

# **CLAS CIRCULAR**

## **2017/23 (25 September 2017)**

### **Disclaimer**

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It would be very helpful if members could let us know of anything that appears to indicate developments of policy or practice on the part of Government or other matters of general concern that should be pursued.

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## CHARITIES & CHARITY LAW

### Law Commission project report: technical issues in charity law

For information **or for action**

The Law Commission has published the final [report](#) of its project on technical issues in charity law, which makes various recommendations aimed at removing unnecessary bureaucracy from charities whilst ensuring proper protections for the public. The Report makes 43 recommendations and includes a draft Bill that would give these proposals legislative effect. It also contains helpful background detail on each of the proposals as well as incorporating evidence supplied by consultees, including CLAS.

CLAS responded to the original consultation phase of this project in July 2015 and members were also involved in responses to the supplementary consultation and a series of consultation meetings with the Law Commission team, including the lead Commissioner, Professor Nicholas Hopkins.

Members will recall that the project was not a full review of charity law and related only to selected technical issues. As such, those issues did not include a number of controversial matters which have recently had a high profile such as the law of public benefit, the charitable status of independent schools, or fundraising practices.

For charities, recommendations include:

- giving them more flexibility to obtain tailored advice when they sell land, and removing unnecessary administrative burdens;
- changes to the law to help them amend their governing documents more easily, with Charity Commission oversight where appropriate;
- increased flexibility to use their permanent endowment, with checks in place to ensure its protection in the long term;
- removing legal barriers to charity mergers when a merger is in their best interests; and
- giving trustees advance assurance that litigation costs in the Charity Tribunal can be paid from the charity's funds.

For the Charity Commission, recommendations include:

- bringing in a single set of criteria to decide changes to a charity's purposes;
- increased powers to prevent charities using misleading names; and
- the ability to confirm that trustees were properly appointed.

The following items will be of particular interest to CLAS members, with the full list of recommendations from Chapter 7 also included at the end. We would also encourage members to read the document, and this chapter in particular, in detail.

### **Unincorporated charities: changing purposes and *cy-près* schemes**

The report examined the ways in which charities can change their purposes and amend their governing documents. There was general agreement as to the importance of ensuring that changes could be made as quickly and efficiently as possible, whilst retaining safeguards to ensure that proposed amendments were appropriate. For unincorporated charities, therefore, the key question related to how Sections 275 and 280 of the Charities Act 2011 should be updated. CLAS's response suggested that the power of unincorporated charities to make a section 275 resolution should continue to be subject both to the approval of the Charity Commission and to the agreement of the members of the charity.

Following consultation, the Law Commission has decided to recommend the adoption of a new statutory amendment power for unincorporated charities. This would replace the power under section 280, enabling unincorporated charities to change any provision in their governing document by a resolution of the trustees and/or members, save for certain listed alterations (similar to regulated alterations by companies and CIOs) which would require the consent of the Charity Commission.

The Law Commission has also recommended that the introduction of this amendment power should be accompanied by the repeal of section 275, which it believes the amendment power will render superfluous. The report states that the difficulties created by section 275 and thrown up by any expansion of the power do not justify the minimal benefit (if any) that it would achieve after the recommended amendment power is introduced. Whilst consultees generally favoured expanding section 275 (as the Law Commission had provisionally proposed) and creating an equivalent power for corporate charities, it has decided that instead it would be simpler to have one, simple process for all.

### ***Cy-près* rules and fundraising appeals**

Where a charity fundraising appeal requires a specific amount for a particular objective, in some cases the appeal may not raise enough money ("failed appeals") or it may raise more than is needed ("surplus cases"). Both kinds of fund can, in some circumstances, be applied to

other charitable purposes under a *cy-près* scheme. The Commission therefore called for opinions on the appropriate threshold for allowing a trustee to apply these funds without recourse to the Charity Commission.

The Law Commission noted that the Charity Commission already permits failed appeals raising less than £1,000 from unidentifiable donors to be applied *cy-près* without a scheme. It suggested that it would be sensible to formalise this approach in legislation, concluding that the threshold for trustees to be able to act alone should be set at £1,000 (capable of amendment by secondary legislation). This was in line with CLAS's recommendation that a *de minimis* limit be introduced.

## Part 7 advice requirements

### *Disposal of charity land*

There is a complex regime of restrictions on charity trustees when it comes to disposing of, or granting mortgages over, charity land. Broadly speaking, charities are required to obtain advice from a qualified surveyor (ie a member of the Royal Institution of Chartered Surveyors) before disposing of any interest in land. While it is clearly desirable that charities take some advice on property matters from suitably qualified and experienced professionals, the key policy question was the extent to which charities should be *compelled* to obtain advice before disposing of charity land.

CLAS had recommended that the legislation should contain some degree of requirement for professional advice to be sought, particularly for smaller charities. CLAS's response stressed, however, that this should be light and proportionate both to the nature of the transaction in question and to the expertise in property matters of the charity proposing to carry it out. The Law Commission found that there was no consensus on this point among consultees.

Taking consultees' views into account, the Law Commission highlighted a total of 10 possible options for reform, including making no change, setting a *de minimis* threshold or permitting charities to dispense with the requirement to obtain advice if they decide that it is unnecessary to do so. Its final recommendations are as follows:

- The category of designated advisers under Part 7 of the Charities Act 2011 should be expanded to include Fellows of the National Association of Estate Agents and Fellows of the Central Association of Agricultural Valuers.
- Qualified charity trustees, officers and employees should be able to give advice under sections 119(1)(a), 120(2)(a) and 124(2) of the Charities Act 2011.
- The Charities (Qualified Surveyors' Reports) Regulations 1992 should be replaced with regulations that require designated advisers to provide advice about issues such as what sum to expect or how the value of the land could be enhanced, and a self-

certification that they have the appropriate expertise and experience and that they do not have any conflicts of interest with the charity.

- The statutory requirement that charity trustees advertise the proposed disposition in the manner advised in the surveyor's report should be removed.

### ***Disposals of land to a connected person***

Part 7 currently prohibits the disposal of charity land to any person falling within the definition of "connected person", without the consent of the Charity Commission (or the court). The Law Commission had noted that where a charity makes a disposal to a wholly-owned trading subsidiary, the subsidiary seems to fall within the definition of "connected person". Likewise, the definition includes "a trustee for the charity" who is not also a "charity trustee" (i.e. holding trustees and others in a similar position). The Law Commission had suggested that both these categories should be specifically excluded from the definition of "connected persons" for the purposes of disposals of land; CLAS's response had agreed with this suggestion.

While a clear majority of consultees agreed with the point in relation to wholly-owned trading subsidiaries, a number raised concerns about excluding holding trustees and others in a similar position from this definition, given the significant influence that some holding trustees can have. As such, the Law Commission has made a recommendation specifically excluding wholly-owned trading subsidiaries from the connected persons regime, but retaining "a trustee for the charity" within it.

### ***Acquisition of land***

While the Charity Commission does encourage charities to follow them, the Part 7 advice requirements do not extend to the acquisition of land. However, the Law Commission noted that charities are just as much at risk of purchasing land at an overvalue as they are of selling it at an undervalue – if not more so, since acquiring land will often involve an ongoing liability to maintain the property. They therefore asked whether the Part 7 advice requirements should be extended to the acquisition of land.

The Commission concluded that, even as amended in accordance with the recommendations on disposals, the requirements should not be extended. The CLAS response had suggested that doing so would merely add unnecessarily to the burdens of trustees. It noted that larger members were perfectly competent to make such judgments for themselves, while smaller ones made so few acquisitions that there was hardly any point in making them seek advice before buying a property in order to house a minister, for example.

In particular, the Commission agreed with comments about the practicality of enforcing an advice requirement in respect of the acquisition of land in the absence of the restriction in the register as an enforcement mechanism. It also accepted concerns about charities facing

difficulties in bidding against other potential purchasers who are not subject to advice requirements. While the Commission acknowledges the inconsistency that is created by the current regime between acquisition and disposal of land, it does not believe that these would be remedied by merely extending the Part 7 regime, since land transactions would be treated differently from transactions involving other assets.

### **Payments to charity trustees**

#### ***Remuneration for the supply of goods***

When a trustee has obtained a benefit in breach of fiduciary duty, the trustee must account to the charity for that benefit. While section 185 of the Charities Act 2011 allows charity trustees to be remunerated for supplying services to their charity such as building, decorating, accountancy or legal services, there is no equivalent provision for the supply of goods. This restriction therefore gives rise to an anomaly under which a charity could pay a trustee to paint the charity's offices (and the trustee could be paid to supply the paint as part of the transaction), but could not pay the same trustee solely to supply the paint. The Law Commission concluded that section 185 should be extended to allow trustees to be remunerated for the supply of goods. While the recommendation does not include any *de minimis* limit for remuneration – which the CLAS response had suggested – it notes that section 185 already contains a condition that “the amount of the remuneration is set out in a written agreement between the charity and the provider of the services (“P”) and does not exceed what is reasonable in the circumstances.”

#### ***Equitable allowances***

When that benefit has been obtained in connection with work undertaken by the trustee for the charity, it might be appropriate to pay the trustee for his or her time, skill and effort in carrying out that work. This is known as an equitable allowance. The only way that a trustee can obtain an equitable allowance is through the courts. Such an award is very rare, in part due to the time and expense involved in court proceedings. The Law Commission therefore recommended that the Charity Commission be given the power to award equitable allowances and consulted on the criteria for the exercise of this power.

CLAS's response suggested that the criterion should be whether the trustee has acted honestly and reasonably and ought fairly to be relieved from liability. The Law Commission's final recommendation, however, is not in line with CLAS's position. It notes that an equitable allowance should be awarded not out of fairness in itself, but as payment for the skill and effort of the trustee. Whether the trustee has acted honestly and reasonably and ought fairly to be relieved from liability is not the correct question. The Commission also considers that the concerns about encouraging breach of fiduciary duty (which CLAS also raised) might be mitigated if the test were based on the criteria used by the courts, as one factor considered

by the courts is whether an equitable allowance would encourage future breaches of fiduciary duty. As such, the Law Commission has recommended that:

- the Charity Commission should have a power to require a charity to remunerate a trustee (or to authorise a trustee to retain a benefit already received) where the trustee has done work for the charity and it would be inequitable for the trustee not to be remunerated for that work (or not to retain the benefit received in connection with that work); and
- the exercise of that power, and the decision not to exercise the power, should be subject to challenge by way of judicial review.

### **Identifying charity trustees**

The Charity Commission has a power to determine the identity of the members of a charity; however, it has no similar power to determine the identity of the charity trustees of a charity. The Law Commission therefore considered whether such a power should be created. CLAS highlighted that for an unincorporated church charity, the trustees might be the entire adult membership of the congregation, subject to an application for registration having been accepted. Such a power would have enabled the Commission to decide, in effect, who was a member of the congregation in good standing and who was not – which would go against the self-understanding of most Churches *as Churches*. CLAS recommended that, if granted, there would have to be some kind of guarantee that such a power would be used only as a very last resort.

In fact, the Law Commission has concluded that such a power would be largely unnecessary. Instead, it has recommended that the Charity Commission be given the power to ratify a charity trustee's appointment or election, subject to the consent of the person whose appointment or election is sought to be ratified. It has also recommended that the decision to ratify, or not to ratify, an appointment should be subject to challenge by way of judicial review.

**Chapter 7: Regulating Charity Land Transactions – full list of recommendations****Recommendation 14** - that:

- the category of designated advisers under Part 7 of the Charities Act 2011 be expanded to include fellows of the National Association of Estate Agents and fellows of the Central Association of Agricultural Valuers; and
- qualified charity trustees, officers and employees be able to give advice under sections 119(1)(a), 120(2)(a) and 124(2) of the Charities Act 2011; and
- the Charities (Qualified Surveyors' Reports) Regulations 1992 be replaced with regulations that require designated advisers to provide:
  - advice concerning:
    - what sum to expect (or, if an offer has already been made, whether the offer represents the market value of the land);
    - whether (and, if so, how) the value of the land could be enhanced;
    - marketing the land (or, if an offer has already been made, any further marketing that would be desirable);
    - anything else which could be done to ensure that the terms of the transaction are the best that can reasonably be obtained for the charity; and
  - a self-certification by the adviser that they:
    - have the appropriate expertise and experience to provide the advice that is required;
    - do not have any interest that conflicts, or would appear to conflict, with that of the charity; and
- the statutory requirement that charity trustees advertise the proposed disposition in the manner advised in the surveyor's report be removed.

**Recommendation 15** – that:

- Part 7 of the Charities Act 2011 only apply where land is solely held by, or held in trust solely for, a single charity.

**Recommendation 16** – that:

- the connected persons regime in Part 7 of the Charities Act 2011 be retained;



- the definition of connected persons should:
  - exclude employees where the disposal is the grant of a short residential tenancy;
  - exclude wholly-owned subsidiaries;
  - be capable of amendment by secondary legislation; and
  - omit the reference to “illegitimate child”;
- disposals of land to wholly-owned subsidiaries should be notified to the Charity Commission; and
- the Charity Commission’s guidance for trustees disposing of land, and guidance for designated advisers, should make clear that disposals to wholly-owned subsidiaries should be for the best terms that can reasonably be obtained for the charity.

**Recommendation 17** – that:

- charities be required to include in a contract for a disposition of charity land a statement that the requirements of Part 7 of the Charities Act 2011 have been complied with; and
- 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.

**Recommendation 18** – that:

- the requirements in section 121 of the Charities Act 2011 concerning advertising proposed disposals of designated land and considering any responses received should be abolished.

**Recommendation 19** – that:

- the Charity Commission amend its guidance Acquiring Land (CC33) as follows:
  - The guidance should reflect our recommendations to reform the regime governing the disposal of land, for example, suggesting that advice could be obtained from a fellow of the National Association of Estate Agents or a fellow of the Central Association of Agricultural Valuers as well as a member of the Royal Institution of Chartered Surveyors.

- The guidance should explain that trustees might decide not to obtain advice from those advisers, or from any advisers, with examples of when the trustees might make such a decision.
- The suggestion that trustees seek advice on whether the proposed acquisition is in the interests of the charity should be removed.

**Recommendation 20** – that:

- disposals of land by liquidators, provisional liquidators, administrators, receivers and mortgagees be excluded from Part 7 of the Charities Act 2011; and
- the exception in section 117(3)(c) of the Charities Act 2011 be reformulated such that it applies only to disposals that are solely intended to further the transferor charity's purposes.

**Recommendation 21** – that:

- the detailed provisions in the Universities and College Estates Act 1925 be repealed and the institutions to which it applies be given the general powers of an owner similarly to trustees under the Trusts of Land and Appointment of Trustees Act 1996 and the Trustee Act 2000; and
- the exercise of that replacement power should not, of itself, engage the exception from the Part 7 advice requirements in section 117(3)(a) of the Charities Act 2011.

[Source: CLAS Summary – 22 September]