29 September 2016

Neil Scott
Head of Professional Standards
Pensions Management Institute
PMI House
4-10 Artillery Lane
London E1 7LS

Dear Mr Scott,

Diploma in Pension Trusteeship Consultation

I am writing to you in my capacity as Chief Executive of the UK Sustainable Investment and Finance Association (UKSIF) regarding the recent joint PMI and Association of Professional Pension Trustees consultation on a new Diploma in Pension Trusteeship (DPT). The consultation is timely and follows various financial and legal developments over the past few years. Our response will focus on the investment management section of the syllabus and more specifically on responsible investment.

UKSIF is the membership network for sustainable and responsible financial services in the UK. We promote and support sustainable and responsible investment (SRI) 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. UKSIF was created in 1991 to bring together the different strands of sustainable and responsible finance nationally and to act as a focus and a voice for the industry. We have around 240 members and affiliates including financial advisers, institutional and retail fund managers, pension funds (including local government schemes), banks, research providers, consultants and NGOs.[1]

1. The need for qualifications for professional trustees

Professional trustees can improve trustee board effectiveness and we welcome TPR's research which shows a correlation between the increasing professionalisation of the industry and increased governance standards.[2] In general professional trustees are expected to operate to a higher standard and are considered to be specialists. Given the trend TPR research has outlined, greater scrutiny of the profession may be helpful and a qualification is one way to achieve this. Since professional trustees hold themselves out to be experts and receive remuneration for their expertise they should be able to demonstrate this. Achieving appropriate qualifications would be helpful in enabling professional trustees to exhibit such expertise, and as Andrew Warwick-Thompson has stated, TPR "expects higher standards of professional trustees and this qualification would help professional trustees demonstrate their knowledge and commitment."[3]

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[1] For more info about UKSIF, please visit www.uksif.org.
[2] TPR and OMB Research, Trustee Landscape Quantitative Research, available at http://www.thepensionsregulator.gov.uk/docs/trustee-landscape-quantitative-research-2015.pdf
[3] Press release, PMI and APPT to launch joint consultation to introduce Diploma in Pension Trusteeship, available at https://www.pensions-pmi.org.uk/news-and-publications/pmi-and-appt-launch-joint-consultation-to-introduce-diploma-in/

The ever changing nature of financial risk and the acknowledgement by trustee boards that the most significant knowledge gaps are understanding of pension scheme investments, pension law and the roles and responsibilities of trustees are two key reasons to introduce mandatory qualifications for professional trustees and ongoing training for all trustees. In our recent policy submission on 21st Century Trusteeship and Governance we called on TPR to introduce such a qualification, on the understanding that it would be regularly updated to reflect the changing nature of pension regulation.[4]

2. Proposed amendments to the PMI syllabus

In our view the syllabus for the PMI qualification should be updated to reflect legal, regulatory and sector developments. It is vital to ensure trustees are not taught in outdated practices. As we go on to discuss in section 5, responsible investment is clearly becoming mainstream and it is important professional trustees understand it. We also discuss in section 6 the reasons that legal clarification of the concept of fiduciary duty may not be enough to ensure trustees adequately understand their responsibilities.

The DPT assumes that individuals have a level of knowledge and understanding necessary to complete the Trustee Toolkit and the PMI Award in Pension Trusteeship (APT). It is therefore important both of these standards reflect the current state of the law. TPR has already updated its Trustee Toolkit to reflect the Law Commission's report, it is our view that the PMI should also update the APT to reflect this thinking. Specifically, there are three areas we think require changes.

First, TPR has considered the Law Commission report on trustees' fiduciary duties important enough to summarise and directly link to in its investment governance 'how to' guide.[5] Legal clarification on the concept of fiduciary duty is welcome and we discuss this more in section 4. We note the expectation in the APT syllabus that trustees have an ability to summarise the Myners principles for the governance of the investment decision making process. We see no reason why a similar expectation should not be placed on trustees in relation to trustees' fiduciary duties (in both the APT and DPT) given the prominence given to it by TPR and the implicit expectation that trustees should understand their own legal duties.

Second, in respect of the *Investment Management* chapter there are three changes we would like to see made ahead of the introduction of any qualification.

1. The summary in TPR's investment governance 'how to' guide states that:

    - [Trustees] should take into account factors which are financially material to the performance of an investment.
    - Where [trustees] think environmental, social and governance (ESG) issues are financially significant you should take these into account. Likewise if [trustees] think certain ethical issues are financially significant.

[4] UKSIF response to TPR consultation 21st Century Trusteeship and Governance, available at http://uksif.org/wp-content/uploads/2016/09/UKSIF-21st-Century-Trusteeship-consultation-FINAL.pdf

[5] Page 7

UK Sustainable Investment and Finance Association • www.uksif.org • Tel 020 7749 9950
83/84 Salisbury House, 29 Finsbury Circus, London, EC2M 7AQ
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- While the pursuit of a financial return should be [trustees'] main concern, the law is sufficiently flexible to allow [trustees] to take other, non-financial concerns into account if you have good reason to think that scheme members share [trustees'] view and there is no risk of significant financial detriment to the fund.

We therefore think it would be extremely helpful for professional trustees to understand this and we would welcome the inclusion of a section in which it is covered. Particularly important is TPR's expectation that trustees understand financially material factors (including where these arise from ESG factors) and non-financial factors, including consideration of how the views of scheme members may be gauged.

2. The section on *Sustainability* in TPR's investment governance 'how to' guide states '[trustees] should bear in mind that most investments in DC schemes are long-term and are therefore exposed to the longer-term financial risks. These potentially include risks relating to factors such as climate change, unsustainable business practices, unsound corporate governance etc. These risks could be financially significant, both over the short and longer term. [Trustees] should therefore decide how relevant these factors are as part of the investment risk assessment. [Trustees] could ask the investment manager(s) and investment adviser for help with this'. A section on sustainability which covers these and other relevant issues should be welcomed and would better enable trustees to have the appropriate conversations with investment advisers that TPR has explicitly recognised as being best practice.

3. TPR's communication 'how to' guide is clear when it states in reference to the SIP 'we also consider it best practice to include information about your policies in relation to long term sustainability, stewardship and non-financial factors'. It would therefore be extremely helpful for inclusion in the syllabus of these aspects to better enable professional trustees to understand these expectations.

Finally, we would welcome an amendment in the section on *Other relevant scheme documents*. TPR recognises that most schemes will have their stewardship activities undertaken by the investment manager. Currently the syllabus covers the contents of stewardship reports and the ability to analyse those reports. We would urge the PMI to encourage trustees to be less reactive to stewardship, in-line with TPR's expectations. In the section on Investment Stewardship in its investment governance 'how to' guide, TPR states:

'We would encourage you to become familiar with your managers' stewardship policies and where appropriate, seek to influence them. For some schemes a formal scheme stewardship approach may be appropriate (eg by following the principles set out in the UK Stewardship Code – see link below), particularly where your scheme holds a significant amount of assets. Good stewardship includes the exercising of rights attaching to investment, such as the voting rights attached to shares. Where practicable you may wish to agree specific voting criteria with your investment managers. Services that provide analysis and voting recommendations are available and can assist you in setting criteria. Where you don't agree specific voting criteria with your investment managers, you might still wish to ask them questions like:

- Who is their proxy voting adviser?
- How often have they disagreed with their adviser's recommendations, and are there are particular issues on which they consistently disagreed?
- Are there any instances where they did not cast votes at all – for example in specific markets – and why?'

There is no reference to the UK Stewardship Code, to trustees agreeing specific voting criteria with investment managers, or the proactive approach to stewardship envisaged by TPR.[6] It is essential the syllabus is updated to reflect these expectations.

4. Progress in clarifying fiduciary duty

Over the past few years there have been several developments relating to responsible investment. The Kay Review in 2012 highlighted short-termism as a key obstacle to well performing equity markets and identified an unclear definition of the legal concept of fiduciary duty as being a significant part of the problem. Following this, the Law Commission was asked to report on the fiduciary duties of investment intermediaries i.e. pension fund trustees, and found that trustees *should* take financially material concerns into account such as those stemming from environmental, social and governance (ESG) factors.[7] The report also highlighted the benefits of good stewardship of and investor engagement with underlying assets and confirmed trustees are able to consider non-financial factors in certain situations.

The Pensions Regulator (TPR) recently updated its code of practice for defined-contribution (DC) pension schemes. As already mentioned, alongside this revision it published six accompanying documents, or "how to" guides on a range of topics. We particularly welcomed the "how to" guide on investment governance which outlines the Regulator's expectations with regard to the incorporation of ESG factors.[8] For the first time from a governmental or regulatory body this dispels the still widely-prevalent myth that trustees' fiduciary duties act as a barrier to consideration of ESG factors and reflects the Law Commission's 2014 report: Where these factors are financially material they *should* be taken into account. It also clarifies that in certain cases non-financial factors may be considered and encourages trustees to familiarise themselves with and to influence stewardship policies. Although these changes have at this stage been confined to defined contribution schemes, we expect the regulator to publish overarching guidance and similar expectations to be placed on trustees in defined benefit schemes.

These developments are welcome because they will in time replace increasingly outdated investment concepts, in particular with regard to investment policies on social, ethical and environmental (SEE) factors. The Law Commission acknowledged the confusion created by SEE factors and particularly the distinction between ESG and ethical factors. Consultees including NEST,

[6] https://www.frc.org.uk/Our-Work/Codes-Standards/Corporate-governance/UK-Stewardship-Code.aspx
[7] Law Commission, Fiduciary Duties of Investment Intermediaries, report available at http://www.lawcom.gov.uk/wp-content/uploads/2015/03/lc350_fiduciary_duties.pdf
[8] TPR, Defined Contribution Code of Practice, Investment Governance Guidance, available at http://www.thepensionsregulator.gov.uk/trustees/investment-management-in-your-dc-scheme.aspx

the ABI and the NAPF explicitly focussed on the need to change the Investment Regulations to tackle this uncertainty and this was ultimately recommended by the report.[9] The Government instead opted to provide clarity through The Pensions Regulator, first in trust-based defined contribution pensions via the DC code revision and it has now indicated it will look to clarify rules for trustees of defined-benefit schemes by the end of the year. The clarification now comes in the form of the concept of financially material factors, which trustees *should* take into account, and the concept of non-financial factors, which trustees may take into account. [10] It is therefore essential that PMI and APPT take this opportunity to introduce an updated syllabus reflective of the Law Commission's assessment (and not refer to SEE factors) and TPR's own investment governance guidance to ensure professional trustees aren't left behind in terms of investment knowledge and understanding.

5. Responsible investment becoming mainstream

The Law Commission and TPR developments are welcome, but there has been regulatory progress in responsible investment in a range of other areas in the UK and internationally. Responsible investment is clearly becoming mainstream and it is important the DPT syllabus recognises this and enables professional trustees to stay ahead of the curve. To summarise, this includes:

- The second Institutions for Occupational Retirement Directive as currently drafted explicitly refers to ESG factors in a range of articles. Most significantly, Article 32 requires statement of investment policy priorities, i.e. a public statement which includes how the investment policy takes ESG factors into account. Despite Brexit it appears very likely the UK will adopt this Directive. <u>That means that all pension funds, not just those that are trust-based, will be required to have investment policies which detail how ESG factors are taken into account during the investment process.</u> This is therefore relevant both to members of pension fund trustee boards and members of IGCs, to whom this qualification is directed.
- Internationally, some jurisdictions have taken great strides in terms of responsible investment particularly with regard to better understanding fiduciary duties and the incorporation of ESG. In the US the Department of Labour issued updated guidance that confirmed ESG factors may be financially material and are valid considerations for fiduciaries in investment analysis.[11] France has introduced measures which require investors to report on how they integrate ESG factors into their investment policies and also on how climate change considerations are incorporated.[12]
- The latest regulations for new LGPS funds replace the Statement of Investment Principles with a new Investment Strategy Statement (ISS).[13] DCLG is clear that authorities will be

[9] Law Commission report, p7.81
[10] Provided trustees have good reason to think the non-financial concern is shared by the membership and there is no risk of significant financial detriment to the fund.
[11] US Department of Labor press release, October 2015, available at https://www.dol.gov/opa/media/press/ebsa/ebsa20152045.htm
[12] IPE, *France aims high with first-ever investor climate-reporting law*, 1st February 2016, available at https://www.ipe.com/countries/france/france-aims-high-with-first-ever-investor-climate-reporting-law/10011722.fullarticle
[13] DCLG, Revoking and replacing LGPS (Management and Investment of Funds) Regulations 2009 consultation, available at

expected to take 'a prudential approach, demonstrating that they have given consideration to the suitability of different types of investment, have ensured an appropriately diverse portfolio of assets and have ensured an appropriate approach to managing risk.' [14] The ISS requires authorities to state their policy on ESG, and the Government is explicit on its expectations of LGPS funds: 'The law is generally clear that schemes should consider any factors that are financially material to the performance of their investments, including social, environmental and corporate governance factors'.[15] Administering authorities are now also expected to state their policy on voting and their approach to risk, including how it will be measured and managed. The new guidance states that 'engagement enables administering authorities as long-term shareholders to exert a positive influence on companies… and drive improvements in the management of environmental, social and corporate governance issues'.

- Elsewhere, interest in responsible investment has also been increasing for both the public and the financial services sector. UKSIF polling commissioned for Good Money Week 2015 showed that 54% of people with savings want to make "a positive difference" as well as a return. For millennials, 58% wanted to invest their savings in companies that achieve positive social outcomes. Our research shows a clear demand for products that enable individuals to save in-line with their values and with an extra 9 million savers by the end of the decade with DC pension pots, we expect this demand to crystallise. Trustees cannot afford to be behind the curve on this and must understand their legal duties and responsibilities in relation to the wants of this growing cohort of investors.
- The main UK pension fund member association has recognised the importance of ESG: In its recent *ESG Made Simple* guide, the Pensions and Lifetime Savings Association state that 'ESG is not at the expense of performance… Regulators will not lie idle. ESG regulation will continue and will drive change which in turn will impact corporate and investment performance'.[16]
- Many pension funds already understand the importance of responsible investment, including ESG integration and stewardship activities and many of these have joined organisations such as UKSIF and the Principles for Responsible Investment or signed up to the UK Stewardship Code as evidence of this.

6. Legal clarity and sector advances may not be enough

Legal clarity on the concept of fiduciary duty has started to be provided by regulators, first in the form of the DC code of practice, and soon for all trust-based pension schemes which fall under its remit, as we have discussed. This is welcome news and will go a long way to ensuring decisions made

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/479642/Consultation_on_investment_reform.pdf
[14] LGPS consultation, p3.3-3.4
[15] DCLG, LGPS Guidance on Preparing and Maintaining an Investment Strategy Statement, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553342/LGPS_Guidance_on_Preparing_and_Maintaining_an_Investment_Strategy_Statement.pdf
[16] PLSA, *Environmental, social and corporate governance made simple*, May 2016 available at http://www.plsa.co.uk/PolicyandResearch/DocumentLibrary/~/media/Policy/Documents/0585-Environmental-Social-and-Corporate-Governance-ESG-Made-Simple.pdf

by trustees are legally sound and ultimately that the pension funds themselves are financially stronger.

However there has been suggestion that this in itself may not be enough. Legal clarity and advances in the sector have been significant factors in responsible investment becoming mainstream, but there are still some obstacles and we have seen evidence that some trustee boards may not consider responsible investment to be relevant to their schemes. This may be for a variety of reasons including that their scheme is too small, that issues such as climate change are 'overblown nonsense', or that ESG concerns are not financially material.

On the first point we would emphasise that responsible investment is not the preserve of large schemes and we would argue that an updated DPT syllabus would help make this clear. Getting fund managers to take account of ESG factors should not necessarily be obstructed by limited governance budgets or knowledge gaps. Looking at the scheme's investment principles may be the starting point, and the Global Head of Responsible Investment at First State, Will Oulton, has argued that "for small schemes in pooled funds [the investment principles] can say: 'The scheme and trustee believes ESG issues are important. Therefore we expect our investment managers to take these into account in the assets they manage'".[17] Schemes of all sizes are able to "do" responsible investment in some form, it is a lack of understanding, not the resources of the scheme, which is the obstacle.

Second, in August a survey of 101 trustees, scheme managers and pension professionals found that more than half did not consider climate change to be a financially material factor, with at least one respondent describing risk from climate change as 'overblown nonsense'.[18] This was staggering given the fact that the Paris Agreement resulted in an international deal to limit global average temperatures to 2°C and the amount of research into the concept of stranded assets that could occur as a result.[19] According to research by Carbon Tracker, to have a chance of not exceeding the 2°C limit between 60-80% of coal, oil and gas reserves of publicly listed companies are 'unburnable'. This will have a significant tangible effect on the valuations of fossil fuel intensive assets and this risk crystallised this year when Peabody filed for bankruptcy.[20] Although this was probably the most high profile case, it was the fiftieth coal company to file for bankruptcy since 2012.

Climate risk is real and material and has been identified as such by the Governor of the Bank of England (Mark Carney has also been instrumental in setting up a new taskforce geared towards

[17] Professional Pensions, *How trustees of small schemes can champion ESG*, available at http://www.professionalpensions.com/professional-pensions/feature/2470436/how-trustees-of-small-schemes-can-champion-esg
[18] Professional Pensions survey, 22nd and 23rd August, more information available at http://www.professionalpensions.com/professional-pensions/news/2468851/climate-change-is-overblown-nonsense-and-not-a-material-risk-says-industry
[19] More information on stranded assets is available at http://www.carbontracker.org/report/unburnable-carbon-wasted-capital-and-stranded-assets
[20] Forbes, *Peabody Bankruptcy Offers Stark Warning To Oil And Gas Groups Of Risks Of Ignoring Climate Change*, http://www.forbes.com/sites/mikescott/2016/04/14/peabody-bankruptcy-offers-stark-warning-to-oil-and-gas-groups-of-risks-of-ignoring-climate-change

standardised climate reporting for companies to aid investors).[21,22,23] Despite this the Professional Pensions survey showed nearly one-third of respondents felt the main barrier preventing climate risk being taken into account was a lack of perception on trustee boards that climate risk is a sufficiently high risk factor. We note and support recent calls from the sector for a focus on education for investment decision makers on the materiality of climate risk and how it can be managed and their legal duties in relation to it.[24] The DPT represents an excellent opportunity for this to begin.

Finally, while climate risk is one of the most prominent concerns for responsible investors, the financial materiality of other environmental, social and governance factors is also clear. Poor corporate governance standards led to the 2015 emissions scandal at Volkswagen. It caused the company's value to drop by a third in the weeks following the event and the company is now facing damages claims from investors of around £7bn.[25,26] Losses stemming from social factors such as poor working conditions have continued to plague sports retailer Sports Direct over the past twelve months. These social risks had crystallised by March, with the company estimated to have had £400m wiped off its value.[27]

Aside from the individual examples mentioned, research has proved the materiality of ESG factors for companies and investors. A recent report by the University of Oxford and Arabesque Partners is clear on ESG: 'It is in the best interests of institutional investors and trustees, in order to fulfil their fiduciary duties, to require the inclusion of sustainability parameters into the overall investment process'. It also concludes that on stewardship: 'Investors should be active owners and exert their influence on the management of their invested companies to improve the management of sustainability parameters that are most relevant to operational and investment performance.'[28]

TPR's work is exceedingly useful in providing legal clarity, but without proper education on the regulator's expectations, the impact of the new code of practice and guidance will be limited and professional trustees will be learning outdated ways of doing investment. This issue is further compounded when consideration is given to a recent study which shows that 'group think' may be

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[21] Mark Carney "tragedy of the horizon" speech to Lloyds of London, September 2015 available at http://www.bankofengland.co.uk/publications/Pages/speeches/2015/844.aspx
[22] Financial Time, *Mark Carney lays out vision for 'green' global growth*, September 2016 available at https://www.ft.com/content/741131f0-80ef-11e6-8e50-8ec15fb462f4
[23] More information available at https://www.fsb-tcfd.org/
[24] ShareAction and Client Earth, Investor Report: The hot debate on climate risk and pension investments: Does practice stack up against the law?, September 2016 available at https://shareaction.org/wp-content/uploads/2016/09/ClimateInvestmentDuties-InvestorReport.pdf
[25] Business Insider, *The Lance Armstrong of Automakers*, September 2015, available at http://uk.businessinsider.com/volkswagen-emissions-scandal-could-set-back-entire-car-industry-say-analysts-2015-9
[26] BBC, *VW hit by flood of new lawsuits in emissions scandal,* September 2016 http://www.bbc.co.uk/news/business-37429466
[27] Sky News*, Sports Direct sees £400m wiped off value,* March 2016 available at http://news.sky.com/story/sports-direct-sees-163400m-wiped-off-value-10216047
[28] Oxford University and Arabesque Partners, *From the Stockholder to the Stakeholder,* 2015 available at http://www.arabesque.com/index.php?tt_down=51e2de00a30f88872897824d3e211b11

prevalent on DB trustee boards which can result in an over reliance on investment consultants.[29] The study showed that 42% of trustees had never challenged the advice of their investment consultant and only 22% appoint a devil's advocate to argue the alternative perspective to the board. Again, we feel an updated syllabus reflective of current investment thinking would be an excellent way to alleviate this problem. As the Law Commission make clear, 'it is for trustees' discretion, acting on proper advice, to evaluate [ESG] risks'.[30] We do not expect professional trustees necessarily to be experts in responsible investment, only to have the capacity to challenge their advisers where appropriate.

7. Best Practice for Trustees

As part of its 25th Anniversary, UKSIF published a report on fiduciary duty for pension fund and charity trustees. We outlined our expectations of best practice given recent legal and regulatory developments in the responsible investment space. It is worth noting this report preceded both the most recent draft of the IORPs2 Directive and TPR's DC code of practice revision. Given the advances in thinking here these expectations of best practice are more relevant than ever. In summary, it is our expectation that trustees should:

- State in their SIP and in reports to stakeholders how they and their agents consider ESG issues, including how they are identified and managed;
- State in their SIP and in reports to stakeholders their approach to investment in industries or places that may be associated with unethical conduct, to investment in local infrastructure and social impact investment and how they intend engage with members to gauge ethical views where necessary;
- Sign the Stewardship Code or explain why this was considered to not be relevant to them and ask their agents to do the same;
- Annually publish their approach to stewardship including how they comply with the principles of the code;

These expectations are not based on idealistic principles but on legal, regulatory and sector developments over the past few years. An updated DPT syllabus which reflects these developments will be hugely beneficial to professional trustees and enable them to do their jobs to the standards now expected.

[29] SEI, IFF Research and Dr Iain Clacher (Leeds University) January 2015, more information available at https://www.seic.com/enUK/about/16880.htm
[30] Paragraph 6.32

I trust the above information is clear. We would be very happy to meet you to discuss the points raised, or if you have any questions or comments please feel free to contact me via fergus.moffatt@uksif.org.

Yours sincerely,

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