LEGAL ADVISORY COMMISSION

PAROCHIAL CHURCH COUNCILS: LEGAL POSITION OF MEMBERS

Legal status of a PCC

1. A parochial church council ('PCC') is a body corporate (see s.3 Parochial Church Council (Powers) Measure 1956).

2. The Charity Commission accepts that PCCs are charities. All PCCs were previously excepted from the obligation to register under the Charities Act 1993 (the provisions of which have now been consolidated with other provisions in the Charities Act 2011). However, since January 2009 PCCs with an income of more than £100,000 *per annum* have been required to register. (Guidance on the registration requirement and the registration process can be found on the *Parish Resources* website at http://www.parishresources.org.uk/registration.htm .)

3. The affairs of a PCC must be conducted, and the assets of a PCC must be held and applied, solely to promote the charitable purposes for which the PCC is established under the 1956 Measure, and not for other purposes (even if charitable) nor, *a fortiori*, for the private benefit of individuals, such as members of the PCC.

4. Since a PCC is a body corporate, liabilities it incurs in contract (eg under a contract of employment or for the provision of goods or services) or tort (eg by virtue of a breach of a duty of care owed to a third party) are enforceable against it rather than against its members. Thus a PCC member can only become personally liable for a debt of the PCC if he or she has voluntarily accepted legal responsibility for it (eg by giving a personal guarantee) or if the debt has arisen in circumstances involving a breach of the PCC member's fiduciary duties (as to which, see paragraph 10 below). A PCC member can also be personally liable under a contract which, whilst purportedly made on behalf of the PCC, was in fact entered into by the PCC member personally because he or she had no authority to enter into it on the PCC's behalf.

5. Similarly, statutory enforcement notices or fines imposed on a PCC will be enforceable against it, as the body corporate, rather than against its individual members. (For the position in relation to enforcement notices in relation to fire safety, see the Commission's Opinion *The application of the Regulatory Reform (Fire Safety) Order 2005 in relation to parish churches and the parochial use of other premises*.)

Fiduciary position of members of a PCC

6. The members of a PCC hold office to promote its charitable purposes**.** In promoting those purposes, the members of a PCC control the conduct of its affairs and the use and application of its assets.

7. The duties of a trustee in the strict sense also apply to all persons who occupy a fiduciary position analogous to that of a trustee. The duties have been held to apply, for example, to directors of a company or other body corporate in relation to the assets of the body corporate (see *Liverpool and District Hospital for Diseases of the Heart v*

Attorney General [1981] Ch 193 and *Harries v Church Commissioners* [1992] 1 WLR 1241). They will accordingly apply to members of a PCC, including members aged under 18.

8. Those duties are stringent and include the following:

(a) the duty to protect the assets of the charity (for the implications of this duty in relation to the registration and enforcement of chancel repair liability, see the Commission's Opinion *Registration and Enforcement of Chancel Repair Liability by Parochial Church Councils* (October 2007);
(b) the duty to show a reasonable degree of care and skill in the administration of the charity (eg by taking appropriate professional advice before buying or selling land or investments, and avoiding imprudent or speculative investments);
(c) the duty not to receive a financial benefit, whether directly or indirectly, from the trust (as to which, see paragraph 14 onwards below);
(d) the duty not to take advantage of knowledge, information or opportunities acquired by virtue of his or her position as trustee; and
(e) the duty not to put him- or herself in a position where his or her duty to the trust and his or her personal interests conflict (so that, for example, the acquisition of an interest in the property of the charity, whether by way of sale or lease, can be set aside at the instance of the Attorney General, as protector of the interests of charity).

9. Those duties are based on the trustee's status, not on the nature of his or her conduct or the effect of that conduct on the trust and its assets. Thus the liability of a trustee to account to the trust for profits made in breach of duty is not dependent in any way on proof of lack of good faith in the conduct of the trust's affairs or on the proof of any loss suffered by the trust.

10. The members of a PCC accordingly have significant legal responsibilities. Furthermore, those responsibilities can be enforced by legal proceedings brought by the PCC itself or by the Charity Commission or the Attorney General. Such proceedings could involve PCC members who had breached their fiduciary duties being required to make good to the PCC losses it had incurred as a result of the breach of duty or sums the members had received without the necessary authority.

11. However, in practice claims for breach of fiduciary duty are very rare and, even when they are made, the courts are unlikely to impose personal liability on trustees who have acted prudently, in good faith and in a way that has not benefitted themselves. PCC members should accordingly have little to fear from claims for breach of their fiduciary duties if they act with a reasonable degree of care and skill in the administration of their charity and avoid consciously applying PCC funds for unauthorised purposes.

12. If PCC members nonetheless remain concerned about the risk of personal liability for breach of fiduciary duty, there is always the possibility of exercising the power conferred by s.189 Charities Act 2011 to take out 'trustee indemnity insurance' to meet liabilities and costs arising from claims for breach of duty. In practice, many PCCs have used that procedure to extend the standard PCC insurance policy to

include trustee indemnity cover. Further guidance on the use of the procedure can be found on the Charity Commission website at: www.charitycommission.gov.uk .

13. Additionally, if PCC members are concerned that pursuing a particular course of action might expose them to the risk of criticism or claims for breach of fiduciary duty, they can seek their own independent legal advice as to whether what they have in mind would be consistent with their legal responsibilities. In practice, it is unlikely that the High Court or the Charity Commission would consider them to have acted improperly if they had acted in accordance with legal advice that what they proposed to do was within their powers.

Trustee benefits

14. Prima facie, a breach of duty will occur if - without having the requisite legal authority to do so - a member of a PCC enters into any contract with a PCC under which he or she (or a connected person[1]) derives a financial benefit. Such contracts can include a contract of service (eg to provide IT related services) or a contract of employment (eg where a priest licensed to the parish is an employee of the PCC). (Note that 'financial benefit' for this purpose does not include expenses properly incurred by a PCC member: charity trustees are entitled to be reimbursed in respect of payments they have had to make personally in order to carry out their duties.)

15. If a breach of duty occurs, the PCC member who receives, or is connected to the person who receives, the benefit must account to the PCC for that benefit unless the retention of the benefit is authorised by the Charity Commission or the High Court. The charity's right to enforce the duty is an asset of the charity and, unless such authority is given, it is therefore the responsibility of the PCC members collectively (by virtue of their duties to act in the charity's best interests and protect its assets) to take steps to secure enforcement.

16. Fortunately, there are mechanisms by which potential difficulties in relation to trustee benefits can be avoided.

17. First, under s.185 Charities Act 2011, provided they meet certain conditions the charity trustees of a charity may resolve to pay one or more of their number (or a connected person falling within the definition contained in s.118 of the 2011 Act) for providing services to the charity. The conditions include that:

- there is a written agreement between the charity and the trustee or connected person concerned which sets out the amount to be paid;
- the payment is no more than is reasonable for the service provided;
- before entering into the agreement the trustees satisfy themselves that paying the trustee or connected person is in the best interests of the charity; and
- only a minority of the charity trustees must be receiving remuneration from the charity, directly or through a connected person.

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[1] In this opinion the expression 'connected person' means a person having a close personal or financial connection with a member of a PCC, such as a spouse, child or business partner.

18. Before entering into such an agreement the charity trustees must have regard to any guidance given by the Charity Commission on such agreements. They must also comply with the duty of care in the Trustee Act 2000 when deciding whether to pay remuneration. In practice, that requires them to (*inter alia*):

- act in the best interests of their charity;
- take professional or other appropriate advice when in doubt;
- be clear that payment can be justified;
- ensure conflicts of interest are properly and openly managed;
- ensure agreements are complied with, and kept on the charity's records as required by law; and
- disclose any payments in the charity's accounts.

19. Furthermore, the trustee who is to benefit (or who has the relationship with the connected person who is to benefit) must not take part in any discussion by the trustees about the making of the agreement or the services provided under it (including subsequent issues about its quality).

20. More detailed guidance on the exercise of the power conferred by the 2011 Act is available on the Charity Commission website.

21. Examples of payments for services which might be authorised under the power conferred by the 2011 Act include legal, accountancy or other professional work and building or decorating work. However, the power conferred by the 2011 Act does not extend to payment for services under a contract of employment. (For that reason, Church legislation is being brought forward to confer on PCCs a power corresponding to that conferred by the 2011 Act which <u>does</u> extend to payment of that kind; but at the date of this opinion it has not been approved by the General Synod.)

22. Whilst there is no objection to someone who is already an employee of a charity becoming one of its trustees, a trustee (or connected person) cannot become an employee without lawful authority. Such authority accordingly needs to be given by means of an Order made by the Charity Commission under s.105 of the 2011 Act.

23. To gain the Commission's consent to employment of a trustee or connected person, where the total remuneration (including all benefits) paid will be under £50,000 per year (as is likely to be the case in nearly all applications by PCCs) there is a streamlined application process using form *CSD-1381C*, details of which can be found on the Charity Commission's website. The form cannot be used where the PCC member or connected person concerned canvassed for the post or was involved in devising the job specification or advertising for the post - including by being involved in settling the terms and conditions of the employment. (In that situation the PCC will therefore need to make out a case justifying the granting of consent.)

24. The PCC will need to show that:

- the charity has a need for the work to be carried out;
- the person to be paid has the appropriate knowledge and skills for the job;
- payment for the job is reasonable in relation to the work being carried out;

- the risks inherent in the inevitable conflict of interest have been considered and managed; and
- (usually) the job has been subject to an open and transparent selection process.

Unauthorised benefits

25. None of the procedures described above can authorise the payment of benefits after they have arisen: they are all concerned with authorising benefits before they arise.

26. As explained in paragraph 15 above, a PCC member who receives, or is connected to a person who receives, any benefit without lawful authority must account to the PCC for it unless the retention of the benefit is agreed by the Charity Commission or the High Court. It is important, therefore, that if a PCC identifies that benefits have, in error, been received by one of its members or a connected person without authority, steps are taken to put matters on a proper footing.

27. To that end the Charity Commission recommends that, where charity trustees become aware of an unauthorised trustee benefit, they should report it to the Commission, with an explanation of why the breach of trust occurred, how the trustees would prevent a similar situation occurring in the future and what benefits, if any, the charity received from the situation. On receipt of that information, the action the Commission will take will depend on the extent of the benefit and conflict of interest and the impact it has on the charity. It will also take into account other factors, such as the reason why the trustees did not obtain authority. The Commission states that it is likely to be more supportive if the trustees can show that the failure to obtain authority was an oversight.

28. Where the Commission considers the arrangements to be in the interests of the charity, it will give advice on the management of conflicts of interest and the authorisation of future benefits to trustees. However, it reserves the right formally to investigate where that is justified by the circumstances, with the consequent possibility of its using its statutory powers to protect the charity. Such cases will include those where trustees appear to have placed their personal or other interests ahead of those of the charity in order to derive significant benefit at the charity's expense, and where they have deliberately ignored the requirements of the law or of previous advice.

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