



Improving the adequacy and outcomes of community sector contracts: A guide for community organisations

The single most significant area of regulation and reporting across the community sector lies in obligations around government-funded contracts. In 2012 ACOSS surveyed community services about their contracting processes. Key findings included:

- 50% of respondents expected to deliver services from the beginning of the new financial year – 1 July 2012 – despite having a contract or funding agreement that was not yet finalised.
- 83% of respondents reported very little capacity within existing contracts for evaluation, advocacy, community development or saving reserves for capital expenditure.
- The largest group of respondents reported no indexation in existing funding contracts.
- Respondents in funding agreements *with* indexation reported 1-2% and 2-3% as the most common rates of indexation, despite these figures being below CPI.

ACOSS' interest in sector development is to support sustainable and effective community services.¹ Over many years, ACOSS and the community sector has sought to improve contracting practices between governments and the not-for-profit sector. As governments across the country work to reduce red tape and improve their external processes, there is an opportunity for the community sector to assert its own agenda for improved contracting and other relationships with government. This Guide has been prepared by ACOSS to support community services improve their own contracting processes.

Disclaimer: This document is intended as a guide to support good contracting processes among community organisations. It is not legal advice and should not be taken as legal advice on specific contracts.

¹ See for example [ACOSS Priorities for reducing red tape](#), 2012 and [ACOSS Submission to the Senate Inquiry on the ACNC Bills](#), 2012.



Quick steps to improved contracting

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1. Quick reference guide

This guide is intended solely as an aid for community organisations when entering into a contract. Where possible, legal advice should be sought by community organisations on any contract.

Things to look for in a contract	Yes	No
General		
Does the contract address everything that has been agreed to during negotiation?		
Is the amount and outcome which you are expected to deliver clear?		
Is the term of the contract an appropriate period of time required to achieve the agreed outcomes?		
Reporting requirements		
Are there any reporting requirements on your organisation?		
If there are reporting requirements, is the cost of administering the reporting requirements proportionate? (i.e. it should not use up funds disproportionate to the activity being funded)		
Timeframes for contract completion or renewal		
Are the clauses covering variations of the contract mutual rather than unilateral?		
Does the contract set out clear timeframes and processes around their cessation or termination?		
Are there notice clauses and clear processes including opportunities for review and appeal where funding may be withdrawn?		
If funding is to continue beyond the life of the contract, is there a clause regarding notice and timeframes for the next negotiation?		
Are there amounts payable by the community organisation if it breaches the contract? If so, are the amounts payable proportionate to the loss that is suffered by the government?		
Funding		
Does the contract allow for the likelihood of cost variations, and reimbursements, over the period of the funded activity or service? (e.g. wage or utility rises)		
If cost variations are allowed, are they based on jointly determined cost, including direct and indirect costs?		

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Things to look for in a contract	Yes	No
Does the contract include provisions for the funding of indirect costs or overheads, such as administration, supervision and staff training, required for the delivery of services?		
Is the indexation of contract amounts explicitly included?		
If so, is the formula on which indexation calculations are to be based included?		
Force majeure events		
Does the contract provide for any interruption to parties' obligations due to events outside of the control of the parties (e.g. extreme weather events)?		
Data protection, confidentiality and independence of the organisation		
Is your ownership of data protected under the contract?		
Can the government only use your confidential information and data with your consent?		
Are there any provisions in the contract which enable direct government control over employment, governance, advocacy or the general operations of your organisation?		
Does the contract include a clause that expressly recognises the role of, and permits, the community sector in advocating for individuals and communities within which they work?		
Does the contract require you to obtain permission from the government or sign off on press or other releases?		
Are you allowed to subcontract your obligations to third parties, if it is deemed necessary to do so?		
Termination of the contract		
Is there a range of options provided to you before the termination of the contract, such as alternative dispute resolution and an ability to remedy the breach?		
If so, is a reasonable period of notice in cases of termination provided?		
Can the government terminate for convenience?		

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2. Negotiation

Contracting processes should be driven by a culture of negotiation. Contracting processes need to include adequate timeframes to review and revise the contract, including through specific legal advice; and where necessary to improve the effectiveness of funding for providing good outcomes for clients and communities. The processes set out in a contract need to cover a full range of eventualities, ranging from successful completion of the contract to problems that might arise throughout the program or failure to comply with core contract requirements.

Key elements of a contract that should be negotiated include all issues in this document, including:

- The amount of costs or other expenses and the outcome it is expected to deliver.
- Indirect costs or expenses that are often un-costed within contracts, and government agencies may be least inclined to negotiate on them; yet they can have significant cost implications for community organisations.
- The relevance of 'risk management' frameworks within a contract. Increasingly, reporting requirements on community organisations are driven by government approaches to risk management, not by protecting clients against the risks of ineffective services or unviable organisations.
- The proportionality of reporting requirements. The cost of administering reporting requirements should not use up funds disproportionate to the activity being funded.

It's often difficult to access the legal advice the Government departments rely on, and many community organisations will not have legal expertise in-house. Yet it is reasonable to seek explanation from the counterparty for contractual clauses asserted by government departments; and always important that these clauses are reasonable and support the funded outcome.

Community organisations may be able to access resources for this purpose including through brokerage to law firms by Just Connect (formerly known as Public Interest Clearing House (PILCH)) organisations; or through direct approach to *pro bono* units within law firms.

How to:

- Where possible, legal advice should be sought by community organisations on any contract.
- In instances where there has been a breach of contract, contracts should outline a range of options before termination, such as alternative dispute resolution. Contracts should stipulate a reasonable period during which the breach can be remedied and notice in cases of termination.

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- Contractual provisions should require all parties to enter into the contract in good faith. For example, contracts can include a recognition that parties are contracting in a joint endeavour primarily for the benefit of clients and the broader community.
- All elements of the agreement must be evidenced in writing and be included in the contract for the obligations to be enforceable. A written contract between the parties is binding and final. It is often not permissible to try to add to or modify the written contract by resort to extrinsic evidence, such as discussions or representations made outside the contract including a discussion or representation made prior to the entry into the contract. Also, bear in mind that a contract will usually supersede any prior written agreements, so all aspects of the agreement should be covered in this one document.

3. Timeframes for contract completion or renewal

A persistent issue in contracting with government agencies is the expectation that services will continue to be delivered in periods after the initial term of a contract has expired and where that contract hasn't been finalised or renewed. These transitional periods of contracting usually result in disruptions for clients or in community organisations taking on a high degree of financial risk, such as unfunded employment, rental agreements or other costs. The insertion of clauses which require compensation or interest payments to community organisations during these delays can overcome these difficulties, even if this is simply a confirmation that the current regime continues to apply. Provisions which stipulate the need to finalise service contracting by the time service delivery is to commence; and which stipulate notice provisions on any termination, conclusion or rollover of a contract, are also good practice.

How to:

- Clauses covering variations of the agreement should be mutual rather than unilateral, meaning either side must obtain the other side's consent. However, it is common for the government to reserve their right to make unilateral changes to the contracts with community organisations.
- Contracts need to set out clear timeframes and processes around their cessation or termination. There should be specific procedures set out to allow for the managed wind-down of a service where funding comes to an end or other eventualities. There should be notice clauses and clear processes including opportunities for review and appeal where funding may be withdrawn, such as on the basis of failure to meet the funding requirements.

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- Where funding is likely to continue beyond the life of a contract, there should be explicit agreements about notice and timeframes for the next negotiation prior to the expiry of the existing contract. Failure to comply by the funding body should entail an automatic rollover of funding to enable a full and appropriate negotiation process to take place. For example, in a three-year contract, discussion about extension or continuation of the contract should begin 6 months out from the end of the current contract. In the event that the funder does not or cannot engage in such discussions 6 months out, the funding should be extended for another 6 months to facilitate negotiation.
- Contract lengths need to reflect the appropriate period of time required to achieve the agreed outcomes, not revise or set arbitrary timeframes such as in responding to delays in contract finalisation.
- Contract lengths should be extended if an event outside the control of either party occurs (e.g. extreme weather events).
- Contracts will often specify an amount that is payable by the community organisation following their breach of the contract. Most commonly, a fixed amount accrues when the community organisation fails to deliver its services or fails to deliver its services on time. The community organisation should determine whether the amount payable following a breach is a genuine estimate of the damage which the government will suffer. The agreed amount is, in theory, a pre-estimate of damages and should be proportionate to the loss that may be suffered by the government.
- Contracts with the government will often have a clause providing that the government may terminate the contract for convenience at any time. Consider whether this is appropriate and the consequences if exercised.

4. Extreme weather events

Contracts with the government should have clauses which provide for the suspension of the community organisations' obligations, such as the obligation to meet reporting deadlines to qualify for funding, if events occur outside the control of the parties and which could not have been avoided through the exercise of due care. Such events may include extreme weather, strikes, natural disasters etc. Consider if any other such events could inhibit your organisation's ability to satisfy its obligation.

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ACOSS' analysis of community sector preparedness for climate change and extreme weather events reveals limited awareness and capacity to respond to such events.² Yet community organisations are often directly affected by events such as floods or bushfires. Even more importantly, the community sector can be critical to rapid and effective responses that identify and support vulnerable individuals and communities in these circumstances. Government funders may not be well-prepared themselves for such eventualities; and existing plans may not include community services in their coordination or contingencies.

Funding contracts need to anticipate interruption to activities that might be affected by such events. ACOSS has heard from sector organisations that have been penalised for missing reporting deadlines to funders because they were supporting their communities in crisis. Key contractual obligations such as reporting deadlines and their consequent trigger for funding need to be subject to over-ride during extreme weather events. It is also vital that community organisations that can provide immediate support to people and communities affected by extreme weather events are supported to do so by their funders.

An ACOSS member organisation operating in western Victoria has played a critical role supporting its community's response to and recovery from a series of devastating natural disasters, including 13 years of drought, the 2009 Victorian Bushfires and the floods of 2011. Initially, it received no formal recognition or resourcing for participating in disaster response and recovery efforts. However, through systematic advocacy and negotiation, the organisation now holds formal memoranda of understanding with its state and local government partners that provide additional funding for service delivery in response to declared disasters (including timely compensation for out-of-pocket expenses incurred through participation in response and recovery).

² In 2012, ACOSS received funding from the Commonwealth Department of Climate Change and Energy Efficiency via the National Climate Change Adaptation Research Foundation to research the vulnerability of community organisations to climate change impacts. The final report for the project, *Extreme Weather, Climate Change and the Community Sector – Risks and Adaptations*, is due for publication in March 2013.

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5. Adequacy of Funding

Adequacy of funding is critical for the program or service effectiveness. It is also important for long-term planning and continuity of services. Organisations may seek funding for a service based on certain cost parameters that can alter considerably by the time the funding is agreed and contracting process needs to be flexible enough to take account of this. Agreements should allow for the likelihood of cost variations over the period of the funded activity or service. They should also be based on jointly determined costs, including direct and indirect costs. Finally, funding should adequately acknowledge that the roles of the community sector are diverse, far-reaching and go beyond that of service delivery.

Indexation of 'continued' funding is also a key factor to ensure that, as costs of delivering services go up, they are adequately covered in the funding arrangements. Where funding is inadequate for the true cost of delivering a service, or indexation is insufficient to cover cost rises over the life of the funding, organisations should have the capacity to wind back services included within funded contracts.

How To:

- Indirect costs or overheads, such as administration, supervision and staff training, required for the delivery of services need to be specifically funded for as part of a contract.
- Cost estimates should be consistent and comprehensive over all direct and indirect costs of a service or activity. It is advisable that these estimates include staff training, mechanisms to support governance and adequate evaluation to facilitate the development of the sector.
- Contracts should include provisions to take into account cost variations, such as wage or utility rises.

6. Indexation

Indexation on contract amounts should be explicitly included; and the basis through which it is agreed should be clearly expressed. The following table shows the average indexation rates for government funding of community services.

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Average rates of indexation (%), government funding for community services*	
Commonwealth government	1.30
State or territory government	2.32
Local government	1.05

* ACOSS Budget Priorities Statement 2011

These averages are significantly lower than basic CPI, much less the pressure of rising wage and utility costs that are increasingly undermining the viability of services. There is no standard approach to indexation across community services in Australia; indeed most governments don't have a consistent or adequate approach to indexation within their own jurisdiction. This further undermines the capacity of services to budget and plan properly for delivering services. While indexation payments are often made through the life of a contract (not upfront) to enable calculations based on CPI and wage increases, the fact and manner of paying indexation should be set out.

ACOSS has recommended the Wage Price Index, when greater than the Consumer Price Index for the same period, be used as the primary index for annual funding adjustments as it more accurately measures cost inflation faced by organisations. In recognition of past inadequate indexation, it is recommended that the Government provide an initial increase of this amount across its funded programs, including to the states and territories, via Specific Purpose Payments.

How to: Funded contracts should stipulate the inclusion of indexation; the formula on which indexation calculations will be based; and the timeframe within the contract when it will be paid.

7. Preserving and enhancing the sector's independence

Community organisations can assert their independence through contracting processes. The community sector is not an arm of government and funding relationships need to protect and enhance organisational independence. It is important to ensure that contractual provisions do not enable direct government control over employment, governance, advocacy or the general operations of an organisation. For example, while funding contracts might include notice provisions such as on the release of a funded report, they should not tie organisations to obtaining permission or sign off on press or other releases.

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- Laziness in drafting, eg. including elements that are not relevant such as compliance with APS code. If government agencies/departments are intending to include these provisions, then they are not appropriate.
- Need for contracts to acknowledge the range of activities, collaborations, partnerships, and straight out funding relationships.
- Contracts should also allow for the community organisations to subcontract any of their obligations under the contract to third parties, if deemed necessary.
- Ownership of data and privacy obligations. A funding relationship should not reduce an organisation's independence; nor should it necessarily buy an organisation's data, reporting or outcomes. Charities and community sector not-for-profits are funded *because* of their connection with the communities they support and their independence from government. These are values that must be preserved, not undermined, by contracting processes.
- In addition, contracts with the government should contain a provision which protects the confidentiality and the privacy of the information owned by the community organisation. The government should not be able to use any of the confidential information without seeking consent from the community organisations.

How to: In order to retain community sector independence, contracts should not include conditions as to who is to be employed or do work under the contract or around the general operations of the organisation

8. Advocacy

Funding for community services has been used at various times by various governments as a way to fetter or constrain community sector advocacy. While recent policy by the Federal Government has outlawed 'gag clauses' in Government contracts with the community sector, this does not extend to other Australian governments. In addition, governments do have the right to impose contractual restrictions that may come close to or blur distinctions between legitimate requirements and gag clauses. For example, contracts can stipulate confidentiality, such as over client data, without curtailing legitimate and important advocacy activities. It is always important for community organisations to defend their right to advocate on individual or systemic issues; and to engage critically with policy and other issues, notwithstanding the existence of any funding or contracting processes underway.

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How To:

- Contracts should include a clause that expressly recognises the role of the community sector in advocating for the individuals and communities within which they work.

9. Measurement and evaluation

In determining how outcomes are to be measured, it is important to ensure that an organisation's services and the benefits generated to the community are valued and recognised. This recognition extends to an understanding from government funders that community services are embedded in the communities they serve and their ability to identify and respond to community needs is a *core value*. In view of this, it is important for any programme evaluation or performance indicators to be suitable for the type of service contracted.

10. Where to get help

Within government, the National Compact provides the ideal framework to pursue and address problems with contracting of non-government community services. ACOSS and our networks put considerable effort in to the Compact negotiations of 2009-10 and that work is now coming to fruition, presenting a number of avenues for charities and not-for-profit community services to utilise. Compact Champions have been appointed at very senior levels within all government departments. These Champions are a key resource that sector organisations should engage as we work with our government funders to improve contracting processes.

In 2012, a group of mental health organisations and their peak worked with the Compact Champion in the Department of Health and Ageing to review and address a range of problems within a contracting process. The result was a much better contractual arrangement for the services and a significantly improved relationship with DoHA.

Outside government, charities and not-for-profits are able to access *pro bono* legal resources from a range of avenues. The national network of Just Connect is one of a number of organisations that can broker *pro bono* legal advice between charities and law firms. Justice Connect was formed when PILCH NSW (established in 1992) and PILCH Vic (established in 1994) merged on 1 July 2013. It is a member-based organisation working with thousands of lawyers, including twenty of NSW and

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Victoria's largest law firms. At the core of Justice Connect's approach is the intake assessment of legal issues and the referral to pro bono lawyers who will assist for free.

Major law firms also run their own *pro bono* practices. Establishing relationships with a key firm willing to support your work can prove immensely valuable when it comes to contracts and other processes.

11. Sources

- ACOSS (2012) *Contracting Survey 2012*, Australian Council of Social Service.
- PC (2010) Study into the contribution of the not-for-profit sector, Productivity Commission.
- PIAC et al (2009) *A Question of Balance: Principles, contracts and the government-not-for-profit relationship*, Report into the contractual relationship between government and not-for-profit organisations, Public Interest Advocacy Centre, Whitlam Institute and Social Justice and Social Change Research Centre, July.

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