



COVID19 Briefing

Emerging Issues for Churches

31 March 2020

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1. INTRODUCTION

- 1.1 At Anthony Collins Solicitors, we are confident of God's goodness at work in this country and across the world and at this time we realise it is a challenging time for churches who will be supporting members of their church and its community. Many (if not all) churches have at the time of writing already suspended public worship. In a hugely positive response many churches are finding different ways to meet either in person in small groups or by uploading virtual services for the wider membership. There is no doubt that technological advances are helping the world to carry on in new and creative ways and churches can be a positive part of this.
- 1.2 For churches like yours to continue and thrive in this more home-based world at the moment, we have compiled guidance on the practical issues you may need to consider at this time, e.g. occupation of properties either as landlord or tenant, governance issues such as the requirement to call your AGM, executing documents, dealing with employee absences and so on. We would, however, stress that in a rapidly-moving situation, with daily updates from the Government and the Chief Medical Officer, we would always suggest seeking specific and up to date advice when making decisions on any of the issues referred to in this note.
- 1.3 This note should show you how you can continue to achieve and fulfil your mission from home and whilst there will need to be innovation and some different ways of thinking applied, it can be done and you can still build the kingdom even when you cannot meet people face to face. It is exactly at times like these where the church and its members are so valuable and we are here to help you with that.
- 1.4 If you come across other issues that are not addressed then please let us know and we would be happy to help and/or develop answers for wider sharing.

Whatever issues your church faces do feel free to contact one of us and we or a colleague will be able to assist you:



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2. REGULATORY GUIDANCE VS STATUTORY OBLIGATIONS

- 2.1 We are entering a period where it is likely to become difficult for churches (as well as other charities) to meet their regulatory requirements whilst also fulfilling their legal duties to ensure their beneficiaries, staff, volunteers and wider members of the public remain safe.
- 2.2 With some obligations remain absolute and others require organisations to act so far as reasonably practicable, balancing and ranking the importance of complying with certain obligations can be very complex.
- 2.3 With wider and more stringent “social-distancing” measures being introduced, all organisations including churches are going to have to learn how to adapt their activities and how they interact with their membership and employees. At a time when fears relate to individuals’ physical health, churches should also remember their duties to protect the mental health of their members, beneficiaries, volunteers and employees.
- 2.4 Even if you are scaling back on activities you will need to consider how to respond to those who are displaying symptoms, those who have been to high risk areas or those who have a pre-existing or underlying health condition.

3. CONTINUING THE CHURCH ONLINE

- 3.1 As mentioned above, some churches have taken the decision to move their services online. This may be live streaming (either through Facebook Live or YouTube Live), pre-recorded services by the leaders of the church or group chats via WhatsApp or other similar means. This is, of course, beneficial for members of the church, including the elderly or those with existing health conditions, who have taken Government advice to self-isolate. However, there are issues to think about prior to holding church services online, such as copyright laws when live streaming and the sharing of private and confidential information (for example, prayer groups).
- 3.2 A standard Church Copyright Licence does not include a licence for copyrighted content to be used in streaming or webcasting church services. This means that unless you have the owner’s permission or the worship songs are already in the public domain or you purchase additional licences (see below) you should not be streaming worship songs. Although recent discussions had suggested that streaming music through a platform such as Facebook or YouTube may possibly be covered by the existing licensing agreements in place with those platforms, CCLI (Church Copyright

Licensing International) has now launched the Church Streaming Licence for the UK and Ireland which is available to purchase. Current guidance suggests the church will in any event need a Limited Online Music Licence (LOML) if you are streaming using the church's own website or if a backing track or a recorded song is played. The church will need to keep under review the current guidance in this regard to ensure that it does not breach copyright.

- 3.3 You will need to be mindful of the church's ongoing responsibility to adhere to the General Data Protection Regulations. Taking group chats as an example, it is important that those who are invited to the group have given their consent for their information to be held by the church and that they are aware of how their information may be used – this will likely be given by way of a privacy notice or policy.
- 3.4 Even though the church's services may primarily or solely be being carried out online it is paramount the church manages its safeguarding requirements and that the church's policy and procedures continue to apply.

4. GOVERNANCE

The Charity Commission has said it would like “to assure charities that our approach to regulation during this uncertain period will be as flexible and pragmatic as possible in the public interest, whilst helping trustees to be aware of and think about the wider or longer impact of their decisions on their charity”. They have recently issued two helpful guidance notes which can be accessed at:

<https://www.gov.uk/government/news/filing-charity-annual-returns-during-the-coronavirus-pandemic>

<https://www.gov.uk/government/news/coronavirus-covid-19-guidance-for-the-charity-sector>

- 4.1 The first guidance note confirms that any charity which is due to file its annual return can contact the Commission for an extension to the filing deadline. (Likewise Companies House has now produced some guidance as regards requesting a three month extension to file accounts with them: <https://www.gov.uk/government/news/companies-to-receive-3-month-extension-period-to-file-accounts-during-covid-19>.)
- 4.2 The second guidance note from the Commission is updated by them regularly and includes details of the Commission's approach to a number of issues facing charities at this time. We suggest you review the guidance regularly to check as and when information is added.
- 4.3 One area the guidance recognises as a key issue for charities in the current circumstances is how to hold meetings when people may be self-isolating or are ill (see below).

- 4.4 **Trustees' meetings:** The trustees will need to think about how they can continue to meet during this period and continue to make decisions validly and effectively. Your governing document may provide that trustees' decisions may be made by written resolution. However, this is unlikely to be an effective way to set strategy and make decisions on an ongoing basis. Depending on the legal structure of your church (a charitable incorporated organisation, charitable company, charitable trust, charitable unincorporated association) and what your governing document says, you may already be able to hold "electronic" meetings e.g. telephone or video conferencing. In addition to this, the Commission has reflected its pragmatic approach in the recent guidance and said that "where there is no such clause in your governing document and you decide to hold meetings over the phone or using digital solutions, we will understand but you should record this decision and that you have done this to demonstrate good governance of your charity".
- 4.5 **AGMs/general meetings of the members:** The requirement to hold an AGM will most likely arise from the church's governing document. If your church is an Association CIO then it must hold its first AGM within 18 months of registration with the Charity Commission and subsequent AGMs should take place at intervals of no more than 15 months.
- 4.6 Assuming it is a requirement, your church will need to consider whether there are alternative ways of holding an AGM. Your governing document may for example include provision for hold a meeting of the members through electronic means. Again, the Commission's recent guidance reflects a pragmatic approach saying that "the Government's health advice may lead to some charities having no choice but to decide to cancel or postpone their AGMs and other critical meetings". It goes on to say "if as trustees, you decide it necessary to do so, you should record this decision to demonstrate good governance of your charity. This is particularly important if it is not possible to hold your AGM which may make it difficult for you to finalise your annual report and accounts". Where the situation impacts on getting accounts and annual returns to the Commission they say charities with an imminent filing date can email them at: filingextension@charitycommission.gov.uk.
- 4.7 **Execution of documents.** With the increasing likelihood that most employees and office holders will be working from home or potentially in self-isolation, it is important to consider how churches will execute legal documents.
- 4.8 The method of execution will depend upon the structure of the church and the type of document being executed. Where the general protocol is for contracts to be signed by certain authorised individuals, your church should be thinking about whether or not the authorised individuals are going to be able to sign documents.
- 4.9 If there are documents which are likely to require signature in the immediate future (relating to a transaction or matter) then for unincorporated churches we would advise the trustees pass a resolution under section 333 of the Charities Act 2011 which

authorises two of their number to execute the deeds/documents on the church's behalf. Another area of concern in the current circumstances is finding a witness for those trustees who sign a deed on behalf of the unincorporated church. Although it is best practice to have an independent witness, generally there is no requirement in law for the witness to be independent. Therefore, so long as a person is not party to the deed then he/she can sign as witness. Please note that where a deed is to be sent to the Land Registry it recommends that the witness should not be a close family member. Subject to this, a witness could be a signatory's family member or neighbour.

- 4.10 The failure of the legislation to develop around electronic signatures means, for land transactions, we are still reliant on regulations dating back to 2008. The Land Registry therefore continues to operate in a way which does not reflect modern internet age expectations.
- 4.11 It may be possible to rely on electronic signatures to execute some documents not relating to land. Whilst they are widely used for some contracts, electronic signatures are still the subject of some legal uncertainty and you should seek advice on the appropriateness of this method for the document being executed because there are some situations in which a wet ink signature is still advisable.
- 4.12 In the unlikely even the church usually executes documents by way of a seal this may give rise to an issue if the seal is kept at the church's premises and is not accessible by any individuals during this period. You may already have in place measures to allow for deeds and contracts to be executed by certain individuals who have power of attorney but this is relatively rare.
- 4.13 For further advice and support on governance matters, please contact Edwina Turner or another member of the Charities and Social Business team on 0121 214 3657.

5. PROPERTY

- 5.1 **Disposal valuation.** In order to dispose of property, the church will need to discuss with your surveyor obtaining a Charities Act compliant valuation. Valuers may find it a challenging time due to locating comparables for valuation purposes and may be more defensive on this and we would be happy to assist you with any conversations to find ways through this. We have spoken with surveyors who have lateral practical solutions.
- 5.2 **Rental or hiring of property.** An income stream for many churches is hiring out its space to community groups or pre-schools and nurseries. As many groups are ceasing community activities this is likely to have a significant impact on the church's income. It is a really important time to enter dialogue with occupants and agree plans with them. There will be business rates reliefs and some financial support packages they may receive to allow them to continue (especially nurseries who stay open for key workers children) and you can work with them to create a workable agreement. We advise strongly that you speak with us and document any agreement accurately so that you don't have a dispute later.

- 5.3 **Leases.** If a church rents and is likely to struggle to meet the rent owed, our advice would be to review the lease (and contact us we can help) and potentially revert to the landlord to re-negotiate terms. The same would also apply in relation to service charges or service charge reductions, for example if the church were to use less of the property. We advise strongly that you speak with us and document any agreement accurately so that you don't have a dispute later.
- 5.4 In relation to occupiers such as nurseries, leases will not usually contain force majeure clauses (which would enable one or both parties to terminate the contract following events that are outside the party's control). Given that the effects of COVID-19 are short term, it is likely that tenants will be asking churches for rental suspension rather than looking to terminate leases. It is important that all parties work together at this time – it is likely that any church landlord which does not provide some flexibility to its tenant will end up with a tenant in financial difficulties which then subsequently impacts the church's income.
- 5.5 If you do provide any concessions to any tenants or as a tenant you are receiving a concession from your landlord then it is important that any concession or waivers of rent are clearly documented to avoid any disagreements or disputes. In considering whether or not to grant a concession you must, as a charity, consider whether or not it is in the best interests of the church, for example its long-term impact on the church's income stream versus the loss of a tenant. Further, we would point out that, if, as a landlord of a business tenancy, you do not offer deferment of rent and the tenant is unable to meet their rental obligations then you are currently prevented from forfeiting the lease based on the non-payment of rent in respect of leases of 6 months or longer, until 30 June 2020. Whilst you will not waive your right to forfeit or be precluded from seeking recovery of the rent, you are unable to take steps to forfeit until after expiry of the above period (which may be subject to further revision/extension in due course). There are some similar, but different, provisions which relate to residential tenancies.
- 5.6 If you are in the midst of negotiating a new lease then it is likely that these negotiations will cease for the time being.
- 5.7 **Rental suspension.** Such provisions in clauses usually apply where there has been physical damage or destruction to the property (including access/egress to it). Unfortunately, this means that the tenant (which could be the church or a tenant of the Church such as a nursery) will be unable to lawfully cease paying rent under the terms of the lease. However, we would refer to the paragraphs above in respect of seeking (if tenant) or agreeing (if landlord) a rent concession to take account of the current circumstances. If agreed, then a side letter, which sets out the basis upon which rent shall be deferred, waived or suspended can be documented, which should clarify for what period this arrangement shall take effect, to which payments it will apply (e.g. rent or service charge or insurance rent) and, critically, that this will not formally vary the terms of the lease.

- 5.8 **Nurseries** There could also be a challenge for churches where nurseries are having to close and, therefore, if applicable, the church would need to consider how leases are dealt with in terms of rent. As explained above, it is likely that the church's lease with its nursery will not contain a force majeure clause. The tenant (the nursery) may, however, argue that the contract (the lease) has been frustrated i.e. because of COVID-19 and the government's guidance of self-isolation, the tenant cannot provide its pre-school to local parents and carers and as a result, it is unable to fulfil the contract. If a situation arises in relation to this, please contact us and we will advise you accordingly.
- 5.9 **Underused buildings.** In relation to buildings that are underused there are likely to be issues regarding vacancy and you may need to notify your insurer depending on the policy. We would advise that you contact your insurance broker for further guidance. We would also recommend that regular inspections of unused space are carried out by someone with suitable experience and that they have an appropriate checklist to follow.

6. EMPLOYMENT ISSUES

Following a fortnight of announcements and proposed legislation, the Government has laid down the foundations for their economic footpath through this pandemic. Furlough is a word few of us had heard a month ago but now is part of our regular vernacular! As we await legislation underpinning the recent announcements and the completion of HMRC's systems, this update on employment issues provides an update to the information in our previous briefing.

Again, we would reiterate that all the information is correct at the time of going to print on 31 March 2020.

- 6.1 **Furloughed employees – the Coronavirus Job Retention Scheme** - The Government published its guidance last Friday (27 March), which provides a little more clarity on this [Scheme](#). Inevitably, the devil will be in the detail and the application of the Scheme to the numerous and complex situations that arise.

The essential aspects of the Scheme remain as follows:

- Employers can place employees on furlough leave (a period of paid absence) and reclaim 80% (up to a maximum of £2,500) of the employees' wage back from the HMRC in addition to any national insurance contributions and minimum automatic enrolment pension contributions.
- Any organisation can claim, provided they had a PAYE scheme in place at 28 February 2020.
- All employees are eligible provided they are on PAYE (this includes zero-hour workers) on 28 February 2020.

- The Scheme started on 1 March 2020 and will continue for three months.
- Whilst on furlough leave, an employee will accrue holiday but cannot undertake any work, volunteering or training that would provide services for or profit their employer in any way.
- Furlough can be used for employees who are shielding in line with NHS letters and guidelines.
- The minimum period of furlough leave is three weeks.
- Employees who were made redundant post 28 February 2020 can be rehired and placed on furlough leave.
- The online reclaiming programme is hoped to be up and running at the end of April 2020.

6.2 Entitlement and selection - The employer will determine which employees would need to be laid off and contact them to request their consent. This is especially key when the employer does not intend to top up the 80% to full pay. If the employee does not consent to this, then they will potentially have an unlawful deduction of wages claim. That said, the alternative may well be redundancy or lay off with no pay, so it is likely that employees will agree in the absence of a viable alternative.

We still have no further information from the Government on selecting employees for furlough leave. The guidance notes that “when employers are making decisions in relation to the process, including who to offer furlough to, equality and discrimination laws will apply in the usual way”.

In view of this we would advise the following;

- Ensure any criteria used to select furlough workers are clear, transparent and non-discriminatory.
- Be especially careful with selection where you are not able to top up the 80% of salary as any selection on potentially discriminatory grounds could result in a finding of less favourable treatment due to the deduction in pay.
- Before applying criteria, offer voluntary furlough leave to employees

6.3 National Minimum Wage (NMW) and furlough Leave - The guidance has clarified the position with regards to the payment of NMW whilst on furlough. As individuals are only entitled to the NMW (and the National Living Wage) for the hours they are working, furloughed workers who are not working can be paid 80% of their pay even if that would fall below the NMW based on their usual working hours.

The only exception to this would be if employees on NMW are required to complete some online training courses whilst furloughed. In those cases, the employees must be paid the NMW whilst training. However, given the Government has clearly set out that no volunteering nor training that would profit the organisation must be completed

during furlough, this training would be for that individual's personal advancement and training.

6.4 Pay on furlough with irregular hours - Details guiding employers with furloughed employees on irregular hours have been given to help when working out furlough pay. The arrangements are as follows:

- More than 12 months employment – furlough pay will be the higher of the following; the same months in the previous year or the average monthly earnings for 2019/2020.
- Less than 12 months – average monthly earnings since that employee started work.

6.5 Provision for self-employed - Given the catastrophic effect of the country's shut down on those who are self-employed, the Government has offered a [similar reimbursement scheme](#).

- The Scheme is available to self-employed individuals or members of a partnership if they have submitted their self-assessment for the tax year 2018/2019, have traded in 2019/20 tax year, will continue to trade in the tax year 2020/2021 and has lost profits because of coronavirus.
- They must have average trading profits of less than £50,000 and more than half the individual's income must come from their self-employed business.
- Individuals who are eligible will receive a taxable grant that will be 80% of their average profits for the last three completed tax years up to a maximum of £2,500 per month for three months.

6.6 Social distancing and health and safety at work - There has been no further guidance from the Government as to employees not in key roles continuing to attend work. As we head towards the anticipated peak of infection in the next fortnight, the message from the Government and the NHS is to stay at home wherever possible. With this in mind, we would continue to advise the following checks:

- Continue to assess whether employees can work from home; it may be that this is not possible in any way given the service they provide, however, regular assessments for other roles should be carried out.
- Employees are 2 metres away at work stations.
- Lunchtimes and/or break times are staggered where possible so that all employees are not congregating at canteens/rest areas/coffee and tea making areas at the same time.
- Check in with employees regards public transport links and whether these are still working and what risks they bring to the employee.

- Address whether more employees in the workplace could use private transport means; this is especially key given pictures of overcrowded public transport as providers reduce the services. Be creative with solutions, whether this is giving them spaces in an organisation's car park usually reserved for employees who are now at home, or subsidising car parking fees.
- Address whether employees who are still coming to work could be placed on furlough leave

6.7 Emergency volunteering leave - In response to the pandemic's effect on the NHS, social care and the society at large, the Government has announced a volunteer scheme. The idea being that volunteers will "fill in the gaps" where possible.

The response has been overwhelming, and Schedule 7 of the Coronavirus Act 2020 sets out the process an individual must follow if they are employed and would like to volunteer.

- Employees (and workers) must give three working days' notice of their intention to volunteer and must submit an emergency volunteering certificate – this is issued by the appropriate authority where the individual is going to volunteer.
- An individual can volunteer for a period of two, three or four weeks in any sixteen-week period.
- The leave is unpaid, but the individual will continue to accrue all other aspects of their employment i.e. holiday etc.
- Employees who work for organisations with less than 10 employees are not eligible to apply for volunteer leave. However, if an employee in a small business is on furlough and wants to volunteer, they do not have to seek leave and so will be able to join the volunteer scheme.

6.8 Holiday rollover - One final piece of legislation to note is the Government's amendment of the paid holiday provision in the Working Time Regulations. To give more flexibility to businesses without costing employees their holiday entitlement, employees (and workers) can now carry over up to four weeks statutory annual leave into the next two years. This will only apply where it has not been reasonably practicable to take the leave due to the effects of the COVID-19 pandemic. If you provide contractual leave over and above the statutory entitlement, the provisions for this contractual leave will remain the same. Regulation 13A of the Working Time Regulation, which permits the additional 1.6 weeks paid statutory leave to be carried over for 12 months, remains the same. This amendment only applies to the first four weeks of paid statutory holiday and is intended to protect those who are working through the pandemic.

For more information on employment issues please contact Libby Hubbard (Tel: 0121 214 3577 or Email libby.hubbard@anthonicollins.com) or Matt Wort (Tel: 0121 214 3501 or Email: matthew.wort@anthonicollins.com).



7. SCHOOLS

- 7.1 Schools have, for most, been closed since 20 March 2020 until further notice. Provision needs to be made by schools for the children of key workers and for vulnerable children (those who have a social worker and those with Education, Health and Care Plans).
- 7.2 A link to the list of “key workers” can be found at: <https://www.gov.uk/government/publications/coronavirus-covid-19-maintaining-educational-provision/guidance-for-schools-colleges-and-local-authorities-on-maintaining-educational-provision>
- 7.3 Broadly, as at the time of writing, this includes eight categories: health and social care, education and childcare, key public services, local and national Government, food and other necessary goods, public safety and national security, transport, utilities, communication and financial services.

8. LOOKING AFTER VULNERABLE PEOPLE

At the time of going to print various supermarkets had opened their doors at certain times of the day for shopping to be undertaken by or on behalf of vulnerable people. We have heard of numerous instances of churches offering to undertake shopping and provide other services to vulnerable people. Churches may wish to issue guidance to remind people to do this safely and to encourage this support as part of the church’s mission.

9. CONTRACTS

- 9.1 The concept of *force majeure* enables parties to a contract to suspend, vary or terminate their contractual obligations as a result of an event which is beyond their reasonable control. Used appropriately, it can save an organisation from certain calamity but it must be proven in each and every case on the facts.
- 9.2 In our view, force majeure could be argued due to the unavailability of a workforce due to a global pandemic but, if the government’s public health strategy limits the extreme impacts, a marginal loss of workforce in social care or construction could have easily been anticipated over the last two years due to Brexit risks. In 12 months’ time it may be difficult to differentiate between contractors looking to renegotiate genuinely due to Coronavirus issues and others wanting to walk away from “bad deals”.
- 9.3 A party to a contract (governed by English law) will only be able to claim force majeure if there is an express force majeure clause in the contract. If such a clause exists, its scope is likely to vary between contracts so it is important to review the specific wording.

- 9.4 Even if a force majeure clause exists, it may not automatically apply and whichever party wants to rely on it will need to be able to prove its applicability based on evidence. Before seeking to rely on a force majeure clause a party should also take all reasonable steps to mitigate its ability to perform the contract. At a very basic level this is why we are seeing so many key and larger events being postponed rather than cancelled; just because they cannot take place on a selected date does not mean they cannot go ahead in three months' time. You can expect to see such arguments run and run.
- 9.5 Where there is no force majeure clause or it does not apply in the circumstances then an option open to organisations may be to consider the alternative, albeit more difficult, principle of frustration.
- 9.6 In this situation the party looking to rely on frustration must prove that it has become impossible to perform a fundamental obligation or that the fundamental obligation has become radically different to what was originally entered into. This is unlikely to be proven where steps could have been taken to sustain the contract, the event in question was foreseeable or the contract pre-empts the event and includes it in a force majeure clause.
- 9.7 If successfully proven, the outcome of the principle of frustration is that the contract is automatically terminated.
- 9.8 An invalid force majeure or frustration claim may result in a counter-claim being issued for breach of contract against the alleged breach. Given the legal complexity surrounding these claims and their novel application to the COVID-19 situation, we strongly advise you seek out legal advice and potentially wait to assess the full impact of COVID-19.
- 9.9 There may be some churches who are part way through a construction project and will be concerned about the impact COVID-19 will have. Many construction contracts contain a completion date by which the works must be completed. The completion date will usually be extended in only very limited circumstances, which may include delays caused by an event neither party could have foreseen at the time the contract was entered into ("force majeure" as above). Whether COVID-19 constitutes a force majeure event on specific construction projects will depend on how the current situation continues to evolve and the impact of the government's response.
- 9.10 For further advice and support on dispute resolution matters, please contact Phil Scully or another member of the dispute resolution team on 0121 214 3565.

10. FINANCIAL RISK MANAGEMENT

- 10.1 Churches may well see a down-turn in giving at this time, both because of the lack of church services as well as members' concern over the long-term impact of the current situation on family finances. It will be important for churches to keep this under review.

- 10.2 If the church has any funding from third parties the church may need to work with the third party to address any potential breaches of financial covenants or undertakings. Any requests for waivers for any relevant breaches should be addressed as early as possible.
- 10.3 Although some may not feel the impact of COVID-19 on their balance sheet immediately, churches should be exploring and reviewing risks and considering any options open to them to ensure they have the funds to get through this extraordinary period. It may be, for example, that at these less than certain times you need to consider minimising spending or pausing plans for developing new projects or changing the way you operate, albeit temporarily.

11. REPORTING SERIOUS INCIDENTS

The Charity Commission has reiterated that charities should follow the Commission's general advice on reporting serious incidents. Below is a link to their guidance:

<https://www.gov.uk/guidance/how-to-report-a-serious-incident-in-your-charity>

12. FINAL THOUGHTS

- 12.1 "Do not be anxious about anything, but in everything by prayer and supplication with thanksgiving let your requests be made known to God. And the peace of God, which surpasses all understanding, will guard your hearts and your minds in Christ Jesus." Philipians 4 v 6-7.
- 12.2 We know that the Lord provides and that we are called to trust Him. There are some practical considerations when operating a church and inevitably there will always be a balance between faith and compliance with regulatory duties. Whatever issues the church faces do feel free to contact one of us, details at the beginning of this briefing.

Anthony Collins Solicitors LLP

Date: 31 March 2020

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