

**NCOSS Submission to the ICAC Consultation  
Paper *Funding NGO Delivery of Human  
Services: A period of transition***



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## 1. Executive summary

The Council of Social Service of NSW (NCOSS) submission to the Independent Commission Against Corruption's (ICAC) Consultation Paper, *Funding NGO Delivery of Human Services: A period of transition* focuses on the need for a fair and equitable funding arrangement which is respectful of both NGOs and their clients whilst meeting NSW Government requirements that use of these monies is not wasteful, inefficient or ineffective.

NCOSS supports a strong, dynamic and effective non-government community sector because of its capabilities to address disadvantage and improve social justice outcomes. The sector has this capability because it is different from government. It has the flexibility and innovation to respond to local community needs. It provides services that governments might not otherwise provide. It works within communities to build relationships and trust that are necessary to support people.

NCOSS accepts that whilst in the majority of cases funding is used appropriately this is not always the case. In some instances this will be unintentional, in other instances it may be the purpose is self-interest and the actions/behaviour would fall within the definition of corrupt behaviour. The consultation paper puts forward the argument that the level of this behaviour is such that the human services NGO funding environment needs to be reassessed and that additional controls should be introduced.

NCOSS would argue that as the extent of corrupt behaviour both with NGOs and the funding agencies is yet to be established the Consultation Paper casts a false impression about NGOs that may lead to recommendations that are inappropriate, ineffective and a barrier to the work that NGOs undertake. Further we would argue that improvements within the funding framework, standardising and streamlining current approaches and skilling agency staff in the areas of contract and relational management are likely to be more effective in working towards ensuring that both the community and government are receiving 'value for money'.

In conclusion, NCOSS has made the following recommendations:

- Research into the risk of corruption involving NGOs
- Development of a funding policy framework that meets the needs of both government and NGOs
- Standardised funding instruments that reflect red tape reduction recommendations
- Effective contract and relational management
- Transference of NSW Government powers to the Australian Charities and Not-for-profit Commission

## 2. About NCOSS

The Council of Social Service of NSW (NCOSS) is the peak body for the non-government human services sector in NSW. Through its organisational membership, NCOSS represents a vast network of service delivery and consumer groups.

NCOSS has a vision of a society where there is social and economic equity, based on cooperation, participation, sustainability and respect.

We work with our members, the NSW Government and other relevant agencies, towards achieving this vision in New South Wales.

## The NCOSS advocacy and policy framework

NCOSS believes our society will be better if it is fairer. We believe in social justice and advocate for policies, programs and measures that are targeted to:

- Fair distribution of or access to resources (including quality of such resources)
- Recognition and respect of diversity
- Participation by and representation of all in all aspects of life.

NCOSS supports a strong, dynamic and effective non-government community sector (sector) because of its capacity to address disadvantage and improve social justice outcomes. The sector is able to achieve this because

- It can take the long term view and is there for the long haul
- It works within communities to build relationships and trust that are necessary to support people
- It works collaboratively to support the particular needs of individuals or communities
- It is independent of governments and partisan interests.

The sector has these capabilities not because it's funded by government but because it is the sector.

These capabilities work for government and are complementary to the work of government. Together better outcomes are achieved.

These capabilities can be hindered however by government policies and processes which seek to standardise practice.

The sector must and should be accountable for its work – to clients, communities and to its funders. This is about ethical and best practice, not just regulatory requirements.

NCOSS calls for balance in regulatory regimes that are sought to be imposed on the sector. These should be evidence based (do they work to achieve the benefit/outcome sought?), based on a risk management approach (do the costs in time and resources justify the regulation given the likelihood and severity of the risk?) and proportionate (sufficient to address the issue without placing onerous requirements on those regulated).

Most of all we would argue that regulation should not undermine the unique characteristics of the sector that allow it to deliver improved social justice outcomes.

## 3. Introduction

To understand the role of the sector in relation to the ICAC Consultation Paper, *Funding NGO Delivery of Human Services: A period of transition* (the 'paper') it is necessary to understand what a non-government organisation (NGO) is and more specifically the role of Human Services NGOs.

A Human Service NGO is an organisation that undertakes service delivery, community development, social justice and advocacy across a range of areas including health, housing, homelessness, employment and education, disability, aged care, services for children, young people and families, Aboriginal affairs, multicultural affairs, and justice. Organisations are diverse

in size and scale, ranging from small voluntary groups to large national organisations.<sup>1</sup>

Human services NGOs (the 'sector') are broadly defined as services that seek to improve individual and community well-being through the provision of care, education and training, shelter and support. They may be universal in nature and accessible to whole communities or highly targeted to meet the specific needs of groups or individuals within communities.<sup>2</sup> (The Consultation Paper notes that in using the term "human services NGOs" they are only referring to human services organisations funded by the NSW Government.)

These organisations are legal entities independent of government. They are private organisations owned by their members, whose primary purpose/focus is to provide particular services or meet specific needs as identified by their governance bodies. Their service provision is often marked by a deep passion. In many cases they are established to survive independently of government funding contracts. They are rarely established with the express purpose of delivering government services. It should be noted that organisations that have been established by government agencies to deliver government services, as opposed to those established with an ideological, faith-based or local community base, are less likely to be sustainable in the long term.

They also play a critical role in addressing inequities and improving outcomes for the most disadvantaged members of our community. They provide alternative services for marginalised people who may not access mainstream services and provide specialised responses to meet the needs of specific population groups. Their flexible, innovative structures and client-focused ethic and equitable base make them well suited to respond to the needs of vulnerable groups. These services are crucial to improving equity, addressing disadvantage and promoting a more inclusive society.

The sector's role in service delivery extends beyond direct provision. It includes developing innovative models, research, policy development, individual and systems advocacy, capacity building, and the provision of information and advice to individuals, members, communities and government.

The role of human services NGOs, as identified by the Productivity Commission is to contribute to community well-being through:

- *Service delivery* either to people outside the organisation or to members.
- *Exerting influence* and promoting change on economic, social, cultural and environmental issues.
- *Connecting the community* and expanding the social networks available to individuals.
- *Enhancing the community endowment* by investing in skills, knowledge and physical, social, cultural and environmental assets for the benefit of future generations.<sup>3</sup>

The Paper identified more pragmatic reasons but equally significant reasons for government funding NGOs to deliver services. They included:

- *NGO delivery of services is viewed as being of lower cost to the government and, for this reason, more efficient*

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1 PC p298

2 PC p298

3 PC p37

- *NGOs are able to provide a higher quality of service than has traditionally been provided by the government*
- *NGOs are more flexible and responsive to clients and communities due to more dynamic internal systems and greater local knowledge.*<sup>4</sup>

The NSW Government funds over 2,000 NGOs to deliver human services across the state. This translates to over 7,000 agreements. It is acknowledged that controlling the probity of these arrangements across that number of agreements is a formidable task.

The ICAC accepts that the vast majority of staff and volunteers working within the sector are dedicated to helping others; however they have also become aware of allegations that suggest a minority see government funding as an opportunity for self-interested behaviour. The paper's main focus is

*....to examine the effectiveness of the control systems of the funding agencies, their interface with the NGOs and the broader operating environment. These controls can be viewed as controls over waste and mismanagement of government funds. ....*<sup>5</sup>

The ICAC is seeking submissions on this and related areas.

## 4. Definitions

**Corrupt conduct** (taken from the *Independent Commission Against Corruption Act 1988 No 35*<sup>6</sup>)

*....corrupt conduct is any conduct which falls within the description of corrupt conduct in either or both of subsections (1) and (2) of section 8, but which is not excluded by section 9. Sec 7 (1) (See Appendix 1 for full definition.)*

### Competitive tendering

The process of selecting a preferred supplier from a range of organisations by seeking offers (tenders) and evaluating these on the basis of one or more selection criteria.

### Contracts

A legal instrument setting out the terms and conditions under which services are purchased by government from an organisation. Although the term 'contract' is often used to refer to both the instrument for tender and grant procurement, it is more commonly applied to tenders, whereas grant funding is more usually referred to as a service agreement.

### Funding models

The mechanism Government uses to engage with the service provider. The Productivity Commission identifies four main models: purchase of service contracting, client directed or 'individualised funding' model, joint ventures, and grants.

### Grants

Funding for a specified purpose directed at achieving goals and objectives consistent with government policy. A grant is usually distinguished from a contract for the purchase of services.

### Human services NGOs

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4 ICAC (2012) *Funding NGO Delivery of Human Services: A period of transition* p4

5 ICAC p5

6 **Part 3 Sections 7-8** Current version for 6 January 2012 to date (accessed 3 September 2012 at 12:33)

<http://www.legislation.nsw.gov.au/fragview/inforce/act+35+1988+pt.3+0+N?>

These are broadly defined as NGOs whose services seek to improve individual and community well-being through the provision of care, education and training, shelter and support. They may be universal in nature and accessible to whole communities or highly targeted to meet the specific needs of groups or individuals within communities.<sup>7</sup> The Consultation Paper notes that in using the term “human services NGOs” they are only referring to those organisations funded by the NSW Government to deliver human services.

### **Non-government organisations (NGOs)**

Collective description for human service organisations that undertake service delivery, community development, social justice and advocacy across a range of areas including health, housing, homelessness, employment and education, disability, aged care, services for children, young people and families, Aboriginal affairs, multicultural affairs, and justice. Organisations are diverse in size and scale, ranging from small voluntary groups to large national organisations. Such organisations use their resources solely for their work and the communities they work with.

These organisations are independent of government and in NSW are registered under either the Associations Incorporations Act (NSW), Co-operatives Act (NSW) or the Corporations Act (CTH).

Other terms include: not-for-profit (NFP), third sector, voluntary sector, and civil society.

### **Service Agreements**

A legal instrument setting out the terms and conditions under which a funding grant is provided by government to an organisation to provide services.

## **5. Purpose of the Consultation Paper**

The Consultation Paper states that its purpose is:

*...to examine the corruption risks in the funding arrangements, in a way that is, at a minimum, compatible with the primary functions of the human services agencies and, preferably, in a way that enhances the management of the funding. Specifically, this paper is produced for the purposes of section 13(1)(f) of the Independent Commission Against Corruption Act 1988...*

*to advise public authorities or public officials of changes in practices or procedures compatible with the effective exercise of their functions which the Commission thinks necessary to reduce the likelihood of the occurrence of corrupt conduct.<sup>8</sup>*

That is, its purpose is to assess the corruption risks in funding agreements and to advise the funding body of possible changes to their procedures and processes to reduce the likelihood of corruption. However these procedures and processes would need to be compatible with the primary function of the funding body and preferably enhance the management of the funding.

However, the Paper recognises that whilst funding *cannot be provided completely on trust*<sup>9</sup> onerous controls are likely to negate the value of contracting NGOs to deliver services.

The paper also appears to have two additional underlying purposes:

- to consider potential measures or strategies to address possible challenges resulting from

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7 PC p298

8 Independent Commission Against Corruption (2012) *Funding NGO Delivery of Human Services in NSW: A period of transition Consultation Paper August 2012* p4

9 ICAC p4

the introduction of person-centred individualised funding arrangements which the NSW Government has committed to support

- provide support for or justify strategies for the reduction in the number of funding agreements, contracts, etc currently in existence, possibly through amalgamations or closure of services.<sup>10</sup>

In summary the Paper appears to be putting forward the following interdependent positions that:

- there is a level of corruption in the NGO sector (sector) sufficient to raise the attention of ICAC and that this risk may increase with new funding initiatives
- existing and anticipated future growth of corruption in the sector impacts, or could impact on the duties of officers in government agencies by causing them to act *against the honest or impartial exercise of official functions*<sup>11</sup>
- ICAC would seek to remove this impact on government officers by increasing their powers to control the operations of NGOs receiving funding from the agency and by redesigning government systems to control funding activities.

It is noted that the proposed remedies are not about preventing corruption in the sector, it is about how it may impact on the duties of government officers. There is the question of why government cannot change its funding system and operations without linking it to possible corruption in the sector.

## 6. Preliminary comments on the Consultation Paper

### 6.1. Research design

It is very difficult to comment on the validity of the research design as there is only the most basic information provided that being:

*The issues raised for discussion in this paper stem from a research project administered by the Commission that involved:*

- *discussions with interested parties – including head office and frontline staff from government agencies, NGOs and peak, oversight, complaint-handling and law enforcement bodies*
- *reviews of relevant published reports*
- *examination of unpublished documents of the Commission and government agencies*
- *examination of the systems governing the funding of NGOs in other jurisdictions.*<sup>12</sup>

There is no indication of the breakdown in terms of the number of each group being interviewed. Whilst the actual breakdown is unknown, the “evidence” used throughout the document does suggest that greater weight is placed on the opinions, presented as “evidence”, of senior

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10 ICAC Sec 4.2 p23

11 *Independent Commission Against Corruption Act 1988 No 35, Part 3 Sect 8 (1)(a)* Current version for 6 January 2012 to date (accessed 3 September 2012 at 12:33)  
<http://www.legislation.nsw.gov.au/fragview/inforce/act+35+1988+pt.3+0+N?>

12 ICAC p5



government staff working in head office.

There is also no indication of what information was sought during the interviews. Consequently it is difficult to assess potential bias and other factors that would need to be considered in relation to the validity, reliability and relevance of the evidence and the proposed remedies.

## 6.2. Reporting of findings

Early in the Consultation Paper it states:

*.....the vast majority of NGOs and staff are dedicated to helping others...(and do not)...see government money as an opportunity for self-interested behaviour.*<sup>13</sup>

Unfortunately this statement is undermined by a tone that is often emotive and sometimes accusatory. In addition sweeping statements are used with little or no substantive detail.

*The Commission's concern is that the arrangements of decision-making and the systems of program and policy control that relate to the decision-making are not working effectively, and that control is breaking down as a result.*<sup>14</sup>

*The environment is characterised by poor coordination of funding between government bodies and poor internal governance capabilities of NGOs.*<sup>15</sup>

*The acceptance by agencies and NGOs that the amount transferred from the government in any one agreement does not cover costs, makes determination of the total price to the taxpayer very unclear and creates opportunities for deceptive overcharging.*<sup>16</sup>

*.....where staff are inappropriately skilled to manage funding contracts, there is a high probability that contracts will be mismanaged, creating opportunities for misappropriation of funds and corrupt conduct.*<sup>17</sup>

*NGOs are fully funded by the government, potentially leading to devious behaviour around renewal of funding.*<sup>18</sup>

Generally, the use of substantive evidence beyond what is clearly anecdotal or opinion is also lacking. There is only one reference to other research<sup>19</sup>, there are no statistics used to support claims of corruption within the sector and no reference to case law. The case studies appear to have been derived from the interview process and are provided without context. There is no indication as to what type of organisation may have provided the information allowing the reader to assess potential bias. There is also a tendency to put forward viewpoints where the relationship between the information provided and the conclusions drawn is at best tenuous. (See 7.3)

Examples of corrupt conduct invariably lacked context. Based on an understanding of the complex environment many NGOs work within, and the potentially competing factors that influence behaviour, several of the examples, once placed in context may not be "corrupt conduct".

There is no definition of "corrupt conduct" within the Paper. It is necessary to go to the ICAC Act to

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13 ICAC p4

14 ICAC p8-9

15 ICAC p21

16 ICAC p18

17 ICAC p12

18 ICAC p14

19 This was the NSW Ombudsman's report on *Consultations with families of children with disabilities on access to services and support* June 2011

obtain an understanding of how the term is being applied. However, the use of the term within the Paper appears to go beyond this definition. Some of the examples<sup>20</sup> used to justify the need for action align with the ICAC Act's definition of "corrupt behaviour" however, because of the lack of context provided, some would be better defined as poor governance standards or poor contract management, whilst others, in the right circumstances, be viewed as best practice. In addition there is no indication of how representative this behaviour is.

Interestingly there is no reference to the Productivity Commission's 2010 report *Contribution of the Not-for-Profit Sector, Research Report*, despite the fact that it covers similar issues whilst providing a number of recommendations which include potential remedies.

In summary, there is a lack of clarity regarding methodology to determine and present evidence within the Paper which undermines the validity, relevance and reliability of the claims it makes and the potential remedies. NCOSS is concerned that the Paper casts a false and misleading impression about the sector that undermines the intent to educate, inform and ensure processes and procedures are in place that prevent and address the risk of corrupt behaviour.

### **6.3. Role of client**

It would appear logical that the recipients of human services ie "the client" would be a significant focus of a consultation paper on *Funding NGO Delivery of Human Services in NSW*. Providing the best outcome for clients appeared to be secondary to protecting tax payers and ensuring "value for money" through the identification of corrupt conduct. An appropriate focus would be to limit corrupt conduct whilst delivering services which provide the best outcomes for clients.

### **6.4. Proposed remedies outlined in the Paper**

The proposed remedies are based on the assumption that there is evidence that corruption is a significant risk within the Sector. Whilst NCOSS accepts that there will be a risk of corruption, as there is in any sector, it does not believe that the level of research currently available is sufficient to draw any conclusions. NCOSS is of the view that there is a need for additional research to assess the actual (as opposed to perceived) risk of corruption and, if it is established that there is a problem, what remedies would be most effective and efficient.

Because the extent and scope of the problem is uncertain, the validity and relevance of the very specific consultation questions and the proposed remedies is in doubt. However, taking into account some of the issues covered in the Paper are also considered in the Productivity Commission's Report<sup>21</sup> relevant remedies may be found in their recommendations, particularly those considered in chapters 11 and 12.<sup>22</sup>

There are also issues raised in the Paper that would be more appropriate to consider from a broader perspective.

Several of the proposed remedies point to additional controls. The sector already operates under a substantial body of legislation. In NSW, NGOs may be registered under the *Associations Incorporations Act (NSW)*, *Co-operatives Act (NSW)* or the *Corporations Act (CTH)*. Once registered, they are obliged to comply with the governance requirements of the relevant Act and Regulations. Failure to do so can lead to financial penalties which for more serious offences include imprisonment for up to two years. More serious offences are dealt with under other legislation

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20 ICAC p4-5

21 Productivity Commission (2010) Contribution of the Not-for-Profit Sector, Research Report

22 Productivity Commission(2010) ppXLIX- LII

including the Crimes Act (NSW).

Other legislation the sector is subject to include but not restricted to:

- Charitable Fundraising Act (NSW)
- Ombudsman Act (NSW)
- Ombudsman Act (CTH)
- Community Services (Complaints Reviews and Monitoring) Act
- Income Tax Assessment Act (CTH)
- Work Health and Safety Act (NSW)
- Privacy Act (CTH)
- Privacy and Personal Information Protection Act (NSW)
- Health Records and Information Privacy Act (NSW)
- Independent Commission Against Corruption Act (NSW)

Contracts and funding agreements also have compliance requirements which can vary considerably and are not necessarily proportionate to the potential level of risk. Red tape demands have been noted as a significant and at times unnecessarily onerous source of control in at least two government reports.<sup>23</sup>

In addition, research on fraud<sup>24</sup> activity within the NFP sector in Australia and New Zealand<sup>25</sup> has shown that external controls are one of the less effective strategies to protect against or identify fraud. Establishment of strong internal controls, (eg segregation of duties, etc) and access to anonymous whistleblowing mechanisms have been identified as the two most effective strategies both in terms of protection and detection. The same research noted that the likelihood of fraudulent activity increases with both the organisation's level of income and the number of staff.

## 7. Response to the Consultation Paper

### 7.1. Chap 1: The difficult task of controlling funds

The main issues raised in this chapter have already been responded to however NCOSS agrees that managing the distribution across 7,000 agreements is a formidable task.

The NSW Department of Premier and Cabinet' Report *Non-government Organisation Red Tape Reduction*<sup>26</sup> made a number of recommendations, many of which are echoed in the Productivity Commission Report, *Contribution of the Not-for-Profit Sector*,<sup>27</sup> to simplify the relationship between government agencies and NGOs and reduce ineffectual and inefficient use of NGO resources. The recommendations were extensive and included simplifying and standardising common terms and conditions in funding agreements/contracts; offering longer contract terms subject to performance; mutual recognition of other agencies' monitoring activities; and introducing a standard chart of accounts for funding agencies (reflecting the outcome of COAG on

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23 NSW Department of Premier and Cabinet (2009) Non-government Organisation Red Tape Reduction, and Productivity Commission (2010) Contribution of the Not-for-Profit Sector, Research Report Chap 11

24 Fraud is identified as a form of corrupt conduct under the ICAC Act Sec 8(2)(e)

25 BDO Australia (2012) *Not-For-Profit Fraud Survey 2012*

<http://www.bdo.com.au/resources/surveys/forensic/bdo-not-for-profit-fraud-survey-2012/download-survey>

26 NSW Department of Premier and Cabinet (2009) Non-government Organisation Red Tape Reduction pp12-16

27 Productivity Commission (2010) Contribution of the Not-for-Profit Sector, Research Report Chap 11

7 December 2009.)<sup>28</sup>

The implementation of these reforms would assist both government agencies and NGOs on several levels. Streamlining government processes and procedures:

- should reduce the amount of information government officers are expected to understand and implement
- reduce the amount of time NGOs spend on applying for funding and reporting
- reduce the time spent reporting the same information to different funders using different formats.

Using a standard chart of accounts and common measurement frameworks would also enable comparative analysis which could identify inconsistencies such as corrupt conduct. These strategies would also reduce the opportunities for NGOs to hide or disguise corrupt or wasteful practices and enable them to administer their compliance more effectively and efficiently.

It is also extremely important that all parties to a service agreements/contracts are clear on what is being referred to, the requirements of the service being delivered, that both sides are fully cognisant of the compliance requirements and exactly what the funding covers. It also needs to be understood that government funding for service delivery does not include the right to influence how a service is managed or governed, the government agency's role is as a customer of a separate legal entity. It is not appropriate for funders to expect a seat on the funding recipient's board, indeed this can create a conflict of interest. All funding must be attached to a legal contract signed by the relevant parties.

## **7.2. Chap 2: Government agency design**

### **Response to Questions:**

1-18 As noted in 6.1 and 6.2, the evidence for further controls is yet to be established, hence many of these questions are difficult to respond to. In addition, the issue of the effectiveness of the internal arrangements of government agencies is probably more efficiently dealt with within the agencies themselves. However based on the examples provided in the Consultation Paper, NCOSS would submit that standardisation of service agreements/contracts, etc, as noted in 7.1, would streamline government processes and procedures and could assist in the identification of corrupt conduct.

In addition NCOSS recommends:

- building on contract management capacity through the deployment of appropriately skilled staff (eg contract managers, financial analysts, etc) at the point of need (Q9-13)<sup>29</sup>
- improving the government agencies' contract management training and supervisory capacities (Q9-13)
- developing effective strategic planning processes which involve all relevant stakeholders (including the sector) (Q4-8)
- simplifying program design and minimising and standardising program procedures and processes, particularly those within the same agency (Q4-8)
- referring NSW government powers to the national charity regulator, the Australian

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<sup>28</sup> Red tape Reduction pp12-16

<sup>29</sup> The NSW Commission of Audit Interim Report (Jan 2012) also viewed this skill as being critical.

Charities and Not-for-Profit Commission to build on the capacity of the Charity Passport and the development of the ACNC public portal<sup>30</sup>. This will enable NSW government agencies to assess exactly what funding each NGO receives and from whom, including those NGOs that operate across state borders. The ACNC bill includes the capacity to respond to NGO failure in accordance with agreed governance standards. It is likely that an NGO that fails to comply with service agreements is likely to fail to comply with governance standards (Q17)

- retaining the same funding model, irrespective of voting cycles, for sufficient period (ie 5-10 years) to identify and build on its strengths, improve potential problem areas and remove ineffective, ineffectual, potentially wasteful aspects. (Q14-16)

#### **Additional comments:**

Government agencies and staff need to understand that NGOs are not arms of government. As customers they only have the right to monitor NGO behaviour in relation to their capacity to provide the service they have paid for. Other agencies, such as the Ombudsman, may have oversight and investigative functions.

One of the most effective trigger mechanisms to alert the existence of fraud (and is equally relevant to corruption) is anonymous whistleblowing protection. It should be noted that whilst this may be effective in urban communities, it may not be as effective in small rural communities where anonymity is not so easily achieved.

Retention of long term frontline staff who have developed an understanding of local NGOs and how they work is also an important strategy to manage potential corrupt conduct. They may be in a position to identify inappropriate behaviour. They may also have developed a relationship of trust with stakeholders (ie staff, volunteers, clients) that enable stakeholders to raise concerns.

NGOs should retain the right to lobby government representatives for several reasons:

- government officials are not always correct in their assessment of a situation, they do not necessarily understand or appreciate the factors that may impact on an NGO at any given time
- NGO staff, clients and/or carers are members of the community and have the same rights as any other person, which includes NGOs speaking on the client's behalf to local, state and federal representatives.

Finally, there is the statement that *“All possible contingencies need to be foreseen and controls put in place”*<sup>31</sup>. An environment where everything is controlled is unlikely to be innovative or creative; it is also unlikely to be flexible or responsive to changing needs. In short it is unlikely to deliver the best possible outcomes for the client and as such is highly likely to be inefficient, ineffective and potentially wasteful.

### **7.3. Chap 3: Agency – NGO interaction**

#### **Response to Questions:**

19-23. NCOSS believes that good funding policy and practice is a key component of a robust and effective relationship between government and the non-government community sector to

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30 ACNC (2012) *Developing a Reporting Framework (Report-Once, Use-Often)*

<http://acnctaskforce.treasury.gov.au/content/Content.aspx?doc=publications/factsheets/html/reporting.htm>

deliver the best value for money outcomes for society.

The NCOSS 2006 Discussion Paper, *Working Together for NSW: Good Funding Policy and Practice* outlines principles and practice to underpin good funding relationships between government agencies and the sector.

NCOSS supports the Commission in its position of being “guided by the principle that government control of funding agreements should be appropriate to the context and type of funding.”<sup>32</sup> NCOSS strongly believes that the model of funding should be determined on a flexible, case-by-case basis with the aim of achieving best value for money. The 2010 Productivity Commission report recommended a case-by-case approach to selecting the funding model that is appropriate to the service being procured and the desired outcome. The 1996 Industry Commission report also recommended a case-by-case approach, and recommended against the selection of funding models determined on the broad categorisation of services or the characteristics of those services.<sup>33</sup> Stakeholder feedback to the 2010 Health NGO Review also supported a flexible approach to funding and procurement.<sup>34</sup>

The Productivity Commission proposed the following criteria to determine the appropriate funding model:

- The nature of the service, including ability to identify and control quality standards
- The capabilities of the clients (or their representatives) to make an informed choice
- The availability of service providers and scope for competition and choice, and
- The risk associated with the service.<sup>35</sup>

NCOSS believes that selecting the right funding model also requires consideration of desired outcomes and the impact of the funding model on the sector’s contribution to those outcomes. The Productivity Commission and the Australian Public Service Commission both argue that funding models must be consistent with the overarching principle of obtaining the best value for money for the community.<sup>36</sup> This requires funders to consider any relevant indirect or wider benefits provided by the sector.<sup>37</sup> The Productivity Commission recommended using an evidence-based approach to assess the nature, extent and relevance of these benefits on a case-by-case basis.<sup>38</sup>

The assessment of funding models also requires funders to consider the potentially adverse impacts of certain funding models on the sector and their wider community benefits. The Whitlam Institute and PIAC report found that the Government’s increased use of purchase of service contracting is transforming the mission and nature of the sector to a more market-based orientation. This threatens to undermine the benefits that led to government engaging community sector organisations in service delivery in the first place.

Similarly, the Productivity Commission identified that contracting has the potential to erode the comparative advantage of NGOs due to the effects of mission drift, isomorphism, separation of stakeholder roles and consequently weaker connections with communities,

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32 ICAC p14

33 Industry Commission (1996) *Competitive tendering and contracting by public sector agencies* p27

34 NSW Health (2010) *Draft Health NGO Review Recommendation Report* p52

35 PC p319

36 PC p347

37 PC p297

38 PC *Recommendation 12.3* p347

reduced advocacy, an association of NGOs with government, and increased government control.<sup>39</sup> Funders must consider these potential impacts as part of the assessment and selection of appropriate funding models.

NCOSS believes that funding models must be selected to suit the characteristics and circumstances of the service being delivered and the desired outcomes. This requires a flexible approach that considers the full range of funding models according to the nature of the service, client capabilities, nature of the market and associated risks. It also requires a consideration of the benefits provided by enhancing and supporting the 'value-add' contribution of the sector.

NCOSS believes that selection of the appropriate funding model requires consideration of all of the available models rather than a presumption in favour of any specific model. This includes consideration of renewable funding (grants), one-off or time-limited project funding, direct negotiation/allocation, individualised funding (for clients), and open or selective tenders.

NCOSS acknowledges that the current system of historical recurrent funding grants may not always be the optimal funding model. Continuing or historical grants combined with a lack of systemic, program-wide performance monitoring and evaluation makes it difficult to review and assess the suitability of current grants. Some long-standing grants may no longer reflect priorities, community need or best practice service models. However, this does not mean that the grants system as a funding model is ineffective or invalid.

NCOSS does not support a policy presumption in favour of competitive tendering and contracting (CTC) as the default or preferred funding model. The Productivity Commission recommended against a presumption that purchase of service contracting would always be the most appropriate funding model. It recommended that competitive tendering is only used in limited circumstances where there is a clearly defined outcome and markets are genuinely contestable.<sup>40</sup>

Inappropriate use of CTC impacts the efficient and effective delivery of service by the sector. The Productivity Commission found that government has an over-reliance on the purchase of service contracting model and it is applying it in situations where other funding models would be more appropriate. Negative effects of CTC included reduced collaboration between organisations, stifled innovation, and limitations on the good practice knowledge base.

The 1995 Industry Commission report proposed five principles to assess whether CTC is the appropriate funding model:

- i. identifying any constraints on the choice of funding models
- ii. reviewing functions – what are the policy goals and what services are needed to deliver on those goals, and the full cost benefits of the existing methods of service delivery
- iii. identifying alternatives – identify and assess other available funding models and assess the likely net cost of the CTC process
- iv. assessing the suitability and risks of CTC – considering service specific factors, market factors and agency factors

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39 PC p306

40 PC Recommendation 12.1 p346

- v. weighing the costs and benefits – make an overall assessment of the costs and benefits compared to other service delivery options.<sup>41</sup>

22. The Paper put forward an argument for the use of outputs (ie specific measures) rather than outcomes (ie more broadly defined measures) as a way of seeking specification of deliverables<sup>42</sup>. It uses the example of:

*...if improved school attendance was an outcome, this can more easily be specified and measured than activities such as “effectively encouraging parents to send their children to school”.*

Specific outcomes such as the example above stymie innovative solutions, remove flexibility and have the potential of replacing one problem with another.

Using the example of school children and truancy, it may be possible to force a child into a classroom but it is unlikely to be a conducive learning environment not just for the child but for the other 30 children who will suffer from the disruption this output is likely to create. The output may be achieved but the outcome will see not just one child failing within the system but potentially thirty.

24-27 NCOSS believes that the overarching aim of any government funding policy should be to achieve the best value for money outcomes for the community. The Productivity Commission notes that value for money is more than service efficiency; it is the optimal allocation of public resources.

The Australian Public Service Commission argues that devolved government must deliver public value. It states that public value is a broad measure covering outcomes, the means used to deliver them as well as trust and legitimacy. It addresses issues such as equity, ethos and accountability.<sup>43</sup> A well-designed and implemented funding policy framework can and should support the delivery of these public value outcomes.

*It is important to recognise that in relation to procurement exercises, ‘value for money’ is not about achieving the lowest possible purchase price. Rather, value for money is the optimum combination of ‘whole of life costs’, quality (fitness for purpose) and risk that meets the government’s requirements. Government agencies are required to conduct a comparative analysis of all relevant costs and benefits of each proposal over the life cycle of the service.<sup>44</sup>*

Irrespective of the funding model used, NCOSS notes and endorses the common set of core principles for best practice contracting developed by the Public Interest Advocacy Centre and Whitlam Institute<sup>45</sup>. These include:

- adopting good practice contracting principles including flexible, longer-term contracts based on outcomes rather than inputs
- developing an explicit , proportional risk management framework
- streamlining tendering , contracting and reporting arrangements
- timely communication and good funding relationships.

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41 Industry Commission pp28-29

42 ICAC p17

43 Australian Public Service Commission(2009)*Policy implementation through devolved government*

44 PC p330

45 Public Interest Advocacy Centre & The Whitlam Institute (2009) *A question of balance: Principles, contracts and the government – not-for-profit relationship* pp48-51



In addition, the Paper notes that there is a lack of clarity around terms used to describe funding instruments and that they are used interchangeably. It notes that it appears to reflect a genuine confusion about the nature of the funding relationship between government agencies and NGOs. Clarifying the terms and standardising how they are used would be of benefit to both the sector and government agencies.

Value for money needs to take into account that the cheapest price may not provide the best outcomes for the client or the community. Ideally value for money would also take into account non-tangibles such as volunteer time and unpaid labour.

Service costings are clearly of concern. The Productivity Report also raised this issue and referred to a number of state government costing exercises for funded services delivered by NFP<sup>46</sup>. It noted that NGOs should participate in cost exercises as both parties have experience and knowledge of the nature and extent of the costs. The Productivity Report noted that cost estimation include:

- *appropriate indexation factors, taking account of industry-specific wage price movements in highly labour-intensive areas of service delivers and a reasonable allowance for productivity improvement*
- *other factors which have a systematic impact on cost, such as location, specific client group characteristics, or the requirement that services be available on weekends as well as weekdays*
- *an assessment of changes in cost that would arise with possible policy change.*<sup>47</sup>

The Paper makes several references to fully funding services. The Productivity Report noted that *“the overall proportion of costs met by government funding for contracted services is around 70 percent.”*<sup>48</sup> Irrespective of what government agencies intend paying for (ie full or partial price for service delivery) it must be clearly stated in the service agreement/contract.

Full service delivery cost should cover all aspects of the service and include so called backroom costs (eg financial and risk management, administration, evaluation, etc)

Where it is not full funding, it needs to be recognised that seeking further funding is a reasonable, indeed, essential act if the service is to be delivered.

The Paper also notes that:

*The acceptance by agencies and NGOs that the amount transferred from the government in any one agreement does not cover costs, makes determination of the total price to the taxpayer very unclear and creates opportunities for deceptive overcharging.*<sup>49</sup>

It may also lead to deceptive underfunding. This also begs the question, if government is not fully funding a service where is the money coming from? Human services NGOs often work with the most vulnerable and disadvantaged. Their capacity to pay fees and charges is often limited and cannot be relied on to meet funding shortfalls.

30-31 The Paper cited concerns about frontline staff advocating on behalf of clients and NGOs and

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46 PC p283

47 PC p284

48 PC p281

49 ICAC p18

puts forward a range of controls to identify and eradicate such behaviour.

*The Commission has evidence to indicate that some frontline staff identify closely with the goals of an NGO in their local community, form personal relationships with NGO staff during the course of business with the organisation, and have personal connections with NGO clients or their families. In some cases, there is a two-way flow of staff between the government and the NGOs. It is not surprising, then, that frontline staff are known to adopt an advocacy role, acting in the interests of NGOs rather than the interests of the funding agency.<sup>50</sup>*

Whether this results in a risk of corrupt conduct is yet to be demonstrated, however this does raise concerns about the lack of trust that appear to exist between frontline staff and agency head offices. Irrespective of personal relationships it is feasible that these staff are not acting in the interests of the NGOs so much as acting in the best interests of the client and good outcomes. It is possible that they are aware of issues that may not be well understood in a centralised environment distant from the realities of service delivery. The response may be entirely appropriate, moral and ethical.

#### **Additional comments:**

Agency-NGO interaction is an area of considerable concern, particularly because both sides perceive the relationship quite negatively. Where agreement exists it appears to relate to a lack of trust.

Government agencies quoted within the Paper suggest they feel they are at a disadvantage because they are reliant on NGOs for local knowledge in terms of need, service delivery and outcomes as well as information about clients. The impression is that government agencies distrust the veracity of the information they receive and question the quality of the service.

On the other hand, the Productivity Report<sup>51</sup> noted that NGOs spoke of a master-servant relationship. The report noted a strong sense of disenchantment about the quality of the relationship with government agencies. NGOs perceived it as unequal, where government ignored the knowledge and expertise of the sector, where there was pressure to model their organisations on government agencies behaviour and practices, distracting them from their purpose (mission-drift) and eroding their independence whilst using service agreements/contract to micro manage service delivery and influence their management, general operations and community activities. They also perceived a bias towards large organisations thereby contributing to the loss of diversity within the sector.

Clearly this is not healthy, nor is it conducive to an effective working relationship, particularly one of partnership which is dependent on the common desire to achieve agreed goals where both parties trust the other's capacity to deliver. It is evident that there is a need to deploy government staff with effective relational management skills and that strategies be put in place to address this issue.

The issue of applying for multiple grants has been raised several times in relation to potential corrupt conduct. It was noted that an NGO may apply for funding for the same service from several sources where each grant covers a different aspect of service delivery. On the surface it could be seen to be double dipping, in reality it is often about ensuring the service is viable. Ideally NGOs would prefer to receive one grant to cover the full service, this would a far more efficient and effective approach to funding service delivery. However the introduction of the ACNC public portal

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50 ICAC p20

51 PC p309 & p334

(database) will enable government agencies to track the funding sources of individual NGOs.

## **7.4. Chap 4: Broader operating environment**

### **Response to Questions:**

35. Irrespective of the funding framework that is used, the information sought from the individual applicants should be aligned with the service or program to be delivered. If a successful applicant cannot provide the service at the level required, then the funder clearly must act. The issue is whether the organisation is providing the service/program not whether the governance and management is at an approved level.

NCOSS submits that the funding relationship between government funding agencies and NGOs needs to be clearly defined, ideally as a contractual relationship supported by strong contract management. Both sides will then be clearer about the point of control, the level of control and the areas over which each has control.

The role of a government funding agency is to ensure the contract is properly implemented, with legal obligations being assumed by both parties and upheld throughout the contract's life.

The steps to achieving this include:

- Government funding agencies design and manage their own contracts in consultation with the sector
- NGOs agree to take up contracts and provide services, where they are able to negotiate and vary, as appropriate relevant conditions and clauses
- Government funding agencies monitor the delivery of the contracted services, not the NGO
- If the NGO does not meet contract specifications, the contract is discontinued, having first held periodic reviews and for just cause.

To assist the capacity of the NGO to fulfil the specifications of the contract, there will be:

- a clear and well-designed contract
- a planning process that uses information from NGO services, clients and communities to inform the contract design
- skilled contract managers available to interact with NGOs throughout the length of the contract
- access to a regional support NGO to provide expert information, advice, training, planning and development assistance
- a clear process to address issues that may arise and an opportunity to correct identified problems.

36. As noted in Section 3 the human services sector is a diverse group of independent organisations who vary in size, income and provide services across a wide range of community needs to an equally wide range of clients. Their focus in general is their client base, so provide their services in a manner best suited to that group. It is not uncommon for two organisations providing similar services, to do so quite differently in response to the needs of their particular target group. In the same way as their clients and purpose differ, so does their management and governance capacity.

Undoubtedly some small organisations do perform poorly in this area however assuming that size is an automatic indicator of capacity ignores the many highly effective small organisations that are providing services throughout the state. It should be noted that recent research by the Australian Institute of Company Directors noted that company directors who sat on the Boards of both a for-profit (FP) and a not-for-profit (NFP) organisation observed that *there are no discernible differences between the governance effectiveness of NFP and FP boards.*<sup>52</sup>

The diversity of the sector is one of its strengths. Supporting small and medium sized organisations with governance and backroom activities is an effective way of retaining this diversity. Rather than outsourcing governance and management, which in effect destroys the organisation's independence, NCOSS believes that regional development organisations, which already exist, be funded to provide this support. Provision of governance services in particular, by a government funding agency that is also monitoring a contract, could result in a conflict of interest and/or increase the risk of corrupt conduct.

NCOSS has submitted applications to government over several years (and again in its *Pre-Budget Submission to the NSW government for the 2013/14 financial year*<sup>53</sup>) for funds to strengthen the network of regional development organisations across NSW that are ideally placed to interact with both NGOs and government departments closer to the ground.

37. Consolidation may solve some problems however it is a one-size fits all solution which could result in the disappearance of effective and efficient NGOs. A more creative solution is required. (See response to Q. 35)

#### **Additional comments:**

- The lack of comprehensive, reliable program data has been identified as a barrier to informed decision-making and program improvement. The Paper notes that some departments are developing common information systems. Information and communication technology has the potential to deliver efficiency savings through more timely, accurate and streamlined information and data management. They can provide a robust evidence base for program planning and evaluation, improve funding and procurement processes and streamline reporting requirements. They can also be used to assist in the identification of corrupt conduct.

The NCOSS strategy, *Community Connexions: NCOSS ICT Strategy Report 2008*<sup>54</sup>, identifies a number of recommendations to meet the medium to long term ICT support and development requirements of the NGO Human Services Sector.

As noted in Section 7.2, the ACNC Charity Passport and Public Portal will both provide government agencies with access to online data that has the potential of reducing red tape for the sector and provide information which may assist in the identification of corrupt conduct.

- Coordination is frequently used as a strategy for people to work together to achieve common goals. It tends not to be a discussion between equals but one person leading a prescribed agenda. The preferred model for the sector is cooperation, where different people agree to come together and work to commonly devised goals. A person who facilitates cooperation is very different from a coordinator.

The Consultation Paper provides examples of coordination groups for government programs.

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52 AICD (2012) *Directors Social Impact Study* p7

53 NCOSS (2012) *Making NSW Number 1 for fairness* p21 <http://www.ncoss.org.au/resources/pbs/pbs2012-13.pdf>

54 Council of Social Service NSW (2008) *Community Connexions: Addressing the information & communication technology needs of the NSW NGO Human Services sector*

The experience of peak bodies suggests there is little capacity for NGO members to influence the agendas and outcomes of these groups.

## 8. Recommendations

- Research into NGO corruption

Peer reviewed research to establish the extent of both actual and potential risk of corrupt conduct where the data is also used to assess potential remedies dependant on established need.

- Funding policy framework

The development of a funding framework that is able to provide ‘best value for money’ outcomes for the health and well-being of the people of NSW. Public value considerations would include the wider community benefits generated by NGOs. This framework would allow for a flexible approach to the selection of funding models and procurement processes.

- Funding instruments

The development of funding instruments that would include:

- meaningful consultation with the Sector
- adopting good practice contracting principles including flexible, longer-term contracts based on outcomes rather than inputs
- developing an explicit , proportional risk management framework
- streamlining tendering , contracting and reporting arrangements
- timely communication and good funding relationships.

- Effective contract management

Deployment of government agency staff with well developed contract management and relational management skills at the point of need (ie both on the frontline and in head office)

- Transfer of powers to ACNC

The Australian Charities and Not-for-profit Commission is currently developing a searchable database that has the capacity of storing substantial amounts of information on the sector, including funding details. By transferring their powers, the NSW Government will assist the sector by streamlining processes and reducing red tape. It will also significant increase the sector’s transparency and accountability.

## **APPENDIX 1**

### **Definition of Corrupt Conduct taken from the ICAC Act<sup>55</sup>**

#### **7 Corrupt conduct**

- (1) For the purposes of this Act, corrupt conduct is any conduct which falls within the description of corrupt conduct in either or both of subsections (1) and (2) of section 8, but which is not excluded by section 9.
- (2) Conduct comprising a conspiracy or attempt to commit or engage in conduct that would be corrupt conduct under section 8 (1) or (2) shall itself be regarded as corrupt conduct under section 8 (1) or (2).
- (3) Conduct comprising such a conspiracy or attempt is not excluded by section 9 if, had the conspiracy or attempt been brought to fruition in further conduct, the further conduct could constitute or involve an offence or grounds referred to in that section.

#### **8 General nature of corrupt conduct**

- (1) Corrupt conduct is:
  - (a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or
  - (b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or
  - (c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or
  - (d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.
- (2) Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority and which could involve any of the following matters:
  - (a) official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition),
  - (b) bribery,
  - (c) blackmail,
  - (d) obtaining or offering secret commissions,
  - (e) fraud,
  - (f) theft,

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<sup>55</sup> *Independent Commission Against Corruption Act 1988 No 35, Part 3 Sections 7-8* Current version for 6 January 2012 to date (accessed 3 September 2012 at 12:33)

<http://www.legislation.nsw.gov.au/fragview/inforce/act+35+1988+pt.3+0+N?>

- (g) perverting the course of justice,
- (h) embezzlement,
- (i) election bribery,
- (j) election funding offences,
- (k) election fraud,
- (l) treating,
- (m) tax evasion,
- (n) revenue evasion,
- (o) currency violations,
- (p) illegal drug dealings,
- (q) illegal gambling,
- (r) obtaining financial benefit by vice engaged in by others,
- (s) bankruptcy and company violations,
- (t) harbouring criminals,
- (u) forgery,
- (v) treason or other offences against the Sovereign,
- (w) homicide or violence,
- (x) matters of the same or a similar nature to any listed above,
- (y) any conspiracy or attempt in relation to any of the above.

(3) Conduct may amount to corrupt conduct under this section even though it occurred before the commencement of this subsection, and it does not matter that some or all of the effects or other ingredients necessary to establish such corrupt conduct occurred before that commencement and that any person or persons involved are no longer public officials.

(4) Conduct committed by or in relation to a person who was not or is not a public official may amount to corrupt conduct under this section with respect to the exercise of his or her official functions after becoming a public official.

(5) Conduct may amount to corrupt conduct under this section even though it occurred outside the State or outside Australia, and matters listed in subsection (2) refer to:

- (a) matters arising in the State or matters arising under the law of the State, or
- (b) matters arising outside the State or outside Australia or matters arising under the law of the Commonwealth or under any other law.

(6) The specific mention of a kind of conduct in a provision of this section shall not be regarded as limiting the scope of any other provision of this section.