



CHARITY LAW ASSOCIATION

Charity Commission for England and Wales CC14 – consultation on revised draft guidance Charity Law Association working party response

The Charity Law Association has approximately 1,050 members, mostly lawyers but also accountants and other charity professionals. It is concerned with all aspects of the law relating to charities and has established a working party to consider the Charity Commission’s consultation on proposed changes to CC14.

The members of the working party are:

Gavin McEwan (Chair), Turcan Connell
Jonathan Brinsden, BDB Pitmans
Katie Dawson, Lupton Fawcett
May Delaney, Harbottle & Lewis
Jane Grenfell, Lee Bolton Monier-Williams
Virginia Henley, Hewitsons
James Maloney, Farrer & Co
Nick Perks, freelance charity consultant
Chris Priestley, Withers Worldwide
Samantha Pritchard, Womble Bond Dickinson
Shalin Punn, Children’s Investment Fund Foundation
Craig Staten-Spencer, Nelsons Law
Andrew Wherrett, VWV

The members of the working party serve in a personal capacity and the views expressed in this submission should not be taken to be the formal opinion of the organisations that they represent. Similarly, the views in this paper should not be seen as constituting the opinion of CLA members as a whole.

The comments of the working party have been grouped below under the individual questions which the Charity Commission posed in its survey.

Question 1

As a result of reading this draft guidance, how clear are you about the duties and good practice that apply to decisions about a charity’s financial investments, whether or not the charity adopts a responsible investment approach?

One of our main concerns with the draft guidance is that it contributes to a proliferation in terms used in connection with investment by charities. The overlap of terminology used will not be helpful to the general (lay) user of CC14. While we appreciate that the phrase “responsible investment” is currently gaining prominence in the investment industry, the guidance has to satisfy the needs of a diverse audience involving a range of people with divergent skill sets and experience, now and in the future. Overly succinct guidance will not serve well those parts of the intended audience who are particularly in need of the guidance.

We can see that the Charity Commission has sought to provide better coverage of responsible investment, and it is helpful to draw out in the guidance the fact that trustees have a range of factors that they can consider when making investment decisions. The use of unqualified terms such as “significant” and “appropriate” in the guidance, however, may raise more questions than answers.

While the draft guidance seeks to provide trustees with greater assurance that they are able to take a responsible approach to investment, we fear its rather sparse approach (lacking illustrative case studies to support trustee decision making, and simply referring trustees of charities without a duty to invest to the Charity Commission’s decision-making guidance) will not give trustees the greater confidence it aims to provide.

On balance, we accept that the draft guidance may help to continue the conversation on charity investment duties, but it is not clear to us that the guidance serves to remove barriers or to encourage responsible investment.

Question 2

As a result of reading this draft guidance, how clear are you about what a responsible investment approach is?

We do not consider the draft guidance to be clear about what a responsible investment approach is. In our view, without detailed examples, a lay trustee would struggle to grasp fully what is meant by a responsible investment approach (particularly given the proliferation of overlapping and potentially confusing terminology in this area). As they stand, the practical examples which are provided in the draft guidance are not sufficiently detailed to allow a lay trustee to develop a full understanding. If they are to be retained (and we think they should be), they need to be unpacked in considerably more detail in order to make them useful to a general audience.

It would be useful, for example, for the practical examples to be given added texture in relation to what the Charity Commission expects of charity trustees in terms of decision making, explanations and processes, and record keeping when exercising their decision-making powers on the subject of investments. At present, the guidance is too high level to achieve that.

One of the examples given at paragraph 2.1 refers to the case of a heritage charity that avoids investments in fossil fuels because the trustees have evidence that this would damage its reputation, reduce donations and not be in the charity’s best interests. As it stands, this example is unhelpful and potentially confusing. It is unhelpful because it begs an obvious question: what would the Charity Commission regard as sufficient evidence in this context? A more fully worked case study could be helpful in explaining what the Commission considers the evidential burden on trustees to be in this context. The example is also potentially confusing because it hints at the criteria in the *Bishop of Oxford* case – and yet the Commission’s published legal underpinning asserts that the principles of that case apply only to charities where there is a duty to invest (a distinction that is not made clear in this example).

We consider that, if further detail were added, by expanding the examples so that they serve as fuller case studies, the section would become much simpler to follow.

It also needs to be remembered that a relatively small number of charities have funds to invest. For those charities that do have funds to invest, it is typically investment managers that are carrying out screening and engagement, and not the charity trustees themselves. Most charities will not take individualised decisions on these matters. The draft guidance takes an individualised approach, but this does not reflect the reality on the ground that most trustees do not manage their own investment personally. A case study on a charity which uses investment managers would be helpful given the breadth of the target audience of the guidance.

Other questions arise which the guidance could attempt to answer. For instance, how should charity trustees select an investment fund which is not bespoke to their own investment mandate? The guidance provides no real assistance in that situation, which we would argue is the situation that most small and even medium-sized investing charities will find themselves in. From that point of view, the reality of what a responsible investment approach means in practice for many charities is not clear from the draft guidance.

Question 3

Is the phrase ‘responsible investment’ an appropriate term for the approach to investing in line with a charity’s purpose and values?

No. Most charity trustees will look to their investment managers for support and will not by themselves fully understand the difference between responsible or ethical investment/ESG principles. If the guidance seeks to support trustees in investing in line with their purposes and values, then it would be better to connect the terminology used back to mission, reputation, and supporters or stakeholders’ values and views. By using the word “responsible”, the implication is that any other investment is “irresponsible”.

The consultation appears to us to be much more about “mission aligned” investment decisions and that may be a better phrase to use for the majority of charity trustees – particularly given that the guidance seeks to be permissive and enabling in its approach.

We question whether there is a need to qualify the term “investment” at all, if the approach which we suggest above is taken and particularly if case studies are used to support the guidance and to provide clearer illustration to trustees of what is expected of them when taking into account their charity’s purposes and values in an investment decision. Using a distinct “badge” for this kind of investment reinforces a perception that this is a type of investment for which particular principles and legal considerations apply (as with social investment). Save in the case of charities with a duty to invest, this is at odds with what the guidance and the legal underpinning on which it rests now states (albeit that we note further below our regret that the new legal underpinning document, which sets out that interpretation, is excluded from the scope of the consultation).

Including a diagrammatic representation of the investment return continuum would be very helpful in enabling trustees to understand the difference between financial and other forms of investment. We suggest that a diagram such as that used in Figure 1 of paragraph 2.8 of the Law Commission’s report on Pension Funds and Social Investment (Law Com No 374) would be a model worth considering.

Question 4

How confident would you be, as a result of reading this draft guidance, that adopting a responsible investment approach is a valid option?

To be satisfied that a responsible investment approach is a valid option, there would need to be clarity that the Charity Commission's stance on the subject was right. In this draft guidance and consultation, there is no availability to comment on the Charity Commission's interpretation of the *Bishop of Oxford* case, for example. This interpretation is crucial because it forms the foundation of the guidance for those charities without a duty to invest and it is therefore regrettable that the new legal underpinning document, which sets out that interpretation, is excluded from the scope of the consultation. The interpretation is also novel, departing significantly from the way the case and its principles are described in the current guidance and legal underpinning.

We note the recent judgment in *Butler-Sloss v Charity Commission* [2021] 4 WLUK 58 on an application for a High Court declaration concerning the approach taken by two charities to responsible investment. We note in particular the comments from Mr Justice Green that

"the Charity Commission appears to be trying to limit the Bishop of Oxford case to its facts, by interpreting it as dealing only with a charity that it says has a permanent endowment. Whether that is right or not, it seems to me that it only adds to the claimants' application that this needs to be looked at afresh by the court."

Given that permission has now been granted to the two charities to seek the High Court declaration they sought, and given that (as the Charity Commission has acknowledged) the judgment could affect the draft guidance, we consider it crucial that relevant stakeholders are given a further opportunity to review and comment on any further draft guidance issued by the Charity Commission in light of the declaration.

The change from the previous approach is significant and yet the explanation in the legal underpinning document is limited. It would be helpful to understand the reasoning supporting the Commission's approach. In particular, the explanation for the new approach in the legal underpinning document seeks to confine the *Bishop of Oxford* case to where there is a duty to invest the relevant funds. However, it is not clear from the judgment that the judge took or intended such a narrow view – the judge readily acknowledged that property may be functional, rather than held for investment.

- The income of the fund in the case was primarily to provide stipends, housing costs and pensions of clergy, so it is not surprising that the judge took the view that *"prima facie the purposes of the trust will be best served by the trustees seeking to obtain therefrom the maximum return"*.
- However, the question the judge considered (and the question seemingly posed by the revised draft guidance) is when it will be in the best interests of the charity to depart from that *"prima facie position"*.
- The revised legal underpinning document also suggests that enactment of the Trustee Act 2000 supports the Commission's revised view. However, the 2000 Act was based upon the Law Commission's 1999 report on Trustees' Powers and Duties. In that report, in recommending the new investment power (and duties), the Law Commission appears to have premised that recommendation on it removing then existing bars to trustees being able to *"maximise their returns"*.

We refer you to the March 2020 submission of a previous CLA working group on responsible investment for more reflection on the legal underpinning.

It is therefore difficult for us to agree the Charity Commission's approach on the basis of this draft guidance alone, certainly until the declaration has been issued in the case referred to above.

In the meantime, for the average lay reader, there may be a degree of appreciation on the range of factors that can be brought into investment decisions, but we are less certain that we could say that there would be confidence in how to implement a responsible investment approach properly.

This is particular true for charities not subject to a duty to invest, whose trustees are referred simply to the Charity Commission's decision-making guidance. While we appreciate that this was doubtless intended to be enabling and positive in its approach, we would suggest that there is a careful balance to be struck. We consider that the lack of fuller case studies showing how to apply that guidance in practice makes it difficult for charity trustees to be confident how they are able to determine that a responsible approach to investment is a valid option.

Question 5

In the section 'Check if extra rules apply', we say that there are some situations where a responsible investment approach can be taken only if at least one of five tests is met.

As a result of reading this draft guidance, how clear are you about when these tests are relevant to the decision to take a responsible investment approach?

The section is clear enough (albeit that its central premise – the distinction between the principles applying to charities with a duty to invest and those applying to other charities – rests on a reading of the *Bishop of Oxford* case that we consider remains, at the very least, open to question): and it is worth commenting that the five tests may be relevant in any case, having in mind the ordinary duty of care applying to charity trustees when investing. If the draft guidance is to provide maximum clarity on the five tests, then we suggest that a full case study may be needed in order to help elucidate the points which are made in this section.

Question 6

Do you have any other comments to make on the draft guidance?

Our only other comment is that the guidance says that charity trustees might have a power to invest "responsibly". This is, however, not expanded upon. The guidance might usefully set out that amongst the investment powers (to the extent that that it is not included in the power in s 3 Trustee Act 2000) in a charity's governing document can be a specific one for "responsible" investments provided the duty of care in s 2 TA 2000 is complied with. The legal underpinning does say that the Charity Commission takes the view that "investment" in TA 2000 means only financial investment and does not cover PRI, social investment or anything non-traditional. It would be useful to know if the Commission believes that a charity can amend its administrative provisions to enable non-financial investment of any and all resources it has (including permanent endowment). It would also be useful to know if the Commission accepts that many "ethical" unit trust funds now secure a higher rate of return than non-ethical ones. Presumably where that is the case, there is no "responsible" investment decision, and only an investment decision.