

**Submission
No 7**

**EFFICIENCY AND EFFECTIVENESS OF THE AUDIT
OFFICE OF NSW**

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Dear Mr O'Dea

Efficiency and Effectiveness of the Audit Office of NSW (Inquiry)

In making this submission, I wish to concentrate on the following two terms of reference:

- Whether the selection of agencies for compliance audit is robust and based on a consideration of the particular risks of that agency;
- Whether the Audit Office has adequate resources to carry out its functions

In addressing these matters I also wish to draw the Committee's attention to the recently released position paper of the Independent Commission Against Corruption (ICAC), *Funding of NGO Service Delivery of Human Services in NSW: A Period of Transition*.¹ In particular, the Committee should note ICAC's first recommendation. This is:

*That legislation be amended to provide the NSW Auditor-General with power to inspect, examine and audit the accounts of NGOs that have been provided with government funding.*²

The Government should implement this recommendation with urgency.³ This is particularly given the Government's stated policy of outsourcing human services delivery to the NGO (non-government organisations or the not-for-profit) sector.⁴ As someone with cerebral palsy who has been confined to a wheelchair all his life, one is far from comforted about the prospect of living to an age where my mother and I are either both, or singularly, unable to live together without outside assistance. With the passing of my father in 2008, this brought many medium and long-term care and support issues into focus for both me and my mother. Mum, ever the more practical of us, responded to an advertisement in the local *Manly Daily*. This announced the establishment of an

¹ See ICAC's webpage http://www.icac.nsw.gov.au/component/docman/doc_download/4044-funding-ngo-delivery-ofhuman-services-in-nsw-a-period-of-transition as at 23 March 2013

² *Ibid.*, p.8 of 26.

³ I also note that under the *Independent Commission Against Corruption Act 1988* there is no reference to "Issue Papers" or "Position Papers" so they do not have the standing of the formal reports the Parliament and the Government would otherwise receive from ICAC. This work should be formally tabled as a report to Parliament and, legislative amendments should be drafted to this effect.

⁴ Please see the current Legislative Assembly inquiry, *Outsourcing Community Service Delivery (Inquiry)* <http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/C6782566488D8117CA2579B90006B615> as at 24 March 2013. Also see my submission to the *Outsourcing Inquiry*, provided to you as Appendix 1.

Attendant Care Program, by the Department of Ageing, Disability and Homecare. It was designed, the notice said, to assist ageing parents who had adult children with disabilities, to make plans for themselves and their children's futures. This sounded exactly what Mum and I were looking for, to give us both peace of mind, in the belief we could secure a future where we were both supported, as our needs grew.

Promises versus Reality

As I told the Productivity Commission's inquiry into *Disability Care and Support* (which implicitly became the *National Disability Insurance Scheme Inquiry*) what *actually* occurred started me on a course of actively doubting the true benevolence of many in the NGO sector.⁵ This was when one NGO case worker, in particular, tried to bully my mother and I into decisions she wanted us to make; to the extent that she interrupted us both (by phone) at our workplaces. The first I knew of this was a call from [REDACTED] caseworker cum bully [REDACTED] where she insisted several care and equipment options be decided upon then and there, to coincide with her funding timeline. After dispensing with [REDACTED] and her *alleged service*, the next phone call I received was from Mum; she was in tears (having also been verbally by the same [REDACTED] and I was enraged. This was an experience which one hoped would make the Productivity Commission think twice about establishing a large disability insurance scheme bureaucracy.⁶ Sadly, it did not.

⁵ See my submissions to the Productivity Commission's *Inquiry into Disability Care and Support*, http://www.pc.gov.au/data/assets/pdf_file/0009/99486/sub0055.pdf (Submission 1); http://www.pc.gov.au/data/assets/pdf_file/0016/100726/sub0186.pdf (Submission 2) as at 25 March 2013; while the third submission is provided to you as part of Appendix 2, pp. 59 to 68 of 68.

⁶ See this quote from Submission 1 to the Productivity Commission, at page 3 of 18:

I recall taking a telephone call early last year, at work, from my ACP service provider. She had just had a conversation with my mother, which ended badly. In short, the enquiry revolved around whether we intended staying with the ACP; the question ending with a reminder of the funding on offer. I quickly explained to her that the terms of my staying were clear: both my mother and I had one clear message from the beginning – whatever else happened we wished to retain our Homecare service. This was the one thing that, up until Ms (Name suppressed)'s intervention, was specifically refused. Therefore, I advised that I was very dissatisfied with the ACP initiative and, was prepared to leave the program. Thereupon started the provider's blackmail argument, which was that I had 'failed to consider my mother's future needs' by unilaterally exiting the program.

These comments fitted a pattern of behaviour engaged in by the provider, when it became clear to her that we were not going to say "Yes" to everything she suggested, nor be managed to her funding timeframes. At times when it suited the ACP provider, I was the client; at other times it was my mother. It never seemed to occur to her that the first thing a mother and son would do, was to check with each other as to what had been said to us. A less than subtle 'divide and conquer' strategy failed. After I told the provider that I thought she was little more than a bully (to which she claimed deep offence) putting down the phone only made it ring again. It was Mum, in a very distressed state, after also having been interrupted at work by a call from the ACP provider. From then on, we decided I would be the only contact point for ACP, and that would be by email...Reflecting on my ACP experience, I became convinced that the provider was having growing difficulties understanding her "unhappy customer". Becoming increasingly shrill with me was never going to work though; I knew I could do far more damage to her Community Care organisation by leaving it, than she could ever do to me. After all, my presence brought funding, which was what, in my view lay at the heart of her concern about my potential departure. Expressing apparent concern for my mother's future health and wellbeing (and insinuating that I was being recklessly indifferent) never blinded me to what was really at stake.

Understandably, the Productivity Commission were reluctant to have me name [REDACTED] or [REDACTED] as the case officer or NGO respectively. But, as I did at the *Outsourcing Inquiry* (see

This, combined with the State Government's objective to outsource services, makes an augmented Auditor's role essential. It has been my view for some time that politicians, corporate identities and other civic leaders have been comfortable to take a rose-tinted view of NGOs. The orthodoxy says that such bodies are full of wonderful people doing selfless things for the poor and underprivileged in our community. While this may be true to some extent, it is not universal. Yet, there appears to be a willingness to avert the communal gaze when evidence to the contrary comes to light.⁷ For example, it was necessary to undertake several internet searches to locate scant media reports for the Ayton matter (highlighted by footnote 7), which I only originally came across by accident, reading the Sunday paper last August.

However limited public reporting may be, it is another question entirely, as to how extensive instances of fraud of disabled or other vulnerable persons are in practise. Certainly, during my tenure as a Director of the Cerebral Palsy Alliance (formerly the Spastic Centre of NSW), I became concerned when a case of client fraud came to the Board's notice. Firstly, this matter took about a year to be detected by management and, while all monies were ultimately recovered, the staffer was allowed to quietly resign. A note was made in the Board minutes not to rehire the worker and, when I questioned the wisdom of this in light of the fact that no formal findings were made (at least none that were going to be acted upon by say, making a police report), it became clear that this line of thinking was not welcome.⁸ It was explained that the families concerned did not want to take the matter any further, which may well have been true; but it left a very bad taste in my mouth. The staffer was potentially free to repeat the same behaviour elsewhere and, no-one would be any the wiser.⁹

This is just one example of why I believe all NGOs, be they charitable, religious, not-for-profit or however else described, should be brought under the jurisdiction of the Auditor-General, if they receive any public funds. The Assistant Auditor of NSW has previously advised me that:

*"...the mandate of the NSW Audit Office does not extend to the not-for-profit organisations themselves, only the State agencies that fund them..."*¹⁰

Taxpayers deserve better

This is ridiculous; public money should not cease to become public money because it is transferred into another organisation's bank account. Indeed, if the Government is funding NGOs to provide goods and services, it is legally inviting the same NGO's to act as its agents or "to step into its shoes".

Appendix 1, p.3 of 25), I do now. Hopefully, with growing media scrutiny and public questioning of NGO conduct (e.g.: *Local lifesavers miss out on donated funds: Kenny* - Updated Sun Feb 10, 2013 11:14am AEDT: ABC News, <http://www.abc.net.au/news/2013-02-10/ironman-kenny-raises-concern-over-life-saving-fundraising/4510406> as at 29 March 2013.

⁷ See for example, Yoni Bashan, *Carer stole elderly pair's life savings*, The Daily Telegraph, February 03, 2013 10:21PM, <http://www.dailytelegraph.com.au/news/carer-stole-elderly-pairs-life-savings/story-e6freuy9-1226568014343> as at 30 March 2013. Previously, the accused had been reported as denying the claim: Yoni Bashan (Police Reporter), *Sydney carer Robert Ayton denies stealing \$87,760 from his two wheelchair-bound clients*, The Sunday Telegraph, August 05, 2012 12:00AM, <http://www.dailytelegraph.com.au/news/sydney-carer-robert-ayton-denies-stealing-87760-from-his-two-wheelchair-bound-clients/story-e6freuy9-1226442836512> as at 30 March 2013.

⁸ See Appendix 1, p. 14 of 25, footnote 46.

⁹ I ultimately took the concerns outlined in Appendix to the Australian Securities and Investment Commission (ASIC) and the new National Charities Commission; see Appendix 4, pp. 22 to 31.

¹⁰ Letter to Adam Johnston from Ron Mathie, Assistant Auditor (Performance), dated 5th July 2012 and reproduced in Appendix 1, p. 25 of 25.

Thus, if the agent is empowered to exercise the authority and/or disperse the funds of the principal, the agent should be subject to the same compliance regime as the principal. This should see NGO's being required to open their books to the NSW Auditor, just like any State agency would be. For this not to be done would be like me hiring a solicitor, providing him with money for costs and disbursements and, then failing to read the itemised account, to ensure costs were paid and any overruns from the initial quotation are adequately explained.¹¹ Similarly, if we accept that the legitimate role of an Ombudsman is to "shine a light into dark places" when it comes to public administration, then surely the Audit Office as the oversight body for public finances should be able to shine a light on how NGOs dispense public money on behalf of the State. For the Auditor not to have this authority makes him analogous to a sundial in semi-shade. He can see the taxpayer's money when it is with the Treasury and other States agencies, but NGOs who receive the funds are shaded from scrutiny.

Reclaiming my citizenship

The Auditor's inability to examine NGOs directly should be unacceptable on many grounds. Firstly, as already stated, scrutiny of public monies and their use should not be dependent on whose bank account in which the finances are held. Secondly, notions of what it is to be a citizen are very much "up for grabs" in this debate. Are those of us who may, through age or disability find ourselves dependent on NGOs for various goods and services, any less citizens of NSW than those who are not so dependent? If the State does not ensure, via the Auditor, that funds earmarked for our benefit, are actually delivered to us by the NGO intermediaries, what does this say of our citizenship? To draw on the roots on democracy, the Agora¹² was the central civic space in ancient Greek city-states; to have a voice here meant you were a citizen, with a role in the politics, the market and the arts of your polis.¹³

If you were not a member of the public, civic community, then in ancient Greek terms you were not a citizen, but a slave. Therefore, to modernise the analogy, bringing the financial operations of NGOs which provide publicly funded goods and services clearly into the civic space, reasserts the public citizenship of service recipients like me; ensuring I do not find myself living in the shadow of one or more NGOs. The push to outsource human services to NGOs has increasingly led me to doubt the strength of my grip on my claim to public citizenship. It was then no accident, that a sub-heading in my submission to the Legislative Assembly's *Community Services Committee* inquiry *Outsourcing Community Service Delivery*¹⁴ is "A slave to benevolence?"¹⁵

I had hoped that this question would give policy makers pause for thought. One hopes careful deliberations are occurring behind the scenes, even if the submission itself is not public. Repeated

¹¹ Solicitors are required to disclose to clients an estimate of costs when their services are first retained, to keep the client informed as to fees and charges as a matter proceeds, as well as providing a full written account of expenses. Information must also be provided as to where a client can lodge a complaint about fees charged and have the matter reviewed: see *What your solicitor must tell you*, NSW Law Society, <http://www.lawsociety.com.au/community/thelawyerclientrelationship/Whatyoursolicitormusttellyou/index.htm> as at 31 March 2013.

¹² See for example, the discussion of the Agora at <http://en.wikipedia.org/wiki/Agora> as at 31 March 2013

¹³ *Polis* being the Greek term for a city ruled by its citizens. See <http://en.wikipedia.org/wiki/Polis> as at 31 March 2013.

¹⁴ See *Outsourcing Community Service Delivery (Inquiry)*, <http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/C6782566488D8117CA2579B90006B615> as at 31 March 2013.

¹⁵ See Appendix 1, pp. 9 – 12 of 25; I also find it interesting that to this date, that the Community Services Committee has determined not to publish my submission; see email exchanges appended to Appendix 1, pp. 22 to 25 of 25.

personal experience with NGO service delivery,¹⁶ not to mention indifferent governance,¹⁷ has not encouraged me to believe in either the true benevolence or competence of many providers. This is a

¹⁶ See for example, my growing frustration with the Commonwealth's DESP (Disability Employment Service Providers) system. The DESPs (generally comprised of federally funded NGOs) are supposed to help you find work, but as I told the Senate's 2011 inquiry into the *Administration and Purchasing of Disability Employment Services* (http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=eet_ctte/disability_employment/submissions.htm as at 1 April 2013; here reproduced as Appendix 2 as the webpage is inoperative):

(Why) maintain the (Job seeker) compliance system and who does it truly serve? The answer to the first question is partly an obvious one; both the Rudd and Howard Governments saw unemployment and the non-engagement of various welfare recipients in the job market as "passive welfare". As a result, phrases such as 'Work for the Dole' and 'Mutual Obligation' became standard phrases in the Australian political lexicon.

However, it may well have been an unintended consequence to develop a publicly funded cottage industry of (NGO disability) employment service providers, looking to fulfil KPI's, principally so they can continue to be funded by government, or can put in a bid for the next round of tenders. In a similar vein, I would anticipate that Green Corps and similar 'Work for the Dole' schemes are entirely publicly funded. Thus, there is no new industry created and no lasting economic multiplier effect when the allocation of public funds runs out. Yet, we call it work and, it counts as compliance as far as the Job Seeker Compliance System is concerned.

What it really all amounts to is a mass public subsidy of activity and processes of limited economic value. While some of it may be defended as having a value in terms of people gaining social interaction, or there being an environmental benefit in a bush regeneration scheme, two things need to be asked. The first question is: why must government feel itself responsible for generating social activity for some people? Have we become that passive as individuals that we no longer organise informal activities for ourselves? Secondly, what is the per-head cost of a government (or government funded) program, as against a private sector equivalent? If examples like the *Building the Education Revolution* (BER) are any guide, government funded providers and programs could be unduly expensive. Ultimately, we should accept that those motivated to change their circumstances or improve their situation will find ways to do so. The compliance system appears to assume, by contrast, that official intervention and oversight is always necessary. While it avoids passive welfare, the system potentially creates passive individuals, content to have government (or a state agent, such as an employment service provider) organise their lives. (Appendix 2, pp. 42-43 of 68)

As someone who is disabled and unemployed, I am required to be on a DESP's books by *Centrelink*. Needless to say, were I not disabled I would not approach DESPs by choice; the Commonwealth Department of Employment and Workplace Relations (the Department) provides the funding and, even though I am called "the client" this is a status of no legal significant; for in truth, the client is but a third party. As I also told the Senate:

If the (Commonwealth) Government is serious about substantial reform, it should insist that there be privity and contractual enforceability between service providers and clients, allowing clients to take action against services for a failure to deliver on undertakings. It would also be appropriate for Government to ban the use of Memoranda of Understanding. These unenforceable documents blight administrative law and are a scourge of public policy. In my own experience, these memoranda are both unreliable and can expose the truly 'marginal nature' of disability employment...I (can) specifically quote a letter I received from Alison Durbin (Assistant Secretary, Disability Employment Services Branch), on behalf of the then Minister for Employment. Ms. Durbin wrote:

The MOUs are designed to articulate the available services required by each employer to assist them hire people with disability. Legal contracts are not used because it would be

point one has tried to make very clearly to the Department of Ageing, Disability and Homecare in that agency's consultation about individual funding packages and the *Living Life My Way* initiative. In particular, I said:

The Government needs to go directly to people with disabilities and their families. You should take lobbyists, care agencies and NFPs out of the mix. They will tell you whatever gets them more funding - this is not necessarily the same as what people with disabilities want.¹⁸

If the State Government concludes that it cannot do without NGOs in the delivery of some human services, then it needs to:

1. Amend the *Public Finance and Audit Act 1983 (PFAA)* in line with ICAC's earlier cited recommendation;¹⁹
2. Further amend the PFAA (and all related legislation) so that for the duration of any contract under which an NGO holds and/or dispenses funds on behalf of the State, it becomes a de-facto State authority. Therefore, its staff will become subject to the *Public Sector Employment and Management Act 2002* and the *Public Sector Code of Conduct*. This is only proper, if an NGO is delivering public services with public money;
3. As a consequence of point 2 above, the Treasurer has discretion under Part 4A of the PFAA and, should exercise it to direct NGOs (as de-facto statutory authority) to pay tax

unlikely that employers would risk facing penalty in the case that they had to defer or stop a recruitment process.

It is important that employers are not discouraged from seeking to employ people with disability by requiring them to be penalized if their fluctuating business concerns cause them to cease a planned recruitment process. [Letter from Alison Durbin (Assistant Secretary, Disability Employment Services Branch), to Adam Johnston, dated 24 November 2006] (Appendix 2, p.2 of 68)

Heaven forbid that the elderly, disabled or unemployed be able to enforce undertakings given by NGO service providers! We might begin to look far too much like citizens, rather than a focus for pity and/or charity.

¹⁷ This is exemplified by my experiences as a former director of the Cerebral Palsy Alliance, as explained in Appendix 1, pp. 13 to 21 of 25. However, the DESP system referred to earlier, also underlines the haphazard management and governance of NGOs.

Please refer to Appendix 3, which is a potted summary of a complaint and FoI process I launched after growing increasingly dissatisfied with the service provided by SEDS (Sydney Employment Development Services, which is a division of the Cerebral Palsy Alliance). My initial letter of complaint (pp. 27 to 29 of 34) was answered by the Department (pp. 25-26 of 29) in October 2012. I viewed the response as bureaucratic doublespeak, which prompted me to launch a FoI claim and then, to have that claim internally reviewed (pp. 8 to 24 of 34).

By agreement, the Department amended its records (pp. 1 to 8 of 34). What is particularly noteworthy is the difficulty the Department had obtaining answers from SEDS (pp. 14 to 22 of 34), the variance between SEDS's eventual response and my complaint (pp. 12 to 13 of 34) and, the Department's assessment of SEDS's handling of my complaint (pp. 11 of 34). Despite the low ratings SEDS maintains its funding and, will apparently do so until contractual arrangements are reconsidered in 2015.

While acknowledging this example concerns the Commonwealth and not the State jurisdiction, it should at least give the Public Accounts Committee pause for thought about both the proper role of, and oversight of NGOs, in the delivery of public services.

¹⁸ Appendix 3, p.33 of 34.

¹⁹ I wrote to the Treasurer in response to the ICAC Position Paper. See Appendix 4, p.1 of 69. Also see my submission to ICAC, included in Appendix 4, pp. 32 to 53 of 69.

equivalents.²⁰ It is not clear to me why many NGOs continue to be granted tax exemptions and charitable gift status. Many NGOs are virtually indistinguishable from for-profit businesses. I discussed these issues at length in submissions to the Not-For-Profit Reform Group of the Commonwealth Treasury²¹ and, the related Not-For-Profit Tax Concessions Working Group.²²

4. For NGOs to retain tax concessions, they should have to demonstrate to the Auditor-General that their dominant purpose remains charitable.²³ The Auditor could then provide advice to the Treasurer, as to whether a tax equivalence charge should be applied, or a tax exemption granted.²⁴ Based on my personal experience as a service recipient and, as a former Board Director, I have increasingly come to doubt the benevolence and predominantly charitable intent of many NGOs.

In relation to disability services, this is now a particularly important issue, given the enactment of the National Disability Insurance Scheme (NDIS) legislation. You will recall that earlier in this submission, great store was placed on reclaiming citizenship. To me, having the Auditor looking actively “over the shoulder” of NGOs affirms my citizenship and, offers me a measure of protection as a service recipient. As I told the Senate inquiry into the NDIS:

(The policy of having NGOs deliver services) is indicative of a much wider malaise within government, the media and civil society more generally; the view appears to hold that “*Thou shalt not criticise the charitable sector, because it is staffed by such wonderful people doing marvellous things that surely such Sainly types would not be doing anything improper?*” While I do not deny that many big-hearted and well-intentioned people enter the so-called Third Sector for the right reasons, this cannot be taken to be universal. I see a worrying parallel with the store many people used to place in the authority and apparent trustworthiness of Catholic priests; look where this has brought us: e.g.: *Establishment of the Royal Commission into child sexual abuse*, Commonwealth Attorney General’s Department <http://www.ag.gov.au/About/RoyalCommissions/Pages/default.aspx> as at 24 December 2012. Less than a decade ago perhaps, many Australians may have felt the allegations and abuse the Commission is set to hear were incredible and unbelievable.

I am determined to do whatever is within my power to ensure the same does not happen in the disability sector. Yet, if the Government succeeds in herding people with disabilities under the (National Disability) Agency, then you bring together the three elements of a large, unwieldy bureaucratic system, third sector/charitable service providers and, a vulnerable community of need. Add just a few people of malicious intent and, you have the makings of another heart-wrenching, hideous and horrendous Royal Commission of the future.²⁵

²⁰ Refer to Section 58B of the *Public Finance and Audit Act 1983* (NSW) http://www.austlii.edu.au/au/legis/nsw/consol_act/pfaaa1983189/s58b.html as at 3 April 2013.

²¹ See Appendix 4, pp. 2 to 15 of 69.

²² See *ibid.*, pp. 16 to 19 of 69.

²³ See *ibid.*, generally

²⁴ I also queried charities receiving tax breaks, when writing to the *Henry Tax Review*. See my submission at http://www.taxreview.treasury.gov.au/content/submissions/pre_14_november_2008/Adam_Johnston.pdf as at 3 April 2013.

²⁵ My submission (no. 440) to the Senate Community Affairs Legislation Committee: *National Disability Insurance Scheme Bill 2012 [Provisions]* p. 8 of 18 http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=clac_ctte/completed_inquiries/2010-13/ndis/report/e01.htm as at 3 April 2013.

I do genuinely hold such fears, which means that while I will watch the NDIS's development closely, I will not become a participant.²⁶ This is because one fears that service delivery will come to be monopolised by large NGOs. Having the Auditor looking at the distribution of grants to NGOs, making NGOs de-facto State agencies during the term of a grant and, allowing the Treasurer to levy tax equivalents for those bodies, whose operations cease to be predominantly charitable will bring much more rigour to both the awarding of grants and their use.

5. The Auditor should also be able to consider the mountain of guidelines, MoUs and, other protocols which proliferate through both government and the NGO sector. These documents tend to dictate what services people like me receive and how we receive them, despite the fact that guidelines are not legal documents and are technically non-binding. Ideally, the Auditor should be able to recommend to Government which guidelines (be they from a Government Department or internal protocols of an NGO he is examining) achieve their stated ends, which are odious and unreasonable and, in particular, which cost more to administer than they deliver in measurable benefits to a service end-user/client?

I have complained about the use of guidelines to numerous inquiries, by NGOs and governments alike.²⁷ In response to the State Government's plan to outsource human services, I specifically advised the *Community Services Committee*:

(Requiring) people to live under the spectre of guidelines which are technically unenforceable but practically immutable, while also having failed to come under any Parliamentary scrutiny, should be (and be seen as) immediately unacceptable. Yet, if past practise is any indication, guidelines and MoUs will likely lay at the heart of devolution and outsourcing. Thus, our political leaders, on all sides of politics, will be able to politely excuse themselves from addressing the detail of the difficulties faced by those who are living with housing stress, disabilities and other frailties of age. However, just as the Right Hon. Pierre Trudeau sought to bring the British North America Act (the Canadian Constitution) 'home to Canada' it is long overdue to *Patriation* agency guidelines back home to Parliament, as regulations. From here, our citizenship cannot be ignored or 'devolved away' by any Minister or Government.

If parliamentarians still decline to follow the legitimate and (most importantly) justiciable route of approving regulations, then they should leave us free to set up our own (private) arrangements, liberated from the yoke of the not-for-profit/charitable sector and the bureaucracy's guidelines.²⁸

Bringing the Auditor in, to assess NGO spending and, whether this spending is in alignment with what the applicable guidelines say they (the NGO) should be doing for service recipients, would again reassert our place as citizens in the public square. This gives service recipients like me clear access to public complaint bodies like the Ombudsman, but with the additional capacity to hold NGOs to their guidelines. They might not be legal documents *strictly speaking*, but if the Auditor has made adverse comment about the application and interpretation of guidelines, this can be cited as another element to any service complaint.

²⁶ "Participant" is the phrase used in the Bill to identify a person with disabilities who is in receipt of services from the National Disability Insurance Agency.

²⁷ See Appendix 2, p.13; p.26; p.37; p.39; p.57 of 68

²⁸ Appendix 1, p.11 of 25.

A persuasive authority

Ultimately, I wrote to bodies like ICAC and the *Community Services Committee* of the Legislative Assembly²⁹ because of an increasingly loss of faith in NGOs.³⁰ Giving the Auditor-General a key, and very much expanded oversight role, goes a long way to make NGOs truly accountable.

Therefore, I recommend that the Committee express its support for ICAC's *Position Paper*. Personally, I also recommend that the reforms be much wider, as listed above. Furthermore, the Committee should be aware of recent case law coming out of the UK, highlighted by the Australian website *quis custodiet ipsos custodes* ("Who shall guard the guards?" *Juvenal, Satires*). The case of *R v Applied Language Solutions*³¹ concerned a private firm of interpreters who had been contracted by the UK Government to provide interpreter services during criminal proceedings. However, the interpreters' non-attendance at court caused a matter to be delayed and rescheduled. As a result, the Court made a costs order against *Applied Language*. The company appealed, and the Appeals Court accepted that the company's omission, in this instance, did not amount to serious misconduct, dismissing the costs order. However, their Honours nonetheless said at 41:

Courts have to alter times not to suit judges but to suit advocates and witnesses in cases to ensure that trials which are in progress proceed on time...The Crown Prosecution Service and, on many occasions, those instructed on behalf of the defence are paid out of the public purse. If a case cannot proceed then this has an effect on funds available to the CPS and to the Legal Services Commission who fund much of the defence work. The CPS lawyer and the defence lawyer will have lost the time that they could otherwise have spent. The loss to the public purse is real... *Having efficient systems and good and reliable interpreters is expensive. A contractor cannot be allowed to maximise its profit or reduce its loss in the context of court proceedings by not having in place the best systems and the best interpreters. It cannot transfer its costs of failing to do so to the CPS or the defence...As the appellant is providing an integral part of the State's obligations, then it must discharge that obligation for the reasons we have set out.*³² (my emphasis)

This case raises important questions about what happens when the State outsources goods and services it previously provided directly. Kyle McDonald writing for *quis custodiet ipsos custodies* says:

(The) bigger issue...is the fact that the contractor was liable to meet the State's obligations in the same manner the State would have been. If this were the case here, it would seem that contractors can be held to account by the Courts when they don't provide State services, as long as those services are within the terms of their contract. Would this overcome claims of commercial-in-confidence 'privilege'?³³

²⁹ The committee expects to release its report in the second half of this year; see Appendix 4, pp. 20 to 21 of 69.

³⁰ I admit to being particularly disheartened by my departure from the Cerebral Palsy Alliance, as outlined in Appendix 1. Also note the "Statement in Response" (contained in Appendix 4, pp. 54 to 69 of 69), which is the statement I gave putting my case, before resigning from the Board. This, combined with my initially difficult experience with the Attendant Care Scheme makes me nervous about my reliance (and the State Government's policy reliance) on NGOs.

³¹ [2013] EWCA Crim 326 (see <http://www.bailii.org/ew/cases/EWCA/Crim/2013/326.html> at 6 April 2013 .

³² *Ibid* at 41.

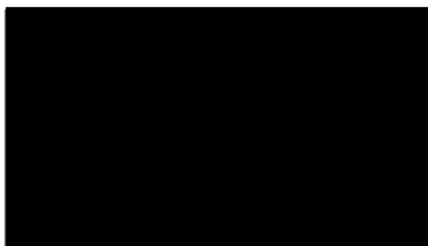
³³ Kyle McDonald, *Private contractors responsible for contracted State obligations?*, Tuesday, 2nd April 2013, Posted 11:50pm, http://www.summarycrime.com/2013/04/private-contractors-responsible-for.html?utm_source=feedblitz&utm_medium=FeedBlitzRss&utm_campaign=quiscustodietipsoscustodes at 6 April 2013.

For a service receipt like me, hearing that there might be precedent for believing you can actually hold a NGO provider responsible for performance (or more likely, non-performance) of an undertaking, is a revelation!³⁴ And the thought that the shield of commercial-in-confidence provisions could fall away as well, is even better! Certainly, commercial confidentiality claims should never inhibit the Auditor's review of NGO finances. It is to be hoped that the principles expressed in *R v Applied Language Solutions* will be applied beyond the criminal jurisdiction and, that the case will be seen as a persuasive authority in all common law jurisdictions, including here in NSW.

Conclusion

Finally, I acknowledge that the recommendations contained in this submission necessarily call for a considerable increase in the Auditor's budgetary allocation. However, if the Government wants to pursue a policy of outsourcing human services in particular, then I think such reform is vital. As stated, from the perspective of this service recipient, an element of my citizenship is also at issue.

Yours faithfully,



6 April 2013

³⁴ See generally, Appendix 2, which outlines my frustration with unenforceable MoUs.