

Faith-Based Organisations

2022 Update



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Welcome



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Welcome

Welcome to our annual faith-based update.

It's been another hugely challenging year for church and faith communities. While lockdown restrictions may have eased, the repercussions of the pandemic are ongoing. Some faith communities are struggling to remain engaged with their members, and stretched as they are on the frontline of responding to various crises including the rising cost of living, seeking to care for creation with renewed urgency, and welcoming refugees to the UK.

If we can advise or support you through any of the varied challenges you are facing, please contact us.

Get in touch

We would also love to hear from you if you have any topics or issues you would like us to cover in an upcoming seminar or masterclass. Your feedback and suggestions are greatly welcomed and valued. If you have any thoughts or ideas, please feel free to email Stephanie.



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In this update

In this update, you will find a number of articles that focus on social investment. At Bates Wells, social finance and investment have been close to our hearts for over two decades. We have a deep understanding of the issues faced by organisations seeking to make or raise investments which not only provide a financial return, but also create positive value for society and align with their values. We don't just advise on the law in this field, we also shape policy and the most significant developments around it. We made the argument for the creation of the statutory social investment power for charities, and we worked with government on the design of social investment tax relief. We also structured key institutions in this sector such as Big Society Capital, Social Finance and Charity Bank.

Purpose and Investment

Faith-based organisations have experienced tensions for a long time between the need to have an investment strategy that seeks to provide a good financial return and aligns with their religious beliefs and core values. Trustees of faith-based organisations must comply with the duties common to all trustees – to act reasonably and to

safeguard their organisation's assets and resources. In addition, trustees of many faith-based organisations are also guided in their investment decisions by the beliefs and values of their faith. They seek to act as good stewards of their organisation's money and assets as a way of living out their faith. In this way, the organisation's religious beliefs have an important bearing on the trustees' investment choices, in addition to the usual charity law requirements. Faith-based organisations therefore have a history of taking great care over what they invest in, ensuring that such investments do not conflict or work against their charitable faith objects. For instance, the majority of faith-based organisations would exclude investment in tobacco, gambling and arms companies.

Now the recent judgment in *'Butler-Sloss'* strengthens the basis on which trustees may invest in line with their faith – and summarises the investment duties more generally for charity trustees. We provide an outline of the 10 key points on [page 30](#). And our client profile on Stewardship ([see page 22](#)) gives a fantastic insight into how a Christian organisation approaches its investment decisions. Janie Oliver, Chief Financial Officer, shares how Stewardship's ambition is to achieve 'Kingdom Impact' by investing in organisations devoted to supporting and building Christian ministry and resourcing the Church.

Mitigation, not litigation: let us help you avoid costly disputes

The current economic climate has presented a seemingly endless list of novel and complicated challenges to senior leaders at faith-based charities across the country. We know that when you're spending your time firefighting, it can be difficult to find the time to turn your attention to projects that really do make a difference.

We believe that finding and building a relationship with an experienced dispute resolution team is invaluable. The Bates Wells team helps faith-based organisations to identify potential legal issues – from potential contractual disputes through to managing conflict within your community – and deal with them before they become a more costly problem.

We're so confident we can add value, we'd like to offer you our free dispute resolution health check, tailored to your organisation, where we help identify and suggest steps to mitigate any potential issues. Spend an hour of your time with us now to avoid potentially more damaging issues arising in the future.

If you'd like to find out more, just get in touch on the numbers below or at DRhealthcheck@bateswells.co.uk



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As a firm and as individuals, we at Bates Wells are passionate about purpose and impact. It informs our work and how we operate as a firm, and also how we as individuals live and make choices in our personal lives. One of our partners, Luke Fletcher, shares [\(page 26\)](#) what he thinks the role of faith groups should be in shaping how we approach investment generally, but also how his faith impacts his own personal financial and investment choices. We hope you find this insightful and inspiring.

If you need any advice on your social investment activities, we would be delighted to provide you with practical, bespoke advice. Please do reach out to us if we can support you in any way.

Employment

Also in this update we focus on safe recruitment practices. There is guidance from Lucy McLynn on what you need to do after you've selected your candidate, and how to protect your organisation from any subsequent challenge [\(page 7\)](#). Aisha Choudry explains the potential penalties of employing illegal workers, and how to avoid them [\(page 11\)](#).

Regulatory and Legal

For unincorporated organisations wanting to minimise potential liability for trustees, a sole corporate trustee may be a good solution. Sophie Cass explains the issues involved, on [page 15](#).

All faith-based organisations need to be aware of the Code of Fundraising Practice and the potential to be investigated for any breaches by the Fundraising Regulator. On [page 19](#), I outline a number of recent investigations into faith-based organisations and some tips on how to ensure compliance with the code. And finally, Barbara Eze and Leona Roche summarise key recent cases involving faith-based organisations [\(page 34\)](#).

Stephanie

Recruitment – what to do after you’ve chosen your candidate



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Right to work checks

Employers must ensure that employees have the right to work in the UK. You must carry out right to work checks before any employee starts work.

A manual check involves obtaining evidence of an individual's immigration status, checking and taking a copy of the documents, and retaining the document in the individual's HR file.

You must ensure that the documents, record of the check and overall process is in line with the **UKVI right to work guidance**: <https://www.gov.uk/government/publications/right-to-work-checks-employers-guide>

The process differs for an online or IDSP (Identity Service Provider) check.

See Aisha's article on *page 11* for more guidance.

Concluding your recruitment safely

“A public expression of views that do not align with the values or faith tenets of the organisation could be very damaging”

Once you've selected a preferred candidate at interview, it's tempting to sigh with relief at a task completed. However, to ensure both that your chosen candidate is suitable, and that your recruitment process is not going to be open to challenge by an unsuccessful candidate, it's helpful to consider the following:

1. References

Engage fully in the process of taking up references. Consider whether the referees provided by the candidate are acceptable. If they don't include their current or most recent employer is there an appropriate explanation for this? If you have asked for a reference from a spiritual leader, is this individual someone whose standing within the faith community can be cross-checked?

Ask pertinent questions in your request for a reference, such as 'would you re-employ this person?' If the former employer reference provided is simply a statement of service – which is common, and not necessarily a cause for concern – follow up and see if the referee will provide more information verbally, or if the candidate can provide a named senior person from that organisation to provide a personal reference for them. Ensure that responses are received to all requests for references. If not, ask for an alternative reference.

2. Dates

Check that the dates of service given in references align with what was said by the candidate in their CV/application form. If not, follow up.

3. Qualifications

Consider whether you wish to see proof of qualifications.

4. DBS checks

Be clear about what Disclosure & Barring Service checks, if any, you are required or entitled to carry out for the post. This is most obviously relevant if the postholder is going to be working with children or vulnerable adults. Ensure that these checks are satisfactorily completed before the employee starts work in that role, even if this means a delay to their intended start date.

5. Health

Decide what health information you need about the candidate. Is their own completion of a health questionnaire sufficient – as a first step at least? Or is their post so critical to the organisation that you would want an Occupational Health assessment at the outset? Ensure that you have asked about whether they have a disability and require any reasonable adjustments to undertake their role.

6. Social media

Think about whether you should conduct some enquiries into your successful candidate's social media history. It is increasingly common in our experience for employers to discover employees engaging on Twitter or Facebook in a way that may cause reputational damage to their organisation. This can be a particular risk for faith-based organisations. A public expression by an employee of views that do not align with the values or faith tenets of

the organisation, or which is inappropriately confrontational, could be very damaging, especially if the postholder is to have a public-facing or communications-focused role.

7. Conditional offer

Ensure that any employment offer that you make is expressly stated to be conditional on satisfactory completion of each of the above steps.

8. Feedback

Decide whether you are going to provide feedback for unsuccessful candidates. If you are, respond to requests in a timely manner. Think carefully about how the feedback is framed so that it does not give rise to any inferences of discrimination. We have seen challenges where the feedback has included that the candidate did not make good eye contact (potentially disability discrimination if the candidate was, for example, autistic), that the candidate is 'too senior' for a post (potentially age discrimination) and that the candidate was not 'a good fit' for the organisation (potentially discrimination on many grounds).

9. Paperwork

Gather any paperwork from the recruitment process, from every participant. Check that it supports the decision made. If a candidate has been scored for answers to each interview question, is it the candidate with the highest scores to whom the offer has been made? If not, was there a higher weighting to certain questions, or to another aspect of the interview and, if so, is that recorded? If a claim of discrimination is brought by an unsuccessful candidate this will all be disclosable documentation, and the paperwork needs to support the outcome.



Compliance and illegal working



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Home Office compliance

“Many employers – including faith-based ones – may not be fully aware of what illegal working can look like in practice”

The government’s work from home mandate was logistically challenging and, for some employers, meant that monitoring visas and carrying out right to work checks fell off the ‘priority list’. At the same time, the pandemic prevented the Home Office from carrying out physical and onsite compliance visits on employers.

However, in the last year, the Home Office has put compliance firmly back on the top of its agenda. As soon as the restrictions lifted, it issued a swift announcement that compliance visits were being resumed and set its teams to work.

To showcase its work, the Home Office publishes quarterly reports on the number of civil penalties issued to employers found to be employing illegal migrants. The most recent report stated that 86 civil penalties were handed out to organisations found to be employing illegal workers and a total of £1,275,000 in civil penalty fines was issued in three months, with 22 penalties being issued in London and the South East alone.

Civil penalties aren’t the only consequence of non-compliance. It can also lead to criminal charges, impact an organisation’s status with other regulatory bodies, such as the Charity Commission, and lead to adverse publicity as some organisations are ‘named and shamed’ in the quarterly reports. Also, employing an individual who does not

have the correct permission to work in the UK or is in breach of their visa conditions is legally prohibited and the employer should be taking urgent steps to terminate employment.

But what is compliance?

Employers must adhere to the Home Office's policies on preventing illegal working, such as conducting right to work checks in a timely and compliant manner, making sure that an individual has the correct permission to carry out the work in question and retaining the required documents in their HR files.

What does illegal working look like in practice?

Many employers, including faith-based organisations, are not fully aware of what illegal working can look like in practice.

Examples include:

1. Expired visas

Faith-based organisations sometimes employ overseas pastors or religious leaders

to work in or run their church or organisation here in the UK. A number of migrants work also in roles that are not sponsored i.e. on dependant and spousal visas.

As it is illegal to employ someone who no longer has the right to live and work in the UK, it is important to have a process to regularly review existing visas and expiry dates, especially for those carrying out key roles.

2. Employing overseas students in breach of their visa conditions

It's common for overseas students to seek part-time employment with a faith-based organisation while studying in the UK. However, you are not allowed to employ overseas students (who hold Student status) for more hours than they are allowed to work. Most students are only allowed to work 10 or 20 hours per week during term time so it's important to keep an eye on these limits. There are also strict rules on what they can and cannot do.

You are not allowed to use overseas students to fill a permanent vacancy, unless they fall into a very specific exemption set by the Home Office. We have recently advised a number of faith-based clients who had employed overseas students on a full time, permanent basis and in breach of their visa conditions.

3. Employing migrants in breach of their visa conditions

You cannot employ migrants in a way that breaches their visa conditions. As well as the issues around employing overseas students outlined above, there are, for example, restrictions on volunteering. Those on a visitor visa are restricted on the type and duration of any volunteer role. Many individuals visit UK faith-based organisations and carry out volunteering which may not be permitted under the Immigration Rules. So it is always important to understand the implications of any visa restrictions.

What can employers do?

Employers should ensure that all right to work checks are done correctly, at the appropriate time, and that all employees have the right to work for you. Right to work checks must be done on all employees, whether under an express or implied contract, and they must be done before the employment starts. If an employee is on a timebound visa (i.e. they have a visa that has an expiry date), you should schedule a follow up before the visa expiry date to make sure they have continued permission to work in the UK.

For some visa holders, such as students, you should keep additional information. Employers should also make sure that they have the correct paperwork to demonstrate a migrant's right to work, including whilst any application/appeal/review is pending.

Top tips

We have worked closely with faith-based organisations to tighten their onboarding processes and transition to a remote/hybrid working environment. Here are four top tips on how to remain compliant.

Conduct compliant right to work checks and ensure that individuals have the right to work in the UK.

Carry out internal audits / 'MOT's. Employers should prioritise reviewing HR files to see if there are any gaps in documents. Diarise key dates, such as visa expiry dates and when to carry out follow up checks.

Train your staff. Immigration policy can change quickly, especially on the right to work processes. It is important to train your staff regularly so they are aware of the key changes.

Make sure that any migrants currently working or volunteering for you have permission to carry out the work in question. Understanding an individual's visa conditions and the Home Office guidance isn't always straightforward. There are also hidden complexities around volunteering and voluntary work, so obtaining legal advice is key.

Sole corporate trustee – a good alternative to full incorporation?



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Unincorporated organisations

It's very common for faith-based organisations to be unincorporated – indeed, many will be grappling with a centuries-old trust deed as a governing document!

If this is the case for your organisation, you're probably already familiar with the drawbacks of unincorporated status – lack of legal personality, trustees having to enter into contracts in their own name, and potentially unlimited personal liability for the trustees.

Incorporation

An obvious solution is to incorporate your organisation. This firstly involves creating an entirely new corporate charity – usually a CIO (charitable incorporated organisation) or a company limited by guarantee – and applying to register it with the Charity Commission. The assets and liabilities of the existing unincorporated charity are then transferred over to the new corporate charity so it can take over running the business of the charity on an ongoing basis.

The 'old' unincorporated charity can then be entirely wound up or is sometimes retained as a dormant 'shell' charity that only exists to preserve future legacies. The new incorporated charity will still have individual trustees but will also have access to the benefits of corporate status – including separate legal personality of the corporate charity (meaning it can enter into contracts in its own name) and limited liability for the trustees.

The incorporation route is, however, by no means a quick win. Current delays at the Charity Commission mean you could be waiting for months until your new entity is registered as a charity and able to take over. Also, the transfer process itself can become complex and require significant time, commitment and resources (financial and staff).

Sole corporate trustee

We are therefore increasingly seeing unincorporated charities considering alternative options. A popular one is the sole corporate trustee structure. Under this option, the board of individual trustees is replaced with a single corporate entity (usually a non-charitable company limited by guarantee), which then serves as the sole trustee. The charity itself remains an unincorporated charity but it now has a single corporate trustee rather than a number of individual trustees. The former individual trustees now sit one level up – as the board of directors of the new corporate trustee.

The key advantages of putting in place a sole corporate trustee are:

- **Speed and management burden** – the process to appoint a sole corporate trustee is usually much less of an upheaval and time commitment than the full incorporation route. Removing the need to register a new charity with the Charity Commission can usually cut out months from your timeline. It's likely that you will still need to take steps to update titles or transfer legal ownership of certain property to the new corporate trustee to reflect the change in trusteeship. However, this is usually a much easier process as the assets will remain within the existing unincorporated charity and
- are not considered to be transferred out to a new separate entity.
- **Limited liability** – the individuals who sit as directors on the board of the sole corporate trustee will benefit from limited liability. Although the sole corporate trustee has potentially unlimited liability for debts to third parties (if the charity itself runs out of assets), if the sole corporate trustee is made insolvent as a result of that liability, its directors are not generally personally liable (in the same way that trustees/directors of a corporate charity would not usually be personally liable for the charity's debts).
- **Title to property** – the sole corporate trustee can hold property in its own name, so changes in the individual board members will not necessitate Land Registry filings to update the property title.
- **TUPE and pension funds** – a potential drawback of the incorporation route is that the business and assets of the unincorporated charity need to be transferred to the new corporate entity, and this can trigger a TUPE transfer for employment purposes as well as giving rise to liabilities on any defined benefit pension funds. The sole corporate trustee route may allow you to avoid this problem, which can be a bar to incorporation.

- **Permanent endowment** – unincorporated charities (particularly older ones) often hold permanent endowment. However, corporate charities are unable to hold permanent endowment as part of their own assets and instead have to hold any permanent endowment on separate trust as trustee. If this is the case for you, the sole corporate trustee route could be more sensible than going through the upheaval of the full incorporation process only to require a subsidiary trust level in any event.

There is one main disadvantage to be aware of when considering the sole corporate trustee route. While administratively simpler to put in place, there is a risk of confusion (both internally and externally) with this structure. This is because the individuals involved are no longer trustees of the charity but are directors of the charity's corporate trustee. This can be difficult to grasp at first but it's essential that the directors understand the distinction and know how to make decisions and hold meetings of the corporate trustee.

Despite this potential risk, any confusion can be alleviated with good training and clear communication, and there are still significant advantages to the sole corporate trustee route that can make it the best choice for an unincorporated charity seeking the benefits that incorporation brings.

“there are still significant advantages to the sole corporate trustee route that can make it the best choice for an unincorporated charity seeking the benefits that incorporation brings”



Faith-based charities face scrutiny from the Fundraising Regulator



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Fundraising – reduce the risks

The Fundraising Regulator was established in 2016 as a non-statutory regulator for England, Wales and Northern Ireland. It regulates fundraising by charities and other philanthropic bodies, as well as agencies engaged by them to raise funds. The regulator establishes and maintains fundraising standards, which are set out in the **Code of Fundraising Practice**. It investigates situations where fundraising practices have led to significant public concern, and adjudicates complaints from the public if organisations cannot resolve the complaints themselves. Following an investigation, it can make and publish decisions. These often include recommendations for changes in organisations' fundraising practices.

In the last couple of years, the regulator has changed its practice, so it now names all charities that it formally investigates on its website and publishes a summary of the investigation. Several of these investigations have been into faith-based charities, including:

- **The Krishnamurti Foundation Trust** – the Trust promotes education about a religious teacher, J Krishnamurti. The

regulator considered a complaint about a legacy which the testator's relatives said was disproportionately high, compared with other beneficiaries. The regulator found that staff of the charity who were treated as friends by the testator should have removed themselves from fundraising activity. It also found that the charity did not have appropriate records or a complaints procedure.

- **Guru Nanak Darbar Gurdwara** – the complaint was that the Gurdwara had raised money to buy Rumallas (holy cloth), but the complainant understood that the charity had subsequently decided to use the money to employ a Granthis (a priest). The regulator found that the Gurdwara had bought Rumallas as intended, but could not establish the total cost, and some money had been put into the Gurdwara's general funds. The charity's records were not accurate and comprehensive enough to determine if it had used restricted funds correctly. The regulator made recommendations about recording keeping, updating the Gurdwara's complaints policy and improving complaints handling.
- **The PCC of The Ecclesiastical Parish of St John Cove** – the complaint was that the church was using restricted donations, raised specifically to fund a monthly event, for the church's general purposes. The regulator found that the charity

had not breached the code in the way donations were used, but had done so by not explaining what would happen to donations if the fundraising target was either not met or exceeded.

- **LifeSpring Ministries** – the complainant’s church had made a donation to an ‘urgent’ appeal to support an evangelistic event, due to take place in 2018. The event was postponed four times and 21 months after the initial appeal the complainant asked the donation to be refunded. The regulator found that the charity breached the code by failing to explain the risks of donating to an event like this, such as risks of postponement. It also found that the charity should have explained what would happen if the required amount was not raised, or was exceeded, and that it should have a complaints policy. The regulator does not have powers to instruct a charity to return a donation.

Faith-based charities, especially places of worship, may not have had the Fundraising Regulator on their radar before. It’s not clear whether this flurry of cases about faith-based charities reflects an increase in the number of complaints that the regulator is investigating relating to faith-based charities, or whether there are a similar number, but more are being published because of the change in policy. Either way, faith-based charities and worshipping communities should be

aware that complaints to the regulator are time consuming to deal with and cause reputational damage for the charity.

Practical steps you can take to reduce the risks of being investigated include:

- Make sure anyone involved in fundraising for your organisation is aware of the Code of Fundraising Practice and that it’s important to comply with it.
- Have a complaints policy that complies with the code.
- Ensure your fundraising literature is accurate and is clear about how funds will be used.
- Engage promptly with any complaints you receive and try to resolve them directly – the regulator usually only gets involved if a complainant has been unable to resolve their concerns with the charity directly.

You may also want to consider registering your charity with the regulator. For charities that spend under £100,000 per year on fundraising, it only costs £50. This shows commitment to upholding good fundraising practice, may give confidence to donors and grant-makers about supporting your charity, and gives access to additional guidance from the regulator.

GUEST FEATURE

Stewardship – generating Kingdom Impact



Janie Oliver

Chief Financial Officer, Stewardship

<https://www.stewardship.org.uk/about-us/our-people/janie-oliver>

Stewardship

The landscape of the investment environment in the UK has been changing significantly over the past few years. With the spotlight on world-changing issues, like the climate crisis, racial justice and gender equality, conversations around the responsibility of investors have become prevalent.

Decisions around what to resource, when, and to which level of risk are increasingly important.

Stewardship is a Donor Advised Fund (DAF) and, true to our name, we continually ask ourselves whether we are being good stewards of our growing assets. How should we be thinking about the entirety of our assets as a tool to achieve our mission and our charitable objectives, not just the grants that are made out every year? How do we make sure we do aggregate good, and avoid harm? How do we encourage our donors to think about some of these questions?

The explosive growth of the Donor Advised Fund market as the UK's fastest growing philanthropic giving vehicle over the past few years has brought this into even sharper focus. For example, we have seen a 40% growth in our balance sheet over the last two years, following the trend of an increase in philanthropic giving. When the assets are invested before they are granted out, they have tremendous potential for sustained and increased impact, and as a DAF we have a responsibility to create opportunities to invest in more meaningful and impactful ways.

We have created an investment framework that puts these questions at the centre of achieving the impact we would like to see.

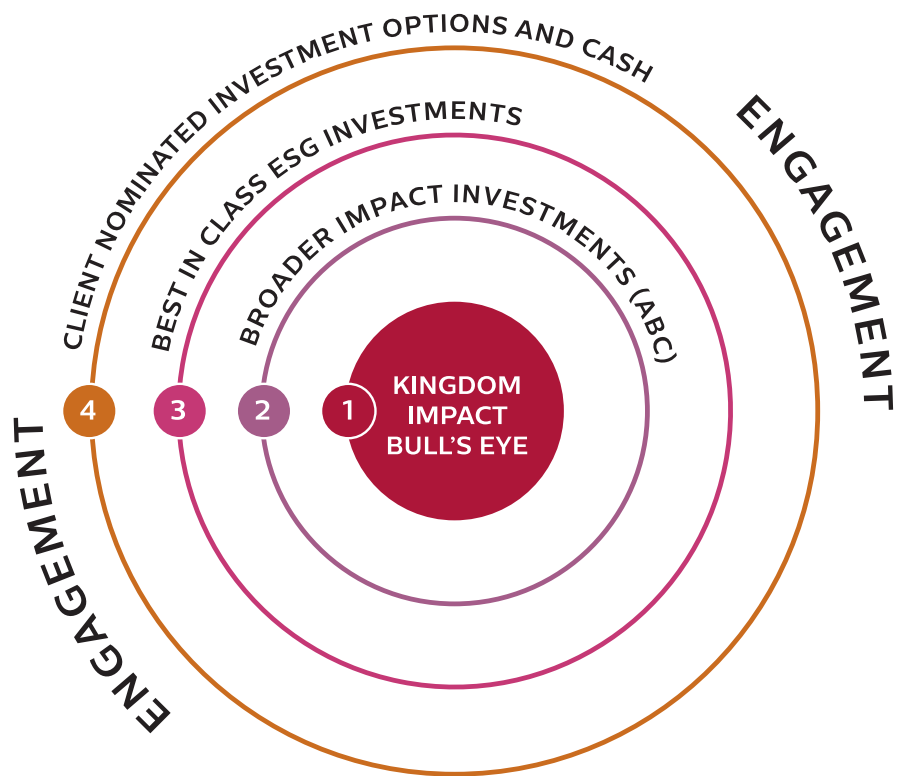
An Impact Framework

We are inspired by the thinking of other influential organisations in this space such as Access – The Foundation for Social Investment. They have developed a framework known as the bull's eye approach.

It asks the primary question – what is the impact that our investments seek to generate? Tiers are then created in relation to the decided impact, with the most important goal at the centre.

As a Christian organisation, our ambition is that the Bull's Eye investments (Tier 1) are aimed at directly achieving what we refer to as 'Kingdom Impact' – namely investments in organisations devoted to supporting and building Christian ministry and resourcing the Church.

We've also expanded the concept of the bull's eye out slightly to 'Broader Impact Investments' (Tier 2) acknowledging that those investments seeking to positively address the UN Sustainable Development Goals are in line with how our faith compels us to act.



The next tier of investments (Tier 3) seeks to invest in 'Best in Class ESG investments' and finally having exhausted those three categories within our investment universe, remaining investments will either be in cash (other than deposits held at ethical banks which are classified in Tier 1 or 2) or in other client-nominated options that do not fall into the other three tiers.

While our investment framework may be relatively new, Stewardship's heart for impact is not. We've been lending to churches and charities for over 30 years, and 2021 was a record year for our lending activity, with £10.2m of new loans made to churches and charities. We see this as a vital part of both our mission and our investment portfolio. In many cases, we have provided a loan, when no other lender has been willing to support a church, which generated both significant kingdom impact as well as financial return.

As well as continuing to look within the mainstream market for investment opportunities, we hope to be able to help shape and create investment opportunities where we see options to expand the inner bull's eye (Tier 1). In 2020, we led a consortium of Christian investors to purchase Kingdom Bank to ensure its future as the only UK bank focused on serving Christian churches and church workers and enable Christians to invest their savings with a missional focus in the work of the Church.

We are excited to continue exploring new opportunities where mission and return intersect and multiply the impact of our mission through investments that deliver social and kingdom impact. This journey will continue into 2022 and beyond and we're looking forward as to how this will challenge, grow us, and scale the impact we're able to achieve.

“We are excited to continue exploring new opportunities where mission and return intersect and multiply the impact of our mission through investments that deliver social and kingdom impact.”

Personal reflections: faith and social investment



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In conversation



Stephanie Biden recently caught up with Luke Fletcher about how his Christian faith impacts his social investment work.

Were you brought up in a faith, Luke?

No. I grew up an atheist and had a very negative view of religion and religious people generally.

So what changed for you?

I realised that my views were mainly based on prejudice and not very well researched. I met and made friends with people I respected and admired who had a deep, profoundly spiritual – and, as it happens, Christian – faith. That got me thinking, studying and reflecting. But, as an atheist, it was only when I used my imagination that I could start to see the possibility that I might be surrounded by a divine intelligence.

How has your faith impacted your working life or your career choices?

I felt a sense of calling to Bates Wells. I had more lucrative opportunities but felt a deep sense that I had to work for and with clients who were serving society and pursuing the public interest. I also knew that it was what I wanted to do with my life and that, if done well, it would be worthwhile in various ways. I suspect my faith shapes my character and daily decisions and actions more deeply than I can comprehend.

“I was and am drawn to clients who, as entrepreneurs and investors, have a vision for how business and finance are able to serve society more fully. And I have been blessed to be able to work for amazing people who are constantly redefining what is possible and shaping the field.”

What sparked your interest in impact investment?

A wise man once said that ultimately you can only serve one master – you cannot serve God and money. So I am interested in how money can be placed at the service of more important goals and priorities. I find it somewhat bizarre that our economic system has tended to divorce financial return from its social and environmental context. I was and am drawn to clients who, as entrepreneurs and investors, have a vision for how business and finance are able to serve society more fully. And I have been blessed to be able to work for amazing people who are constantly redefining what is possible and shaping the field.

Does your faith impact on your engagement in this area?

I doubt there is any aspect of my outlook or approach that is not shaped by my faith. If you boil it down, I think my imagination has been transformed by my faith in such a way that my whole vision and outlook is infused with principles and ideas that come, for example, from the teachings and stories of Jesus and his way of life. And maybe there is a touch of the iconoclast in me – is financial return an idol in our culture?

How have you observed other people of faith engaging in the impact investment space?

I've been consistently surprised at how many of the people who have been early pioneers in the worlds of social entrepreneurship and impact investment are faith driven. Obviously, there are many who are driven by other motivations and have other ethical foundations too. But it's striking that so many of the people who have broken new ground before it was fashionable are people with a deep religious conviction.

What should be the role of faith groups in shaping how we think about investment generally?

I believe faith groups are moral actors and when you invest you lend your moral authority to an investment. Every investment is a moral statement. If faith groups continue to invest in fossil fuel majors, for example, faith groups are saying, whether they like it or not, that it is acceptable to pollute the atmosphere and contribute to what is increasingly looking like irreversible climate change. I think faith groups need to pay more attention to how they continue to provide a licence to operate for fossil fuel majors and other businesses that harm our planet and its people. It's thorny but I believe faith groups need to lead.

How does your faith impact on personal financial and investment choices?

There is a verse in the Psalms, an ancient book of devotional songs, that says 'The Earth is the Lord's and everything in it'. If you take that to heart, you realise that you do not actually own anything. The way I see it is that everything I am given, I have on trust. I am charged with making the most of what I am given in the time I have it. So my calling is to be a good steward, and to leave things in a better state.

In practice, this means that I tithe via Stewardship as a starting point for giving, which I find liberating and life affirming, but I have also tried to decarbonise my pension and bank and invest ethically, with a B Corp bank using its ISA impact funds. I also have a loan from another B Corp bank invested, with some of my own money, in Bates Wells, which I like to think is an impact investment!

How can faith groups and individuals get started in thinking about impact investment?

I would say that you should start by finding someone you respect and trust who has been walking along the road some time. And then walk alongside them for a while and see what you learn.

Butler-Sloss case: Social investment clarified



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Social impact investment

The recent Butler-Sloss judgment on charity investment has significant implications for faith-based organisations wishing to make investments in line with your beliefs. It clarifies the law for charity trustees wanting to take ‘non-financial considerations’ into account when making investments.

Here, we summarise the ten key legal principles applying to charity trustees when investing.

The full judgment is here:

Butler-Sloss & Ors v The Charity Commission for England and Wales & Anor [2022] EWHC 974 (Ch) (29 April 2022),

You can find a more detailed version of this article at: <https://bateswells.co.uk/updates/butler-sloss-v-charity-commission/>

Charity investment principles

1. Trustees’ powers of investment derive from the trust deeds or governing instruments (if any) and the Trustee Act 2000.

In the case of charities with corporate legal structures, such as companies, the Trustee Act 2000 does not apply – the investment powers are set out in your governing document. However, trustees of corporate structures will probably still want to observe the principles set out in the Trustee Act 2000.

2. Charity trustees’ primary and overarching duty is to further the purposes of the trust. Investment powers must be exercised to further the charitable purposes.

Taking an ‘intentional’ approach to investment involves starting with your charitable purposes when formulating and reviewing your investment strategy. The power to invest should not be used in a way that undermines or does not serve the charitable purposes.

3. This is normally achieved by maximising the financial return on your investments at an appropriate level of risk for the benefit of your charity and its purposes.

Using your investments to achieve the maximum available risk-adjusted financial return has usually meant seeking to diversify the investment portfolio across a spread of suitable investments. However, this judgment confirms that maximising financial returns is not mandatory. Even where trustees are focused on maximising financial returns, you may need to consider other matters – such as potential conflicts or reputational risks – when making investments.

4. Social investments or impact or programme-related investments are made using separate powers than the pure power of investment.

This judgment concerns general powers of investment, not the exercise of other powers. The statutory social investment power or a charity's grant-making power are likely to cover investments made (a) specifically with a view to (i) achieving a financial return and (ii) directly advancing the charity's purposes or (b) wholly in advancement of the charity's purposes, with some expectation of financial loss.

5. Specific investments can be prohibited under the trust deed or governing instrument.

It is possible to structure your charitable constitution, whether at formation or by subsequent amendment, to exclude certain classes of investment.

6. Trustees have the discretion as to whether to exclude investments that may potentially conflict with your charitable purposes.

You don't have to exclude investments or classes of investments that have the potential to conflict with your charitable purposes. However, when you conclude that there is a 'direct conflict' with your charitable purposes - which often include advancement of your faith - trustees are now obliged to carry out a balancing exercise to consider all relevant factors, particularly the seriousness of the conflict and the financial impact of excluding the investment. You will need to weigh up the 'likelihood and seriousness' of each factor and consider carefully whether your strategy will be successful in reducing or removing the conflict.

7. Reputational or relational risk.

Reputational or relational risks are considered to be relevant factors to consider when weighing up your investment decisions.

8. Trustees should be careful when making investment decisions on purely moral grounds.

Trustees are obliged to act in the way they consider in good faith most likely to advance the purposes of the charity. Moral considerations may often be wholly aligned with your charitable purposes. However, you need to be careful when making decisions on moral grounds not directly connected with your charitable purposes, where there may be a wide range of different, legitimate views on the issue amongst followers of your faith. The position might be different for a faith-based charity which takes a position on a moral issue as a central tenet of the faith, where there might be a strong consensus of opinion and/or investing might also be said to conflict with charitable objects.

9. Trustees are required to act honestly, reasonably and responsibly in formulating an appropriate investment policy for the charity.

You must formulate your investment policy in the way the trustees consider – acting honestly, reasonably and responsibly – to be in the best interests of your charity and its purposes. Where there are potential conflicts or reputational risks, the trustees need to balance these alongside any financial considerations. This approach extends to decisions about engagement or divestment of investments, as well as

any decision to focus your investment on positive impact.

Investments held specifically to enable your charity to engage with the relevant company are unlikely to involve an exercise of the ‘pure’ investment power.

10. Trustees who adopt an investment policy after a thorough balancing exercise have complied with their legal duties and cannot be criticised.

Butler-Sloss provides comfort that there is no single ‘right’ investment policy. Trustees who apply themselves properly and reasonably to the task of balancing all relevant factors in formulating an investment policy that they believe in good faith to be in the best interests of their charity’s purposes should, in doing so, fulfil their legal duties, even if the court or other trustees might have come to a different conclusion.



Case update



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Religious discrimination and unfair dismissals

A series of cases heard during 2022 serve as a cautionary tale for employers who don't take into account religious observances or fail to follow due process in dismissal processes.

Indirect discrimination

Philip Bialick, an Orthodox Jewish employee who worked as a litigation executive, was dismissed after his employer refused to grant him annual leave on a High Holiday during Passover – observance of which means doing no work.

Bialick's employer maintained a policy that employees cannot be absent from work for more than two weeks at a time. Due to contracting Covid-19 and the need to self-isolate, Bialick was absent from work for the two weeks prior to the High Holiday in question. Although Bialick had pre-booked the High Holiday as annual leave, his employer required him to return to work on this date in line with their absence policy. The employer dismissed Bialick after he did not attend work on the High Holiday.

The tribunal found that the policy of preventing employees from being absent for more than two weeks amounted to indirect discrimination. By way of comparison, a Christian employee in the same position as Bialick would not be obliged to use their annual or discretionary leave to observe religious holidays nor be forced to choose between potential dismissal or their faith. As such, Jewish employees were found to be at a particular disadvantage.

[Click here for the full judgment](#)

Unfair dismissal

The Employment Appeal Tribunal upheld the decision that the London Borough of Hammersmith and Fulham's dismissal of an employee following conduct at a political rally was unfair.

Mr Keable was dismissed following his attendance at the 'Jewish Voice for Labour' rally in March 2018 and an exchange of words with an attendee of an opposing rally, where Keable expressed controversial views regarding the Zionist movement. The conversation was filmed and widely shared on social media, leading to Keable being identified as an employee of the London Borough of Hammersmith and Fulham. The council dismissed Keable on the grounds of conduct – specifically that the comments made were inappropriate, likely to be considered offensive and have the potential to bring the council into disrepute.

Keable successfully appealed his dismissal. The first tribunal held, and the appeal tribunal agreed, that the dismissal was 'well beyond the range of reasonable responses of a reasonable employer'. Procedurally, Keable was not informed of the specific allegation that led to his dismissal. Further, the possibility of a warning – a less harsh sanction – was not discussed with him. The judgement found that Keable made the comments outside of the workplace in his

private capacity with no discernible link to his employment at all; he did not himself publish the comments; the comments were not found by the council to be discriminatory, anti-Semitic or racist.

[Click here for the full judgment](#)

Unfair dismissal and direct discrimination

Mr Ferguson was employed as Director and CEO of Kintail Trustees Ltd, the corporate trustee of a Scottish charity, the Robertson Trust. Ferguson was also a senior member, treasurer and trustee of the Stirling Free Church – Ferguson and the Church believed that marriage and 'rightful sexual relations' were exclusively heterosexual.

The Trust's overarching aim was to improve the wellbeing of people and communities affected by poverty and trauma in Scotland. Importantly, the Trust's funding policy expressly prevented it from funding 'projects and activities which incorporate the promotion of political or religious beliefs'. The corporate trustee granted the Church a 12-month licence to occupy space in the Trust's building – a decision and process that Ferguson was not involved with.

Knowing Ferguson's religious affiliation and assuming that Ferguson was involved in the granting of the licence, the chair of the corporate trustee raised the issue of Ferguson's religious affiliation with the board on the basis that the granting of the licence may breach the Trust's funding policy and conflict of interests policy, and that it could be seen as detrimental to the Trust to be associated with the Church due to its views.

Ferguson was called before a disciplinary hearing and ultimately dismissed. Ruling in Ferguson's favour, the Tribunal found that no reasonable employer would have dismissed Ferguson in such a way. Ferguson had been given no clear indication that concerns over his performance had reached the level of risking his future employment. He had been given no formal or informal warning as to his performance. The Trust had failed to carry out any process under its disciplinary policy. The Tribunal was split, but a majority found that Ferguson had been subject to direct discrimination under section 13 of the Equality Act 2010 on grounds of his beliefs. This was on the basis that a comparator in a similar position to Ferguson – but not holding the views Ferguson and the Church held on marriage – would not have been treated or dismissed in the way Ferguson was.

[Click here for the full judgment](#)

Church retains access

The Upper Tribunal (Land Chamber) dismissed an appeal by the neighbours of St. James' Church in the village of Saul, Gloucestershire, concerning contested access to a right of way.

The Church had initially applied to HM Land Registry in 2018 for a vehicular right of way over a track along Mr and Mrs Hughes' property, which the Church claimed had been used by successive generations of churchgoers and visitors to access the Church and graveyard. The Hughes' property is on the site of a former school, previously owned by the Church, which, along with the track, were sold by the Church in 2012. The Church did not register an easement over the track at that time. After a successful reference to the First-tier Tribunal, the Church successfully registered an easement over the land.

The appeal concerned whether the tribunal's findings relating to the use of the land were sufficient to give rise to an easement under the doctrine of lost modern grant (that is, where an easement has been enjoyed for at least 20 continuous years (without any other lawful exemption), the court will presume that such right of way was granted but that the grant was subsequently lost). The appeal

also considered whether ‘occasional’ use of the land was enough to suggest to the reasonable person that a right was being asserted. The Upper Tribunal held that the use of the track by church goers was a ‘matter of routine’ and frequent enough to establish prescriptive use. Furthermore, a period of 20 years had already been achieved before the land was first sold in 2012 – and therefore prescription was already complete by the time it was sold.

[Click here for the full judgment](#)

Contentious addition to Scottish charity register

The Office of the Scottish Charity Regulator’s decision to add the philosophically pro-life organisation, Stanton Healthcare (East of Scotland), to its register generated significant public interest.

A key consideration by the regulator was understanding the link (if any) between Stanton Healthcare (East of Scotland) and other organisations under the Stanton International umbrella, namely Stanton Belfast, whose activities had been subject to a number of allegations in the media concerning its interactions with women

accessing abortion services. Stanton Healthcare (East of Scotland) could show a degree of separation from the other organisations. While affiliated with Stanton International, it would be separately governed; while its ethos would be pro-life, the organisation demonstrated that it would be working within relevant NHS guidance.

The majority of the organisation’s charitable purposes were clearly related to purposes detailed in Scottish charity law. In relation to the object for ‘the advancement of the philosophical belief in the existence and equal value of human life from the moment of conception until natural death’, OSCR noted that Scottish charity law provides that the advancement of any philosophical belief is analogous to advancement of religion. Therefore, such purpose was charitable.

Finally, OSCR considered any potential disbenefit by including the organisation on the register. Importantly in this case, the fact that some people disagree with the organisation’s pro-life views does not mean there is necessarily disbenefit.

OSCR | Deciding whether an organisation meets the charity test

What is a religion for charity law purposes?

The First-tier (Charity) Tribunal dismissed an appeal that sought to overturn the Charity Commission's decision to refuse to register a charity whose proposed objects were to advance 'the Ifa Dudu religion for the purpose of achieving the Nyeungana vision'.

The Charity Commission had not been satisfied that the proposed charity was established for exclusively charitable purposes for the advancement of religion for public benefit. The appellant, Oluwagbemileke Afariogun, explained that the Ifa Dudu religion drew on the more established Ifa religion of the Yoruba people in West Africa as well as the interpretation of other religions such as Christianity, Sikhism and Rastafarianism.

The tribunal noted that a religion must have an 'identifiable formal content and attain a certain level of cogency, seriousness, cohesion and importance' for charity law purposes and held that the Ifa Dudu religion failed to meet this threshold. The religion was new and relied upon the interpretation of various other religions; the draft governing document of the proposed CIO did not include a definition of Ifa Dudu; and

the religion's statement of faith document was brief and had been revised during the registration process indicating that it could be amended without formality. Given that there was no evidence that Ifa Dudu is a religion for charity law purposes, the proposed charity did not fall within the charitable purpose of advancement of religion.

The tribunal also commented on the public benefit of the proposed charity. The judge was unable to assess whether the advancement of Ifa Dudu was, in fact, of benefit to the public and whether there was a sufficient section of the public that would benefit.

This case serves as a good reminder, particularly for emerging religions, that there is a specific threshold to be met when considering whether a belief system is a religion for charity law purposes.

[Click here for the full judgment](#)

Contested heritage of memorials

Jesus College, Cambridge sought permission to remove the memorial of Tobias Rustat from its Grade I-listed chapel in light of a review of Rustat's connections with the transatlantic slave trade and to re-erect the memorial in a newly created exhibition and secular study space where it could be conserved, studied and researched as appropriate.

The Consistory Court of the Diocese of Ely rejected the College's petition: the College had failed to present a convincing argument that outweighed the considerable or notable harm that would be caused by the removal of the Rustat memorial from the chapel as a building of special architectural or historic interest.

The court accepted the expert historian's evidence that the main source of Rustat wealth was not the transatlantic slave trade and that such funds made no contribution to his gifts to the college. On this basis, the widespread opposition to the location of Rustat's memorial was a consequence of the 'false narrative' that the origins of Rustat's substantial wealth was the transatlantic slave trade.

The college's pastoral argument that the presence of the Rustat memorial in

the chapel created a serious obstacle to the chapel's ability to provide a credible Christian ministry and witness to the college community was not sufficiently persuasive. The court further noted that although a church building is to be a safe space, uncomfortable, challenging, difficult or painful images, ideas or emotions are present in churches, such as images of Christ on the cross, or the martyrdom of saints.

The college has **confirmed** that it will not be appealing the judgement, but claims that the decision 'shows a lack of understanding of the lived experiences of people of colour in modern Britain'. The college also called on the Church of England to 'change how it deals with matters of racial injustice and contested heritage'.

The Church of England published **guidance** in 2021 for churches and cathedrals that are considering how to deal with historic objects with contested heritages. It will be interesting to see how this might develop in light of the ongoing debate around how to deal with historic items of contested heritage.

[Click here for the full judgment](#)

You may also be interested in [Suhan Rajkumar's recent article](#) on Navigating the polarised politics of our times

Registration of excepted church charities

In its business plan for 2021–2022, the Charity Commission has listed as one of its priorities the registration of church charities. Working with the Church of England to pilot the process of expanding the Charities Register, the Charity Commission will begin with the handling of applications from cathedrals and then, over the next ten years, up to 35,000 excepted charities that are not currently required to register as their income is below the £100,000 threshold.



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