

Law Commission Paper on Technical Issues in Charity Law

Response by the Wellcome Trust

July 2015

Key Points

- We agree with the Law Commission's proposals relating to disposals of land — the existing legal framework is often viewed as a formal compliance or 'box-ticking' exercise that adds little more than delay.
- We would not support additional formal requirements for acquisitions beyond those that apply to other assets.
- It would be valuable to consider a statutory power that would enable a charitable trust to become an incorporated body by operation of law.

Introduction

1. The Wellcome Trust is the UK's largest charity. In 2015, we will invest around £750 million in biomedical research and the medical humanities — a figure that we plan to increase over the next five years. Our breadth of support includes public engagement, education and the application of research to improve health.
2. Our response to this consultation focuses on the legal framework for disposals (and acquisition) of land by charities. Other areas of the consultation either relate to matters that are not relevant to us (for example, statutory or Royal Charter charities, or small trusts) or are unlikely to apply to us (for example, insolvency of a trustee or the determination of trustees by the Charity Commission). However, we would like to express our general support for the principle of clarifying and simplifying the legal framework wherever possible, as reflected by the proposals in this consultation.

Consultation questions

Disposals (and acquisition) of land

3. The Wellcome Trust directly owns around £1.6 billion of property, predominantly in our investment portfolio. As a result of the size of our portfolio, we have longstanding relationships with a number of property managers, and are therefore able to access the professional expertise required to comply with Part 7 of the Charities Act 2011.
4. Our experience echoes the comments in paragraph 8.57 of the consultation. In many transactions, although we take advice from various property agents on a disposal transaction, the formal report meeting the statutory requirements will only be obtained towards the end of the process and after the principal terms have been agreed. In this sense, the procedure can be viewed as a formal compliance or 'box-ticking' exercise that adds little more than delay.
5. We also agree with the comments in paragraph 8.49. In many cases, a RICS surveyor is not best placed to provide advice on a sale, compared to a local estate agent.
6. We typically require the provision of formal reports meeting the statutory requirements within our wider retainer arrangements with property managers, and so we do not incur an explicit additional cost to obtain these. However, we recognise that most charities are unlikely to be in this position. Even with the benefit of our wider relationships, there are occasions when we have to specifically arrange a report. This can add delay and incur additional costs of thousands of pounds each year for no additional benefit.

7. As part of managing property assets, the Trust may wish to enter into intra-group transactions. As noted in the consultation, these transactions can only proceed with explicit approval from the Charity Commission. Obtaining this takes time and does not seem to be a good use of the Commission's limited resources. The delays involved can have real commercial effects. For example, in the past we have wanted to grant a lease to an affiliate to protect our rights, and faced a delay of several months to obtain Commission approval. This could potentially limit our ability to act, and result in us being forced to sell valuable assets.
8. We recognise the argument that the existing regime provides a degree of protection for smaller charities that may not have access to legal and property advice. However, we do not see a policy reason for a specific regime relating to land that is substantially more onerous than those that apply to other significant charity transactions (such as investments or, if the Law Commission's recommendations are implemented, social investments). While land can be a valuable and complex charity asset, so can many financial investments, and it is difficult to see a strong reason for the very different regimes that the law currently sets out.
9. In relation to the specific consultation questions, our responses are below.
10. *Paragraph 8.85: "We provisionally propose that:*
 - (1) the general prohibition on trustees disposing of charity land should be removed; and*
 - (2) in its place should be a duty on trustees, before disposing of charity land, to obtain and consider advice in respect of the disposition from a person who they reasonably believe has the ability and experience to provide them with advice in respect of the disposal; but*
 - (3) the duty to obtain advice should not apply if the trustees reasonably believe that it is unnecessary to do so."*
11. We strongly agree with this proposal. We consider that this aligns requirements with the duties of trustees relating to investment transactions. It places the responsibility onto trustees to obtain and consider appropriate advice, while leaving flexibility to determine what advice is required. This protects charity assets while enabling trustees to respond to the specific situation before them.
12. We also agree that the statutory framework should be supplemented by guidance from the Charity Commission. This should be produced in a more user-friendly format for trustees (particularly of smaller charities) than the bald statutory requirements.
13. *Paragraph 8.95: We invite the views of consultees as to whether the new advice requirements that apply to disposals of charity land should also apply to the acquisition of land by charities.*
14. There is intellectual force in the argument that advice requirements should apply equally to acquisitions and disposals. The advice requirements for disposals, as provisionally proposed by the Law Commission in its consultation, do not appear unreasonable to apply to acquisitions. However, we would strongly oppose additional formal requirements for acquisitions beyond those that would apply for other assets.
15. *Paragraph 8.68: We provisionally propose that the provisions of Part 7 of the Charities Act 2011 relating to dispositions to connected persons be repealed. Do consultees agree?*
16. We agree with this proposal. We also agree with the Law Commission's view that the general law — supplemented by Charity Commission guidance and the procedure for authorisation under section 105 of the Charities Act 2011 — provides sufficient protection without requiring a specific regime for land.

17. Paragraph 8.70: If, contrary to our proposal in paragraph 8.68 above, the provisions concerning connected persons are retained, we provisionally propose that the definition of “connected person” should exclude:

(1) a charity’s wholly-owned subsidiary company; and

(2) a trustee for a charity who is not also a “charity trustee”, as defined by the Charities Act 2011.

Do consultees agree?

18. We also agree with this proposal, although we would prefer to repeal these provisions entirely. We would also suggest widening the first of the exclusions. For example, we do not see any reason why a subsidiary company of a charity, whether or not wholly-owned, should be treated as a connected person, unless one of the charity trustees has a personal interest in that subsidiary company. We would therefore propose that the first exclusion should cover any entity where a charity trustee has an interest solely in their capacity as a charity trustee.

Incorporation of charities

19. Paragraph 12.50 of the consultation focuses on unincorporated charities and the expansion of powers to transfer assets to another charity under section 268 of the Charities Act 2011. We are a charitable trust, and so this issue is of direct relevance to us. We have examined the possibility of incorporation as this would have distinct benefits for us. However, the practical difficulties involved in transferring all of our assets and liabilities, particularly overseas assets, were a barrier to doing this.

20. We believe it would be valuable to consider a statutory power to incorporate an existing charitable trust. Rather than establish a new charitable company and transfer the existing charitable trust’s assets, the existing trust would become an incorporated body by operation of law and would automatically continue to hold all of the charity’s assets. Eliminating a transfer step would substantially simplify the process. The incorporated body could either be registered under the Companies Acts (perhaps in a similar way to a Community Benefit Society converting to a company) or as a Charitable Incorporated Organisation, and would be regarded as a matter of law as a continuation of the existing charity.

21. This would resolve many of the issues that currently arise from transferring assets. The detail of the incorporation might be set out in a scheme agreed with the Charity Commission to ensure appropriate regulatory oversight and include any detailed provisions required for a particular charity’s individual situation (for example, to deal with overseas assets where there were specific legal requirements in that country).

22. The Trust would be happy to discuss any of these points in more detail or meet with the Law Commission to discuss this further as your thinking develops.

The Wellcome Trust is a global charitable foundation dedicated to improving health. We support bright minds in science, the humanities and the social sciences, as well as education, public engagement and the application of research to medicine. Our investment portfolio gives us the independence to support such transformative work as the sequencing and understanding of the human genome, research that established front-line drugs for malaria, and Wellcome Collection, our free venue for the incurably curious that explores medicine, life and art.