

# Draft NSW Human Services Agreement Standard Terms

NCOSS Submission

28 May 2016

## About NCOSS

The NSW Council of Social Service (NCOSS) works with and for people experiencing poverty and disadvantage to see positive change in our communities.

When rates of poverty and inequality are low, everyone in NSW benefits. With 80 years of knowledge and experience informing our vision, NCOSS is uniquely placed to bring together civil society to work with government and business to ensure communities in NSW are strong for everyone.

As the peak body for health and community services in NSW we support the sector to deliver innovative services that grow and evolve as needs and circumstances evolve.

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## Introduction

Thank you for the opportunity to provide feedback on the NSW Human Services Agreement Standard Terms ('Standard Terms') and Funding and Service Schedule ('Schedule').

"The relationship between the government and not-for-profit parties in the delivery of government services is largely defined in the actual contracts they may enter into to. It is here that the rubber hits the road. "(*Question of Balance* 2009 p4). Contracts don't govern everything, and they don't create the goodwill necessary for their operation but they certainly create a framework for the transactional element OF the relationship.

The NSW Government contracts thousands of service providers from our sector. Until now, different agencies have different contracts, different reporting requirements and different expectations about how a contract will be managed. In addition, NSW Government contracts have often increased the burden of red tape with no discernible improvement to service quality.

The cost of compliance with these contracts and their terms impacts on the sustainability of organisations and the quality of services we deliver. In some cases, particularly at the federal level, government contracts have constrained the capacity of the sector to fulfil one of its most important roles – advocacy on behalf of the people and communities they work with.

For these and other reasons, in November 2015 NCOSS launched its *Fair Deal for our Community Services* report and campaign. The *Fair Deal* report was informed by consultation with more than 200 community organisations at more than 20 forums across NSW, and calls for:

- Co-design of future reform and change processes in partnership with the sector
- Policy and program design that happens in partnership with people and communities
- An ethical, transparent, whole of government procurement framework
- A new standardised human services contract that is based on the principles outlined in the Whitlam Institute's paper *A Question of Balance*
- A review of the compliance burden experienced by our sector, and
- Better communication between government and our sector

NCOSS commends the Government for its efforts to streamline contracting terms across agencies for human services. We agree that establishing a streamlined set of contract terms can reduce the compliance burden on our sector and make it easier to do business with government. This was an important message from our sector that came out of the consultation we undertook last year to develop *Fair Deal*.

Overall, we consider that the benefits derived from streamlining the contracting arrangements, coupled with the improvements in the contract terms mean that overall, this draft agreement is an improvement on the arrangements in place currently. The feedback is provided to assist the Department of Premier and Cabinet build on these improvements and develop a contract that delivers on DPC's objectives, has few if any unintended consequences, that is fair and proportionate to the risk and size of the contract, and balances accountability and compliance costs.

## Methodology

This submission was created with the benefit of:

- Written input from peaks, service delivery and advocacy organisations across NSW
- Feedback from a forum facilitated by NCOSS with more than 20 participant, sampled from among the membership of the Forum of Non-Government Agencies
- Detailed drafting advice from Justice Connect's Not-for-profit Law project

In 2009, the Whitlam Institute published *A Question of Balance* – essentially a blueprint for fair and reasonable contracting between the sector and government. The principles in this paper are sound and were based on the experience of NGO providers in employment services. They also helped shaped the thinking of the organisations that worked on preparing this submission.

## Key considerations

The benefits derived from streamlining the contracting arrangements, coupled with the improvements in the contract terms, mean that this draft agreement is an overall improvement on the arrangements in place currently. There are some areas where we propose improvements and amendments. Specifically, our consultation and analysis found that:

1. The use of plain language ensures that the terms are easier to understand. Plain language drafting is critical to ensure compliance but it is also important for establishing clear intent and creating the framework for a strong and robust relationship. This document is a solid example of plain language drafting.
2. The provisions recognising and protecting advocacy in the Schedule (Clause 6.7) were strongly supported. We suggest that this reference – and perhaps the entire clause – be moved to the Standard Terms.
3. There are a number of clauses where red tape has been reduced, however there are places where amendments would further reduce the compliance burden or remove unintended consequences. These are provided at annexure A, along with a number of a number of drafting issues that we feel can be resolved by small changes in wording.
4. Partnerships, joint ventures and other collaborative ways of working are not only usual practice but also encouraged by funders. Similarly, subcontracting is commonly used in the sector to deliver part or all of a service where this is the most efficient approach. The current clause (Standard Terms Clause 6.2) seeks to restrict the use of these arrangements and conflicts with the NSW Government's agenda to promote more effective collaboration between organisations. Consideration should be given to making changes to this clause to preserve the funder's legitimate interest in how the service is delivered without impeding the capacity of organisations to deliver services efficiently and collaborate with other NGOs.

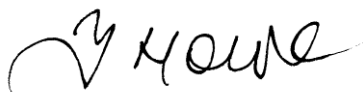
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5. The mutuality of the agreement would be enhanced if Clause 1.2 (“Our key obligations”) of the Standard Terms was expanded to include similar obligations to “Your key obligations” ie acting professionally, with due care, skill and diligence, engaging respectfully and in a timely way, etc.
6. The draft clauses in the Standard Terms relating to Licensing and Warranties (Clause 3.2) are surprisingly broad, particularly noting that intellectual property can be created from multiple funding sources. It seems entirely appropriate that funders are provided a licence to use material produced, however it is also normal commercial practice for that licence to be at least somewhat limited and that acknowledgement is provided. We propose a more standard commercial arrangement where the funder is permitted to use the material but their capacity to sub licence, modify and publish the material is more limited. We also recommend removing the references to ‘Third Party Material’.
7. NCOSS has long argued that ‘without fault’ termination clauses (Standard Terms Clause 8.2) are inherently imbalanced and unfair. That said, we note the policy position of the NSW Government and for the purposes of this submission propose that the notice period for a without fault termination be set at six months.
8. The guidance for funders within the Schedule is valuable and will help government agencies identify what they want from their programs/projects. It will also focus the negotiation processes between the Providers and the government agencies and help develop the culture the NSW Government wishes to achieve eg Under Clause 2.2 of the Schedule, ‘Performance and outcomes measures’ could provide strong examples of outcomes rather than outputs/through puts.

As stated, this agreement represents an overall improving in the contracting terms used by government. The relatively minor amendments we have proposed here would strengthen it further, and build on the good work already done.

We would very much welcome the opportunity to discuss this submission with you in greater depth. Should you have any questions in relation to this matter, please do not hesitate to contact me or Deputy CEO, John Mikelsons (02) 8960 7916 or via email at: [john@ncoss.org.au](mailto:john@ncoss.org.au)

Yours sincerely



Tracy Howe  
Chief Executive Officer

### DRAFT NSW HUMAN SERVICES AGREEMENT: STANDARD TERMS

Clause no.	Comments
General comment	Suggest the Schedule identify the Departmental funding source code in the Services Schedule to facilitate administration of the program.
General comment	Suggest that all subclauses be numbered and the use of dot points be restricted to lists.
1.1 d)	There may be an error in the second dot point. If not, this requires clarification.
1.4 c)	There are a range of reasons that an organisation might legitimately refuse to provide services to a Service User that extend beyond an emergency, particularly where there is a risk to the health and safety of an employee. Suggest that the clause be amended so that organisations can refuse to provide services to a Service User but that there is then a process of engagement with the funder to either transition the Service User to another service or otherwise resolve the issue.
1.6 b)	In the past similar clauses only referred to service managers and senior staff. This is a very broad clause with the potential to increase red tape. Suggest that the clause be amended to refer to service managers and senior staff and only in exceptional circumstances would it include other staff. The definition of Personnel presently also includes contractors which may be problematic in this context.
1.6 f)	Currently some Funders cover wages to enable Providers to employ replacement staff. We suggest that this clause be removed to enable those Funders who wish to provide funding for replacement staff be able to continue to do so.
2.1 d)	This requires that funding for the service be kept in a separate bank, building society or credit union account. It is not practical for funding under the Standard Terms to be maintained in its own separate bank account, it would increase red tape and does not align with current accounting practice. Large organisations would need to maintain numerous bank accounts at any one time. If the provision is to be retained it should only apply to smaller NGOs with real insolvency risk.
2.2 a)	Suggest inserting after the word 'spend' the words 'at the end of the Funding Period'.
2.2 c)	Suggest this clause state the funds that are to be repaid are 'unspent funds'.

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Clause no.	Comments
2.2 d)	If there is a requirement for funded organisations to pay interest on funds not returned promptly, the requirement should be reciprocal and the funder should have to pay interest on late payments.
3.1 b)	Suggest adding in at the end of this clause the words 'in this Agreement'.
3.2 c)	Suggest the words in the second bullet 'this material' be amended to 'Agreement Material, Third Party Material or Other Material'.
3.4 a)	Suggest placing 'and/or' between the two dot points to clarify that the second obligation only applies to Services which generate health records.
3.4 c)	This clause will present challenges in implementation, but also could create unintended information silos within an organisation. Two options for resolving this are either to delete the clause entirely, or to replace 'only to perform this Agreement and the Services' with 'for the purpose for which it was collected'.
3.5 b)	Suggest the word 'withhold' replace the word 'not'.
4.3 b) 2 <sup>nd</sup> dot point	Suggest adding at the end of the clause 'when performed or omitted as part of the delivery of the Services'.  Also, the issue of indemnifying the State for acts of truly independent contractors (which is part of Personnel) may be problematic.
4.4 a) 3 <sup>rd</sup> dot point	The Provider may include a number of Services. Access to the complaints register needs to be to the register relating to the actual service that the complaint refers to. Suggest amending the clause, replacing 'Services' with 'relevant Service'.
5.2 a)	In the case of the wind up of an organisation, we suggest that the Service Provider be permitted to transfer records to another Service Provider (with NSW Government consent) or directly to the funder having sought permission from their existing and former clients first. Where there is no consent, the records need to be closed and archived.
5.3 a)	Suggest that the 'initial period' be replaced with 'Agreement period' to improve the clarity of this clause.
5.4 c)	Suggest the word 'Material' be replaced by 'Records.' Material has a wide definition and

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Clause no.	Comments
	does not just include what is produced during the term of the agreement so it is different in this respect to Records.
6.2 f)	Suggest that this clause specify that 3 months notice is required for a direction to stop using a particular subcontractor.
7.3 d)	Suggest adding after 'Intervening Event' the words 'after receiving notice from you'.
8.3 a)	Suggest that 8.3a) be amended to replace 'with written notice' to 'with three months written notice'.
8.4 c)	On termination there is a requirement to provide assistance to NSW Government for at least 6 weeks <u>at no cost</u> to transition the services. The need to have a transition clause to ensure ongoing care to a service user is understood. However, in certain circumstances the cost of doing so may be significant. Suggest that the costs for assisting with transition (after the funding has stopped) be met by the funder.
9.2 a) 4 <sup>th</sup> dot point	Suggest redrafting to 'have no legal proceedings threatened or occurring against it which will directly impact on their capacity to provide the service'.
Definitions	<p>The definition of, and reference to, 'Additional Term' is unclear. Suggest the definition needs to be more specific and set out where the additional terms will be set out.</p> <p>Auspiced Entity – It will not always be an <u>unincorporated</u> entity.</p> <p>Personnel – This is very broad. We suggest that agents and contractors not be included and be dealt with separately.</p> <p>Suggest including the term 'Service User' and 'Provider' in the list of definitions</p>

## FUNDING AND SERVICE SCHEDULE (FUNDING SCHEDULE)

Clause no.	Comments
3.1	The Schedule requires a 'budget'. This seems unnecessary noting that the reporting is now focussed on outputs and outcomes, rather than inputs.



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Clause no.	Comments
4	Suggest this entire clause be included in the Standard Terms.
6	In general, we suggest most of Clause 6 would fit better in the Standard Terms to prevent duplication and avoid confusion with other clauses. In addition Clause 6.2 ideally would be optional not required if the Service is required to go through an accreditation process that covers training requirements.
6.3 c) & d)	The requirement to notify when funding or assistance is received 'for any activities connected to the service' is very broad. It is also unclear what this clause is seeking to achieve. Without that context, it appears to be an unreasonable requirement that increases red tape and we suggest it is deleted.
6.4	Suggest an additional clause that reflects lead organisations who are acting in an administrative role for a group of organisations working collaboratively or as part of a joint venture, etc.