



COVID19 Briefing

Emerging Issues for Churches

23 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.
- 4.2 The second guidance note recognises a key issue for charities at this time is how to hold meetings when people may be self-isolating or are ill.
- 4.3 **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”.

- 4.4 **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.
- 4.5 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 call them on 0300 066 9197.
- 4.6 **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.
- 4.7 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.
- 4.8 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.
- 4.9 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.

- 4.10 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.
- 4.11 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.
- 4.12 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. Of course, if as landlord you do not offer deferment of rent and the tenant is unable to meet their rental obligations then, subject to unfolding guidance from the central Government at this time, potentially as landlord you can forfeit the lease based on the non-payment of rent. We would, however, suggest if this were to be an option that you consider the long-term impact that this would have on your own income stream and also any adverse effect upon reputation.
- 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 legally stop paying rent under the contract. This is a changing area as Government policy unfolds and we suggest you review the guidance from the Government on an ongoing basis in this regard. Rent suspension will be a matter of negotiation between the parties.
- 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

The spread of the coronavirus across the UK and the Government's response and public health strategy is resulting in an increasing number of corollary issues within the workplace. Issues such as self-isolation, Statutory Sick Pay and a downturn in business are key and the situation is not a static one.

Below, we have provided answers to some FAQs to assist with these situations.

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 these issues.

The information in this briefing is correct as at 4pm 18/03/20.

- 6.1 **Service delivery roles.** Employers have a duty to protect the Health and Safety of their employees. A fundamental requirement is to take steps to ensure that there is good hygiene in the workplace and that working practices do not pose undue risks to employees and they are given adequate protection. These steps will range from assessing whether employees need personal protective equipment when carrying out their roles (especially when caring for individuals with symptoms) through to ensuring thorough cleaning of premises and reviewing hand washing facilities and practices. A further key requirement is to ensure effective communication with employees to update them on Government guidelines and any key changes that may need to be implemented in a short time frame. Effective and regular communication with employees can also help employees feel safer in the workplace if they trust their employer to keep them updated and informed.
- 6.2 **Sick employees.** Employees who are absent from work and have been diagnosed with coronavirus or are suffering from symptoms are entitled to Statutory Sick Pay (SSP) and/or contractual sick pay. Employers are advised by the Government to be flexible as regards notification of the illness as sufferers have been told not to attend GP surgeries and so will not be able to obtain their normal sickness certification.
- 6.3 **Do employees who are self-isolating get sick pay?** Employees who are not ill but are self-isolating are entitled to Statutory Sick Pay and/or contractual sick pay depending on the circumstances. The Statutory Sick Pay Regulations have been updated so that anyone in self-isolation is deemed incapable of work and entitled to SSP. In more 'normal circumstances' it is only those who receive a written notice of this sort who will be entitled to Statutory Sick Pay. In current circumstances employers may want to take a pragmatic view about whether they are going to request this written notice and whether that is reasonable or whether verbal confirmation from an employee that they been told to self-isolate by a medical practitioner or NHS 111 or Government guidance is acceptable.

Contractual sick pay is, of course, dependent on the contents of the contract or policy. Where the wording in the contract or policy closely follows the Statutory Sick Pay

Regulations then an employee might be entitled to contractual sick pay even if they are asymptomatic and have self-isolated. Where the wording doesn't follow the regulations then it seems less likely that the employee would be entitled to contractual sick pay. Should they wish to do so, employers can use their discretion and pay contractual sick pay even when the employee is not entitled. We suggest that where this happens it is made clear this exercise of discretion is not a change to the policy or contract.

- 6.4 What happens if an employer requests that an employee self-isolates?** This situation may be different where the employee is willing to work and has not been told by health professionals to self-isolate but the employer has told them to remain away from work.

In these situations, the employer should again look to see whether there are any options for working from home. If this is not possible we would advise the employee be paid their full pay.

Employers may want to be careful about drawing distinctions on pay between those who remain away from work following instruction from a health professional and those who have not been instructed to stay away but make their own decision to stay away from work following Government guidance. If employers pay full pay to employees who are requested to place themselves in isolation by medical practitioners but not to those who self-isolate, this might lead to employees who are self-isolating coming back to work. Not only might this put other employees in danger but if the employee is then requested to stay away from work by the employer they would be entitled to full pay in any event.

- 6.5 What about employees who have an underlying health condition and self-isolate?** Employees who have underlying health conditions or who may be more susceptible to the virus may be more anxious at this time. [Government guidance on social distancing](#) gives a list of those considered most at risk. If possible, it is advisable that employees who have any of these conditions work at home or very much limit their time in work. If home working is not possible employers should take a range of factors into account before deciding how these employees should be paid. Employers should also be aware of possible discrimination issues relating to disability, pregnancy and maternity and age.

- 6.6 What about employees who refuse to come into work because of their fear of exposure?** Given the current fears surrounding the virus, employees who have no reason to self-isolate under current guidance might feel nervous about attending the workplace. As noted above, all employers have a duty of care to provide a safe environment for employees and this includes taking all measures, as advised by the Government, to minimise exposure and contagion. If an employer has done this and an employee still refuses to attend work the employee must either demonstrate that they can work from wherever they are currently based or they may need to take unpaid leave or holiday. Employers will need to be wary when an employee who suffers from

mental health issues (such as anxiety etc.) refuses to attend the workplace. If they are disabled then it may be necessary to make reasonable adjustments. This might include helping the employee address their anxieties and/or giving them paid sick leave until they feel able to return to work. This will obviously need to be kept under review.

6.7 Do employers have the right to request details as to why an employee is self-isolating? All employees must inform their employers of any reason why they are not attending work, usually in accordance with their contract of employment. Failure to do so is unauthorised absence and employees may be subject to action under the employer's disciplinary policy. It is reasonable for an employer to request details as to why an employee is absent and to clarify the period of their absence. In these circumstances, it is appropriate to request that employees confirm on their first day of absence the reason they are self-isolating and the relevant advice they have followed from NHS 111 or Public Health England.

6.8 Potential loss of income. The economic impact of the virus will be widespread. This inevitably will have an impact on churches suffering the double blow of paying SSP and loss of income if/when those who give regularly are affected by the current situation. The Government will reimburse "small to medium-sized business" eligible SSP costs for two weeks for each employee; however, that may not be enough. We would advise employers who are anticipating reducing staff costs to look to their contracts to see whether they include lay off provisions. Many will not. A unilateral reduction in hours will be a breach of contract. As a result, employers may wish to seek to agree a period of reduced or unpaid leave as an alternative to redundancies. Other options to consider include requiring employees to take annual leave (which can be done in certain circumstances) or asking people to cover other roles or exploring seconding them to another employer with a shortage of workers.

6.9 Summary

- In service delivery roles, take adequate steps to protect the health and safety of your workforce;
- If employees are self-isolating, contact them to understand why and whether they are able to work from home;
- SSP will have to be paid when employees are self-isolating in accordance with Government guidelines and they are unable to work from home;
- Open discussions on other ways to take time off where there is no option to work from home and no entitlement to SSP;
- What are the options when economic downturn impacts the affordability of employees?; and
- Keep in contact wherever possible with employees; fear of the future and for the jobs might be key and silence will exacerbate that fear.

For more information on employment issues please contact Libby Hubbard

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7. SCHOOLS

- 7.1 At the time of writing the Government has announced that all schools will close from the end of the school day on Friday 20 March 2020 until further notice. Provision will need 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." Philippians 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: 23 March 2020

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