

Justice Connect COVID-19 Response Briefing Note

Guidance for the not-for-profit
sector

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1. Introduction

COVID-19 has become a global health crisis, causing major disruptions to all layers of our social fabric.

Of particular concern is the likely impact of COVID-19 on Australia's most vulnerable communities and the frontline not-for-profit organisations servicing them.

Australia's community services sector is grappling with the surge of legal uncertainties that have flowed as a result of the outbreak of COVID-19.

Justice Connect's Not-for-profit Law program provides free legal help to community organisations. Not-for-profit Law is a unique legal service to 'help the helpers'— providing tailored legal support for community organisations across Australia.

With the assistance of Justice Connect member firm Clayton Utz, this briefing note aims to provide guidance to community organisations on some of the most pressing issues raised by COVID-19, including employment, contracts and insurance. You can access the Clayton Utz COVID-19 resource [here](#).

If you have specific questions about any of these issues or how your not-for-profit community organisation may be impacted by COVID-19, please [contact Not-for-profit Law](#) and we will do our best to assist your organisation.

Organisations must conduct their own risk assessment and obtain advice regarding their specific circumstances, operational needs, responsibilities and legal obligations. The following information is not legal advice but a list of key issues for consideration.



2. Employment

Since the first version of this briefing note, the Commonwealth, State and Territory Governments have rapidly escalated their responses to the ongoing health and economic crises, but are now easing restrictions with a view to getting Australians back to work.

While the number of new cases and transmissions of COVID-19 is decreasing, you need to remember the work, health and safety obligations owed to your workers.

One of the big challenges for organisations will be differentiating between new measures which are necessary and those that are being recommended out of an abundance of caution. A failure to comply with mandated requirements will be an offence under the relevant legislation and may also be a breach of work health and safety laws. A failure to comply with non-mandated guidance will not necessarily be a breach of the law but may be a failure to comply with an organisation's duty of care or primary duty under work health and safety laws.



Seek legal advice

You should seek specialist legal advice if your organisation is unclear about the necessity of undertaking a measure or its implications.

2.1 Work Health and Safety

2.1.1 Health and safety of your workers

Your organisation must consider the health and safety issues that COVID-19 presents to workers. This section considers the responsibilities of organisations to:

- ensure, so far as reasonably practical, the health and safety of workers
- balance the health risks to workers against the critical services provided by the organisation, and
- manage risk, reputation, culture and mental health impacts in the backdrop of changing medical advice and information

Key terms



For the purposes of section 2.1, 'workers' refers to employees, contractors, volunteers, trainees, apprentices, and all other people involved in delivering your services to the community.

'Health Department' refers to the relevant federal, state or territory government department.

2.1.1.1 Managing your workers

Your organisation will need to make sure it is taking appropriate steps to manage its workforce in a way that's consistent with its obligations to ensure the health and safety of its workers. Here are some ways you can do this:

1. Monitor information from the World Health Organisation (**WHO**), relevant Health Departments and SafeWork Australia for updates and guidelines.
2. Review your organisation's current risk assessment as the information about assessment of risk to workers changes, noting that the likelihood of harm to workers will not be the same for every organisation. As community measures are relaxed in each State and Territory, you should re-assess potential new risks such as vulnerable workers.



3. The Business Council of Australia is encouraging workers to download the COVIDSafe App which was launched on 26 April 2020. However, you can't require your workers to download the app. You also can't require them to download the App on any devices owned by your organisation.
4. Review controls and test whether they remain effective. Consider having multiple controls in place, such as increased cleaning services, increased personal protective equipment (**PPE**) training, suspension or cancellation of certain activities, encouraging good personal hygiene, enforcing social distancing and reducing the number of people physically in the workplace.
5. Consult with workers and unions as required on risk assessments and control measures that should be implemented. Make sure you communicate the control measures clearly and provide clear directions and guidance to all workers of what is expected of them. You should also remind workers that they still have to abide by other risk mitigation measures and these measures shouldn't be ignored or not complied with.
6. Consider if your organisation is required by law or industrial instrument to consult with unions and/or health and safety representatives.
7. Consider your organisation's workforce and which of your workers may be more impacted and have a particular vulnerability to COVID-19. Consider having one-on-one or targeted small group discussions with vulnerable workers to ensure their needs and individual circumstances are heard and considered.
8. Make sure your organisation has a Pandemic or Infectious Diseases Plan that is consistent with WHO and Health Department information. The Pandemic or Infectious Diseases Plan may draw from an existing business continuity or crisis management plan. Confirm that appropriate responsible people (Committee or Board and Senior Management) know about the Pandemic or Infectious Diseases Plan and their responsibilities.
9. Share any relevant information you have regarding COVID-19 and its possible impact on work health and safety with your workers and give them an opportunity to express their views before you make decisions on health and safety matters.
10. Avoid holding meetings with large numbers of workers. Instead, try to hold video or teleconferences.
11. Consider appointing a COVID-19 risk manager who can be the point of contact for workers to report to if they or someone they are in frequent contact with is diagnosed with, or exposed to, COVID-19.
12. Brief and educate workplace health and safety officers of what to look out for and what to report to the risk officer.
13. Develop succession contingencies for your organisation's leadership.
14. Plan for workers to be absent. Cross-train workers to perform critical functions in the event of an unexpected absence or quarantine of another worker. Workers should be able to perform duties of other workers if need be.
15. Document your organisation's risk assessments, consultation efforts and decision-making processes with respect to risk management.
16. Consider relevant insurance policies. Understand your reporting obligations and speak to your insurer if you have any questions. Refer to section 4 for further information.

2.1.1.2 Communicating with your workers

1. Effectively communicate with workers who are at the workplace as well as those that are working from home.
2. Provide workers with regular updates through various forms of communication (such as email, SMS, signs around the office). Where appropriate, use languages other than English, or diagrams or pictures in communication. Aim for face-to-face interaction online if possible (such as Skype, BlueJeans, Zoom).
3. Communicate your organisation's risk assessment with workers and consult with them about the appropriate control measures which can be implemented.



4. Educate workers on the measures and updates issued by authorities – particularly the applicable Health Department – as well as your organisation's risk assessment. You should also consult with your workers regarding the appropriate control measures which can be implemented.
5. Make sure workers know that they must urgently report any increased risk of infection, (for example if they have been in contact with a person diagnosed with COVID-19 or if they have travelled to a country identified as high risk).
6. Encourage workers to communicate any questions or concerns they may have and any difficulties they face working from home.
7. Contact any workers who are based offsite and make sure their safety conditions match your health and safety obligations.
8. Where workers are working from home make sure they have a safe place to work. Clearly explain that ordinary workplace policies and procedures apply during flexible working arrangements, including the obligation not to put themselves at risk.
9. Speak regularly to organisations that share facilities or co-locate with you to make sure relevant information is shared effectively.
10. Consider what the paper trail looks like. Work health and safety issues that are raised but not addressed can result in prosecution.

2.1.1.3 Flexible work arrangements

1. If possible, allow for social distancing and continue to encourage workers to work flexibly. Continue to monitor and distinguish between guidance versus mandated requirements.
2. When considering whether or not to return workers to the office in accordance with the Government's Roadmap to a COVIDSafe Australia announced on 8 May 2020, or if workers are coming into the office during this time, ensure spatial separation between desks and workstations (approximately 1.5 meters between workers).
3. Encourage your workers to self-report and self-isolate for the recommended 14 days if they display any symptoms or have come into contact with a confirmed case of COVID-19. Tell your workers that they must identify and comply with any isolation orders.
4. With the different approaches to the reopening of schools for certain age groups, and timing of this, your organisation should be mindful of workers with school-aged children or other caring responsibilities to allow them to balance work responsibilities and carer duties.
5. For workers that can work offsite, make sure workers have the necessary equipment to work remotely and have a safe environment in which to do so. Measures to support workers working from home may include video-conferencing, online meetings or sending work to be reviewed by email.
6. Keep up to date with the latest Government announcements regarding the types of businesses that are restricted from opening, and the proposed changes to those restrictions, which may impact your organisation.

2.1.1.4 Group interactions

1. Consider suspending unnecessary interstate and international travel, particularly to places where there is high prevalence of COVID-19. Your organisation should continue to demonstrate caution before immediately resuming travel when restrictions are lifted. All travel should be considered on a case by case basis.
2. Consider how workers may avoid public transport, especially during peak travel times. You may want to allow workers to arrive late or leave early to avoid rush hour or allow workers to use spare carparks.



3. Where possible, replace external face-to-face meetings with videoconferences to reduce the number of visitors coming through the office.
4. The State and Territory Governments are beginning to ease restrictions on public gatherings for certain activities, although social distancing rules still apply. You should continue to monitor any updates and make sure you differentiate between mandated requirements and guidance. If you hold a particular event or meeting, make sure hand sanitiser is readily available to everyone and that attendees are encouraged not to shake hands.

2.1.1.5 Practical safety tips

1. Ensure that workers are practising social distancing:
 - this requires workers to stay 1.5m apart
 - limit non-essential workers from visiting the workplace
 - discourage physical contact in the workplace, and
 - limit social in-person gatherings
2. Continue to encourage workers to work from home if you can. Develop a staggered return to work plan as the longer workers work from home, the more different risks can arise such as ergonomic issues, mental health impacts.
3. Onsite facilities such as common areas should remain closed until you conduct a detailed risk assessment of their ongoing operation.
4. If your workers are working from home on a roster or alternative basis, disinfect desks, tables, telephones, keyboards and other surfaces at your workplace. Obtain proof from cleaning companies you have hired of the work undertaken to clean the workplace.
5. Workplaces where a worker potentially has COVID-19 should be shut down and thoroughly cleaned before workers return. Obtain proof from cleaning companies you have hired of the work undertaken to clean the workplace.

2.1.1.6 Sick workers

1. Encourage workers who have mild respiratory symptoms, such as coughing, sneezing, shortness of breath or a mild temperature, to stay home or work from home.
2. Educate workers on their leave entitlements and ability to access personal leave balances if they are ill, self-isolating, concerned they have been exposed to infection, or are caring for an ill family member.
3. Allow for workers to take paid or unpaid leave where possible.
4. Make sure workers who have returned from overseas self-isolate in accordance with applicable Health Department instructions and take further leave or work from home if possible.
5. Workers should be encouraged to self-report and should know that if they knowingly attend work in breach of a reasonable and lawful safety direction they may breach the work health and safety legislation which may have personal consequences for them.
6. You can request that workers provide medical certificates or statutory declarations to show that they need to take sick leave. However, because of the increased strain on the healthcare system keep in mind that it may be difficult for the worker to get an appointment.
7. Consider whether a medical certificate is required before workers return to work.



2.1.1.7 Vulnerable workers

1. The Health Department has identified the following people to be at most risk of serious infection:
 - people with compromised immune systems
 - people over the age of 60
 - Aboriginal and Torres Strait Island people over the age of 50
 - people with chronic medical conditions, and
 - people in group residential settings
2. The WHO has also identified people with pre-existing medical conditions such as high blood pressure, heart disease, lung disease, cancer or diabetes to be at increased risk.
3. If your organisation has workers in the above categories, you'll need to consider their circumstances when making any plans.
4. Whatever procedures your organisation puts in place, particularly when there are different measures for different categories of workers, it should be done with the assistance of medical experts or work health and safety advice.

2.1.1.8 Pregnant workers

1. Pregnant workers should be given special consideration.
2. If possible, you should arrange for them to work at home until the risk has passed. If this isn't possible, you should provide them with alternate safe work.
3. It is still not clear whether pregnant women are considered vulnerable, but they share a number of characteristics with at risk people, such as a lowered immune system.
4. Your organisation should take a cautious approach when conducting a risk assessment of pregnant workers. Your organisation should take account of the increased likelihood that they will contract the virus or the greater consequences of infection, which may mean you need to have a higher standard of steps to manage the risks. If possible these steps should be based on expert work health safety or medical advice.
5. The Fair Work Act contains a number of sections about pregnant workers, including that employers have to find an 'appropriate safe job' for the 'risk period', which is the length of pregnancy. There cannot be other changes to the worker's terms and conditions of employment if they are otherwise fit for work.

2.1.1.9 Workers' health and safety when working from home

If it's not appropriate to have workers working from home, consider using special leave. Refer to 2.1.2.2 for more information.

If workers are working from home, put processes in place to ensure the health and safety of the workforce as well as to meet your organisation's operational demands.

1. If it's not usual for workers to work from home, consider assessing risks that may arise when working from home.
2. Consider drafting a work from home policy.
3. Provide workers with appropriate equipment so they can work safely and effectively from home.
4. Make sure workers are educated about proper ergonomic practices. Develop a self-check checklist for workers to complete that helps verify that they are working in a safe environment.
5. Train your workers on how to conduct their work safely in external environments.



6. Keep in touch with workers at home regularly to make sure they are healthy and coping with the working arrangements. You should also provide frequent updates and communications about the status and impact of COVID-19. Consider regular briefings via video or teleconference or sending links to useful webpages. It is also a good idea to establish channels of communication for workers to provide feedback about working from home difficulties, such as reporting technical issues they're having.
7. Encourage workers to practise social distancing even when working from home. They are still 'at work' and you are still responsible for their health and safety.
8. Because people are likely to be working from home for some time, or alternating between working from home and working in the office, you should encourage workers to:
 - establish a dedicated workspace at home that is ergonomically set up and free from distractions
 - maintain a routine, for example, encourage workers to keep active
 - keep usual work hours where possible, and
 - maintain a sense of collegiality by using technology to connect virtually with others in the organisation
9. Your managers should be contactable and proactive and should aim for face-to-face interaction when possible. It's important still to celebrate occasions such as birthdays, wins and important developments.

2.1.1.10 Health and safety of others

So far as reasonably practical, your organisation needs to ensure the health and safety of other people, particularly service-users who may be vulnerable to greater harm caused by infection of COVID-19.

1. Consider limiting contact and interactions with service-users and while restrictions are being eased consider:
 - limiting non-essential visitors to the workplace
 - conducting meetings virtually where possible, and
 - cancelling on-site events and transferring them to a virtual platform if possible
2. If you have to have face-to-face interactions:
 - limit the number of attendees
 - consider hosting multiple sessions to limit the number of attendees together at the one time
 - provide hand sanitiser
 - encourage people who are unwell to stay home, and
 - ensure that social distancing is followed
3. Monitor the WHO and relevant Health Department websites for updates and guidelines relevant to organisations that are providing community services.
4. Review your risk assessment to make sure it accurately reflects current COVID-19 advice and the assessment of risk to people who may be put at risk by your organisation.
5. The risk assessment should give particular consideration to people who are more vulnerable to serious harm caused by COVID-19 including the elderly and those living with pre-existing health conditions.
6. Risk assessment policies need to be continually reviewed as information changes.
7. Your organisation should consider whether it's safe to continue to offer all services and should also consider safety when interacting with other organisations.
8. Make sure your organisation's Pandemic or Infectious Diseases Plan considers risks to people outside the workplace.



9. Consult, co-operate and co-ordinate where practical with clients, service-users, customers, suppliers, other organisations (co-located workplaces), building management and service providers such as cleaners, security, deliveries.

2.1.1.11 Complying with Government directives

Your organisation will need to make sure it's complying with any Government health directives and requiring workers to do so as well.

1. Ensure compliance with the applicable Health Department directions and reporting obligations. Among other things, directives may relate to workplace closure, social distancing or self-quarantining measures.
2. Ensure compliance with the applicable Workplace Health and Safety Department's directions and guidelines.

2.1.1.12 Mental health

The uncertainty of COVID-19 exposure as well as the consequences of being, or potentially being, socially isolated creates a greater concern for the mental health of workers.

1. Review the organisation's risk assessment and consider appropriate controls for mental health risks.
2. Remind workers that they and their families can access an Employee Assistance Provider (**EAP**) (if available). Distribute the names and contact details of any trained mental health officer or human resources representatives who workers can reach out to if working from home.
3. Consider increased risk of mental health issues arising from workers working from home and increased isolation from the workplace. Make regular contact with workers by phone, Skype or online messaging. This will make them feel involved but also gives them a sense of social support and engagement.
4. Develop strategies to mitigate the impact of social distancing measures.
5. Encourage workers to discuss any concerns they may have regarding working from home, the impact of any proposed control measures, not feeling connected to the team or COVID-19 generally.
6. Where employees are required to stand down or work from home for an extended period, consider high risk and vulnerable individuals and develop management plans.
7. Workers who have worked from home for an extended period of time may experience a period of readjustment when asked to return to the workplace. Workers should be consulted regarding any return to work plans.

2.1.2 Employee Entitlements

Your organisation needs to make sure that interim measures are consistent with existing employment law responsibilities.

Section 2.1.2 considers the responsibilities relating to employees only. Further information about managing volunteers in the outbreak of COVID-19 can be found [here](#).

2.1.2.1 Legislation and contracts

Your organisation needs to make sure any interim or ongoing arrangements responding to COVID-19 are consistent with contractual and statutory (legislation) obligations.

1. Review entitlements contained in relevant remuneration and leave policies, for example – applicable modern awards, enterprise agreements, Fair Work Act provisions and employment contracts.
2. The Fair Work Act allows employers to stop making payments to an employee during a period of stand down as a result of, among other things, 'a stoppage of work for any cause for which the employer cannot reasonably be held responsible'.



- Your organisation should seek legal advice before taking this course of action. An organisation that ceases operations where it is not reasonably expected to do so may **not** be protected by this provision.
 - Modern Awards and Enterprise Agreements may include terms imposing additional requirements for an employer to meet before standing down an employee (for example notice, consultation, time and pay).
3. Review employment contracts to determine the classification of the employee (such as casual or part-time) and your right to cancel shifts.

2.1.2.2 Leave entitlements, special leave and payments

Your organisation may decide to provide special leave or other payment arrangements to discourage unwell employees from attending work if they have been exposed to COVID-19.

1. Policies should reflect the current social and economic climate and provide practical payment and leave response mechanisms. These may include ex-gratia or discretionary arrangement options to employees who may not ordinarily have access to paid leave.
2. Circulate applicable policies that make clear that it's a complex and evolving situation and that conditions will continue to be reviewed.
3. Special leave and pay arrangements should consider a range of factors including existing legal obligations, the employee's position and their ability to perform tasks remotely.
4. Make sure leave entitlements are consistent across different departments and teams. As part of this, consistent leave application and approval processes should be used.
5. Make sure employees are aware of the different leave options open to them including sick leave, carer's leave and annual leave. An employee can be directed to take annual leave during a shut down in limited circumstances.
6. Consider whether your organisation is prepared to offer advanced leave if workers have accrued inadequate personal leave. Allowing advanced leave means allowing workers to access leave they have not yet accrued.
7. Policies that make sure workers won't be penalised for taking sick leave are important for encouraging self-reporting and reducing potential COVID-19 exposure.
8. Review and promote your flexible work policies that allow workers to stay home to care for a sick family member. Be aware that more workers may need to stay at home to care for sick children or other sick family members than is usual.
9. Encourage casual workers to self-report when they are ill. Casual workers don't have relevant leave entitlements. Your organisation should consider special leave or payments to discourage casual workers from attending work if they are unwell.
10. Where a discretionary payment is made to a worker, your organisation should explain the nature of the payment as well as the rate of pay and the period of payment.
11. Your organisation should be mindful that short term special arrangements may only be viable for a small number of workers for a short period of time.
12. You can direct your workers to the different financial assistance packages introduced by the Commonwealth Government if workers have been stood down, made redundant or you have had to reduce their hours. States and Territories have also introduced their own assistance packages.

2.1.2.2.1 Issuing directives to employees

1. Employers can issue lawful directions to workers, directing them not to attend work if they, or someone they are in regular or close contact with, have been exposed to COVID-19. In these circumstances, workers are likely to be entitled to remuneration.



2. In most circumstances, employers can reasonably direct workers to attend medical examinations and obtain health clearances from their doctors. All relevant documentation should be reviewed before doing this.

2.1.2.2.2 Privacy

1. Consider whether there are any concerns or additional obligations with respect to privacy law given your organisation may be holding sensitive health information.
2. Avoid disclosing personal information beyond what is necessary.
3. Avoid disclosing information including names of infected workers or those that may have been exposed and are self-isolating.
4. Where appropriate, take steps to make sure health data remains anonymous.
5. Obtain any relevant worker's consent before circulating any personal information.
6. Make sure personal information is stored safely and correctly.

Further information about managing privacy risks during the COVID-19 outbreak can be found [here](#).

2.1.2.3 Discrimination

Where interim measures are in place that impact certain workers, your organisation faces a greater risk of adverse action and discrimination claims arising from the perception of management actions.

Under Commonwealth discrimination laws, a positive diagnosis of COVID-19 is a 'disability'.

It's unlawful for you to directly or indirectly discriminate against a worker because of a disease, illness or injury. However, it's up to you to decide whether the disease prevents a worker from completing the inherent requirements of their role and manage them accordingly.

Your organisation should:

1. Make sure mandated isolation decisions are medically required and supported by expert advice.
2. Document all decision-making processes and make sure proper processes and organisational policy is complied with.
3. Take particular care and seek advice where a decision may be perceived to be because of race, age, disability, ethnic origin, parental responsibility or some other prohibited reason.
4. Make sure workers are treated consistently and with uniformity where appropriate.
5. Make sure workers who access rights – including the taking of sick leave, reporting of workplace risks and complaints – are protected from retaliatory action.
6. Consider increased risks of bullying, harassment, reprisal action and victimisation and ensure management is supported in dealing with it proactively.
7. Remind workers about codes of conduct and enforce compliance.

2.1.2.4 Workers' compensation

A worker who has an illness arising from COVID-19 may be entitled to workers' compensation, depending on how they contracted the virus. This is why it's important to protect the health and safety of workers in the ways identified above.

1. The test is different in each jurisdiction but generally, to be covered, the worker's employment must have significantly contributed to them contracting the virus.
2. Because exposure to COVID-19 can occur in public settings, it will be difficult to determine where the worker contracted the virus and whether their employment was a significant contributing factor.



3. By asking your workers to work remotely, the workplace in which an injury can occur is broadened.
4. Having no or limited control over workers' work from home environment increases risks in relation to other injuries being sustained.
5. Social distancing, self-isolation and mandated requirements to work from home can also increase the potential for stress-related conditions. Workers may also become distressed about being unable to fulfil their duties and obligations properly during the pandemic. If unsupported, these worries can develop into mental health problems.
6. An employer may have insurance notification obligations in relation to identified claims.
7. For workers in the workplace you should:
 - implement as many of the practical work health and safety tips outlined above in order to reduce the likelihood of an injury occurring
 - when trying to limit the potential of the workplace to be the 'source' of the infection and a significant contributing factor, think about implementing practical measures such as educating workers on how to avoid infection, providing hand sanitiser etc.
 - keep records of workers at the workplace, and
 - put more robust measures in place if your workplace is high-risk
8. For workers working from home you should:
 - request that they get a medical certificate if they injure themselves at home and keep detailed notes about the incident so you have adequate information to assess the injury and report it to your workers' compensation insurance, and
 - take steps to make sure you're caring for your workers' mental and physical health while they are working from home

2.1.3 Planning a return to the workplace

1. Following the Government's announcement of the Roadmap to a COVIDSafe Australia, it's critical that your organisation ensures that it's ready to deal with the challenges that lie ahead, as well as considering your duties under the work health and safety legislation.
2. Steps 1 and 2 of the Roadmap recommend that workers continue to work from home during these phases. Your workers should not be rushing back to work and you should work together with them and act consistently with the advice from health authorities.
3. When navigating the return to work process, your organisation must actively control the risk against the spread of COVID-19 at the workplace. You should take a risk based approach and implement suitable control measures that are particular to your unique workplace and which focus on both the physical and mental health of workers.
4. Your organisation's risks at the workplace will have changed as a result of COVID-19 and you will need to deal with and respond to these new risks.
5. Your organisation will need to implement a COVIDSafe Plan to meet your legal obligations.
6. When planning a return to work your organisation should:
 - undertake a risk assessment which assesses both the physical and mental health risks of the return to work process. Your workers should be consulted as part of this process
 - carefully consider which employees need to return to the workplace first. You should consider options such as a staggered return to work, alternating teams and office stations and have staggered start and finish times
 - consider arrangements for transitioning employees from remote working back to the workplace



- ensure that it is staying up to date with the latest public health directives and guidance from regulators
- continue to review and amend its COVID-19 plans and ensure that the controls you've implemented are managing the risks which you have identified
- implement controls which promote social distancing such as creating separate walkways through workplaces, limiting the number of people in meeting rooms, avoiding sharing desks, phones and other work tools
- try to reduce direct contact between workers, customers, service-users, clients, suppliers and other people in the workplace, such as by continuing to support working from home and creating barriers and screens
- promote good hygiene practices among workers, such as by providing plenty of soap and disposable hand towels
- trying to limit environmental exposure, such as by increasing cleaning and disinfection of high traffic areas or shared surfaces
- implementing controls to reduce the risk of people who have been infected with COVID-19 coming to work
- managing workers' mental health risks and monitoring their mental health, and
- communicating with your workers regarding the measures you have introduced to address COVID-19



Not-for-profit Law resources

See Not-for-profit Law's webpages on [employees](#), [volunteers](#) and [looking after your workers \(including volunteers\) during COVID-19](#).

Other resources

[DHHS \(Victoria\) Guidance Note on Employment-Related Matters](#)

[Fair Work Ombudsman COVID-19 Guidance](#)

[Safe Work NSW WHS Guidance](#)

[WorkSafe Victoria COVID-19 Guidance](#)

[SafeWork Australia - COVID-19 hub](#)



3. Contracts

The impact of COVID-19 may mean organisations are prevented or delayed from performing or complying with contractual obligations – for example meeting KPIs under a government funding contract or delivering face-to-face services to fee paying clients. In some circumstances changes to the law could mean that continued performance of your obligations under the contract could be a breach of the law.

3.1 Organisations should analyse contracts

Your organisation should analyse any contracts it has with clients, government departments, other community organisations (for example sub-contractors or auspicing agreements) or for-profit entities. Your organisation should try to spot any vulnerabilities and critically think about whether it can comply with its contractual obligations and identify whether it can (or should):

- implement a non-contractual 'commercial' solution to the problem
- suspend performance of contractual obligations
- terminate the contract entirely, or
- seek to vary the terms of the contract (for example KPIs)



Seek legal advice

Each contract and the potential course of action should be evaluated on a case-by-case base, taking into account the potential operational, financial and reputational impacts on the organisation.

Specialist legal advice should be sought before taking steps to reach a commercial settlement, suspending performance of contractual obligations, terminating the contract or seeking to vary the terms of the contract.

3.1.1 Non-contractual 'commercial' solutions

In some circumstances there may be no contractual solution to the problem. Your organisation should consider whether non-contractual commercial solutions are appropriate, for example finding alternative ways to continue to deliver services. If both parties to a contract agree to reach such a solution, the agreement should be documented in writing.

3.1.2 Suspend performance of contractual obligations or terminate the contract entirely

There are several 'contractual' mechanisms that may allow an organisation to suspend performance of or terminate the contract.

3.1.2.1 Force majeure

1. A force majeure clause is a type of clause in a contract that allows parties to a contract to obtain relief from the consequences of non-performance, or delayed performance, in particular circumstances (typically unavoidable or unforeseeable events).
2. Not all contracts contain a force majeure clause. Your organisation should review its contracts to determine if they contain force majeure provisions.
3. Typically, a force majeure provision will relieve an affected party:
 - that is prevented or delayed from performing its contractual obligations



- due to an event or circumstance that is not within the reasonable control of the affected party, and
 - where the affected party is not reasonably able to prevent or overcome the event or circumstance by the exercise of due diligence
4. A party's ability to rely on a force majeure provision depends on the terms of the relevant contract.
 5. Whether COVID-19 constitutes an event of force majeure will depend on the definition of force majeure in the contract.
 - Definitions can sometimes be a list of specified events, which often include 'epidemics', 'quarantine' and 'acts of God', but typically they relate to events that are beyond a party's reasonable control, can't be prevented or overcome by the exercise of due diligence and actually cause a delay, failure, or inability to comply with contractual obligations.
 - In most cases a lack of finances, lack of funds or the inability to borrow funds won't constitute force majeure.
 6. If COVID-19 is an event of force majeure, the party seeking relief should make sure it complies with the terms of the contract in claiming relief.
 - Typically, force majeure provisions require notice to be given specifying (to the extent practicable) details of the relevant event, the extent to which relevant obligations are affected and, potentially, the anticipated length of delay that will arise from it. There may also be obligations to continue to provide updated information.
 7. If an organisation is seeking to rely on a force majeure clause, the party affected by the force majeure event is usually required to use reasonable endeavours to mitigate (reduce) the effect of that event on its ability to continue to perform its obligations under the agreement.
 8. Generally, relief is only available for the duration of the actual delay arising out of the force majeure event.
 9. Termination rights are generally able to be invoked where the affected party is prevented from performing its obligations due to a force majeure event occurring for an 'extended' period of time. The period of time will depend on the circumstances relevant to the contract.

3.1.2.2 Termination or frustration

1. If a contract doesn't contain a force majeure provision, or the definition of force majeure is not broad enough to capture COVID-19, the termination provisions of the contract may be an appropriate way to end the contract. For example, some contracts will include:
 - a 'hardship' provision that will allow a party to terminate the contract if performance has become excessively burdensome, or
 - a 'termination for convenience' provision that will allow a party to terminate the contract for any or no reason
2. Your organisation could also consider whether the contractual doctrine of frustration could apply to relieve compliance.
 - This means parties may argue that the contract is frustrated altogether – that is, without the fault of a party, the contract is incapable of being performed due to an unforeseen event (or events), resulting in the obligations under the contract being radically different from those contemplated by the parties.
 - Establishing frustration can be difficult because it doesn't apply to hardship. The fact that the method for performance contemplated by a contract has been affected, or the burden of performance has been increased, by an event or events occurring without fault, does not amount to frustration unless performance in accordance with the contract has become practically impossible.
 - The doctrine of frustration is also applied within very narrow limits. For a party to succeed in claiming frustration, it must show that the parties never agreed to be bound in the fundamentally different situation that has unexpectedly emerged.



3.1.3 Vary the terms of the contract

Most contracts will contain a variation provision that will set out a process under which the contractual terms can be varied. This may be an option for organisations wishing to renegotiate the timeline or substance of KPIs, or the mode of delivering a service.

3.2 Illegality

New COVID-19 related laws are swiftly being implemented by the Commonwealth Government, as well as at the State and Territory level. These laws impose a number of new restrictions, such as limiting the number of people that can gather indoors or requiring the closure of certain types of businesses.

It is important to critically think about whether the new laws make performance of your obligations, or the obligations of the other party to the contract, illegal. If so, those obligations may be suspended for a certain period of time or the contract may be frustrated.



Not-for-profit Law resources

See Not-for-profit Law's webpages on [agreements](#) and [managing your contractual obligations during COVID-19](#)

Other resources

[Business Victoria](#) COVID-19 Guidance

[Fair Trading NSW](#) COVID-19 Guidance



4. Insurance

4.1 Consider insurance coverage

1. Your organisation should start by first identifying the impact of COVID-19 on the organisation – in particular, what loss may be suffered, or liability may arise from claims against the organisation.
2. The next step is to review your insurance policies to understand whether insurance might cover those impacts. Your organisation should then confirm the scope of insurance cover and the policy conditions and exclusions.



Understanding insurance coverage

If your organisation is not sure about what insurance coverage it has, consider speaking to your core funders, peak bodies or your insurance broker for more information.

3. If your organisation forms the view that the impact of COVID-19 is covered by your insurance policy:
 - **Notify:** Inform the insurer (or broker) that your organisation is making a claim. Don't be pressured into estimating the amount of your claim at this stage. Instead, ask your insurer to waive any requirement that the finalised claim be lodged within an allotted period of time.
 - **Record:** Keep a diary with a chronology of events. Record what happened, what your organisation did to mitigate the impact and what your organisation did to keep services running. Keep a diary note of the time spent by you and any staff as a consequence of the event. This should include hours spent, the date incurred, a description of what was done, and any costs incurred (with receipts or invoices).
 - **Mitigate:** You are entitled to compensation for your loss in accordance with the terms of your insurance policy, although insurers will expect you to mitigate (reduce) your loss where possible.

4.2 Specific insurance policies that may be relevant

The virus will impact organisations and sectors in different ways, and there will be a range of insurance issues to consider.

1. COVID-19 may result in an employee experiencing physical illness, or illness or injury to their mental health arising from stressors in relation to the virus. In some circumstances workers may be covered by workers' compensation schemes (but this will vary in each state and territory and depend on the circumstances).
2. The impact of COVID-19 may enliven other insurance obligations for other types of workers. Harm caused to or by a volunteer may trigger public liability insurance responsibilities and entitlements. Similarly, a contract with an independent contractor may include provision for insurance implications of COVID-19-related harm to or by the contractor.
3. COVID-19 may impact the operations of your organisation, for example disruption in supply chains, employee absenteeism or cancelled appointments, which may result in a loss of revenue.
 - If your organisation earns income from its activities (for example, you run a social enterprise or a fee for service arrangement) your organisation may have what is known as business interruption insurance.
 - Business interruption insurance commonly forms part of a property insurance policy and is usually only available where there has been loss or damage to physical assets. The operational impacts of COVID-19 might not be covered by business interruption insurance, but it's important to closely review the wording of the particular policy. There are sometimes extensions of cover which may



provide coverage in circumstances where a property is closed on the order of a public authority due to infectious disease.

4. COVID-19 may result in an event being cancelled or postponed. If your organisation runs events, your organisation may have taken out event insurance. Organisations should consider these policies and check if they cover circumstances of this nature.
5. COVID-19 may impact travel plans, including cancellation of intended travel and associated loss of bookings.
 - If staff in your organisation travel for work, your organisation may have taken out travel insurance.
 - While cancellation costs can be covered under travel insurance policies, care should be taken to understand whether there are exclusions that might be triggered by the impact of the virus. The policy is unlikely to provide cover where a trip has been cancelled voluntarily and out of precaution only, rather than due to official restrictions on travel.
 - The date on which travel was prohibited or restricted (or warnings issued) will also be relevant.



Not-for-profit Law resources

See Not-for-profit Law's webpages on [risk and insurance](#) and [managing your contractual obligations during COVID-19](#)

Other resources

[Australian Financial Complaints Authority](#)

[Volunteering Australia – Running the risk?](#)

[Insurance Council of Australia - Insurance and COVID-19](#)

