

GENERAL SCHEME

Charities (Amendment) Bill 2022

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**Denotes heads the subject matter of which were approved by Government and included in the Courts and Civil Law (Miscellaneous Provisions) Bill 2017 ("Bill"). The specific wording of the proposed amendments may differ from those originally approved due to the need to reflect feedback and legislative changes since the Bill was approved for drafting.*

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PART 1
PRELIMINARY AND GENERAL

HEAD 1: Short title and commencement

Provide that –

- (1) This Act may be cited as the Charities (Amendment) Act 2021.
- (2) This Act shall come into operation on such day or days as the Minister may appoint by order or orders either generally or with reference to any particular purpose or provision and different days may be so appointed for different purposes or provisions.

Explanatory Note:

This is a standard statutory provision.

Given that a number of the amendments proposed to be made to the Charities Act 2009 include offence provisions, it is proposed that the Bill would include a specific commencement provision.

HEAD 2: Interpretation

Provide for definitions used in the Bill including a definition of “Act of 2009” as meaning the Charities Act 2009.

Explanatory Note:

This is a standard provision.

HEAD 3: Amendment of section 2 of Act of 2009

Provide that –

Section 2 is amended in subsection (1) –

- (a) in the definition of “charitable organisation”, in paragraph (b), by the deletion of –
 - (i) the word “and” appearing after subparagraph (ii), and
 - (ii) subparagraph (iii),
- (b) in the definition of “charitable trust”, in paragraph (c), by the substitution of “otherwise payable to the trustees of the trust other than in accordance with a court order or section 89” for “payable to the trustees of the trust other than in accordance with section 89”,
- (c) by substituting the following for the definition of “charity trustee”:

“ ‘charity trustee’ includes–

 - (a) in the case of a charitable organisation that is a company –
 - (i) a director of the company, and
 - (ii) any other officer of the company who is a person in accordance with whose directions or instructions the directors of the company are accustomed to act unless the directors are accustomed so to act by reason only that they do so on advice given by the officer in a professional capacity,but does not include a company secretary who holds no other office of the company, and
 - (b) in the case of a charitable organisation that is a body corporate (other than a company) or an unincorporated body of persons –
 - (i) any person who is a member of the board or other governing body of the body, or any other person acting in such capacity, and

- (ii) any person in accordance with whose directions or instructions persons referred to in subparagraph (i) are accustomed to act unless such persons are accustomed so to act by reason only that they do so on advice given by the person in a professional capacity,

but does not include a person who performs the functions of secretary to the board or other governing body, as the case may be, and performs no other functions relating to the management and control of the body,

and references to a charity trustee of a charitable organisation shall be construed as including references to a trustee of a charitable trust;”,

- (d) in the definition of “education body” by the deletion of paragraph (g);
- (e) by the insertion of the following definitions:

“ ‘insolvency arrangement’ has the meaning assigned to it by section 2 of the Personal Insolvency Act 2012;

‘member of a charitable organisation’ means –

- (a) in the case of a charitable organisation that is a company, the subscribers or shareholders of the company,
- (b) in the case of a charitable organisation that is a body corporate (other than a company), a person, other than a charity trustee of the organisation, who is entitled to appoint, nominate or vote for the appointment of an individual as a charity trustee of that organisation,
- (c) in the case of a charitable organisation that is an unincorporated body of persons, a person, other than a charity trustee of the organisation, who is entitled to appoint, nominate or vote for the appointment of an individual as a charity trustee of that organisation;

‘Register of Insolvency Arrangements’ means the register established and maintained under section 133(1)(a), (c) or (d) of the Personal Insolvency Act 2012;

‘vulnerable person’ has the meaning assigned to by section 2 of the National Vetting Bureau (Children and Vulnerable Persons) Act 2012”,

and

- (f) in the definition of “registration number”, by the substitution of “sections 39(7)(e) and” for “section”.

Explanatory note:

The proposed amendment to the definition of “charitable organisation” in draft Head 3(a), is intended to ensure that the issue of payments to charity trustees and other “relevant persons”, which is dealt with in the provisions of the revised section 89 provided for in this Draft General Scheme, are dealt with by way of a substantive provision. By deleting subparagraph (iii) in the manner proposed, it is intended that if a charity is found to have paid a member or a trustee in contravention of section 89 that the issue can be dealt with by way of compliance action under the Act of 2009. If left as is, then a breach of section 89 would result in an organisation falling outside the definition of “charitable organisation” under the Act of 2009. If an organisation’s actions served to take it outside of the definition of “charitable organisation” then this could limit the regulatory compliance tools available to the Charities Regulator to address the matter under the Act of 2009.

The proposed insertion of a definition of “member of a charitable organisation” arises from the use of the term in the Act of 2009 and its use in certain amendments included in this Draft General Scheme including the proposed amendment of section 89.

The proposed amendments to the definition of “charitable trust” in draft Head 3(b) are intended to align the definition with certain exceptions to the rule against remunerating trustees that are applicable under general trust law i.e. where such remuneration is the subject of a court order.

The proposed substitution of the definition of “charity trustee” in draft Head 3(c), is intended to clarify the term. The proposed amendment is intended to exclude from the definition of “charity trustee”, third party providers of company secretarial services and any member of staff of an organisation who is the company secretary but not a director or similar officer of that organisation. At present, there would appear to be some confusion on the part of charitable organisations, which may in the past have appointed a paid member of staff to the position of company secretary or entered into a contract with a third party provider of company secretarial services. This raises a difficulty under the Act given that, as a general rule, charity trustees should not be in receipt of remuneration from the charitable organisation and thus should not be employed by the charitable organisation of which they are a trustee. The proposed amendment of the definition is intended to clarify that the term “charity trustee” does not cover such persons.

Other officers in a company law context include auditors. Such persons should not be considered charity trustees under the Charities Act 2009 on the basis that such persons would not normally be responsible for the management and control of the charity.

In addition, the amendment is intended to clarify that the term “*other officers*” should also apply to persons who may be appointed to particular offices identified in a charity’s constitution such as treasurer, chairperson or president of the board or governing body provided that such persons have the requisite responsibility for the management and control of the charity. Further, “other officers” in the context of a company or unincorporated body is also intended to capture persons who may be carrying out functions of a director or a member of a governing body of an organisation but who are not formally appointed as such.

At present bodies that raise funds for institutions of higher education are exempt from a number of key provisions of the Charities Act 2009 as they fall within the definition of “education body”. Funding bodies such as university foundations are exempt from having to prepare and submit annual statements of accounts to the Charities Regulator under section 48 and are also exempt from the requirement to have their financial statements audited under section 50. However, unlike institutions of higher education, such foundations are not subject to statutory audit by the Comptroller and Auditor General. The proposed deletion of paragraph (g) of the definition of “education body” provided for in Head 3(d) is intended to bring such funding bodies within the full remit of the Charities Act 2009 so that there is greater transparency and accountability in relation to their finances and activities.

The proposed inclusion of the new definitions of “insolvency arrangement” and “Register of Insolvency Arrangements” set out in draft Head 3(d) are required further to the proposed amendment of section 55 (Persons disqualified from being trustees of a charitable organisation) of the Act of 2009 provided for in Head 22.

The proposed inclusion of a definition of “vulnerable person” is included in Head 3(d) as a consequence of the proposed amendment of section 39(5)(l). The amendment of section 39(5)(l) is intended to align the wording used in that provision with the terminology used in more recent legislation such as the National Vetting Bureau (Children and Vulnerable Persons) Act 2012. **[NOTE:** This amendment is dependent on the proposed amendment of section 39(5)(l) of the Charities Act 2009, which is set out in Head 7 of this General Scheme.]

The term “registration number” is defined in both section 39 and 40 of the Act of 2009. For completeness, the definition of that term in section 2 should therefore refer to both sections. The amendment proposed in subhead (e) of draft Head 3 provides for this.

Head 4: Amendment of section 3 of Act of 2009

[Note: Subject to the approval of this draft Head, prior to commencement, a period facilitating necessary administrative changes will be required for the Charities Regulator.]

There is also a requirement for a transition period post-commencement for those organisations working in the human rights space who are not registered charities, to allow them time to register].

Provide that -

Section 3 is amended:

(a) in subsection (1) by:

(i) substituting paragraph (d) i.e. “any other purpose that is of benefit to the community”, with the purposes listed in paragraphs (a) to (l) of subsection (11),

(ii) by inserting a new charitable purpose of ‘the advancement of human rights’

[Draft Provision for a transition period]

(iii) A charitable organisation (other than a charitable organisation to which *section 40* applies) that, immediately before the commencement of *section x subsection x*, was operating in the State as, or carrying on the activities in the State of, a charitable organisation shall, if it wishes to continue to so operate or carry on such activities after such commencement, apply, not later than—

(a) 6 months, or

(b) the expiration of such longer period as the Minister may specify.

Section 3 is also amended,

(b) By the deletion of subsection (11).

Explanatory note:

The proposed amendments to section 3 (1) and 3(11) as set out in draft Head 4, are intended to give greater clarity to those purposes that the Charities Regulator can consider as a ‘charitable purpose’, with those same purposes remaining subject to subsection (2) of section 3.

Section 3(1) of the Charities Act 2009 (hereafter ‘2009 Act’) defines charitable purpose as:

- a) the prevention or relief of poverty or economic hardship;
- b) the advancement of education;
- c) the advancement of religion;
- d) any other purpose that is of benefit to the community.

These definitions were originally set out in 1891 during a court case in the United Kingdom (Commissioners for Special Purposes of Income Tax v Pemsel), and have remained largely unchanged in Irish legislation since.

Section 3(2) of the 2009 Act states that ‘purpose shall not be a charitable purpose unless it is of public benefit’.

The definition of a *purpose* is provided for under section 3(11) of the same Act:

A purpose that is of benefit to the community includes—

- a) the advancement of community welfare including the relief of those in need by reason of youth, age, ill-health, or disability,
- b) the advancement of community development, including rural or urban regeneration,
- c) the promotion of civic responsibility or voluntary work,
- d) the promotion of health, including the prevention or relief of sickness, disease or human suffering,
- e) the advancement of conflict resolution or reconciliation,
- f) the promotion of religious or racial harmony and harmonious community relations,
- g) the protection of the natural environment,
- h) the advancement of environmental sustainability,
- i) the advancement of the efficient and effective use of the property of charitable organisations,
- j) the prevention or relief of suffering of animals,
- k) the advancement of the arts, culture, heritage or sciences, and
- l) the integration of those who are disadvantaged, and the promotion of their full participation, in society.

The 2009 Act also defines a number of exclusions under section 2;

- a. a political party, or a body that promotes a political party or candidate,
- b. a body that promotes a political cause, unless the promotion of that cause relates directly to the advancement of the charitable purposes of the body,
- c. an approved body of persons within the meaning of section 235 of the Taxes Consolidation Act 1997,
- d. a trade union or a representative body of employers,
- e. a chamber of commerce, or
- f. a body that promotes purposes that are—
 - i. unlawful,
 - ii. contrary to public morality,
 - iii. contrary to public policy,

- iv. in support of terrorism or terrorist activities, whether in the State or outside the State, or
- v. for the benefit of an organisation, membership of which is unlawful

The proposed amendment also allows for the addition of 'the advancement of Human Rights' as a defined charitable purpose.

Ireland is unusual among common law jurisdictions in not having human rights defined in legislation as a charitable purpose.

It is therefore currently possible for human rights organisations to apply for registration under a number of charitable purposes, as long as it doesn't meet the definition of an excluded body, but where 'human rights' is not specifically mentioned.

Note: If the amendments proposed in section 3 are agreed, the Charities Regulator will require time, prior to enactment, to make the necessary amendments to all registration and related processes and procedures undertaken. In tandem, a transition period will be required post-commencement to enable existing organisations that may be working in the human rights space that are not registered charities, to apply to register.

HEAD 5: Amendment of section 28 of Act of 2009

Provide that –

Section 28 is amended –

- (a) in subsection (1) by the substitution of “that an offence, other than an offence under this Act, has been” for “that an offence has been”, and
- (b) by the insertion of the following subsection after subsection (1):

“(1A) Where the Authority in the performance of its functions obtains information that causes it to suspect that an offence under this Act has been committed by a charity trustee or a charitable organisation, it may disclose such information to the persons referred to in paragraphs (a) to (e) of subsection (1), as may be appropriate.”

Explanatory note:

The proposed amendment of section 28(1) set out in draft Head 5(a) is intended to clarify that where the Charities Regulator suspects that offences may have been committed under the Charities Act 2009, it is not obliged to notify those offences to the Garda Síochána for example.

The amendment set out in draft Head 5(b) clarifies that the Charities Regulator may disclose such information regarding suspected offences under the Charities Act 2009 to the bodies referred to in subsection (1) where appropriate. An example would be Revenue, which is responsible for administering charitable tax exemptions under sections 207 and 208 of the Taxes Consolidation Act 1997 (‘TCA’) and assigning associated CHY numbers. Suspected offences under the Charities Act 2009 by a registered charitable organisation which has a charitable tax exemption under the TCA may be relevant to Revenue in terms of its statutory functions.

Head 6: Amendment of Section 33 of Act of 2009 (Administrative cooperation on regulatory matters)

Provide that –

Section 33 is amended

- (a) in subsection (1) –
 - (i) by the substitution of “and other public bodies” for “and relevant regulators”,
 - (ii) by the substitution of “with such bodies” for “with relevant regulators”,
 - (iii) in paragraph (a), by the substitution of “public body” for “relevant regulators”,
 - (iv) in paragraph (b), by the substitution of “public body” for “relevant regulator”, and
 - (v) in paragraph (c), by the substitution of “the public body” for “relevant regulators”,
- (b) in subsections (2), (3), (4) and (5), by the substitution of “public body” for “relevant regulator” wherever it occurs, and
- (c) in subsection (6) –
 - (i) in the definition of “relevant Minister”, by the substitution of “public body” for “relevant regulator” wherever it occurs, and
 - (ii) by the insertion of the following definition:
 - “ ‘public body’ means –
 - (a) a relevant regulator, and
 - (b) any other body in which the State has vested functions relating to the oversight and monitoring of activities of organisations some or all of which are charitable organisations.”.

Explanatory Note

In order for the Charities Regulator to be in a position to carry out its statutory functions, it is essential that public bodies are in a position to share relevant information relating to the regulation of charitable organisations with the Charities Regulator in appropriate cases.

Section 33 of the Charities Act 2009 provides for administrative cooperation on regulatory matters and permits the Charities Regulator to enter into arrangements with “relevant regulators” within the meaning of that section. The arrangements envisaged by section 33 are intended to facilitate administrative cooperation on matters relating to the regulation of charities, to avoid duplication of activities and to ensure consistency of decision-making between the Charities Regulator and other “relevant regulators” as far as practicable.

The definition of “relevant regulator” in section 33 is such that certain public bodies fall outside the section.

The addition of a new definition of “public body” for the purposes of section 33 of the 2009 Act is intended to extend the scope of that section so that the Charities Regulator can enter into administrative cooperation arrangements with public bodies whose activities relate to charitable organisations. This will enable the sharing of information and appropriate collaboration between the Charities Regulator and other public bodies on matters relevant to the regulation of charitable organisations in Ireland.

Note: One order, the Charities Act 2009 (Section 33) Order 2017 (S.I. No. 586 of 2017), has been made under section 33 of the Charities Act 2009 to date.

HEAD 7: Amendment of section 39 of Act of 2009

Note: The following section(s)* contained will not apply to ‘Education Bodies’ as amended under draft Head 3 [*those highlighted in red]

Provide that –

Section 39 is amended –

- (a) in subsection (5) –
 - (i) in paragraph (b) –
 - (I) in subparagraph (ii), by inserting “or the United Kingdom” after “other than an EEA state”, and
 - (II) in subparagraph (iii), by inserting “or in the United Kingdom” after “in an EEA state”,
 - (ii) in paragraph (c), by inserting “or in the United Kingdom” after “established in an EEA state” in both places where it appears,
 - (iii) by the substitution of the following for paragraph (d):
 - “(d) specify –
 - (i) the names of the charity trustees of the charitable organisation and include declarations, in such form as may be determined by the Authority, from each charity trustee that he or she is for the time being qualified, for the purposes of section 55, to hold the position of charity trustee,
 - (ii) the Personal Public Service Number (PPSN) of each charity trustee or such alternative identification information as may be accepted by the Authority,
 - (iii) the address at which each charity trustee ordinarily resides, and
 - (iv) an electronic mail address and a telephone number at which each charity trustee may be contacted,”
- and

- (ii) in paragraph (l), by the substitution of “children or vulnerable persons” for “vulnerable people (including the aged, children and young people, the sick, disabled and handicapped)”,
- (b) by the substitution of the following subsection for subsection (6):

“(6) The Authority may exempt an applicant or a category or class of applicants for registration under this section from such of the requirements of subsection (5) as it considers appropriate where it is satisfied that–

 - (a) compliance by the applicant or category or class of applicants, as the case may be, with a requirement would be unduly onerous in the circumstances, or
 - (b) the exemption is otherwise justified by reference to the particular circumstances of an applicant or category or class of applicants, as the case may be.”,
- (c) by the insertion of the following subsections after subsection (6):

“(6A) Where the Authority determines that an application for registration does not satisfy the requirements of subsection (5), it shall, as soon as may be thereafter notify the applicant in writing of its determination.

(6B) A notification referred to in subsection (6A) shall specify the requirements of subsection (5) which the Authority has determined the application for registration has not satisfied.

(6C) Where an applicant receives a written notification under subsection (6A), the applicant may, within 21 days from the date of the notification or such longer period as may be specified by the Authority, furnish to the Authority the documents or other information necessary to satisfy the requirements specified in the notification.

(6D) Where an applicant receives a notification under subsection (6A) and fails to submit the documents or other information necessary to satisfy the requirements specified in the notification to the Authority within the period specified in the notification, the applicant’s application for registration under this section shall be deemed to have been withdrawn.”,
- (d) in subsection (7) –
 - (i) in paragraph (f), by the deletion of “and”,
 - (ii) by the insertion of the following paragraph after paragraph (f):

- “(fa) the constitution of the charitable organisation, and”
- (iii) in paragraph (g), by the substitution of the words “particulars or information” for the word “particulars”,
- (e) by the substitution of the following for subsection (9):
 - “(9) Where the Authority makes a decision to grant an application under this section, it shall, as soon as may be thereafter, notify the applicant in writing of –
 - (a) the decision, and
 - (b) any conditions applicable to the registration with which the applicant is required to comply.”,
- (f) by the substitution of the following for subsection (11):
 - “(11) The charity trustees of a charitable organisation that is registered under this section shall—
 - (a) notify the Authority in writing forthwith when a condition imposed in accordance with subsection (9)(b) has not been satisfied within the period specified by the Authority or, where the registered charitable organisation has breached the condition, as the case may be,
 - (b) **notify the Authority in writing forthwith –**
 - (i) **if a particular or other information entered in the register in respect of the charitable organisation ceases to be correct,**
 - (ii) **if the charitable organisation proposes to wind up or otherwise cease its activities,**
 - (iii) **if a particular or other information provided to the Authority in respect of a charity trustee of the charitable organisation ceases to be correct, and**
 - (iv) **if a person is appointed as or ceases to be a charity trustee of the charitable organisation,**
 - and**
 - (c) **as part of a notification referred to in paragraph (b), furnish the Authority with –**

- (i) the particulars of any correction or proposal referred to in that paragraph,
- (ii) in a case to which sub-paragraph (ii) of paragraph (b) applies, a statement of the assets and liabilities of the charitable organisation and details of any proposed transfer of its assets on winding up, and
- (iii) in a case to which sub-paragraph (iv) of paragraph (b) applies –
 - (I) the date on which any person was appointed as or ceased to be a charity trustee of the charitable organisation, and
 - (II) where a person has been appointed as a charity trustee, a declaration, in such form as may be determined by the Authority, from the person that he or she is for the time being qualified, for the purposes of section 55, to hold the position of charity trustee.

(11A) The Authority may specify the form and manner of a notification referred to in subsection (11).

(11B) A charitable organisation that is registered under this section shall not amend its constitution without the prior approval of the Authority and the Authority shall not grant such approval if the proposed amendment to the charitable organisation's constitution would be contrary to this Act.”,

- (g) in subsection (12), by the substitution of “particular or other information” for “particular”,
- (h) by the deletion of subsection (13),
- (i) in subsection (15) –
 - (I) by the substitution of “information, particular or declaration” for “information or a particular”, and
 - (II) by the substitution of “this section” for “that subsection”,
 and
- (j) by the insertion of the following subsections:

“(18) The charity trustees of a charitable organisation in respect of which there is a contravention of subsection (3), (11) or (11B) shall each be guilty of an offence.

(19) Where a charitable organisation that is a body corporate has contravened subsection (3), (11) or (11B) the charitable organisation shall be guilty of an offence.

(20) In this section ‘Personal Public Service Number (PPSN)’ includes any other identifying series that is unique to the person concerned and that may generally replace the Personal Public Service Number (PPSN) system.”.

Explanatory note:

The amendments set out in this draft head are intended to address the following:

- (i) the impact of the Trade and Cooperation Agreement (the “Agreement”) reached between the European Commission and the United Kingdom on 24 December 2020 on organisations from the UK including Northern Ireland given that section 39(5) of the Charities Act as currently drafted does not permit charities that have their principal place of business in the UK to register as a charity unless they establish a principal place of business in the State;
- (ii) difficulties encountered by the Charities Regulator in contacting charity trustees directly where required;
- (iii) a lack of clarity in respect of how incomplete or otherwise deficient applications for registration can be dealt with in the first instance other than by way of refusal, as is the current position;
- (iv) the need for clarity in relation to registrations, which are subject to conditions such as the requirement to submit a copy of the charity’s constitution as filed with the Companies Registration Office to the Charities Regulator;
- (v) difficulties in maintaining an accurate and up-to-date publicly available Register of Charities and ascertaining those who are responsible for the control and management of a charity at a particular time for compliance and enforcement purposes due to a failure on the part of some charities to keep the details of their charities up-to-date.

The Agreement reached between the European Commission and the United Kingdom on 24 December 2020, means that there are implications arising from the principal place of business requirements set out in the Act of 2009 in respect of:

- (a) existing registered charities whose principal place of business is in the UK;
and
- (b) applicants for registration whose principal place of business is in the UK.

Applicants established in non-EEA states (i.e. third countries) must have a principal place of business in the State. As of 1 January 2021, the UK is not an EEA state and is therefore considered a third country.

Since 1 January 2021, charities which are established in the UK and have no principal place of business in the State (“UK Charities”) are not eligible for registration by the Charities Regulator. This is a unsatisfactory position in relation to maintaining UK Charities already on the Register of Charities (which previously completed a section 39 registration process, or were deemed registered under section 40 of the 2009 Act), as it creates an anomaly between the requirements for registered charities and the requirements provided for under the Act of 2009 in respect of applicants for registration.

Legislative clarity is required in respect of the above issues so that UK Charities, whether registered charities or applicants for registration, can operate (or continue to operate) in the State without establishing a principal place of business here.

Ensuring that there is sufficient clarity on the matter is also important given that there is a possibility that charities engaged in the cross border supply of services as part of a trade could seek to rely on a provision in the Agreement which prevents Ireland from requiring a service supplier to establish or maintain an enterprise or to be resident in the State as a condition of the cross border supply of service. Potential sensitivities could arise if UK Charities were unable to register due to place of business conditions, particularly those established in Northern Ireland with the effect that they could not operate on an all-island basis without establishing a principal place of business in the State.

Draft Head 7(a)(i) and (ii) therefore proposes to amend section 39(b) and (c) of the Act of 2009 to provide that UK Charities do not need a principal place of business in the State, so that they are on the same footing as charities established in an EEA state. In this regard, it is noted that other statutes, such as the Taxes Consolidation Act 1997, which grant rights to entities established in the EEA have been amended (see the Withdrawal of the United Kingdom from the European Union (Consequential Provisions) Act 2020) to confirm that rights which attach to entities established in the EEA also attach to entities established in the UK. **[NOTE:** Related amendments to section 50 (draft Head 15) of the Act of 2009 and the new section 54A (draft Head 19) are also proposed.]

Draft Head 7(a) proposes to amend section 39(5)(d) of the Act of 2009 in order to specify additional requirements in relation to charity trustees’ details.

It is important that, where required, the Charities Regulator is able to contact charity trustees without delay. As charity trustees are volunteers who may have work or other commitments, it is important that they can be contacted directly if required. The details that are required to be provided to the Charities Regulator should therefore include a direct telephone number or e-mail address (neither of which would be published on the register).

It is considered important for the Charities Regulator, donors, beneficiaries and the public that the identities of all those who are proposed by an organisation to be charity trustees are clearly identifiable. It is therefore proposed that in order to provide the Charities Regulator with some way in which to ascertain and verify the identity of those proposed to be charity trustees of an organisation, that PPSNs should be provided in respect of such persons (with discretion for the Authority to accept other identification information where it considers it appropriate to do so e.g. a passport where a person does not have a PPSN). This would align more closely with Revenue's current practice of requiring a charitable organisation that is seeking charitable tax status to provide the PPSNs of its charity trustees. **[NOTE:** This provision pertaining to PPSNs is dependent on the commencement of Head 32, which seeks to add the Charities Regulator as a specified body under Schedule 5 of the Social Welfare Consolidation Act 2005 (as amended) for the purposes of this Schedule and sections 262 to 270 of that Act].

The proposed amendment of paragraph (l) of section 39(5) is intended to align that provision with an updated reference to "vulnerable person" as defined in section 2 of the National Vetting Bureau (Children and Vulnerable Persons) Act 2012. **[NOTE:** This amendment is dependent on a new definition of "vulnerable person" being included in section 2 of the Act as proposed under Head 3(d) of this General Scheme.]

The proposed substitution of section 39(6), which is set out in paragraph (b) of draft Head 7 is intended to broaden the circumstances in which the Authority may exempt applicants from the requirements set out in section 39(5). The amendment clarifies that the Authority can exempt individual applicants and categories of applicants in appropriate cases. This is important as there may be particular groups of applicants with identifiable similarities that the Charities Regulator may decide should not have to meet certain of the requirements set out in section 39(5) for reasons of proportionality or otherwise. Further to section 39(6), the Charities Regulator introduced a small charity (simplified) application process, to facilitate a more efficient application process in relation to such applicants. The criteria for the small charity (simplified) application process are:

1. The annual income of the applicant organisation is expected to be less than €20,000 for the foreseeable future;
2. The organisation does not have 'the advancement of religion' as a charitable purpose;
3. The organisation was established in the Republic of Ireland and will only operate and carry on activities in the Republic of Ireland;

4. The organisation does not own, or intend to own, any land or buildings;
5. The organisation does not have, or intend to have, any employees;
6. The activities of the organisation do not, and will not, involve working with vulnerable groups (including children).

The amendments proposed in subhead (c) of draft Head 7 are intended to address the fact that there is currently no specific provision in section 39 providing that the Charities Regulator can refuse to make a decision on an application where the application is incomplete or otherwise deficient. This means that an applicant, who is refused registration on the grounds of an incomplete or otherwise deficient application (e.g. lack of clarity in respect of the link between activities and advancement of the applicant's stated charitable purpose), could potentially seek to appeal that refusal to the Charity Appeals Tribunal under section 45 of the Act of 2009. For operational reasons it should be possible for the Charities Regulator to decline to deal with an application where it is of the opinion that the application does not comply with the requirements of section 39(5). The amendments proposed in subhead (c) of draft Head 7 are intended to address situations where an application is deficient in some respect and to set out a clear and fair process for dealing with such applications. The proposed amendment would facilitate a more proportionate approach to incomplete or otherwise deficient applications as it would provide applicants with an opportunity to address any issues within a reasonable period. The process provided for would also ensure that the formal appeals process is limited to cases where an assessment of whether or not the applicant is a charitable organisation within the meaning of the Act of 2009 has been possible as opposed to those applications where such an assessment cannot be carried out due to the application being incomplete or deficient in some way.

A key element of the new Charities Governance Code is the requirement that charity trustees and all those involved in a charitable organisation are familiar with the governing document of the organisation. The proposed amendment of section 39(7), which is set out in subhead (d)(ii), is intended to facilitate greater transparency for the public and greater adherence by charity trustees and volunteers, employees and members with the terms of their governing documents by providing a clear basis for the publication of the governing documents of all registered charitable organisations on the Register of Charities.

The proposed amendment of section 39(7)(g), which is provided for in subhead (d)(iii), is intended to clarify the scope of what can be included in the Register of Charities to encapsulate any other information which the Charities Regulator believes should be included on the Register having regard to its statutory functions under section 14 of the 2009 Act.

The proposed amendment of section 39(9), which is set out in subhead (e), is intended to provide for the imposition of conditions by the Charities Regulator in respect of applications for registration where appropriate. Examples of such conditions would include a

requirement to submit a copy of the organisation's constitution as approved and submitted to the Companies Registration Office, that a bank account in the name of the registered charitable organisation be opened etc.

The amendment proposed in subhead (f) of draft Head 7 provides that charity trustees should notify the Charities Regulator in writing where a particular or other information, which is entered in the Register regarding their charity is no longer correct. Currently, charity trustees have an obligation to "inform" the Charities Regulator of such matters. There is no penalty for failing to do so, however.

From an operational perspective, it is preferable that there is a written record of changes to a charity's particulars and therefore the amendment provided for in subhead (f) of draft Head 7 provides for written notifications to be submitted to the Charities Regulator.

Further, in a review of the details of 810 charity trustees carried out in 2018, which was based on a random sample of 112 registered charities of varying sizes, the Charities Regulator found that 57% of the charities had not provided up to date details of their charity trustees to the Charities Regulator. The number of inaccurate charity trustee entries in respect of these charities was 33% of the total charity trustee details checked as part of the overall sample population.

There are limited duties for charity trustees under the Act to ensure that information, which has been submitted to the Charities Regulator as part of the registration process (as opposed to the subset of that information, which is published on the Register) is kept up to date. The draft head therefore proposes to substitute the current subsection (11) with further duties on charity trustees to notify the Charities Regulator where any key information relating to their charitable organisation's registration changes. The proposed amendment includes a requirement for a declaration from any person proposed to be appointed by a charitable organisation as a charity trustee that such person is not disqualified under section 55 of the Charities Act 2009 from being a charity trustee. Such declarations are already provided by charity trustees. However, this amendment has been proposed in order to have a clear statutory basis for such declarations and to provide that a person who knowingly or recklessly provides a false or misleading declaration with regard to their eligibility to be a charity trustee commits an offence under the Act.

Section 73, which deals with the imposition of intermediate sanctions in place of a prosecution, is an important compliance tool for the Charities Regulator as it facilitates a proportionate regulatory response whereby the Charities Regulator can, in appropriate cases, work with relevant charitable organisations to bring them back into compliance or ensure that a similar breach does not occur in future.

However, section 73 is predicated on a breach of the specific sections specified in the provision also constituting an offence under the 2009 Act. For this reason, the new

subsections (18) and (19), which are provided for in this draft Head provide that breach of certain requirements of section 39 by charity trustees will be an offence. The amendment of section 73(1) to refer to section 39, as proposed in Head 26, is therefore intended to ensure that where charity trustees of a charitable organisation fail to comply with provisions such as subsection (11) that the Charities Regulator can, in appropriate cases, take action under section 73 and impose intermediate sanctions rather than proceed with a prosecution.

Subsection (13) of section 39 currently provides as follows:

“(13) If, after the making of an application under this section in relation to a charitable organisation but before the making of a decision by the Authority in respect of the application, a charity trustee of that charitable organisation ceases to be qualified for the position of charity trustee by virtue of section 55, the charitable organisation shall not be eligible to be registered for the purposes of this section before the expiration of one year, or such shorter period as the Minister may determine, from the date of the charity trustee so ceasing to be qualified, and the Authority shall not, before such expiration, perform any functions in relation to that organisation under this section.”

The proposed amendment set out in subhead (h) of draft Head 7 provides for the deletion of the above subsection. The purpose of the subsection is unclear. Further, given the different grounds on which a person can be disqualified from being a charity trustee under section 55 of the Charities Act 2009, it seems disproportionate in the circumstances to prevent an organisation from applying to register as a charity for a period of one year from the date of disqualification in circumstances where an alternative charity trustee could have been identified.

Subhead (i) of draft Head 7 proposes to amend section 39 by including 2 additional subsections, which relate to contraventions of the section. Charitable organisations are required to apply for registration under section 39(3). The purpose of including new subsections (18) and (19) is to render it an offence for an organisation not to register with the Charities Regulator where the terms of section 39(3) are met. Similarly, failure to comply with other requirements of section 39 such as the requirement to notify changes of particulars or other information to the Charities Regulator so that that the Register can be duly updated etc., will be offences under this section.

The proposed insertion in subhead (i) of draft Head 7 of a definition of “Personal Public Service Number (PPSN)” is taken from a similar definition provided for in section 50 (Use of Personal Public Service Number (PPSN).) of the Public Service Pensions (Single Scheme and Other Provisions) Act 2012 (No. 37).

NOTE: A transitional provision may be required to clarify that the amendments to section 39 apply to applications, which have been submitted to the Authority but in respect of which no decision has been made at the time that the amendments come into operation.

The notification requirements under subsection (11) and requirement for consent provided for in subsection (11B) should apply to all registered charitable organisations regardless of whether or not they are registered before the date that the amendments come into operation.

HEAD 8: Amendment of section 40 of Act of 2009

Note: The following section(s)* contained will not apply to ‘Education Bodies’ as amended under draft Head 3 [*those highlighted in red]

Provide that –

Section 40 of the Charities Act 2009 is amended –

- (a) in subsection (2), by the deletion of “or procurement”,
- (b) by the insertion of the following subsections after subsection (4):
 - “(4A) Where a charitable organisation to which subsection (1) applies is notified by the Authority of a requirement for it to provide information under subsection (4), the charitable organisation shall, within 14 days from the date of the notification or such longer period as may be specified by the Authority, furnish to the Authority the documents or other information necessary to satisfy the requirements specified in the notification.
 - (4B) Where a charitable organisation receives a notification under subsection (4A) and fails to submit the information necessary to satisfy the requirements specified in the notification to the Authority within the period specified in the notification, the Authority may enter in the register a statement that the organisation is no longer deemed to be registered under subsection (1).”
- (c) in subsection (6) –
 - (i) by the substitution of “subsection (4)” for “subsection (3)”,
 - (ii) in paragraph (f), by the deletion of “and”,
 - (iii) by the insertion of the following paragraph after paragraph (f):
 - “(fa) the constitution of the charitable organisation, and”
 - (iv) in paragraph (g), by the substitution of “particulars or information” for “particulars”;and
- (d) by the insertion of the following subsections after subsection (6):

“(7) The charity trustees of a charitable organisation that is deemed to be registered in the register under subsection (1) shall—

- (a) notify the Authority in writing forthwith –
 - (i) if a particular or other information entered in the register in respect of the charitable organisation ceases to be correct,
 - (ii) if the charitable organisation proposes to wind up or otherwise cease its activities,
 - (iii) if a particular or other information provided to the Authority in respect of a charity trustee of the charitable organisation ceases to be correct, and
 - (iv) if a person is appointed as or ceases to be a charity trustee of the charitable organisation,and
- (b) as part of a notification referred to in paragraph (a), furnish the Authority with –
 - (i) the particulars of any change or proposal referred to in that paragraph,
 - (ii) in a case to which sub-paragraph (ii) of paragraph (a) applies, a statement of the assets and liabilities of the charitable organisation and details of any proposed transfer of its assets on winding up, and
 - (iii) in a case to which sub-paragraph (iv) of paragraph (a) applies,—
 - (I) where relevant, the date on which any person was appointed as or ceased to be a charity trustee of the charitable organisation, and
 - (II) where a person has been appointed as a charity trustee, a declaration, in such form as may be determined by the Authority, from the person that he or she is for the time being qualified, for the purposes of section 55, to hold the position of charity trustee.

(8) The Authority may specify the form of and any other information to be provided in a notification referred to in subsection (7).

(9) A charitable organisation that is deemed to be registered shall not amend its constitution without the prior approval of the Authority and the Authority shall not grant such approval if the proposed amendment to the charitable organisation's constitution would be contrary to this Act.

(10) The charity trustees of a charitable organisation in respect of which there is a contravention of subsection (4), (7) or (9), shall each be guilty of an offence.

(11) Where a charitable organisation that is a body corporate contravenes subsection (4), (7) or (9), the charitable organisation shall be guilty of an offence.

(12) A person who, in purported compliance with this section, knowingly or recklessly provides information, a particular or a declaration to the Authority that is false or misleading in a material respect, or who believes any such information or particular when provided by him or her, in purported compliance with this section, not be true, shall be guilty of an offence.

(13) The Authority shall, from time to time, review each entry in the register and, if it becomes aware that any particular or other information in the register relating to a charitable organisation referred to in subsection (1) is incorrect or has ceased to be correct, it shall make such alterations to the register as it considers necessary and notify the charitable organisation concerned in writing of any such alteration.

(14) The Authority shall, where it is informed by the Revenue Commissioners that a charitable organisation which was deemed to be registered in the register under subsection (1) no longer has an entitlement to an exemption under section 207 or 208 of the Taxes Consolidation Act 1997, enter in the register a statement that the organisation is no longer deemed to be registered under subsection (1).

(15) A statement entered in the register under subsection (4B) or (14) shall remain in the register for so long as the Authority considers appropriate.

(16) The Authority may publish in such manner as it considers appropriate a list of organisations which, pursuant to this section, are no longer deemed registered in the register.

(17) An organisation that has ceased to be deemed registered in the register under this section, shall be entitled to make an application to be registered in the register under section 39.”.

Explanatory note:

The amendment proposed in subhead (a) removes the possibility that the Authority could request that Revenue use its powers to require a charitable organisation or third parties to produce information or records. The amendment to section 40(2) set out in paragraph (a) whereby the words “or procurement” would be deleted from the provision is intended to address this matter.

The proposed insertion of two new subsections provided for in subhead (b) is intended to ensure that deemed registered charitable organisation fully engage with the Charities Regulator and provide all required information to the Charities Regulator in relation to their registration. Given the significant requirements, which apply to entities applying to register under section 39 of the Act of 2009, it is important that where a deemed registered charitable organisation fails to provide information requested of it that the Charities Regulator has a mechanism to remove the organisation concerned from the Register. This would go some way to addressing what could be seen as an unfair advantage for those charities that were automatically included in the Register further to section 40 of the Act of 2009 when compared to organisations who were and are required to apply for registration under section 39 of the Act.

The amendment set out in subhead (c) of draft Head 8 is intended to clarify the existing provision. Subsection (6) of section 40 provides as follows:

“(6) The Authority shall, as soon as practicable after receiving information pursuant to a request under subsection (2) or a requirement under subsection (3) in respect of a charitable organisation, enter in the register—...” (emphasis added)

Subsection (3) of section 40 provides that the Revenue Commissioners shall comply with a request from the Charities Regulator under subsection (2). Charitable organisations that are deemed registered under section 40 may be required to provide information to the Charities Regulator as if they were an applicant under section 39 of the Act. It is therefore proposed to substitute the reference in this subsection to “subsection (3)” with a reference to “subsection (4)”.

The amendments proposed in subhead (d) of draft Head 8 (new subsections (7) and (8)) are intended to align section 40, which applies to deemed registered charitable organisations, with section 39 of the 2009 Act. The amendments are intended to ensure that the Charities Regulator can carry out its functions relating to the establishment and maintenance of the Register of Charities under the 2009 Act. The amendments also mirror similar amendments being proposed in relation to section 39 e.g. declarations from new trustees as to qualification for the purposes of section 55 etc.

The new subsection (9) regarding the requirement for consent to any proposed change to the main object provided for in a charitable organisation's constitution is intended to align with a similar amendment proposed in respect of section 39.

The new subsections (10) and (11) are intended to align with similar amendments proposed in relation to section 39 in order to make it an offence for charitable organisations not to provide required information to the Charities Regulator and for any failure to notify the Charities Regulator of changes to certain key information and particulars relating to the charitable organisation.

The new subsection (12) is intended to align section 40 with section 39(15), which makes it an offence for a person to knowingly or recklessly provide information or particulars to the Charities Regulator that is false or misleading in any material respect or who believes such information or particular not to be true. In the interests of fairness, it is important that the legal obligation to provide accurate and true information or particulars to the Charities Regulator applies regardless of whether an organisation is registered under section 39 of the Charities Act 2009 or deemed registered under section 40 of that Act.

The new subsection (13) flows from the earlier amendments to the section and is intended to mirror a similar provision in section 39 of the Act.

The new subsections (14) to (16) provided for in subhead (d) of draft Head 8 arise from section 40(1) of the Charities Act 2009 itself, which provides as follows:

"40.— (1) A charitable organisation in respect of which—

- (a) there was, immediately before the commencement of section 39, an entitlement to an exemption under section 207 or 208 of the Taxes Consolidation Act 1997, and*
- (b) the Revenue Commissioners had issued a number (commonly referred to as a "CHY number") for the purposes of such exemption,*

shall, subject to section 44, be deemed to be registered in the register for so long only as there continues to be an entitlement to such exemption."

(emphasis added)

The number of entities that are on the Register due to being deemed registered in the register pursuant to section 40(1) has fallen since the commencement of section 39 of the 2009 Act. This is mainly due to the fact that over that time, some of the entities concerned have lost their entitlement to an exemption under section 207 or 208 of the TCA 1997.

Since such entities were only deemed registered in the Register on foot of having such an exemption at the time that section 39 was commenced, it is a logical consequence that the loss of the relevant exemption would lead to the entities being removed from the Register.

As such entities are, further to section 40(1), no longer deemed registered in the Register in such circumstances, it is also logical that this fact be noted initially in the Register in a manner similar to sections 43 and 44. This is particularly important in order to distinguish such entities from those entities that are registered in the Register further to an application under section 39. Unlike charities that are deemed registered under section 40(1), the loss of charitable tax status by a charity that is registered on foot of an application under section 39 does not automatically affect that charity's entry on the Register of charitable organisations maintained by the Charities Regulator under the 2009 Act.

Further, as decisions with regard to charitable tax status, and specifically exemptions under section 207 or 208 of the TCA 1997, are matters, which are exclusively within the remit of the Revenue Commissioners and not the Charities Regulator (a fact recognised by section 7 of the 2009 Act), it follows that such decisions cannot form the basis for an appeal to the Charity Appeals Tribunal.

Where the Revenue Commissioners inform the Charities Regulator that an entity, which is on the Register solely by virtue of section 40(1) of the 2009 Act, no longer has the required exemption, a note is entered on the Register stating that the entity is no longer "deemed registered in the Register under section 40". This is done to distinguish the entities concerned from entities that are removed from the Register for other reasons e.g. under section 44.

Section 14 of the 2009 Act provides that it is a function of the Charities Regulator to maintain the Register and to publish such information concerning charitable organisations and charitable trusts as it considers appropriate. For reasons of transparency it is important that there is clarity between those situations where an entity is no longer deemed to be registered in the Register due to losing its charitable tax exemption under the TCA 1997 and those situations where an entity is no longer deemed registered for any other reason under the 2009 Act.

The proposed amendment to section 40 provided for in subhead (d) of this Head would provide further clarity in respect of the distinction between entities who are no longer registered further to the loss of the relevant tax exemption and those that are no longer registered for other reasons including those referred to in section 44. The proposed amendment also requires the Charities Regulator to note this fact in the Register where applicable.

In line with the Charities Regulator's function to maintain the register, it is important that notices in the register relating to entities that have been removed from the register, can themselves be removed in due course. This is provided in subhead (d) of draft Head 8 by way of the proposed insertion of subsection (15). In order to provide a record of entities that were previously entered in the Register, subsection (16) is intended to facilitate the

publication by the Charities Regulator of a list of de-registered charities, which would be separate to the main Register of Charities.

Where a charity is removed from the Register by the Charities Regulator under section 43 or 44 of the 2009 Act, it is not permitted to apply to be registered in the register for one year from the date that it ceases to be registered. Given that there is no requirement for a charity that is registered under section 39 of the 2009 Act to have, or apply to Revenue for, a charitable tax exemption, it would be unfair to prevent a section 40 deemed registered organisation that is removed from the register due to losing its charitable tax exemption from applying under section 39 to be registered for a period of one year. The proposed insertion of subsection (17) in section 40, as detailed in subhead (d) of draft Head 8, is intended to address and clarify this issue.

HEAD 9: Amendment of section 43 of Act of 2009

Provide that –

Section 43 of the Charities Act 2009 is amended –

- (a) by the insertion of the following subsections after subsection (2):

“(2A) Where a charitable organisation fails to comply with conditions referred to in section 39(9)(b), the Authority may remove from the register all of the information entered in relation to that organisation and the organisation shall thereupon cease to be registered.”,

(2B) Where the main object of the constitution of a charitable organisation is amended in contravention of section 39(11B) the Authority may remove from the register all of the information entered in relation to that organisation and the organisation shall thereupon cease to be registered.”,

- (b) in subsection (4)(a), by the substitution of “39(11)(other than paragraph (a)), 47, 48, 50, 52, 54A, 54B or 59A” for “47, 48, 50 or 52”,

- (c) in subsection (5), by the insertion of “or 66A” after “section 53”,

- (d) by the insertion of the following subsection after subsection (5):

“(5A) Where the Authority is of opinion that a body registered in the register –

(a) is not a charitable organisation, or

(b) has wound up or otherwise ceased to operate,

it may remove from the register all of the information entered in relation to that organisation and the organisation shall thereupon cease to be registered.”,

- (e) by the deletion of subsections (6) and (7),

- (f) in subsection (10), by the substitution of “section 39(7)” for “section 39(6)”,
and

(g) by the insertion of the following subsection after subsection (11):

“(12) A statement entered in the register under subsection (11) shall remain in the register for so long as the Authority considers appropriate.

(13) The Authority may publish in such manner as it considers appropriate a list of organisations which, pursuant to this section, are no longer registered charitable organisations.”.

Explanatory Note:

The amendment proposed in subhead (a) of draft Head 9 is included to ensure that where any conditions are imposed as part of an applicant’s registration and those conditions are breached, that the organisation can be removed from the register.

The amendment proposed in subhead (b) of draft Head 9 relates to, and is therefore dependent on, the proposed insertion of sections 39(11), 54A (General duties of trustees) and 59A (Requirement to notify significant events).

The amendment to section 43(5) in subhead (c) of draft Head 9 relates to, and is therefore dependent on, the proposed insertion of section 66A (Directions arising from inspector’s report) relating to a new type of direction that it is proposed that the Charities Regulator would be able to give to a charitable organisation, which is the subject of an inspector’s report under section 66 of the Charities Act 2009.

Under the Charities Act 2009, in order to be registered in the register, a body must have –

- (a) made an application under section 39 on foot of which the Charities Regulator has determined that it is a “charitable organisation” within the meaning of section 2 of the Act, or
- (b) been deemed registered in the register under section 40(1) of the Act.

Numerous sections of the Charities Act 2009, including section 39, require the Charities Regulator to determine whether a body is a “charitable organisation” and therefore meets what is termed the ‘charity test’ under the 2009 Act or not.

Despite this, subsection (6) of section 43 requires the Charities Regulator, where it is of the opinion that a body is no longer a charitable organisation within the meaning of the Act, to apply to the High Court for a declaration that the body is no longer a “charitable organisation”. This requirement is therefore at odds with other provisions, which enable

the Charities Regulator to make decisions as to whether a body is a “charitable organisation” or not without recourse to the courts. While recognising that oversight of such decisions is important, given the significant cost associated with High Court proceedings and the time associated with having such matters concluded, it is felt that an appeal of such decisions to the Charity Appeals Tribunal would be more appropriate. Such an appeal would provide the requisite oversight while keeping costs for charitable organisations and the Charities Regulator to a minimum. Further, under section 80 of the Charities Act, an appeal from the Charity Appeals Tribunal to the High Court on a point of law would also be possible.

In order to amend the provision to provide for an appeal to the Charity Appeals Tribunal in place of an application to the High Court for a declaration, subhead (d) of draft Head 9 provides for a new subsection (5A) and subhead (e) of the draft Head provides for the deletion of subsections (6) and (7).

The new subsection (5A)(b) proposed in subhead (d) of draft Head 9 also provides that an organisation may be removed from the Register where the Charities Regulator is of the opinion that it has ceased to operate or exist. This may happen for a number of reasons including situations in which a charitable organisation informs the Charities Regulator that it wishes to wind up for the purposes of changing its form to a company limited by guarantee or it appears to the Charities Regulator that a particular registered charitable organisation is no longer active. The proposed provision mirrors a similar provision in section 34 of the Charities Act 2011 for England and Wales and is a practical requirement to ensure that the Charities Regulator can carry out its statutory function of establishing and maintaining a Register of charitable organisations in line with section 14(1)(f) and Part 3 of the 2009 Act.

The amendment provided for in subhead (f) of draft Head 9, is intended to correct what is understood to be an incorrect cross-reference. Subsection (10) of section 43 provides that where a body ceases to be registered the Charities Regulator shall not, before the expiration of 1 year thereafter, “... *perform any functions in relation to that organisation under section 39(6)*”. Section 39(6) provides that the Charities Regulator may exempt an applicant from certain requirements with regard to registration. Section 39(7) provides that subject to certain matters, the Charities Regulator may grant an application and enter specified details regarding the applicant in the register. Given the content of section 43(10), it would appear that section 39(7) is the appropriate provision to be referenced.

In line with the Charities Regulator’s function to maintain the register, it is important that notices in the register relating to entities that have been removed from the register, can themselves be removed in due course. This is provided in subhead (g) of draft Head 9 by way of the proposed insertion of a new subsection i.e. subsection (12).

Subhead (g) of draft Head 9 also includes a new subsection (13), the purpose of which is to enable the Authority, at its discretion, to publish a list of organisations that are no longer registered charitable organisations.

HEAD 10: Amendment of section 44 of Act of 2009

Provide that –

Section 44 of the Charities Act 2009 is amended –

- (a) by the insertion of the following subsection after subsection (2):

“(2A) Where the main object of the constitution of a charitable organisation is amended in contravention of section 40(9) the Authority may remove from the register all of the information entered in relation to that organisation and the organisation shall thereupon cease to be registered.”,
- (b) in subsection (4)(a), by the substitution of “40(7), 47, 48, 50, 52, 54A, 54B or 59A” for “47, 48, 50 or 52”,
- (c) in subsection (5)(b), by the insertion of “or 66A” after “section 53”,
- (d) by the insertion of the following subsection after subsection (6):

“(6A) Where the Authority is of opinion that a body that is deemed to be registered in the register by virtue of section 40 –

 - (a) is not a charitable organisation, or
 - (b) has wound up or otherwise ceased to operate,

it may remove from the register all of the information entered in relation to that charitable organisation and shall by notice in writing inform the charitable organisation that it is no longer deemed to be so registered.”,
- (e) by the deletion of subsections (7) and (8), and
- (f) by the insertion of the following subsection after subsection (12):

“(13) A statement entered in the register under subsection (12)(b) shall remain in the register for so long as the Authority considers appropriate.

(14) The Authority may publish in such manner as it considers appropriate a list of organisations which, pursuant to this section, are no longer registered charitable organisations.”.

Explanatory Note:

The amendments proposed in subheads (a) and (b) of draft Head 10 relate to, and are therefore dependent on, the proposed insertion of sections 40 (7) and (9), 54A (General duties of trustees) and 59A (Requirement to notify significant events).

The amendment proposed in subhead (c) of draft Head 10 relates to and is therefore dependent on the proposed insertion of a new section 66A relating to a new type of direction that can be given by the Charities Regulator to a charitable organisation which is the subject of an inspector’s report under section 66 of the Charities Act 2009.

Under the Charities Act 2009, in order to be registered in the register, a body must have –

- (a) made an application under section 39 on foot of which the Charities Regulator has determined that it is a “charitable organisation” within the meaning of section 2 of the Act, or
- (b) been deemed registered in the register under section 40(1) of the Act.

Numerous sections of the Charities Act 2009, including section 39, require the Charities Regulator to determine whether a body is a “charitable organisation” and therefore meets what is generally referred to as the ‘charity test’ under the 2009 Act.

Despite this, subsection (7) of section 44 requires the Charities Regulator, where it is of the opinion that a body deemed registered in the register under section 40, is no longer a charitable organisation within the meaning of the Act, to apply to the High Court for a declaration that the body is no longer a “charitable organisation”. This requirement is therefore at odds with other provisions, which enable the Charities Regulator to make decisions as to whether a body is a “charitable organisation” or not without recourse to the courts. While recognising that oversight of such decisions is important, given the significant cost associated with High Court proceedings and the time associated with having such matters concluded, it is felt that an appeal of such decisions to the Charities Appeal Tribunal would be more appropriate. Such an appeal would provide the requisite level of oversight while keeping costs for charities and the Charities Regulator to a minimum.

In order to amend the provision to provide for an appeal to the Charity Appeals Tribunal in place of an application to the High Court for a declaration, subhead (d) provides for a new subsection (6A) and subhead (e) provides for the deletion of subsections (7) and (8).

The new subsection (6A)(b) proposed in subhead (d) of draft Head 10 also provides that an organisation may be removed from the Register where the Charities Regulator is of the opinion that it has wound up or has otherwise ceased to operate. This may happen for a number of reasons including situations in which a charitable organisation informs the Charities Regulator that it wishes to wind up for the purposes of changing its form to a company limited by guarantee or it appears to the Charities Regulator that a particular registered charitable organisation is no longer active. The proposed provision mirrors a similar provision in section 34 of the Charities Act 2011 for England and Wales and is a practical requirement to ensure that the Charities Regulator can carry out its statutory function of establishing and maintaining a Register of charitable organisations in line with section 14(1)(f) and Part 3 of the 2009 Act.

In line with the Charities Regulator's function to maintain the register, it is important that notices in the register relating to entities that have been removed from the register, can themselves be removed in due course. This is provided in subhead (f) of draft Head 10 by way of the proposed insertion of a new subsection i.e. subsection (13).

Subhead (f) of draft Head 10 also includes a new subsection (14), the purpose of which is to enable the Authority, at its discretion, to publish a list of organisations that are no longer registered charitable organisations.

HEAD 11: Amendment of section 45 of Act of 2009

Provide that –

Section 45 of the Charities Act 2009 is amended –

- (a) in subsection (2), by the substitution of “subsections (2A) and (9)” for “subsections (7) and (9)”, and
- (b) in subsection (3) –
 - (i) by the substitution of “A body that is no longer deemed registered in accordance with section 44 (other than subsection (10))” for “A body that, in accordance with section 44 (other than subsections (8) and (10) is no longer deemed registered”, and
 - (ii) by the substitution of “referred to in that section” for “referred to in that subsection”.

Explanatory Note:

The amendments set out in draft Head 11 are consequential amendments necessitated by the proposed amendments in draft Heads 9 and 10. The effect of the amendments set out in subheads (a) and (b) of this Head is that determinations under sections 43 or 44 that a particular body is not a “charitable organisation” within the meaning of section 2 of the Charities Act 2009, can be appealed to the Charity Appeals Tribunal in place of High Court proceedings.

HEAD 12: Amendment of section 46 of Act of 2009

Provide that –

Section 46 of the Charities Act 2009 is amended –

- (a) by the substitution of the following for subsection (2):

“(2) A person (other than a registered charitable organisation) who, in any notice, advertisement, promotional literature or any other published material, describes the person or their activities in such terms as would cause members of the public to reasonably believe that the person is a charitable organisation shall, subject to subsection (6), be guilty of an offence.”,

and

- (b) in subsection (7), by the substitution of the following for paragraphs (a) and (b):

- “(a) the name of the charitable organisation as it appears on the register,
- (b) that it is a registered charitable organisation,
- (c) the registration number of the charitable organisation, and
- (d) such other information, including the names of the charity trustees and the address of its principal office, as may be prescribed.”.

Explanatory Note:

Section 46 of the Charities Act 2009 provides for certain offences relating to references to charitable status by persons and bodies, which are not registered charitable organisations within the meaning of the Act.

Subsection (2) applies to a body (other than a charitable organisation) and provides that it is an offence for such a body *“in any notice, advertisement, promotional literature or any other published material”* to describe itself or *“its activities in such terms as would cause members of the public to reasonably believe that it is a charitable organisation...”*.

The term “body” is defined in section 2 as follows:

“ ‘body’ includes, in relation to a trust in respect of which there is only one trustee, that trustee.”

Under section 46(2) as it is currently worded, where a sole trustee of a trust carries out the activities referred to in that subsection he or she commits an offence. However, as an individual is not a “body”, if an individual who was not a trustee of a trust carried out the activities referred to in section 46(2), it is unclear whether the offence set out in subsection (2) would apply. This would appear to be an anomaly and there would appear to be no obvious rationale for limiting the application of the provision to a “body” as defined. For this reason, the amendment set out in subhead (a) of draft Head 12 proposes to amend the provision to refer to a person as opposed to a “body”, so that the meaning of “person” as provided for in section 18 of the Interpretation Act 2005 can be relied upon. The effect of this amendment would be to put it beyond doubt that if a body corporate (whether a corporation aggregate or a corporation sole), an unincorporated body of persons or an individual describes themselves or their activities in a way that would cause members of the public to reasonably believe that they are a “charitable organisation” within the meaning of the Act of 2009 but they are in fact not a registered charitable organisation under the Act, then this would constitute an offence under section 46.

The amendment provided for in subhead (b) of draft Head 12 includes an additional requirement relating to the publication of a charitable organisation’s registration number and the charity’s name as it appears on the Register of charities. These are important identifiers for the public. Publication of the organisation’s charity registration number is required to ensure that a registered charitable organisation uses its charity registration number in published materials. Not all charities are required to have a CHY number but they are required to have a charity registration number to indicate that they are a registered charitable organisation under the 2009 Act. It is therefore important that a common identifier is used by all registered charitable organisations.

HEAD 13: Amendment of section 47 of Act of 2009

Provide that –

Section 47 of the Charities Act 2009 is amended by the deletion of subsection (11).

Explanatory Note:

Section 47 of the Charities Act 2009 provides that charitable organisations are required to keep proper books of account. The requirement to keep proper books of account is a basic requirement designed to protect charities, beneficiaries, donors, funders, staff, volunteers and the public.

Subsection (11) provides that the section does not apply to charitable organisations, which are companies.

As the majority of registered charitable organisations (excluding schools) are companies, section 47 does not therefore apply to the majority of registered charitable organisations. Although companies have a similar obligation to keep proper books of account under section 282 of Companies Act 2014, that provision is not enforceable by the Charities Regulator.

As a result, the current wording of section 47 of the Act of 2009 is such that while a registered charity that is not a company, can potentially be removed from the Register under sections 43 and 44 of that Act or can have intermediate sanctions imposed on it under section 73 of the Act for breaching section 47 and failing to keep proper books of account, it would not be possible for the Charities Regulator to remove a registered charity that is a company from the Register for failing to keep proper books of account or to impose an intermediate sanction under section 73 of the Act on the company.

For compliance and enforcement reasons and in the interests of fairness and equality of treatment, it is important that the obligation to keep proper books of account under the Charities Act 2009 applies to all registered charities regardless of form. It is also preferable that the Charities Regulator can take appropriate regulatory action in relation to any charity found to be in breach of the requirement to keep proper books of accounts. This can be achieved by the deletion of subsection (11) of section 47 as proposed in draft Head 13.

Under section 33 of the Charities Act 2009, the Charities Regulator is required to secure administrative co-operation between it and relevant regulators for the purposes of, among other things, avoiding duplication of activities. An MOU between the Charities Regulator

and the ODCE could address any potential concerns about duplication of offence provisions should they arise.

HEAD 14: Amendment of section 48 of Act of 2009

[Note: Exemption remains in situ for 'Education Bodies', no proposed changes to section 48 subsection 6(b)]

Provide that –

Section 48 of the Charities Act 2009 is amended –

- (a) in subsection (1), by the insertion of “, which is not a company,” after “a charitable organisation”,
- (b) in subsection (3)(a) –
 - (i) by the insertion of “referred to in subsection (1)” after “a charitable organisation”,
 - (ii) by the substitution of “€250,000” for “€100,000”,
- (c) by the insertion of the following subsections after subsection (3):
 - “(3A) A charitable organisation that is a company shall, when preparing its financial statements under the Companies Act 2014, prepare those statements in accordance with any requirements relating to the form and content of annual statements of accounts as may be prescribed by regulations made by the Minister in consultation with the Minister for Enterprise, Trade and Employment.
 - “(3B) Regulations under subsection (3A) specifying requirements relating to the form and content of the annual statement of accounts of a charitable organisation that is a company shall be limited to requirements that are additional to those which apply to the charitable organisation under the Companies Act 2014.”

and

(d) in subsection (6) -

- (i) by the deletion of paragraph (a), and
- (ii) by the substitution of the following for paragraph (c):

“(c) to a charitable organisation in respect of a financial year in which two or more of the following conditions are met:

- (i) its balance sheet total does not exceed €10,000 or such greater amount, not exceeding €50,000, as may be prescribed;
- (ii) its gross income does not exceed €10,000 or such greater amount, not exceeding €50,000, as may be prescribed;
- (iii) it has no employees,”.

Explanatory Note:

Section 48 of the Charities Act 2009 relates to the ‘Annual Statement of Accounts’ to be prepared in respect of each financial year by the charity trustees of a charitable organisation. The proposed amendments are required in order to facilitate the introduction of essential Charity Accounting and Reporting Regulations. A public consultation process on draft Charity Accounting and Reporting Regulations undertaken towards the end of 2016 gave rise to a number of areas of concern. Some of these arise from changes to company law provided for in the Companies Act 2014.

The amendment provided for in subhead (b)(ii) of draft Head 14 reflects feedback from the public consultation process, which strongly supported an increase in the threshold provided for in section 48(3)(a) of the Act of 2009 from €100,000 to €250,000. Under section 48(3)(a), where the gross income or expenditure of a charitable organisation in a financial year does not exceed €100,000, the charitable trustees of the organisation may provide an income and expenditure account and a statement of the assets and liabilities of the charitable organisation (“simplified income and expenditure account”) rather than an annual statement of accounts. It is understood that the threshold of €100,000 which appears in the Act of 2009 was based on the threshold which is applied by Revenue in the

context of the charitable tax status of entities. The Charities Regulator has considered this matter and has recommended that it would be more proportionate were the threshold provided for in section 48(3)(a) to be increased from €100,000 to €250,000. This would have the effect of increasing the number of registered charities that would be permitted to meet their obligation under section 48 by way of a simplified income and expenditure account rather than the more detailed annual statement of account under the Charity Statement of Recommended Practice (“Charity SORP”), which will apply to larger charities.

The amendments provided for in subheads (a), (b)(i), (c) and (d) of draft Head 14 aim to remove the current exemption, which applies to charities that are companies, whereby the relevant accounting and reporting provisions in the Act of 2009 do not apply to such charities. The majority of registered charities (excluding schools and other education bodies that are exempt from certain accounting-related obligations under the Charities Act 2009) are now incorporated as companies. If these amendments are not made, those parts of the planned Charity Accounting and Reporting Regulations, which deal with accounting requirements under section 48 would apply to less than half of relevant registered charities.

The amendment of section 48 of the Act of 2009 provided for in subhead (c) of draft Head 13 to provide for a regulation-making power will enable the Minister, in consultation with the Minister for Enterprise, Trade and Employment, to require charities that are companies to comply with additional information requirements to those that are already required under the Companies Acts, specifically the requirement that their annual statement of accounts be prepared in accordance with the methods and the principles of the Charity Statement of Recommended Practice (SORP). SORPs are sector-driven recommendations on financial reporting, auditing practices and actuarial practices for specialised sectors, which supplement the Financial Reporting Council (FRC) standards and other legal and regulatory requirements that are not specifically addressed in the FRC standards. The introduction of SORP reporting will –

- improve the quality of financial reporting by charities,
- enhance the relevance, comparability and understandability of the information presented in charity accounts,
- provide clarification, explanation and interpretation of accounts standards and their application to charities and to sector specific transactions, and
- assist those who are responsible for the preparation of the trustees’ annual report and accounts.

Feedback from the public consultation process in 2016 on the draft Charity Accounting and Reporting Regulations strongly indicated that there is broad consensus in civil society that the Charity Accounting and Reporting Regulations should apply to all charities, regardless of their form.

NOTE: A version of draft Head 14 was previously approved by the Government and appears in Part 15 of the General Scheme of the Courts and Civil Law (Miscellaneous Provisions) Bill 2017.

The fundamental policy objective underlying the proposed amendments set out in Head 14 is the need for greater transparency for entities that are charitable organisations within the meaning of the Charities Act 2009. In this regard, it is also important to note that the Charities Act 2009 was intended to be neutral as to form in terms of its application. A charitable organisation should not be able to avail of exemptions under the Companies Act 2014, which would enable it to be less transparent in terms of its financial affairs when compared to charitable organisations that are not companies. The amendments to sections 48 and 50 of the Charities Act 2009, which are set out in draft Heads 14 and 15, are intended to facilitate the placing of *additional* obligations on charitable organisations regardless of whether they are companies entitled to avail of exemptions under the Companies Act 2014 or not. This approach is similar to that adopted in England and Wales and, in this way, it is intended that the amendments and the associated implementation of the sections concerned, will deliver the level of transparency required in respect of charities in Ireland.

Section 48 of Act of 2009 (Annual statement of accounts) provides as follows:

“(6) This section does not apply—

(a) to a charitable organisation that is a company,

(b) to an education body,

(c) to a charitable organisation in respect of a financial year in which its gross income or total expenditure is less than—

(i) €10,000, or

(ii) such greater amount, not exceeding €50,000, as may be prescribed, or

(d) in relation to a centre for education designated by the Minister under section 10(4) of the Act of 1998.”

The effect of subsection (6)(c)(i) is that a charity with gross income or total expenditure of less than €10,000 does not have to prepare an annual statement of accounts. The wording as it stands currently allows the following possible scenarios to arise:

1. A charity with gross income of €1,000,000 but with total expenditure of €9,999 would not have to prepare an annual statement of accounts;
2. A charity with gross income of €9,999 but with total expenditure of €1,000,000 would not have to prepare an annual statement of accounts;

3. A charity with gross income and total expenditure of less than €10,000, but which has assets or liabilities of €1,000,000 would not have to prepare an annual statement of accounts.

Although scenario 1 and 2 are in reality unlikely, it is possible that scenario 3 could arise where a charity has valuable property assets, but as it has effectively ceased operations it could have little gross income or expenditure. This could happen for a number of reasons including where there is disagreement between the charity trustees or where demand for the purpose for which the charity was set up has diminished over time. It is important that basic financial information on such charities is made available to the Charities Regulator particularly given the importance of ensuring that charitable assets are used to advance a charity's charitable purpose and the need to ensure that such assets remain within the charities sector.

The criteria for a company to avail of an audit exemption are based on satisfying two out of three of the following criteria:

1. Balance sheet total does not exceed €4.4 million;
2. Turnover does not exceed €8.8 million;
3. Number of employees does not exceed 50.

It is therefore proposed that an exemption from the requirement to prepare any statement of accounts should be based on satisfying three similar but much lower thresholds as follows:

1. Balance sheet total does not exceed €10,000;
2. Gross income does not exceed €10,000;
3. No employees.

The above proposal is reflected in the proposed substitution of paragraph (c) of subsection (6) detailed in this Head.

HEAD 15: Amendment of section 50 of Act of 2009

[Note: Exemption remains in situ for ‘Education Bodies, no proposed changes to section 50, subsection 13(b)]

Provide that –

Section 50 of the Charities Act 2009 is amended –

- (a) in subsection (13) –
 - (i) by the deletion of paragraph (a), and
 - (ii) by the substitution of the following for paragraph (c):
 - “(c) to a charitable organisation in respect of a financial year in which two or more of the following conditions are met:
 - (i) its balance sheet total does not exceed €10,000 or such greater amount, not exceeding €50,000, as may be prescribed;
 - (ii) its gross income does not exceed €10,000 or such greater amount, not exceeding €50,000, as may be prescribed;
 - (iii) it has no employees,”
- and
- (b) in subsection (14), in paragraph (b) by the substitution of “EEA state or the United Kingdom” for “EEA state” in both places where it appears.

Explanatory Note:

Section 50 of the Act of 2009 relates to the ‘Annual Audit or Examination of Accounts’ in relation to the accounts of a charitable organisation.

The amendment provided for in draft Head 15 is required due to the fact that the majority of registered charities (excluding schools and other educational bodies that are exempt from audit requirements under the Charities Act 2009) are now constituted as companies. The ‘small company audit exemption’, which is provided for in section 360 of the Companies Act 2014, provides that a company can qualify for an exemption from audit if it satisfies two or more of the following conditions:

- Balance sheet total does not exceed €4.4 million;

- Turnover does not exceed €8.8 million;
- Number of employees does not exceed 50.

Most registered charities in Ireland would meet two or more of the conditions specified above and therefore would, where they are companies, be entitled to avail of the relevant exemption.

An exemption from having to have an annual audit or examination of accounts undermines the level of assurance stakeholders can draw from charity accounts, as there is no independent opinion on the truth and fairness of the figures provided in the accounts. It is relevant that section 50(2) of the Act of 2009 provides that the Minister shall not prescribe an amount greater than €500,000 as the threshold of the gross income or total expenditure of a charitable organisation (which is not a company) above which a charity's accounts would need to be audited (under the Act of 2009).

Therefore, the proposed amendment would, in effect, apply section 50 of the Act to those charities constituted as companies.

This amendment is necessary to ensure that all charities' financial statements (over a specified threshold) are subject to statutory audit, both in terms of effective regulation of the charities sector and to provide assurance to all stakeholders.

The amendment provided for in draft Head 15(b) is a Brexit-related amendment the rationale for which is set out in the Explanatory Notes to draft Head 7.

NOTE: A version of draft Head 15 (a) was previously approved by Government and appears in Part 15 of the General Scheme in the Courts and Civil Law (Miscellaneous Provisions) Bill 2017. The format of the proposed amendment has been amended slightly to make it absolutely clear that charitable organisations that are companies fall within the remit of section 50.

HEAD 16: Amendment of section 52 of Act of 2009

Provide that –

Section 52 of the Charities Act 2009 is amended –

- (a) in subsection (1), by the substitution of “annual return” for “annual report”,
- (b) in subsection (3)(b), by the substitution of “annual return” for “annual report” in both places where it appears;
- (c) in subsection (4), by the substitution of “annual return” for “annual report”,
- (d) in subsection (5) –
 - (i) by the substitution of the following for paragraph (a):

“(a) A copy of the financial statements prepared by a charitable organisation in accordance with the Companies Act 2014 shall, in respect of the financial year concerned, be attached to an annual return submitted by that charitable organisation in accordance with this section.”, and
 - (ii) by the deletion of paragraph (b),and
- (e) in subsection (6) –
 - (i) by the substitution of “annual return” for “annual report”, and
 - (ii) by the substitution of “document referred to in subsection (4)” for “document”.

Explanatory Note:

Section 52 of the Act of 2009 requires charity trustees of a charitable organisation to submit an “annual report” to the Charities Regulator regarding the charitable organisation’s activities in the previous financial year. An annual report submitted under section 52, which

is currently limited in nature, is different to the more comprehensive annual report that an organisation might prepare for its members or shareholders for example.

Further, Charities SORP, which is referred to in the explanatory note to draft Head 14 (proposed amendment of section 48 of the Act of 2009) includes charity-specific requirements one of which relates to the preparation of a trustees' annual report. The objective of a trustees' annual report is to provide information about a charity's financial performance and the charity's financial position. Charity SORP prescribes the content for the trustees' annual report and includes items such as objectives and activities; financial review; achievements and performance; etc. The Charities Regulator is concerned that, once accounting and reporting regulations are made under section 48, that there may be some confusion with regard to the trustees' annual report as required under the Charities SORP and the "annual report" as required under section 52 of the Act of 2009. To address this issue and limit the potential for confusion on this matter in future, it is proposed that the term "annual return" be used to describe the information required to be submitted to the Charities Regulator under section 52 rather than the term "annual report".

Section 52 provides for a number of matters relating to the submission of such annual reports to the Charities Regulator.

Subsection (5) of section 52 provides as follows:

- “(5) (a) A copy of the accounts prepared by a charitable organisation in accordance with the Companies Acts shall, in respect of the financial year concerned, be attached to an annual report submitted by that charitable organisation in accordance with this section.*
- (b) This subsection applies to a charitable organisation that—*
- (i) is a company, and*
 - (ii) is not required to annex its accounts to the annual return made by it to the registrar of companies under the Companies Acts.”*

Under sections 996 and 1220 of the Companies Act 2014, certain charitable organisations that are companies, may be exempt (by an order made by the Registrar of Companies) from the obligation to file their financial statements/accounts with the Registrar of Companies.

The effect of section 52(5)(b) of the Act of 2009 is that where a charitable organisation is a company that is required to annex its accounts to the annual return made by it to the Registrar of Companies under the Companies Acts (i.e. it is not exempt), the charitable

organisation does not need to annex its accounts to any annual report it submits to the Charities Regulator pursuant to section 52.

As a result, where a company is not covered by section 52(5)(b), the Charities Regulator will be required to seek copies of the accounts of the company from the Registrar of Companies. This is an unnecessary administrative burden for both the Charities Regulator and the Registrar of Companies. The effect of deleting paragraph (b) of subsection (5) as proposed in subhead (a)(ii) of draft Head 16, would be that all charitable organisations who are required to prepare financial statements in accordance with the Companies Act 2014 would be required to attach copies of those financial statements to any annual return submitted to the Charities Regulator under section 52 of the Act of 2009. This obligation would apply regardless of whether or not the organisations concerned are required to annex those financial statements to any annual returns made to the Registrar of Companies.

The proposed substitution of “financial statements” for “accounts” in subsection (5)(a) of section 52, which is provided for in subhead (a)(i), is intended to align the text of the provision with the terminology used in the Companies Act 2014.

Subsection (4) of section 52 lists 3 types of documents that should, where applicable, be attached to an annual report submitted to the Charities Regulator.

Subsection (6) refers to “*any document attached thereto*” but does not specifically cross-refer to the documents specified in subsection (4). While it is arguably clear from reading section 52 as a whole that the reference to documents attached to an annual report in subsection (6) is intended to refer to any documents required to be attached further to subsection (4) of that section, the amendment to section 52(6) is intended to clarify this. The proposed amendment set out in subhead (b) of draft Head 16 would also further clarify the meaning of section 54(1), which cross-refers to section 52(6) of the Act.

NOTE: The content of draft Head 16 (other than the proposed amendment of section 52(5)(a) and (6)) was previously approved by the Government and appears in Part 15 of the General Scheme in the Courts and Civil Law (Miscellaneous Provisions) Bill 2017.

HEAD 17: Amendment of section 53 of Act of 2009

Provide that –

Section 53 of the Charities Act 2009 is amended –

- (a) in subsection (1), by the insertion of “or the charity trustees of the charitable organisation” after “a charitable organisation”,
- (b) by the substitution of the following for subsection (2):

“(2) Information which is the subject of a direction under subsection (1), shall be provided in such manner and at such time and place as may be specified in the direction.”,
- and
- (c) by the insertion of the following subsection after subsection (2):

“(3) A charity trustee who contravenes this section shall be guilty of an offence.”.

Explanatory Note:

Section 53 of the Act of 2009 is an important compliance and enforcement tool for the Charities Regulator as it provides that the Charities Regulator can issue written directions to a charitable organisation to provide it with any information that the Charities Regulator may reasonably require to enable it to perform its functions.

In order to align the section more closely with other provisions of the Act, subhead (a) of draft Head 17 proposes to insert a reference to “charity trustees of the charitable organisation”.

In addition, it is proposed in subhead (b) of draft Head 17 to specifically provide that information shall be provided by charity trustees in such manner and at such times and places as may be directed by the Charities Regulator. This amendment is intended to clarify that where the Charities Regulator wishes to attend at the premises of a charity to examine certain information as part of its general monitoring and compliance programme that it can arrange to do so. Ensuring and monitoring compliance by charities with the 2009 Act is a key function of the Charities Regulator under section 14(1)(g) of the Act.

Unlike other provisions of the Act, failure to comply with a direction under section 53 is not currently an offence. Indeed, the only sanction available to the Charities Regulator in such circumstances is to remove the charitable organisation concerned from the register further to section 43 or 44, as the case may be.

Depending on the particular circumstances, the removal from the register of information relating to a charitable organisation may not be a proportionate response to a breach of a direction under section 53. For this reason, it is felt that section 53 should be amended to make specific provision for the Charities Regulator to take appropriate compliance action against a charitable organisation that fails to comply with a direction under section 53. By providing in subhead (c) of draft Head 17 that a failure to comply with a direction under this section is an offence and amending section 73 to cross-refer to section 53, the intermediate sanctions available to the Charities Regulator under section 73 as an alternative to prosecution would be extended to breaches of section 53.

HEAD 18: Amendment of section 54 of Act of 2009

Provide that –

Section 54 of the Charities Act 2009 is amended in subsection (1) –

- (a) by the insertion of “through publication on the internet or through any other means it deems appropriate,” after “public”, and
- (b) by the substitution of “annual returns” for “annual reports”.

Explanatory Note:

The proposed amendment to section 54 set out in draft Head 18 is intended to align this section with wording used in other sections, including section 39 of the Charities Act 2009, which requires publication of the Register of charities on the internet. As the Charities Regulator envisages publishing accounts submitted to it by charitable organisations under section 48 of the 2009 Act on the Register of charities, section 54 should be amended to make it clear that the requirement for the Charities Regulator to make annual reports and attached documents e.g. financial statements of charities, available for public inspection can be met by publication on the Register.

Requirements relating to data protection have been considered. As the information that would be published on the Register/website of the Charities Regulator under this section would be the annual returns and attached financial statements of registered charitable organisations (other than “private charitable trusts”), it appears unlikely that any material data protection issues would arise particularly since the CRO already makes such materials publicly available in respect of companies. However, prior to implementing this provision, the Charities Regulator is aware that a privacy impact assessment would be required, which would consider the effect of the amendment of section 54 in terms of determining whether the change would be likely to have an impact on privacy rights and, if so, how such potential impacts could be mitigated or managed.

HEAD 19: Charity trustees

Note: The following section(s)* contained will not apply to ‘Education Bodies’ as amended under draft Head 3 [*those highlighted in red]

Provide that –

The Charities Act 2009 is amended by the insertion of the following section after section 54:

“Charity trustees

54A. (1) Notwithstanding any provision of the Companies Act 2014, a charitable organisation shall have at least three charity trustees –

- (a) all of whom are natural persons,
- (b) the majority of whom shall be resident in an EEA state or the United Kingdom, and
- (c) the majority of whom shall have no personal connection to each other.

(2) A charitable trust whose sole trustee is a body corporate shall be deemed to comply with subsection (1) provided that the body corporate incorporated in an EEA or the United Kingdom has a minimum of three directors –

- (a) all of whom are natural persons,
- (b) the majority of whom shall be resident in an EEA state or the United Kingdom,
- (c) the majority of whom shall have no personal connection to each other,

and for the purposes of this Act, the directors of the body corporate shall be treated as the charity trustees of the charitable trust.

(3) Where the number of charity trustees of a charitable organisation falls below three, the remaining charity trustees (referred to in this subsection as the “continuing charity trustees”) may act notwithstanding any vacancy in their number but, if and so long as their number is reduced below three, the continuing charity trustees or continuing charity trustee, as the case may be, may act for the purpose of increasing the number of charity trustees to three or more (including, in the case of a charitable organisation that is a body corporate, by summoning a general meeting of the body corporate) but for no other purpose.

(4) Any breach of a requirement of subsection (3) shall not of itself affect—

- (a) the validity of any contract or other transaction, or
- (b) the enforceability, other than by the charity trustee or charity trustees who have acted in breach of a requirement of subsection (3), of any contract or other transaction by any person,

provided that nothing in this subsection affects the principles of liability of a third party where he or she has been an accessory to a breach of duty or has knowingly received a benefit therefrom.

(5) The charity trustees of a charitable organisation in respect of which there is a contravention of this section shall each be guilty of an offence.”.

Explanatory Note:

There is no minimum number of charity trustees provided for under the Charities Act 2009. For the purposes of granting a charitable tax exemption, Revenue specify that there should be a minimum of 3 trustees, officers or directors (who are not related) and that the majority must be resident within the State.

In the Law Reform Commission’s 2006 ‘Report on Charitable Trusts and Legal Structures for Charities’, the Law Reform Commission (“LRC”) noted that given that trustees were responsible for managing funds in which the public have an interest, stringent controls should be put in place. At paragraph 1.37 of the Report, the LRC considered that increased numbers of trustees would enhance internal accountability and safeguard the assets and funds of the charity against possible fraud and recommended that a minimum of 3 trustees be required to act for a charitable trust, or 3 officers in the case of an unincorporated association. The LRC also noted Revenue’s requirement of 3 charity trustees and noted that *“it would seem advisable to include a similar requirement within the proposed charity legislation. Otherwise anomalies may arise where charities with less than 3 charity trustees may be in a position to register as a charity with the Charities Regulator and yet be unable to avail of charitable tax exemption.”* (paragraph 1.38 of the Report)

As part of the registration process under section 39 of the Act of 2009, the Charities Regulator advises applicants of Revenue’s requirement for a minimum of 3 trustees as most charities once registered, will subsequently apply to Revenue for charitable tax status.

As noted, for charitable tax status purposes, Revenue also require that the majority of charity trustees should be resident in the State. Section 137 of the Companies Act 2014 provides that at least one director of a company must be an EEA resident. There is no

residency requirement for charity trustees under the Charities Act 2009. It is proposed that at a minimum the majority of charity trustees of a charitable organisation should be resident in the EEA or the United Kingdom.

The insertion of section 54A provided for in Head 19 is therefore intended to provide for a minimum of 3 charity trustees all of whom shall be natural persons and the majority of whom shall have no personal connection to each other and shall be resident in the EEA or the United Kingdom. The section is also intended to provide for –

- (a) existing charitable trusts which may have a single corporate body as its trustee (in line with a similar recommendation made by the LRC in its 2006 Report), and
- (b) situations where the number of charity trustees of a registered charitable organisation for whatever reason falls below the required minimum.

NOTE: This section should not be commenced until such time as existing charitable organisations have been given an opportunity to implement the requirements specified in this section. As this will represent a change for some existing registered charitable organisations, it is important that such organisations are given sufficient time to make the necessary arrangements to comply with the section in preparation for its commencement.

NOTE 2: This draft Head 19 will also need to be aligned with draft Head 7, concerning references to the United Kingdom.

HEAD 20: General duties of charity trustees

Provide that –

The Charities Act 2009 is amended by the insertion of the following section after section 54A (inserted by this Act):

“General duties of charity trustees

54B.(1) Without prejudice to any other duty imposed by or under an enactment or by law on a charity trustee in relation to the exercise by him or her of functions in that capacity, the duties of a charity trustee of a charitable organisation shall include –

- (a) to act in good faith in what the charity trustee considers to be the best interests of the charitable organisation,
 - (b) to avoid conflicts of interest and to act honestly and responsibly to advance the charitable purpose(s) of the charitable organisation, and
 - (c) to exercise the care, skill and diligence which would be exercised in the same circumstances by a reasonable person having both –
 - (i) the knowledge and experience that may reasonably be expected of a person in the same position as the charity trustee, and
 - (ii) the knowledge and experience that the charity trustee has.
- (2) The Charities Regulator may draw up codes and guidance in relation to the general duties of charity trustees and a charity trustee shall have regard to and be guided by such codes or guidance in the performance of his or her role as a charity trustee.
- (3) The charity trustees of a charitable organisation shall take such steps as are reasonably practicable for the purposes of ensuring that—
- (a) any breach of a duty referred to in subsection (1) is remedied forthwith, and
 - (b) any charity trustee who has been in serious or persistent breach of a duty referred to in subsection (1) is duly removed as a charity trustee of the charitable organisation.
- (4) Any breach of a duty referred to in subsection (1) or the failure by the charity trustees of a charitable organisation to take such steps as are referred to in subsection (3) shall, for the purposes of section 74, be treated as misconduct or

mismanagement on the part of the charity trustee or the charity trustees, as the case may be.

(5) Any breach of duty referred to in subsection (1) shall not of itself affect—

- (a) the validity of any contract or other transaction, or
- (b) the enforceability, other than by the charity trustee in breach of that duty, of any contract or other transaction by any person,

provided that nothing in this subsection affects the principles of liability of a third party where he or she has been an accessory to a breach of duty or has knowingly received a benefit therefrom.

(6) Insofar as the duties referred to in subsection (1) are based on common law rules and equitable principles, regard shall be had to those rules and principles when interpreting the duties referred to in that subsection and applying the relevant provisions of this section.”

Explanatory Note:

The Charities Act 2009 is neutral as to the form that a charitable organisation can take. For that reason, the definition of “charity trustee” includes directors and other officers of companies, trustees of a charitable trust, members of Boards of Management of educational bodies, and those who hold similar positions in unincorporated charitable organisations.

A charity trustee may therefore have specific fiduciary duties under common law or statutory duties under section 228 of the Companies Act 2014 or both, depending on the particular form that his or her charitable organisation takes.

The general functions of the Charities Regulator are set out in section 14 of the Charities Act 2009. Section 14 includes the function to promote compliance by charity trustees with their *duties* in the control and management of charitable trusts and charitable organisations (section 14(1)(b)). Despite the reference to *duties*, none are set out in the Act or elsewhere in statute, save for charity trustees who are directors of charities that are companies and are guided by the duties set out in section 228 of the Companies Act 2014. Equally, the ability of the Charities Regulator to promote compliance is severely hampered by the lack of codified duties for charity trustees. The fiduciary duties which charity trustees are obliged to comply with are derived from case law, much of which is historical. It follows that the duties are enunciated on a case by case basis and are not set out in codified form. This makes it difficult for charity trustees to understand their legal obligations.

Another function of the Charities Regulator is to ensure the accountability of charitable organisations to donors and beneficiaries of charitable gifts and the public (section 14(1)(d)). For accountability you need to have a legal standard which all charitable organisations must meet regardless of legal form. The common standard applicable to all charitable organisations are the trustee duties. In order to hold persons and organisations accountable they must be aware of the applicable standard and the new section will assist with this. A related issue is the lack of consistency and fairness as between charity trustees depending on whether the charitable organisation is a company or not. While all charity trustees are subject to the duties outlined in the new section under common law, those trustees who are also company directors of a charity that is a company are subject to statutory duties under section 228 of the Companies Act 2014.

A number of the functions set out in section 14 relate to issues associated with the proper management and administration of charitable organisations. While the 2009 Act includes a number of duties on the part of charity trustees with regard to specific regulatory obligations e.g. keeping proper books of accounts, requirement to submit annual reports to the Charities Regulator etc., the issue of misconduct or mismanagement on the part of charity trustees is mentioned only in the context of section 74 of the 2009 Act.

Section 74 sets out the basis on which the Charities Regulator can apply to the High Court for certain protective orders in respect of a charitable organisation. One of the grounds on which the High Court may make an order under section 74 in respect of a charitable organisation is where it is satisfied that *“there has been any other misconduct or mismanagement on the part of any charity trustee or member of staff in relation to the affairs of the charitable organisation.”* (section 74(1)(e)). The new section 54B on charity trustee duties and specifically the provision provided for in subsection (4) of that section, is intended to clarify the meaning of the phrase “misconduct or mismanagement” in section 74 as it applies to charity trustees by specifically linking it to a breach of duty by a charity trustee or trustees or a failure to take steps to remedy a breach as set out in section 54B(1) and (3).

In order to carry out its functions under section 14 of the 2009 Act, it is important that the Charities Regulator can point to specific statutory obligations on the part of charity trustees.

Draft Head 20 is intended to reflect what are generally understood to be the fiduciary duties of trustees and the duties of directors under the Companies Act 2014. By incorporating a specific provision into the Charities Act 2009 on general duties of charity trustees, it is intended that common duties will apply to all charity trustees under the Act regardless of the legal form that their charitable organisation takes. Breach of those duties by a charity trustee can then form the basis for specific compliance and enforcement action by the Charities Regulator. This would further support the policy objective of protecting charitable organisations, which is reflected in existing provisions of the Charities Act 2009.

NOTE: The text of draft Head 20 is based on similar provisions, which can be found in sections 227 and 228 of the Companies Act 2014 and section 66 of the Scottish Charities Act 2005.

HEAD 21: Record of members of charitable organisation

Note: The following section(s)* contained will not apply to ‘Education Bodies’ as amended under draft Head 3 [*those highlighted in red]

Provide that –

The Charities Act 2009 is amended by the insertion of the following section after section 54B (inserted by this Act):

“Record of members of charitable organisation

54C. – (1) A charitable organisation, other than a company, shall keep a record of the members of the charitable organisation which shall include the following information:

- (a) the name and address of each member;
- (b) the date on which the details of any person who is a member were entered in the register;
- (c) the date on which the person ceased to be a member of the charitable organisation;
- (d) an indication of whether the member has any voting rights in relation to the appointment of charity trustees of the charitable organisation.

(2) The charity trustees of a charitable organisation in respect of which there is a contravention of this section shall each be guilty of an offence.”.

Explanatory Note:

Under section 116 of the Companies Act 2014, companies are required to keep a register of their members. A similar requirement does not currently apply to charities that are not companies despite the fact that they may be membership organisations.

Issues can arise in practice where there is a dispute over whether or not particular charity trustees were validly appointed. In some cases, the issue will stem from a lack of clarity as to who was entitled to vote at a given time. It is important, particularly where members of an organisation have a right to vote in relation to the appointment of a charity’s trustees, that an accurate and up-to-date record of members is retained by the charity. Issues that can arise where the validity of a person’s appointment as trustee of a charity is challenged

include whether the Board of the charity was properly constituted, whether it had the power to make the decisions it did etc. From a governance perspective it is also important that charity trustees have an accurate record of the charity's members so that they can engage with them where required.

The purpose of the proposed amendment is to ensure that a charity, which opts for an unincorporated membership structure, keeps basic records in relation to its members.

HEAD 22: Amendment of section 55 of Act of 2009

Provide that –

Section 55 of the Charities Act 2009 is amended –

- (a) in subsection (1) –
 - (i) by the substitution of the following for paragraph (b):

“(b) is, as a debtor, subject to an insolvency arrangement which is registered in the Register of Insolvency Arrangements and is in effect,”
 - (ii) by the insertion of the following paragraphs after paragraph (e):

“(e a) is convicted of a summary offence under –

 - (i) section 39, 40, 41, 46, 47, 57, 63, 65 or 68, or
 - (ii) the Act of 2001,,

(e b) is the subject of or is deemed to be the subject of an order under section 819, 840, 841, 842 or 848 of the Companies Act 2014 or is the subject of a disqualification undertaking or a restriction undertaking under section 850 or 852 of that Act, and
 - (iii) by the substitution of the following for paragraph (g):

“(g) has been removed from the position of charity trustee of a charitable organisation by court order under section 74.”;
- (b) by the insertion of the following subsection after subsection (1):

“(1A) A person who, by virtue of paragraphs (a) to (f) of subsection (1), is not qualified or ceases to be qualified to be a charity trustee of a charitable organisation, shall forthwith notify the Authority in writing of that fact.”
- (c) by the insertion of the following subsection after subsection (2):

“(2A) An application referred to in subsection (2) shall be made on notice to the Authority.”
- (d) by the insertion of the following subsection after subsection (3):

“(3A) Where the High Court makes an order under subsection (3), the registrar of the court shall –

- (a) forward a copy of the order to the Authority as soon as may be, and
- (b) comply with any request by the Authority for further details or information relating to the person and the order.”,

and

- (e) by the substitution of the following subsection for subsection (4):

“(4) The Authority shall establish and maintain a register of all persons who have ceased to hold the position of charity trustee of a charitable organisation by virtue of paragraphs (ea)(i) and (g) of subsection (1).”.

Explanatory Note:

The amendment to subsection (1)(b) which is proposed in subhead (a) of draft Head 22, is intended to update the current reference in section 55(1)(b) to a person making a *“composition or arrangement with creditors”*. The current wording of paragraph (b) is considered to be too wide and therefore it is proposed to substitute that paragraph with a reference to insolvency arrangements under the Personal Insolvency Act 2012, which come into effect when entered in the Register of Debt Relief Notices, the Register of Debt Settlement Arrangements or the Register of Personal Insolvency Arrangements, as the case may be (collectively referred to in the proposed amendments as the “Register of Insolvency Arrangements”).

The amendment to insert paragraph (e a) in subsection (1), is proposed in order to ensure that persons who take on the role of charity trustee of a charity understand their legal obligations and those of the charity under charity law including the Charities Act 2009.

In particular, it is essential that charity trustees retain sufficient control of the charity such that they understand the charity’s financial position at all times and that they are willing and able to engage in a fully transparent manner with the Charities Regulator when any issues or queries arise.

As of April 2022, there have been two prosecutions for offences under the Charities Act 2009, one of which was taken by the Charities Regulator. The Charities Regulator’s preference to date has been to work with charity trustees to bring them and their charities into compliance wherever possible. However, in some cases, where charity trustees of a charity are unable for whatever reason to meet key obligations under the Charities Act such as the requirement to keep proper books of account or the requirement to furnish specified

information to the Charities Regulator when formally directed to do so, serious questions arise as to the appropriateness of such persons continuing to be charity trustees of the charity concerned or indeed any charity. The consequences of a charity's trustees being unable to adequately account for a charity's finances or refusing or otherwise failing to provide requested information to the Charities Regulator when directed, has the potential to seriously impact the charity and the wider charity sector as lack of compliance by charities can undermine public trust and confidence in the charity and the charities sector more generally.

At present, section 55 of the Charities Act 2009 specifies circumstances in which a person is disqualified from being a charity trustee. Paragraph (d) refers to a person who is convicted on indictment, which covers all offences and thus is not limited to offences under the Charities Act 2009. While recognising that the charities sector faces significant challenges in attracting persons to volunteer as charity trustees it is nevertheless important that those who do volunteer are capable and fully engaged with their responsibilities under the Charities Acts.

With this in mind, it is proposed that section 55 should be amended so that a *summary* conviction in respect of the following would also serve to preclude a person from taking on the role of a charity trustee:

- **Sections 39 and 40** (NOTE: These sections relate to charitable status) – offences arising from a failure to register as a charitable organisation, breach of conditions associated with registration as a charity, failure to notify certain changes to or certain provide particulars or other information the Charities Regulator, changing a main object without the consent of the Charities Regulator, knowingly or recklessly providing information or a particular to the Authority in respect of a charity that is false or misleading in a material respect or where the person believes such information or particular not to be true;
- **Section 41 and 46** - These sections concern offences relating to unregistered charities carrying out activities in the State and persons holding a person or body out as being a registered charity when it is not.
- **Section 47** – Offence of failing to keep proper books of account.
- **Section 53** – If this section is amended as proposed in the General Scheme, offences arising from a failure to provide information to the Charities Regulator when directed to do so will be an offence.
- **Section 57** – Offence of acting under the direction of a person who is not qualified to be a charity trustee in circumstances where the person knew or had reasonable grounds to know that the person was not qualified to hold the position of charity trustee.
- **Section 63** – Offence arising from the making of certain false statements to the Charities Regulator knowing the statements to be false e.g. falsely claiming that an

offence under the Charities Act 2009 or the Criminal Justice (Theft and Fraud) Act 2001 has been committed.

- **Section 65** – Offence of failing to comply with a requirement in the context of an investigation by an inspector appointed under section 64 of the 2009 Act to investigate the affairs of a charity.
- **Section 68** – Offence of failing to produce documents and other records to the Charities Regulator when directed to do so.

It is worth noting that failure to comply with the above provisions would require a prosecution before such could be grounds for disqualifying a person as a charity trustee i.e. therefore a person would have to be prosecuted and convicted of the summary offence concerned in the first instance.

It is also proposed that a summary conviction under the Criminal Justice (Theft and Fraud) Act 2001 should be grounds for disqualifying a person from being a charity trustee. Given that charities can only thrive where beneficiaries, volunteers, employees, donors, funders and the wider public have trust and confidence in them and given the special position of charities, arguably higher standards should apply and persons who have any convictions with regard to theft and fraud, regardless of whether they are summary in nature, should be precluded from being charity trustees of a charity.

The amendment to insert paragraph (eb) in subsection (1), is proposed so that directors of companies who are restricted or disqualified from acting as directors of a company under the Companies Act 2014 would also be disqualified from acting as trustees of a charity. The provision therefore proposes to amend the list provided for in section 55(1) by adding the following provisions of the 2014 Act:

- (i) section 819 (Declaration by court restricting director of insolvent company in being appointed or acting as director etc.)
- (ii) section 840 (Default under section 149(8) concerning fact of director's becoming disqualified under law of another state)
- (iii) section 841 (Default under section 23 or 150(2) by director disqualified under law of another state)
- (iv) section 842 (Court may make disqualification order)
- (v) Section 848 (Disqualification of restricted person following subsequent winding up)
- (vi) section 850 (Disqualification undertaking – initiation of procedure that provides person opportunity to submit to disqualification)
- (vii) section 852 (Restriction undertaking – initiation of procedure that provides person

opportunity to submit to restriction)

The rationale for seeking to include the above orders and undertakings under the Companies Act 2014 is that if a director is not fit to act as a director of a company (which would cover a charitable organisation that is a company), he or she should likewise be precluded from taking on the role of a charity trustee in any other type of charitable organisation.

The amendment proposed to paragraph (g) of section 55(1) derives from the proposed amendment of section 74 of the 2009 Act which is dealt with under Head 27. Head 27 proposes that the jurisdiction to make orders under section 74 be transferred to the Circuit Court. If this amendment is made, there would need to be a consequential amendment to section 55(1)(g) to refer to “court order”. This would ensure that paragraph (g) would cover any order that may have been made by the High Court before the amendment takes effect and any orders made by the Circuit Court after it takes effect.

The amendment to insert a new subsection (1A), which is proposed in subhead (b) of draft Head 22, is required in order to enable the Charities Regulator to ensure that charity trustees are eligible to hold the position of charity trustee in a given charitable organisation. The amendment would make it mandatory for a charity trustee who becomes ineligible to be a charity trustee under section 55(1)(a) to (f) to immediately notify the Charities Regulator in writing of that fact. **(Note:** As the Charities Regulator will have been the applicant under section 74 of the Charities Act 2009, there is no need for a person to notify the Charities Regulator where he or she becomes ineligible to be a charity trustee further to paragraph (g) of section 55(1).) This amendment is also required given that section 56 renders it an offence to act as a charity trustee while disqualified. The fact that a person had applied for and been granted an order under section 55(2) would be relevant to whether or not an offence had been committed under section 56 of the 2009 Act.

The amendment proposed in subhead (c) of draft Head 22 is required in order to ensure that the Charities Regulator is notified of any application made by a person under section 55(2).

The amendment proposed in subhead (d) of draft Head 22 is required to ensure that the Charities Regulator is aware of any orders made further to an application under section 55(2). At present, the Charities Regulator is required under section 55(4) to establish and maintain a register of all persons who have ceased to hold the position of charity trustee of a charitable organisation under section 55(1). The amendments set out in subheads (b) and (d) are required in order to enable the Charities Regulator to maintain such a register and to ensure that it is kept up-to-date.

Subsection (4) of section 55 currently provides as follows:

“55(4)_ The Authority shall establish and maintain a register of all persons who have ceased to hold the position of charity trustee of a charitable organisation by virtue of subsection (1).”

A number of other public bodies retain registers of persons referred to in subsection (1) of section 55. By way of example, the Companies Registration Office maintains a register of persons disqualified and restricted from acting as directors of companies under the Companies Act 2014. Requiring the Charities Regulator to retain a register of all disqualified persons would entail duplication of a number of existing registers and public information sources. It is therefore proposed to restrict the register provided for in section 55(4) to those persons who are disqualified as a result of being convicted of offences under the Charities Act 2009 where the Charities Regulator is the prosecuting authority or further to an order made under section 74 of the Act of 2009 where the Charities Regulator is the moving party. In this way the register would be confined to cases where the disqualification arises from actions the Charities Regulator has taken which are the only cases in which the Charities Regulator could be confident of having full information for the register.

HEAD 23: Requirement to disclose information relating to a significant event

Provide that –

The Charities Act 2009 is amended by the insertion of the following section after section 59:

“Requirement to disclose information relating to a significant event

59A.(1) Where in the course of, and by virtue of the carrying out of, his or her duties in relation to a charitable organisation, information comes into the possession of a charity trustee of the charitable organisation that causes him or her to form the opinion that there are reasonable grounds for believing that a significant event has occurred or is likely to occur in respect of that charitable organisation, the charity trustee shall, as soon as it is practicable to do so, disclose that information to the Authority.

(2) In this section, ‘significant event’ means –

- (a) a substantial loss to the property of the charitable organisation,
- (b) an event that places the beneficiaries of the charitable organisation, its property or its reputation at significant risk, or
- (c) any other matter that may be prescribed by the Minister.

(3) The failure by the charity trustees of a charitable organisation to disclose information relating to a significant event to the Authority under this section shall, for the purposes of section 74, be treated as misconduct or mismanagement on the part of a charity trustee or the charity trustees of the charitable organisation, as the case may be.

(4) This section does not apply to matters referred to in section 59 in respect of which a charity trustee of a charitable organisation has an obligation to notify and provide a report in writing to the Authority.”.

Explanatory Note:

In order for the Charities Regulator to be able to carry out its role as protector of charities under Part 4 of the Charities Act 2009, it is important that it be made aware of any significant events that have caused or could pose a significant risk to a charitable organisation, its beneficiaries or its property and that information relating to such matters is disclosed to it. The disclosure of such information to the Charities Regulator is also important in terms of enabling the Charities Regulator to fulfil its general functions under section 14(1), paragraph (a) of which requires the Charities Regulator to increase public trust and confidence in the management and administration of charitable trusts and charitable organisations.

The purpose of draft Head 23 is to make it obligatory for charity trustees to disclose information to the Charities Regulator relating to significant issues, which could ultimately damage or threaten the viability of the charitable organisation. A recent example, which highlighted the importance of such disclosure, can be seen in the safeguarding concerns, which arose in the UK in relation to certain charities operating overseas and their dealings with vulnerable persons. Such scandals, particularly when regulators have no advance knowledge of the circumstances that gave rise to a particular issue, can significantly damage public trust and confidence not only in the particular charity but also in the wider charities sector.

Functions of the Charities Regulator under section 14(1)(a) of the 2009 Act, include the requirement to *“increase public trust and confidence in the management and administration of charitable trusts and charitable organisations,”* (paragraph (a)), and to *“ensure the accountability of charitable organisations to donors and beneficiaries of charitable gifts, and the public,”* (paragraph (d)). Requiring charity trustees to disclose information on “significant events” to the Charities Regulator will assist the Charities Regulator to carry out its statutory functions under the 2009 Act.

Subsection (4) of the new section 59A is intended to make it clear that information and notifications under section 59 of the 2009 Act relating to suspected theft and fraud offences do not fall within the ambit of the new section 59A.

HEAD 24: Directions arising from report

Provide that –

The Charities Act 2009 is amended by the insertion of the following section after section 66:

“Directions arising from report

- 66A.(1) Where the Authority receives a report of an inspector under section 66, the Authority may direct the charitable organisation which is the subject of the report to do any of the following:
- (a) implement specified measures to address any concerns referred to in the report in such manner and within such period as may be specified by the Authority;
 - (b) present to the Authority, within such period as the Authority may specify, a plan setting out a proposed course of action to address any concerns raised in the report, such plan to include timelines by which specified measures will be implemented by the charitable organisation.
- (2) The Authority may, on application to it in writing, extend a period referred to in a direction under subsection (1), where it is of the opinion that the extension is reasonable in all the circumstances.
- (3) The Authority may cause a plan referred to in subsection (1)(b) to be published in such manner as it considers appropriate which may include publication on its internet website.
- (4) A charitable organisation which fails to comply with a direction under subsection (1) shall be guilty of an offence.”

Explanatory Note:

The Charities Act 2009 provides the Charities Regulator with the power to publish reports furnished to it by inspectors under section 66. However, other than applications to the High Court for certain orders under section 74 of the Act, Part 4 does not refer to any other specific compliance action deriving from the content of such reports.

There are therefore limited options for the Charities Regulator to follow-up with a charitable organisation to ensure compliance other than by way of recommendations, criminal

prosecution or applying for a High Court order under section 74 of the 2009 Act or section 43 of the Charities Act 1961.

The new section proposed in draft Head 24 is intended to confer a statutory power on the Charities Regulator to direct that any concerns identified in a report under section 66 be addressed in a specified manner or by way of a specific plan of action devised by the charitable organisation concerned, or both.

NOTE: The amendments to section 43(4)(b) and 44(4)(b) provided for in earlier draft heads, are dependent on this amendment being provided for.

HEAD 25: Amendment of section 69 of Act of 2009

Provide that –

Section 69 of the Charities Act 2009 is amended –

- (a) by the deletion of subsection (2), and
- (b) by the substitution of the following for subsection (3):

“(3) Where it is contemplated that proceedings for an offence will be brought against any person and books, documents or other records of which possession is taken in accordance with a warrant under this section are required for the purposes of those proceedings, those books, documents or records may be retained until final judgment is entered in those proceedings.”.

Explanatory Note:

Section 69 of Act of 2009 (Entry and search of premises) includes the following provisions:

“(2) Subject to subsection (3), any books, documents or other records of which possession is taken in accordance with a warrant under this section may be retained for a period of 3 months.

(3) If, within the period specified in subsection (2), proceedings for an offence are brought against any person and books, documents or other records of which possession is taken in accordance with a warrant under this section are required for the purposes of those proceedings, those books, documents or records may be retained until final judgment is entered in those proceedings.”

The requirement to either return evidence seized under a warrant to a suspect within 3 months, or bring proceedings for an offence within 3 months is not feasible in practice. It would not be possible to seize records, analyse those records, carry out further investigations arising out of that review, interview further witnesses or suspects identified as a result of those further investigations, prepare a file for submission to the DPP and receive directions from the DPP to bring proceedings within 3 months.

The amendment to subsection 69 set out in this draft Head, therefore proposes the deletion of subsection (2) and the substitution of subsection (3) with a provision, which confirms that any books and records seized will, where proceedings are contemplated, be returned after judgment has been entered in the proceedings concerned.

HEAD 26: Amendment of section 73 of Act of 2009

Provide that –

Section 73 of the Charities Act 2009 is amended –

- (a) in subsection (1) –
 - (i) by the substitution of “39, 40, 47, 48, 50, 52, 54A, 54B, 54C or 89” for “47, 48, 50 or 52”, and
 - (ii) by the substitution of “section 51(2), 53(1) or 66A” for “section 51(2)”,and
- (b) in subsection (4), by the substitution of the following for “proceedings for the offence consisting of the contravention concerned shall be brought.”:

“the Authority may do any of the following:

 - (i) where the contravention concerned is an offence under this Act, bring proceedings in respect of the offence;
 - (ii) take any other action under this Act as it considers appropriate”.

Explanatory Note:

The amendment proposed in subhead (a)(i) of draft Head 26 provides that a breach of section 39 (e.g. failure to register or comply with conditions of registration or update details with the Charities Regulator), 40 (failure to provide information etc.), section 59A (Requirement to notify significant events) and section 89 (agreements regarding payments to charity trustees) can also form the basis for the imposition of intermediate sanctions.

(Note: This amendment is dependent on the inclusion of relevant new provisions in sections 39, 40, 54A, 54B, 54C and 89.)

The purpose of the proposed amendment of section 73 is to broaden its potential application due to the fact that the imposition of intermediate sanctions, where warranted, may in certain circumstances be a more effective and proportionate regulatory remedy than prosecution for an offence. One of the reasons for this is that intermediate sanctions can include the publication of particulars of the contravention by the Charities Regulator and, if

section 73 is amended as proposed, on the charitable organisation's website. Publication of the particulars of a contravention by a charitable organisation, may be a more effective way of ensuring compliance with regulatory obligations by the charitable organisation concerned and may also have a greater deterrent effect while at the same time providing a greater level of transparency for donors, funders, volunteers and the public.

The amendment proposed in subhead (a)(ii) of Head 26 provides that a failure to comply with a direction under section 53(1) (Direction to provide information) or section 66A (Directions arising from an inspector's report) could also form the basis for the imposition of intermediate sanctions. **(Note:** This amendment is dependent on amendment of section 53 and the inclusion of the new section 66A as set out in draft Heads 17 and 24).

The amendment proposed in subhead (b) of draft Head 26, is intended to make it clear that failure to comply with an intermediate sanction imposed under section 73 may lead to a prosecution *or* other regulatory action rather than rendering a prosecution mandatory in such cases, as would appear to be the position at present under the section.

Amendments in respect of sections 43 and 44 of the 2009 Act, which provide for references to section 73, are proposed so that if intermediate sanctions under section 73 are breached, such breaches may ultimately lead to the removal of a charitable organisation from the Register in appropriate cases. The amendments are intended to provide an additional regulatory option for the Charities Regulator where section 73 is breached.

The current wording of section 73(4) is mandatory in nature. For a number of reasons, prosecution may not be considered to be the optimal regulatory response even where intermediate sanctions are breached. The Charities Regulator should be permitted to exercise its discretion as to the most appropriate and proportionate regulatory action, where intermediate sanctions under section 73 are, for whatever reason, not effective. The proposed amendments to section 73 are therefore intended to facilitate a greater level of flexibility of approach and proportionality of regulatory action.

HEAD 27: Amendment of section 74 of Act of 2009

Provide that –

Section 74 of the Charities Act 2009 is amended –

(a) in subsection (1) –

- (i) by the substitution of “Where the Circuit Court” for “Where the High Court”, and
- (ii) by the substitution of “the Circuit Court may” for “the High Court may”, and
- (iii) by the insertion of the following paragraph after paragraph after (e):

(f) there is no effective management or Board oversight of the activities of the charitable organisation

(b) in subsection (2), by the substitution of “The Circuit Court may” for “The High Court may”,

(c) in subsection (4) –

- (i) in paragraph (e), by the substitution of “charitable organisation,” for “charitable organisation, and”,
- (ii) in paragraph (f), by the substitution of “charitable organisation, and” for “charitable organisation.”, and
- (iii) by the insertion of the following paragraph after paragraph (f):
 - “(g) an order directing that the charitable organisation be wound up in accordance with the charitable organisation’s constitution or in such other manner as may be specified in the order, or directing the Authority to present a petition to the High Court to wind up the charitable organisation under the Companies Act 2014.”,

(d) by the insertion of the following subsections:

- “(5) Any person who is appointed to act as a charity trustee of a charitable organisation under this section, shall not be liable in damages for anything done, anything purported to be done or anything omitted to be done –
- (a) by, or by any other person on behalf of, the charitable organisation prior to the date of the his or her appointment under this section, or
 - (b) by him or her in performing functions of a charity trustee of the charitable organisation concerned unless the act or omission is shown to have been in bad faith or due to any negligence or misconduct on his or her part.
- (6) The jurisdiction of the Circuit Court under this section in relation to a charity shall be exercisable by the judge of the Circuit Court—
- (a) for the circuit in which the charity has its principal place of business, or
 - (b) if the charity does not have a principal place of business in the State, for the Dublin Circuit.”.

Explanatory Note:

The Indecon Report regarding the social and economic impact of charities in Ireland published in 2018 found that over half of registered charities examined had income of less than €250,000 and of those, the majority had income of less than €50,000. The research also provided evidence that a significant number of those charities had no employees and existed because of the participation of volunteers.

The significant costs associated with High Court proceedings are such that in practical terms, the regulatory sanctions provided for under section 74 are a potential option in only a handful of cases, where the charities in respect of which there are compliance concerns have substantial assets and charitable funds to meet the costs of High Court proceedings. Similarly, a decision to apply to the High Court for an order under section 74 in respect of a small charity with limited charitable funds, regardless of the significance of the particular compliance issues encountered by the Charities Regulator, would be problematic from a regulatory and public interest perspective in that the staff time and monetary resources required for High Court proceedings are unlikely to be considered proportionate or an appropriate use of public funds in such cases.

While recognising that the definition of the term “order” provided for in subsection (4) of section 74 is non-exhaustive in nature, the proposed inclusion of a further paragraph is

intended to specifically provide for the possibility of a winding up order in appropriate cases. The addition of the option for the court to direct that the Charities Regulator apply to the High Court is designed to overcome any jurisdictional issue that the Circuit Court might have in making such an order.

The insertion of paragraph (1)(f) will more correctly address a situation where the management and/or Board of a charitable organisation is unable to manage and oversee the activities of the charitable organisation. The existing grounds, set out in subsections (1)(a) to (e) involve some wrong doing or shortcoming on the part of the charity and/or charity trustees and employees. The proposed new ground deals with circumstances where there is no wrongdoing per se but there has been a breakdown in key relationships within an organisation such that it cannot function.

The threshold for determining that there is no effective management or Board oversight of the activities of a charitable organisation will be a matter for the Court ultimately. Guidance on this can be gleaned from case law, relating to the power to wind up a company on ground that it is “just and equitable” to do so.

The Courts have intervened in the following circumstances which are analogous to the proposed additional ground: where there is no functioning executive; where there is evidence of an irretrievable breakdown in trust and confidence; in a functional or corporate deadlock; or where there was a breakdown in governance which was built on a history of close ties and mutual co-operation.

The amendments proposed in relation to section (1)(f) and (4)(g) of section 74 should be viewed in the overall context of the amendments which are proposed in the General Scheme in particular the proposed amendment of section 73, which provides for intermediate sanctions. The amendment proposed in relation to section 73 is intended to ensure that the principle of proportionality can be applied in relation the imposition of regulatory remedies at an early stage in appropriate cases thereby avoiding the necessity for criminal sanctions and applications for orders under section 74 where possible.

It is also proposed to amend this section by way of the addition of a further subsection to provide that any person who is appointed charity trustee of a charitable organisation further to an order made under this section, is indemnified from liability for damages in respect of matters which occurred prior to the date of his or her appointment and for his or her own acts or omissions provided they are not shown to have been made in bad faith, are not negligent and do not constitute misconduct. This is seen as a necessary protection for anyone appointed by the court to serve as a charity trustee of a charitable organisation further to an application by the Charities Regulator under section 74.

HEAD 28: Amendment of section 77 of Act of 2009

Provide that –

Section 77 of the Act of 2009 is amended in subsection (1), by the insertion of “, or such longer period as the Tribunal may determine under subsections (1) to (4) of section 45,” after “no later than 21 days”.

Explanatory Note:

Under section 45 of the 2009 Act, the Charity Appeals Tribunal has the right, “for good and sufficient reason”, to extend the specified period of 21 days for the appeal of certain decisions relating to the removal of an organisation from the Register or, in the Minister’s case, the appeal of decisions to register an entity under section 39 (see section 45(1) – (4)).

However, section 77(1) of the 2009 Act provides that *“An appeal to the Tribunal shall be brought not later than 21 days from the date of the decision that is being appealed.”*

The amendment set out in draft Head 28 is intended to align section 77 with section 45 insofar as the latter provision provides for the possibility of the 21-day period being extended in certain circumstances.

HEAD 29: Amendment of section 89 of Act of 2009

Provide that –

The Charities Act 2009 is amended by the substitution of the following for section 89–

“Permission to enter into certain agreements with charity trustees or connected persons, members etc.

89.— (1) Notwithstanding anything contained in the constitution of a charitable organisation, a charitable organisation shall not remunerate, pay, accrue or otherwise pay or provide for any sum to be paid to a charity trustee or on behalf of a charity trustee out of the property of the charitable organisation other than –

- (a) for reasonable expenses properly incurred in the administration and management of the charitable organisation,
- (b) in accordance with an agreement or appointment referred to in subsection (2), the entry into which has been approved by the Authority, or
- (c) in accordance with a court order.

(2) A charitable organisation that proposes –

- (a) to enter into an agreement (in this section referred to as an “agreement”) with a relevant person for the provision by the relevant person of a service to, or on behalf of, the charitable organisation in consideration of the payment to the relevant person out of the property of the charitable organisation, or
- (b) to appoint an employee of the charitable organisation as a charity trustee of the charitable organisation,

shall apply to the Authority for approval to enter into the agreement or to make the proposed appointment, as the case may be.”

(3) An application under subsection (2) shall –

- (a) be in writing,
- (b) where it relates to an agreement, include particulars –
 - (i) of the proposed payment to or remuneration of a relevant person, such payment not to exceed what is reasonable and proportionate having regard to the service proposed to be

provided by the relevant person pursuant to the draft agreement, and

- (ii) detailing how the payment or remuneration will advance the charitable organisation's charitable purpose,
- (c) where it relates to an appointment referred to in subsection (15), a copy of the person's contract of employment with the charitable organisation and the reasons for proposing to appoint the person concerned as a charity trustee of the charitable organisation,
- (d) attach a copy of the proposed agreement which is the subject of the application,
- (e) include a declaration that the charity trustees of the charitable organisation, other than any charity trustee who—
 - (i) will provide a service under the agreement,
 - (ii) provides a service under an agreement other than the agreement referred to in subparagraph (i),
 - (iii) is in receipt of remuneration out of the property of the charitable organisation other than in accordance with an agreement, or
 - (iv) has a personal connection with a person who—
 - (I) will provide a service under the agreement,
 - (II) provides a service under an agreement other than an agreement referred to in subparagraph (i) or clause (I),
 - (III) is in receipt of remuneration out of the property of the charitable organisation other than in accordance with an agreement, or
 - (IV) it is proposed to appoint as a charity trustee,

are satisfied that the proposed agreement or the proposed appointment would be in the best interests of the charitable organisation and is in accordance with the provisions of the constitution of the charitable organisation, and

- (e) contain such other information as the Authority may specify.
- (4) A charitable organisation shall not enter into an agreement or appoint an employee of the charitable organisation as a charity trustee of the charitable organisation under this section unless the Authority gives its approval to the

charitable organisation entering into the agreement or appointing the employee concerned as a charity trustee, as the case may be.

- (5) The Authority may, by reference to specified criteria, direct that in respect of particular types of agreements charitable organisations are exempt from such of the requirements of this section as it considers appropriate, where it considers that compliance by charitable organisations with those requirements would be unduly onerous.
- (6) Where the Authority receives an application for approval under this section it may –
 - (a) grant the approval,
 - (b) grant the approval subject to such conditions as it deems appropriate in the circumstances, or
 - (c) refuse the application for approval.
- (7) Where the Authority approves an agreement or appointment under subsection (5)(a) or (b) it shall notify the applicant in writing of its decision and any conditions, as the case may be.
- (8) Where the Authority refuses an application under this section, it shall notify the applicant in writing of its decision and the reasons for it.
- (9) A charitable organisation shall not enter into an agreement or appoint an employee as a charity trustee in contravention of the provisions of the constitution of the charitable organisation.
- (10) A charitable organisation shall keep a register of all agreements with relevant persons and enter in it the following information:
 - (a) the name and address of the relevant person;
 - (b) whether the person is a member of the charitable organisation, a charity trustee or a person with whom a charity trustee of the charitable organisation has a personal connection;
 - (c) the date of the agreement;
 - (d) the value of the agreement.
- (11) The Authority may give directions or issue guidelines in relation to agreements and appointments of charity trustees to which this section applies.
- (12) A charitable organisation shall, before submitting an application under this section, have regard to any directions or guidelines issued by the Authority under this section.
- (13) A person to whom a direction under this section applies shall comply with the direction.

- (14) Where, in relation to an agreement, there has been a contravention of this section, the agreement shall be null and void.
- (15) Subsection (14) shall not operate to prevent a charitable organisation from recovering damages in respect of any loss incurred by it by virtue of an agreement to which that subsection applies.
- (16) Where there is a contravention of this section by a charitable organisation, the charity trustees of the charitable organisation who are responsible for the contravention or who failed to take reasonable steps to prevent the contravention shall each be guilty of an offence.
- (17) A person who, in purported compliance with this section, knowingly or recklessly provides information or a particular to the Authority that is false or misleading in a material respect, or who believes any such information or particular when provided by him or her, in purported compliance with this section, not to be true, shall be guilty of an offence.
- (18) The Minister may prescribe the circumstances in which an application may be made by a charitable organisation to the Authority under this section for approval to appoint an employee of the charitable organisation as a charity trustee of the charitable organisation.
- (19) For the avoidance of doubt, this section shall not apply to any remuneration paid by a charitable organisation to a person, who is not a charity trustee or member of the charitable organisation, under a contract of employment.
- (20) In this section—

‘employee’ means a person who is in receipt of remuneration under a contract of employment with the charitable organisation;

‘relevant person’ means, in relation to a charitable organisation—

- (a) a charity trustee of the charitable organisation,
- (b) a person with whom a charity trustee of the charitable organisation has a personal connection; or
- (c) a member of a charitable organisation;

‘remuneration’ includes any benefit in kind;

‘services’ includes goods;

‘sum’ includes pension contribution, honorarium, perquisite and benefit in kind.”.

Explanatory Note:

Section 89 of the Charities Act 2009 has yet to be commenced. The section provides that a charitable organisation may enter into agreements with charity trustees or persons with whom a charity trustee has a “personal connection” (as defined in the Act) for the provision of “services” in certain circumstances.

It is understood that the original intention behind section 89 was to permit charitable organisations in certain cases to enter into agreements for goods or services with its charity trustees or persons connected to them. It is further understood, that section 89 was not intended to apply to agreements to remunerate or pay any other sums to charity trustees for carrying out trustee-related duties.

Section 89 sets out certain requirements for charitable organisations intending to enter into an agreement under the section. However, as enacted, the approval of the Charities Regulator would only be required in limited circumstances. Subsection (5) of section 89 currently provides that where a charitable organisation has only one charity trustee that it must get the approval of the Charities Regulator before entering into an agreement under section 89. The approval of the Charities Regulator is not required in any other case.

Where a charitable organisation proposes to engage the services of a charity trustee or any person with whom a charity trustee has a personal connection for non-trustee related services e.g. marketing advice, provision of goods, such arrangements should require the approval of the Charities Regulator. Such a requirement would ensure that there is proper oversight of such agreements and would align with the Charities Regulator’s functions under section 14, particularly subsection (1)(c), which requires the Charities Regulator to promote the effective use of the property of charitable trusts and charitable organisations. Therefore, the requirement for the Charities Regulator’s approval should apply regardless of the number of charity trustees that a charitable organisation has.

Subsection (10) of section 89 currently details a number of circumstances in which section 89 does not apply. Subsection (10) provides as follows:

“(10) This section shall not apply in relation to—

- (a) any remuneration paid to a person in his or her capacity as a charity trustee or under a contract of employment, or*
- (b) any remuneration to which a person is entitled in accordance with law or a provision of the constitution of a charitable organisation.”*

To the extent that subsection (10)(a) excludes contracts of employment from the ambit of section 89 agreements, this would appear to be in line with the definition of “charitable organisation” in section 2 of the Charities Act 2009.

However, to the extent that subsection (10)(a) was intended to exclude payments to charity trustees for trustee-related services and thus to ensure that section 89 only applied to non-trustee related services, subsection (10) does not appear to fully align with the definitions of “charitable organisation” and “charitable trust” in section 2 of the Act. Further, given that it is understood that prior to the establishment of the Charities Regulator, in certain cases some charities were permitted to appoint employees of their organisation as charity trustees, it would appear that there is a need to recognise this in some way in the 2009 Act. This would appear to be particularly important given that the current Register of charitable organisations includes a substantial number of entities that were *deemed registered* and thus included on the Register solely by reason of the fact that on 16 October 2014 they had an entitlement to a charitable tax exemption under section 207 or 208 of the Taxes Consolidation Act 1997.

Under the definition of “charitable organisation” in section 2 of the Act, a body corporate or an unincorporated body of persons is currently required under its constitution to –

- “(ii) ...apply all of its property (both real and personal) in furtherance of that purpose, except for moneys expended –*
 - (I) in the operation and maintenance of the body, including moneys paid in remuneration and superannuation of members of staff of the body, and*
 - (II) in the case of a religious organisation or community, on accommodation and care of members of the organisation or community,*
- and*
- (iii) none of the property of which is payable to the members of the body other than in accordance with section 89...” (emphasis added)*

The definition of “charitable organisation” does not refer to the remuneration of charity trustees but rather is limited to a reference to moneys expended in the operation and maintenance of the body and the remuneration and superannuation of staff of the body.

The position with regard to obtaining charitable tax status is that in general in order to obtain and maintain a charitable tax exemption, an organisation’s charity trustees cannot be in receipt of any payments other than reasonable expenses properly incurred in the administration and management of the organisation. However, as noted above, the Charities Regulator understands that in the past, in certain cases charitable organisations were permitted to appoint employees as charity trustees.

Similarly, the Governance Manual for Primary Schools (2015 - 2019) issued by the Department of Education and Skills requires Boards of Management to include the Principal of the relevant school and another member of the teaching staff on the Board (section 3, page 15). As schools are “charitable organisations” within the meaning of the Act, members of their Boards of Management are therefore considered “charity trustees” under the Act.

It is understood that under the general law applying to trusts, trustees can be paid for carrying out trustee-related duties in limited circumstances, where for example it is permitted further to a Court order. It is further understood that under trust law, such an order may, for example, have been made in recognition of the fact that a trustee may have contributed directly to a significant increase in the value of a trust by his or her actions as trustee. It would appear that this may have been the scenario that was intended to be covered by the reference in subsection (10)(b) to “*any remuneration to which a person is entitled in accordance with law or a provision of the constitution of a charitable organisation.*” (**Note:** See note to draft Head 3 regarding relevant case law on this point.).

It is preferable that as a general rule charity trustees not be paid for trustee-related duties nor should such persons be in a position of paid employment with a charity of which they are trustees, unless the charitable organisation has the approval of the Charities Regulator. The situations in which a charitable organisation may apply or should be required to apply for approval to appoint an employee as a charity trustee, should be prescribed by the Minister.

The amendments, which are proposed in respect of section 89, are intended to reflect these requirements more clearly so that the section as amended would–

- (a) state the general rule that charity trustees should not be paid for trustee-related duties,
- (b) permit charitable organisations to enter into agreements for non-trustee related services with a charity trustee or a person with a personal connection to a charity trustee of a charitable organisation, where such an agreement is approved by the Charities Regulator,
- (c) provide that the Minister may prescribe the circumstances in which charitable organisations may be permitted to apply for approval to appoint an employee as a charity trustee,
- (d) permit the Charities Regulator to exempt certain types of agreements from the requirements of section 89 e.g. by reference to the value of agreements (*de minimis*), types of agreements etc.
- (e) require charitable organisations to retain a record/register of agreements they have with relevant persons under this section;
- (f) permit the Charities Regulator to issue directions to individual charitable organisations regarding requirements under section 89, and
- (g) permit the Charities Regulator to issue guidelines to charitable organisations more generally in relation to agreements under section 89. These guidelines might relate to matters such as the requirement to ensure value for money when deciding to

engage in a contract for goods or services through seeking a number of quotes for services etc.

The section as amended should not apply to –

- (i) remuneration of a person under a contract of service i.e. a member of staff (which is permissible and acknowledged in the definition of “charitable organisation” in section 2 of the 2009 Act), and
- (ii) payments to charity trustees in respect of reasonable expenses properly incurred in the administration and management of the charitable organisation (which are permissible and acknowledged in the definition of “charitable organisation” in section 2 of the 2009 Act).

The phrase *“or on behalf of a charity trustee”* which appears after *“pay any sum to a charity trustee”* in subsection (1) is intended to prevent a charitable organisation paying an expense for the benefit of a charity trustee e.g. rent or a tv subscription. The phrase *“accrue or otherwise provide for”* have been included to rule out any argument that benefits could be accrued for in the charity accounts which would only be paid out at some stage in the future when a relevant charity trustee resigned from his or her position.

The definition of ‘sum’ is proposed to be extended in order to ensure that pension contributions, honoraria and perquisites are included. The phrase “benefit in kind”, which constitutes the current definition of the term “sum” in section 89 of the Charities Act 2009 could be read as referring to benefit in kind tax on a perquisite rather than the perquisite itself.

PART 3
AMENDMENT OF OTHER ACTS

HEAD 30: Amendment of section 34(2) of the Charities Act 1961

In section 34(2), to provide for the deletion of “other than a purpose of the charity of which they are trustees”.

Explanatory note:

Section 11 of the Charities Act 1973 substituted section 34 of the Charities Act 1961 in its entirety.

Section 34(1) of the 1961 Act relates to dispositions of charity lands on terms that are advantageous to the charity.

Section 34(2) relates to dispositions of charity land, which although not for market value, nevertheless operate for the benefit of the public.

Section 34(2) provides that an application can only be made under section 34(2) where a disposition of charity land is for less than market value, and the entity to which the land is proposed to be disposed has a different charitable purpose to that of the charity, which is disposing of the land.

The logic underpinning the requirement that an entity to which a disposition of land is proposed to be made under section 34(2) must have a charitable purpose, which is different to that of the charity disposing of the land, is unclear. Based on the experience of the Charities Regulator in implementing section 34(2), the requirement is also proving unnecessarily problematic for those charities that wish to dispose of land so that the land can continue to be used for a charitable purpose in circumstances where the charity, which owns the land is, for whatever reason, unable to continue to use the land for that purpose.

It is proposed to amend section 34(2) by removing the requirement that the entity to which the land is disposed must have a charitable purpose, which is different to that of the charity disposing of the land.

The amendment proposed in draft Head 30 would allow for the transfer of charity land to other charities better able to continue or re-establish the use of the land for charitable

purposes for the benefit of the public such as the continued operation of schools and other educational facilities. Without the requisite legislative amendment, there is a risk that many charitable properties will not be properly utilised or, in some circumstances, adequately maintained and thus would not operate for the benefit of the public.

Note

Amendment in context:

“34.—

(2) Where an application is made to the Board by the trustees of any charity comprising land representing that a specified disposition of the land for the benefit of a specified charitable purpose ~~other than a purpose of the charity of which they are trustees~~, being a disposition the consideration for which is not the market value, would, if effected, operate for the benefit of the public, the Board may, if they think fit, inquire into the circumstances, and if, after inquiry, they are satisfied that the proposed disposition would both be for the benefit of the specified charitable purpose and operate for the benefit of the public, they may authorise that disposition and give such directions in relation thereto (including direction for securing the due investment or application of any money arising therefrom for the benefit of the charity) as they think fit.”.

HEAD 31: Amendment of section 851A of Taxes Consolidation Act 1997

To amend section 851A(8) of the Taxes Consolidation Act 1997 by the substitution of the following paragraph for paragraph (f):

- “(f) in relation to a charity, such information, including taxpayer information as may be –
 - (i) in the possession of a Revenue officer in relation to the name of a charity, its objectives, its governing documents and its principal officers, or
 - (ii) required by the Charities Regulatory Authority for the purpose of or in connection with the performance by it of its functions under the Charities Act 2009, provided that such information may only be used for that purpose or in connection with the performance of such functions.”.

Explanatory note:

Section 851A(2) of the TCA provides as follows:

“(2) All taxpayer information held by the Revenue Commissioners, a Revenue officer or a service provider is confidential and may only be disclosed in accordance with this section or as is otherwise provided for by any other statutory provision.”

Section 851A(3) provides as follows:

“(3) Except as authorised by this section, any Revenue officer, service provider or any person to whom taxpayer information is disclosed who knowingly—

- (a) provides to any person any taxpayer information,*
- (b) allows to be provided to any person any taxpayer information,*
- (c) allows any person to have access to any taxpayer information, or*

- (d) *uses any taxpayer information otherwise than in the course of administering or enforcing the Acts,*

shall be guilty of an offence and shall be liable—

- (i) *on summary conviction to a fine of €3,000, and*
(ii) *on conviction on indictment to a fine of €10,000.”*

Paragraph (j) of section 851A(8) of the TCA provides that a Revenue officer may disclose “taxpayer information the disclosure of which is expressly authorised by another enactment.”

Paragraph (i) of section 851A(8) of the TCA provides that a Revenue officer may disclose “information which is not taxpayer information,”.

Notwithstanding paragraphs (j) and (i) of section 851A(8), it is also proposed to amend section 851A of the TCA to specifically refer to the provision of information, including taxpayer information, by the Revenue Commissioners to the Charities Regulator for the purposes of the latter carrying out its functions under the Act of 2009. The amendment set out in draft Head 31 is intended to address Revenue’s preference that both Revenue staff and taxpayers can see all relevant restrictions on taxpayer confidentiality in the one place i.e. section 851A of the TCA.

NOTE: A draft head similar to that set out in draft Head 31 was previously approved by the Government and appeared in Part 15 of the General Scheme of the Courts and Civil Law (Miscellaneous Provisions) Bill 2017.

Head 32 Amendment of Schedule 5 to Social Welfare Consolidation Act 2005

To amend Schedule 5 to the Social Welfare Consolidation Act 2005, in paragraph 1(4), by the insertion, after “an tÚdáras un Ard-Oideachas,” (inserted by section 18 of the Social Welfare and Pensions (Miscellaneous Provisions) Act 2013), of the following:

“Charities Regulatory Authority”.

Explanatory Note:

The Charities Regulator is not currently listed as a specified body under Schedule 5 Social Welfare Consolidation Act 2005 (as amended).

In order to conduct those proposed functions relating to PPSNs, as outlined in draft Head 7, the Charities Regulator must be listed as a specified body in Schedule 5 of the Social Welfare Consolidation Act 2005 (as amended) for the purposes of this Schedule and sections 262 to 270 of that Act.

The addition of the Charities Regulator as a specified body requires an amendment via primary legislation.