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Sub #3

11.1.3.3

24 October 2011

Ms Cawcutt
Research Director
Health and Disabilities Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Ms Cawcutt,

RE: One Funding System for Better Services Bill 2011

We welcome the opportunity to make this submission to the Health and Disabilities Committee Inquiry into the proposed One Funding System for Better Services Bill.

We commend the Government for engaging in detailed consultation while drafting this legislation. It is very refreshing and we encourage the government to consider a similar process in developing a new service agreement which should follow the passing of the legislation.

Previous Committee Submission

We proposed to the Scrutiny of Legislation Committee hearing to *Review of Part 8 of Statutory Instruments Act 1992 (Qld): Forms Authorised by Legislation (2011)* that common form style agreements and contracts of government should be subject to scrutiny by the Parliamentary Scrutiny of Legislation Committee. The final report of the Committee stated:

> In relation to the matters raised regarding common form agreements and Government contracts, the committee notes that these matters will also fall within the ambit of the relevant portfolio committees. Just as the more consistent examination by committees of policy, financial and administrative matters will facilitate a greater ability to effectively scrutinise forms for public use, the committee anticipates the same will be true for standard form contracts and the terms within those contracts. (Paragraph 4.9 at page 14)[1]

We proposed that government can achieve regulation through means other than subordinate regulation as traditionally understood. It is in this area, commonly referred to as 'soft law', that we submit that common form agreements or contracts of government could be considered to be 'forms', and thus fall within the operation of Part 8 of the Act and be subject to review by the Scrutiny Committee.

[1] Queensland, Scrutiny of Legislation Committee, *Review of Part 8 of the Statutory Instruments Act: Forms Authorised by Legislation,* Report No. 46, June 2011.

We raise this for discussion in the context of governments contracting with nonprofits, and the current trend for government to use a common service agreement for all nonprofits funding. The common service agreement is a set of terms and conditions that applies to all funding agreements between government and nonprofits, with a schedule itemised for that particular arrangement. In our view, it is the standard terms and conditions which are akin to a form. There are likely to be other examples of common form agreements or contracts being used by government departments, or which are drafted as a result of legislative provisions, but not necessarily forming a contract between government and another (e.g. under PAMDA).

Contracting has transformed the nature of government, and in doing so, has shifted the balance from public or administrative law to the civil law of contract.[2] Administrative law has well-developed common law and statutory principles which protect citizens from the overreach of government power which may affect their rights, freedoms and liberties. The same is not evident in contract law. Government powers to unilaterally affect citizens are tempered by the rule of law; particularly the administrative law requirements that government agencies act within their powers, accord due process, provide access to information, and allow for review of decisions.

Contracts are bypassing what may have in the past been either in the form of public legislation or regulation. Freiberg comments that contracts 'will not have been subjected to any type of parliamentary scrutiny that is applied to legislation, and may continue in effect well beyond the term of the government that entered into them'.[3]

Government lawmaking relates to the drafting of instruments that determine the law or alter its content rather than, like contracts, applying established rules and allocating benefits and burdens to particular parties in a particular transaction. Thus legislative drafting is clearly a very different process from contracting. Nevertheless, there is a significant body of literature in regulatory theory that interprets contracts both as the subject of regulation and also as a type of regulation governing contractual practices.

Contracts or agreements entered into pursuant to legislative provisions may be accepted as a type of subordinate legislation. However, in this regard, we are only submitting that significant common form style agreements should be scrutinised by the committee.

Comments about the One Funding System For Better Services Bill (2011) (the Bill)

We would propose that contracts made by government should not have any less safeguards for individuals or organisations than those contained in the Bill.

For example, Divisions 2 and 3 of the Bill contain authorities and procedures for authorised officers to enter private places. These are in substantial accord with the Fundamental Legislative Principles. Clauses 52-57 set out general matters about appointed officers.

By comparison, the Department of Communities Standard Service agreement Part A clause 17.1 states:

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[2] J Kettl, *Strategic Review of the Administration of Australian Government Grant Programs* (Australian Department of Finance and Deregulation, 2008) <www.finance.gov.au/publications/strategic-review/docs/GrantsReview_2nd_Complete.pdf>; A Freiberg, *The Tools of Regulation* (The Federation Press, 2010) 132.

[3] Freiberg, above n 2, 134.

Access to Your premises and records

(a) To ensure You are meeting Your obligations under the Service Agreement, We may notify You that a Departmental Officer requires access to:

(i) the premises where the Services are provided and/or the premises from which You conduct Your business; and

(ii) copies of records held or created by You relating to the provision of the Services by You.

(b) The notice referred to in clause 17.1(a) need not be in any particular form. In giving You notification under this clause, We will explain to You why access is required. You must comply with any notice given to You under this clause.

(c) When accessing premises and/or records in accordance with a notification under clause 17.1(a), We will use Our best endeavours to minimise interference to Your employees and the conduct of the Services.

This does not require the department to comply with the statutory provisions relating to entry onto to private property and searches. To take just one example, the contract defines "we" and "authorised officer" in terms which fall far short of the usual safeguards found in the Bill and other legislation:[1]

> **"Department, Us, We or Our"** means the State of Queensland acting through the Department of Communities (includes the Chief Executive) or any other department or agency of the Queensland Government responsible for the administration of the Service Agreement;
>
> **"Departmental Officer"** means the person for the time being holding, occupying, or performing the duties of an officer of the Department, as specified in the Service Agreement (Part C) - Specifications, or any other persons specified by the Chief Executive and notified in writing to You;"[2]

This is only one small example of disparities between the Act of a department, and private contracts made on a 'take it or leave it' basis with community service organisations. Other offending areas are dispute resolution, appeal mechanisms, and termination of funding. We strongly suggest that powers under private contract and legislative fiat should be subject to the same procedural safeguards.

The Bill - Specific Issues:

1. Clause 6(b) – How main object is mainly achieved. The legislation only applies to government funding. Is there also a responsibility to provide safeguards to the delivery of products and services from other funding sources (such as the public by donation or fee)? If these are suitably provided for under other legislation or regulation, why is it necessary for government to have its own provisions? If it is not provided for, should Queenslanders, particularly in relation to community services, be protected from inappropriate operators no matter what the source of funding?
2. Clause 8 – Finite Resources. The State is not the only entity to have finite resources – it is an dilemma shared by community organisations. In administering the legislation, regard should also be had to this point. Further, a significant amount of funding provided by the government does not meet the full cost of the services required to be delivered, as noted by the recent Productivity Commission Research brief. Accordingly, government influence and

[1] Shortfall in areas such as the chief executive must exercise the power of appointment only if certain conditions are met with a written terms of appointment, identity card and limits on exercise of power etc.
[2] Department of Communities Standard Service Agreement Part A Clause 32.

power over such organisations should be proportionate to the level of funding for the agreed service or product.

3. Clause 21 – Cooperative approach. The clause should be positively worded so that the chief executive is required to seek a cooperative approach. Further, any remedy under clause 21(1)(b) should have no lesser protections than that found under the proposed Bill.
4. Clause 23 – Report. We suggest that this step be mandatory, not permissive. A written report should be required in any serious situation.
5. Division 3 – Interim manager. We welcome greater specification of the appointment, duties and powers of an interim manager, as we have previously expressed doubt on the workability of the current legislation. We note that clause 32(2) might be circumvented by contractual provisions. It is common in service agreements to allow termination of funding without further reason if one contract is terminated by a government funder: "Where funding under another agreement with You has been terminated by Us, We may terminate the Service Agreement, without following the show cause process".[3] Again, this highlights the need for funding terms to mirror the procedure and principles of the legislation.
6. Clause 63 – General Power to enter places. There is room in this provision for extra safeguards for entry onto premises where vulnerable people reside or work, as is often the case with community organisations. The Queensland Scrutiny of Legislation Committee has paid particular attention to matters in legislation which involved child health and disability activities conducted by nonprofit organisations – e.g. *Alert Digest* (No 3, 2005) p 7, [19]–[23]; *Alert Digest* (No 1, 2000) pp 6–7, [48]–[54]; *Alert Digest* (No 11, 1998) [1.46]–[1.50]; *Alert Digest* (No 13, 1997) [1.4]–[1.7].[4] Powers should be dependent upon adequate procedures when such situations arise.
7. Clause 89 – Reviewable decisions. These provisions should be mirrored in any funding agreement. Decisions to achieve the same purposes as those set out in the section should not be handled differently only because they are made pursuant to a contractual agreement, rather than the legislative provisions.

If the Committee is interested in further discussion on this point, we are happy to make ourselves available in person or provide further information.

Once again, we thank you for the opportunity to submit our views to the Committee.

Kind Regards

Myles McGregor-Lowndes
Director, The Australian Centre for Philanthropy and Nonprofit Studies
QUT Business School

[3] Department of Communities Standard Service Agreement Part A Clause 15.2(e).
[4] http://www.parliament.qld.gov.au/view/committees/SLC.asp?SubArea=alerts,

ATTACHMENT A: Excerpt from transcript of Scrutiny of Legislation Committee hearing on *Review of Part 8 of Statutory Instruments Act 1992 (Qld): Forms authorised by Legislation,* 21st March 2011. Prof. Myles McGregor-Lowndes, Director, Australian Centre for Philanthropy and Nonprofit Studies, QUT:

The thrust of these reforms has been to enhance the ability of Parliament to review both the government's legislative activity and public administration. However regulation can be achieved by government through means other than subordinate regulation as it is traditionally understood. It is in this area of what is commonly referred to as 'soft law' that we submit that common form agreements or contracts of government that are made publicly available as a template, could be considered to be forms and fall within the operation of Part 8 of the Act and accordingly subject to review by the committee.

We raise this for discussion and in the context of governments contracting with nonprofits and the current trend to have a common service agreement that is used by government for all nonprofits being funded by government. The common service agreement is a set of terms and conditions that applies to all government/nonprofit funding agreements with a schedule particularised for that particular arrangement. In our view it is the standard terms and conditions which are akin to a form. There are likely to be other examples of common form agreements or contracts being used by government departments or which are drafted as a result of legislative provisions but not necessarily forming a contract between government and another (e.g. under PAMDA).

Contracting by government has transformed the nature of government and in doing so has shifted the balance from public or administrative law to the civil law of contract. Administrative law has well developed common law and statutory principles to protect citizens from the overreach of government power which may affect their rights, freedoms and liberties and this is not evident in contract law. Government powers to affect citizens unilaterally are tempered by the rule of law, in particular the administrative law requirements that government agencies act within their powers, accord due process, provide access to information, and allow for review of decisions.

But it should be noted that contracts are having the effect of bypassing what may have in the past been either in the form of public legislation or regulation. Freiberg comments that contracts 'will not have been subjected to any type of parliamentary scrutiny that is applied to legislation, and may continue in effect well beyond the term of the government that entered into them'.

In the era of New Public Management, private contracts allow a very flexible regulatory response to issues that is quick, efficient and able to be crafted to fit the precise situation. However, when they are made public, have standard terms which are rarely altered, in a 'take it or leave it' funding situation they are little different to an administrative fiat. There is a significant body of literature in regulatory theory that interprets contracts both as the subject of regulation and also as a type of regulation governing contractual practices. Many of the rights government seeks to capture and obligations it seeks to impose in its contract especially with nonprofit organisations lie well beyond what it could ever capture or impose with legislation. The obligations and governmental powers set out, for example, in the Department of Communities Common Service agreement have recently been assessed by ACPNS in terms of fairness and judged against fundamental legislative principles and found to go well beyond parliamentary accepted principles.

Contracts or agreements entered into pursuant to legislative provisions may be accepted as a type of subordinate legislation however in this regard we are only submitting that common form style agreements should be scrutinised by the committee. Such form contracts could already come within the jurisdiction of Part 8 of the *Statutory Instruments Act* 1992 and therefore subject to the jurisdiction of the committee. Alternatively the committee's powers could be enlarged to accommodate scrutiny of contractual regulation and this would provide a benchmark of 'fairness' that would work for both government departments and nonprofit organisations.

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About The Australian Centre for Philanthropy and Nonprofit Studies (ACPNS)

ACPNS brings together academics and research students with expertise in philanthropy, nonprofit organisations, and the social economy.

Through our research and teaching, ACPNS brings to the community the benefits of teaching, research, technology, and service relevant to philanthropic and nonprofit communities. The Centre has conducted significant research about nonprofit legal structures, writes the Queensland Associations Incorporation Manual for the Caxton Legal Centre and maintains web based information for incorporated associations through its wiki Developing The Organisation (https://wiki.qut.edu.au/display/CPNS/DYO+Home) and QCOSS Community Door site (http://www.communitydoor.org.au/).

ACPNS offers teaching programs tailored for students interested in pursuing careers in the management of philanthropic and nonprofit organisations or in public administration associated with nonprofit organisations.

The Centre was the first fully accredited member of the Nonprofit Academic Centers Council in the southern hemisphere.

Of relevance to the committee's role ACPNS has carried a body of research and proposed reforms to reduce the regulatory burden for nonprofit organisations. For example, ACPNS developed the Standard Chart of Accounts for government reporting requirements of nonprofits. The Standard Chart of Accounts was adopted by COAG this year. The application of the Standard Chart of Accounts by all Australian governments will remedy the lack of consistency in accounting terms required by government departments which fund nonprofit organisations and thereby save time and resources for nonprofits.