



SOCIAL INVESTMENT BY CHARITIES

ICAEW welcomes the opportunity to comment on the consultation paper *Social investment by charities* published by the Law Commission on 24 April 2014, a copy of which is available from this [link](#).

This ICAEW response of 27 June 2014 reflects consultation with the Charities technical subcommittee of the ICAEW Business Law Committee. The Business Law Committee includes representatives from public practice and the business community and is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.

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GENERAL COMMENTS

We have answered the questions in the consultation as representing the views of our members working with and for charities, as trustees, staff members, accountants in public practice, and other stakeholders. Our responses are therefore given from a general and practical standpoint, rather than on the basis of detailed legal consideration.

In particular, we are concerned that charity trustees will not commit to social investment while its tax treatment remains unclear. This uncertainty is likely to continue as long as HMRC is unwilling to provide advance clearances as indicated in paragraph 6.9 of the consultation paper.

We note that it is very difficult to make social investments, such as in social enterprise funds, outside the stated objects of the charity. Given the difficulty of changing the objects clause, these proposals for reform of the law governing social investment by charities are welcome but may be academic for many charities.

RESPONSES TO SPECIFIC QUESTIONS

Q1: We invite consultees' comments on whether the current law governing social investment by charities is satisfactory.

No, we do not consider the current law governing social investment by charities to be satisfactory.

Q2: We invite consultees' comments on the Charity Commission's guidance in CC14

We consider that CC14 is helpful up to a point but the guidance could be improved. We suggest that the Law Commission might be able to assist the Charity Commission in drafting changes to the guidance.

Q3: 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. We support the creation of a new statutory power to make social investments, not least in order to protect the legality of decisions by charity trustees.

Q4: 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.

Q5: 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?

We agree that a checklist of factors for charity trustees to consider would be helpful. However, we consider that the checklist should function as guidance (for example in a suitably updated version of CC14) rather than becoming a legal requirement.

Q6: 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.

Subject to our comments in reply to question 5 above, the sort of considerations listed at (1) to (7) should be implicit in any Trustee Board deliberations when a social investment is proposed. The final point (8) illustrates the major drawback of having a statutory checklist: a requirement to consider "any other relevant factors" is circular and unenforceable. The checklist would sit much more easily in guidance such as CC14, where the 7 specific considerations could be listed (and expanded if necessary) as examples of the points that trustees should bear in mind.

Q7: 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?

Yes.

Q8: 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.

The difficulty with this question is that their duty of care requires trustees to seek advice on matters that are outside their area of knowledge and experience. However, there is no obvious source of independent, authoritative advice on making social investments so there may be no-one for the trustees to consult. In these circumstances addressing point (6) in the 'checklist' above will enable the trustees to demonstrate the proper discharge of their duty of care.

Q9: 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.

We consider that the current law concerning the use of permanent endowment to make social investments is satisfactory.