

Committee Secretary  
Senate Standing Committees on Community Affairs  
PO Box 6100  
Parliament House  
Canberra ACT 2600  
**Submitted via electronic upload**

**Re: Submission to Impact on service quality, efficiency and sustainability of recent Commonwealth community service tendering processes by the Department of Social Services**

I am concerned about the perceived lack of fairness of template community service agreements currently used by the Commonwealth.<sup>1</sup> The power imbalance between government and community organisations, particularly for those that are small or receive the majority of their income from government causes a number of issues which impact on the efficiency and effectiveness of such arrangements. The Productivity Commission in its 2010 Report - *The Contribution of the Not-for-Profit Sector*, (chapter 12) neatly sets out the issues and their possible solutions and I will not repeat them.<sup>2</sup>

This power imbalance might be redressed by provisions in government administrative procedures or legislation.

I suggest that the contractual relationship between government and community organisations should be gauged against the following principles:

1. provide scope for genuine negotiation between government and community organisations
2. respect the independence of community organisations
3. be based on fair and reasonable terms and conditions. The overarching test of 'fairness' should be:
  - (1) Would the provision cause a significant imbalance in the parties' rights and obligations arising under the contract?
  - (2) Is the provision reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term? and
  - (3) Would the provision cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on?
4. further, no provision should infringe the spirit of the principles set down for the scrutiny of delegated legislation
5. be underpinned by an agreed explicit risk management framework:

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<sup>1</sup> Refer: McBratney, Amanda & McGregor-Lowndes, Myles — 'Fair' government contracts for community service provision: Time to curb unfettered executive freedom? *Australian Journal of Administrative Law*. 19(1) 19-33; McGregor-Lowndes, Myles & McBratney, Amanda — Government Community Service Contracts: Restraining Abuse of Power *Public Law Review* 22 279-297.

<sup>2</sup> Available at <http://www.pc.gov.au/inquiries/completed/not-for-profit>

- (1) This framework should be predicated upon the principle that risk should be allocated to the party best able to manage the risk;
  - (2) The price of 'risk' should be transparent and fully compensated for when imposed by government
6. seek to minimise the compliance burden on community service organisations;
- (1) The level of tendering, contractual and reporting requirements should be proportionate and fit for purpose given the level of public money and risk involved.
7. recognise the need for flexibility in service delivery
8. allow for innovation in service design and delivery.

These principles should be embedded in government administration by legislation (*Public Governance, Performance and Accountability Act 2013*) or inclusion in such instruments as the *Commonwealth Grants Rules and Guidelines*.<sup>3</sup>

Regards,

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<sup>3</sup> Available at <http://www.finance.gov.au/resource-management/grants/>