

Not-for-profit Sector Development Blueprint

Submission to the Blueprint
Expert Reference Group

December 2023

Consultation: Developing a Not-for-profit Sector Development Blueprint

Justice Connect welcomes the opportunity to comment on the Not-for-profit Sector Development Blueprint Issues Paper (the **Issues Paper**) released by the Blueprint Expert Reference Group.

About Justice Connect

In the face of huge unmet legal need, Justice Connect designs and delivers high-impact interventions to increase access to legal support and progress social justice. We help those who would otherwise miss out on assistance, focusing on people disproportionately impacted by the law and the organisations that make our communities thrive. We have been serving the community for more than 25 years.

Our expertise – our Not-for-profit Law Program

[Not-for-profit Law](#) is Justice Connect's specialist program delivering legal support for community organisations and is a sector-led response that not-for-profits and their peak bodies trust; it is the only service of its kind in Australia. We build the capacity and capability of not-for-profit organisations through legal help so they are stronger, more effective and can focus on helping more people in need.

Since its establishment in 2008, Not-for-profit Law has helped hundreds of thousands of community organisations across Australia with legal, regulatory and governance issues through an effective, integrated, multi-channel service design, to help them achieve good governance and make sense of complex laws.

We achieve impact at scale by delivering a combination of one-to-many and one-to-one supports, including:

- 300+ free legal information resources, including fact sheets, guides, and interactive tools
- free and affordable webinars and training delivered for individual staff and community organisations, and through peak bodies and government agencies
- free legal advice provided by our in-house legal team and via pro bono referrals to our 50+ member law firms, and
- data and evidence driven advocacy and engagement on sector wide issues.

Our submission

Our submission focuses on responding to the consultation's focus areas and questions which are connected to the work of our Not-for-profit Law program and our evidence-based insights.

Governance, organisation, and legal environment

Overcoming the complexity of our federation

Australia's federal system of government means that charities and not-for-profit organisations often operate in multiple jurisdictions. A fit for purpose regulatory regime for the not-for-profit sector requires better co-ordination between State, Territory and Commonwealth governments and more efforts towards harmonisation of laws that impact the not-for-profit sector.

For examples of how inconsistent laws affect the efficient operation of charities and other not-for-profit organisations, see our recent [submission](#) to the Productivity Commission Inquiry into Philanthropy¹ (our **Philanthropy submission**) where we highlighted the impact of:

¹ https://justiceconnect.org.au/wp-content/uploads/2023/06/230607_JC_Submission_Productivity-Commission-Inquiry-into-Philanthropy_FINAL.pdf



- inconsistent definitions of "charity" and "charitable purpose" across jurisdictions
- inconsistent laws impacting volunteers and volunteer involving organisations, and
- complex and confusing fundraising laws.

The Issues Paper welcomes the progress that has been made in current efforts to fix fundraising laws, in particular the agreement reached by Federal, State and Territory governments to reconcile fundraising regulation around an agreed set of National Fundraising Principles (the **Principles**) for charities registered with the Australian Charities and Not-for-profits Commission (**ACNC**).

In our view the efforts to harmonise fundraising laws highlight the benefits as well as the pitfalls of co-ordination between governments.

As the Issues Paper notes, State and Territory governments committed to releasing their plans to implement the Principles by July 2023. This has not occurred. Tasmania and South Australia have taken steps to introduce the Principles, but in these states' approaches we have observed some early trends which concern us and cast a shadow over the prospects of successful harmonisation and genuine red tape reduction for charities.

First, the value of the Principles as a path to harmonisation depends on the Principles operating to the exclusion of each State or Territory's existing fundraising rules. This way, no matter where a charity fundraises it only needs to consult one set of Principles. But the South Australian government, for example, has signalled its intention is to introduce the Principles as an extra set of conditions that will operate in addition to the existing laws and Code of Practice that apply to charitable fundraising in that state. In our view, simply adding on the Principles to existing fundraising rules will make compliance more complex and challenging for charities.

Second, although the State and Territory Treasurers announced their agreement to a published set of Principles in February, there is a real risk that each jurisdiction will amend the Principles as part of its implementation process. For example, when the Tasmanian House of Assembly recently discussed the proposed implementation of the Principles via the Charities and Associations Law (Miscellaneous) Amendment Bill 2023, the Minister for Consumer Affairs said:

"The national fundraising principles as agreed by all jurisdictions in February of this year ... will be implemented in Tasmania by a code of practice drafted in regulations. This means they will need to be drafted by the Office of Parliamentary Counsel **who will draft them in a legally sound way for application in Tasmania**. Then they would go through the regulatory process that we have... **We do not blindly copy and paste model provisions, but adapt them for our Tasmanian context.**"² (emphasis added)

There is a clear risk: if State and Territory governments amend the Principles then there will no longer be a single set of Principles for charities to follow. As lawyers we know that even small additions, omissions, or substitutions of words can have significant consequences for the interpretation of a law. Differences in the wording of the Principles may also make it more challenging for State and Territory governments to agree on uniform regulatory guidance for charities. This is disappointing given that we know the Principles were developed over a number of years by a working group of State and Territory government representatives and were subject to stakeholder consultation before being released in February 2023.³

If these issues go unaddressed, we are anxious that the Principles, which were a practical attempt to simplify and harmonise fundraising regulation, will in fact result in a more complex regulatory regime for charities.

² Tasmania, *Parliamentary Debates*, House of Assembly, 16 November 2023 (Madeleine Ogilvie, Minister for Consumer Affairs) p58-59

³ <https://ministers.treasury.gov.au/ministers/andrew-leigh-2022/media-releases/agreement-reached-reform-charitable-fundraising-laws>



Observations from our #FixFundraising campaign

The Issues Paper asks what a regulatory framework for the not-for-profit sector that overcomes the complexity of our federation might look like. We offer the following observations based on our experience advocating for the simplification and harmonisation of fundraising laws:

- Beyond goodwill, there is often no incentive for Commonwealth, State and Territory governments to harmonise laws. It took sustained pressure from the charity sector over 10+ years to achieve the incremental reforms to fundraising laws that we have witnessed.
- The effectiveness of temporary working groups convened by Commonwealth, State and Territory governments may be limited: a structured, permanent, transparent, and accountable approach is necessary.
- Co-ordination and co-operation between the politicians that announce reforms and the bureaucrats that implement them is essential.
- Consultation with the sector is crucial to designing and implementing reforms in a way that will truly simplify compliance for charities.

Recommendation: A fit-for-purpose regulatory regime for the not-for-profit sector requires better co-ordination between State, Territory and Commonwealth governments and more efforts towards harmonisation of laws that impact the not-for-profit sector.

Improving the Deductible Gift Recipient system

In our [Philanthropy submission](#) we highlighted the problems that organisations face when trying to access deductible gift recipient (DGR) endorsement. From our experience advising small to medium sized community organisations, we know that access to DGR endorsement continues to be one of the most misunderstood and resource-intensive areas of the tax system for not-for-profit organisations.

We repeat our recommendation from our Philanthropy submission and note that the Productivity Commission's recently released [draft report](#)⁴ has similarly recommended an expansion of DGR eligibility.

Recommendation: DGR endorsement should be extended to all charities registered with the ACNC provided that charities do not use donated funds for purposes solely for the advancement of religion, childcare, or primary or secondary education.

Building efficient and effective boards and not-for-profit organisations

Good governance is crucial to the success of every not-for-profit organisation, and investment in knowledge and capability building of boards (and staff) is essential for building efficient, effective, and impactful boards and organisations.

Our experience is that many not-for-profit organisations are small, place-based organisations that rely heavily on volunteers, have limited resources and are unable to access or pay for legal assistance. Such

⁴ Productivity Commission 2023, Future foundations for giving, Draft report, Canberra, November, p 39.
<https://www.pc.gov.au/inquiries/current/philanthropy/draft/philanthropy-draft.pdf>



challenges are heightened during times of crisis, when resources are necessarily prioritised for core service delivery.

Our Not-for-Profit Law program successfully supports new, emerging, and established organisations to develop and maintain good governance practices and build their capacity to deliver more assistance to their communities. In our experience, not-for-profit organisations benefit from investment in knowledge and capability building around governance and compliance at all stages of their lifecycle.

New and emerging organisations

Many groups need support from an early stage in order to successfully establish a new not-for-profit organisation with the right foundation to support good governance. This is especially so for small, local groups and organisations that support specific cohorts and intersectional community groups.

Without such assistance, it can be easy to skip over key considerations around setting up a not-for-profit organisation or establish an organisation with an inappropriate legal structure that does not support good governance or the growth and sustainability of the organisation. For example, our service often receives requests for help from organisations that inadvertently set up using a for-profit private company structure and then face difficulties trying to register as a charity or apply for funding opportunities that are only open to not-for-profit organisations.

Example: Starting a not-for-profit organisation

Our Getting Started resources, viewed over 43,000 times in the last financial year, assist people to navigate key legal questions when starting a new not-for-profit organisation, including understanding what 'not-for-profit' means, choosing a legal structure, and setting up the board.

Established organisations

As organisations develop and grow, the needs and responsibilities of boards can change. Not-for-profit organisations operate in a complex, unique, and fragmented environment which requires compliance with a mix of state and federal laws that are often not designed with the community sector in mind. Adding to this, there is a constant wave of legislative reform that organisations and their boards need to keep abreast of, including a growing trend towards imposing positive duties in critical areas (for example, preventing workplace sexual harassment, managing psychosocial hazards in the workplace, and work, health and safety obligations).

Factors such as the location of operation, employment of paid staff, tax status or the types of programs or services delivered and to whom, can all have an impact on the way in which an organisation should be governed and the role of the board and senior staff. For these reasons, it's important for boards to be able to access knowledge and capability building support to help them understand their role, improve compliance, and adapt and change.

Experience tells us that smaller organisations and those that grow quickly, sometimes as a result of receiving government funding, often lack knowledge and confidence in governance and can find it hard to attract experienced board members, especially in regional, rural and remote areas. Access to services that provide information, advice, training, and other supports targeted specifically to not-for-profit boards and staff is critical to ensure a healthy and vibrant community sector which is underpinned by skilled boards and good governance.

Example: Improving not-for-profit governance with resources and training

Our governance resources, viewed over 154,000 times in the last financial year, assist boards to understand the key legal duties of board members, as well as what's involved in governing a not-for-profit organisation in compliance with the law. In our most recent annual Online User Survey, users commented on how our resources helped them to establish organisations and embed good governance practices:

- "We enhanced our board awareness, priorities around risk management and a planned response to potential incidents."
- "Improving governance compliance with Australian Charities and Not-for-profits Commission and Australian Securities and Investments Commission requirements."
- "Helped with our risk assessment and creation of policies."
- "Such better board induction process and resources to share with new board members."
- "We are accredited because of the action we took using your resources."

Last financial year, we delivered 117 webinars and customised training sessions on governance and related topics to over 4,800 participants. Our most in-demand training session is a 3-hour module on 'Governing a Not-for-Profit Organisation'. We are regularly engaged by local councils and government agencies to deliver training packages to the community organisations they fund or regulate. These opportunities are taken up enthusiastically by not-for-profit organisations and are often oversubscribed, demonstrating the strong level of interest in knowledge and capability building activities to support boards. When governments proactively fund governance training for funded organisations, they invest in better risk management and more efficient service delivery.

Example: The impact of governance training for a place-based community organisation

Not-for-Profit Law provided tailored governance training to the board and manager of a Neighbourhood House that provides a range of supports to its local community.

Four months after the training, the organisation reported, "Training like this is important for Neighbourhood Houses because Board members and staff often come from diverse backgrounds with minimal not-for-profit experience. It's really important that everyone understands their roles and responsibilities".

They reported the following improvements to their governance practices resulting from the training:

- the board always now has their constitution on the table at board meetings
- they have created posters about purpose and values for public spaces to remind everyone what they are aiming to achieve
- they are keeping governance documents up to date via a newly established Policies and Procedures Working Group, and
- three new board members that attended the session have 'come to the table' with a clear idea of their role, responsibilities, and potential liabilities.

Recommendation: Government investment in knowledge and capability building of boards and staff is essential for building efficient, effective, and impactful not-for-profit organisations.

Government contracting, funding, and tendering

Improving government funding agreements

In our experience, most government funding agreements are difficult for not-for-profit organisations to understand without specialised legal advice (a cost which is not factored into the funding itself). The agreements tend to be written in complex language, inconsistent across government departments, structured to consist of multiple documents often with inconsistent terms, and reflective of the often significant power imbalance between the parties, with inappropriate levels of risk transferred to community organisations. The complexity of funding agreements can operate as a barrier to new and emerging organisations taking up funding opportunities.

These issues have been explored for years by many within the sector and are currently the subject of the consultation into 'A stronger, more diverse and independent community sector' by the Department of Social Services.⁵ Over a decade ago, the Productivity Commission in its report into the Contribution of the Not-for-Profit Sector noted a number of issues experienced by not-for-profits when contracting with government, including little scope for meaningful negotiation, unfair terms and conditions, inappropriate transfer of risk and cost, and complexity of contracts and reporting requirements.⁶ These issues are still relevant today.

Example: The Commonwealth Simple Grant Agreement

Not-for-Profit Law's factsheet about the [Commonwealth Simple Grant Agreement](#) helps organisations to understand the structure and terms of the Agreement. It serves as an example of many of the abovementioned issues:

- The Grant Agreement may consist of a number of documents including the Commonwealth Simple Grant Agreement template, the Grant Details and Supplementary Terms, the schedules including the Commonwealth General Grant Conditions, and any other documents referred to in the Grant Details. If there are inconsistencies between two or more of the Grant Documents, organisations should refer to the list set out in the Grant Documents.
- The Commonwealth has broad powers to terminate the Agreement including:
 - for a minor breach by the Grantee
 - if the Grantee is experiencing financial difficulties, or
 - for the government's convenience.

The Grantee must give a very broad indemnity, where the indemnity extends to third parties, but the limitation to the indemnity does not.

⁵ See, for example, McBratney, Amanda & McGregor-Lowndes, Myles (2012) 'Fair' government contracts for community service provision: Time to curb unfettered executive freedom? *Australian Journal of Administrative Law*, 19(1), pp. 19-33 <https://eprints.qut.edu.au/56018/> and McGregor-Lowndes, Myles & McBratney, Amanda (2011) Government community service contracts: Restraining abuse of power. *Public Law Review*, 22(4), pp. 279-297 <https://eprints.qut.edu.au/47580/>

⁶ Productivity Commission 2010, Contribution of the Not-for-Profit Sector, Research Report, Canberra, page 341



Recommendation: Government funding agreements should be simpler in structure and language, and allocate risk in a way that is proportionate to the financial value of the contract, the size of the organisation and the risk profile of the funded activity.

Ensuring not-for-profit organisations are supported to establish legally sound joint working arrangements

In addition to the legal support that not-for-profit organisations require to understand and comply with the terms of government funding agreements, support is often also required to navigate different contracting, funding and tendering models formulated by government.

The ways in which organisations can work together are varied and many, including through consortia, memoranda of understanding, auspicing, sub-contracting, joint ventures, partnerships and more. It is important for community organisations to understand the legal implications and arrangements for these different mechanisms for collaboration so that risks can be identified, managed, and assigned through clear agreements.

Not-for-Profit Law often receives enquiries from not-for-profit organisations that need legal advice to navigate government contracting, funding and tendering models which require some form of joint working arrangement to be eligible for funding. We also receive enquiries from community organisations that have used inappropriate or poorly drafted agreements to document joint working arrangements which have led to confusion about liability and responsibility or resulted in a dispute.

Recommendation: Government-led contracting, funding, and tendering models which encourage or require collaboration between funded not-for-profit organisations to deliver projects or services must factor in the cost of setting up legally sound joint working arrangements.

Contact

We thank the Blueprint Expert Reference Group for providing the opportunity to contribute to this important consultation. We agree to this submission being made public and would be happy to discuss its contents further.

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