

The Rt Hon Geoffrey Cox QC MP
Attorney General
5-8 The Sanctuary
London
SW1P 3JS

4 March 2019

Dear Attorney General

Charity Investments – Alignment with Objects – Request for a Tribunal Reference

1. Introduction

- 1.1 We are writing an open letter on behalf of a coalition of charity investors and other interested charities (the “Coalition”) who wish to see a reference to the Tribunal on the question of whether and how charities are expected to align their investments with their objects and their commitments to wider society, including what to do about forms of investment which conflict with charitable objects, particularly in the light of climate change.
- 1.2 We are writing to you as the Attorney General as you have the power to refer a question about the operation of charity law or its application to a particular state of affairs to the Tribunal or to consent to the Charity Commission making such a reference.
- 1.3 We set out in Appendix A to this letter a list of the charities which comprise the Coalition. Whilst members of the Coalition adopt and support a range of different approaches to responsible investment, the Coalition is united in the belief that the question of whether and how charities are expected to align their investments with their objects and their commitment to benefit wider society is a question of outstanding public interest that needs urgent resolution. The Coalition is of the view that the Tribunal is the best forum to assess the arguments and evidence and to provide an authoritative and independent view.
- 1.4 We set out in Appendix B to this letter an illustrative set of questions which are of the kind we believe should be put to the Tribunal for the purpose of a definitive ruling.

2. The Need for a Tribunal Reference

- 2.1 The rationale for making such a request is based on the following principles:
 - 2.1.1 **The relevant case law is outdated and insufficient** - the courts last considered this issue nearly 30 years ago in the Bishop of Oxford case. Whilst there is some comment in the case with respect to investments which conflict with objects and other bases for considering non-financial factors when investing, the issues were not considered at length and the status of these comments, which do not appear central to the decision, is ambiguous and unclear. Most urgently, clarity is needed in the context of investments in relation to climate change, which was not considered in the judgement in the Bishop of Oxford case, and so it

214266/0001/001583706

www.bwbllp.com

is especially unclear how a Tribunal would expect charity trustees to act lawfully in this context. The short time frame in which new responses need to be found to deal with the global threat of climate change, adds significant urgency to the need for a Tribunal decision.

- 2.1.2 Since the Bishop of Oxford case, there have been a number of other important legislative and other legal developments which suggests that a similar case today may have a different outcome or at least be seen by the Tribunal in a different light. The Charities Act 2006 removed any presumption that charities provide public benefit and placed an obligation upon the Charity Commission to issue guidance with respect to the public benefit test. It is unclear in law how the trustees of charities, which exist for public benefit, ought to interpret and apply their investment duties differently to investors of other descriptions. There is currently a risk that charity trustees misinterpret their duties and so there is an urgent need for clarification of the current legal position by the Tribunal;
- 2.1.3 **Climate change is developing and public opinion is changing** - there is growing recognition of the crucial need to change behaviours in the marketplace and identify different investment and other mechanisms through which climate change, a matter of the greatest public interest, can be tackled. With public focus intensifying on this issue, especially in the wake of the most [recent IPCC report](#), we suggest there is a major risk to trust and confidence in charities generally, given charities exist for public benefit, unless charities are seen to be responding to an issue of such national and international significance by investing responsibly and not simply following the general investment herd;
- 2.1.4 **OSCR has changed its guidance for charity investors** - there has been a recent recognition by OSCR that greater clarity was required in respect of charitable investments in order to give confidence to trustees in the application of their duties with respect to the investment of charitable funds. Following public and industry consultation, OSCR recently published its new guidance on charity investments, which stipulates the need for trustees to *make sure that investments are not inconsistent with the charity's purposes*. The guidance explicitly provides the example of a charity which decides to negatively screen out investments in fossil fuel companies, an example which is missing from current Commission guidance and a form of screen which is the subject of increasing debate; and; and
- 2.1.5 **CC14 is potentially misleading and needs to be more robust but there is a limit to the clarity which Charity Commission guidance alone is able to bring** – we believe that CC14 in its current form is potentially misleading, in that it fails to explain the potential for investments to conflict with charitable objects and fails to set out what charity trustees ought to do to assess the potential for conflict or what should happen if there is conflict. We believe that a Tribunal would conclude that charity trustees are in fact prohibited from making investments which directly conflict with their charitable objects. Guidance which merely refers to trustees being able to make investments which are not the most financially advantageous on account of wider considerations fails to address the fundamental point of law and is therefore deficient. Guidance cannot address this point whilst the law is unclear and only a reference to the Tribunal is able to create the legal clarity urgently needed.
- 2.1.6 Separately from the Tribunal reference, revised Guidance would have a role to play. There is therefore an opportunity for the Charity Commission to adopt a more robust approach to

regulation of irresponsible investment on the part of charities generally, particularly with a focus on climate change given recent scientific and policy developments. Such an approach would accord with the Charity Commission's Statement of Strategic Intent. The Commission is able to communicate how trustees should go about developing responsible investment policies which are consistent with their charitable objects and we believe there should be a much greater sense of expectation that charities will develop ethical policies and will consider the potential for conflict with charitable objects in doing so. However, we do not believe that there is any substitute for a Tribunal ruling which puts the question of the state of the current law beyond doubt and which provides an authoritative answer to what trustees should do about investments which conflict with objects, particularly in the light of climate change. We believe that a contemporary ruling would support the Commission, as it is extremely difficult to apply a near thirty year old case to the current context.

2.1.7 The alternative would be for a charity facing this difficulty to seek a declaration from the court as to the application of the law in its own case. In order to do this, the charity would need to seek the Commission's permission for charity proceedings, pursuant to section 115(2) of the Charities Act 2011. In those circumstances, the Commission is not permitted (without special reasons) to authorise the taking of charity proceedings where in its opinion the case can be dealt with by the Commission under the powers of the 2011 Act. It seems to us that this is a case which can be dealt with by the Commission under its power under section 325 to make a reference to the Tribunal and this course is preferable.

2.2 We elaborate upon each of these principles in greater detail in the rest of this letter.

3. **Seriously Outdated and Insufficient Case Law**

3.1 The case law with respect to charity trustee investment duties is insufficient as it does not address the questions which charity trustees face today when making investment decisions. It is also seriously outdated and so it is impossible to tell how a Tribunal or court would be likely to view charity trustee investment duties in the light of climate change or other contemporary forms of investments which may conflict with charitable objects, such as high cost credit or high sugar foods to name only two examples. The only way legal clarity can be provided about the nature of trustee investment duties and the steps which trustees should take today is for a Tribunal judgment to set out the law on trustee duties and to articulate the principles which trustees ought to consider and apply to resolve these issues.

The Bishop of Oxford Case

3.2 The question of the appropriateness of certain investments by charities was last considered in detail by the courts in 1991 when judgment was handed down in the [Bishop of Oxford](#) case, the landmark case on responsible investment, and some would argue the cornerstone of the responsible investment industry.

3.3 In 1991, the Bishop of Oxford sought a declaration from the court that the Church Commissioners of England, in their management of funds, were obliged to have regard to the object of promoting the Christian faith through the established Church of England and that they must not act in a manner which would be incompatible with that object. The court

declined to make these declarations, but the judgment contained some helpful guidance on the obligations of charity trustees in relation to “ethical investments”, which came to form the bedrock of approaches in the marketplace to responsible investment.

3.4 In particular, the court stated that there would be some cases (which the judge at the time thought would be comparatively rare) where the objects of a charity would conflict with certain types of investments and that, *“if, as would be likely in those examples, trustees were satisfied that investing in a company engaged in a particular type of business would conflict with the very objects their charity is seeking to achieve, they should not so invest... even if it would be likely to result in significant financial detriment to the charity”*.

3.5 The judge cited, in passing, the examples of cancer research companies and tobacco shares, trustees of temperance charities and brewery and distillery shares, and trustees of charities of the Society of Friends and shares in companies engaged in production of armaments. It seems highly likely that, if a court were to consider the question of conflict with objects today that a range of other forms of conflict would now be relevant and, in the light of climate change and the comprehensive nature of it, the potential for conflict now seems far from exceptional. It is profoundly unsatisfactory for charity trustees not to know where the line is drawn in terms of legality or how to approach this line (in terms of what form of evidence or advice needs to be taken into account when developing investment strategy).

Climate Change Not Considered

3.6 In 1991, the court did not consider the position of charity trustees in relation to carbon intensive assets or the nature or impact of climate change on trustee duties. The comments which the court made with respect to the potential for conflict also only appear to be obiter comments in the context of the case, as they appear to be made merely in passing. There is therefore a real need for a contemporary ruling to give these issues real consideration.

Intervening Legislative and Market Developments

3.7 The courts have not considered trustee investment duties since that case, and there have been other legal developments that suggest the case may be decided differently if considered by a court today. It is questionable for example whether the principles in the Bishop of Oxford case have to some extent been qualified, amended or even superseded to some degree by the introduction of statutory duties and responsibilities with regard to charitable investments imposed by the Trustee Act 2000, such as the duties to consider the need for diversification and ensure investments are suitable.

3.8 Similarly, the introduction of the statutory social investment power for charities in the Charities (Protection and Social Investment) Act 2016 expressly empowers trustees to consider the degree to which an investment advances charitable objects when making investments and essentially equates the interests of a charity with the degree to which an investment advances the charitable objects. The introduction of the 2016 Act and the nature of the statutory duties set out in the Act makes it much more likely that the law, properly decided, is that charity trustees ought to consider the relationship between their

investments and their charitable objects when setting investment strategy and that charity trustees are prohibited from making investments that conflict with charitable objects.

- 3.9 The rise of social investment and of impact investment as a phenomenon in the investment marketplace suggests that a court or Tribunal today, when considering the duties of trustees, would be far more likely to pay heed to the positive and negative impacts which different forms of investment have on wider society and the environment and, in our view, suggests that a court would be more likely to be sympathetic to the argument that charities ought to minimise negative harm or “disbenefits” arising from investments, particularly in light of the public benefit test and its application in the context of investment activity.

4. Climate Change Developments – Changing Public Opinion

- 4.1 Today, in the light of the [recent IPCC report](#) and the need to reduce greenhouse gas emissions to “net zero”, there is a need for investors to support a dramatic energy transition over the next three decades in order that global warming be limited to 1.5°C above pre-industrial levels.
- 4.2 It is debatable how best to achieve this energy transition but an increasing number of charity investors believe that the only way to achieve this change is for there to be mass divestment from carbon intensive investments and reinvestment into clean energy sources, which increasingly brings into question the ethics of investment into carbon intensive investments.
- 4.3 The need for an energy transition at this scale has huge implications for all investors, but particularly trustees of charity investors, which exist for public benefit and which must think about their wider role in society, beyond their narrow financial interests.
- 4.4 As was [highlighted](#) by the Commission in 2014, “*what may well have chanced [since the Bishop of Oxford case] is the public perception of charities and what they should be doing*” and “*it may be that now there is more of an expectation from the public that ethical investment is a good thing and that they are more likely to support charities that take such an approach*”. The Commission’s analysis queries whether and how the Bishop of Oxford principles are still relevant in today’s climate. The nature of climate science and the shape of public opinion has continued to change rapidly since 2014.
- 4.5 In November 2015, Christopher McCall QC was instructed to give his [written Opinion](#) on ethically questionable investments, which he agreed could be published given the importance of the issues it raised. In his [latest article](#), Christopher McCall QC considers whether “*interpretations of the law around ethical investment [are] still fit for purpose*”, and if “*the objects of [a] charity call for various classes of investment to be ruled out*”. The article concludes that “*the present law is that that may be the case but only in exceptional circumstances*” (emphasis added).
- 4.6 We are of the opinion, supported by Christopher McCall QC, that reconsideration of the current legal position and the way it is interpreted today is of critical importance.

- 4.7 It is arguable that investment in carbon intensive assets may conflict with a range of charitable objects. Christopher McCall QC poses a pertinent question – should trustees of “charities not be thinking what they can do in terms of their investments to reduce the very needs the profits of their investments are used to pre-empt?”. It seems to us that a court or Tribunal would today view charity trustee investment duties very differently to the early 1990s.

Public Support for Litigation

- 4.8 Client Earth recently commissioned [a poll](#) to explore public attitudes to climate related issues. The report made a series of important findings, including that:
- 4.8.1 More than three in five feel the Government is not doing enough in preparing for and adapting to climate impacts;
- 4.8.2 Fewer than a fifth believe fossil fuel companies can be trusted to change their business model; and
- 4.8.3 Three fifths would be interested in a pension fund or financial institution that considers climate change impacts of the companies it invests in.
- 4.9 This report reveals a fast changing landscape of public opinion in which there is widespread support for forms of climate related litigation in appropriate circumstances. In this context, it is important to note that the public generally expect charities to meet higher standards than other actors, though this is not currently clear from the current form of CC14.

Trust and Confidence

- 4.10 A number of recent press articles have sought to bring into focus the compatibility of certain forms of investment with charities who seem to have charitable objects which are in conflict or whose values and communications appear to be in conflict with their investments.
- 4.11 A recent example is [an article](#) which appeared in the Guardian interrogating The National Trust’s investments into oil, gas and mining firms, despite pledges by the charity to reduce its use of fossil fuels and recognition of “*the impact of climate change*”. It draws stark comparisons between the National Trust’s investment choices, the detrimental activities of the companies in which it indirectly holds investments and the charitable purpose for which The National Trust exists.
- 4.12 A spokesman for the National Trust provided a summary of its investment policy, which states that the charity will “*not [invest] directly in companies which derive more than 10% of their turnover from the extraction of thermal coal or oil from oil sands*”. This type of policy is closely analogous with the policy of the Church Commissioners in the Bishop of Oxford case. Yet 30 years on, it would appear that this type of divestment policy is not sufficient to establish public trust and confidence in a charity’s investment practices, given the nature of public expectations of charities.

- 4.13 Until charity trustees are at the very least encouraged to review consistency between their charity's objects and choice of investments, there is a real risk that more charities will be subjected to this level of public scrutiny and stories of this kind will continue to damage trust and confidence in charities and draw accusations of hypocrisy and inconsistency.
- 4.14 The charity's spokesman also outlined that the National Trust had not invested directly into fossil fuels and mining companies, but had instead invested in the CAF UK Equitrack Fund, which it is explained is a UK fund run particularly for charities. It seems therefore that the National Trust is just one of many charities that is investing in this manner, and it seems highly likely that a range of other charities will be judged over time by the court of public opinion to be acting cynically if current investment practices continue.

Engagement and Divestment

- 4.15 There is significant debate regarding how best to effect the necessary economic transition from the current carbon intensive economy we have to a future sustainable economy.
- 4.16 The view that corporate engagement is the most effective means of facilitating corporate change are coming under challenge by the growing divestment movement, which is increasingly gaining traction in terms of charities, universities and other investors who are committing to divestment and who see divestment as both necessary and urgent.
- 4.17 It is not fair to expect trustees to resolve these tensions without clear guidance from a court of law about the principles that should be applied and the answer may depend on the evidence of industry-wide changes in corporate behaviour at the pace and scale needed to effect the transition in the time available. The only way these questions can ultimately be resolved is with a court judgement which sets out the principles which trustees should be considering and applying to these issues. This question is becoming increasingly pressing.
- 4.18 It is widely accepted that temperature rises above 1.5C present substantial risks to the overall economy as well as to individual investment portfolios¹². It seems important that trustees are able to understand how a court would consider trustee investment duties in the context of an overall investment strategy which either seeks to bring about a 1.5C world or one that is liable to contribute to higher temperature rises. It is possible, for example, that the Tribunal or a court might conclude that there is some form of presumption that a charity investors' investment strategy ought to be compatible with a transition to a '1.5C world'.

5. OSCR's Guidance on Charity Investment

- 5.1 OSCR has recently published [new guidance](#), which places a particularly strong focus on:

¹ <https://www.mercer.com/content/dam/mercer/attachments/global/investments/mercer-climate-change-report-2015.pdf>

² <https://www.cisl.cam.ac.uk/resources/sustainable-finance-publications/unhedgeable-risk>

- 5.1.1 ensuring investments are consistent with a charity's objects, including suggested methods for trustees to use when screening the alignment of investments with their charitable objects; and
- 5.1.2 the application of environmental, social and governance ("ESG") factors to trustees' investment decisions, noting that the value of an investment could be detrimentally affected by, for example, not taking "*a responsible approach to its impact on the environment*", and as such trustees need to be aware of ESG factors.
- 5.2 In summary, it would seem that OSCR is taking the view that it is good practice to consider the environmental impact of a charity's investments, due to the effect that impact may have on the investment's financial viability, and the reputation of the charity. In support of that alignment, OSCR repeatedly outlines that there should be a connection and consistency between a charity's aims and its investment.
- 5.3 The new guidance also places a great deal of focus on the need to consider public perceptions of charitable investments, and that disregard for awareness of ESG factors when making investments may well have a negative impact on charities, both financially and from a reputational perspective. OSCR highlights the very real risks in charities falling short of public expectations when investing charitable funds.
- 5.4 Other regulators, such as the Pensions Regulator, are also issuing updated and revised guidance which emphasises the proper place of sustainable investment. In this context, it is worth noting that there is an increasing evidence base to support the proposition that sustainable investment strategies produce good or better long term returns. It would be wrong to assume that responsible investment necessarily involved financial detriment.

6. **CC14 Potentially Misleading – Not Robust on Responsible Investment**

- 6.1 The Charity Commission's guidance for trustees on investment matters (CC14, published on 1 October 2011) considers ethical investments and states that trustees "can" decide to invest ethically, even if the investment might provide a lower rate of return than an alternative investment, and that the law permits this if "a particular investment conflicts with the aims of the charity". What the Guidance does not do and thereby is likely misleading (and potentially unlawful) is to state what we believe to be the legal position, that charities are prohibited from making investment decisions which conflict with their charitable objects.
- 6.2 As part of the Commission's Statement of Strategic Intent ("Statement") published in October 2018, the Commission highlights the importance of public trust in the charity sector and that the privilege of charitable status carries the "*reciprocal obligation*" to adapt to ensure that trust and confidence in the charity sector is nurtured given that trust is a "*precious commodity*".
- 6.3 The Statement provides that "*[t]o be the effective regulator that the public demands and the sector requires, the Commission must do all it can to 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.(emphasis added)*"

- 6.4 The Commission has outlined a strategic objective to “*shape the agenda*”, as part of which it has committed to:
- 6.4.1 understanding “*the wider content in which charities work*”;
- 6.4.2 “*lead thinking about how charities can thrive in a changing world, [and help] to shape and update the environment in which they operate*”; and
- 6.4.3 “*use [its] authority and influence as the regulator to draw attention to behaviour that could jeopardise public confidence in the sector as a whole.*”
- 6.5 Taking the opportunity to provide greater clarity for trustees with respect to their investment duties and forms of investment which may conflict with charitable objects, particularly in the light of climate change, would map closely with the Commission’s challenge “*to demonstrate that [its] approach is delivering greater benefit to the public*”.
- 6.6 The Statement highlights that “*the public has high expectations of charities conduct and behaviour because of the importance of the work they do*”, and this standard applies equally to the way in which trustees invest charitable funds. To invest in a manner, contrary to the very purposes for which a charity exists, is likely to be detrimental to the public trust that is so important to the development and success of charities as a whole.
- 6.7 However, whilst the Commission is able to issue guidance, it is not able to authoritatively pronounce upon the nature of the law of charity trustee duties, particularly in a context where there has been no serious consideration of the nature of the ethical dilemmas facing charity trustees today with respect to climate change, other recent forms of investment and corporate behaviour which have been shown to conflict with charitable objects and with respect to the choice between corporate engagement and divestment strategies over time.
- 6.8 The only way to provide clarity with respect to these pressing questions is for the Tribunal to be asked to give its view as to the nature of the relevant charity investment duties.

We would welcome the opportunity to discuss with the Attorney General the issues we have raised within this letter, as well as the illustrative questions appended to it. We would very much welcome the Attorney General’s feedback, especially with respect to the form of the questions which we believe ought to be put to the Tribunal, which are in illustrative form. The Coalition stands ready to provide technical support to the Attorney General in the preparation of final form questions, the sourcing of relevant evidence and the drawing up of potential relevant scenarios for the Tribunal to consider.

Given the urgency of the threat of climate change and the fact that charity trustees are making a wide range of investment decisions in a context which currently lacks legal clarity, we believe that the case for a reference to the Tribunal and for a definitive ruling is clear and compelling and that the Attorney General therefore needs to decide whether or not to make or support a reference. We should be grateful for an indication of the timeframe in which you expect to consider this matter and would hope that, as a matter of fairness and good administration, you will provide reasons for your decision.

Please note that we are writing in parallel to the Charity Commission to ask that it seeks a reference to the Tribunal on his own motion and seeks your consent as Attorney General to do so.

We look forward to hearing from you.

Yours faithfully

BATES WELLS BRAITHWAITE

Bates Wells Braithwaite

CC:

The Chair of the Charity Commission

The Secretary of State for Environment, Food and Rural Affairs

The Secretary of State for Digital, Culture, Media and Sport

The Minister for Civil Society

The Chair of the Committee on Climate Change

APPENDIX A
COALITION OF CHARITIES

Access – The Foundation for Social Investment

The Ashden Trust

B Lab UK

Britain Yearly Meeting of the Religious Society of Friends (Quakers)

Carbon Tracker

The Centre for Innovation in Voluntary Action

ClientEarth

The Ecumenical Council for Corporate Responsibility (ECCR)

Friends Provident Charitable Foundation

Future Fit Foundation

Gower Street

The JJ Charitable Trust

Joseph Rowntree Charitable Trust

LankellyChase Foundation

The Margaret Hayman Charitable Trust

The Mark Leonard Trust

The National Council of Voluntary Organisations

Nesta

Panahpur

The Polden-Puckham Charitable Foundation

Royal Society for the Protection of Birds

The Solberga Foundation

The Stockwell Charitable Trust

Thirty Percy Foundation

APPENDIX B

ILLUSTRATIVE QUESTIONS TO BE PUT TO THE TRIBUNAL

What is the test for assessing whether a form of investment conflicts with charitable objects?

Where a form of investment conflicts with charitable objects, are trustees prohibited from investing or, if already invested, obliged to divest?

What degree of conflict is necessary before a charity is prohibited from investing or obliged to divest from a form of investment and how is the existence and nature of any conflict to be assessed?

What evidence or advice should charity trustees consider when determining whether a conflict exists?

Should trustees consider financial, scientific and legal advice when formulating investment strategies?

In what circumstances does the Tribunal expect that certain forms of investment would conflict with certain forms of charitable objects?

Are certain forms of carbon intensive investments in conflict with certain forms of charitable objects?

Would the Tribunal expect charity investors generally to adopt an investment strategy which is aimed at ensuring that the world is able to stay within a 1.5C increase in global surface temperatures?

Would the Tribunal expect charity investors to analyse whether corporate engagement is effective or is likely to be effective over time and whether major firms in carbon intensive industries are or are able to transition as quickly as is needed to a low carbon economy, given the pace of change required?

Would the Tribunal expect charity investors to adapt investment strategies to changes in science and policy over time, for example, if the case for divestment becomes more or less compelling over time?

Are there any restrictions on the obligation to divest from investments which conflict with objects?

Where there is a risk of conflict, should charity trustees weigh up the risks and benefits of a policy of divestment from certain forms of investment against the risks and benefits of a policy of investment?

Are there any specific principles which the Tribunal would expect charity trustees to observe when weighing up the risks and benefits of divestment against the risks and benefits of engagement?

Where a risk of conflict with objects exists and a charity chooses to invest, what would the Tribunal expect of a charity with respect to corporate engagement and the nature of any such engagement?

When developing investment strategy, should charity trustees consider the relationship of any proposed investment strategy to their charitable objects and how best to use their assets as a whole to advance their charitable objects, whether directly or indirectly, as part of an overall strategy?

What impact does the public benefit requirement have on investment by charities?



Bates Wells Braithwaite

Bates Wells Braithwaite

10 Queen Street Place
London EC4R 1BE

Tel: +44 (0) 20 7551 7777

Fax: +44 (0) 20 7551 7800

DX: 42609 (Cheapside 1)

To what extent and in what way should charities be influenced by changing public opinion about what forms of investment and what overall investment strategies are suitable for charities?

What constitutes “significant financial detriment” in terms of risk and return and when would it be permissible for a charity to divest from a form of investment where there is some risk of detriment?

Where a charity chooses to divest due to a risk of conflict with objects, what freedom does a charity have to reduce the level of diversification of its investment portfolio where it considers it appropriate?

Given the nature of charity trustee investment duties, should charities structure their engagements with their investment managers to ensure that their investment duties are properly discharged?