

18th June 2014

Dear Professor Cooke,

**Re: Law Commission Consultation Paper No. 216: Social Investment by Charities
Response from the UK Sustainable Investment and Finance Association (UKSIF)**

Thank you for the opportunity to respond to this consultation paper. UKSIF welcomes the Commission's paper on social investment and is also pleased to note more generally the current Government's commitment to encouraging the kind of investment which aims to achieve a positive social outcome as well as a financial benefit.

Our response draws on member feedback as well as some of our previous submissions to consultations including our responses to the Charity Commission Consultation on "*Charities and Investment Matters*" in January and February 2011.

This submission focuses on the first half of the paper as we feel we have insufficient expertise to fully answer the questions on the Trustee Act 2000 and the use of permanent endowments to make social investments.

We agree with the Commission that the current law governing social investment by charities does not do enough to give trustees the confidence to make social investments. Feedback from our members indicates that the provision of a new statutory power and checklist would be helpful.

However, we believe that any new legislation or regulation must be shaped in consultation with HMRC as there are significant concerns among the charity trustee and investor community about the risk that social investments may be deemed, after the event, to be 'non-qualifying' investments.

About UKSIF

The UK Sustainable Investment and Finance Association (UKSIF) supports the UK finance sector as a global leader in advancing sustainable development through financial services. We promote and support responsible investment and other forms of finance that advance sustainable economic development, enhance quality of life and safeguard the environment. We also seek to ensure that individual and institutional investors can reflect their values in their investments.

We have approximately 250 members including charity foundations and other charity-focused organisations, pension funds, asset managers, financial advisers, investment banks and NGOs.

Our answers to the consultation questions are below.

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

We believe that mixed-motive investments or 'social investment' i.e. investments which aim not only at achieving some kind of financial return but also a social impact, can be a valuable tool for a wide range of

organisations and individuals. This is particularly the case for charities, where social investment products can provide a further opportunity to contribute to their charitable purposes, as well as maximising what are often relatively limited resources.

We believe that although the current law does nothing to actively discourage charities from making social investments, it provides insufficient certainty for charity trustees. Charity trustees are often volunteers who come from a wide variety of background; our members tell us that while there are “quasi-professional” charity trustees with investment and other relevant backgrounds who feel confident in making decisions about mixed-motive investments, there are others who are pressed for time or without an investment background who currently feel uncertain of their duties and the scope of their powers involved in making these kinds of investments.

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

Although we believe that CC14 has been useful in providing guidance on a wide variety of investment matters to charity trustees, it is less clear and less ‘grounded’ in case law on social investment than it is elsewhere – for instance, on conflicts of interest. We understand from our members – including those investment firms with charities as clients – that it is in part the lack of solid case law on social investment issues that deters some trustees and their legal advisors from making social 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?

Yes. Although CC14 does give both a ‘power to spend’ and a ‘power to invest’ to trustees, it is insufficiently clear where social investment falls. A statutory power would, we believe, be helpful in providing more charity trustees with the confidence to undertake mixed-motive investments.

Although we think that a statutory power and a checklist would be helpful, we would like to emphasise the need for any proposals to be designed and implemented in full consultation with HMRC. There is currently some nervousness that charity trustees may leave themselves open to action from HMRC if a social investment they have made is regarded, after the event, to be a ‘non-qualifying’ investment.

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?

Yes.

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

Yes, our conversations with members – many of whom actively engage with charity trustees on these issues – indicate that a checklist would be helpful.

We are aware that there are concerns from some in the charity trustee community that such a checklist is considered to be unnecessary and place an unwelcome burden of complexity upon trustees who should be ‘trusted’ to exercise any statutory powers as they see fit in the best interests of the charity. However, we think that such fears would be outweighed by the potential usefulness of a ‘checklist’ both in giving

confidence to trustees and help ensure they consider a range of relevant factors when deciding their mixed-motive investment strategy.

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.**

We think that these factors look reasonable and cover a broad range of issues. However, the relationship between a given social investment and a charity's stated mission, values and purpose is an important one and, we believe, a primary advantage and motivation for social investment. We would therefore recommend that the checklist draw this out more clearly by including a duty *"to examine the relationship between the social investment and the charity's overall mission, values and purpose"*.

Our members also tell us that it is important that social investments, like any other investment, be monitored carefully and reviewed on a regular basis. In our view, the checklist as currently stated above does not sufficiently emphasise this and we would recommend that any re-wording take this into account.

I trust that the comments above are self-explanatory and hope that you will not hesitate to contact us if you would like any further information or have any queries.

Kind Regards,



Simon Howard
Chief Executive
The UK Sustainable Investment and Finance Association (UKSF)