

**MacRoberts LLP****CCPS-Coalition of Care and Support Providers in Scotland****Coronavirus Job Retention Scheme (CJRS)*****Introduction***

In this paper we will provide a third sector specific overview of the Coronavirus Job Retention Scheme (CJRS) and furlough of workers with a focus on issues specific to the social care setting.

At the outset a very important point to note is that this is intended to be a high level commentary of the latest legal position and the information is accurate as at 18 May 2020. There have been many updates to the scheme and it is likely that there will be more as the current situation continues. Individual circumstances may also need to be taken into account and therefore the advice in this paper is for guidance only and is not legal advice.

***The CJRS Framework***

There has been a lot of information about the CJRS published on the gov.uk website, some of which has been conflicting.

**HMRC Direction**

The most important document is the Treasury Direction issued by the Chancellor on 15 April 2020 under sections 71 and 76 of the Coronavirus Act 2020. The Treasury Direction sets out the rules, detail and eligibility requirements of the CJRS.

The Treasury Direction takes precedence over the guidance where the guidance deviates from it. However, HMRC have indicated that they will interpret the Treasury Direction in light of the guidance. It is not clear how that will happen where there is a clear inconsistency between the Treasury Direction and the guidance.

**Guidance**

Perhaps the most important guidance for the purposes of the issues discussed in this paper is the Government [Guidance for employers](#). This was first published 26 March 2020 and has been amended many times, most recently on 14 May 2020.

There is other useful guidance on the CJRS including [a step-by-step guide for employers](#) and [guidance](#) on calculating the 80% Furlough pay.

Helpfully last week the Scottish Government have published a link on their website to [guidance for social care employers on the use of the Coronavirus Job Retention Scheme \(furlough\)](#) stating “*we urge employers to read the guidance and to act in accordance with it.*” This provides specific guidance on when social care employers will be able to access the CJRS.

Finally, COSLA has issued [Guidance for Commissioners during Covid-19 Response](#) (dated 17 April 2020). This has been produced for commissioners in Scotland to provide information on pressures on social care providers arising from the COVID-19 response, and to put forward ways in which commissioners can alleviate these pressures.

However, it is important to emphasise is that the Guidance (which ever one is being referred to) is just that – it is guidance only and is not legally binding. The legally binding document in relation to the CJRS is the HMRC Treasury Direction. This means some care does need to be taken with Guidance where it is inconsistent with the Treasury Direction.

### ***Difference between vulnerable and extremely clinically vulnerable***

It is important to understand the difference between vulnerable and extremely clinically vulnerable people in relation to Covid- 19. The difference is summarised in the table below

	Where listed	Guidance
<b>Vulnerable</b>	<a href="#">NHS Inform</a> (wide category of people including over 70's and those who are pregnant)	Advised to strictly adhere to physical distancing measures
<b>Extremely Vulnerable</b> <b>Clinically</b>	<a href="#">NHS Inform</a> (a much narrower list of those with specific health conditions)	Are advised to "Shield" for a minimum of 12 weeks

### ***Public Funding and Access to CJRS***

The [government employer guidance](#) makes it clear that the government expects that the scheme will not be used by many public sector organisations, as the majority of public sector employees are continuing to provide essential public services or contribute to the response to the coronavirus outbreak.

Where employers receive public funding for staff costs, and that funding is continuing, the government expects employers to use that money to continue to pay staff as usual rather than put them on furlough. This also applies to non-public sector employers who receive public funding for staff costs.

In a small number of cases, for example where organisations are not primarily funded by the government and whose staff cannot be redeployed to assist with the coronavirus response, the scheme *may* be appropriate

The Treasury Direction does not, however, prevent public sector employers from accessing the CJRS, or put any restrictions on their eligibility.

The COSLA Guidance for Commissioners states at page 6 that "*Scottish Government has agreed that any reasonable additional costs for adult services caused by Covid 19 for staff sick pay or for those self-isolating can be met and recorded through local Health and Social Care mobilisation plans. This would be costs that are over and above those already agreed as part of hourly rates.*" The expectation therefore is that these additional cost will not be funded by the CJRS.

The guidance for social care employers on the use of the Coronavirus Job Retention Scheme (furlough) published on the SG website states:-

*"Care services remain a vital part of the response to Covid-19, and therefore we expect employers to keep the vast majority of their staff working to maintain these services. This is why published guidance on the scheme states that companies in receipt of public funding are "expected to continue employing staff".*

*However, it is important to note that this “expectation” does not prevent employers in the care sector furloughing staff altogether. Instead, it sets a principle that in the social care sector, furloughing is expected to be the exception rather than the rule. It is vital that where care workers are available to work, they continue to do so to help support the Covid-19 response. As a result, the guidance makes this point to keep key public sector workers on the frontline where they are needed and applies to care workers in the same way it applies to NHS workers, police and local government employees etc.” (our emphasis)*

This guidance provides examples of where this might be appropriate:-

1. Where specific roles have been scaled back or need to stop, however redeployment should first be considered.
2. Shielding employees (although see below)
3. Those who need to stop work for other reasons – e.g. to support a vulnerable individual who is shielding

This Guidance also makes it clear (as does other guidance) that those who are self-isolating should not be Furloughed.

### ***Volunteering***

Whilst employees are not prevented from undertaking volunteer work when Furloughed, any volunteer work must not be for the employee’s own employer. The Guidance is clear that this would be viewed as an attempt to circumvent the CJRS and may be regarded as fraud. The Government has explicitly stated that organisations may be audited retrospectively and any fraudulent or erroneous claims will be subject to claw back.

### ***SSP, Shielding and CJRS***

#### Shielding

The following table sets out the position of the various government sources on the question of whether or not employees who are Shielding can be placed on Furlough:-

<b>Employer Guidance</b>	<b>ACAS Guidance</b>	<b>SG Guidance</b>	<b>Treasury Direction</b>
Shielding employees can be Furloughed	Shielding employees can be Furloughed	Shielding employees can be Furloughed	Shielding employees are not specifically mentioned. However, the Direction states that those eligible for SSP cannot be Furloughed (see Para 6.3). Since 16 April 2020 employees who are shielding are entitled to SSP. As such this suggests that they cannot be Furloughed under the terms of the Direction.

We hope that further clarification on this point is provided by the government.

### Sickness Absence & SSP

In order to qualify for statutory sick pay (SSP) an employee must be absent from work due to incapacity. The SSP Regulations were amended so that certain absences related to COVID-19 could be deemed to be days of incapacity. Currently an employee will be deemed to have an incapacity for SSP purposes where they are self-isolating or shielding. Note that this does not include those who are in the “vulnerable” categories or those who are living with someone who is shielding.

The Employer guidance is clear that, for short-term absences as a result of COVID-19, or because an employee is self-isolating, statutory sick pay (SSP) should be paid, subject to the eligibility requirements being met. The CJRS is not intended to cover short-term sickness absence.

The provisions of the Treasury Direction appear to suggest that an employee on long-term sick leave who has been on unpaid sick leave which started before 28 February 2020 cannot be furloughed until they are fit to return to work (being the “ending of the circumstance” that led the employee to be on unpaid leave.).

### ***Discrimination***

In dealing with issues of Furlough, sickness absence and shielding employers need to be very careful of unlawful discrimination under the Equality Act 2010. In particular there are risks of claims for age, pregnancy and disability discrimination.

The ECHR has produced [helpful Coronavirus \(Covid-19\) Guidance for Employers](#).

In relation to Furlough, the Employer’s Guidance makes it clear that “*equality and discrimination laws will apply in the usual way.*” Where an employer is selecting which employees to designate as furloughed, decisions on which employees to furlough should not be made based on protected characteristics. The ECHR Guidance gives the example of an employer furloughing a pregnant employee in order to avoid its health and safety obligations towards that employee. This is likely to be unlawful discrimination. Specific legal advice should be sought in these situations.

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