

Responses to key questions

Association of Children's Welfare Agencies (ACWA)

Delivering the Services

- Should Service Users be defined?

This term is not necessary to specifically define in the Human Services Agreement, and would be better defined in the particular Funding and Service Schedule, for example by reference to eligibility criteria for particular Services.

- What specific responsibilities in the delivery of human services need to be highlighted?

Further to our comment on cl.1.2 of the Service Agreement, we strongly submit that a key obligation on Human Services should be included to the effect that the Services required to be provided under an Agreement or Funding and Service Schedule cannot be varied, unless certain conditions are met. We suggest including a clause 1.2(d) as follows:

1.2(d) We agree that we will not ask you to vary the Services unless:

- (i) We have consulted with you about your ability to undertake any variation of the Services, and
- (ii) We have assisted you to identify any cost and other impacts which you may incur under the proposed varied Services, and
- (iii) We have agreed to make whole any such costs and impacts to you and
- (iv) You have agreed that you are willing and able to undertake the proposed varied Services, based on cl.1.2(d)(i), (ii) and (iii), and
- (v) The parties will document their agreement for any variations to the Services.

Further to our comment at cl.2.2 of the Funding and Services Schedule, we strongly recommend that third party and NSW Government-related factors be

taken into account in measuring performance and outcomes at clauses 2.2 and 2.3. For example an express carve out should be included to exempt a Service Provider from consequences arising from a failure to meet their performance outcomes for reasons of changing NSW Government policy, or the Commissioning Agency's failure or inability to deliver its obligations or outcomes, or of a third party's acts or omissions.

Further to our comment at cl.3.5(e) of the Services Agreement, we are concerned that an obligation for Personnel to sign individual confidentiality deeds with the NSW Government will be an unreasonable and unacceptable further burden on NGO Boards and employees. Given that NGO's own employment contracts with Personnel address confidentiality requirements, cl.3.5(e) should be removed from the Services Agreement in its entirety so that NGOs' ability to recruit and maintain functioning services is not unnecessarily impacted by the operation of this clause. We are concerned that if the clause and obligation remains, then NGOs will have significant recruitment barriers imposed upon them.

Funding the Services

- Is it necessary to explicitly state that that Funding is conditional upon the Commissioning Agency receiving an appropriate annual allocation in the NSW budget – or can this be treated as an intervening event?

Organisations are unlikely to commit appropriate resources to tendering if it is uncertain whether the project will be properly funded or not – such matters should be an intervening event and full costs recovery for the Organisation should be provided for, in the event that a program does not proceed. Therefore, any termination right of the State for an intervening event, should be exercisable under clause 8.2 and **not** 8.3, thus triggering the costs recovery provisions in the termination without fault regime.

- Should there be an obligation on the Service Provider to use the interest earned from Funding directly on the delivery of the Service?

Service Providers often suffer losses under funded programs and as such should have the full and unconditional benefit of any interest earned from Funding, for use at their discretion.

- Is Section 2.3 (GST) clear, understandable and actionable?

- Payment and use clauses

Further to our comment on cl.2.1 of the Draft Agreement, we strongly submit that there needs to be a consequence for late payment of Funding to Service Providers. We are aware that late payments have had a crippling impact on a number of agencies, particularly smaller agencies, and whose ability to deliver the Services is adversely affected. During 2015/16 ACWA has advocated on behalf of agencies in relation to late payments (see Attachment A).

To avoid this, provision should be made for interest to be payable for late payments, calculated in accordance with s.100 of the Civil Procedure Act. For example, add a clause as follows:

2.1(e): We must pay you Interest on any outstanding Funding amount not paid within 28 calendar days after the date the Funding amount was due and payable under this Agreement, calculated in accordance with s.100 of the Civil Procedure Act 2005.

Using IP

- Are the obligations on Service Providers clear and understandable?

Yes.

- Is the obligation on Service Providers in the Moral Rights section clear?

Yes.

Dealing with risks and disputes

- Should conflicts of interest be more clearly defined?

Yes, there should be precise definition as to what is expected here.

- Do Service Providers' insurance policies typically permit or exclude indemnities?
- Insurance clause 4.2 of the Draft Agreement

ACWA is aware that a number of agencies, particularly smaller agencies have found it challenging or have been unable to obtain insurance following commencement of the Royal Commission into Institutional Responses to

Child Sexual Abuse, in January 2013. We take this opportunity to strongly recommend that the NSW Government considers how the insurance framework currently operating in Victoria, under the Victorian Managed Insurance Agency (VMIA) may be applied in NSW to address insurance-related challenges faced by Service Providers in NSW. *VMIA, a statutory authority established under the *Victorian Managed Insurance Authority Act 1996*, underwrites and develops insurance products specifically for Victorian Government including for community organisations who receive government support.*

Recording & auditing performance

- Should Service User's files belong to the Service Provider or the Commissioning Agency?

ACWA believes that the Service User's files should either belong to the Service Provider (as regards commercial information) or to the actual client themselves (as regards personal information). There are serious privacy issues which need to be managed from the outset if the files are to be provided to the Commissioning Agency and in such circumstances, the quality of data collection may be significantly impaired if clients believe that their personal information will not be kept confidential.

ACWA does not believe that it is in the Service User's interest for their files to become the property of the Commissioning Agency.

- Should Service User's files be required to be returned to the Commissioning Agency at the end of the Agreement?

No.

Varying, subcontracting, assigning

- Does the subcontracting clause give Service Providers sufficient scope to operate under the Agreement?

See the mark-up of the Services Agreement in this regard. ACWA is of the view that Service Providers must have the ability to take back any failed sub-contract before it is breached by the relevant Commissioning Agency.

Suspending services, funding

- Are the circumstances in which the suspension of services and suspension of funding sufficiently clear?

See the mark-up of the Services Agreement in this regard.

- Is the definition of Intervening Event sufficiently clear?

Yes. However, see our comments above regarding clause 8.2 instead of 8.3 being the relevant termination clause for an ongoing Intervening Event.

Terminating Agreement or schedules

- Are the circumstances in which an Agreement can be terminated sufficiently clear?

Further to our comments in the mark-up of the Services Agreement;

- i) In respect of cl.8.2 of the Services Agreement (termination without fault), in our view the primary focus (where relevant) must remain on children and their best interests and political need, a secondary concern. This clause should be limited to protect against the termination of services provided to young people, children and their families such that the NSW government may only terminate for cause (following consultation and notice, and escalation through the dispute resolution provisions). In the event that there is a change in policy which may make the government inclined to conclude a program, then the program should only be concluded at the end of its natural term and not sooner.
- ii) In respect of cl.8.3 of the Services Agreement, we strongly submit that Human Services be required to consult with any relevant Regulator and take their views into account in good faith, prior to being able to exercise any right of termination under this clause.

- Is the relationship between suspension (section 7) and termination (section 8) clear?

See the mark-up of the Services Agreement in this regard.

Using this Agreement

- Is there anything that would add value to this section of the Agreement?
- Comments on any of these definitions would be appreciated.

Attachment A: Overdue Exceptions Placements

Agency Name has been de-identified	Amount of money owing from exception placements	Length of time it has been owing (e.g. 3 months/ 6 months)				Number of placements it relates to
		1-30 days	31-60 days	61-90 days	90+ days	
Agency 1	\$691,213.19	\$88,140.42	\$108,853.85	\$494,218.92		10
Agency 2	\$1,902,735.26	\$1,127,398.10	\$576,184.35	\$199,152.81		
Agency 3	\$9,969.39		\$9,969.39			4
Agency 4	\$53,000.00				\$53,000.00	3
Agency 5	\$124,184.62			\$124,184.62		5
Agency 6	\$151,850.73	\$59,415.53	\$29,778.88	\$59,557.76	\$3,098.56	
Agency 7	\$570,305.87	\$295,449.33	\$133,232.34	\$59,815.19	\$81,809.01	
Agency 8	\$2,650,000.00					32
Totals	\$6,153,259.06	\$1,570,403.38	\$858,018.81	\$936,929.30	\$137,907.57	54

(Note: this data was collected from ACWA members between December 2015 and January 2016)