of the Act and the power to acquire land in Part III. Schedule 3 contains transitional and saving provisions. Schedule 4 lists the repeals to be effected by the Act.

Section 41: Power to amend other Acts

131. **Section 41** empowers a Minister of the Crown to make further amendments of Acts of Parliament in consequence of or in connection with Part II or III of the Act (powers of investment and acquisition of land respectively). The power is exercisable by statutory instrument subject to the negative resolution procedure. However, where it is proposed to exercise the power in relation to a local, personal or private Act, the making of any such instrument must be preceded by consultation with any person who appears to the Minister to be affected by any proposed amendment. It is likely that this power will be exercised, in particular, in respect of local and private legislation containing provisions which operate by reference to the Trustee Investments Act 1961. The phrase "Minister of the Crown" means the holder of an office in Her Majesty's Government in the United Kingdom, and includes the Treasury, the Board of Trade and the Defence Council (Ministers of the Crown Act 1975 section 8(1)). The power under section 41 will come into force when the Act is passed (section 42(1)) and may be exercised in relation to Acts which extend beyond England and Wales (section 41(1)).

Section 42: Commencement and extent

132. **Section 42** provides that with the exception of itself and sections 41 and 43 (which come into force when the Act is passed) the provisions of the Act will come into force on such day or days as the Lord Chancellor may by order appoint (section 42(1) and (2)). Such commencement orders may include transitional provisions and savings (section 42(3)).

133. **Section 42(4)** limits the extent of the Act to England and Wales only. This is subject to two qualifications. First, as mentioned, an order may be made under section 41(1) amending an Act extending beyond England and Wales. Second, the extent of consequential amendments and repeals (other than to the Charities Act 1993 and the Trustee Investments Act 1961) made in Schedules 2 and 4 to the Act will be determined by the extent of the provision amended or repealed (section 42(5)).

Schedule 1 – Application of duty of care

134. The First Schedule specifies the circumstances in which the new general duty of care will apply. They have been noted and discussed against the relevant provisions of the Act but in brief a trustee acting under a power conferred by the Act or the trust instrument will be subject to the duty in section 1 in the following circumstances:

- when exercising a power of investment or of reviewing investments (paragraph 1);
- when acquiring or managing land (paragraph 2);

*These notes refer to the Trustee Act 2000 (c.29)
which received Royal Assent on 23 November 2000*

- when appointing or reviewing the appointment of an agent, nominee or custodian (paragraph 3);
 - in the compounding of liabilities (paragraph 4);
 - when insuring trust property (paragraph 5) and
 - when dealing with reversionary interests, valuations and audits under section 22(1) or (3) of the Trustee Act 1925 (paragraph 6).
135. [Paragraph 7](#) makes clear that the duty of care will not apply where it is clear from a trust instrument that it should not.

Schedule 2 – Minor and consequential amendments

136. The majority of the amendments in Schedule 2 simply extend the application of the new general power of investment under section 3 to regimes where the powers of investment were as wide as the equivalent powers of trustees were allowed to be under the present law in the absence of express provision in the trust instrument (see for example paragraphs 3, 4 and 8). These notes refer to a few of the more significant.
137. [Paragraph 1](#) - Trustee Investments Act 1961 - the provisions of the Trustee Investments Act 1961 mentioned in paragraph 1(1), which are replaced by the new power of investment in Part II of the Act, are repealed by the Act, except in so far as they are applied by or under any other enactment. Consequently, where (notwithstanding the provisions in Parts II and III of Schedule 2) an enactment continues to operate by reference to the Trustee Investments Act 1961, its effect is preserved. For this purpose it will still be possible (under section 12 of the 1961 Act) for additions to be made to the list of investments specified in Schedule 1 to that Act.
138. In brief the provisions mentioned relate to the following matters: paragraph 1(1) - section 1 (new power of investment of trustees); 2 (restrictions on wide range investments); 5 (certain valuations to be conclusive for purposes of division of trust fund); 6 (duty of trustees in choosing investments); 12 (power to confer additional powers of investment); 13 (power to modify provisions as to division of trust fund) and 15 (saving for court powers);
139. [Paragraph 1\(2\)](#) – section 3 (relationship between Act and other powers of investment); Schedules 2 and 3 (supplementary provision);
140. [Paragraph 1\(3\)](#) – section 8 (special cases); 9 (supplementary); Schedule 4 paragraph 1(1) and section 16(1) to the extent mentioned (construction of references to section 1 of the Trustee Act 1925 which was replaced by section 1 of the 1961 Act).
141. [Paragraph 2](#) - Charities Act 1993 – sections 70 and 71 of the 1993 Act were enacted to enable the Secretary of State, by secondary legislation, to expand the investment opportunities of charity trustees. In view of the new wider powers of investment which will be available to charity trustees under Part II these provisions are no longer needed. The amendments of section 86(2) remove references to sections 70 and 71. Sections 70 and 71 are to be repealed by Schedule 4 to the Act.
142. [Paragraphs 7 - 17](#) make consequential amendments to the Settled Land Act 1925. These fall into a number of broad groups. The amendments in the first group (paragraphs 7 - 9) either grant to trustees of the settlement (in relation to the investment of capital money) the general power of investment in section 3, or make provision to reflect this widening of investment power.
143. The second group of amendments (in paragraph 10) operate on section 75 of the 1925 Act. They amend the section so as to make the investment (or other application) of capital money under that Act a matter exclusively for the trustees of the settlement (subject to a requirement to consult and act in accordance with the wishes of the tenant

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for life so far as practicable) or the court. These amendments permit the trustees to delegate their functions in accordance with Part IV of the Act, but this is again subject to restrictions designed to safeguard the life tenant's right to be consulted in relation to the investment or application of capital money.

144. **Paragraph 11** inserts a new section 75A into the Settled Land Act 1925. The new provision is closely based on section 10(2) of the Trustee Act 1925 (which is repealed by the Act), and permits life tenants or statutory owners (with the consent of the trustees of the settlement), when selling land, to act as mortgagee for up to two thirds of the value of the property being sold.
145. The amendments in the next group (paragraphs 12 - 14) repeal those sections of the Settled Land Act 1925 which concern matters which will in future be governed by other provisions in the Act (such as the remuneration of trustees of the settlement).
146. **Paragraph 16** concerns the role of an assignee for value of a life tenant's estate or interest in the investment of capital money, and the final group of amendments (paragraphs 15 and 17) implement a number of changes to the powers both of trustees of the settlement and life tenants, reflecting some of the changes made to the powers of trustees by the Act.
147. **Paragraphs 18, 21, 23 and 24** amend the Trustee Act 1925 by removing provisions which are no longer necessary. Paragraph 19 clarifies that the power of trustees to give receipts extends to investments.

Schedule 3 – Transitional provisions and savings

148. **Paragraph 1** provides that a banker or banking company holding bearer securities under section 7(1) of the Trustee Act 1925 (which is to be repealed by the Act) when Part IV of the Act comes into force will be deemed to be a custodian of those securities under section 18.
149. **Paragraphs 2 and 3** provide that sections 8 and 9 of the Trustee Act 1925 (which are repealed by the Act) continue in effect in relation to matters occurring before the relevant repeal takes effect (as to which see section 42). Paragraph 6 provides that section 23(2) continues to apply to appointments made before the repeal of that section takes effect.

Schedule 4 – Repeals

150. **Paragraph 1** lists the sections that are being repealed in the Trustee Investments Act 1961 and the Charities Act 1993.
151. **Paragraph 2** lists repeals of section in other Acts.