

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 organisation across Australia.

With the assistance of Justice Connect member firm Clayton Utz, this briefing paper 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 Response Briefing Note [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 get advice on their specific circumstances, operational needs, responsibilities and legal obligations. The following information is not advice but a list of key issues for consideration.



2. Employment

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's 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**) and applicable Health Department 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.
3. 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, reducing the number of people physically in the workplace etc.
4. 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.
5. Confirm that appropriate responsible people (ie Committee or Board and Senior Management) know about the Pandemic or Infectious Diseases Plan and their responsibilities.
6. Consult with workers and unions as required.
7. 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.
8. Brief and educate workplace health and safety officers of what to look out for and what to report to the risk officer.
9. Support supervisors and remind them to stay calm and not overreact to prevent panic among the workforce.
10. 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. Provide workers with regular updates through various forms of communication (ie email, SMS, signs around the office). Where appropriate, use languages other than English, or diagrams or pictures in communication.
2. Educate workers on the measures and updates issued by authorities - particularly the applicable Health Department.
3. 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.
4. Make sure communications are designed to encourage a calm and supportive environment rather than encouraging panic or discrimination.
5. Contact any workers who are based offsite and make sure their safety conditions match your health and safety obligations.
6. 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.
7. Speak regularly to organisations that share facilities or co-locate with you to make sure relevant information is shared effectively.

2.1.1.3 Flexible work arrangements

1. If possible, encourage workers to work flexibly. Measures to support workers working from home may include video-conferencing, online meetings or sending work to be reviewed by email.
2. 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.
3. Encourage workers to self-report and self-isolate for the recommended 14 days if required.

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.
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. Postpone any large gatherings, meetings or conferences, especially if external visitors are invited. If you assess the risk and decide to hold the event, 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. Remove unpackaged food from the office kitchens.
2. Place antibacterial gel throughout the office for workers to use, for example at the entry so workers can use before entering the building or floor and in common areas like kitchens, reception, bathrooms.
3. Display posters encouraging workers to regularly wash their hands throughout the office in line with the WHO guidelines.



4. Reiterate good coughing and sneezing etiquette and hygiene.
5. Provide ample supply of soap, paper towels and tissues for workers to use.
6. Provide closed bins so workers can dispose of tissues hygienically.
7. Implement a more frequent cleaning schedule for common areas and use strong cleaning agents.
8. Regularly disinfect desks, tables, telephones, keyboards and other surfaces.
9. Encourage workers not to shake hands.
10. Isolate areas of the workplace where a worker who may have contracted COVID-19 has been and make sure the area is thoroughly disinfected.

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. 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.

2.1.1.7 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 ordinary for workers to work from home, consider assessing risks that may arise when working from home.
2. Provide workers with appropriate equipment so they can work safely and effectively from home.
3. Make sure workers are educated about proper ergonomic practices.
4. Provide frequent updates and communications about the status and impact of COVID-19.
5. Communicate expectations about the application of policies and procedures.

2.1.1.8 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. Monitor the WHO and relevant Health Department websites for updates and guidelines relevant to organisations that are providing community services.
2. 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.
3. 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.
4. Risk assessment policies need to be continually reviewed as information changes.
5. Your organisations should consider whether it's safe to continue to offer all services and should also consider safety when interacting with other organisations.



6. Make sure your organisation's Pandemic or Infectious Diseases Plan considers risks to people outside the workplace.
7. 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.

2.1.1.9 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.

2.1.1.10 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 risk assessment and consider appropriate controls for mental health risks.
2. Engage with an Employee Assistance Provider (**EAP**) and seek advice on available assistance.
3. Increase access to EAP and communicate options around onsite visits, phone access and increased supervisor support.
4. Consider increased risk of mental health issues arising from workers working from home and increased isolation from workplace. Develop strategies to mitigate the impact of social distancing measures.
5. 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.

2.1.2 Employee Entitlements

Your organisation needs to make sure 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. Your organisation must make sure it's across provisions relating to paid leave arrangements.
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 (ie casual or part-time) and your rights 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 had exposure 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 adequate personal leave. Allowing advanced leave means allowing employees to access leave they have not yet accrued.
7. Policies that make sure employees 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. If childcare centres or schools are closed, consider the leave or work from home options available to caregivers. If these workers think they are treated unfairly or that there are unfair requirements in light of their caregiving responsibilities, this may lead to a risk of a discrimination claim. Refer to 2.1.2.3 for more information.
10. Encourage casual workers to self-report when they are ill. Casual employees don't have relevant leave entitlements. Your organisation should consider special leave or payments to discourage casual employees from attending work if they are unwell.
11. Where a discretionary payment is made to an employee, your organisation should explain the nature of the payment as well as the rate of pay and the period of payment.
12. Your organisation should be mindful that short term special arrangements may only be viable for a small number of employees for a short period of time.

2.1.2.2.1 Issuing directives to employees

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

2.1.2.3 Discrimination

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

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 employees are treated consistently and with uniformity where appropriate.
5. Make sure employees 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 employees about codes of conduct and enforce compliance.

2.1.2.4 Workers' compensation

An employee 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 is 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 employee's employment must have significantly contributed to the employee contracting the virus.
2. This may be difficult to establish and it may be difficult to evidence which is why your organisation should keep clear records of any investigations and actions into people with identified exposure arising from or at the workplace.
3. Where an employee's employment puts them at greater risk of contracting the virus the significant contribution test may be easier to meet.
4. These types of situations include work related travel to an area with a known viral outbreak, work activities that require engagement or interaction with people who have contracted the virus, and work activities that contravene health department recommendations.



5. In addition, employees may claim illness or injury to their mental health arising from stressors caused by the risk of exposure to the virus or management action taken in relation to the virus. A psychological illness or injury arising from reasonable management action taken in a reasonable way will not generally form a basis for a valid claim.
6. Every matter will need to be considered on its individual merits, having regard to the individual circumstances and evidence in relation to the claim.
7. An employer may have insurance notification obligations in relation to identified claims.



Not-for-profit Law resources

<https://www.nfplaw.org.au/employees>

- The Fair Work system
- The NES
- Modern Awards
- Enterprise agreements
- Employment contracts

<https://www.nfplaw.org.au/volunteers>

- National Volunteer Guide
- National Volunteer App
- Volunteer safety

Other resources

[DHHS \(Victoria\) Guidance Note](#)

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

[Safe Work NSW WHS Guidance](#)



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.

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 - 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 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.

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 or terminate the contract.

3.1.2.1 Force majeure

1. A force majeure clause is a type of contract clause 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 range from 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 in or 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 of 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 alternative. 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, that 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.



Not-for-profit Law resources

<https://www.nfplaw.org.au/agreements>

- Contracts review
- Federal funding agreements
- State funding agreements
- IT agreements
- Leases

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.



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 will be 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. This is because establishing the claim amount can be a complicated and lengthy process.
 - **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 (this is referred to as acting as the 'prudent uninsured').

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 an 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 will be important to closely



review the wording of the policy. There are sometimes extensions of cover which pick up closure of a property location 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 or event 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 a 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.
 - Some insurers may have given notice already that they will not cover losses arising from travel impacted by the virus on the basis that it is a known risk.
6. COVID-19 may result in increased numbers of staff working remotely.
 - Cyber liability insurance will generally protect an organisation against certain internet-related risks – for example, computer and network hacking, fraud, information stealing or data and privacy breaches.
 - If organisations have this insurance, they should consider whether these policies cover staff working remotely.



Not-for-profit Law resources

<https://www.nfplaw.org.au/riskinsurance>

- Avoiding insurance claims
- Insurance basics
- Types of insurance
- Types of cover

Other resources

[Financial Services Ombudsman](#)

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

