

## CLAS CIRCULAR 2022/06 (4 MAY 2022)

### Disclaimer

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It would be very helpful if members could let us know of anything that appears to indicate developments of policy or practice on the part of Government or other matters of general concern that should be pursued.

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## CHARITIES & CHARITY LAW

### Ethical investment and the powers and duties of charity trustees

For information

An important case on the duties of trustees in relation to investment policy: *Butler-Sloss & Ors v The Charity Commission for England and Wales & Anor* [2022] EWHC 974 (Ch). Nothing ostensibly to do with religion or faith communities at all, *but it will apply as much to religious charities as to secular ones.*

The claimants were trustees of two charities, the Ashden Trust and the Mark Leonard Trust, whose principal purposes were environmental protection and improvement and the relief of poverty. They wanted to adopt an ethical investment policy to avoid making potentially-profitable investments which, they considered, would conflict with their charitable purposes. Their proposed policy criteria for an investment would be whether or not it was in accordance with the principles of the Paris Climate Agreement of April 2016.

The only leading case in this area is *Harries v Church Commissioners for England* [1992] 1 WLR 1241, aka "the Bishop of Oxford case", which was about the Church of England's investment policy in relation to South Africa; unfortunately, however, both sides agreed that the guidance in that case was unclear. So the trustees sought the Court's approval for the adoption of their proposed new investment policies to ensure that they were acting lawfully. They also sought a series of declarations as to the proper approach to be taken in relation to such issues generally by charity trustees.

The Charity Commission and the Attorney General invited the Court to deliver a judgment that set out the correct approach in law for charity trustees to follow when considering adopting an ethical or responsible investment policy, but they argued that it was premature for the Court to approve the trustees' proposed investment policies based on the available evidence [4].

Mr Justice Michael Green summarised what he considered to be the law in relation to charity trustees taking non-financial considerations into account when exercising their powers of investment like this: *the primary duty of trustees is to further the purposes of the trust and they would normally be expected to maximise their trust's investments. However, if they hold a reasonable view that particular investments would potentially conflict with their trust's charitable purposes, they have the discretion to not to make them.*

The long version, from para [78] of the judgment:

1. Charity trustees' powers of investment derive from the trust deeds or governing instruments of the charity (if any) and the [Trustee Act 2000](#).

2. Because trustees' primary and overarching duty is to further the purposes of the trust, the power to invest must be exercised to further its charitable purposes.
3. That is normally achieved by maximising the financial returns on investments; the standard investment criteria set out in s.4 of the Trustee Act 2000 require trustees to consider the suitability of the investment and the need for diversification and apply those criteria and take appropriate advice so as to produce the best financial return at an appropriate level of risk for the benefit of the charity and its purposes.
4. Social investments or impact or programme-related investments are made using separate powers than the pure power of investment.
5. Where specific investments are prohibited from being made by the trustees under the trust deed or governing instrument, they cannot be made.
6. **But** where trustees are of the reasonable view that particular investments or classes of investments potentially conflict with the charitable purposes, they have a discretion as to whether to exclude such investments: they should exercise that discretion by reasonably balancing all relevant factors including, in particular, the likelihood and seriousness of the potential conflict and the likelihood and seriousness of any potential financial effect from the exclusion of such investments.
7. In considering the financial effect of making or excluding certain investments, trustees can take into account the risk of losing support from donors and damage to the reputation of the charity generally and in particular among its beneficiaries.
8. However, trustees need to be careful about making investment decisions on purely moral grounds because among the charity's supporters and beneficiaries there may be differing legitimate moral views on certain issues.
9. Essentially, trustees are required to act honestly, reasonably (with all due care and skill) and responsibly in formulating an appropriate investment policy for the charity that is in the best interests of the charity and its purposes. Where there are difficult decisions to be made involving potential conflicts or reputational damage, the trustees need to exercise good judgment by balancing all relevant factors in particular the extent of the potential conflict against the risk of financial detriment.
10. If that balancing exercise is properly done and a reasonable and proportionate investment policy is thereby adopted, the trustees have complied with their legal duties in such respect and cannot be criticised, even if the court or other trustees might have come to a different conclusion.

Michael Green J concluded that the claimants had exercised their powers of investment properly and lawfully, having taken account of all relevant factors and not taken into account irrelevant ones. He

ruled that the trustees could adopt their Proposed Investment Policy and that doing so would discharge their duties properly to exercise of their powers of investment.

[Source: BAILII, 29 April]

### Reform of charity law in Ireland

For information

Those member Churches with congregations in the Republic of Ireland should note that Irish Government has published the [Charities \(Amendment\) Bill 2022](#), with accompanying Explanatory Notes. It updates existing charity law with the intention of improving the ability of the Charities Regulator to conduct its statutory functions and ensure greater public trust and confidence in the sector.

As well as providing for greater transparency in charity finances, it also includes new financial thresholds to ensure more appropriate reporting requirements that reflect a charity's size; clarification on the general duties of trustees; enhancements to the Regulator's powers in relation to the protection of charitable organisations; and the establishment of "the advancement of human rights" as a recognised charitable purpose.

[Source: Republic of Ireland Department of Rural and Community Development, 29 April]

## FAITH & SOCIETY

### Emergency Services: Ministers of Religion

For information

On 26 April, Lord Moylan [asked](#) 'Her Majesty's Government what plans they have to put in place a multi-professional strategy for the emergency services concerning the attendance of ministers of religion at the scene of situations involving serious injury.' In response, Baroness Williams of Trafford said that 'a working group bringing together representatives from policing and the Catholic Church has now concluded its exploration on the issue of access to crime scenes for religious ministers. Decisions regarding access in such situations remain an operational matter. However, the College of Policing has now published revised guidance on managing investigations, reflecting those discussions and wider input. As a result of those changes, we do not have any plans to pursue a multiprofessional strategy.'

In a supplementary, the Bishop of St Albans asked if the Government 'have any plans to ensure how this information will be rolled out in training people who are going to be in charge of these scenes? Is there going to be any monitoring to ensure that this is available? The sacrament of the last rites is a fundamental religious principle for many people. Can we have some assurance that this is going to be monitored?' Baroness Williams responded that 'I am sure it will be monitored, for the very reason that we need to be very clear that the police should be able to do the job that they have to do at the scenes of what might be quite critical incidents. They need to have the freedom to make those judgments but also be mindful of the wishes of people who might want to have a priest or religious leader with them at the time of critical illness or nearing death ... there is certainly further learning to be done on this, but I think this is a very welcome step forward.'

[Source: Lords *Hansard*, 26 April]

### Marriage and Civil Partnership (Minimum Age) Act 2022

For information

The [Marriage and Civil Partnership \(Minimum Age\) Act 2022](#) received Royal Assent on 28 April. Its purpose is to address the practice of child marriage in England and Wales. It raises the minimum age of marriage and civil partnership to 18 in England and Wales, meaning that 16- and 17-year-olds will no longer be permitted to marry or enter a civil partnership with parental or judicial consent. It will also mean that any marriages or civil partnerships that take place overseas or in Scotland or Northern

Ireland than involve under-18s where one of the parties is domiciled in England and Wales will not be legally recognised in England and Wales. It will *not*, however, affect the validity of any marriage or civil partnership entered before the Act comes into force. The Act will also make it illegal for a person to arrange the marriage of a person under the age of 18 in England and Wales in circumstances where that is not already illegal.

Section 7(1) provides that 'The provisions of this Act come into force on such day as the Secretary of State may by regulations appoint': so it will be brought into operation in stages – *and we do not yet know the MoJ's timetable*. We have already had a query from a Church of England diocese, one of whose parishes has a wedding booked for 1 September at which one of the couple will be under 18.

*Obviously, we will keep a very careful eye out for the Regulations when they are laid and let CLAS members know as soon as we spot them. In the meantime, however, all we can suggest is that everyone should be extremely careful.*

[Source: CLAS, 3 May]

### HM Passport Office guidebook for the clergy

For information

Following a query which we picked up on Twitter about the procedure under the new rules for couples requiring proof of marriage in the interim between the wedding and the registry generating the certificate, it may be helpful to remind readers of the existence of the Passport Office's [Guidebook for The Clergy](#) 'on their role and responsibilities during burials, baptisms and marriages'.

[Source: HM Passport Office, 21 July 2021]

## NORTHERN IRELAND

### The Charities Act (Northern Ireland) 2022

For information

The Charity Commission for Northern Ireland has [published](#) an information pack on the new Act and the impact it will have on charities and their legal duties. CCNI will also be [running](#) information sessions.

[Source: CCNI, 21 April]

## PROPERTY & PLANNING

### Historic England guidance on terne-coated steel

For information

Historic England has published a Guidance Note on [Church Roof Replacement using Terne-coated Stainless Steel](#). It considers nine design, specification and installation issues that frequently arise when considering the use of TCSS to replace stolen lead roofing. It presents the findings of the survey and laboratory tests, and provides technical guidance on addressing each of the issues.

[Source: Historic England, April]

## WALES

### Guidance on the design and delivery of mandatory Religion, Values and Ethics

For information

The Welsh Government has [published](#) a summary of responses paper for its consultation on guidance on the design and delivery of mandatory Religion, Values and Ethics (RVE) education. The draft RVE Guidance is intended to support those engaged in the design and delivery of RVE in settings and schools across Wales.

The summary notes that the guidance was generally seen as a 'valuable starting point for engaging with the new RVE curriculum' and that there was 'general support for the overall sentiment and orientation of RVE and the Curriculum for Wales as a whole.'

The summary also noted that respondents 'offered a range of suggestions on where the guidance could be strengthened. These tended to relate to three overarching themes:

1. 'Tone: including in the language of the opening section outlining legal precedents and statutory obligations, which many found to be difficult to understand. This was in contrast to later sections, which many found to be accessible and engaging.'
2. 'Structure: Some felt that navigating the document and identifying relevant information could be improved. Suggestions included greater use of signposting at the top of the document, including in outlining sections that may be relevant to different audiences, e.g. by distinguishing information that supports planning and coordination, 5 and sections that support design and delivery. This effectively communicates the RVE curriculum to a range of relevant audiences with differing needs, including practitioners and SACs.'
3. 'Detail: including greater depth in certain places to help practitioners, senior leaders, and other stakeholders to understand and respond to the curriculum in practice. This included more explicit links between the RVE Guidance and other elements of the Curriculum for Wales Framework, such as the four purposes and the Humanities AoLE. Others felt that additional elements such as the inclusion of a glossary of terms would be helpful, including in correctly interpreting and applying some of the concepts or ideas within the curriculum.'

The summary also noted the practical considerations relating to the RVE curriculum, such as 'signposting bilingual materials, training and support either within the guidance itself or more broadly.'

[Source: Welsh Government, 28 April]