

Proposals for reform of dealing with charity land

Property analysis: On 22 March 2021 the government responded to the Law Commission's report on Technical Issues in Charity Law. It agreed to most of the recommendations, including those which are designed to reduce some of the administrative burdens associated with dealing with charity land. Maxim Cardew, Chancery barrister who specialises in charity and property law at Maitland Chambers, analyses the background and the implications of the report.

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Law Commission's recommendations for charity law reform accepted by government, [LNB News 22/03/2021 98](#)

What are the Law Commission's proposals, and which have the government accepted?

The government accepted the vast majority of the Law Commission's recommendations. While it appears at first sight that many of the recommendations are of a very technical nature (and some of them, indeed, are), individually, and especially collectively, they are likely to be of considerable practical importance for charity trustees and lawyers.

Section 5 of the government's response addresses the Law Commission's recommendations on acquisitions, disposals (including certain leases) and mortgages of charity land. The current rules are largely set out in Part 7 of the Charities Act 2011 (CA 2011). As set out in the Law Commission's report, aspects of the current law have been criticised as being complex, impractical, and causing unnecessary cost and delay. The Law Commission's most significant recommendations are considered below.

Advisors and surveyor's reports (Recommendation 14)

The Law Commission recommended, and the government accepted, that the range of advisors from whom charities may seek advice on dispositions should be expanded to include estate agents, valuers, and, where appropriate, suitably-qualified charity trustees/staff.

The government also accepted the Law Commission's recommendation that the rules about the contents of the surveyor's report, currently set out in the Charities (Qualified Surveyors' Reports) Regulations 1992 (1992 Regulations), be replaced with a more flexible advice requirement. The replacement of the highly-prescriptive contents of the 1992 Regulations, which are often frustrating to comply with in practice, will no doubt be welcome to trustees.

Connected persons (Recommendation 16)

The Law Commission, perhaps unsurprisingly, recommended that the connected person regime in CA 2011, s 117 should be retained (this says that no charity land may be conveyed etc to a connected person without the permission of the court or the Charity Commission). However, the Law Commission made a number of recommendations about who should (or should not) be covered by this regime.

It suggested that short-term disposals to employees be excluded from the connected person regime. The government accepted this recommendation, on the basis that it is sensible to facilitate charities' work. Again, for nearly all charities this will be a good thing. However, the current regime does serve an important role in preventing private benefit and conflicts of interest, so it remains to be seen whether it will lead to an increase in litigation and other issues in this area. The reality may be that

any such issues (even if they increase as a consequence) will be unlikely to come to light in most cases.

As to who else should fall within the connected person regime (defined in CA 2011, s 118), the Law Commission recommended that wholly-owned subsidiaries be excluded from the definition going forward. The government rejected this on the basis that (it says) charities frequently fail to appreciate the need to deal with subsidiaries on an arm's length basis and do not appropriately manage conflicts of interest, and that they do not appreciate the distinction between a charity and its subsidiaries. The government's response also says that the Charity Commission was concerned that removing this safeguard would result in an increase in transactions not in charities' interests.

While most trustees will of course endeavour to act properly, given the fundamental importance of the duty of loyalty, and the corresponding duty to avoid conflicts of interest (or duty), it is right that the government has not eroded the definition of connected party transactions, even though in some cases an administrative burden will remain for charity trustees wishing to make such a disposal (although, if the transaction is in the charity's interest, it is of course likely to be approved).

Compliance and enforceability (Recommendation 17)

The Law Commission recommended that charities be required to include in a contract for a disposition of charity land a statement that the requirements of Part 7 of CA 2011 have been complied with; and that a contract for a disposition of charity land should be enforceable by a purchaser if such a certificate has been given in the contract, or such a certificate has not been given but the purchaser has acted in good faith.

The government accepted this recommendation. This reduction of red-tape will no doubt be welcomed by trustees: while failure to comply with these requirements does not necessarily invalidate a transaction, compliance with them can create significant challenges in practice.

The government noted that currently it is purchasers who have to check if the statutory requirements have been complied with (at risk of the disposition not being enforceable), which the government considered to be an onerous obligation that causes delay and expense. Indeed, making purchasers wholly responsible for these checks is probably not a sensible system.

However, the proposal that a purchaser acting 'in good faith' should be able to enforce a disposition, even without a certificate of compliance by the charity, might go too far—as it could lead to an uncertain and subjective test for when a disposition will be enforceable.

Advertisement (Recommendation 18)

One of the more radical proposals of the Law Commission was its recommendation to abolish the requirement in CA 2011, s 121 that charities holding land for a stipulated purpose have to give public notice of any disposition of that land and take into consideration any representations received in response.

The government rejected this recommendation, noting that these are often long-standing community assets such as recreation grounds and village halls. It also observed that evidence from the Charity Commission's caseload showed that such disposals are often highly controversial. It noted that, where appropriate, charity trustees can request permission from the Charity Commission to dispense with the requirement to give public notice.

Other recommendations

The Law Commission also recommended, and the government accepted, that:

- the rules in Part 7 of CA 2011 should apply only where land is held by, or on trust for, a single charity (Recommendation 15)
- disposals of charity land by insolvency practitioners, mortgagees and receivers be excluded from Part 7 (Recommendation 20)
- the rules applicable to charities governed by the Universities and College Estates Act 1925 should be reformed (Recommendation 21)

Are the proposals likely to make it on to the statute books and what preparations should practitioners be making?

One of the Law Commission's recommendations was for the Charity Commission's guidance (CC33) to be updated to reflect the above proposed reforms (Recommendation 19) and the Charity Commission has agreed to do this. Given the, mostly, technical nature of the proposed reforms, important as they are—it is probably to be anticipated that if, and when, they come before Parliament, they will be put into law. Obviously, the government and Parliament have largely been occupied with other matters for several years now, but it is nevertheless to be hoped that this will take place in the near future. Even if this happens, however, it is doubtful that these reforms will take effect in law in time for charities currently considering disposals to benefit from them. However, if a disposal is not time-sensitive, charity trustees might prefer to wait before making a disposal if they would rather do so under the new regime.

Is this a positive development?

The Law Commission's report and recommendations are, on the whole, to be welcomed. In summary, the general effect of these recommendations is to reduce some of the administrative burdens associated with dealing with charity land. In relation to the recommendations considered above, the government has sought to strike a balance between reducing those burdens but preserving proper protection for charities and their beneficiaries—and it seems to have got that balance right.

Interviewed by Vinothini Samugamnathan

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