



# Risky business: the potential for improper influence in the non-government sector

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## **Introduction**

Every two years, we come to this conference to discuss ways of preventing corruption in the public sector. You may think that my choice to speak about non-government organisations - or NGOs – at this event is an unusual one. However, considering the topic of today's forum – improper influence - my choice could not be more relevant.

Increasingly, governments are relying on the NGO sector to provide essential services to some of the most vulnerable people in our community.

This is particularly the case in the human services area, where NGOs have taken a more active role in providing direct services across the out-of-home-care, child and family, health and disability sectors for some time. In recent years, there has been a rapid expansion of the non-government sector that is worth billions of dollars annually. This presents some very complex challenges for funding agencies as well as for law enforcement and watchdog bodies – certainly for my agency and I suspect for many of yours.

Monitoring the delivery of community services in NSW is a major focus of the work of my office. The increased reliance of government agencies on NGOs to provide direct services has brought a number of significant issues to our attention that I suspect will require a collaborative and appropriate response across a range of agencies.

Today, I will discuss the nature of some of the challenges identified through our work – that I believe, if left unaddressed - could allow improper influence to go unchecked and have the potential to flourish. I will also highlight some of the unique challenges faced by government agencies in the provision of services to Aboriginal communities.

My focus will be on two key areas. Firstly, the administration of funding contracts and secondly, the systems NGOs have in place for probity checking and screening. By 'probity checking' I mean formal and informal processes used to assess the integrity, character and honesty of prospective employees, board members and other volunteers engaged in their work, particularly in high risk areas of employment where the client base is especially vulnerable.

## **The current landscape**

At the outset, I should make clear I am not opposed to devolving responsibility for delivering a broad range of human services to the NGO sector. Through the work of my office I have seen the excellent work carried out by many NGO services in numerous communities. In NSW, we are currently facing critical shortages of government workers in the community services area, particularly in regional areas. NGOs that have existing relationships in specific communities are often best placed to fill some of the gaps created by this shortage.

Government agencies often do not have the same level of operational flexibility as NGOs and have a higher benchmark or expectation imposed on them to provide quality services, and to be accountable and transparent to the public for how they expend their funds.

However, while government can devolve responsibility for service delivery, it retains responsibility for the appropriate expenditure of public money and for the outcomes achieved.

Public accountability and transparency is not an unfamiliar concept in Australia. It has been gathering momentum since the 1970's, when public demand for greater independent scrutiny led to the

establishment of an integrity framework, which included the Administrative Appeals Tribunal and the creation of my office as well as other oversight and anti-corruption bodies.

Over the years, the Australian people have sent a clear message about what they expect of publicly funded services their tax paying dollars fund – whether these services are delivered by government agencies directly or by the NGO and private sectors. This message is reflected in the establishment of the various Industry Ombudsmen – whose role is to oversee and monitor private organisations in their provision of public services across the energy, insurance, finance and telecommunication industries.

With billions of taxpayer dollars being spent annually on the non-government sector, the public expect and deserve efficient and effective services and value for money. If this expectation is not met, then this should be a concern for all of us.

In NSW alone, around **\$2 billion** in funds is paid annually to approximately 3,000 organisations to deliver a range of community-based services on behalf of the NSW Government.<sup>1</sup> **\$750 million** is allocated to implement *Keep Them Safe*, a five-year plan to change the way vulnerable children and their families are supported and protected, with 40% of this amount going to NGOs to expand their role in the community services sector.<sup>2</sup> In the disability sector, an investment of **\$2 billion** as part of the second phase of the *Stronger Together* plan has been made. The *Stronger Together* package will ultimately deliver **\$5.5 billion** in new growth funding over 10 years to disability services in NSW.

One area that has received a great deal of attention of late is services to Aboriginal communities. **\$2.65 billion** was spent on delivering services to Aboriginal people in NSW in the 2008-2009 financial year.<sup>3</sup> On a Federal level, **\$4.6 billion** has been spent by the Australian Government on *Closing the Gap* since 2008.<sup>4</sup> Yet, in spite of this, a report released by the Steering Committee for the Review of Government Service Provision in August this year, revealed that the billions of dollars the Commonwealth government spends on Indigenous programs each year is yielding 'dismally poor' returns and that the results from this large investment are 'disappointing at best' and 'appalling at worst.'<sup>5</sup>

In recognising similar concerns, at a state level, I recently made a report to Parliament, *Addressing Aboriginal disadvantage: the need to do things differently*. I found that in NSW, years of significant spending have failed to make substantial and sustainable inroads into high levels of disadvantage in Aboriginal communities and that the programs, considering the level of investment, have delivered poor outcomes. In the report, I called for greater scrutiny and highlighted that government agencies need to be far more accountable to the public and to Aboriginal people for their expenditure on Aboriginal programs. This view is supported by the NSW Auditor-General's Performance Audit Report on *Two Ways Together – NSW Aboriginal Affairs Plan*, which found that the implementation of Two Ways Together was undermined by the weakness in its governance framework, which made accountability unclear.<sup>6</sup>

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1 Office of the Registrar of Indigenous Corporation (ORIC), Analysing key characteristics in Indigenous corporate failure, 2010 in Russel G Smith and Penny Jorna, Fraud in the 'outback': Capable guardianship in preventing financial crime in regional and remote communities, (No. 413, Australian Institute of Criminology, June 2011), p. 2.

2 NSW Department of Premier and Cabinet, Keep Them Safe: A shared approach to child wellbeing, NGOs and the new system, [www.keepthemsafe.nsw.gov.au/ngos\\_and\\_the\\_new\\_system](http://www.keepthemsafe.nsw.gov.au/ngos_and_the_new_system), accessed 29 August 2011.

3 Department of Finance and Deregulation, Strategic Review of Indigenous Expenditure – Report to the Australian Government, February 2010.

4 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Doing Time – Time for Doing: Indigenous youth in the criminal justice system, June 2011, p. 268.

5 Peter Martin, 'Indigenous programs very hard to get right', Sydney Morning Herald, 26 August 2011.

6 NSW Auditor-General, Performance Audit Report on Two Ways Together – NSW Aboriginal Affairs Plan, May 2011.

The more work governments delegate to NGOs, the greater the need for independent oversight bodies and anti-corruption agencies to re-think the way we deal with the challenges of oversighting the delivery of what would traditionally have been government services.

In my view, this should as a minimum, include tracking very closely how lead government agencies plan to manage the expansion of the NGO sector, including the accountability systems they put in place to ensure the sector delivers effective and efficient services to its intended target groups. In addition, given the lack of consistency of jurisdiction, structures and accountability mechanisms within states, from state to state and nationally, it also means that we need to be more flexible, innovative and collaborative in our approach to issues.

## **Administration of funding contracts**

Most NGOs are not established as large, multi-faceted organisations – they typically start out small and in response to an identified need. Frequently, they consist of people who have the same ideas about an identified need and a commitment to addressing it but not necessarily the business acumen to operate a growing and diverse organisation effectively.

In this environment, it is critical that government funding agencies ensure that organisations they fund understand and have good governance processes in place to ensure risks are appropriately identified and managed, and that strong and transparent accountability mechanisms are in place to prevent improper conduct from occurring. However, this must be balanced because it is also important that funding agencies do not over-burden NGOs and tie them up in red-tape – something which I will discuss in more detail later.

Recently, the Australian Crime Commission has been examining the issue of fraud and abuse of authority in regional and remote communities, and has so far identified that in many circumstances, a major obstacle in proving fraud or other criminal conduct by NGOs is obtaining clear evidence that distinguishes ‘corrupt practice’ from ‘mere incompetence.’

In carrying out its work, the Crime Commission has observed that in some cases the organisation may simply have failed to maintain proper records and discharge its funding agreement responsibilities. Poor record keeping can either be an indicator of fraudulent behaviour or may simply be a sign that the organisation has poor corporate governance and a lack of competence. However, of significant concern to the Crime Commission is the lack of evidence that the responsible funding agencies have identified these poor and/or possibly fraudulent practices early, and have taken action to address them.

Without this taking place, it is easier for funded organisations to argue that they were unclear about their responsibilities, therefore making it more difficult to establish the nature of the conduct that could be in play.

The Crime Commission has also observed to us that the very different requirements at a state and federal level around funding administration, not only creates difficulties for NGOs who are in most cases doing their utmost to comply with the necessary requirements within the context of limited resourcing, but that this lack of consistency also makes it more difficult for funding agencies to monitor compliance with service and funding agreements, and take any necessary action.

My office is working with the Australian Crime Commission to promote greater consistency across states and territories when it comes to the terms and reporting requirements for service and funding arrangements, as well as the compliance checking and monitoring carried out by funding agencies.

Greater consistency of practice will also make it easier to differentiate in the future between corruption and competency issues – and this should involve an examination of how NGOs manage and acquit their financial responsibilities as well as by monitoring the quality of the service outcomes achieved for their clients. This is because improper influence can occur not only as a result of deliberate, corrupt practice but also by allowing poor performing organisations to go ‘unchecked’ in continuing to receive valuable funding to service very vulnerable members of the community thereby ‘influencing’ the quality of services available in certain locations.

Not only is there inconsistency in funding administration between states and territories, but in NSW there is also inconsistent practice by agencies within the same department. This creates confusion, particularly for NGOs dealing with multiple government agencies, and also allows greater opportunity for misrepresentation in financial reporting. Service agreements that are consistent at a State and Federal level would help to address the confusion caused by different agencies having different reporting requirements.

A properly targeted and consistent approach to funding administration would also go a long way to better supporting the work of NGOs by providing them with an understanding of what is required of them and how they will be held accountable when they receive government funding. This clarity is particularly important for those NGOs that work nationally and so interact with multiple government agencies across jurisdictional boundaries.

Fortunately, it’s not all bad news. In the disability sector, the NSW Department of Ageing, Disability and Home Care in partnership with the National Disability Service, has developed a governance manual called, ‘It’s Your Business’, which provides best practice advice on complying with a range of standards and legislative requirements. The manual’s implementation is accompanied by a state-wide program of training and workshops, and aspects of the manual will be applied by other human service agencies within the same department. Such initiatives are important.

Also, earlier this year the federal Treasury released its final report on the *Scoping study for a national not-for-profit regulator*, which recommends the establishment of a single regulator for the purposes of governance, accountability and transparency of not-for-profit agencies.<sup>7</sup> This is a significant step in the right direction to improve regulation in the not-for-profit sector.

Finally, it is important to note that for NGOs operating in regional and remote locations, a further layer of complexity exists which makes dealing with the challenges outlined above even more difficult. According to a study on ‘fraud in the outback’ by the Australian Institute of Criminology, the risk of financial crime increases in areas where there are high levels of unemployment, limited economic opportunities and restricted access to services.<sup>8</sup>

Fraudulent behaviour occurs in all aspects of society. However, because of the significant Aboriginal populations in remote and regional areas who are dependent on access to many government funded programs, Aboriginal people are more vulnerable to the impacts of fraud because they are often experiencing higher levels of disadvantage than the general population which is compounded by the limited access to services in remote locations.<sup>9</sup>

A number of the smaller NGOs operating in regional and remote areas of NSW are Aboriginal organisations – which is a positive, and is consistent with the principles of self determination. The NSW Government has committed to expanding the Aboriginal service sector, particularly across the

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<sup>7</sup> The Treasury, *Scoping study for national not-for-profit regulator*, April 2011, p. 3.

<sup>8</sup> Russel G Smith and Penny Jorna, *Fraud in the ‘outback’: Capable guardianship in preventing financial crime in regional and remote communities*, (No. 413, Australian Institute of Criminology, June 2011), p. 5.

<sup>9</sup> *Ibid*, p. 2.

child and family and out-of-home care sectors. However, we know from our own work and the findings of a recent study conducted by the Office of the Registrar of Indigenous Corporations, that the most common cause of failure for Aboriginal corporations was poor management and poor corporate governance.<sup>10</sup> Therefore, it will be critically important that as with any emerging sector, funding agencies have a clear strategy for how they will provide ongoing support and mentoring to the Aboriginal service sector including working with the relevant peak bodies, to ensure that effective and viable organisations are established and that these organisations are not set up to fail.

A further challenge, which is often the case in any family or small community, is the general reluctance of people to report wrong doing on the part of family members or those who live within their community. For remote Aboriginal communities, where large numbers of family members often live in the same town, these kinship ties can influence the willingness of a victim or observer to report fraud or misconduct, not only due to issues associated with loyalty but because they are fearful of any repercussions – a fear that is understandable when people have to go on living in close proximity to the person or persons they may have raised concerns about.<sup>11</sup> Having said this, an interesting trend is emerging in a number of Aboriginal communities across NSW, where Aboriginal people are coming forward both individually, and as a collective, to report their concerns to oversight agencies such as our office, about poor service delivery and improper/corrupt conduct.

For example, communities have reported concerns to my office about certain family groups having a monopoly on service provision against a background of particular family group's having a track record of delivering poor services and/or failing to distribute their services equitably across their community (i.e. looking after their own family and kin networks). There have also been suggestions that in some areas, these organisations have used their status as 'recognised government funded service providers' to improperly influence so-called community consultation processes held with government agencies, and in this way acting as 'gate-keepers' of information coming in and out of communities. In addition, clear allegations of misuse of funds and property such as vehicles have also been made. If these types of concerns are not addressed swiftly and properly, this can result in serious and systemic disadvantage resulting for very vulnerable people.

The follow-on effect of these issues is a growing sense of distrust within many Aboriginal communities in relation to the quality of decision-making about the delivery of government funded services and of government more broadly. Both Aboriginal people and many others working in the human services environment often struggle to understand why government agencies continue to fund certain organisations when they have failed to provide an effective community service. While it is crucial for funding agencies to demonstrate that they have provided appropriate supports to such organisations – Aboriginal and non-Aboriginal – they also need to balance this with the overriding need for services to reach those most vulnerable.

There is a very real risk for oversight agencies, that if we are not seen to be actively responding to the concerns of communities, not only will Aboriginal people be less likely to come forward with information into the future, but our own reputations will be damaged.

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<sup>10</sup> Office of the Registrar of Indigenous Corporation (ORIC), *Analysing key characteristics in Indigenous corporate failure*, 2010 in Russel G Smith and Penny Jorna, *Fraud in the 'outback': Capable guardianship in preventing financial crime in regional and remote communities*, (No. 413, Australian Institute of Criminology, June 2011), p. 2.

<sup>11</sup> Russel G Smith and Penny Jorna, *Fraud in the 'outback': Capable guardianship in preventing financial crime in regional and remote communities*, (No. 413, Australian Institute of Criminology, June 2011), p. 4.

## Probity checking and screening practices

When a government agency chooses to license or directly fund an NGO, it is at the very least, perceived to be an endorsement of the quality of the services of the NGO. When things go wrong, it reflects poorly not only on the NGO but also on the government agency that funded it.

Critical to the success of an NGO and its reputation is its people. Inadequate probity checking procedures and employee screening practices can, and often do cause things to go badly wrong. In the human services sector in particular, sadly, this can lead to situations where vulnerable people are exposed to serious risk of harm.

In our work we have seen many cases where services have failed to undertake basic checks of prospective employees who have a history of violence, fraud, substance abuse and other similar high risk problems, which have led to the placement of vulnerable clients in unsafe situations.

My office has received notifications from several government agencies and NGOs providing services to children regarding child abuse allegations against their staff.

These are the types of matters I have encountered that have raised my concerns about the adequacy of probity checking by NGOs in the health, child and family, and disability and housing sectors.

Given such concerns, my office recently convened a forum of NSW government agencies with responsibilities for health and human services. In addition, we invited the peak bodies that represent many of the thousands of NGOs funded to deliver services and the oversight and regulatory bodies with responsibilities in this area.

One of the main issues to come out of the forum was the inconsistent approach by government agencies to probity checking requirements. Where one agency may require an NGO to screen volunteers at their organisation, another agency may not. Similarly, some agencies may require full referee checks on all employees while others do not.

The implications of inconsistent probity checking practices were highlighted at the probity forum by the Aboriginal Child, Family and Community Care Secretariat – or AbSec – who indicated they support full criminal record checks in relation to all members of boards of management, noting that *'more often than not'* Aboriginal communities know if someone closely involved in a service has a criminal record and this can affect the reputation of the organisation and impact on their willingness to use it.

AbSec also noted that in more extreme cases, 'criminals' can become involved in the governance of a community organisation in order to wield influence and, on occasions, can intimidate others from voting against them.<sup>12</sup>

The forum generally agreed that probity checking is, or at least should be, incorporated into funded organisations' selection and recruiting practices<sup>13</sup> and this should be incorporated into their funding agreements.

Following the forum, I made a special report to Parliament on *Improving probity standards for funded organisations*. In summarising the concerns, the report argued that there should be as a minimum, consistent baseline checks of all paid employees and others with key responsibilities in planning and

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<sup>12</sup> NSW Ombudsman, *Draft Discussion Paper: Improving probity standards for funded organisations*, August 2010, p. 21.

<sup>13</sup> *Ibid*, p. 8.

delivering services taking into account the vulnerability of clients who use the services with the flexibility to strengthen or relax checking requirements in appropriate circumstances.

This report draws on matters I have encountered through my work in the community services area, including my findings from an investigation my office conducted into one of the largest non-government providers of out-of-home-care services in NSW, which revealed that 12 children were exposed to unacceptable levels of risk and, in many cases, actual harm. We found that there had been poor practice in carer assessment, authorisation and placement matching, which also led to some children's medical conditions being left untreated. In one case, three young siblings left a placement significantly underweight with tooth decay, lice infestations, inadequate clothing and few possessions. While this NGO has made a commitment to improving its systems, they admitted that managing their rapid growth and expansion was a significant factor in their poor carer assessment and screening practices.<sup>14</sup>

My office is also overlooking a matter where a person with substantial involvement in the non-government out-of-home-care sector had not been properly screened prior to their appointment to a very senior position in an out-of-home-care NGO. A number of serious concerns have since come to light that question the suitability of this person for the position.

These examples illustrate the serious risk if the transition from government run services to NGOs does not occur in a way that matches the capacity of the sector to undergo what will be a massive expansion in its service base and workforce.

This issue is clearly not limited to paid employees. Speaking at a national investigation symposium in 2010, Ken Robertson, Manager of Risk Management, Audit and Assurance from Mission Australia, identified a large volunteer workforce as a key risk for NGOs in relation to fraud and corruption.<sup>15</sup>

Many NGOs do not carry out appropriate background checks on volunteers and there have been many instances of volunteers with concerning fraud histories 'shopping' around from one charity to another. Sometimes, this history is not evidenced from referee checks as NGOs may not want to report this on to the next NGO as they are aware that adverse publicity may affect their funding prospects.

My office looked into allegations that a person with a serious and recent criminal conviction in relation to drugs was actively involved in volunteering for a funded NGO to assist vulnerable people, including people presenting with substance abuse problems. The person of concern in this case was related to the NGO Chairperson. Despite the board knowing that the person of concern had been convicted of drug-related offences, they allowed him to remain on the board because of his experience in working in the criminal justice area.

Our primary concern was focussed on the fact that the organisation had failed to recognise the need to address the risks likely to be associated with this person's ongoing involvement in the operations of the service or take steps to mitigate those risks. We were also very concerned that it had not been addressed by the funding agency.

At the 2<sup>nd</sup> National Ageing and Disability Conference in 2005, Lauren Kelly and Julie Blyth of the Northern Sydney Sexual Assault Service described how offenders will often move from facility to facility, saying that when suspicions arise in one place, offenders move on.

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<sup>14</sup> Life Without Barriers, *Review of NSW Out of Home Care Services*, August 2011, p. 15.

<sup>15</sup> Ken Robertson, *Whistleblowing in an NGO*, presentation to the National Investigations Symposium, *Whistleblowing* session, 5 November 2010.

They described how they know of an offender who had allegedly sexually assaulted in at least three different facilities, targeting clients with little or no verbal communication. Because he hadn't been formally charged, the offender was still working with an agency that provides locums to disability and aged care services.

These examples, while shocking, illustrate the clear need for a consistent and sophisticated approach in this area. Offenders of this nature are opportunists and opportunity is created where there are no checks or balances in place to identify the risks at the outset and prevent misconduct from occurring.

I believe there are strong public interest grounds for introducing a consistent probity checking system across the NGO and health and human services sector and this would include a baseline approach to probity checking imposed on the recipient of funding grants.

As recommended in my report on *Improving probity standards for funded organisations*, such an approach would ideally consist of criminal records checks on all paid employees, board management and committee members or others with significant responsibilities and/or unsupervised contact with vulnerable clients.<sup>16</sup>

An effective probity checking system should, among other things:

- include screening for full-time employees, board members, caseworkers and volunteers in most circumstances
- clarify the circumstances in which employees should be screened, and
- require the strict compliance of NGOs with probity checking procedures.

And in some circumstances, extended checks may also be required to screen individuals who take on high-risk roles and responsibilities, such as those who provide personal care to highly vulnerable clients in unsupervised settings. The nature of these extended or additional checks might include:

- seeking reports from previous employers who were not nominated as referees,
- accessing reports from professional bodies, and

in some circumstances, obtaining character references from respected community members who are well-placed to provide advice.<sup>17</sup>

As many of you know, 'working with children checks' are distinct from the probity checking procedures I am referring to here as they are required by legislation to be carried out on individuals engaged in child-related employment. While I do not propose to go into details about the working with children check today, I will say that there are a range of gaps that my office has identified that need to be addressed in the working with children check processes – one of which is the need for a rigorous and consistent national approach.<sup>18</sup>

Given the large amount of public funds involved and the nature of the work performed, there is a community expectation that those appointed to paid positions or accepted as volunteers by funded NGOs are people who have been scrutinised and have a high level of probity.

## **NGOs and the red-tape argument**

In canvassing these issues, it is also important to recognise that any recommendations for change to systems or increased accountability must be balanced with the need to ensure NGOs are not burdened with too much or unnecessary red tape.

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<sup>16</sup> NSW Ombudsman, *Improving probity standards for funded organisations*, December 2010, p. 16.

<sup>17</sup> *Ibid*, p. 19.

<sup>18</sup> Adele Horin, 'Sex offenders lie to dodge ineffective job checks' *Sydney Morning Herald*, 31 October 2011.

One of the main strengths of NGOs is in fact their lack of bureaucracy, as it allows for greater flexibility within the organisation in addressing the needs of its clients and in many cases, makes them better community service providers than government agencies.

I believe the key to addressing the red-tape problem is proportionality. That is, administrative obligations should be proportionate to the size of the agency and the amount of money they receive from government. This would go some way to ensuring an effective system that promotes accountability and at the same time does not place unreasonable restrictions on the flexibility of the NGO in providing services to the community.

Other options to consider include:

- reducing reporting but increasing monitoring, which when undertaken, could be comprehensive but not random,
- external handling or oversight of complaints, or
- the introduction of a whistleblower scheme for NGOs or for particular functions performed by NGOs.

## **Conclusion**

I have only very briefly discussed two significant challenges among many that will need to be considered and addressed as governments increasingly turn to NGOs for the delivery of services.

These are not issues limited to NSW – but are indeed common to all state and federal jurisdictions. The trend to utilising NGOs is increasing. It will be important for oversight, integrity and corruption agencies to work together to develop as consistent an approach to responding to these challenges as possible and to work with Governments in supporting the development of appropriate practice and procedure around probity and funding requirements.

The bottom line is that citizens expect agencies that deliver essential services, whether government or non-government, to operate effectively, but also ethically, transparently, with appropriate accountability and free from improper influence.

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