Government Business

Draconian contracts dog NFP reforms

In spite of its desire for a national compact with the not-for-profit sector, research shows the government must clean up its own house first, writes Verona Burgess.

The federal government is expending considerable time and energy trying to reach a national compact with the not-for-profit (NFP) sector.

The report of the consultation phase, aimed at testing the sector’s interest in a national compact, was released last October.

Now, new research from the University of Western Sydney (UWS) illustrates that such an agreement may not achieve very much unless the government radically overhauls the draconian and largely one-sided contracts it imposes on NFP service providers of human services.

Many of the findings will resonate beyond NFPs to anyone who has been involved in the painful business of a contract with government.

The research project — A Question of balance: principles, contracts and the government not-for-profit relationship — was a joint effort of the Whitlam Institute, the Social Justice and Social Change Research Centre (both within UWS) and the Public Interest Advocacy Centre. It was supported by Jobs Australia, the national peak body for NFPs that assists unemployed people get and keep jobs.

It involved interviews with 24 entities, including 14 providers with the Job Network. All had experience of contracting with various departments in human services across federal, state and some local governments (which, interestingly, some found existent to deal with).

The study analyzed seven contracts between non-government organizations and commonwealth departments. It concludes that the contractual relationship between the government and NFPs needs to be redeveloped from core principles down, to improve both the relationship between the two and the delivery of quality services.

The authors acknowledge that the government has already overhauled one of the most pernicious conditions imposed on NFPs in the Howard years — the gag clause.

They also said that participants readily accepted that government invisibly dominated the relationship with providers and also recognized its responsibility to ensure the proper use of public funds.

The core issue was the extent of that dominance and its consequences.

One provider likened the power imbalance to “a 12-lane freeway going the government’s way, and a one-way bike track going our way”.

The study recommended a common set of principles for contracts based on good faith, goodwill and a relationship of trust, proper respect, support and collaboration.

It said contracts should be clear, readily understood and guided by proportionality, be responsible, reasonable and establish meaningful outcomes; should allow decisions to be made at the appropriate level, operate consistently, be based on full and fair costing, allow for shared risks and be administered in a timely manner.

The authors said there was no justification for unfair terms in standardised contracts; that there should be obligations on both parties and effective remedies for breach; that priority should be given to developing shorter-term framework agreements that were not unduly legally complex, to better reflect the range in size, risk and complexity of programs and funding arrangements; that nothing should exclude the operation of the centre proferrent rule whereby a court can interpret an ambiguous clause against the proferrent of that clause, which in those contracts would be the commonwealth; that preliminary clauses should clearly set out the purpose and objectives so that performance could be measured and should also set out the basis of the selection of the NFP party, including relevant expertise and skills.

Standard form provisions should be developed to improve transparency and fairness in seven key problem areas: intellectual property and moral rights (there’s a lot about this, and many who do business with the commonwealth recognize it as a very significant problem); employment issues, particularly government insistence on the power to discipline the removal and replacement of specified personnel; the use of income generated, acknowledgement of funding; freedom of speech, particularly no limit on public statements; prevention of fraud; and reporting obligations, including record keeping, independent audits and access.

The study also recommended a standard chart of accounts.

The contracts exacerbated the imbalance between the parties by removing protections that were accepted norms in contract law.

There was an evident lack of any negotiating power for NFPs in negotiating or varying the terms of the contract. There were also inherent difficulties in the consultative process associated with tendering, including short time lines, limited opportunities and information sessions that did not allow the exchange of information.

“Fear of breaching the process guidelines, for example, meant that officials were not prepared to speak beyond the written scripts, making any exchange effectively impossible.”

There were numerous examples of government micromanagement to the extent of intervening arbitrarily in the details of the NFP’s operations.

Interviewers found the extent and reach of these powers disturbing and highlighted the administrative impact, the costs, the negative impact on relationships with clients, and the overall climate of “policing” that infected their work. The root of the issue for many was this behaviour said about the relationship between the contracting parties.

As one put it, “nobody trusts anybody. Therefore they all build systems inside these systems checks and counter-checks and all that which leads to up to 50 per cent of your money being wasted on administrative costs”.

Does this sound familiar? If so, the research paper is definitely worth a read.

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