



CHARITIES

What to consider in the current environment including UK Government support in response to COVID-19

15 April 2020

COVID-19 is fundamentally a human crisis and drastic measures have been put in place to ensure the safety of citizens, which understandably have left charities facing ever increasing challenges. We expect to see an impact on daily life for a sustained period of time.

This note summarises some of the measures taken by the UK Government to support charities and mitigate impacts resulting from social distancing put in place to fight COVID-19. This is, of course, a moving arena and things are changing daily. Thus the below is only correct as at its stated date and contains information currently available which is often brief and lacking detail.

As a result of the COVID-19 outbreak, charities are seeing significant falls in income due to, amongst others, the postponement and cancellation of fundraising events, the difficulties in public fundraising campaigns and the closure of charity shops and other activities. Estimates have placed the funding shortfall at £4.3 billion over the coming 12 weeks. Whilst the pandemic is eating up the reserves of some charities, the demand for services is often increasing and without an urgent injection of cash, many charities may be forced to close.

After many calls on the government to provide a rescue package for charities, Rishi Sunak, the Chancellor of the Exchequer, announced financial support for charities on 8 April 2020. At the time of writing, only outline details of this support package directed at charities had been released. This package and details of other general measures of support open to charities are set out below.

If you would like to discuss any of the matters outlined in this note, or indeed anything else, please contact your usual contact at Slaughter and May – we are very aware that, in the most challenging of times, charities are needed more than ever but the issues faced by the sector are no different (and indeed more acute) than the rest of the country and economy.

I. Financial support package for charities

The Government has announced a £750m package directed specifically at charities. This package is comprised of £360m directly from Government departments and £370m directed at small and medium-sized charities. The Chancellor has also stated that the Government will match the public's donations to the BBC's Big Night for the National Emergencies Trust, pledging a minimum of £20m.

Detail has not yet been provided on which charities will be eligible for the financial support or how the grants will be made. The initial announcement states that the charities that will benefit from the £360m fund are to be 'frontline charities' and that this will come directly from Government departments. A package of £370m directed towards small and medium sized charities, including through a grant to the National Lottery Community Fund, is to be directed at those charities in England supporting local communities during the outbreak, including those delivering food, essential medicines and providing financial advice.

There is only minimal information on which charities will be considered frontline charities or those providing essential community services, with initial indications suggesting that these will include charities supporting the vulnerable and providing vital services such as hospices, St John Ambulance to support the NHS, Citizens Advice, victims' charities and vulnerable children's charities.

The announcement states that Government departments will work to identify priority charities to receive this support with the aim that they receive the funds in the coming weeks. This is still a developing area and further information is expected.

2. COVID-19 health-check for charities

As an overview, the following provides an idea of the most frequent questions and challenges we are seeing develop amongst charities over the past few weeks. As the effects of the pandemic intensify, these points may provide a framework for a COVID-19 health-check, or at least offer reassurance that charities are not alone in their issues.

- With likely financial short-falls, are you eligible for government support and are you accessing other sources of funds that might be available? Are there any steps you can take to increase cash flow, such as seeking payment holidays or reducing capital expenditure or operation costs?
- What does your forecasting look like – what is a reasonable forecast at the moment? Are you keeping your trustees and directors adequately informed? Is it time for more frequent cash flow forecasts and virtual meetings?
- Will your employees be able to continue working on a remote basis? What decisions are you making as to whether employees are being furloughed? Is furlough appropriate given your financial position or the ability for employees to operate? Many charities have already taken or are taking these difficult decisions but what are the criteria by which employees have been chosen, have employees been properly communicated with, is there a potential for top-up by the charity and what is the process for recouping the monies from the government?
- Are you able to continue to provide services or will changes to operations be needed? Will your volunteers and employees continue to be available for service delivery? Are contingency plans in place?
- Will you need an extension of time to file annual returns or accounts with the Charity Commission? How will you conduct meetings? Can you access your reserves or restricted funds?
- Do you have any situations where you need to terminate contracts or where other parties are likely to terminate contracts due to COVID-19? Is it possible that parties will seek to invoke force majeure clauses due to COVID-19? What is the position regarding prepayments for events and conferences?
- Have you developed 'what if scenarios', both in the short and longer term and including worst-case scenarios?
- Are your banking relationships strong with access to individuals at banks that will consider your position in the round? Is additional liquidity or backstop liquidity needed and what government funds can potentially be accessed? Is taking on additional debt a proportionate response and has the ability to repay been considered?

3. Further COVID-19 related support

3.1 Coronavirus Job Retention Scheme

The Coronavirus Job Retention Scheme (Scheme) applies to 'furloughed employees'. A 'furloughed' worker is someone who remains employed and kept on payroll but is not provided with work for a minimum period of 3 weeks (the employee is given a leave of absence rather than being made redundant).

- The Scheme is open to all UK employers with a UK bank account and PAYE payroll scheme in place on 28 February 2020.
 - The Scheme will support employers whose operations have been severely impacted by COVID-19.
 - An employer can furlough any employees who were on the PAYE payroll on 28 February 2020.
 - The Scheme also applies to employees who were made redundant after 28 February 2020 if they are rehired by the former employer.
 - Employees on unpaid leave are not eligible, unless they were placed on unpaid leave after 28 February 2020.
 - Under the Scheme, HMRC will reimburse 80% of furloughed workers' regular wage costs (see below), up to a cap of £2,500 per month. This will also cover the associated employer NICs and minimum automatic enrolment employer pension contributions on that subsidised wage. HMRC are working urgently to set up a system for reimbursement. Existing systems are not set up to facilitate payments to employers.
 - While employers can pay employees more than the amount covered by the Scheme, these amounts (and related employer NICs and minimum auto-enrolment employer contributions) will not be reimbursed.
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- Regular wage is the employee's actual gross salary as of 28 February, excluding any commission, bonus or fees.
- This Scheme will be backdated to apply to employees from 1 March.
- To access the Scheme, an employer must designate affected employees as 'furloughed workers' and notify them in writing of this change. A record of the communication must be kept. Once notified, an employer needs to submit to HMRC information about the employees who have been furloughed and their earnings through an online portal. More information is expected.
- Once HMRC have received the claim and established that the employer is eligible for the grant, they will pay it via BACS payment to a UK bank account nominated by the employer.
- Only one claim can be made every 3 weeks but this means that employees can effectively be operated on a rota system on and off furlough.
- During furlough, the furloughed worker must not do any work for the employer organisation. A furloughed worker can undertake training and volunteer work (although the employee must not volunteer for the charity employer).
- When the Scheme comes to an end, the employer must determine whether the employees can return to their duties or whether it is necessary to consider termination of employment on the grounds of redundancy.

Employers are reminded that changing the status of an employee remains subject to employment law and the employment contract.

In announcing the Scheme, the Chancellor stated that "any employer in the country – small or large, charitable or non-profit will be eligible for the scheme". This Scheme will be open initially for at least 3 months, but can be extended if the Chancellor deems it necessary. Further information is expected as this is a developing scheme.

3.2 Deferring VAT

This will be of relevance to charities where they are VAT registered:

- VAT deferral will apply for any payment falling due between 20 March 2020 and 30 June 2020. Payments due after 30 June 2020 must be paid in the usual way.
- The scheme is optional and no application needs to be made, but any direct debits will need to be cancelled (and reinstated after the deferral period). Businesses do not need to make a VAT payment during this period and they are given until 31 March 2021 to pay any deferred amounts. No interest or penalty will be chargeable.
- Any VAT returns must be submitted as usual and on time, and HMRC will continue to process reclaims and refunds as normal.
- Does not apply to payments under the Mini One Stop Shop (MOSS) scheme.

3.3 Statutory Sick Pay relief package for SMEs

This relief, although not specifically directed at charities, should apply to all UK employers with fewer than 250 employees:

- Any UK employer with less than 250 employees on 28 February 2020 is able to claim sick pay for employees who have been off for two weeks due to COVID-19.
- Employers should keep records of employee absences and payments of statutory sick pay.

The scheme is currently being developed and further information should be provided once the relevant legislation extending the statutory sick pay to employees absent due to COVID-19 is passed.

3.4 12-month business rates holiday

This may be of relevance to charities paying business rates on retail premises:

- For all retail, hospitality and leisure businesses in England.
 - To apply automatically to the next council tax bill of such businesses.
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3.5 Coronavirus Business Interruption Loan Scheme (CBIL)

The CBIL Scheme is offering loans of up to £5m for SMEs through the British Business Bank, although charities will only have access to the CBIL if more than half of their income comes from trading activity (which means many charities are likely to be excluded). This is an area of some focus, with some commentators suggesting that this element will either be changed in further guidance or modified in the future.

- CBIL is available to UK based businesses with a turnover of no more than £45m per annum, which have borrowing proposals that a lender would consider viable if it were not for COVID-19 and which a lender believes would enable the business to trade out of short or medium term difficulties.
- The Government will make a Business Interruption Payment covering the interest payments and any lender-levied fees for the first 12 months.
- The Government will provide lenders with a guarantee of 80% (subject to pre-lender cap on claims) on each loan to give lenders confidence to continue financing SMEs.
- CBIL is now open for applications and can be applied for by contacting one of the 40 accredited finance providers.

3.6 Coronavirus Large Business Interruption Loan Scheme (CLBILS)

The CLBILS will provide a Government guarantee of 80% to enable banks to make loans up to £25m to firms with annual turnover of between £45m and £500m. This allows lenders to lend to businesses that were viable before the COVID-19 pandemic but are now suffering significant cash flow difficulties.

- CLBILS is expected to be delivered through commercial lenders and on commercial terms.
- A business would be eligible if it is UK-based in its business activity; has an annual turnover between £45m and £500m; is unable to secure regular commercial financing; has a borrowing proposal which the lender would consider viable if it were not for COVID-19 and believes would enable the business to trade out of any short-term to medium-term difficulty.
- Banks and building societies, insurers and reinsurers (but not insurance brokers), public sector organisations

including state-funded primary and secondary schools cannot apply for CLBILS.

- CLBILS will launch later in April. Further information will be provided as this is a developing scheme.

3.7 Other funding and sources of support

The charity sector (which has been significantly hit by stops on funding but will also be a sector that many will rely on during the pandemic) will benefit from a number of the measures above as well as other sources of support. One is the launch of the C-19 Business Pledge, which is seeking to ensure businesses continue to support charities.

The C-19 Business Pledge seeks to mobilise the business response to COVID-19. Under this pledge, businesses have made various commitments such as sending food supplies to food banks, providing assistance to local hospices and assistance to charities supporting the elderly and vulnerable.

4. Contracts

COVID-19 has caused organisations to face difficulties in performing contracts. Parties may be questioning how they can be excused from fulfilling their contractual obligations and how to protect themselves from another party's failure to perform its contractual obligations.

4.1 Contracts - seeking to rely on a Force Majeure clause

A 'force majeure' (FM) clause is typically found in English contracts. An FM clause operates by express inclusion in a contract to suspend or extinguish a party from performing its contractual obligations following the occurrence of specific events which are unforeseen and outside the party's control. To determine whether an FM clause can be invoked, the exact language of the FM clause must be examined. If the clause states that an 'epidemic' is an FM event, then COVID-19 could trigger the FM clause. If 'epidemic' is not included as an FM event, you may nevertheless invoke the clause if it contains a sweep up provision which defines an FM event as one which is not reasonably foreseen by nor within the reasonable control of the party seeking to invoke the FM clause.

The mere existence of the sweep up provision or reference to an 'epidemic' in the FM clause does not mean that a party can simply rely on it in light of the COVID-19 epidemic. This is because the FM clause often provides that the FM event must be one which 'prevents', 'hinders' or 'delays' the

performance of the contractual obligations. As such, if you are seeking to invoke the FM clause, you must demonstrate how the outbreak is, as appropriate, hindering, delaying or preventing you from performing your obligations. You must also consider whether the FM clause requires you to notify the counterparty in a timely manner of the FM event and whether it requires you to continue performing your obligations that are unaffected by the FM event. It is pertinent that you comply with any such requirements.

4.2 Contracts – receiving a Force Majeure notice

If you have received a notice by a party relying on the FM clause, you should examine its exact wording to ensure that the claimed event qualifies as an FM event. You should also examine the link between the claimed event and the non-performance of the contractual obligations and you may request evidence from the other party. You may wish to negotiate with the other party amending the contract to reach a sensible solution, but you should note that this may not be practical or possible.

4.3 Contracts – Frustration

Force majeure and frustration are mutually exclusive; FM events do not constitute grounds to frustrate a contract, as the contract has already provided for how such an FM event should be dealt with. If the contract does not include an FM clause or the FM clause cannot be invoked as it does not apply, the contract may be frustrated. While frustration is difficult to establish, a contract may be discharged on the ground of frustration when a frustrating event or circumstance:

- a. arises after the formation of a contract;
- b. is not due to the fault of either party;
- c. was not contemplated by the parties at the time of entering into the contract and strikes at the root of the contract; and
- d. renders the performance of the contract physically or commercially impossible or transforms the obligation into a radically different one.

Unlike a FM event, frustration terminates the contract. If the COVID-19 outbreak only makes the performance of the contract more difficult or delays performance, frustration will not apply. Before asserting frustration, you should carefully consider whether COVID-19 satisfies the criteria for frustration.

5. Governance considerations

The Charity Commission for England and Wales stated that its approach to regulation during the COVID-19 outbreak will be flexible and pragmatic as far as possible in the public interest.

5.1 Meetings and decision-making

Following the UK Government's health advice, charities may have no choice but to cancel or postpone their AGMs and other meetings. If the trustees of a charity decide that this is necessary, such decision should be recorded to demonstrate good governance of the charity.

As it is difficult to hold face-to-face meetings during this period, charities are advised to review their governing documents and check for clauses allowing them to meet virtually or to use teleconferencing. If there is no such clause in the governing documents, trustees may still hold meetings remotely if they decide to do so but should record such decision to demonstrate good governance of their charity.

Charity trustees are urged to consider their short, medium and long term priorities to determine whether their financial planning requires amending given this period of uncertainty. The Charity Commission provides guidance that reserves may be used to assist in coping with the outbreak. If the charity's assets or funds have internal limits on their use, such assets or funds may be re-prioritised to allow for use in such times. However, if the funds are restricted and cannot be used at trustees' discretion, the restrictions may be amended but this course of action should only be considered if other alternatives such as reserves are not possible.

Charities are being asked to submit their annual reports on time. However, where the completion of such reports are impacted by the current pandemic, charities with an imminent filing date can request an extension from the Charity Commission.

5.2 Charities Statement of Recommended Practice – Guidance for charity accounts

The Charities Statement of Recommended Practice (SORP) has issued guidance to help trustees in managing their financial accounting in light of the impacts from COVID-19, with the key messages including:

- Trustees should understand the impact of the pandemic on their charity's work, governance and finances.
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- Where a charity is preparing a set of accounts and these have not been approved yet, trustees should consider whether information needs to be included to explain the impact of COVID-19 on their charity.

When preparing their annual reports, trustees are advised to consider, amongst other things, the following:

- how the measures introduced to control COVID-19 affect the charity's activities;
- the financial uncertainties relating to the charity's financial sustainability and the measures taken to address them;
- if applicable, how volunteers assisted the charity in managing its services during the pandemic;
- the impact of COVID-19 on the charity's fundraising ability and how this has been managed;
- how the staff, volunteers and beneficiaries have been affected by the pandemic and the implications for the charity's work for the coming year;
- whether the outbreak impacts on a defined benefit pension liability and any investments the charity holds; and
- the impact on the charity's reserves and any changes to designated funds set aside for future commitments.

Trustees should also ensure that the prepared accounts give a 'true and fair' view and if they cannot be prepared on a going concern basis, this should be disclosed.

6. Providing volunteers and response services to the crisis

Some charities rely on volunteers to assist in service delivery and/or fundraising activities, however charities may find a downturn in volunteers who may be reluctant to help during the outbreak, especially if they are at more risk. On the other hand, some charities and agencies are seeing increased volunteer support, such as the extraordinary response to the NHS call for volunteers.

Charities may find that their employees may be unavailable for work. Charities are urged to consider how they can best support their staff and volunteers to work from home, as well as supporting their employees' mental and physical wellbeing.

There are many examples of charities providing their services in support of the response to COVID-19. For instance, charities are alleviating the pressure on the NHS by continuing to support ambulance services and responding to 999 calls, voluntarily aiding its NHS partners by caring for additional patients in a bid to free up hospital beds as COVID-19 spreads and supporting foodbanks in preparing food parcels to those who are vulnerable. These are just a few and there are many more examples of charities helping in the current crisis and creating ways for volunteers to assist.

7. Can you assist with COVID-19?

If your charity is considering assisting with COVID-19, the Charity Commission recommends reviewing your charity's charitable objects in your governing document. Certain objects, such as the advancement of health; the relief of hardship or distress; the relief of the elderly or the relief of poverty, may already allow you to offer support. Your charitable objects may also include a general object to act for any charitable purpose or to support the general benefit of a local area. Such objects would also allow you to assist in responding to COVID-19. If your charity has other objects, it may be able to adapt them to offer support. For instance, if your charity's object is the advancement of religion, it can offer assistance as part of its pastoral work.

Charities wishing to provide support must consider whether there are any restrictions to their objects, for instance, to benefit a certain local area only. If your objects do not allow you to assist, the objects may be changed by amending the governing document. Prior to embarking on this course of action, the Charity Commission urges you to consider whether there are other charities better suited to respond and the long-term impact of changing your charity's objects including on your current beneficiaries. If you decide to change your charitable objects, you must check whether your trustees have the power to amend them. If not, permission may be required from the Charity Commission.

We trust that you have found this short note helpful. If you have any further queries or would like to speak with us, please contact your usual contact at Slaughter and May or please email at probono@slaughterandmay.com.