



# COVID19 Briefing

Emerging Issues for Churches

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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. Public worship has for some time now been suspended and 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 We previously compiled this guidance on the practical issues you as a church may need to consider at this time and in this updated briefing we have updated that advice in line with more recent government and regulatory advice. This briefing covers the 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 Christ's Kingdom even when you cannot meet people face to face. It is exactly at times like these the church and its members are so valuable and we are here to help you with your continuing mission work.
- 1.4 If you come across other issues that are not addressed in this document 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 do our best to assist you.



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## 2. REGULATORY GUIDANCE VS STATUTORY OBLIGATIONS

- 2.1 We continue to be in a period where there are likely to be challenges for churches (as well as other charities) to meet regulatory requirements whilst also fulfilling legal duties to ensure their beneficiaries, staff, volunteers and members of the public remain safe.
- 2.2 Some obligations remain absolute and others require organisations to act so far as reasonably practicable and so balancing and ranking the importance of complying with certain obligations can be very complex.
- 2.3 With stringent “social-distancing” measures still in place all organisations, including churches, are having to learn how to adapt their activities and how to 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 Earlier this month, the Government announced that it would allow the re-opening of churches in Step 3 of its plan to lift restrictions. This is expected to be no earlier than 4 July and will be dependent upon the scientific evidence available nearer the time. The Government has also set up the Places of Worship Taskforce, the members of which include some leaders and representatives from different faiths, to work together on a plan for phased re-opening of churches and other places of worship.
- 3.2 In the meantime 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).

- 3.3 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.
- 3.4 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.
- 3.5 Video conferencing will also require careful thought. Video calls can make people feel more connected when it is not possible to meet face-to-face but it is important to remember that all usual data protection and confidentiality rules will apply during virtual meetings and services. Allow participants to join meetings with voice only if they feel more comfortable without using video and be aware that children could wander into shot unintentionally, potentially raising safeguarding issues. Finally, if meetings or services are recorded, ensure that all attendees are aware that they are being recorded.

There is more information available in our Data Protection team's e-briefing: <https://www.anthonycollins.com/newsroom/ebriefings/video-conferencing-safely/>

- 3.6 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 three 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/guidance/manage-financial-difficulties-in-your-charity-caused-by-coronavirus>

<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 and deadline for filing 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 relates to the management of coronavirus-related financial difficulties. We have set out more information on this at paragraph 10.2 of this note.
- 4.3 The third 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.
- 4.4 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).
- 4.5 **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".

If your church does choose to hold electronic meetings, you should be aware of its continuing data protection responsibilities, as set out above in paragraph 3.4 of this note.

- 4.6 **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.

- 4.7 Assuming it is a requirement, your church will need to consider whether there are alternative ways of holding an AGM (please also see paragraph 4.8 below for incorporated charities). 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](mailto:filingextension@charitycommission.gov.uk).
- 4.8 In addition, on 20 May the Government presented a Corporate Governance and Insolvency Bill to introduce a series of measures to help. Broadly speaking the proposals will temporarily allow charitable companies and CIOs but not unincorporated charities to hold general meetings, including AGMs, virtually even where there are no provisions in the governing documents to do so during the 6 months from 26 March to 30 September (applied retrospectively). For those charitable companies and CIOs who were forced to postpone AGMs which were due to be held after 26 March, they will be given a limited period after the Bill is passed to hold those AGMs for a maximum period of up to 8 months. The Bill also includes some other proposed relaxations, including the power to make secondary legislation around filing deadlines. More information can be found at the following link: <https://www.anthonycollins.com/newsroom/ebriefings/rules-not-allow-you-to-hold-your-agm-government-proposes-plans-to-help/>
- 4.9 **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 can execute legal documents.
- 4.10 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.
- 4.11 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.

4.12 The failure of the legislation to develop around electronic signatures means, for land transactions, we are still reliant on regulations dating back to 2008. However, the Land Registry has recently announced temporary changes that relax its usual execution rules.

4.12.1 Until now, Land Registry regulations have required conveyancers to hold an original 'wet ink' deed in order to complete a disposition. Following the changes, a signature page will still need to be signed in ink and witnessed in person but the signature can now be photographed or scanned and then sent to that party's conveyancer along with a final agreed copy of the document.

4.12.2 Additionally, identity verification for Land Registry purposes can now be done by way of a video call and can also be carried out by a wider range of professionals, including doctors, dentists, vets, police officers and teachers.

These changes came into effect on 4 May 2020 and will apply "until further notice".

4.13 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.

4.14 In the unlikely event 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.

4.15 For further advice and support on governance matters, please contact Esther Campsall or another member of the Charities and Social Business team on 0121 212 7431.

## 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 comes from hiring out its space to community groups or pre-schools and nurseries. As many groups have ceased community activities this is likely to have a significant impact on the church's income. It is a really important time to enter into 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 do not 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 if 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 do not 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 upon 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 its 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 we would suggest there is a side letter, which sets out the basis upon which rent will be deferred, waived or suspended, which should clarify for what period this arrangement will 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 have had 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 currently provide its pre-school to local parents and carers and as a result, it is unable to fulfil the contract. However, this position may change for English nurseries next month, given Government proposals to re-open nurseries and schools on 1 June. 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.
- 5.10 Where empty or underused properties are attracting trespassers, you can take action to address this. Landowners are still able to issue possession proceedings against unnamed trespassers, despite a moratorium on other possession claims. If you find yourself in this situation, please contact us and we will advise you accordingly.
- 5.11 Other practical issues will need to be considered as and when buildings are re-opened. As many buildings have been unoccupied for weeks, possibly months, there is an increased likelihood of Legionella bacteria building up in the water systems of buildings left unoccupied (or with minimal occupancy). Follow this link to our briefing on the risk of Legionella following the COVID-19 pandemic:  
<https://www.anthonycollins.com/newsroom/ebriefings/the-risk-of-legionella-following-the-covid-19-pandemic/>

## 6. EMPLOYMENT ISSUES

Again, we would reiterate that all the information is correct at the time of going to print on 20 May 2020.

**6.1 Furloughed employees – the Coronavirus Job Retention Scheme.** This scheme, first announced by the Government on 20 March 2020, introduced the word “furlough” to our vernacular; a word that is now used as if we have known about it forever! Since 20 March, the Government has updated and extended the scheme and added guidance. At its core, the CJRS seeks to assist employers in avoiding mass redundancies, because of the economic effect of the pandemic, by providing a grant so that employees can continue to be paid 80% of their wages whilst not working. 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 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 19 March 2020 but public bodies and those in receipt of public funding for staff costs have some restriction on when the scheme can be used, as detailed below;
- All employees are eligible provided they are on PAYE (this includes zero-hour workers) and were employed on or before 19 March 2020;
- The scheme started on 1 March 2020 and will continue until 31 October 2020 as announced by the Chancellor on 12 May 2020;
- From the start of August, the Government will look to employers to share the cost as furloughed employees start to return to the workplace part-time – further details and guidance on this are expected by the end of May 2020;
- 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;
- Employees who are shielding or who have caring responsibilities can be placed on furlough;
- The minimum period of furlough leave is three weeks; an employee can be furloughed multiple times and can be taken off and put back on furlough provided each period is for three weeks;
- Employees who were made redundant or stopped working for whatever reason post 28 February 2020 can be re-employed and put on furlough even if they are not re-employed until after 19 March 2020 provided they were on PAYE on 28 February 2020 and an RTI submission was made to the HMRC in respect of that employee on or to 28 February 2020; and
- The online reclaiming programme for employers was launched 20 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; and
- 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 have 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; and
- 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.** The Prime Minister announced on Sunday 10 May 2020 (followed on 11 May 2020 by the Government's document "Our Plan to Rebuild The UK Government's COVID-19 Recovery Strategy" <https://www.gov.uk/government/publications/our-plan-to-rebuild-the-uk-governments-covid-19-recovery-strategy>) that employees who were unable to work from home should be looking to return to their places of work. It is our understanding that the Government is not expecting a mass return to work as it is still strongly reiterating that most people should remain working from home where this is possible.

In preparation for the return of employees who cannot work from home, employers are being asked to carry out rigorous risk assessments in collaboration and consultation with employees and their representatives. The purpose of these are to take steps to ensure the safety of returning employees by introducing new ways of working which seek to ensure social distancing and increased hygiene measures. The Government has produced more specific guides to various sectors to give more information and guidance as to details of these measures. (<https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19>).

It is key to note that the Prime Minister's announcement only applies to workers in England. The devolved Governments of Northern Ireland, Wales and Scotland are not following the Prime Minister's lead and are sticking to the message that employees should remain at home.

Working with the Government's sector specific guidance, we would continue to advise that the following checks be made for employees already in the workplace and for those who may be returning following the Prime Minister's announcement;

- 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 two metres away at work-stations.
- Staggered start and finish times are introduced to avoid groups of people congregating as they arrive or leave.



- Reduce the number of people employees are coming into contact with by demarking teams to work in and limiting employees to working within these teams.
- 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 as regards public transport links and whether these are still working and what risks they bring to the employee. The updated Government guidance encourages employees not to use public transport except where absolutely necessary. You may want to consider advising employees to wear face masks if they are having to use public transport.
- Address whether more employees in the workplace could use private transport means. Be creative with solutions, whether this is giving them spaces in an organisation's car park that would be reserved for employees who are now at home or subsidising car parking fees. Many city centres have removed parking charges to assist with this.
- 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](mailto:libby.hubbard@anthonicollins.com)) or Matt Wort (Tel: 0121 214 3501 or Email: [matthew.wort@anthonicollins.com](mailto:matthew.wort@anthonicollins.com)).

## 7. SCHOOLS AND CHILDCARE SETTINGS

7.1 Schools have, for most, been closed since 20 March 2020 with provision being 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). At the time of writing, the Government has proposed that educational and childcare settings reopen from the week commencing 1 June 2020 to cater for children in nurseries, Reception, Year 1, Year 6 and priority groups and to provide some face-to-face support to pupils in Year 10 and 12.

<https://www.gov.uk/government/publications/coronavirus-covid-19-implementing-protective-measures-in-education-and-childcare-settings/coronavirus-covid-19-implementing-protective-measures-in-education-and-childcare-settings>

7.2 The guidance sets out some practical steps that childcare and educational settings should follow when planning to re-open. It acknowledges that young children cannot be expected to remain two metres away from staff and each other. The guidance does not recommend the wearing of face masks, except in relation to children whose care already involves the use of PPE (due to intimate care needs) and where a child becomes unwell with symptoms of coronavirus and the supervising adult cannot maintain a distance of two metres from the child. Instead, nurseries and schools should focus on the following measures:

- avoid contact with anyone with symptoms;
- frequent handwashing and good respiratory hygiene practices (e.g. “catch it, bin it, kill it”);
- regular cleaning of settings; and
- minimising contact and mixing.

- 7.3 In order to reduce contact, the guidance recommends that children and staff stay in a small, consistent group and do not mix with others from outside this group. For pre-school children, staff to child ratios will continue to apply as set out in the Early Years Foundation Stage. In primary schools, classes should be split in half, with no more than 15 pupils and one teacher (and one teaching assistant, if needed) per small group. Where a setting cannot implement these small groups, it should discuss its options with the local authority or trust.
- 7.4 Careful planning will be required before 1 June, which will include carrying out risk assessments, planning small groups and staggered timetables, organising classrooms and considering how to reduce travel on coaches, buses or other public transport. Education and childcare providers will also need to communicate these plans to parents and children where appropriate.
- 7.5 Although places of worship generally look unlikely to be opened until 4 July at the earliest (in Step 3 of the government's roadmap) it is likely to depend upon the individual circumstances of the child provision offered on the church's premises as to how and when it may proceed to open within the guidelines.
- 7.6 For more advice in relation to this section, please contact Kaleigh Grainger or another member of the Regulatory team on 0121 212 7440 or [RegulatoryTeam@anthonicollins.com](mailto:RegulatoryTeam@anthonicollins.com).

## 8. LOOKING AFTER VULNERABLE PEOPLE

Various supermarkets have 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 **Force majeure.** 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 re-negotiate 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 **Statutory demands.** Where a church is a creditor, it will be unable to issue a statutory demand for debts that have arisen because of coronavirus. Statutory demands are often used to encourage engagement from a debtor and ultimately seek repayment.

Currently, there is a temporary ban on statutory demands, which is in force until 30 June 2020, though we expect that the ban may be extended beyond then if the economy struggles to recover. If this is relevant to your church we recommend that you monitor the situation and seek advice on the best options to recover the debt owed.

- 9.11 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 The Charity Commission has warned that charities are at increased financial risk during the coronavirus crisis and may be targeted by fraudsters. In response, the Commission has published new guidance to help charities work through coronavirus-related financial difficulties. It confirms that the starting point for trustees will always be what is in the charity's best interests and lists a number of factors that trustees will need to consider when judging what actions will be in the charity's best interests. These factors include the trade-off between reducing the running costs of the charity and meeting the immediate needs of the charity's users. Churches should also consider safeguarding issues and whether the sale of investments at this time (when they are likely to fetch a much lower price than the trustees would usually expect) is in the charity's best interests.

<https://www.gov.uk/guidance/manage-financial-difficulties-in-your-charity-caused-by-coronavirus>

10.3 Recent Charity Commission guidance aimed at independent examiners warns them to ensure that charities are not incorrectly spending restricted funding. It acknowledges that charities may be finding it "difficult" to meet expenditure from unrestricted funding streams but emphasised that restricted funds should not be used to meet general expenditure. In many ways this guidance is nothing new but it does signify that the Commission's flexibility in the pandemic will not be limitless.

10.4 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.

10.5 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.

- 10.6 For more information on what emergency funding facilities are out there to survive the COVID-19 cash-flow crisis, please see our briefing <https://www.anthonycollins.com/newsroom/ebriefings/what-emergency-funding-facilities-are-out-there-to-survive-the-covid-19-cash-flow-crisis/>

## 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. ACS WEEKLY UPDATE FOR CHARITIES

Our website is updated weekly with the most recent developments in the charities sector. To sign up to receive a copy of our weekly briefing, please visit our website, and scroll down the page to complete the sign-up form <https://www.anthonycollins.com/>.

## 13. FINAL THOUGHTS

- 13.1 "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." Philippians 4 v 6-7.
- 13.2 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 regulator duties. Whatever issues the church faces do feel free to contact one of us; contact details are given at the beginning of this briefing.

**Anthony Collins Solicitors LLP**

**Date: 26 May 2020**

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