

A question of balance: recognising value in the government–not-for-profit contractual relationship

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Overview

- The project and its partners
- Research methodology
- Key findings from literature review
- Key findings from interviews
- Key findings from contracts review
- Proposed contractual principles
- Improving the relationship framework
- Standard-form provisions
- Standard chart of account

The project and its partners

- Commenced early 2008
- Project Partners:
 - Public Interest Advocacy Centre
 - Social Justice & Social Change Research Centre, University of Western Sydney (UWS)
 - Whitlam Institute
- Funding Partners:
 - Jobs Australia
 - UWS Research Partnership Grant
- Report Released July 2009

Project intentions and limitations

- To test the hunch that the design and operation of the contracts themselves is where the rubber hits the road
- To examine the extent to which improving the contracts could lead to positive change in the relationships and the provision of key services: reversing or challenging assumed notions of how change might be promoted
- No desire to join the blame game
- No presumption of conclusions directly addressing 'broader' issues, eg, the Compact

Research methodology

- Literature review
- Interviews with key stakeholders
- Contract review

Key findings from literature review

- Situating the work within a broader context of changes in public sector management
 - the emergence of 'new public management' allied to market imperatives
 - focus on quantifiable outcomes, efficiency, out-sourcing linked to monetary incentives
 - erosion of the distinctive role of not-for-profits
- Critical areas:
 - competitive funding v collaboration
 - 'consciousness of discourse' in not-for-profit responses and evidence of some benefits
 - advocacy

Literature review findings ... cont'd

- The contractual nature of recent reforms:
 - 'new contractualism': the primary mode for delivering government services
 - fundamental changes in the nature of relationships: government–not-for-profits; citizen–state
 - not sufficient to *just* consider the nature of contracts but the 'contracting regime': structure, culture and practices
 - debate on purpose and *whose* needs are being met
- Emerging space for alternatives

Key findings from interviews

- Clarity of purpose provides the foundations
- Contractual forms are important but not well understood
- Need to recognise and balance government's inevitable dominance
- There is little room to negotiate
- Considerable importance is place don relationships
- Intellectual Property rights are an emerging issue

Interview findings ... cont'd

- The impact of the contracting regime on NFP operations:
 - organisational mission and operational detail
 - advocacy
 - government micro-management
 - a rigidity that stifles local responsiveness
 - price pressures and full costing
- Balancing accountability and compliance costs
- Apportioning risk lies at the heart of the contractual challenge
- Genuine desire for richer, broader relationships

Key findings from contracts review

- Inequality of bargaining
- Lack of acknowledgment of strengths of not-for-profit contract party
- Lack of focus on shared goals
- Lack of focus on program outcomes
- Limited capacity of not-for-profit parties to understand and negotiate terms
- Standardisation for tendering and other purposes
- Different treatment of for-profits and not-for-profits

Contracts review findings ... cont'd

- Impact of these factors on contract form:
 - onerously long and complex contracts
 - numerous and cascading definitions
 - government entitlement to vary obligations through separately issued guidelines
 - lack of certainty in service delivery obligations
 - lack of guarantee of payment
 - highly detailed provisions leaving little scope for innovation or responsive service delivery

Contracts review findings ... cont'd

- Impact of these factors on contract relationship:
 - little or no opportunity to negotiate amendments to terms
 - significant scope for government party to unilaterally vary terms and/or terminate contract
 - limited capacity of organisations to obtain expert legal advice on contractual obligations
 - usual contract interpretation rules negated by government
 - high levels of government intervention in key governance aspects of not-for-profit party
 - little equity on contract dispute resolution

Contracts review findings ... cont'd

- Impact on independence and culture:
 - loss of control on employment decisions
 - loss of control of governance structure
 - limits on advocacy
 - emphasis on business model of direct service delivery / de-emphasis on human service delivery
 - loss of focus on human service expertise
 - risk shifting
 - increasing reliance on single contract and building organisation to suit contract
 - loss of intellectual property rights

Proposed contractual principles

- Affecting:
 - foundations on which contract is constructed
 - nature of the relationship between parties
 - nature of the contract
 - operation of the contract

Contract foundation principles

- **Good faith:**

- involvement in contract development
- genuine opportunity to negotiate
- recognition of power imbalance
- focus on joint endeavour primarily to benefit clients and community

- **Good will:**

- prioritise the dignity of those involved
- limit compulsion to absolute necessity and last resort
- presumption of good faith
- focus on mediation in dispute resolution

Relationship contract principles

- **Trust:**

- effective due diligence builds confidence in parties
- mutuality and clear articulation of expectations
- communication and reporting to promote confidence
- presumption of capacity to perform obligations

- **Proper Respect:**

- recognition of distinctive features and roles of parties
- mutual benefit from exercise of separate expertise
- explicit recognition of independence and role as advocates

Relationship contact principles ... cont'd

- **Supportive and Collaborative:**
 - support knowledge transfer and mutual understanding
 - emphasis on consultation in design, delivery and development of program and service
 - opportunities for constructive interactions
 - access to key decision-makers

Contractual form principles

- **Clear and Readily Understood**
 - clear purpose and shared goals
 - clear statement of the nature of the contractual relationship
 - articulation of expectations of both parties
 - all obligations and terms clear on the face of the contract
 - minimise jargon and technical language
 - emphasis on simplicity
 - transparent link between contractual requirements and purpose of those requirements
 - clear and agreed reasons for information gathering and reporting

Contractual form principles ... cont'd

- **Proportionality:**
 - information gathering and reporting proportional to need and intended use
 - requirements and costs of compliance consistent with level of funding
 - monitoring and compliance that reflects real risks
- **Meaningful outcomes:**
 - evident connection between purpose and aims
 - outcomes valued by respective parties
 - public good sought through individual and community benefit
 - directly measurable or effective proxy measures
 - numeric targets that reflect agreed outcomes

Contractual form principles ... cont'd

- **Responsible and Reasonable:**
 - goals, targets and milestones
 - provision for the proper management of public funds
 - expectation of return on public investment
 - contract interpretation provision
 - reasons given for decisions
 - adverse findings and/or penalties must be based on evidence
 - address performance within life of contract to enable improvement rather than penalty

Contract operation principles

- **Appropriate decision making:**
 - agreed outcomes, targets, measures and milestones
 - discretion on how outcomes are best achieved for individuals/community
 - delegation to local officials
 - minimal prescription of manner and methods of delivery
- **Consistent with presumption of good will and trust:**
 - allow for early alert of difficulties without risk
 - avoid unnecessary reporting burdens
 - provide for information **exchange** and **feedback**
 - promote innovation and achievement of additional community benefit

Contract operation principles ... cont.

- **Full and fair costing:**
 - costs to be agreed jointly and include all costs of delivery
 - costing to reflect intended quality of service
 - costing of risk shifting
 - provision for variables
 - provision for particular circumstances affecting costs
 - provision for variation on costs and agreed process for appeal
- **Risks exist, can't be eliminated and will be shared:**
 - identify principle risks
 - provide for agreement on risk minimisation
 - monitoring and compliance that reflects risks
 - recognise costs of having systems to minimise risk

Contract operation principles ... cont'd

- **Timeliness:**

- adequate time between tendering/application process and commencement of contract
- agreed reporting schedule
- sufficient time to implement and achieve agreed outcomes
- contract renewal process that allows continuity or wind-down

Improving the framework

- Import prohibition of unfair contract terms concept
- Proposed principles be reflected in enforceable provisions with remedies
- Better fit between contract size and complexity and the size and complexity of the program and organisations
- Enable operation of *contra proferentum* rule
- Preliminary clauses to reflect purpose and objectives and basis of selection of party

Use of standard form provisions

- Intellectual property and moral rights
- Employment issues: removal and replacement of specified personnel
- Use of income generated
- Acknowledgment of funding
- Freedom of speech: no limit on public statements
- Prevention of fraud
- Reporting obligations

Standard chart of accounts

- Developed and proposed by Professor Myles McGregor-Lowndes
- Should be adopted across governments for all not-for-profit funding agreements and service delivery contracts

Where to from here?

- How to achieve reform in government processes?
- Extent to which contracts can be reformed consistent with these principles?
- Implications on other areas:
 - proposed national compact
 - internal operations of organisations



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