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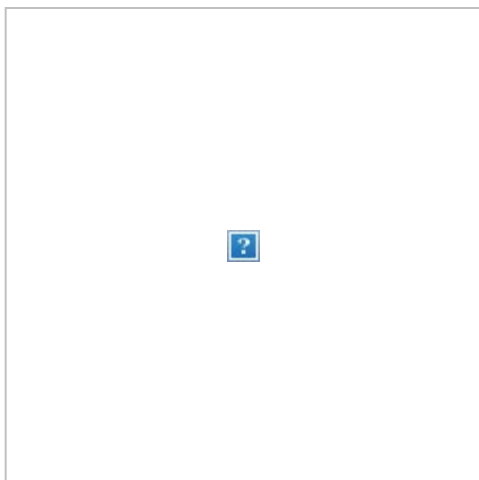
Government response

## Update on investment guidance following Butler-Sloss case

High Court judgement on investment guidance following Butler-Sloss case

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Following discussions with stakeholders, we recognise that some charities may feel uncertain as to whether the recent High Court judgment (Butler-Sloss and others v Charity Commission) has changed trustees' legal duties.

We consider that the judgment offers welcome clarification of how existing legal principles should be interpreted by trustees in a modern context, but that it does not fundamentally alter those principles. We therefore confirm that charities can continue to rely on the legal position in our published guidance [Charities and investment matters: a guide for trustees \(CC14\)](#) when making investment decisions.

The new judgment confirms that trustees have wide discretion where appropriate to exclude certain investments based on non-financial considerations when making financial investment decisions. These principles are described as ethical investment in our CC14 guidance, and have also been described as responsible investment.

The judgment also confirms that there is no obligation on trustees to do so – they can, where appropriate, make financial investments designed only to secure the best financial return. Indeed, the principles which apply to wider cases were set out by Mr Justice Green, and he stated these as “Charity trustees’ primary and overarching duty is to further the purposes of the trust. The power to invest must therefore be exercised to further the charitable purposes. That is normally achieved by maximising the financial returns on the investments that are made”.

In 2020 we [conducted a listening exercise](#) on these matters, recognising that practice around investment has evolved, especially in the context of climate change and wider ESG (environmental, social and governance) considerations – which trustees may wish to take into account, in line with the law, in making balanced judgements about their investment approach.

Some stakeholders felt that, amongst other things, our guidance as drafted “seems not give some trustees sufficient confidence and assurance that responsible investment is something they can consider, or that the Commission supports.” Our listening exercise also heard that jargon and terminology can be barriers to trustees’ understanding in making decisions on investment matters.

In light of this, we started work on updating our guidance, including

conducting a formal consultation. Further work was paused in 2021 because of the commencement of the Butler-Sloss proceedings, which concluded in April this year.

We are now progressing a wider redesign of CC14, which aims to ensure the guidance is easy to follow and enables charity trustees to better understand the law around making financial investments on behalf of their charity.

The redesigned guidance will also incorporate an updated explanation of social investment, which is distinct from financial investment and is currently covered in separate guidance. Furthermore, we will ensure the redesigned guidance is accessible, with straightforward structuring and examples where helpful, and using terminology that is best able to convey trustees' duties clearly in the current context.

As we consulted on draft guidance prior to the legal case, we will not undertake a further formal public consultation, however a draft of the new guidance will be shared and tested with users and sector experts so feedback can be incorporated before it is finalised. We expect our final guidance to be published by Summer 2023.

## **The judgment in detail**

As part of his judgment Mr Justice Green gave the following summary of the law in relation to charity trustees taking into account non-financial considerations when exercising their powers of financial investment. We accept and endorse this framework in full, and will consider whether we can use it as a structure for our future guidance. In the meantime, we are clear that the principles expressed here are reflected in CC14:

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

2.Charity trustees’ primary and overarching duty is to further the purposes of the trust. The power to invest must therefore be

exercised to further the charitable purposes.

3. That is normally achieved by maximising the financial returns on the investments that are made; the standard investment criteria set out in s.4 of the Trustee Act 2000 requires trustees to consider the suitability of the investment and the need for diversification; applying those criteria and taking appropriate advice is 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, the trustees have a discretion as to whether to exclude such investments and 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, the 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 in relation to making decisions as to investments on purely moral grounds, recognising that 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.”

Read the full High Court judgment: [Butler-Sloss & Ors v The Charity Commission for England and Wales & Anor \[2022\] EWHC 974 \(Ch\) \(29 April 2022\) \(baillii.org\)](#)

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