

**LAW COMMISSION  
CONSULTATION PAPER No 216**

**SOCIAL INVESTMENT BY CHARITIES**

**RESPONSE FORM**

This optional response form is provided for consultees' convenience in responding to our Consultation Paper on Social Investment by Charities.

You can download the Consultation Paper free of charge from our website at <http://www.lawcom.gov.uk> (see A-Z of projects > Charity Law).

The response form includes the text of the questions and provisional proposals in the Consultation Paper, with space for answers. You do not have to respond to every question or proposal. Answers are not limited in length (the box will expand, if necessary, as you type).

Each question and provisional proposal is followed by a reference to the Chapter of the Consultation Paper in which that question or proposal is discussed, and the paragraph at which it can be found. Please consider the discussion before responding.

We invite responses from **24 April 2014 to 18 June 2014**.

Please send your completed form:

by email to: [propertyandtrust@lawcommission.gsi.gov.uk](mailto:propertyandtrust@lawcommission.gsi.gov.uk)

OR

by post to: James Linney, Law Commission, 1st Floor, Tower, Post Point 1.53,  
52 Queen Anne's Gate, London SW1H 9AG

If you send your comments by post, it would be helpful if, wherever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

Freedom of information statement

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The Law Commission will process your personal data in accordance with the DPA and in most circumstances this will mean that your personal data will not be disclosed to third parties.

**Your details**

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<b>Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above):</b>
Charity Law and Policy Unit
<b>If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:</b>
<b>As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.</b>

We invite consultees' comments on whether the current law governing social investment by charities is satisfactory.

Consultation Paper, Chapter 3, paragraph 3.110

For the reasons outlined in Chapter 3, we agree that the current law, or tellingly the perception of the current law, is unsatisfactory. Either way, this will act as a deterrent. Some of the problems are inherent in the vague definition of investment, exacerbated by the addition of the 'social' aspect. It does not help that the rules around investment stress financial return, particularly the high profile case law in this area. Dicta around ethical investments can easily be translated across to social investments, even though they are distinct and judges will not have been considering social investment vehicles when making such comments.

The issue with private benefit may well be important in perceptions of social investments, but we would add that the sector has had experience of dealing with such situations before and have not found any difficulties insurmountable e.g. in charitable involvement in urban or neighbourhood regenerations schemes. The issue is part of a wider discussion of proving public benefit, which we note is outside the reference of the Commission's work.

We invite consultees' comments on the Charity Commission's guidance in CC14.

Consultation Paper, Chapter 3, paragraph 3.111

This is very much an enabling framework and in that light, we would agree it is a helpful document. Practical concerns are best left to those better placed to make operational comments, but one overriding concern is a lack of consistency across a number of Charity Commission documents e.g. the definition of public benefit. The nature of Charity Commission guidance, perhaps, means that there are unintended inconsistencies. We have experienced this in other research e.g. on the impact of the Equality Act 2010 on charities where the specific guidance on the equality legislation does not always sit well with the public benefit guidance. Inconsistent terminology or emphasis can cause unnecessary confusion, or, equally of concern in investment, a lack of confidence in a charity's capability to make investments.

We provisionally propose that a new statutory power should be created conferring on charity trustees the power to make social investments, meaning any use of funds from which a charity seeks to achieve both its charitable purposes and a financial benefit.

Do consultees agree?

Consultation Paper, Chapter 3, paragraph 4.12

The clarity that would be provided by a statutory power is to be welcomed. It would reduce concerns that such investments are not permissible and would give advisors something concrete to point to, in order to allay trustees' fears. On the legal aspects, the enactment of such a power without more would not be enough to discourage negative perceptions about the primacy of financial return as the purpose of investment.

In this age of increased financial scrutiny to counter money laundering and terrorist financing, it might be difficult to convince HMRC to recognise the wide definition of social investment given the potential dangers of abuse. Without this assurance for charities, a statutory power would be meaningless.

We provisionally propose that the new power should apply unless it has been expressly excluded or modified by the charity's governing document.

Do consultees agree?

Consultation Paper, Chapter 4, paragraph 4.13

In line with practice in relation to other statutory powers (like the general power of investment in the Trustee Act 2000) this is appropriate. If a charity wishes to exclude or expressly limit such powers, it should be able to do so.

We provisionally propose that the new statutory power should be accompanied by a non-exhaustive list of factors that charity trustees may take into account.

Do consultees agree?

Consultation Paper, Chapter 4, paragraph 4.21

We agree, with some reservation. There are two inherent dangers in a statutory list of factors. The first is how a checklist is perceived and utilised within the sector. It may, if taken too seriously, become a series of probanda that ultimately constrain effective social investment. At the other extreme, lip service may be paid to the list, so that it simply becomes a 'tick box exercise' replacing a trustee's fiduciary obligations to consider the appropriateness of any investment.

The second concern is that, without guidance about the weighting to be given to any particular factor or group of factors, it becomes difficult for trustees to make a clear judgement. This is similar to the concerns expressed in relation to the factors listed in s.15 of the Trusts of Land and Appointment of Trustees Act 1996, where it was difficult for the courts and legal advisors to balance the impact of competing factors without development through case law. Comments such as in para 4.20 of the Consultation paper about failing to take into account one or more of the factors not *necessarily* amounting to a breach is unhelpful in this context and would not provide much comfort.

We, like the Commission, are not proposing that some factors are mandatory and others not, but the impact or weight of the various factors does need some consideration and guidance. We do not feel it is appropriate that this guidance be left to the Charity Commission to create post the enactment of any such list – it needs to be clear from the outset how such a structured discretion would operate.

We invite the views of consultees as to whether the following, or other, factors should be included in such a statutory checklist:

- (1) the anticipated overall benefit from the social investment;
- (2) the duration of the social investment;
- (3) the risks of the social investment failing or under-performing;
- (4) how the performance of the social investment will be monitored;
- (5) whether and how often the social investment will be reviewed;
- (6) whether the charity trustees should obtain advice from a suitable person on all, or any aspect of, the social investment and, if so, the substance of that advice;
- (7) the relationship between the social investment and the charity's overall investment portfolio (if any) and its spending or grant-making policies; and
- (8) any other relevant factors.

Consultation Paper, Chapter 4, paragraph 4.22

While we will comment on some of the factors below, detailed consideration is best left to charities and practitioners.

(1) 'Overall benefit' would need definition, particularly to stress what sort of benefit beyond financial is permissible.

(2) We agree, to the extent that this compliments factors (1) & (3). Does it add anything on its own?

(3) Essential, although clear guidance would be needed about how to assess the risk, given the special nature of a social investment (seeking to achieve both financial return and a charitable purpose).

(4), (5) & (6) replicate the essential compliance features of the general duties under the Trustee Act 2000, but seem more nuanced towards the special requirements of social investments. Again, appropriate guidance would be needed in (6) about what level of expertise would allow trustees to discharge the duties, having in mind that this a specialised form of investment.

(7) This is welcome, but should emphasise that it might be permissible for a specific social investment to be the dominant investment or spending by a charity, provided that it does not endanger the charitable purposes more widely.

(8) There are major tax considerations of social investments e.g. if they are not considered to be approved charitable investment within s.558 of the Income Taxes Act 2007, then they will be regarded as non-charitable expenditure within s.543 and liable to tax.

We provisionally propose that, when exercising the new statutory power to make social investments, charity trustees should not be required to comply with the duties under the Trustee Act 2000 to consider the standard investment criteria, to review investments periodically, and to consider obtaining advice.

Do consultees agree?

Consultation Paper, Chapter 4, paragraph 4.27

Yes, to the extent that such relevant criteria will be covered by factors (4), (5) & (6) above. It does create a separate regime for social investment; whether this is a problem may be gauged better by the reaction from the sector. Legally, it captures the distinct nature of both the investment and the particular context provided by charity law in which the investment operates.

We invite the views of consultees as to whether the requirements under the Trustee Act 2000 to consider the standard investment criteria, to review investments periodically, and to consider obtaining advice, should be excluded whenever trustees (in the technical legal sense) are making social investments.

Consultation Paper, Chapter 4, paragraph 4.33

Yes, on the basis that they are replaced and nuanced by factors (4) to (6). The requirement to comply with both sets of criteria would add unnecessary confusion, and would not add any additional safeguards.

Of course, the comments here and to the previous question assume that a checklist will be enacted. If not, the relevant duties under the Trustee Act 2000 would continue to apply and the concerns noted in para 3.75 - 3.78 of the Consultation paper would remain unaddressed.

We invite the views of consultees as to whether the current law concerning the use of permanent endowment to make social investments is satisfactory. If consultees consider the law to be unsatisfactory, we invite their views as to how the law should be reformed.

Consultation Paper, Chapter 5, paragraph 5.33

No particular views, as we believe that the legal principles governing permanent endowment do not impact on social investment particularly.