



Government Supervision of Funding Agreements and the Sisters Inside Case

*Community Legal Centres Queensland
Webinar
20 October 2022*



Session Overview

1. The background of the dispute and why it was important to Sisters Inside to resist the scope of the audit;
2. The reasons given by the Supreme Court of Queensland for deciding that the audit request (as amended shortly before the hearing date) was not valid; and
3. The consequences of the judgment for non-government organisations that are contracted to provide services by the State Government and possible future consequences of the judgment.



Part 1: The background of the dispute and why it was important to Sisters Inside to resist the scope of the audit;

Debbie Kilroy OAM, Sisters Inside



Part 2: The Invalid Audit Request

- Numerous reasons to ensure non-governmental organisation (NGOs) and not-for-profits (NFPs) are kept separate and independent to government.
- By ensuring they are kept independent, NFPs are able to focus directly on the people they support.
- Funding Agreements, Funding Schedules, Contracts and Service Agreements are designed to show separation and independence through a contractual and commercial relationship.

The reason we are so concerned with procedures is because they are the way to ensure procedural fairness is preserved and protect organisations.



Services Agreement

12.1 Performance review

- (a) We can, at any time, conduct a Performance Review. Where We consider it appropriate, We will involve You in any Performance Review.
- (b) A Performance Review may include gathering and analysing information about the Services or Your use of the Funding, for the purpose of Us:
- (i) assessing the extent to which terms of the Service Agreement can be, or are being, met by You; and
 - (ii) considering or recommending a course of action to ensure compliance or to seek a remedy of any non-compliance.
- (c) We will give You notice prior to conducting a Performance Review, which need not be in any particular form but will specify the Funding and Services that We wish to review and any premises to which We require access.

12.2 Auditors

We can, by notice to You, nominate auditors to conduct a Performance Review for Us *or* to conduct any financial and compliance audit of You.
[emphasis added]

12.3 Compliance with Notice

If We give You a notice under clauses 12.1 (c) or 12.2, You must:

- ...
- (b) give Our officers or employees or Our Auditors full and free access to:
 - ...
 - (iii) Your accounts, records, documents and papers that relate directly or indirectly to the receipt, expenditure, or payment of the Funding or the conduct of the Services; and
 - ...



Services Agreement

12.4 Minimum Interference

When conducting a Performance Review or audit under this clause 12, We will, and will procure Our Auditors to, use best endeavours to minimise interference to Your employees and the conduct of the Services.

3.1 General

(a) You must:

(i) use the Funding and deliver the Services strictly in accordance with the Service Agreement;

...

(iv) comply with any legislation and requirements of any Commonwealth, State, Territory or local authority in relation to the Funding, the Services and the Service Agreement, including a Governing Act; and

...

3.4 Your Conduct

(a) You must conduct all activities that comprise the Services diligently, effectively and in a professional manner, including by:

(i) delivering the Services without coercion and in a manner that promotes the privacy, dignity, self-esteem and independence of Service Users; and

...

7.1 Your Use of Funding

(a) You must use the Funding only:

...

(ii) in accordance with the Funding Schedule and the requirements of a Governing Act; and

...

21. Conflict of Interest and Comprising Relationship



The State's Proposed Audit

- Six (6) revised requests, including one on 25 May 2022 being two days before the Application's hearing.
- All requests were stated as 'compliance and financial audits' and not a Performance Review.
- However, the 25 May 2022 request **was** stated to be a Performance Review under clause 12.3.
- As the State revised its request on 25 May 2022 , Brown J only addressed the matters for determination by reference to this revised request.



Judgment

Held:

- The State of Queensland had overstepped its bounds by seeking to procure documents beyond the scope of what is permitted by the Services Agreement.

Sisters Inside:

- Documents sought went beyond those related directly or indirectly to the Funding and Services.

State of Queensland:

- Not required to identify motivation;
- If no documents relate directly or indirectly does not invalidate the request;
- Categories of documents may be removed and reinserted between requests; and
- No material difference between a Performance Review and an audit.



Primary Issues

1. Is there a difference between a Performance Review and an audit and their processes; and
2. What is the State's purpose and what purpose is permitted under the Services Agreement?



Performance Review vs Audit

- Performance Review and an audit are **not** the same, and are not used interchangeably in the Services Agreement.
- Performance Review is defined in clause 12.1. It contains its own procedure for providing notice and any notice must specify the Funding to which it relates.
- Clause 12.3 applies to Performance Reviews and audits. Accordingly, the scope of the documents for both processes is the same (i.e. clause 12.3), though the documents required may differ according to the purpose of each process.
- Audit is given its ordinary meaning, which is “an official examination of financial statements,” and “a searching, examination or solemn rendering of accounts.”
- The process to be followed for each differs and should not be conflated.



State's Purpose

- The State must be clear about the process it has chosen.
- Must be a nexus between a Performance Review or audit, and the Funding and Services provided on the basis of that Funding.
- 'Matters of Concern' – high-level, non-specific comments made to department incapable of being adequately particularised as allegations.
- By allowing the Matters of Concern to become its primary focus, the State turned the funding audit into an investigation.

Purpose 1: Performance Review Assessing and considering use of Funding and Services.

Purpose 2: Audit
Official Examination of financial statements and examination of accounts.

Purpose 3: Investigation
Using Clause 12 to investigate other matters beyond the Services Agreement.

Purpose 4: CSA Investigation
Using Clause 12 to investigate matters under the *Community Services Act 2007* (Qld).



State's Purpose

- Matters of Concern not only alleged a breach of the Services Agreement, but of the *Community Services Act 2007* (Qld) ('the Act').
- The Act only applies to 'Declared Funding', which is defined as funding the subject of a Funding Declaration.
- Specific investigative, enforcement and compliance procedures are provided for in the Act.
- Seeking documents for the purpose of investigating and conducting a procedure under the Community Services Act falls outside the scope of clause 12.
- Here, the State's purpose was an attempt to use a contractual provision to undertake a statutory enforcement mechanism.

Purpose 1: Performance Review Assessing and considering use of Funding and Services.

Purpose 2: Audit Official Examination of financial statements and examination of accounts.

Purpose 3: Investigation Using Clause 12 to investigate other matters beyond the Services Agreement.

Purpose 4: CSA Investigation Using Clause 12 to investigate matters under the *Community Services Act 2007* (Qld).



State's Purpose

- Remaining Matters of Concern were ambiguous.
- It was not clear what documents or information were required to be provided to respond to the matters.
- Accordingly, the State did not comply with the obligation of minimum interference in clause 12.4 and the implied duty of co-operation.

Purpose 1: Performance Review Assessing and considering use of Funding and Services.

Purpose 2: Audit Official Examination of financial statements and examination of accounts.

Purpose 3: Investigation Using Clause 12 to investigate other matters beyond the Services Agreement.

Purpose 4: CSA Investigation Using Clause 12 to investigate matters under the *Community Services Act 2007* (Qld).



Performance Review

- Performance Review is defined in clause 12.1. It requires:
 - Notice to be given; and
 - That notice must specify the Funding and Services that they wish to review.
- The 25 May 2022 request did not identify the specific Funding and Services they wished to review. Accordingly, it did not comply with clause 12.1 and was invalid.
- The scope of documents that can be requested under clause 12.3 is the same for a Performance Review and an audit, however the scope of the documents to be provided may differ due to the purpose of the process.



Conclusion

- Pivotal point for an audit or performance review is the nexus to the funding by the state and the services provided on the basis of that funding.
- Anything further than that is beyond the rights and obligations contractually provided in the Services Agreement.
- The State still has the right to conduct a process under the Community Services Act if they wish, but that process is separate and distinct to the processes provided under the Service Agreement.
- Abuse of process such that they tried to merge four largely incompatible processes into one.
- If services are to be delivered independent to the government and political interference then the State must be constrained to their contractual and legislative rights respectively.



Part 3: The consequences of the judgment



Dealing with requests for information

- Check the terms of the contract.
- Confirm what process is being followed (e.g. Performance Review or audit).
- Ensure the request is not wider in scope than is permitted.
- Request clarification where required.
- Resist broad requests.
- Request internal review of decision.



Information that may fall outside the scope

Compliance with other Acts

Information Concerning Earlier Funding

ACNC Compliance

Corporate Compliance



Judicial Review Act 1991 (Qld)

Section 4(b) - Meaning of decision to which this Act applies

In this Act—

decision to which this Act applies means—

- (a) a decision of an administrative character made, proposed to be made, or required to be made, under an enactment (whether or not in the exercise of a discretion); or
- (b) a decision of an administrative character made, or proposed to be made, by, or by an officer or employee of, the State or a State authority or local government authority under a non-statutory scheme or program involving funds that are provided or obtained (in whole or part)—
 - (i) out of amounts appropriated by Parliament; or
 - (ii) from a tax, charge, fee or levy authorised by or under an enactment.



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