

Government of South Australia
Department of Treasury and Finance
State Administration Centre
200 Victoria Square
Adelaide South Australia 5000

By email: FMT@sa.gov.au

20 December 2017

Dear Sir/Madam

Feedback on the NFP draft Funded Services Agreement and draft Standard Grant Agreement

Justice Connect's Not-for-profit Law service appreciates the opportunity to provide feedback on the draft Funded Services Agreement and the draft Standard Grant Agreement (the **Exposure Drafts**).

About Not-for-profit Law

Not-for-profit Law is an Australia-wide program of Justice Connect, providing free and low cost legal assistance to not-for-profit community organisations, including not-for-profit community organisations in South Australia.

Justice Connect is a registered charity and an accredited community legal centre. Not-for-profit Law 'helps the helpers' by providing practical legal information, advice and training to not-for-profit community organisations. By helping those involved in running not-for-profits to navigate the full range of legal issues that arise during the lifecycle of their organisation, we save their time and resources. This allows them to focus on achieving their mission, whether that's providing refuge for women and children fleeing family violence, caring for people with a disability, managing community-based housing, helping out in emergencies or protecting the environment.

In our experience, not all not-for-profits can access legal advice before they enter into government funding agreements, or secure assistance with navigating specific contractual issues as they arise. In order to help not-for-profits to understand their funding agreements, we have developed practical legal resources and training aimed at building the legal capacity of organisations funded under government funding agreements so they can better understand, comply with and deliver on the requirements of the agreement. **Attached** to this letter is an example factsheet that we developed for Specialist Homelessness Organisations funded under the NSW FACS Funding Deed. As you will see, the factsheet is focused on drawing the attention of not-for-profits to components of the agreement so that they are better able to understand and comply with the agreement. Not-for-profit Law is well-placed to develop these resources as we have a long history of providing legal information to not-for-profits and we are independent from government.

Feedback on the Exposure Drafts

We welcome the South Australian Government's move towards a simplified and consistent approach to funding and grant agreements for the not-for-profit sector. We applaud the consultative approach taken by Government as part of the South Australian Not-for-Profit Funding Rules and Guidelines (**SANFRAG**) reform. We believe that the Exposure Drafts are a step in the direction towards an improved framework for funding the work of the not-for-profit sector.

Set out below are a number of areas in which the Exposure Drafts could be amended to ensure that not-for-profits are better able to understand, comply with and deliver on the requirements of their funding agreements. This is not an exhaustive review, however we would be pleased to provide more extensive feedback or discuss our feedback in greater detail.

We also recommend the development of explanatory materials, such as factsheets or webinars, to assist not-for-profits to understand their obligations under the agreements. To illustrate the need for such materials, set out below are several issues covered in the Exposure Draft that we believe would be better understood by not-for-profits with the assistance of guidance or explanatory materials.

The comments below relate to the Funded Services Agreement (**FSA**), unless the Standardised Grant Agreement (**SGA**) is specifically referenced.

1. The need for “one stop shop” clauses

In our review, we identified several issues that are dealt with in multiple clauses of the Exposure Drafts. Three examples are set out below. To assist NFPs to navigate the FSA and SGA, we recommend that the Exposure Drafts are amended to utilise “one stop shop” clauses that deal with issues in their entirety. Alternatively, explanatory materials (such as a fact sheet) could be produced with an index to the FSA and SGA, setting out which clauses deal with each key issue.

Clauses dealing with a failure to meet the terms of the Exposure Drafts

The draft FSA gives the Government Party many different powers to investigate, rectify or remedy a failure to meet the terms of the FSA (see for example, clause 4.5, clause 10.3, clause 17.1, clause 20.1 and special condition 5.12).

These clauses are confusing and at times contradictory – for example, if a NFP breached a warranty under clause 4.5, we query whether the Government Party would terminate under clause 4.5 or follow clause 20.1(b) before terminating. Further, if the Block Funding is not spent in accordance with the FSA the NFP could be either required to repay under clause 10.3, open their doors for investigation under clause 17.1 or be subject to termination of the FSA under clause 20.1.

So that both parties are clear on when a Government Party can or cannot investigate, when a Government Party must notify the NFP of a breach and request rectification, and when the Government Party can terminate, it would be best if the above clauses were all dealt with in a “one stop shop” section of the FSA. As a general principle, and other than when a “serious breach” has occurred, we suggest providing the NFP with notice, and an opportunity to respond and rectify the failure to comply with the FSA prior to the Government Party exercising its rights under this clause. This comment also applies to clause 5.1 of the SGA.

Clauses relating to dispute resolution

The draft FSA contains two clauses that deal with dispute resolution under the FSA – clause 19 and clause 36. This could cause confusion about which dispute resolution process to follow and we recommend that dispute resolution should be dealt with in one clause.

Clauses relating to intellectual property

We understand that Item 17 of Attachment 1 and clause 14 of the FSA are an improvement on the existing funding contracts. Whilst we believe that the NFP should own any intellectual property developed by the NFP in relation to the FSA, and we encourage the steps taken to make this clearer under the FSA, the current drafting may cause some confusion. Item 17 of Attachment 1 envisages that either the NFP or the Government Party could own the intellectual property under the FSA, however, this is not discussed anywhere in Attachment 2. Further, clause 14.2 does not sit well with Item 17 of Attachment 1. If the Government Party owns the intellectual property there is no need for the NFP to grant the Government Party a license, and instead it may be that the NFP requires the license. We suggest amending clause 14 so that unless otherwise specified in Item 17 of Attachment 1, the NFP owns all of the Intellectual Property Rights in relation to the FSA and either:

- the NFP owns the intellectual property and that the NFP is going to license to the Government Party any Intellectual Property Rights in any reports or manuals required to be supplied under this Agreement; or
- the NFP owns the intellectual property and that the NFP is not going to license Intellectual Property Rights to the Government Party; or
- the Government Party owns the intellectual property and therefore there is no need for the NFP to license Intellectual Property Rights to the Government, but instead for the Government Party to license the right to the NFP.

We also suggest making it clear in clause 10.1 of the SGA that the Recipient owns all of the intellectual property in relation to the SGA unless otherwise specified in Attachment 1.

2. The need for clearly defined terms

Not-for-profit Law welcomes the plain English drafting in the Exposure Drafts. However, we have identified several clauses in the Exposure Drafts where terms or concepts are undefined and open to uncertainty or ambiguity. We recommend consideration of minor amendments in order to clarify the terminology below.

Clause 7.1 – given the broad definition of ‘NFP Personnel’, leaving ‘Additional Personnel Checks’ as an open ended definition could result in a burdensome and invasive obligation for NFPs. One way to ensure that the scope is limited would be to define ‘Additional Personnel Checks’ in reference to checks required under law. Further, it is not clear why this clause is titled ‘Approved Subcontractors,’ as ‘Approved Subcontractors’ are dealt with in clause 22 and come within the definition of NFP Personnel.

Clause 7.2 – the term ‘unsuitable’ is open-ended and arguably subjective. We suggest that the term ‘unsuitable’ be defined in reference to a standard or connected with the results from the checks made in clause 7.1.

Clause 11.1 – we suggest that any reference to documents, records, management accounts or financial statements be under a defined term such as ‘Records’ and that it be made clear that these documents are only documents in connection to the FSA and that it does not include Confidential Information such as client records. We also suggest defining or deleting the words ‘effectively and efficiently,’ it is sufficient if a NFP delivers the Outcomes within the Block Funding and by the Milestone Dates. This comment also applies to clause 6.1 of the SGA.

Clause 15.2 – we suggest making it clear that nothing in this clause requires a party to disclose information where doing so would be contrary to any law. We also query the use of the phrase “need to know” – this is arguably subjective and unlike clause 15.1, the Confidential Information is not connected with information that relates to the FSA. This is particularly important in light of clause 15 surviving termination (see clause 21.2). This comment also applies to clause 11.2 of the SGA.

Clause 20.2 – we recommend that the ‘period of notice’ should have a minimum amount (for example, 30 days) so as not to cause unfair disadvantage to some NFPs and to make sure that the Parties have enough time to get their affairs in order in the event of termination of the agreement.

Clause 21.2 – given that clause 21 survives termination, we suggest adding specific reference to the Special Conditions ‘that by their nature remain in force’ so that both Parties are clear on what does and what does not survive termination of the FSA.

Clause 24.3 – given the acknowledgement made in clause 34.1 (No further obligation) we suggest that the ‘additional transitional requirements’ be spelt out in Attachment 1 so that a NFP can be clear upfront on what they are agreeing to.

Clause 25.1 – given the broad subjective understanding of ‘conflict of interest’, and that breach of clause 20.1(f) would result in termination of the FSA, we suggest defining ‘conflict of interest’. It is important that the definition of ‘conflict of interest’ does not conflict with the *Not-for-Profit Sector Freedom to Advocate Act 2013*.

Clause 7.1 in the SGA - we suggest defining ‘Financial Year’ in Attachment 1 to take in to account the Recipient’s financial accounting practices.

3. Clauses that could be expanded on in guidance or explanatory materials

As discussed above, NFPs would benefit from guidance or explanatory materials that explain their obligations under the FSA and SGA. Examples of where such guidance would be of assistance are set out below.

Clause 11.2 – as a clause that survives termination, this is an example of a clause that the NFP would need to be aware of in order to make sure that it has measures in place to comply with this clause after the conclusion of the FSA.

Clause 12.1 – we commend the South Australian Government for the inclusion of a clause that is clear on the types of insurance that a NFP will require. We know that insurance and coverage can be confusing for many small to medium sized NFPs and believe that guidance on the types of insurance would be useful and welcomed.

Clause 25.1 – given the broad subjective understanding of ‘conflict of interest’ we suggest the development of explanatory materials that provide guidance on how to identify a conflict of interest, utilising examples that are relevant to NFPs.

Clause 38.1 and clause 40 – when there are special conditions, multiple attachments and specific orders of precedence to interpret an agreement, we suggest explanatory materials so that it is less confusing for a NFP to read the agreement and understand exactly what constitutes the totality of the agreement they are signing.

4. Other comments

In addition to our substantive comments above, we set out below some comments related to specific clauses.

Clause 8.4 and 8.7 – this clause appears twice – first in 8.4 and then again in 8.7.

Clause 10.1 – if the term of the Agreement is 3 years and the Block Funding is also for that 3 years, we query why an NFP would have to write to the Government Party to let them know on the anniversary of the Commencement Date at year 1 that they have ‘unspent funds’. This clause should only apply if certain funds are required to be spent by certain milestones, including on the Expiry Date.

Clause 20.4 – we commend the South Australian Government for the inclusion of this clause.

Clause 20.3(b) and 24.2 – in light of clause 34.1, we suggest specifying which Party covers the cost of the ‘effective, smooth and efficient handover of the Funded Services’ or of complying with ‘reasonable directions’ if the FSA is terminated under clause 20.2.

Clause 33.5 in the FSA and clause 12.6 of the SGA – we commend the South Australian Government for the inclusion of this clause, but would suggest altering this clause to make it clear that “Nothing in this ‘Agreement’ derogates from the operation of *the Not-for-Profit Sector Freedom to Advocate Act 2013*.”

Contact details

Thank you once again for the opportunity to provide feedback on the Exposure Drafts. We would welcome a discussion with the Department of Treasury and Finance about possibilities for Not-for-profit Law to assist South Australian not-for-profits, through the development of explanatory materials or training resources. We would also be pleased to discuss any of our comments about the Exposure Drafts. Please do not hesitate to contact Amy Williams (Lawyer, Not-for-profit Law) on 02 8599 2182 or at Amy.Williams@justiceconnect.org.au with any questions.

Yours sincerely



Sue Woodward
Acting CEO
Justice Connect
03 8636 4468
Sue.Woodward@justiceconnect.org.au



Amy Williams
Lawyer, Not-for-profit Law
Justice Connect
02 8599 2182
Amy.Williams@justiceconnect.org.au