

PROPERTY LAW AND EQUITY REFORM COMMITTEE

THE CHARITABLE TRUSTS ACT 1957

WORKING PAPER

TERMS OF REFERENCE

In October 1967 the Committee was asked by the then Minister of Justice to consider the comments made by T.A. Gresson J. in the case of Re Goldwater deceased [1967] NZLR 754. Subsequently it was suggested that the whole of the Charitable Trusts Act 1957 called for a general examination. In particular the question was raised of the desirability of establishing more effective means of control of charitable trusts, perhaps by means of a Charities Commission along the lines established in the United Kingdom.

ANALYSIS

This working paper is divided into Parts as follows:

- Part I The desirability of establishing more effective means of control of charitable trusts.
- Part II The proposal that any charity wishing to make a public appeal for funds should be required to register before doing so.
- Part III Problems arising under specific provisions of the Charitable Trusts Act 1957.
- Part IV Problems relating to charitable trusts arising under other statutes.
- Part V Conflicting statutory provisions.

PART I

THE DESIRABILITY OF ESTABLISHING MORE
EFFECTIVE MEANS OF CONTROL OF CHARITABLE TRUSTS

1. DEFECTS IN THE EXISTING LAW

The only existing provision for the general oversight of charitable trusts is the power vested in the Attorney-General. This may not be effective in practice because the Attorney-General has no means of obtaining information about the operation of existing trusts nor indeed does he even have any means of ensuring a knowledge of their existence. The only occasions in practice when his functions are exercised are:

- (a) when trustees make an application to the court for the approval of a scheme; and
- (b) when some complaint is raised by a member of the public.

In the latter case the question may be determined by the Attorney-General under s.58 of the Act. For the reasons given above however this situation rarely arises. On the face of it, therefore, charitable trusts are uniquely free from supervision.

The Committee has, however, little evidence that there is any significant degree of misappropriation of charitable funds in New Zealand, although diversion of funds to purposes not in accordance with the terms of the trust does occur.

2. LAW IN OTHER JURISDICTIONS(A) England

The present machinery in England is established under the Charitable Trusts Act 1960 but has its origins in much earlier legislation. In 1818 Parliament appointed a Commission (which finished its work in 1837) to enquire into existing charities; and in 1835 a Select Committee was constituted to report, inter alia, "by what mode the Charity Funds may be most efficiently, promptly and economically administered". The enquiries revealed a state of affairs which showed the need for some form of public supervision, and as a result the Charity Commission was established by the Charitable Trusts Act 1853 (U.K.). Trusts for educational purposes were placed under the supervision of the Board of Education by the Board of Education Act 1899 (U.K.). The Charity Commission keeps a register of charitable trusts, and trustees are required to make reports and submit accounts annually; there being machinery for a continuing check upon the administration of the trusts. The Commissioners are given the necessary powers of enforcement, investigation, etc.

(B) United States

Until recently the position in most of the United States was similar to that existing in New Zealand, namely that the Attorney-General had powers of supervision but these in practice could seldom be exercised. Beginning in the early 1940s a trend began towards the enactment of legislation attempting to effect the same kind of supervision as that which exists in England. This does not appear to have taken in any State the form of a special body such as the Charity Commission, but the machinery for supervision is operated through the offices of the State Attorney-General. The

legislation in general has called for the compilation of a register and the submission of reports and accounts.

(C) Australia and Canada

As far as can be ascertained there is no register in Australia or Canada providing for this kind of supervision and the position in those jurisdictions appears therefore to be the same as in New Zealand.

3. THE NEW ZEALAND SITUATION

- (1) Whether there is any substantial amount of maladministration of charitable trusts in New Zealand could only be ascertained by the collection of factual evidence which would be a difficult, invidious and perhaps impossible task. Maladministration may occur in one of three ways:
 - (a) Inaction through dilatoriness in not giving effect to the charitable intentions.
 - (b) Misappropriation through the funds being deliberately applied for the trustee's own benefit or applied for some non-charitable purposes.
 - (c) Misapplication (which is more likely to happen) through trustees (acting entirely in good faith) applying funds to charitable purposes which are not within the terms of the trusts.
- (2) There is no reason to think that there is any significant amount of misappropriation; but instances

of misapplication of funds do sometimes occur. We suggest that the problems are not of any magnitude in New Zealand for the following reasons:

- (a) The majority of charitable gifts made in New Zealand either inter vivos or by will are channelled through existing charitable organisations. It is hardly practicable for a donor to establish a new and separate charitable trust foundation unless he has a large fund to devote to the purpose. The number of donors in New Zealand with sufficient wealth to do this is very small. The abuses of which complaints are made in the United States on the other hand appear to arise largely in this kind of situation because in the United States there are many people of sufficient wealth to establish their own individual trusts or foundations, whether for philanthropic or fiscal reasons.

- (b) A large number of existing organisations administering charitable trusts are for one reason or another subject to a legal requirement that their accounts be audited. These would include organisations which are subject to Government audit such as Universities and local authorities. There are also many organisations which, while not subject to a legal requirement of audit, in fact have their accounts audited each year. This happens particularly, even in the case of small trusts, where accounts are customarily presented to a general meeting, for example of a parish. In such cases the auditing is usually undertaken by an honorary auditor. In the case of trustee corporations holding charitable funds the accounts would of course be audited. We understand that

it is the practice for these corporations to have an internal check of the proprieties of the payment of funds held by them for charitable purposes. The significance of audit is that it is clearly within the professional obligations of an auditor concerned with the accounts of any trust to satisfy himself that payments are authorised in terms of the trust instrument. This is accepted as a general principle of auditing and that auditors do in fact check payments against the terms of the trust instrument is within the experience of members of the Committee.

- (3) It would seem, therefore, that it would be difficult to justify the setting up of a body of officials to supervise charitable trusts in New Zealand. It is undoubtedly true that the factors we have mentioned, namely that most charitable gifts are made to established trust foundations and that in many cases the administration of such trusts is subject to audit, do not cover all existing charitable trusts in New Zealand, but they probably apply to a substantial proportion of them. It seems to us therefore that the benefit of the establishment of organised supervision would be disproportionate to the resources and manpower involved.
- (4) A possibility that the Committee has considered, however, is whether all charitable trusts should be required by law to have their accounts audited. If this were a legal requirement it seems to us that it could be a satisfactory safeguard to prevent maladministration at comparatively small trouble or cost in the sense that the overall cost of supervision would be widely spread among many auditors. (In the U.S.A. where departments have been set up in the offices of

States Attorneys-General the experience has been that it has been impossible to make them large enough to carry out full checks of all accounts and returns submitted.) The objections to this proposal would be:

- (a) For enforcement it would still require a register of charitable trusts and someone to check that audited accounts, or at least audit certificates, were supplied annually, and to follow up defaulters. This would be less expensive than establishing an organisation not merely to keep a register but to carry out the checking of accounts itself.
- (b) There might be objections from the point of view of some trusts which are not now audited because of the cost of obtaining an audit.

4. RECOMMENDATION

Subject to the comments under Part II the Committee has tentatively reached the conclusion on the present information that the existing procedure of complaint to the Attorney-General is adequate to cope with such breaches of charitable trusts as may arise and that there is at present no justification for recommending any change to the law in this area.

PART II

THE PROPOSAL THAT ANY CHARITY WISHING TO MAKE A PUBLIC
APPEAL FOR FUNDS SHOULD BE REQUIRED TO REGISTER BEFORE
DOING SO

1. THE EXISTING LAW

The Committee was asked to give particular consideration to the questions raised by Rev. R.M. O'Grady, Associate-General Secretary of the National Council of Churches, in a newspaper article in which he said:

"The public has no protection against charities in New Zealand ...

"It would not be difficult for a skilled promotional person to raise \$10,000 or more for almost any appeal one cares to name. Simply by national advertising and a small mailing to selected persons any charity can get itself established in a few weeks...

"Raising really big money for charity requires time and planning. By far the best method is the house-to-house collection."

After referring to the provisions of the Charities Act 1960 (U.K.) he commented:

"New Zealand has no similar legislation which means, in effect, that the ordinary citizen has no means of finding out the legitimacy of the appeal. Nor can he tell whether it is functioning with any degree of efficiency."

Persons who misappropriate money which they have collected for a real or supposed charity can be dealt with under our present criminal law; but then, of course, the damage has been done. What may be needed is some further safeguard to discourage such dishonesty.

2. THE LAW IN THE UNITED KINGDOM

Under the provisions of the Charities Act 1960 (U.K.)

the Charity Commissioners and the Secretary of State for Education and Science maintain registers of charities (ss. 2 and 4(1)), which are open to public inspection (s.4(7)). Registration is compulsory except for -

- (a) Exempt charities; these comprise important national institutions such as the British Museum and some universities and colleges (ss. 4, 45 and the Second Schedule);
- (b) Charities excepted by order or regulations (s.4(4)) (a number of orders have been made in respect of, e.g., religious charities, boy scouts, and the armed forces); and
- (c) Charities not having permanent endowments (s.45(3)) nor any income from property amounting to more than 15 pounds a year, nor the use and occupation of any land (s.4(2) and (4)).

Institutions ceasing to be charities or ceasing to exist or operate must be removed from the register (s.4(3)).

Additional safeguards are provided in England by the House to House Collection Act 1939 (U.K.) and the House to House Collections Regulations 1947 (S.I. 1947 No. 2662), as amended by the House to House Collections Regulations 1963 (S.I. 1963 No. 684). The Act requires a collection for a charitable purpose (which in this context means any charitable, benevolent or philanthropic purpose, whether or not charitable within the meaning of any rule of law), to be licensed, unless special exemption from licensing is obtained. A person who is promoting, or proposing to promote, a collection in any locality may apply to the chief of police of the area concerned for a licence. The licence may be refused on a number of grounds; e.g. that the amount likely to be

applied for charitable purposes as a result of the collection is inadequate in proportion to the value of the proceeds likely to be received; that remuneration which is excessive in relation to the total amount of the collection is likely to be retained or received by any person, or that the applicant for a licence is not a fit and proper person to hold a licence by reason of the fact that he has been guilty of some such offence as is referred to in the Act. But a person refused a licence has a right of appeal to the Home Secretary. Both the promotion of a collection and acting as a collector are offences punishable by a fine and imprisonment as provided in the Act if a licence is required but has not been granted or is not in force. Certain exemptions from licencing may be granted. (See generally Tudor, Charities (6th ed. 1967), 383 - 384.)

3. ACTION TAKEN

One of the topics within the general field of charitable trusts raised with the Committee by the Minister of Justice is the control of those trusts that solicit funds from the general public. In particular, the Minister asked the Committee to consider whether those trusts should be required to have their accounts audited.

In preliminary discussions the Committee formed the tentative view that this would be a proper requirement in theory, but the fear was expressed that in practice this might prove an onerous burden to some trusts. It was felt that, if this were the case, the proposal could not be justified unless and until some evidence was produced to show that the present lack of controls was leading to abuse. Accordingly, it was decided to undertake a survey of existing trusts to attempt to establish how many currently had their accounts audited.

Questionnaires were sent out to 144 charitable trusts approximately half of which made public requests for funds.

The method of selection was completely random; if the name and address of a trust was known to us it was added to the list. Some attempt was made, however, to get a reasonable balance between "big" trusts and "little" trusts.

A copy of the questionnaire that was sent to the trusts is attached to this paper. Also attached is a list of the trusts to which it was sent. The important questions from the Committee's point of view are numbers 4 and 5 which ask whether the trust makes a public appeal for funds and if so, whether the accounts are subject to regular audit.

Of the 144 questionnaires sent out 101 were returned completed.

Of the 101 trusts that made a return (there were two "spoilt papers"):

54 do not make public appeals for funds

45 do make public appeals for funds

Of the 45 trusts that make public appeals:

43 have their accounts audited regularly (one answered this question "not by accountants")

1 does not have its accounts audited regularly.

Of the 43 trusts that have their accounts audited regularly:

37 are required to do so, either by statute or (more usually) by their own rules

6 do so voluntarily.

RECOMMENDATION

The Committee is divided on the question of the introduction of an audit requirement. Following consideration of any submissions received on this working paper the two following alternative submissions will be further considered.

- (1) That no audit requirement be introduced because of:
 - (a) the difficulty of defining a public appeal for money;
 - (b) the financial burden which might be imposed on small charities;
 - (c) the existence of machinery provisions in s.58 of the Act to enable the Attorney-General to take appropriate action if questions arise as to the condition and management of charities.

- (2) That every charity making a public appeal for funds be required to have its accounts audited because:
 - (a) an auditor has the expertise and status to advise the Attorney-General of any suspected malpractice;
 - (b) major organisations already have their accounts audited at regular intervals;
 - (c) provision could be made for suitable exemptions from the audit requirement.

PART IIIPROBLEMS ARISING UNDER SPECIFIC PROVISIONS OF
THE CHARITABLE TRUSTS ACT 1957Part II of the Act - Incorporation of Trust Boards

A suggestion was received to the effect that the Charitable Trusts Act 1957 is open to abuse in that any society which apparently complied with the provisions of the Act as to registration could be registered without enquiry as to whether it was charitable or not.

The provisions of ss. 10(3) and 26 of the Charitable Trusts Act 1957 appear to make the Registrar's duties sufficiently clear.

Section 8 - Society may apply for incorporation

Some societies which exist exclusively or principally for charitable purposes may be incorporated under the Incorporated Societies Act 1908. Every society which is so incorporated is required, by s.23 of that Act, to deliver an annual financial statement to the Registrar of Incorporated Societies. No such requirement exists in the case of a Trust Board incorporated under Part II of the Charitable Trusts Act 1957.

Either to obtain privacy in relation to its financial affairs or for some other reason an incorporated society which exists for charitable purposes may wish to be incorporated as a Trust Board under Part II of the Charitable Trusts Act 1957. Section 8(2) of the latter Act prohibits such an application. The only practicable way round this difficulty would seem to be to arrange for the incorporation of a new Trust Board under

Part II of the Charitable Trusts Act 1957 and for the incorporated society to transfer its assets to the Trust Board. If the society had substantial assets this could be a cumbersome and expensive process. To overcome this difficulty the Committee proposes to recommend that s.8 of the Charitable Trusts Act 1957 be amended to allow an incorporated society to apply for re-incorporation under the Charitable Trusts Act 1957.

Section 10 - Applications for incorporation

Two suggestions were received to the effect that Trust Boards (as distinct from societies) incorporated under Part II of the Charitable Trusts Act 1957 should be given power to mortgage.

The Committee is disposed to agree with these suggestions, but considers that a better approach would be to recommend that s.21 (powers in respect of property) be widened to include a power to mortgage subject to there being no contrary intention expressed in the instrument.

Section 21 - Powers in respect of property

The effect of s.21(1)(a) is that a Trust Board is required to obtain the consent of the Supreme Court to any dedication of land as a road or street. This would apply even to the dedication of, say, a small corner splay, or to a street widening requirement of a local authority.

The suggested recommendation that both ss. 21 and 33 be amended to empower the Attorney-General to give the necessary consent should meet this difficulty.

Section 32 - Property may be disposed of for other charitable purposes

The Committee is concerned at the high cost of applications to the Court under s.32. It is therefore proposed to recommend that the Attorney-General (or perhaps the Solicitor-General in the alternative) be empowered to approve a scheme under s.32 where the funds or assets involved are not in excess of a stated value which value could from time to time be varied by Order in Council.

Section 33 - Extension of powers or alteration of mode of administration of trust

In Re Martin deceased [1968] NZLR 289 it was held that s.32 empowers the Court in appropriate circumstances to approve the sale of land held on a perpetual trust for the distribution of the income to charities notwithstanding the testator's direction to hold and lease the land. It was also held that the section empowers the Court in like circumstances to distribute the proceeds of the sale for the charitable purposes set out in the will or for other charitable purposes approved by the Court.

The Committee is disposed to recommend that the principles laid down in Re Martin deceased should be endorsed by statute and that s.32 should be amended accordingly. It is considered, however, that the Court should have this power only where the sum involved is small (say \$5,000 or less). Where the sum involved is large (say over \$5,000) it might be appropriate for the power to use capital to be limited to capital works in pursuance of a charitable purpose.

Section 34 - Trustees may prepare a scheme

Under s.34 the trustees may prepare a scheme. Under s.37 any person desiring to oppose a scheme so prepared may

give notice of his intention to oppose the scheme, but under s.53(a) the Court may decide what persons shall be heard in support of or in opposition to the scheme. Under s.53(c) the Court may approve a scheme with or without modification, and s.54 recognises that the Court may reject a scheme. In the case of Re Goldwater [1967] NZLR 754 at 756 T.A. Gresson J. followed the unreported decision of Tompkins J. in the Estate of Arthur Powys deceased and held that the Court had no jurisdiction to approve an alternative scheme put forward by a person appearing in opposition to the scheme put forward by the trustees.

At the present time if the trustees' scheme is rejected because an alternative scheme has been put forward, unless that alternative scheme is acceptable to and adopted by the trustees, in which case it has to be approved and then re-advertised, then there is no means whereby the alternative scheme can be approved by the Court.

The Committee recommends amendments to ss. 35 and 36 so as to streamline procedure where an alternative scheme is acceptable to and adopted by the trustees.

The Committee is of opinion:

- (1) That the status quo, namely that only the trustees may put forward a scheme, should not remain.
- (2) That, subject to suitable safeguards in regard to advertising, persons who put forward alternative schemes in opposition to the trustees' scheme should be entitled to bring such alternative scheme before the Court contemporaneously with the trustees' scheme, and if such alternative scheme

were to be approved that Court should have a discretion to appoint new trustees in lieu of the existing trustees to administer the trusts of the alternative scheme.

Section.35 - Scheme to be laid before Attorney-General

Section 35(3) provides, as a general rule, that the application for approval of a scheme shall be filed in the office of the Court at or nearest the place where the trustees or the majority of them reside or the property is situated. Section 36 provides for advertising in a newspaper circulating in the judicial district in which is situated the office of the Court in which the application has been filed. Judicial districts as such having been abolished by the Judicature Amendment Act 1972, another suitable reference point must be sought. It may happen that the trustee resides in Wellington and that the trust property is situated at Wellington but the charitable purposes are to be carried into effect in (say) Auckland or Dunedin. If the application is filed in the office of the Court at Wellington, then the advertising is to be in a paper circulating in the Wellington judicial district. As a result it may not come to the notice of persons most likely to be interested in opposing the scheme. There is a proviso to s.35(3) which enables the application to be filed in an office of the Court approved by the Attorney-General or the Court, which is capable of providing a useful solution in such cases, but there is no obligation on the applicants to seek such approval.

Accordingly the Committee recommends that s.35(3) be repealed and that the following be enacted in lieu thereof:

After that specified date, if there were no notices of opposition the trustees could then obtain a fixture and advertise the date of the fixture.

Such advertisements would be inserted in a newspaper circulating in the area in which such application is to be or has been filed and must state where the proposed application or applications can be inspected.

The Committee considers that in modern times there is no justification for requiring the advertisements to be inserted in the Gazette. Section 54 would have to be amended so that notice of approval or rejection of the scheme has to be advertised in the same newspaper as that in which the trustees had advertised their intention to propose a scheme. As far as is known the provisions of the present s.54 are honoured more in the breach than in the observance thereof.

Correlation of Parts III and IV

The Committee does not agree with a submission received that Parts III and IV should be amalgamated. Under Part IV money may have been collected on the streets or in other ways and the holders of the fund may not know who the donors were. The object of Part IV is to provide for the disposal of surplus money so collected. The circumstances are entirely different from those which give rise to the intitiation of a scheme under Part III, so that amalgamation of the two Parts is inappropriate.

Section 38 - Meaning of term "charitable purposes" in Part IV of the Act

Section 38 might with advantage be extended so as to apply expressly to the relief of victims (and their dependants) of a disaster, whether arising from inevitable

accident or from some tortious or criminal act. It is proposed to so recommend.

The Committee does not agree with a submission that the definition of "charitable purposes" in s.38 should be accepted for all purposes, including revenue. The Committee is, however, giving further consideration to the possibility of recommending the enactment of a general definition of charitable purposes. It is recognised that any such definition would inevitably be long and detailed and would have to include some general phrase such as "all other purposes which are, by the law of New Zealand, charitable", with the result that in cases not specifically provided for reference would still have to be made to the general law.

Section 61A (as inserted by s.3 of the Charitable Trusts Amendment Act 1963) - Trusts for recreational purposes

Section 61A follows the pattern of the Recreational Charities Act 1958 (U.K.), though the New Zealand provision is in some respects wider.

The background to the U.K. legislation is explained and certain difficulties of interpretation are mentioned in the following note in Nathan and Marshall, A Casebook on Trusts (5th ed. 1967), 200 - 201 (see also Nathan and Marshall, Cases and Commentary on the Law of Trusts (6th ed. 1975 by D.J. Hayton), 269-270):

"The Act was passed to remedy a defect in the law revealed by the House of Lords in I.R.C. v. Badddeley [1955] AC 572. The short issue in that case was whether a conveyance of land to trustees should be stamped at a reduced rate under s.13 of the Stamp Act 1891, on the ground that the trusts upon which it was held were exclusively charitable. The objects of the trust were 'the moral, social and physical well-being of persons resident in West Ham and Leyton who for the time being were or were likely to become members of the Methodist Church and who were of insufficient means otherwise to enjoy the advantages provided'. The method by which the objects were to be attained was 'by the provision of facilities for moral, social and

physical training and recreation and by promoting and encouraging all forms of such activities'. The House of Lords by a majority (Lords Simonds, Porter, Tucker and Somervell; Lord Reid dissenting) held that the objects were not exclusively charitable. The word 'social' included worthy objects of benevolence which were not charitable in the legal sense and the trust accordingly failed (see Williams' Trustees v. I.R.C. [1947] AC 447). Lord Simonds also held ([1955] AC 572, 592) that 'a trust cannot qualify as a charity within the fourth class in Pemsel's case (i.e. as being of general public utility) if the beneficiaries are of a class of persons not only confined to a particular area but selected from within it by reference to a particular creed'. Lord Somervell appeared to agree with this. Lords Porter and Tucker expressed no opinion on the point and Lord Reid dissented (citing Verge v. Somerville [1924] AC 496; and Goodman v. Mayor of Saltash (1882) 7 App Cas 633).

"The Act established two criteria for the validity of a recreational charity: first, the trust must be for the public benefit; and, secondly, the facilities must be provided in the interests of social welfare [as to the meaning of this phrase, see (1959) 23 Conv. (N.S.) 365 (D.W.M. Waters)]. The second criterion itself has two elements: the first is constant, namely, that the object of providing the facilities must be to improve the conditions of life of the beneficiaries; but the second may be satisfied in alternative ways - by showing either that the beneficiaries have need of the facilities by reason of the factors enumerated in the Act, or that the facilities are available to the members or female members of the public at large.

"The Act is not free from difficulties of interpretation. For example, what is the test of 'public benefit to be applied? If it is Lord Simonds' test for trusts of general public utility, a trust like that in I.R.C. v. Baddeley would still not be charitable. The 'social welfare' criterion would not be satisfied in that the beneficiaries did not have need of the facilities by reason of the factors comprised in the Act. Similarly with the 'public benefit' criterion, since Methodists and potential Methodists in West Ham would not constitute a section of the public for the purposes of the fourth class in Pemsel's case. A possible interpretation, which is tentatively put forward, is that 'the public' means the public at large in the whole country or in some defined geographical part of the country. Exceptionally, however, 'the public' may consist of a class of persons where the

class has need of the recreational facilities by reason of the special factors mentioned in the Act; or by reason of the fact that the class of persons consists entirely of females.

"Another difficulty is that there is no clear dividing-line between some of the factors mentioned in the Act. For example, where does one draw a line between 'youth' and 'age'? Does 'youth' end where 'age' begins? Is 'middle-age' unprovided for?

"There have been no contested decisions on the scope of the Act. In Wynn and Others v. Skegness U.D.C. [1967] 1 WLR 52 a convalescent home and holiday centre for North Derbyshire mineworkers was conceded to be within the terms of the Act."

For further criticisms of the English legislation see:

Hanbury, Modern Equity (9th ed. 1969), 268 - 269;

Pettit, Equity and the Law of Trusts (2nd ed. 1970), 178 - 179;

Tudor, Charities (6th ed. 1967), 115 - 117, 386 - 400;

Maurice, "Recreational Charities: the New Act" (1959) 23 Conv. (N.S.) 15;

Waters, "Social Welfare" (1959) 23 Conv. (N.S.) 365.

Subject to the broadening of s.61B as suggested below, it is proposed to recommend that s.61A be repealed subject to existing valid charitable trusts being expressly saved.

Section 61B (as inserted by s.4 of the Charitable Trusts Amendment Act 1963) - Inclusion of non-charitable and invalid purposes not to invalidate trust

The definition of "imperfect trust provision" in s.61B(1) refers to "charitable purpose or purposes" and

"objects". It is not clear whether this definition extends to trusts for a society or institution by name, without any express reference to the purposes or objects of that society or institution, when the society's purposes or objects comprise both charitable and non-charitable purposes. It would appear from Re Inman [1965] VR 238 that if the trust is simply for a body corporate or unincorporate for the furtherance of its work, and such work is not wholly charitable, s.61B(1) cannot apply because the trust is for one purpose which comprises all the objects of the body. See (1965) 39 ALJ 237 and P.T. Burns, "Salvage of Trusts with Mixed Charitable and Non-Charitable Purposes" (1965) 1 Otago L. Rev. 41 at 46 - 47.

The Committee has provisionally agreed to recommend that this section should be amended to make it clear that it does extend to trusts for a society or institution by name without any express reference to the purposes or objects of that society or institution, notwithstanding that the society's purposes or objects comprise both charitable or non-charitable purposes. The society or institution should be placed under a statutory obligation to apply the property affected by the imperfect trust provision to charitable objects only; but without prejudice to the application of any other property of the society or institution towards any valid non-charitable purpose.

It is proposed to recommend the enactment of the following new subsection to be included in s.61B:

"(1A) Where any property or income is given to any body (whether incorporated or unincorporated), and by reason of the terms of the gift or the constitution of the body or otherwise the donee is restricted as regards the purposes for which the property or income may be used, if those purposes include some that are non-charitable and invalid as well as some charitable purpose or purposes, the provisions of this section shall apply as

if the restriction of the purposes arose by reason of a trust created by an imperfect trust provision."

Second Schedule Form 2

In order to bring this form into closer conformity with s.8(1) it is proposed to recommend that the words "for or principally" be added after the words "society" at the end of the first line of paragraph 1.

PART IVPROBLEMS RELATING TO CHARITABLE TRUSTS
ARISING UNDER OTHER STATUTESPERPETUITIES ACT 1964

Doubts have been felt as to the application of s.21 of the Perpetuities Act 1964 to a power or direction to accumulate income when the accumulations would be added to the capital of a fund the income of which would, following the accumulation period, be applied for charitable purposes in perpetuity. The reason for this doubt is that the section validates the power or direction to accumulate income only if the disposition of the accumulated income is or may be valid; whereas in the circumstances mentioned the accumulated income would in one sense, not be disposed of at all but would be held in perpetuity.

This doubt could be resolved by providing that s.21 of the Perpetuities Act 1964 does not apply to charitable trusts, and the Committee proposes to so recommend.

PART VCONFLICTING STATUTORY PROVISIONS

In Attorney-General ex rel. Rathbone and McKay v. Waipawa Hospital Board [1970] NZLR 1148 the Supreme Court had to consider an apparent conflict between the provisions of s.32 of the Charitable Trusts Act 1957 and s.74 of the Hospitals Act 1957. Beattie J. commented (at pp. 1159-1160);

"Collision may be avoided in this case by holding that s.74 which is ex facie in conflict with s.32, merely provides for an exception from the general rule contained in s.32. Sect.on 74 is not the only one of its kind. Section 9 of the Education Lands Act 1949 which gives power to Trustees of high schools to sell or exchange high school reserves makes it lawful for a transfer to the Crown, 'with or without consideration or for an inadequate consideration any ... reserve held by them freed and discharged from all trusts and reservations affecting the same'. Another far-reaching provision is s.150(2) of the Municipal Corporations Act 1954 permitting a Corporation to sell or exchange land vested in it in trust for any particular purpose or purposes. An amendment in 1961 inserts a further provision that the Council, with the consent of the Minister may sell or exchange any land vested in the Corporation as an endowment for the general purposes of the district.

"Therefore, in certain circumstances, these examples indicate that the Legislature regards it as being consistent with public policy that these special powers should be given to a responsible public authority, more particularly where the power is subject to the approval of the appropriate Minister of the Crown.

"In my opinion the existence of that power as I have interpreted it, is consistent with public policy. Reading the Hospitals Act 1957 as remedial and applying s.5(j) of the Acts Interpretation Act 1924, then the history of the Act intended to be remedied by s.74 and

its predecessors can be taken to meet a situation more common with hospitals than gifts will be made to them by persons with general charitable intentions; those gifts will be put to their best use at the time, but in many cases they will become mixed with other funds. Also, circumstances may change, demanding a constant re-adjustment of the application of such funds. It would be impracticable and unnecessarily burdensome in my opinion if in every case a Hospital Board required Court approval."

The Committee has tentatively decided to recommend that the powers of the Court under the Charitable Trusts Act 1957 should not be affected by the provisions of the Hospitals Act 1957 or any similar legislation. The recommendation may take the form of a suggestion that the Minister of Justice might consult with the Ministers responsible for the legislation involved with a view to vesting sole authority to vary charitable trusts in the Court.

SUBMISSIONS

The views put forward in this working paper are tentative only and the Committee would be grateful for any suggestions or constructive criticisms. It requests that submissions be sent to:

The Secretary,
Property Law and Equity Reform Committee,
c/- Department of Justice,
Private Bag,
Postal Centre,
WELLINGTON

before 31 March 1978.

APPENDIX I

Submissions have been received from:

1. The Registrar-General of Land dated 22 April 1968.
2. Messrs Millar & Kerr (Christchurch) dated 19 July 1968
3. Messrs Duncan, Cotterill & Co. (Christchurch) dated 6 August 1968
4. Messrs Burt, Harris, Moodie & Goold (Auckland) dated 15 August 1968
5. Messrs Parry & Field (Christchurch) dated 19 August 1968
6. Messrs Goldwater, Marshall-White & White (Auckland) dated 3 October 1968
7. The Assistant Public Trustee dated 29 August 1969

The Committee has also considered:

1. An article by the Rev. R.M. O'Grady, Associate-General Secretary of the National Council of Churches, "Is it Time to Sort Out a Muddle of Charities?" in The New Zealand Herald, dated September 1970.
2. An article by Mr Denis Wederell, "Charitable Trusts are Going into Business" in the National Business Review, dated 12 June 1972, p.7.

APPENDIX II(1)

PROPERTY LAW & EQUITY REFORM COMMITTEE

Questionnaire on Charitable Trusts

1. What is the full name of your Trust?
2. Is the trust established incorporated or registered under any Act of Parliament?
Yes/No.
3. If the answer to question 2 is "YES" what is the name of the Act?
4. Has the trust ever made a public appeal for funds, or in any way solicited funds from the general public?
Yes/No.
5. If the answer to question 4 is "YES" does the trust have its accounts audited regularly?
Yes/No.
6. If the answer to question 5 is "YES" is the trust legally obliged by any Act of Parliament or its own rules or regulations to have its accounts audited?
Yes/No
7. If the answer to question 6 is "YES" what is the source of the legal requirement?

NOTE: When completed please return the questionnaire to:

The Secretary,
Property Law & Equity Reform Committee,
Private Bag 1,
Government Buildings,
WELLINGTON

APPENDIX II (2)LIST OF CHARITIES TO WHICH THE QUESTIONNAIRE
WAS SENT

J.L. Hay Charitable Trust, c/- Hay's Ltd., Private Bag,
Christchurch

Hellaby Grasslands Research Trust, N.Z.I., P.O. Box 634,
Auckland

Rose Hellaby Medical Scholarship Trust, c/- Messrs Earl, Kent,
Massey & Hamer, P.O. Box 222, Auckland

E.L. Herbert Memorial Trust, P.O. Box 23, Eketahuna.

Lucy Duncan Hewitt Fund, N.Z.I. Trust Dept., P.O. Box 634,
Auckland

Thomas Hobson Trust, c/- Geraldine County Council, P.O. Box
51, Geraldine

Norman Cunningham Trust, N.Z.I. Trust Dept., P.O. Box 634,
Auckland

Dempsey Trust, Robertson, Brent & Haggitt, Barristers &
Solicitors, P.O. Box 118, Dunedin

Dolamore Trust, Trustees, Executors & Agency Co., P.O. Box 88,
Gore

P.A. Edmiston Trust Board, N.Z.I. Trust Dept., P.O. Box 634,
Auckland

Charles & Ella Elgar Trust, c/- Dymock, MacShane & Co., Public
Accountants, P.O. Box 1723, Wellington

William Francis Gordon Trust, D.P.T., P.O. Box 648, New
Plymouth

Gilbert Conway Hamilton Trust, D.P.T., P.O. Box 20, Dannevirke

Anglican Boys' Society Trust, P.O. Box 30-689, Lower Hutt

Blair Benefactions, The Trustees, Executors & Agency Co. of
N.Z. Ltd., P.O. Box 760, Dunedin

W.G.D. Brown Trust, N.Z.I. Trust Dept., P.O. Box 1193,
Wellington

Sir John Logan Campbell Residuary Estate, N.Z.I. Trust Dept.,
P.O. Box 634, Auckland

Harold Chaffer Memorial Endowment, Trustees, Executors & Agency Co., of N.Z. Ltd., P.O. Box 760, Dunedin

Arthur Thomas Clarke Trust, D.P.T., Wellington

William Louis Cox Memorial Scholarship Fund, D.P.T., P.O. Box 31, Tauranga

Homewood Trust, P.O. Box 32, Te Puke

Arthur Hopwood Charitable Trust Board, P.O. Box 645, Palmerston North

Sir John Ilott Trust, P.O. Box 1491, Wellington

Charles Hayward Izard Trust, c/- Castle & Castle, P.O. Box 1433, Wellington

Andrew Jack Trust, D.P.T., P.O. Box 429, Dunedin

Kelliher Art Competition Trust, N.Z.I., Trust Dept., P.O. Box 634, Auckland

Thomas George Macarthy Trust, D.P.T., Wellington

Robert McClelland Trust, D.P.T., P.O. Box 1474, Christchurch

Mackelvie Trust, c/- Buddle, Weir & Co., P.O. Box 1309, Auckland

J.R. MacKenzie Trust, P.O. Box 10-006, The Terrace, Wellington

J.R. McKenzie Youth Education Trust, c/- Mr A.I. Cottrell, P.O. Box 214, Christchurch

Reginald Mitta MacKinnon Trust, D.P.T., P.O. Box 831, Invercargill

Godfrey William Magnus Trust, c/- McCulloch, Butler & Spence, P.O. Box 524, Wellington

Hyman Marks Trust, c/- Stewart Beckett & Co., P.O. Box 387, Christchurch

Masterton Trust Lands Trust, P.O. Box 90, Masterton

John Meehan Trust, D.P.T., P.O. Box 196, Timaru

Thomas Richard Moore Trust, D.P.T., P.O. Box 604, Palmerston North

Laurance William Nelson Trust, D.P.T., P.O. Box 642, Whangarei

N.Z. Aeronautical Trusts Ltd., P.O. Box 1610, Auckland

Ngaitahu Maori Trust, P.O. Box 31, Kaiapoi

Norwood Crippled Children's Trust, P.O. Box 599, Wellington

Nuffield Trust, c/- Ernest Hunt, Turner & Co., P.O. Box 2194, Wellington

Otaki & Porirua Trusts, The Diocesan Secretary, Church House, 18 Eccleston Hill, Wellington

Papawai and Kaikokirikiri Trusts, Church House, 18 Eccleston Hill, Wellington

Returned Services Association Trusts, P.O. Box 1010, Wellington

Sir Charles Perin Skerrett Estate, Education Charities Fund, N.Z.I. Trust Dept., P.O. Box 1193, Wellington

Sutherland Self-Help Trust, c/- Self Help Co-op Ltd., P.O. Box 193, Wellington

Doris Elizabeth Geraldine Swadling Trust, D.P.T., P.O. Box 45, Hawera

Tainui Maori Trust, P.O. Box 78, Taumarunui

Taranaki Maori Education Trust, P.O. Box 27, Hawera

Taranaki Maori Trust, P.O. Box 27, Hawera

National Council of Y.M.C.A.s of New Zealand Inc., P.O. Box 1780, Wellington

National Society on Alcoholism, P.O. Box 1642, Wellington

Auckland Institute and Museum Trust Board Inc., Private Bag, Auckland

Queen Elizabeth II Arts Council of New Zealand, P.O. Box 2563, Wellington

National Library of New Zealand, Private Bag, Wellington

Windsor House Board of Governors Inc., P.O. Box 2355, Christchurch

St. Kilda Municipal Band, P.O. Box 314, Dunedin

Moral Re-Armament Association, P.O. Box 1834, Wellington

Dunedin Opera Co., P.O. Box 533, Dunedin

Dunedin Operatic & Dramatic Society, P.O. Box 1203, Dunedin

N.Z. Epilepsy Association, P.O. Box 6436, Te Aro, Wellington

Mana Arts Festival Trust, P.O. Box 53035, Titahi Bay,
Wellington

New Zealand Returned Services Association Inc., P.O. Box 1010,
Wellington

Disabled Servicemen's Re-establishment League (Inc.),
Wellington Branch, P.O. Box 1420, Wellington

The Wellington Society for the Prevention of Cruelty to
Animals (Inc.), P.O. Box 7069, Wellington South

Boys Brigade in New Zealand Inc., P.O. Box 9007, Courtenay
Place, Wellington

Boy Scouts Association of New Zealand, P.O. Box 2675,
Wellington

Outward Bound Trust of N.Z., P.O. Box 3158, Wellington

Grand Lodge of New Zealand Freemasons, P.O. Box 6439, Te Aro

St. Joseph's Orphanage, Upper Hutt

S.F. Hoskins, African Mission Seminary Fund, c/- Catholic
Supplies, Dixon Street, Wellington

St. Joseph's Relief Depot and Creche, Buckle Street,
Wellington

Home of Compassion, Island Bay, Wellington

The Little Company of Mary Trust Board, Calvary Hospital,
Florence Street, Newtown, Wellington

Wellington Catholic Education Board, P.O. Box 908, Wellington

Alcoholics Anonymous, P.O. Box 5196, Lambton Quay

National Society on Alcoholism Inc., P.O. Box 1642, Wellington

The Mother Superior, Little Sisters of the Poor, Andersons
Bay, Dunedin

The Wellington City Mission Trust Board, P.O. Box 6031, Te Aro

N.Z. Red Cross Society Inc., P.O. Box 6073, Te Aro

Wellington Free Ambulance Transport Service, P.O. Box 11025,
Manners Street, Wellington

St. Vincent's Home of Compassion, Pukenui Crescent, Auckland 5

Wellington Branch of N.Z. Society for the Protection of Home
and Family Inc., P.O. Box 6088, Te Aro

Wellington Free Kindergarten Association Inc., P.O. Box 3524,
Wellington

Wellington Marriage Guidance Council, P.O. Box 6032, Te Aro

Auckland Institute & Museum Trust Board Inc., Private Bag,
Auckland

Royal Forest and Bird Protection Society of New Zealand Inc.,
P.O. Box 631, Wellington

N.Z. Surf Life Saving Association, P.O. Box 272, Wellington

Mr R. Lowe, General Secretary, Methodist Connexional Office,
P.O. Box 931, Christchurch

Wellington Medical Research Foundation Inc., P.O. Box 3025,
Wellington

Friends of the Deaf Society Inc., P.O. Box 3100, Auckland

Wellington Branch of the N.Z. Crippled Children's Society,
P.O. Box 1586, Wellington

Intellectually Handicapped Childrens Society, P.O. Box 2771,
Wellington

Outdoor Pursuits Centre of New Zealand, P.O. Box 984,
Wellington

St. Vincent de Paul Society, P.O. Box 6371, Te Aro

The Church Army in New Zealand, P.O. Box 7059, Ponsonby,
Auckland

Presbyterian Orphanage & Social Services Trust Board, P.O. Box
1314, Wellington

Baptist Union of New Zealand, P.O. Box 6212, Te Aro,
Wellington

Salvation Army, P.O. Box 6015, Te Aro

Wellington Liberal Jewish Congregation, P.O. Box 6416, Te Aro

Wellington Tramway Museum Inc., P.O. Box 2612, Wellington

Wellington Mountain Safety Committee, P.O. Box 5031, Lambton Quay

The Plymouth Brethren, 134 King Street, Palmerston North

Wesley Church Social Services, P.O. Box 6133, Te Aro

Apostolic Church, P.O. Box 6201, Te Aro

Church of Christ, P.O. Box 1582, Wellington

Greek Orthodox Church, 118 Onepu Road, Lyall Bay, Wellington 3

Assembly of God, P.O. Box 3098, Wellington

Church of Jesus Christ of Latter Day Saints, Templeview, Hamilton

Y.W.C.A. of New Zealand, P.O. Box 9315, Courtenay Place, Wellington

Youth Hostels Association of N.Z., P.O. Box 1203, Wellington

Corso, P.O. Box 2500, Wellington

Lepers Trust Board Inc., D. Douglas Esq., 115 Sherborne Street, Christchurch

Dr Barnado's Home, P.O. Box 899, Wellington

Ryder Cheshire Foundation (N.Z.) Inc., P.O. Box 5094, Wellington

Senior Citizens, P.O. Box 1300, Wellington

Plunket Society Dominion Headquarters, P.O. Box 672, Dunedin

N.Z. Brass Bands Association, P.O. Box 2375, Christchurch

The Trustees, Alexander Turnbull Library, P.O. Box 8016, Wellington

Cholmondeley Memorial Children's Home Inc., P.O. Box 2490, Christchurch

City of Wellington Highland Pipe Band, P.O. Box 2870, Wellington

Human Rights Organisation, P.O. Box 5050, Lambton Quay, Wellington

Wellington Multiple Sclerosis Society

Hannah Playhouse Trust Board, P.O. Box 233, Wellington
Christchurch Theatre Trust, P.O. Box 268, Christchurch
Auckland Theatre Trust, P.O. Box 68257, Auckland
Auckland Opera Trust, P.O. Box 9399, Auckland
Downstage Theatre Trust Board, P.O. Box 1990, Wellington
Association of Ballet and Opera Trust Boards of New Zealand,
P.O. Box 17058, Wellington
Otago Art Society, P.O. Box 842, Dunedin
Laura Fergusson Trust, 224 Great South Road, Remuera, Auckland
Birthright Wellington Inc., Aurora House, 62 The Terrace,
Wellington
Christchurch City Mission, P.O. Box 9012, Addington,
Christchurch
Christchurch Children's Homes Appeal, P.O. Box 2453,
Christchurch
Cashmere Evangelical Trust Inc., P.O. Box 828, Christchurch
Cancer Society of New Zealand Inc., I.B.M. House, The Terrace,
Wellington
Wharema Geriatric Home and Hospital, Nelson
Wellington After Care Association Inc., 111 Brougham Street,
Wellington
Diocese of Waiapu, Abbotsford Home Trust, Napier
Wellington Board for Relief of the Aged, Te Hopai Home,
Hospital Road, Wellington 2
Friendly Road Fellowship, P.O. Box 615, Auckland
Canterbury Sheltered Workshops Association, P.O. Box 8072,
Riccarton, Christchurch
Aid Rhodesia Movement, P.O. Box 10120 Wellington