Charities, climate change and investments

A coalition of leading charities, supported by Bates Wells, is seeking a landmark ruling on charity trustee investment responsibilities.

Luke Fletcher summarises the steps being taken to bring the law and guidance up to date.

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In October 2018, experts from the UN Intergovernmental Panel on Climate Change (IPCC) warned that the world's governments have 11 years to limit the global temperature rise to 1.5 degrees Celsius from pre-industrial levels. A 1.5 degree world, we are told, would lead to catastrophic climate breakdown affecting billions of people and species across the world.

The IPCC's warning has inspired widespread calls to action, with climate change protests taking place across the globe.

The coalition

Similarly inspired by the climate change debate, a growing coalition of leading charities, NGOs and faith groups has come together to ask the Charity Commission to act. In early March 2019, the coalition sent open letters, drafted by Bates Wells, to the Charity Commission and Attorney General asking them to refer important questions on trustee investment duties to the Charity Tribunal.

The coalition is seeking a landmark ruling on whether charities should ensure their investments support their objects and their duty to provide public benefit. The coalition is also looking for specific legal guidance on whether charities should invest in companies that contribute to dangerous climate change; noting that temperature rises above the IPCC target of 1.5°C present substantial risks to the overall economy and may undermine the very aims many charities exist to achieve.

The unsatisfactory legal position

Charity Commission guidance for trustees on investment matters (CC14) is based on the judgment in the landmark Bishop of Oxford case, which was handed down in 1991. This was at a time before climate change was an important public policy issue and before charities were seriously wrestling with questions about whether their aims could be undermined by their investments, not only in companies with carbon-intensive activities, but also those offering payday loans or marketing high-sugar foods to children.

The coalition argues that the Bishop of Oxford case has been overtaken by a vast increase in scientific evidence about the impacts of climate change, as well as important legislative, policy and market developments.

'At the heart of the call for a reference is the coalition's recognition that the current situation is deeply unsatisfactory. Charity trustees wishing to review their investment policy in line with their public benefit obligations and current market practices are faced with outdated case law and uncertain guidance.'

For example, the statutory power for charity trustees to carry out social investment, introduced by the Charities (Protection and Social Investment) Act 2016, allows trustees to consider the degree to which an investment advances charitable objects when making investments.

The Charity Commission's own recent Statement of Strategic Intent states that the commission must 'ensure that charities show they are being true to their own purposes, can demonstrate the difference they're making, and meet the high expectations demanded by the public'. Public opinion is changing: there is a growing recognition of the crucial need to change behaviours and identify different investment and other mechanisms through which climate change – a matter of the greatest public interest – can be tackled.

A reference to the Charity Tribunal

Under section 325 of the Charities Act 2011, the Charity Commission, with the consent of the Attorney General, can refer questions of charity law to the Charity

Tribunal. The Attorney General has a similar power to make a reference. The coalition is asking the Charity Commission – and the Attorney General – to use these powers to refer questions surrounding trustee investment duties to the tribunal.

The Charity Commission gives guidance to charities, but is unable to pronounce definitively on the nature of the law governing the duties of trustees. The Charity Tribunal exists to clarify important aspects of charity law and is thus the best forum to grapple with these issues and to assess the arguments and evidence in providing an authoritative and independent view.

A judgment of this kind, in the coalition's view, would give charities the legal certainty to allocate greater investment into responsible and sustainable investments should they choose to do so, and to reconsider their investment policies. It would form a sound foundation for the Charity Commission to revisit its guidance.

What next?

At the time of writing, the Charity Commission has published an interim response to the coalition's letters. The response indicates that the commission is sympathetic to calls for greater clarity for trustees, but states that a reference 'could be costly, time-consuming and its outcome, by definition, uncertain' and that there are other options to consider. It is the coalition's view that the cost and effort involved in seeking a view from the tribunal is considerably outweighed by the benefit of obtaining an authoritative summary of the law and of how it should be applied today – as opposed to an arguable or potentially challengeable interpretation.

The coalition's primary objective is for the Charity Commission to make the reference directly, and it is willing to support the Charity Commission in every manner possible to obtain legal clarity on these difficult questions. If this is not achievable then the coalition is open to alternative

means of obtaining the urgently needed clarification.

The coalition is currently made up of more than 50 civil society organisations, and the numbers are growing. Its members include the RSPB, with around 1.2 million individual members, and NCVO, with approximately 14,000 civil society member organisations. The parties to the coalition together hold more than £2.5 billion in investments under management.

Coalition members have a range of approaches to responsible investment and joining the coalition does not commit them to supporting a particular position on how charities should invest.

At the heart of the call for a reference is the coalition's recognition that the current situation is deeply unsatisfactory. Charity trustees wishing to review their investment policy in line with their public benefit obligations and current market practices are faced with outdated case law and uncertain guidance. The coalition's aim is that trustees should have a clear understanding about how to comply with their legal responsibilities.

FIND OUT MORE

Our Call for New Landmark Judgment on Responsible Investment, and information on how to join the coalition is at **http://bateswells.co.uk/2019/03/call-for-new-landmark-judgment-on-responsible-investment-join-the-coalition-and-sign-up**

The commission's statement of strategic intent is at **https://www.gov.uk/government/publications/charity-commission-strategy-2018-2023/charity-commission-statement-of-strategic-intent-2018-2023**