How ready is the legal and governance framework in the United Kingdom to meet the challenge of climate change?

UKELA
Better law for the environment

Sectoral summary: charity law

Q1: Is the climate emergency expressly recognised in the legal framework for the charity sector?

The principal legislation governing the charity sector is the Charities Act 2011 ("CA 2011"). The climate emergency is not specifically recognised in the CA 2011. It does however arise in a few ways:

- Section 3 of the CA 2011 sets out which charitable purposes are recognised in law. A charity can only be registered if they are established for one of these purposes and if that purpose is for the public benefit. The charitable purposes include "the advancement of environmental protection or improvement" (and this encompasses the recognised purpose of advancing sustainable development) which enables charities to be set up to address the climate emergency although the purpose does not need to refer to the climate emergency (many prominent environmental charities registered do not refer to "climate change" or the "climate emergency" in their purposes). Further, many of the charitable purposes encompass issues which are inherently linked to the climate emergency such as human rights or the relief of poverty.
- By section 292A of the CA 2011, charities may make "social investments" which are special investments, distinct from other investments. Social investments enable charities to choose to invest their funds in a way that would not achieve the best financial return provided that the investment directly furthers the charity's purposes. This power could be used to make investments to seek to avert the climate emergency (e.g. investing in renewable energy technologies) even if they do not achieve the best financial return. It will be easy for most environmental charities to demonstrate a direct link between an investment to avert climate change and their purposes. Demonstrating such a link would be more difficult for charities without specific environment related purposes.
- A number of charities are also companies and are subject to the duties and obligations of the Companies Act 2006. The climate related issues raised in that framework are addressed in other notes and so are not considered further here.

Q2: What are the main issues arising from climate change for charities?

The climate emergency will affect the beneficiaries that charities serve. Charities will have to plan for and respond to the different impacts that the climate emergency could have on their beneficiaries, whether from physical risks (e.g. rising sea levels or the increased likelihood of extreme weather events such as drought) or transitional risks (e.g. the impact of environmental policies on poverty or migration). It will be necessary and important for many charities to raise awareness of the impacts that the climate emergency and the associated policies and decisions designed to support the transition to net-zero will have on their beneficiaries.

Public opinion is vital to the support of charities, particularly as a large proportion of charity funding comes from donations from the public. Therefore, the climate impact of a charity's decisions can put a charity's funding or reputation at risk and can place the charity under undue scrutiny. This has been seen in a number of recent prominent examples of charities responding to public opinion by refusing sponsorship from fossil fuel companies even where their charitable purpose is not directly related to the environment (e.g. the Royal Shakespeare Company Portrait Gallery and BP and the Southbank Centre and BFI and Shell). As the climate emergency grows in importance in the public eye, charities can expect to see more public scrutiny of their climate impact, particularly as a result of the funding that they receive, in the future.

The climate emergency will also necessarily bring with it the need for the whole economy to take action to reduce emissions. Many charities do not currently have a net zero objective and this in part has been linked to difficulty linking a net zero strategy to the charity's purposes and the cost of making changes (which in turn diverts what may be limited funds away from the charity's core activities). Charities will need to understand better their role, as undertakings, in the economy-wide transition to net zero and take action to reduce their contribution to the climate emergency.

Q3: What initiatives are taking place within the sector to further the goal of achieving Net Zero and how might other sectors learn from that?

There are countless initiatives by charities working within their charitable objects to seek to support the goal of achieving net zero: it is not possible to capture all the innovative and inspiring initiatives charities are undertaking in this short note. Some positive examples are:

- **Educating the public**: Oxfam have published resources to educate children to help them understand the climate crisis and take action at home through the "learn-think-act" approach. It provides activities that will help children think about their climate impact, for instance a home energy audit or by understanding harnessing the power of worms by composting in order to reduce food waste which is a major source of carbon emissions.
- **Publishing resources to assess industry's climate impact**: Julie's Bicycle has produced a set of Creative Industry Green Tools. These are free online carbon calculators which help the creative sector calculate and understand the impact of their venues, offices, tours, productions, events or festivals and enable them to take decisions which reduce their climate impact.
- **Working with industry to reduce emissions**: the Centre for Sustainable Energy works with social housing providers to reduce carbon emissions and tackle fuel poverty through stock management and engaging staff and tenants in energy saving. This is done through a range of methods including providing energy auditing and in-depth energy efficiency assessments for housing stock and training staff and tenants in energy efficiency measures.
- **Using charitable funds to address the climate emergency**: the Funder Commitment on Climate Change is a commitment by 60 charitable foundations that manage assets of more than £4.7 billion to use their funds to address the causes of climate change and support adaptation to its effects in light of the serious risk the climate emergency poses to the pursuit of their charitable aims.
- **Improving corporate accountability**: The charity, Carbon Disclosure Project (CDP) runs a global disclosure system for investors, companies, cities and states to manage their environmental impact. It seeks to improve corporate awareness through measurement and disclosure by requesting information on climate risks and low carbon opportunities from the world's largest companies on behalf of over 590 institutional investor signatories and rating them on their environmental performance.

Q4: What initiatives are taking place within the sector to adapt to climate change and how might other sectors learn from that?

There are countless initiatives by charities to seek to adapt to climate change: it is not possible to capture all the innovative an inspiring initiatives charities are undertaking in this short note. Some positive examples are:

- **Publishing toolkits to help integrate climate resilience into policy decisions**: Water aid has developed a WASH (water, sanitation and hygiene) system design toolkit which includes a range of exercises intended to guide a WASH system assessment in order to build resilience. As part of this, they are proposing integrating climate resilience into this in order to hardwire in climate resilience to the development of WASH systems around the globe.
- **Working with indigenous communities**: Cool Earth have launched a "rainforest firefighters" campaign which is a collaboration with Central Asháninka del Río Ene which seeks to develop new approaches to combat rainforest fires drawing on the knowledge of indigenous communities. Through the campaign, the collaboration develops forest fire management plans through indigenous-led prevention planning which connect the data available in the West (for instance from satellite monitoring) with the local knowledge of indigenous communities to help local communities, who are often in the best place to contain a forest fire before it gets out of control, monitor and identify trends in forest health to combat fires before they start. These plans can then be shared with other rainforest communities to create a network for rainforest fire protection.
- **Building local resilience**: Christian Aid has a resilience programme which works to build climate resilience in local communities by building shared understanding, trust and long-term solutions with communities. For instance, in Malawi, the Enhancing Community Resilience Project was designed to enhance chronic climate vulnerability faced by rural people in Malawi by working primarily at household level adopting multiple disaster risk reduction or climate change adaptation strategies (e.g. Village Savings and Loans, conservation agriculture, irrigation, livestock, diverse seeds and postharvest management) supported by more widescale support at local, region and national levels (e.g. early warning communication) and to capture the benefits of synergies between these measures.

Q5: Is the regime effective in light of future challenges?

To a certain extent the CA 2011 is sufficiently flexible to enable the charity sector to adapt to future challenges, particularly in light of the broad definition of charitable purposes. However, there are two key areas where, from a climate emergency perspective, the regime is not necessarily effective:

1. **Charitable purposes**

The definition of charitable purposes in section 3 of the CA 2011 includes the purpose of "the advancement of education". This is broad enough to enable organisations to be registered as a charity to commission and disseminate research which, contrary to the widely accepted scientific consensus, argues that there is no consensus on the climate emergency or advocates against policies and technologies (such as renewable energy) which are considered to be necessary to prevent the climate emergency. There is an argument that such charities provide a platform for educational research and informed and open debate. However, it is also argued that there is no public benefit (and thus the test for recognition as a charity has not been met) in the dissemination of information which runs contrary to a scientific consensus and thus undermines the education of the public on that topic. The Charity Commission has not so far intervened to prevent this.

One recent example is a request by a group of scientists to remove the Global Warming Policy Foundation from the register of charities on the basis that the publications produced by the Foundation ran contrary to the scientific consensus on the climate emergency and therefore undermined, rather than advanced, the education of the public. That request was reported to have been refused on the basis that the Charity Commission (i) did not have the power to remove the Global Warming Policy Foundation from the register on that basis and (ii) lacked the ability or remit to assess the scientific accuracy of the Global Warming Policy Foundation's publications.

2. Responsible or ethical investments

There is also a question as to the extent to which charities can invest their funds in a way compatible with net-climate emergency which do not achieve the best financial return on investment for the charity. Charity trustees have a general power of investment under section 3 of the Trustee Act 2000 (many charities also have express powers of investment in their governing document). This is a power to make "financial investments" (as opposed to social investments). They also have a legal duty to act prudently and in the best interests of the charity and to adhere to statutory requirements set out in tax legislation (Income Tax Act 2007).

The broad principles in relation to charity investments were considered in *Harries v The Church Commissioners for England* [1992] 1 WLR 1241 (known as "The Bishop of Oxford Case") where it was held that *prima facie* the purposes of a charity will best be served by the trustees seeking to obtain the maximum return from investments and this should be the starting point for all charity trustees (subject to an appropriate level of risk being adopted). However, the Court acknowledged that charities may make "ethical" or "responsible" investments (i.e. those which do not provide the greatest financial return) in certain circumstances which the Court thought would be rare: (i) where a particular investment directly conflicts with the purposes of the charity (e.g. a cancer relief charity investing in tobacco), and (ii) where the charity might lose supporters or beneficiaries if it invests in a particular way. In consequence, it was held that trustees should not invest charity funds as a means of making moral statements at the expense of the charity, albeit moral considerations may be taken into account if there would be no significant financial detriment to the charity.

The Charity Commission's Guidance in CC14 develops this further, and suggests that whether investing in a way that would conflict with the charity's purpose is a matter of discretion for the charity's trustees: i.e. when considering whether and how to invest, they may undertake a form of balancing exercise that takes account of both their ethical views regarding particular investments formed with regard to the charity's purpose and financial detriment that may result from giving effect to their ethical views.

The Charity Commission has recently issued for consultation new draft guidance on responsible investments – the results of the consultation are still under consideration at the time of drafting. Under that guidance, charities would, according to the Charity Commission, be able to make responsible investments (defined as a financial investment approach which reflects the purpose and values of the charity). This is on the basis that the application of the Bishop of Oxford Case is limited to its facts, interpreting it as dealing only with a charity that has a permanent endowment. However, it has been argued that the draft guidance and this legal justification is inconsistent with the law as explained in the Bishop of Oxford Case.

There are, therefore, questions as to the extent to which trustees can pursue an "ethical" or "responsible" investment strategy including whether charity trustees can adopt investment policies which seek to exclude investments which are incompatible with the Paris Agreement and the net-zero goal where, at least in the short term, there would be likely to be lower investment returns as a result. The Ashden Trust and the Mark Leonard Trust, both charities with environmental protection or improvement as their charitable purpose, are seeking clarity through the courts on trustees' duties in respect to "responsible" or "ethical" investment. Permission to proceed was granted by the High Court in April 2021 (see *Butler-Sloss & Ors v Charity Commission & Anr* [2021] EWHC 1104 (Ch)) and the hearing will take place in 2022.

Q6: What are the top additional interventions (of any kind) that would improve the legal and governance framework in the sector?

1. Imposing a duty on all charity trustees to consider the environmental, or climate, impact of the charity's operations when taking decisions.
2. Requiring charities, as part of their annual report prepared pursuant to s162 of the CA 2011, to report on the environmental risks faced by the charity and the charity's environmental performance.
3. Permitting charity trustees to use their general powers to invest charity funds to support the mitigation of and adaptation to the climate emergency.

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