

Hodgson's choice? possible changes to legal obligations relating to the disposal of property

Currently charities that are regulated by the Charity Commission (all registered charities and the relatively few remaining excepted charities) are subject to statutory controls when they dispose of their property (which includes, amongst other things, letting property as well as selling it). It appears that this statutory regime may be substantially altered in the future but the legal principles of charity trustee good faith and care that it is intended to support will remain.

There are currently direct statutory obligations on charity trustees to obtain valuation advice and consider it prior to committing themselves legally to any commercial disposal of land.

The procedures that they must follow are precise and prescriptive. They are now to be found in sections 117 to 125 of the Charities Act 2011, which more or less reproduce the statutory provisions contained in the relevant sections of the 2006 Charities Act which was the subject of the review by Lord Hodgson last year.

The provisions notably have never applied to exempt charities, which currently include all charitable community benefit societies (charitable industrial and provident societies) who are regulated by the Financial Conduct Authority and other organisations with a separate principal regulator such as academy schools, who are regulated by the Department for Education.

In his review, Lord Hodgson recommended that:

1. Disposals of charity land should be deregulated and rely on the charity trustees acting under their duty of care and following Charity Commission guidance.
2. The Charity Commission should work with relevant professional bodies to develop this guidance and include specific types of common transaction – including acquisitions as well as disposals.
3. The Charity Commission should still approve disposals to “connected persons”, plus mortgages and other charges granted to “connected persons”.

The issue is now one of a number of matters under consideration by the Law Commission who are charged with considering whether “it may be more appropriate for charity trustees to have more autonomy, subject to appropriate safeguards”.

Of course the provisions of sections 117 to 125 of the Charities Act 2011, originally enacted in a slightly different form in the Charities Act 1992, were intended to establish precisely those safeguards. They did not purport to preclude autonomy on the part of trustees with regard to their activities, but rather codified the duty of charity trustees to take appropriate advice and act in an appropriate manner in disposing of or exploiting charity assets. This was no doubt to address a concern that they were not in fact doing so. Nevertheless, the

discretion on whether to dispose of land under the current regime lies entirely with the charity trustees.

The statutory provisions have however been widely regarded as over-complex and over-burdensome in some scenarios and could no doubt do with some amendment. For the majority of substantial transactions they do have a strong internal logic and focus the minds of charity trustees on the appropriate issues, in particular the need to have regard to detailed professional advice. It does not follow as a matter of course, especially in times of economic stress, that if something is broke it should be thrown away and replaced with something entirely different with the risk that may never really work at all. The conventional wisdom is that it should be fixed.

The guidance envisaged by Lord Hodgson in most cases would in any event probably have to have substantially similar effect to those in the current legislation. If charity trustees are to legally obliged to have regard to the proposed new guidance, the burden on charities and their trustees in many cases may in reality be very similar to the position now.

The Charity Commission does not directly engage in property transactions and may be hard pressed to deal with this proposal if it is to be put into effect, even with the assistance of "relevant professional bodies". The Commission is inclined to remind us that it cannot do what it used to do because of its now limited resources, and it is therefore questionable to what extent their resources can be applied to this task.

The problem might be better addressed by amending the current legislation so that it is more flexible and fitted towards the type of transaction that the charity is undertaking, rather than probably unnecessarily expending time and money and risking unintended consequences by attempting to entirely reinvent the wheel.

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