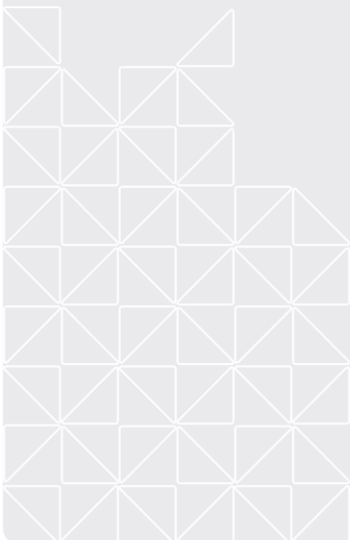


Submission to FACS

Targeted Earlier Intervention Programs – sector consultation paper

16 October 2015



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About Justice Connect and Not-for-profit Law

Justice Connect is a not-for-profit organisation that provides access to justice through pro bono, facilitating free legal assistance to people experiencing disadvantage and the community organisations that support them.

Formed on 1 July 2013 when PILCH NSW (established in 1992) and PILCH Vic (established in 1994) formally merged, Justice Connect operates across NSW and Victoria and is a recognised leader and innovator in this work globally.

Not-for-profit Law (NFP Law) is Justice Connect's specialist legal service for not-for-profit (NFP) community organisations. This unique service (the first and only one of its kind in Australia) provides free and low-cost legal help to small to medium NFP community organisations across NSW and Victoria.

By 'helping the helpers' with legal advice, information and training, we support not-for-profit community organisations to comply with the law and be well governed, assisting them to focus their time and energy on achieving their mission.

NFP Law draws on the expertise of lawyers in its 50 member law firms to ensure its resources and advice are high quality. The significant pro bono contribution of lawyers adds enormous value to the work of NFP Law.

We are committed to improving access to legal help for NFP community organisations, and on improving the legal landscape in which they operate.

Our policy and law reform work is focused on effective and appropriate regulation of the NFP sector, helping NFPs be more efficient and better run, and ensuring that reform takes into account impacts on the NFP sector.

About this submission

NFP Law welcomes this opportunity to comment on the future of the targeted earlier intervention programs in NSW. We congratulate the Government on seeking to genuinely engage with the sector on the proposed reforms and applaud the Government's efforts to ensure we have a cohesive and effective service system that is flexible, localised and child-focused.

Given NFP Law's focus on the legal issues faced by NFPs and our work to ensure that reform takes into account impacts on the NFP sector, this submission focuses on the issue of 'reform processes' highlighted in the Consultation Paper, including the legal issues arising for NFPs out of sector reforms.

This submission is based on our experience working with small-medium NFPs, and includes examples of common legal questions we receive from organisations that wish to work more collaboratively.

While collaboration occurs all the time in the community sector, we have found that particular issues arise when formal collaborative arrangements among NFPs are driven by reform processes.

While we do not presume that the proposed reform process envisages NFPs engaging in a competitive tendering process or requiring joint working arrangements, we believe there is value in including our experience of the legal issues that we have seen arise when organisations do engage in reform processes with such elements.

We hope that you find our reflections helpful and that they assist with informing the design of the upcoming reforms.

Legal issues NFPs experience due to sector reform

Our experience of receiving 710 enquiries from NFPs across NSW since July 2013 to date is that many organisations (particularly small-medium NFPs) struggle to understand, negotiate and resolve legal issues arising from government-driven reform processes in tight timeframes without specialist legal help.

We have been approached by NFPs for help on a variety of issues arising directly from government tendering processes and funding reforms, including NFPs:

- confused about the terminology used by Government to describe two or more organisations working together to deliver a service including 'consortia', 'partnerships' and 'joint working arrangements' and the legal import of those terms
- wanting advice on relevant funding deed, service level and program level agreement clauses
- who have hastily entered into an arrangement in an attempt to be part of a consortia bid and now want advice about its legal implications for their NFP and/or are in dispute with the other parties as the relationship has since broken down
- who are confused about their legal obligations in relation to client files, and how their clients' privacy rights interact with contractual requirements to Government
- who have been unsuccessful in a tender process and are wanting urgent advice on the legal implications of impending funding cuts (eg. on making staff redundant and/or winding-up their organisation),
- in sectors not currently undergoing sector reform but who can 'see the writing on the wall' and are looking to re-structure, merge or wind-up.

Case study 1: Rushed process leads to dispute

NFP Law was approached by an NFP who wanted advice about a 'joint working arrangement' it had entered into with a number of other NFPs in response to a successful government tender application.

The NFP, who was not the lead agency under the tender, was unsure whether it had entered into a legally binding relationship with the other parties.

Due to time constraints and lack of funding, the organisation had not received legal advice prior to entering into the arrangement. The organisation was very unclear about its legal obligations under the document.

Further, the relationship between the parties had broken down in the months following the grant of funding (they had been unable to carry out a comprehensive due diligence process due to the tight tender timelines) and some of the parties were now seeking to exit the arrangement.

In addition to issues arising directly from government tendering requirements (and the arrangements they require NFPs to enter into), there are a wide variety of flow-on legal issues for NFPs in areas of law such as:

- **Legal structuring:** eg seeking advice about the critical differences between, and implications of, arrangements to work together via a range of legal arrangements including consortia, auspicing, sub-contracting, joint venture, amalgamation, or merger

- **Employment law:** eg advice about the key legal issues surrounding employee (and contractor) rights and entitlements, particularly when an organisation merges or winds up, or changes the roles or duties of current staff members
- **Property and assets:** eg advice about how property within or developed by a consortia will be owned; or if an NFP is merging or closing, how they can effectively transfer property (including leases) to another organisation
- **Client files / privacy / confidentiality:** eg the privacy and other implications of transferring or sharing client files and client personal information between organisations
- **Governance:** eg how a consortia or integrated organisation will be governed and the legal obligations of any governing body; and/or the legal obligations of board members when an organisation is ending
- **Tax:** understanding the tax implications of restructuring to ensure all organisations retain their tax concession status.

It is worthwhile noting that most small-medium NFPs that provide services to vulnerable people are funded in a way that means they have no capacity to pay for legal advice to help them when they recognise the implications and extent of these important legal issues.

We are also concerned that many NFPs are currently struggling with mergers, consortia arrangements or the prospect of winding-up and have little idea of the complex legal issues involved. We expect that these issues will slowly emerge and be costly. For example, not knowing the law about 'transfer of business' under the *Fair Work Act 2009* (Cth) could leave small NFPs with redundancy payments they had not planned for, and which could potentially lead them to insolvency.

Key issues and recommendations

In some instances the above legal issues faced by NFPs have been exacerbated by shortcomings in government's reform processes and management.

In this section we reflect on some key issues for consideration by Government in establishing a reform process for earlier intervention services in NSW, together with recommendations.

Our views are based on our experiences working with NFPs presenting with legal issues such as those explained above which have been precipitated by sector and funding reforms.

NFPs need adequate timeframes to consider, make and implement effective collaborations and partnerships

Recommendation 1: Adequate timeframes should be planned so that NFP organisations can properly plan for and adapt to new arrangements, and do so in a way that minimises potentially serious legal issues (eg redundancies/loss of charity tax status) from occurring or escalating.

The timeframes for the changes should be properly planned and spaced out so that if organisations are having to enter into joint working arrangements, they have sufficient time to obtain advice on the legal impact of such arrangements for their service or staff. This will also ensure that boards comply with their fiduciary duty of reasonable care, skill and diligence and not make 'hasty marriages' to survive in the sector reform climate.

We have talked to our member law firms that regularly assist the for-profit sector with 'transfer of business' issues, and they note that such projects would usually be planned over 12 to 24 months and would be allocated significant resources to ensure they are successful.

We already know of one merger that failed at the last minute because, in the hasty due diligence process, employee pay rate and award issues were overlooked. We also refer to case study 1 above which illustrates the fall-out resulting from a rushed process.

NFPs need adequate resourcing to cope with change

Recommendation 2: The Government should undertake research to realistically cost the impact of its reform process on small-medium NFPs and build into any future reform process the provision of adequate funds to assist the NFP sector to cope with the changes (including legal costs).

Where there is a significant change in policy by Government, the sector should receive adequate financial and resource support to deal with legal issues resulting from the changes.

Case study 2: Legal assistance unaffordable for many NFPs

NFP Law was approached by two small-medium NFPs who wanted to merge in response to sector funding reforms and in order to improve their chances of securing ongoing funding.

NFP Law referred the matter to a member law firm for assistance with the due diligence and merger process.

The firm subsequently reported to NFP Law that the work on the file, if billed, would have been approximately \$70,000.

If not for the pro bono legal assistance they received, the organisations would not have been able to fund the significant legal costs involved in the merger process. It is likely that the merger would simply not have happened, or possibly would have proceeded without obtaining proper (and early) legal advice leading to poorer outcomes.

While pro bono assistance is obviously invaluable for those NFPs that received it, either through NFP Law or otherwise (and we certainly cannot refer all organisation that need legal help), limited pro bono resources should not be used to 'fix' issues created by inadequately planned government policy changes. It is imperative that organisations affected by substantial reforms (including those that are required to engage in new ways of working as a result of reforms to funding processes) are equipped to obtain resources and support services to engage effectively in the reform process, and adapt and maintain strong and effective operations once reform has been implemented.

The sector needs support to understand legal issues involved in reform processes

Recommendation 3: The Government should publish or fund the publication of plain language legal information and training to help resource the sector to identify and understand the different arrangements they are being asked to enter into, and how the law will apply to their organisation.

While legal information is no substitute for specific legal advice, having a basic awareness that there will be legal implications to certain decisions, and understanding how the law will apply in certain circumstances, can help to guide the decision-making or advice-seeking behaviour of NFPs. Early advice can often prevent legal issues escalating. By contrast, if the sector (particularly sector peaks and organisations providing advice and support to the sector) is inadequately informed of the issues involved, this can exacerbate confusion within the sector and lead to poor planning and decision making.

Case study 3: Lack of understanding of legal structures

NFP Law was approached by a peak body seeking help to draft a template 'consortia agreement' for use by its member organisations when entering into consortia arrangements.

The peak was of the belief that a consortia was a specific, legally recognised concept.

NFP Law advised that the term consortia was not a legal concept per se, but rather a term of art to describe two or more organisations working together. Legally speaking, this could involve a range of possible arrangements such as a memorandum of understanding, joint venture, sub-contracting, or partnership.

It became apparent that the peak body did not have a clear understanding of the different legal structures that could be used by NFPs wanting to work together.

It is not strategic for each small-medium NFP to individually seek basic legal information about their current legal rights or obligations in the reform process. Where issues are common and the legal information could be provided in a way that is accessible to all and generate a common understanding across the sector, this should be pursued.

Legal information and education could be provided to the sector by way of web-based legal information factsheets and guides, face-to-face training and webinars, short FAQ podcasts, etc. If the Government does not feel it is in the best position to provide this information, sector peaks and intermediary sector-based support services (such as NFP Law) are best placed to be funded to provide this support.

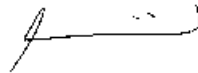
Thank you for the opportunity to contribute to this consultation. We would be happy to elaborate on any of the issues raised in this submission on request.

Yours faithfully



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