

STATUTORY MACHINERY FOR SUPERVISING CHARITIES

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This paper purports to provide no more than an outline of the various statutory methods used for assisting, supervising and controlling the administration of charitable funds in a number of selected common law jurisdictions.

Background in English Law

In English law, control over charities was originally divided between the Crown, the Court of Chancery and the visitors of charitable corporations.¹

It was the traditional function of the Sovereign as *parens patriae* to act as protector of charities and the Attorney General's responsibility to take legal proceedings to correct the misuse of charitable funds stems from this. Whether the jurisdiction of the court over charities is to be regarded as part of the royal prerogative which was exercised by the Chancellor or whether it is founded solely on the court's inherent jurisdiction over trusts is a matter of dispute and of little current importance.² By the seventeenth century the main function which the Crown exercised with respect to charities independently of the courts was to designate the destination of property left for uncertain charitable purposes without the creation of a trust.

Apart from this function it was the Court of Chancery which for the main part established charitable trusts, controlled trustees, redressed breaches of trust and made schemes for the administration of the trust property or its application *cy près*. Legal proceedings, relating to such matters required the intervention of the Attorney General and in most cases only he could initiate them. The inevitable inefficiency of a system which depended for its success on continuous supervision by an official with other and usually more pressing duties led to the enactment of the *Statute of Charitable Uses*, 1601 and the more recent attempts to provide statutory machinery for regulating charities in England and other common law countries.

Prior to the nineteenth century the jurisdiction of visitors over eleemosynary corporations was of some importance. The visitor, who in the absence of specific appointment would be the founder and his heirs, unless they were specifically excluded, had jurisdiction to inquire into and to regulate the administration of the corporate property and to see that it was rightfully employed. On the failure of heirs of the founder the visitorial jurisdiction devolved upon the Crown. Early in the nineteenth century the courts became more and more doubtful of the effectiveness of this form of jurisdiction and began to intervene frequently on the basis of their power to supervise the administration of trusts. In England at the present time the powers of the visitor are in practice limited to the details of internal management and discipline. In view of this development, the abolition of heirship and the fact that visitors are now rarely appointed, the visitorial

jurisdiction has ceased to have practical significance. In theory the founder of an incorporated charitable foundation and, after his death, the Crown may still be entitled to exercise visitorial powers in the absence of statutory provisions to the contrary.

A. ENGLAND AND WALES

The Charity Commissioners

1. The main responsibility for the supervision of charities continues to be vested in the Charity Commissioners. Although their present functions are, in general terms, similar to those imposed by the legislation of 1853, 1855 and 1860, the Commissioners were reorganized and their powers extended by the *Charities Act*, 1960. They are appointed by the Home Secretary, are deemed to be civil servants and are normally three in number of whom two must be either barristers or solicitors.¹ Although not incorporated they may sue and be sued under the name of the Charity Commissioners for England and Wales.²

2. Under the Act, the Commissioners have the general function of "promoting the effective use of charitable resources by encouraging the development of better methods of administration, by giving charity trustees information or advice on any matter affecting the charity and by investigation and checking abuses."³ Within this general description it is possible to classify the responsibilities of the Commissioners as administrative, advisory, supervisory and quasi-judicial.⁴

Administrative Functions

3. Although the Charity Commissioners are prohibited from acting in the administration of any particular charity⁵ they have a number of important powers which may affect the way in which the charity will be administered by its trustees. In the first place, they have power to sanction administrative acts which appear to them to be expedient in the interests of the charity even though such acts might otherwise be *ultra vires* the trustees.⁶ This power, however, cannot be exercised if the acts are expressly prohibited by the trusts of the charity or by Act of Parliament.⁷ Where no such prohibition exists the Commissioners may, for example, authorise compromises, direct the source from which expenditure is to be borne or authorise the trustee to combine with the trustees of some other charity for the purposes of administration.⁸ The Commissioners also have the function of granting or withholding consent to legal proceedings relating to a charity other than those brought by the Attorney General.⁹ Their consent is necessary with respect to specified dealings with property which forms part of the permanent endowment of a charity and they have miscellaneous other powers with respect to the establishment of common investment schemes, the custody, safekeeping and certification of deeds and other documents relating to charities, the taxation of solicitor's costs for work done for a charity and legal proceedings to compel the payment of rent charges to which a charity may be entitled.¹⁰

4. One of the new responsibilities conferred upon the Commissioners by the *Charities Act*, 1960 was the establishment and maintenance of a register of charities.¹¹ Charity trustees are under a duty to apply for registration and to furnish such information as the Commissioners may prescribe.¹² The register takes the form of a card index which is available for public inspection. Copies of the trust deeds or other governing instruments of registered charities are also filed with the Commissioners and are available to the public. In recommending the creation of the register the Nathan Committee stressed its advantages for the would-be beneficiary, for social workers and for the Commissioners in the exercise of their *cy prèès* jurisdiction. They were also influenced by their belief that many trusts for charitable purposes had disappeared simply because their deeds had been lost or destroyed as a consequence of the neglect or forgetfulness of trustees.¹³

5. Perhaps the most important consequence of registration is that, while a trust or institution remains on the register, it is conclusively presumed to be a charity. This presumption applies for all purposes other than those of an application to rectify the register.¹⁴ Although the Commissioners are not vested with responsibility or power to determine whether or not a particular trust is valid, the effect of the registration provisions is that, subject to any appeal to the High Court, they have the function of determining whether the objects of a trust or institution are exclusively charitable. Once this is done and registration is effected the body is automatically entitled to all privileges, including fiscal privileges, afforded to charities.

6. Any person who is or who may be affected by registration may either seek to prevent it or apply to have the trust or institution removed from the register.¹⁵ This right applies to other government departments as well as, for example, the next of kin of the donor or testator although, as the Act expressly provides for an exchange of information between the Commissioners and other government departments, it is normal for the Commissioners to work in close consultation with the Inland Revenue when determining charitable status at the first instance. Persons entitled to object to registration as well as the Attorney General and the Charity trustees are entitled to appeal at any time to the High Court from a decision of the Commissioners in favour or against registration.¹⁶

Advisory Functions

7. Under the Act any charity trustee may seek advice from the Commissioners on any matter affecting his duties with respect to the charity. A trustee will not be in breach of trust for anything done in accordance with the Commissioners' advice unless he is, or should be, aware that the advice was given in ignorance of material facts or unless legal proceedings with respect to the matter have been brought.¹⁷ This advisory function of the Commissioners is especially useful when there is some dispute between trustees as to the limits of their powers under the instrument governing the charity.

Supervisory Functions

8. The Commissioners have far-reaching powers to institute inquiries with respect to particular charities or classes of charities.¹⁸ The Act contains no limitations or restrictions on the purposes for which such inquiries can be made. The Commissioners' power to conduct an inquiry may be delegated and they or their delegate can hear evidence on oath and require information to be supplied in writing verified by statutory declaration.¹⁹ It is an offence punishable summarily to destroy or suppress documents which may be required by the Commissioners for the purpose of an inquiry.²⁰ Charities with permanent endowments are generally required to furnish annual accounts to the Commissioners and other charities are obliged to supply accounts on the Commissioners' request.²¹ Any such accounts are available for public inspection during the time that the Commissioners see fit to keep them. The Commissioners are empowered to require any accounts to be audited.²²

Quasi-Judicial Functions

9. Where, as the result of an inquiry instituted by the Commissioners they are satisfied that a charity trustee has been guilty of misconduct or mismanagement in the administration of a charity and that it is desirable to act in order to protect the charity, they may in their discretion remove any trustee or officers responsible, order that trust property be vested in the custodian for charities, freeze money or securities belonging to the charity and restrict the transactions which may be made in the administration of the charity without their approval.²³ They may also remove trustees who are not acting, or who are mentally incapable, bankrupt or convicted felons. The Commissioners have power to appoint new trustees in place of trustees removed or in addition to existing trustees where it is necessary to do so.²⁴ The Act also provides that they may exercise the same powers of appointment, discharge and removal as are exercisable by the High Court in charity proceedings.

10. Subject to certain limitations the Charity Commissioners have the same scheme-making jurisdiction as is possessed by the High Court in charity proceedings.²⁵ This jurisdiction includes, although it is by no means confined to, the power to exercise the extended *cy præs* jurisdiction under the Act. The Commissioners may not make schemes if they consider that for any reason the case should be dealt with by the court.

Thus, where the case is of a contentious character or where it raises special questions of law or fact, the Commissioners may refuse to act. Before they may exercise their power to make schemes the matter must normally come before them on an application by the charity or by virtue of an order of the court. If, however, the charity has income from property amounting to no more than fifty pounds a year the Commissioners may act on the application of the Attorney General, any charity trustee or person interested in the charity. If no application is made to them in a case where they consider that a scheme is necessary, the

Commissioners may themselves request the Home Secretary or the Minister of Education to refer the matter to them with a view to a scheme. If, after the trustees have been given an opportunity to make representations, the reference is made, the Commissioners may proceed to exercise their scheme-making power which, however, may in such circumstances not involve an alteration of the purpose of the charity if it has been established for less than forty years.²⁶

11. Where a scheme made by the Commissioners would be otherwise beyond their power or would conflict with or amount to an alteration of the provisions contained in an Act of Parliament regulating the charity the scheme may be effected by a statutory instrument made by the Home Secretary and laid before Parliament.²⁷

Exceptional Cases

12. The Commissioners' powers which have been outlined in the preceding paragraphs are subject to a number of exceptions. In the first place, the second schedule contains a description of trusts and institutions which are referred to as "exempt charities."²⁸ Such charities are not subject to the Commissioners' power to veto legal proceedings or dealings with endowed property. They may obtain registration but are not required to do so. The Commissioners' powers to institute inquiries, to require the production of documents, to require accounts and audits, to apply to the Minister in order to obtain jurisdiction to make a scheme and to intervene in cases of mismanagement or misconduct by trustees are also excluded.

13. Apart from exempt charities there are other charities which although generally subject to the Commissioners' inquisitorial, supervisory and quasi-judicial powers are excepted in a few specific instances. The requirement of registration does not apply to charities with no permanent endowment, income from property less than fifteen pounds a year and no use and occupation of land.²⁹ In the same way regulations may except charities permanently endowed from the obligation to submit annual accounts and from the necessity to obtain the approval of the Commissioners for proposed dealings with the endowed property. Examples of charities which have been excepted from compulsory registration are voluntary schools without permanent endowments other than their premises, specific denominational charities mainly concerned with the advancement of religion, and unendowed funds belonging to units of the Boy Scouts or Girl Guides associations.

The Minister of Education

1. The Minister of Education retains his jurisdiction under the *Endowed Schools Act*, 1869 and later statutes dealing with educational endowments. Although the *Charities Act*, 1960 provides that the Minister can exercise any of the functions conferred on the Charity Commissioners, it states that it shall be for the Minister to act in relation to charities whose purposes are wholly or

mainly purposes connected with general educational functions and that it is for the Commissioners to act in other cases.³⁰ This division of functions may be altered or made more precise by Order in Council.

Local Authorities

1. Under the *Charities Act*, 1960, County and Borough Councils are authorised to maintain an index of local charities and to publish information from the index. The Charity Commissioners are obliged to supply from the register information relevant to the index on the request of the particular council and information relating to any subsequent changes in the register without further request. Local indices must be available to the public at all reasonable times.³¹

2. County and Borough Councils are authorised to carry out reviews of any group of local charities with similar purposes and to report and make recommendations to the Charity Commissioners on the basis of the information obtained. Such recommendations may for example suggest that the trustees or officers of the group should amalgamate to some extent for administrative purposes. No review can extend to a charity without the consent of its trustees nor can ecclesiastical charities be reviewed. Local authorities are authorised to co-operate with local charities whose activities are similar or complementary to services provided by the authorities. The charities are similarly authorised to co-operate with local authorities in such circumstances.³²

The Home Secretary

1. The Home Secretary appoints the Charity Commissioners and although, as they are a statutory body with statutory functions, he is not responsible for their decisions with respect to individual charities, he is responsible to Parliament for their general functioning. He receives their annual reports and shares with the Minister of Education the responsibility for making regulations under the *Charities Act*, 1960. It should be noted that the Act confers no right to appeal to the Home Secretary from the decisions of the Commissioners. Appellate jurisdiction in such matters is exercised by the court.³³

2. The Home Secretary also exercises supervisory, appellate and regulation-making powers under the *House-to-House Collections Act*, 1939.³⁴

The Official Custodian for Charities

1. The official custodian is an officer of the Commissioners who is appointed by them. He is a corporation sole with perpetual succession and the legal title to property held on trust for charitable purposes may be vested in him by order of the Commissioners or of the court or by the trustees with his consent. His powers, duties and liabilities are the same as those of a corporation appointed as a custodian trustee under the *Public Trustee Act*, 1906. He is subject to directions given to him by the Commissioners but generally has no power to interfere with the administration of a trust by its trustees. He has no power to charge for his services and his expenses are to be met by the Commissioners.³⁵

The Commissioners of Inland Revenue

1. Prior to the enactment of the *Charities Act*, 1960 a large number of the cases in which the courts had to determine whether the objects of a trust or institution were limited to exclusively charitable purposes arose by way of appeal or case stated by the Commissioners of Inland Revenue or appeal from the Commissioners for the Special Purposes of the Income Tax. In view of the provisions in the *Charities Act*, 1960 which relate to the effect of registration as a charity such cases are unlikely to arise so frequently in the future. As has been mentioned already, the Inland Revenue has rights to oppose registration or to apply for rectification of the register. The consultation between the Commissioners and other government departments which is provided for in the Act ensures that the views of the Inland Revenue will be available to the charity Commissioners when considering applications for registration.

B. NEW ZEALAND

Supervision by the Attorney General

1. Under the *Charitable Trusts Act*, 1957 the Attorney General's powers with respect to the Crown's prerogative rights over charities are supplemented by provisions which confer a wide inquisitorial jurisdiction. The Attorney General is vested with an absolute discretion to inquire into the objects and administration of any charities and the results they achieve.¹ He is authorised to delegate this power to any person. He or his delegate may require the production of any documents relating to the charity or its administration and it is the duty of charitable trustees to answer questions and to give all reasonable assistance to the person conducting the inquiry.² Any such person has all the powers of summoning witnesses, hearing evidence on oath etc., which are conferred by the *Commissions of Inquiry Act*, 1908.³

2. The Attorney General or his delegate may apply to the Court for an order with respect to any breaches of trust or mismanagement by charitable trustees, or relating to administration of, or the conduct of an inquiry into, any charity.⁴

Scheme-Making

1. As is the case under the English *Charities Act*, 1960, the conditions under which charity property may be applied *cy præs* are modified by the New Zealand legislation. Under the *Charitable Trusts Act*, 1957 trustees are authorised to prepare *cy præs* schemes or schemes which merely affect the administration of the trust and to submit them to the Attorney General. The Attorney General may remit such schemes to the trustees with suggested amendments and, after the trustees have considered his suggestions and resubmitted their proposals, he must produce a report on the scheme. After receiving the report the trustees are empowered to apply to the Court for approval of the scheme and must file the report with their application. The application, proposed scheme and report are to be available for public inspection. Notice of the application must be adver-

tised in the manner prescribed in the Act and any persons who desire to oppose the scheme have, it seems, a right to do so.⁵

2. A similar procedure is authorised for schemes affecting trust funds raised by voluntary contribution. Here, however, additional elements exist in the provision made for participation of contributors in the scheme-making process, in the power of the Attorney General to approve schemes in the place of the Court and in the right of any particular contributor to recover his contributions when it is proposed to furnish some new charitable purpose for the trust.⁶

Incorporation and Registration of Trusts

1. The *Charitable Trusts Act* provides a simple and free procedure by which trustees for purposes which are exclusively or principally charitable may become incorporated. Registration is supervised by the Registrar appointed under the *Incorporated Societies Act*, 1908 but the fact of registration is not evidence that the purposes of the trust are exclusively or principally charitable.⁷

C. REPUBLIC OF IRELAND

The Commissioners of Charitable Donations and Bequests Constitution

1. The Commissioners, of whom there may be no more than eleven, are appointed by the government for life subject to the possibility of removal. Like the Charity Commissioners for England and Wales, they are a body created by statute and vested with statutory functions and discretions. They must, however, report to the government at least once a year and the report must be tabled in each house of the legislature. They are under an obligation to forward their annual accounts to the Minister of Local Government and these are required to be audited by an auditor appointed by the Minister. The Commissioners are incorporated with perpetual succession and capacity to sue and be sued.¹

Functions and Powers

2. In general, the functions of the Commissioners are similar to those of the English Charity Commissioners. They lack, however, the wide statutory powers to institute inquiries into the administration of particular charities which are conferred by both the English and New Zealand legislation. They are, on the other hand, permitted to act as trustees and in that capacity they may administer charitable trusts transferred to them.²

3. In particular the powers of the Commissioners to advise trustees, to authorize dispositions of realty, to sanction compromises with respect to charities, to hold trust documents, to authorize legal proceedings, to approve investments and to establish common investment funds are similar to those conferred by the *Charities Act* for England and Wales.³

4. The Commissioners have power to appoint new trustees either in addition to or in replacement of existing trustees. Their power to require from trustees

information relating to the administration of a charity appears to be limited to the production of documents.⁴

5. Where the trust property is worth not more than £5000 or where under previous legislation the Commissioners have framed a scheme for the administration of the charity they have the extended *cy præs* jurisdiction created by the Act.⁵

6. The Commissioners are entitled with the consent of the Attorney General to sue to recover charitable gifts which are being withheld or misapplied.⁶

7. The Commissioners have a general power to accept and administer gifts of any charitable purpose. Subject to requirements relating to the consent of trustees and the Commissioners, property held on existing charitable trusts may be transferred to and administered by the Commissioners. The Commissioners have power to appoint persons to administer property held by the Commissioners on charitable trusts.⁷

8. Other powers given to the Commissioners by the Act include the power to apply for funds held in court and impressed with charitable trusts, to apply to take over the administration of an estate which includes property bequeathed or devised for charitable purposes where the personal representatives are not acting with adequate expedition and to certify cases in which the Attorney General should commence legal proceedings with respect to a charity.⁸

9. The Commissioners must be given notice of any legal proceedings brought by persons not authorised by them, other than those brought by the Attorney General, and are entitled to receive annually from the Probate Office particulars of every charitable devise or bequest contained in wills which have been entered in the Probate Office or of which that office has received copies.⁹

10. Personal representatives are, subject to any exemption granted by the Commissioners, obliged to publish in the official journal and in one morning newspaper published in Dublin particulars of all charitable gifts made in the will.¹⁰

D. NORTHERN IRELAND

The Ministry of Finance

1. Under the provisions of the *Charities Act*, 1964, the Ministry of Finance is given powers and responsibilities substantially similar to those vested in the Commissioners of Charitable Donations and Bequests in the Republic of Ireland. Only the more important differences will be noted below.

2. On the application of trustees of a charity, the Ministry is empowered to make schemes incorporating the trustees and vesting the trust property in the new corporation. At the same time the Ministry may insert in the scheme provisions for the administration of the charity. Such provisions may be amended from time to time on the application of the corporation or of any other interested person.¹

3. The Ministry has no power to appoint a new trustee in substitution for an existing trustee unless the latter is refusing to act or desires to be discharged from the administration of the charity.²

4. The Ministry has power to accept a transfer of property worth no more than £250 which is contained in a devise or bequest to a non-existent beneficiary if the personal representatives are satisfied that the testator intended to make a gift to a charity.³

E. UNITED STATES

Supervision by State Agencies

1. In the majority of states there is no legislation which substantially modifies or adds to the traditional methods of supervision and enforcement. Nor is there any doubt that the powers of the courts, attorneys general and, in rare cases, visitors are generally as inadequate and ineffective as in other common law jurisdictions. In some of the majority states the existence of any responsibility in the Attorney General is in doubt, in some its existence has been denied by the officer himself despite legislative and judicial authority to the contrary and, in most, though not all states, intervention by the Attorney General has been minimal. Attempts to introduce supervisory legislation have on a number of occasions met with considerable opposition and have been defeated.¹

2. In a few states the lack of extensive statutory powers has not prevented the Attorney General from taking an active interest in the way in which charitable funds have been administered.² In one state his inherent responsibility for charities has been regarded as sufficient to justify his demand for regular reports from foundations.³ In other states there are officials in the Attorney General's department who are concerned primarily with obtaining notice of foundation activities and intervening in or initiating court actions to secure the proper application of funds. The existence of legislation now in some states and the unsuccessful attempts to obtain legislation in others has on a number of occasions been a product of the experience gained and the knowledge obtained by the more active Attorney Generals' departments. At least one of these departments has sought and received excellent co-operation from the federal Revenue Service.⁴

3. In a dozen states the powers of the Attorney General have been supplemented by statute. Some of these states have followed the model of legislation enacted in New Hampshire in 1943.⁵ The others have adopted, in some cases with modifications, the *Uniform Act for Supervision of Trustees for Charitable Purposes*.⁶

The New Hampshire Model

4. Under the New Hampshire legislation the day to day responsibility for supervising charitable funds is the responsibility of the director of charitable trusts who, although himself subject to supervision by the Attorney General, is

empowered to exercise all the powers and obligations which by common law and statute are vested in the Attorney General with respect to charities.⁷ Charitable trusts must be registered with the director and unless excused must furnish annual reports.⁸ The Attorney General (and, hence, the director) is given wide powers to conduct formal investigations and his consent is required for any agreement or compromise which might affect the interests of a charitable trust.⁹ Probate registrars are obliged in law if not in fact to notify the Attorney General of wills creating charitable trusts and the Inheritance Tax Department voluntarily supplies similar information.¹⁰ The Attorney General is given power to make such regulations "as may be reasonable or necessary to secure records and other information for the operation of the register and for the supervision, investigation and enforcement of charitable trusts."¹¹ The register is required to be open to public inspection. It should be noted that, although in many respects, this legislation has points of similarity with that presently in force in England and Wales, it specifically exempts charitable corporations holding property for their corporate charitable purposes. It thus perpetuates the distinction between charitable trusts and charitable corporations which has bedevilled charity law in the United States. A number of unsuccessful attempts have been made to have the exemption removed.¹²

5. In the states in which the model of the New Hampshire legislation has been accepted, only Ohio appears to exclude corporate foundations from the scope of its statute.¹³ The Massachusetts statute which appears to have the widest operation, applies to all public charities with the sole exception of those established for religious purposes.¹⁴

The Uniform Act

6. The Uniform Act was adopted by the National Conference of Commissioners on Uniform State laws in 1954. The problem of determining the types of charities to be exempted from the Act was the subject of much discussion and much difference of opinion prior to the adoption.¹⁵ It has continued to be a source of difficulty. The provision finally adopted is a masterpiece of ambiguity which, like the New Hampshire Act, seems intended to distinguish between corporate charitable foundations and foundations organized as trusts. Its language, moreover, ignores the fact that in many states charitable corporations are regarded as holding their corporate property subject to trusts or "quasi-trusts" for their corporate charitable purposes. In those states which have adopted the main provisions of the Uniform Act all except Michigan and Washington appear to have successfully avoided any distinction between corporate foundations and foundations organized as trusts.

7. In very broad outline the principal substantive provisions of the Uniform Act are as follows: the Attorney General is responsible for establishing and maintaining a public register of trustees who are subject to the Act,¹⁶ trustees are required to file copies of the instruments governing the charity and periodic

reports at such times, and containing such information, as the Attorney General may stipulate by regulation;¹⁷ the Attorney General is given far reaching investigatory powers, including the power to subpoena witnesses, to require the production of documents and to hear evidence on oath;¹⁸ he is authorised to institute proceedings to secure compliance with the Act and to secure the proper administration of charitable funds subject to the Act;¹⁹ he is authorised, also, to make rules and regulations necessary for the administration of the Act;²⁰ custodians of probate court records are obliged to furnish copies of documents appertaining to charitable trusts within the Act;²¹ and state tax officials are bound to file annually with the Attorney General, a list of all applications for tax exemption made by trustees who are within the provisions of the Uniform Act.²²

8. The information required to be stated in the annual reports varies slightly from state to state. In most cases a copy of the return which is required by the federal government to be completed annually by tax-exempt foundations is accepted. Under the California Act, which may serve as an example, the following types of information are required: a list of all assets on hand at the beginning and end of the period; a list of all gains and losses from sales and investment; a list of all receipts, income, contributions gifts, disbursements and expenses; a statement of the purposes for which distributions, donations and payments have been made, and the names, addresses and amounts received by individual recipients.²³

Supervision by Federal Agencies

1. By virtue of its administration and enforcement of taxation laws the federal government exercises the most comprehensive and efficient supervision of charitable foundations in the United States. At the level of policy, the House Ways and Means Committee and, to a lesser extent, the Senate Finance Committee are concerned with the scope of and the conditions attaching to tax privileges granted to foundations. Other congressional committees have on a number of occasions conducted investigations of tax-exempt foundations with the most recent and the most publicised being those conducted from 1962 by Congressman Wright Patman of Texas.²⁴ The Patman reports have been heavily criticised but produced a number of valid criticisms which have been accepted by the Executive. There is little doubt that the investigations also stimulated activity by the Treasury which culminated first in the *Treasury Department Report on Private Foundations* of 1965 and more recently in amendments to the provisions of the *Internal Revenue Code* which deal with tax exempt foundations.²⁵

2. Responsibility for the administration and enforcement of taxation laws is vested in the Treasury Department and is exercised by the Internal Revenue Service. The Service maintains supervision and control of foundations by issuing rulings on questions relating to tax exemption, by requiring annual returns and

reports, by keeping records and by conducting audits. Its enforcement powers are sanctioned by the possibility of invoking criminal penalties or by withholding or revoking tax exempt status.

3. Recognition of exempt status is made by way of a ruling and, although a foundation may be entitled to exemption without a ruling, it will not be permitted to advertise its exempt status. Rulings may be made by district directors of the Service although, if legal or factual problems exist, the application may be made to, and the ruling made by, the National office. Rulings may also be made with respect to the effect of particular transactions on a foundation's tax-exempt status. Unless the position of the Service with respect to the transaction is clear, these will be made in the National office.

4. Under amendments to the Internal Revenue Code which were enacted in 1969, exempt private foundations are generally required to make both an annual return of income, receipts and disbursements²⁶ and an annual report containing, as well, additional information relating to the value of its assets and investments, the grants and contributions received or made by it, the names and addresses of recipients of grants and statements of the purposes of each particular grant. The names and addresses of the foundation's managers and the relationship, if any, between them or any substantial contributor and the recipient of grants must be included. There must also be supplied a list of all persons who are substantial contributors to the foundation's assets or that own 10 percent or more of the stock of any corporation in which the foundation has a 10 percent or greater interest.²⁷ The penalty for failure to file returns and reports is generally \$10 a day while the failure continues, with a maximum of \$5000. The penalty is imposed on the officers of the foundation.²⁸

5. Private foundations are required to keep detailed financial records and these are subject to audit by the Service at any time.

6. The contents of annual returns and reports are generally available for public inspection. The names of contributors are not disclosed. The annual reports must also be available for inspection at the principal office of the foundation. The Service is required to notify state Attorneys General of refusals to grant, and revocations of, exempt status and of the mailing of a notice of deficiency of tax.²⁹ The Service's detailed information relating to such matters must be made available on request.³⁰

Conclusion

It is clear that, despite variations in detail, the enactments which have been outlined have several general features in common. Some form of registration, periodic reports, investigatory powers and the ability of the supervisory agency to initiate legal proceedings are at the core of any statutory scheme to ensure the proper administration of charitable funds. The main contrast between the American statutes and those of the other jurisdictions which have been considered lies in the greater involvement of the supervisory bodies in the actual

administration of particular charities in England and Wales, Northern Ireland, the Republic of Ireland and New Zealand. The scheme-making, advisory and quasi-judicial powers possessed, for example, by the Charity Commissioners for England and Wales extend beyond the powers possessed by any of the State or Federal agencies in the United States. It seems probable that this difference should be attributed more to the hostility which has been almost invariably aroused by attempts to extend governmental supervision over foundations in the United States rather than to any significant local variations in the type or intensity of the problems which arise from the perpetual devotion of funds to charitable purposes.

One of the most important issues which has to be faced in any jurisdiction concerns the extent to which the supervision of charities should be regarded as a function of the authorities responsible for the administration of revenue laws. On the one hand it is clear that much information required for the efficient supervision of charitable foundations must inevitably be obtained in the course of administering and enforcing tax legislation. On the other hand it seems just as clear that in many respects the concern of revenue authorities must necessarily be more limited than, and in some respects even inimical to, the public interest in securing the maximum benefit from funds devoted to charity. Problems concerning investment policy, obsolete or impracticable objects, and inefficient or inactive management of charitable funds may not loom very large in the eyes of officials whose primary function is to administer legislation designed to produce revenue. Normal sanctions imposed under taxation legislation such as the withholding or revoking of an exemption and the consequent taxation of assets given for charitable purposes may not further the interests either of the public or of the donors.

With the exception of that of Northern Ireland, the enactments which have been considered appear to be based on judgments that the functions of supervision and enforcement should be divided between revenue officials and some other body with statutory powers. Different attempts to strike the balance between the two agencies have been indicated. The desirability of the fullest possible co-operation and exchange of information is beyond dispute.

It is obvious that the need to establish a separate body with powers supplementary to those possessed by revenue authorities will vary in urgency from jurisdiction to jurisdiction. The degree of necessity cannot be ascertained with certainty without a search of probate records and a study of the operations of charitable foundations and institutions now in existence. It is not without significance that where such surveys were conducted in England and the United States it was found that, even where honest administration was not endemic, inactive and inefficient management of charitable funds existed on a scale sufficiently large to call for governmental intervention.

Footnotes

BACKGROUND

1. *Tudor on Charities*, (6th ed. 1967), chapter 7.
2. It could conceivably have some relevance in a dispute as to the application to charitable corporations of principles developed in cases concerning charitable trusts.

A. ENGLAND AND WALES

1. *Charities Act*, 1960, para. 1
2. *ibid.*, para. 4.
3. *ibid.*, s. 1(3).
4. This is the classification adopted by the Nathan Committee: cmd. 8710, para. 97.
5. *Charities Act*, 1960, s. 1(4).
6. *ibid.*, s. 23(1).
7. *ibid.*, s. 23(5).
8. *ibid.*, s. 23(2), (3), (4).
9. *ibid.*, s. 28.
10. *ibid.*, ss. 29, 22, 25, 26, 27.
11. *ibid.*, s. 4.
12. *ibid.*, s. 4(6).
13. Cmd. 8710, chapter 4.
14. *Charities Act*, 1960, s. 5.
15. *ibid.*, s. 5(2).
16. *ibid.*, s. 5(3).
17. *ibid.*, s. 24.
18. *ibid.*, s. 6.
19. *ibid.*, s. 6(2), (3).
20. *ibid.*, s. 6(9).
21. *ibid.*, s. 8(1).
22. *ibid.*, s. 8(2), (3).
23. *ibid.*, s. 20(1).
24. *ibid.*, s. 20(3), (4).
25. *ibid.*, s. 18(1).
26. *ibid.*, s. 18(5), (6).
27. *ibid.*, s. 19.
28. Exempt institutions include universities, the British Museum, institutions administered by the Church Commissioners, institutions exempt under earlier legislation and registered friendly societies.
29. *Charities Act*, 1960, s. 4(4).
30. *ibid.*, s. 2.
31. *ibid.*, s. 10.

32. *ibid.*, ss. 11, 12.
33. *ibid.*, s. 42.
34. See *Tudor on Charities*, (6th ed. 1967), pp. 383-384.
35. *Charities Act*, 1960, ss. 3, 17.

B. NEW ZEALAND

1. *Charitable Trusts Act*, 1957, s. 58.
2. *ibid.*, s. 58(3).
3. *ibid.*, s. 58(4).
4. *ibid.*, s. 60.
5. *ibid.*, s. 30-37.
6. *ibid.*, s. 38-50.
7. *ibid.*, ss. 7-15.

C. REPUBLIC OF IRELAND

1. *Charities Act*, 1961, ss. 5-15.
2. *ibid.*, s. 31.
3. *ibid.*, ss. 21, 22, 25, 33, 34, 46.
4. *ibid.*, ss. 43, 42.
5. *ibid.*, ss. 29, 47.
6. *ibid.*, ss. 23.
7. *ibid.*, s. 31.
8. *ibid.*, ss. 28, 27, 26.
9. *ibid.*, s. 53, 58.
10. *ibid.*, s 52.

D. NORTHERN IRELAND

1. *Charities Act*, 1964, ss. 10-11.
2. s. 12(2).
3. *ibid.*, s. 14.

E. UNITED STATES

1. Fremont-Smith, *Foundations and Government*, 1965, pp. 222-225.
2. See Fremont-Smith, *op. cit.* pp. 241-257 for a discussion of the practice in New York, Pennsylvania, Hawaii, Texas and Washington. New York and Washington have now extended the Attorney General's powers by statute: N.Y.L. 1966, c. 831; Wash. L. 1967, Ch. 53.
3. Hawaii; see Fremont-Smith, *op. cit.*, pp. 253-254.
4. See Fremont-Smith, *op. cit.*, p. 243.
5. Rhode Island (1950), South Carolina (1953), Ohio (1953), Massachusetts (1954), and Iowa (1959).
6. California (1955), Michigan (1961), Illinois (1961), Oregon (1963), New York (1966), Washington (1967).
7. N.H. Rev. Stat. Ann., s. 7:20.

8. *ibid.*, s. 7:19-22, 28.
9. *ibid.*, s. 7:24-27, N.H. Rev. Stat. Ann., s. 556:27.
10. N.H. Rev. Stat. Ann., s. 7:29; Fremont-Smith, *op. cit.*, p. 278.
11. N.H. Rev. Stat. Ann., s. 7:22.
12. Fremont-Smith, *op. cit.*, p. 277.
13. *ibid.*, pp. 260-62.
14. Mass. Gen. Laws Ann., Ch. 12, s. 8F.
15. Fremont-Smith, *op. cit.*, pp. 263-66.
16. *Uniform Supervision of Trustees for Charitable Purposes Act*, s. 4.
17. *ibid.*, s. 5, 6.
18. *ibid.*, s. 8.
19. *ibid.*, s. 11.
20. *ibid.*, s. 7.
21. *ibid.*, s. 13.
22. *ibid.*, s. 14.
23. Fremont-Smith, *op. cit.*, p. 326.
24. U.S. Congress, House of Representatives, Select Committee on Small Business, *Sub-committee Chairman's Reports*. Fremont-Smith, *op. cit.*, pp. 365-373.
25. Pub. L. 91-172, Title 1, Dec. 30, 1969.
26. I.R.C. §6033.
27. I.R.C. §6056.
28. I.R.C. §6652.
29. I.R.C. §6104(b).
30. *ibid.*

Works Consulted

1. *Tudor on Charities*, 6th edition, 1967, (Sweet & Maxwell).
2. Keeton: *The Modern Law of Charities*, 1962, (Pitman).
3. *Report of the Committee on the Law and Practice Relating to Charitable Trusts*, Cmd. 8710, 1952.
4. Nathan, *The Charities Act*, 1960.
5. Fremont-Smith: *Foundations and Government* 1965. (Russell Sage Foundation).
6. *U.S. Treasury Report on Private Foundations*, 1965.
7. Kutner and Koven: *Charitable Trust Legislation in the Several States* (1966-67) 61 Nw. W.L. Rev. 411.
8. Karst: *The Efficiency of the Charitable Dollar* (1959-60) 73 Harv. L. Rev. 433.
9. Ball: *Accountability of Charitable Trustees*, (1959) 98 Trusts and Estates 970.
10. Taylor: *Public Accountability of Foundations and Charitable Trusts*, 1953, (Russell Sage Foundation.)