

FAQs for Specialist Homelessness Services (SHS)

Questions from SHS raised during training about the FACS Funding Deed, JWAs and Subcontracting
November 2016 - February 2017

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About this document

The material included in this document is intended to provide general information in summary form on legal topics, for general informational purposes only.

The contents of this document do not constitute legal advice, are not intended to be a substitute for legal advice and should not be relied upon as such. You should seek legal advice or other professional advice in relation to any particular matters or concern that you or your organisation may have.

Every effort has been made to ensure the currency and accuracy of the information contained in this document however we cannot guarantee the information is current when you access it.

Further contacts

- Justice Connect Not-for-profit Law: www.justiceconnect.org.au/nfpenquiry or 1800 NFP LAW (for further free legal advice for your organisation)
- FACS: Manager.PrudentialOversight@facs.nsw.gov.au
- Homelessness Sector Development: rochelleb@shssectordev.org.au

Frequently Asked Questions

Use of Funds

1. What can FACS funding be used for?

FACS must be satisfied that the funds have been used by the service provider *for the purposes of the Program Level Agreement (PLA)* (Clause 6.2(b) Funding Deed). So if the expense is relevant to the PLA, it can be claimed against FACS funding.

There needs to be a clear link between the costs to which the funds are applied and the services being delivered. See Clause 4.1(a) and (b) of the PLA which state that funds are paid based on the 'services actually provided'.

In addition to the Funding Deed and PLA, also look at details set out in the financial monitoring objectives from the Good Practice Guide to Grants Administration (NSW Premier and Cabinet Guidelines) which state:

Funds should be used in an efficient, effective and appropriate manner, consistent with Government priorities and community needs; and Funds should be properly accounted for with adequate safeguards in place to prevent misuse.

Therefore FACS may request information that will satisfy them that the expenses meet the above requirements.

2. Can organisations use FACS funding to pay for insurance?

The Funding Deed is silent on which particular insurance policies are required and where the money to pay for an organisation's insurance policies can come from. However, in order for organisations to deliver the service under the PLA, they are required to properly insure, minimise risk and indemnify FACS from potential liabilities.

Representatives from FACS provided the following list of insurances for which the cost of insurance can be claimed against FACS funding:

- Workers compensation insurance
- Professional liability insurance
- Property insurance for FACS assets e.g. Motor vehicle, properties, contents etc
- Volunteer personal accident insurance (if the work performed by the volunteers relates to the service delivery in the PLA)

Representatives from FACS have stated that in their view, FACS funding cannot be used for Directors and Officers (D&O) liability insurance through the PLA, and is the responsibility of the organisation. However where a management fee is charged against the program, it could include the cost of other insurance. It could be argued that a well-functioning and confident Board covered by D&O insurance is directly relevant to service delivery. This would need to be negotiated directly with FACS.

3. *Can Funds be used for 'winding up' or redundancy for employees?*

The Funding Deed and PLA permit Funds to be used in the performance of specified services and only for services actually provided (see above, question 1). It might be difficult for an organisation to link winding up costs (which would presumably be incurred after the organisation has either provided the relevant service or failed to provide that service) to the delivery of a relevant service.

In addition, Clause 6.2(e) of the Funding Deed requires the Service provider to seek prior written consent from FACS before committing Funds for expenditure "*that is likely to occur after the Service End Date.*"

It may be possible to use Funds for redundancy payments that can be linked to the performance of the services, as 'employee entitlements'. However, if payment might be made after the end date of the services, prior written consent from FACS may still be required.

Also keep in mind there needs to be a relevant link between the services provided and the costs. So only employee entitlements earned while providing the relevant services can be paid with the Funds. For example, where an employee only spends 50% of their time working on services funded under a particular PLA, the organisation can only use the Funds to pay for 50% of that employee's redundancy.

4. *Can Funds be used to provide training?*

According to representatives from FACS, Funds can be used to provide training to personnel in accordance with the PLA and Program Guidelines.

5. *Can Funds be used for record keeping (storage of records as required under the Funding Deed) and record destroying (after the 7 years)?*

Representatives from FACS have stated that the cost of record keeping is an allowable expense during the term of the PLA. Where the PLA has expired and the service provider has no capacity or funds to keep the records, they should contact the FACS District to arrange the safe record keeping.

6. *After this financial year (2016/17), is it true that FACS will no longer reallocate unspent or uncommitted funds if it is over \$1000?*

In relation to unspent or uncommitted Funds, representatives from FACS have said:

- surplus funds have always been subject to recovery and will continue to be recovered
- currently funds less than \$1,000 are not economical to recover, and
- each year program managers decide on the reallocation of surplus funds.

Intellectual property

7. *If a third party is the original creator of material (e.g, a logo designed by a graphic design company), and they give a licence to the organisation to use it, can FACS access the material?*

Under Clause 11.2(b) of the Funding Deed, *“The Service Provider grants, and will ensure third parties grant, to Family and Community Services a perpetual, irrevocable, royalty-free and licence fee-free, world-wide, non-exclusive licence (including a right of sub-licence) to use, copy, modify and exploit the Program Material”*)

“Program Material means all Material:

- a. brought into existence for the purpose of a Program Level Agreement or this Deed;
- b. incorporated in, supplied or required to be supplied along with the Material referred to in paragraph a; or
- c. copied or derived from the Material referred to in paragraph a or b.”

This is a broad licence to use, copy, modify and exploit all intellectual property (IP) developed for the purpose of providing the services. It also requires the Service Provider to ensure FACS is able to use IP created by third parties. This could include intellectual property created by contractors or volunteers. To comply with this provision, the Service Provider must ensure that it has necessary rights (through any contracts or licence agreements with third parties) not only to use the IP itself but for FACS to use, copy, modify and exploit the IP without any royalties or licence fees applying..

8. *If a sub-contractor designs something with FACS money, does the Lead have access to use that material for the term of the agreement (eg: 3 years) and would FACS also have a licence for the 3 years?*

This would depend on the clause, if any, in your JWA or sub-contract or any other intellectual property (IP) licence. For example, in the [template sub-contract](#) prepared by NFP Law, the sub-contractor retains ownership of the IP in the material they designed and they give the Lead a licence to use the IP to the extent that the Lead needs it to comply with the Funding Deed. So this is not a broad licence for the Lead to do what they like with the material.

The licence required to be given to FACS for use intellectual property created by third parties (discussed above) is ‘perpetual’ – that is, without time limit. This means the IP could be used beyond the term of the agreement.

For more information about intellectual property, see www.nfplaw.org.au/ip and please seek legal advice if you are unsure about IP for your organisation.

9. *If a client gives permission to an organisation to use his/her photo to promote the program (say in the organisation’s annual report), can FACS use that photo as part of the IP licence, even if the client expressed that his/her photo can only be used by the organisation?*

If the publication is ‘Program Material’, which FACS is permitted to use under clause 11.2(b) of the Funding Deed, the Service Provider should consider how privacy laws might also apply.

Under privacy law, a photograph of an individual is 'personal information' (or potentially 'sensitive information' if the photo identifies the person as having a particular disability or religion, for example). In general, privacy laws require you to notify an individual of the way/s you might use their personal information when you collect it (ie, when you take the photograph). For sensitive or health information, consent is usually required. You may then only use the photo for the purpose for which it was taken, and if another use is intended, consent is generally required.

If you are unsure about the use of a client's personal information in a particular context, seek legal advice.

Privacy and confidentiality

10. Are there exemptions to disclose or share information across different services within an organisation or between organisations?

Under the Funding Deed, organisations are required to comply with NSW privacy laws. Your organisation may also need to comply with Federal privacy laws. In general, organisations can only use (internally) or disclose (externally) personal information for uses the person was made aware of or consented to (in the case of sensitive and health information) at the time it was collected.

There are exceptions to this principle. If you are not sure of what to do, to seek legal advice before disclosing or sharing personal information to avoid breaching privacy laws. Breaching privacy laws could result in a breach and termination of the Funding Deed, as well as giving rise to other penalties under privacy laws.

See www.ipc.nsw.gov.au, www.oaic.gov.au and www.nfplaw.org.au/privacy for more information about NSW and federal privacy laws.

11. What can an organisation do if its auditor, or FACS, requests files that can include confidential information?

Organisations may have legal requirements to provide certain documents to an auditor, to FACS, or to another party, as well as legal obligations not to disclose certain information under privacy and confidentiality laws. If there is personal or confidential information in files requested by an auditor, it may be possible to first remove any personal or confidential information.

If you are not sure of what to do, to seek legal advice before disclosing or sharing personal or confidential information.

12. What kind of information can be requested under GIPA?

The *Government Information (Public Access) Act 2009* (GIPA Act) allows members of the public to gain access to information held by government agencies and organisations who have a government contract.

The guiding principle of the GIPA Act is public interest. It is generally presumed that all government agencies will disclose or release information, unless there is an overriding public interest against doing so.

Under GIPA, members of the public can access information such as how a NSW government agency works or their own personal information held by a government department. In order for FACS to comply with GIPA, FACS can obtain information held by a contracted organisation that:

- relates to the performance of the service, or
- has been collected by the contractor from a member of the public, or
- was received by the contractor from FACS to facilitate delivery of a service.

The Right to Information Unit, FACS Legal is responsible for all aspects of the management and processing of formal access applications.

There are time limits in relation to requests under the GIPA act, so organisations need to act quickly if a request is received.

If you are unsure of how to respond, seek legal advice. For more information about GIPA please see www.facs.nsw.gov.au/about_us/right_to_information# and www.ipc.nsw.gov.au

Subpoenas

13. In what situations can an organisation refuse to provide information under a subpoena?

Before providing information under a subpoena, it is important to establish that the subpoena is valid, and to understand which information must be provided. If you are not sure what to do about a subpoena or other request for records, seek legal advice.

Legal Aid NSW and Women's Legal Service NSW have recently updated a detailed guide to subpoenas called "Subpoena Survival Guide" which can be found here: <http://lacextra.legalaid.nsw.gov.au/PublicationsResourcesService/PublicationImprints/Files/753.pdf>

14. Who covers the cost of providing information under a subpoena?

The court that issued the subpoena should be providing conduct money. If there is a large amount of photocopying or retrieval of a lot of documents from archives required, you may be able to seek more conduct money.

More detail is available in the "Subpoena Survival Guide" <http://lacextra.legalaid.nsw.gov.au/PublicationsResourcesService/PublicationImprints/Files/753.pdf>

Conflicts of interest

15. What types of conflicts or potential conflicts need to be disclosed to FACS?

Clause 13 of the Funding Deed requires organisations to disclose conflicts of interest to FACS which arise *in the performance of their obligations under the Funding Deed or PLA*. Therefore not all types of conflicts of interest need to necessarily be disclosed.

Representatives from FACS have stated that disclosure of interests is a matter for an organisation's board subject to their own as conflict of interest policy and to protect the integrity of the organisation and manage risk. In particular, they specified that Service Providers would not

need to disclose to FACS conflicts or potential conflicts of interest which occur in the everyday running of the organisation such as:

- clients being related to employees, or
- employees being related to board members.

Organisations and their boards must comply with other laws requiring them to manage conflicts of interests.

Record keeping

16. When does the limitation of 7 years commence from?

Clause 11 of the Funding Deed requires organisations to retain clear operational records during the term *and for 7 years after the expiry or termination of the Funding Deed*. Organisations should check if there is any relevant legislation requiring you to retain records for any different period.

If you are not sure what in relation to retaining or destroying records, it is important to seek legal advice. There is also more information available at www.nfplaw.org.au/recordkeeping

17. What happens if a client asks for their records to be destroyed?

Under NSW and federal privacy laws, clients have rights to access their own personal information and have it corrected. However, removing destroying information may result in breach of overriding legal obligations that require records to be kept. Before destroying any documents seek legal advice.

Reporting and notifications to FACS

18. Can FACS ask for more information after an organisation provides information through FACS' template via the online portal?

Representatives from FACS have stated that they are able to ask for any information that is *relevant* to the Funding Deed and PLA. This might include program performance data/information, financials, governance – policies, and registers (asset, conflicts, complaints etc). According to FACS, they may also request relevant staff qualifications and information regarding recruitment for the program, but not personal staff information or information about donors etc.

Remember that organisations must comply with privacy obligations and not disclose personal information where this would be a breach of confidentiality or privacy laws. Seek legal advice if you are unsure of what FACS is asking you to provide.

19. If an organisation changes its constitution, do you provide notice to FACS of intent to change before change is made or after the change has occurred?

Clause 3.3 of the Funding Deed, in relation to changes to the constitution, is unclear. To avoid doubt, it may be best to check with FACS before making a change to your organisation's constitution.

Clause 3.3(b) states that if an organisation's constitution is changed, FACS may object, on reasonable grounds, to the proposed changes. An example where FACS might have reasonable grounds to object is where the purposes or objects of the organisation are changed so that the organisation can no longer provide the services required.

20. If an organisation has not notified FACS of a disposal of a vehicle when purchasing a new one. Is that a breach?

Clause 9.1(b) of the Funding Deed relates to asset management and specifically states that organisations must obtain prior written approval from FACS before selling or disposing of an asset ('asset' is defined in the Funding Deed to be anything purchased with FACS funding and over \$5000).

If the vehicle was \$5000 or more and purchased with FACS funding, then prior approval from FACS should have been obtained. This could be a breach of the Funding Deed, and legal advice should be sought as to how to remedy any possible breach.

For any dispute in relation to the Funding Deed, the dispute resolution procedure set out in Clause 20 should be followed.

21. Do you need to contact FACS if you have an unfair dismissal claim?

If an unfair dismissal claim might have an effect on your organisation's ability to perform the services under the Deed or PLA (for example, your liability may leave you without sufficient funds to operate), this could place you at risk of breaching your agreement with FACS. In clause 23 of the Funding Deed, the Service Provider promises that 'no suit, cause of action, proceeding, application, claim or investigation is current, pending, threatened or in prospect against your organisation that may have an adverse effect on the performance of this Deed or a PLA'.

If you are unsure about whether FACS should be notified, seek legal advice. For more general information about employees and disputes with employees, please see www.nfplaw.org.au/employees

22. What counts as not operating? What does "required to operate" mean?

Clause 3.1(g)(ii) of the Funding Deed states that organisations need to notify FACS immediately in writing if they have not been 'operating for a period of 5 consecutive business days or more' when they are required to operate.

FACS have said that operating generally relates to the service being open and available for clients. For example if the service is a drop in centre and should be open for client access

between specified times (ie 9am-4pm Monday to Friday) and if the service closes due to no staff, staff illness, fire, flood etc and clients do not have access – that would be ‘not operating’.

Dispute resolution

23. How strict is FACS on the number of working days provided to resolve a dispute?

Clause 20 sets out the procedure for resolving disputes with the Funding Deed. It states that if the dispute is not resolved within 10 business days after the commencement of the first and the second level discussions, the issue can be progressed. It may be possible to request more time to resolve the dispute directly before it is progressed, in the interest of cost and effectiveness.

Working with Children Checks (WWCC)

24. Do all workers who work with vulnerable people, including homelessness services, need a WWCC?

In NSW a Working with Children Check (**WWCC**) is only legally required for people working directly with children in ‘child related work’. In addition, clause 3.2(d) of the Funding Deed only requires a WWCC for personnel performing ‘child related work’. For more information, see www.kidsguardian.nsw.gov.au. However, your organisation might be required to obtain WWCCs for personnel under another funding agreement. There may also be requirements for your organisation under a funding contract or legislation to obtain criminal record checks, references and other checks for personnel.

For more information see: www.nfplaw.org.au/recruitment

Re-contracting

25. FACS says in their recent guidelines on JWAs that they won’t consider recontracting if the JWA changes [content of the programme has changed]. What is your take on this matter?

Representatives from FACS have stated that they will allow subcontracts (JWAs) to change, but organisations need to let FACS know what the changes will be, particularly if they want to change the provider or they affect the lead’s ability to deliver on the PLA contract with FACS.

In addition, clause 21 of the Funding Deed requires prior written consent from FACS to sub-contract.

In relation to recontracting, there is more material available through the FACS website here: <http://www.housing.nsw.gov.au/help-with-housing/specialist-homelessness-services/info-hub-for-service-providers/sector-updates>

26. How do you manage what partners are doing/what they need to do successfully?

It is important in your JWA or sub-contract to be clear on what the roles and responsibilities are for both the lead and sub-contractor, and passes on the relevant legal obligations under the head agreement. This means that the sub-contractor has an enforceable legal requirement to fulfil these responsibilities.

It is also important to have a good dispute resolution process in your agreement so that if there are issues they can be dealt with in a fair and timely way.

For more information and assistance in discussing these issues, see the NFP Law resources on the Funding Deed www.nfplaw.org.au/govfunding and on SHS sub-contracts www.nfplaw.org.au/sub-contracts

27. Can you opt out of JWA?

This will depend on the type of JWA you have and what the conditions are. For example, if your JWA is in the form of a Memorandum of Understanding (MOU) then it is likely to not be legally binding so either party should be able to walk away at any time without the other party being able to take legal action.

To 'opt out' of a JWA that is a sub-contract, check the termination clauses in your agreement and ensure you comply with these. For example, the Funding Deed may allow you to terminate the Deed for no reason by giving 90 days' notice.

The template sub-contract (JWA) prepared by NFP Law (www.nfplaw.org.au/sub-contracts) does not include a similar term to the one in the Funding Deed but prompts parties to "carefully consider" what they would like in the termination clause including something similar to the Funding Deed termination for convenience clause or termination by mutual agreement.

28. What happens if a Lead organisation goes bankrupt or falls over - what would a partner do in that situation? Can they negotiate directly with FACS to be funding directly?

This might depend on the JWA you have and the termination clauses in your agreement. For example, the template sub-contract (JWA) prepared by NFP Law www.nfplaw.org.au/sub-contracts states that the agreement may be terminated immediately if the other party is bankrupt or insolvent.

An organisation in this situation, who has been delivering the services, may be able to negotiate directly with FACS to be directly funded.

If you are not sure what to do, seek legal advice.

29. Is it the case that partner organisations are vulnerable in re-contracting and that Leads might not re-sign a new JWA, leaving partners with no contract/funding?

According to representatives from FACS, maintaining and strengthening existing JWAs is a key objective of the re-contracting process. However, a JWA that is a sub-contract is an agreement

between the Lead and sub-contractor. Ultimately, these parties are free to decide whether they want to re-sign.

There is more information on re-contracting, organisations can have a look at the material available through the FACS website here: <http://www.housing.nsw.gov.au/help-with-housing/specialist-homelessness-services/info-hub-for-service-providers/sector-updates>

30. What checks are available if an organisation would like to be able to check up or do due diligence on other organisations in their consortium or JWA?

There are a few free online searches you can do to check if an organisation has any past or pending litigation or other issues, such as if they have had their charity registration cancelled. These are limited as not all completed cases in the court are reported. There may also be other ways to gain information such as checking with relevant peak bodies or other organisations in the sector:

- the 'find a charity' search through the ACNC www.acnc.gov.au can provide you with a charity's constitution, financial statements and will provide information if charity registration has been cancelled,
- through these two sites, you can look if there are current or past court cases in NSW against an organisation:
<https://onlineregistry.lawlink.nsw.gov.au/content/>
www.caselaw.nsw.gov.au, and
- you may also request information directly from the organisation as part of the due diligence process.

CPI and ERO

31. CPI and ERO is tricky for partner organisations. How does it work if increases are not claimed by Leads or not passed on?

This is a matter for Leads and partners (sub-contractors) to negotiate as part of the re-contracting process. For example in the [template sub-contract](#) prepared by NFP Law in Schedule 1, it is suggested that when parties are negotiating fees, that the application of CPI to the fees or pass-through of increases to funds provided by FACS to the Lead contractor should be clearly set out.

Contracts generally

32. What does "in good faith" mean in a contract?

In the FACS Funding Deed the term 'in good faith' is used in Clause 20 – dispute resolution. It is also used in a few clauses in the [template sub-contract](#) prepared by NFP Law (dispute resolution, termination and records).

It is fairly abstract principle but in general means:

- act with honest intent, without taking advantage of another person; or
- act honestly, decently, reasonably and not arbitrarily.

The term also encompasses cooperating to achieve the purposes of the agreement.

33. Is being silent on elements in a contract part of a contract as well?

Generally terms would not be read into a contract if the contract is silent on it but there are some implied terms in contracts under common law. For example in contracts for professional services there is an implied term that services will be delivered with reasonable care.