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# Draft Code of Best Practice for Engagement with the Not-for- Profit Sector

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**Office for the Not-for-Profit Sector,  
Department of Prime Minister and Cabinet**

**29 April 2013**

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## Acknowledgement

The Law Council of Australia thanks the Law Society of NSW, the Queensland Law Society and the Law Society Northern Territory for their assistance in the preparation of this submission.

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## Introduction

1. The Law Council of Australia is pleased to provide the following submission on the Draft Code of Best Practice for Engagement with the Not-for-Profit Sector, *Engaging today for a better tomorrow* (the Draft Code), to the Office for the Not-for-Profit Sector (NFP) in the Department of the Prime Minister and Cabinet (PM&C).
2. The Law Council is acutely aware of how important effective engagement between the Government and NFP sector is in the formulation of policies and draft legislation. Accordingly, the Law Council welcomes the creation of the Draft Code as an important practical tool to guide and strengthen the Government's consultation and engagement with NFP organisations. Notwithstanding this, the Law Council also has some concerns with the Draft Code that it considers should be addressed before the Draft Code is finalised. These concerns relate to:
  - (a) the absence of firm timeframes for consultation and engagement with organisations in the NFP sector;
  - (b) the vagueness of the language used in the Draft Code;
  - (c) the absence of appropriate guidance in relation to consultations and engagement with Indigenous people; and
  - (d) the suitability of the proposed evaluation process for reviewing agencies' consultation processes.
3. The Law Council has previously expressed some of these concerns in correspondence to Government ministers, including Prime Minister Julia Gillard and former Prime Minister Kevin Rudd, in the context of the importance of upholding appropriate legislative standards. In these letters, the Law Council expressed particular concern about the importance of ensuring adequate timeframes for consultation for both legislative and policy proposals.<sup>1</sup>
4. The following paragraphs outline the Law Council's concerns with the Draft Code.

## Concerns with the Draft Code

### **Absence of timeframes for consultation**

5. The Draft Code currently does not include a recommended minimum period for written consultation by Government Departments in relation to policy proposals. Instead, it simply states that the Government undertakes to:

*Allow sufficient time for consultation. This may include providing time for:*

- *peak bodies to discuss with their members; and*

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<sup>1</sup> See Law Council letter to Prime Minister Julia Gillard, 8 March 2011, available from [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uuid=98A83C99-E2AB-2DEA-6C02-A63510A1C2A1&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=98A83C99-E2AB-2DEA-6C02-A63510A1C2A1&siteName=lca); See also Law Council letter to former Prime Minister Kevin Rudd, 20 August 2009, available from [http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uuid=8A37BF64-1E4F-17FA-D2F2-6774E0D97F72&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8A37BF64-1E4F-17FA-D2F2-6774E0D97F72&siteName=lca)

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- organisations to gain agreement from their board.<sup>2</sup>

6. The Draft Code could be strengthened through the inclusion of a minimum timeframe for consultation and engagement with the NFP sector. Other countries have included minimum consultation periods in the guidelines they have developed to guide consultation between their Governments and the community sector. For example, in the United Kingdom (UK), the *National Compact* - an agreement governing relations between government and civil society organisations in England – provides that the Government should:

*Give early notice of forthcoming consultations, where possible, allowing enough time for CSOs (Civil Society Organisations) to involve their service users, beneficiaries, members, volunteers and trustees in preparing responses. Where it is appropriate, and enables meaningful engagement, conduct 12-week formal written consultations, with clear explanations and rationale for shorter time-frames or a more informal approach.*<sup>3</sup>

7. The UK Government's *Consultation Principles*, which were published in July 2012 and replace the previous *Code of Practice on Consultation* issued in 2008, also suggest that 12 weeks may be an appropriate timeframe for consultation on "new and contentious policy."<sup>4</sup>
8. The *Ready-Reference Engagement Guide* prepared by the New Zealand Government's Department of Internal Affairs (New Zealand Guidelines) also recommends that for issues of widespread interest, Government agencies should allow "several months for citizens and communities to provide input."<sup>5</sup>
9. The Law Council acknowledges that it may not be possible for Government Departments to undertake extensive consultation on some issues or adhere to a minimum consultation period in exceptional circumstances. However, the Law Council submits that the Draft Code should be amended to specify a minimum consultation period of 12 weeks for consultations on policy proposals being undertaken by Government Departments unless exceptional circumstances exist. In this case, the relevant department should provide a written explanation of the exceptional circumstances.
10. There have been a number of consultation timelines set by Government Departments that have been too short to allow the Law Council to contribute to the consultation process in a meaningful and considered manner, if at all. Examples of such consultations, along with consultations that have been conducted at times which limited public debate, are outlined in the table at the end of this submission. As noted

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<sup>2</sup> Department of the Prime Minister and Cabinet, *Engaging today for a better tomorrow – Draft Code of Best Practice for Engagement with the Not-for-Profit Sector*, March 2013, p.5. Available from <http://www.notforprofit.gov.au/sites/default/files/files/Engagement%20Code-for%20public%20consultation%20-%20Copy.pdf> (the Draft Code)

<sup>3</sup> *The Compact – The Coalition Government and civil society organisations working effectively in partnership for the benefit of communities and citizens in England*, 2010, paragraph 2.4, available from [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/61169/The\\_20Compact.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61169/The_20Compact.pdf)

<sup>4</sup> *Consultation Principles: Guidance*, 17 July 2012, available from [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/60937/Consultation-Principles.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60937/Consultation-Principles.pdf)

<sup>5</sup> Office for the Community and Voluntary Sector, New Zealand Government Department of Internal Affairs, *Ready Reference Engagement Guide: Supporting Government Agencies to engage effectively with citizens and communities*, July 2011, available from [http://www.goodpracticeparticipate.govt.nz/documents/ENGAGEMENT\\_GUIDE\\_FINAL.PDF](http://www.goodpracticeparticipate.govt.nz/documents/ENGAGEMENT_GUIDE_FINAL.PDF)

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in this table, some consultations by Government Departments have run for as little as two weeks. Other consultations have taken place over the Christmas holiday period in December and January.

11. The Law Council's ability to provide thorough and constructive feedback is significantly limited when consultations run for such short periods of time, or during periods when many of the people who would ordinarily respond to consultations are on leave. Two of the Law Council's Constituent Bodies, the Law Society of New South Wales (LSNSW) and the Queensland Law Society (QLS), have made similar observations in this regard, noting that the ability of the NFP sector to properly examine proposals and to usefully respond is necessarily limited when consultations – particularly those involving complex policy issues – provide for short response times, or where proposals are introduced at times that limit public debate.
12. The relevant New Zealand Guidelines encourage Government agencies to ensure they conduct consultations at times that do not limit public debate, noting in particular that “during Christmas and January, many people are on holidays and community organisations may not have anyone available to respond.”<sup>6</sup> The Draft Code frames its equivalent undertaking in considerably broader language than the New Zealand Guidelines, stating that the Government undertakes to:

*“Consider public holidays and other busy times for the sector, such as when AGMs are being held.”<sup>7</sup>*

13. Whilst the Law Council welcomes the Government's undertaking that it will consider public holidays and other busy times in scheduling consultations, the Law Council submits that the Draft Code would be strengthened through the inclusion of an undertaking that the Government will not conduct consultations at times that limit public debate, such as over the Christmas-New Year period, when many people are on leave.

## **Vagueness of language used in Draft Code**

14. Another concern that the Law Council has in relation to the Draft Code is the vagueness of the language that is used to convey what the Government and NFP sector undertake to do, as well as the acknowledgements by both the Government and NFP sector.
15. Examples of the broad and vague language used in the Draft Code are evident in the following undertakings:

The Government undertakes to:

- *Improve the way it publicises consultations both to the sector and across Government departments.*<sup>8</sup>
- *Keep all contributing organisations informed during the consultation process.*<sup>9</sup>

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<sup>6</sup> Ibid.

<sup>7</sup> Op.cit., Draft Code, p.5.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

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16. A number of the undertakings and acknowledgements in the Draft Code are drafted in a similarly broad way. The use of such language results in a perception of the Draft Code as a purely aspirational document rather than a firm commitment about how the Government will consult and engage with the NFP sector.
17. The Law Council submits that the Draft Code would be strengthened if it specified how the Government intends to carry out certain undertakings. In the context of the examples above, this would involve the Draft Code being amended to specify how the Government will improve the way it publicises consultations to the sector and across Government Departments, and how the Government will keep all contributing organisations informed during the consultation process. Examples of how these undertakings could be amended are outlined below:

The Government undertakes to:

- *Improve the way it publicises consultations both to the sector and across Government departments by:*
  - o *Ensuring Government department websites are updated once per week to publicise any new consultations; and*
  - o *Directly contacting NFP organisations with an interest in a particular consultation to inform them that the consultation has commenced, within two business days of the consultation being announced.*
- *Keep all contributing organisations informed during the consultation process by updating the relevant consultation webpage every week to reflect any changes in the consultation process.*

18. In addition to this, one of the Law Council's Constituent Bodies, the LSNSW, has expressed concern about the broad way in which certain acknowledgements that the NFP sector is deemed to have given have been drafted in the Code. Acknowledgements of particular concern include:

- *The sector acknowledges that there may be some policy decisions that are outside the scope of the consultation process and can't be influenced,<sup>10</sup> and*
- *The sector acknowledges that issues identified by the sector may not be seen as the highest priority by Government.<sup>11</sup>*

19. Based on the way that these acknowledgements are currently drafted, it is unclear which policy decisions may fall outside the scope of the consultation process and may not be able to be influenced. It is also unclear what type of issues identified by the NFP sector may not be considered a high priority by the Government, and how the Government would make such a determination.

20. The LSNSW considers that the consultation process may be negatively impacted if the Draft Code does not amend these acknowledgements to include greater detail, such as the types of policy decisions that would fall outside the scope of the consultation process, and how the Government intends to prioritise different policy issues. The

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<sup>10</sup> Ibid., p.4.

<sup>11</sup> Ibid., p.5.

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Office for the Not-for-Profit Sector should consider amending these acknowledgements when preparing the final version of the Code.

## Engagement and consultations with Indigenous people

21. The Law Council notes that the Draft Code suggests that when consulting with Indigenous groups, agencies should refer to the *Framework for Engagement between Australian Government Agencies and The National Congress of Australia's First Peoples*.<sup>12</sup> The Law Council also notes that the Department of Families, Housing, Community Services and Indigenous Affairs (FAHCSIA) has developed *Engaging Today, Building Tomorrow: A Framework for Engaging with Aboriginal and Torres Strait Islander Australians*<sup>13</sup> which is designed to assist Government agencies to effectively consult with Indigenous people.
22. It is noted that one of the shared principles outlined at the beginning of the Draft Code reiterates the Government's and NFP sector's commitment "to enduring engagement with marginalised and disadvantaged Australians, in particular, Aboriginal and Torres Strait Islander people and their communities."<sup>14</sup>
23. Two of the Law Council's Constituent Bodies, namely the LSNSW and the Law Society Northern Territory (LSNT), have expressed concern about the absence of any mechanisms in the Draft Code to ensure that the Government actually consults and engages meaningfully with Indigenous NFP organisations. The LSNSW submits that this should also include consultation with Indigenous small and medium enterprises.
24. The LSNSW also considers that the Draft Code lacks the mechanisms to ensure that any engagement with Indigenous NFP organisations is undertaken in compliance with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>15</sup> The LSNSW suggests that the 'Principles of Engagement' section on page 2 of the Draft Code should be amended to specifically mention that the Government is required to carry out consultations in a way that fulfils the rights of Indigenous people to self-determination and to consent and partnership in accordance with the relevant articles in the UNDRIP.<sup>16</sup>
25. In addition to this, the LSNT notes that the Code as drafted would not address its concerns with the consultations that were carried out by the Government with Indigenous legal service providers in relation to the Stronger Futures legislation and policy initiatives. These consultations were characterised by poor use of interpreters; holding consultation meetings on certain days when members of the Indigenous community were not able to attend; and inadequate consultation documents.
26. The Law Council submits that these issues should be considered in detail when the final version of the Code is being prepared.

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<sup>12</sup> Ibid., p.11.

<sup>13</sup> See <http://trove.nla.gov.au/work/152751296?selectedversion=NBD47223152>

<sup>14</sup> Op.cit., Draft Code, p.1.

<sup>15</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, A/61/L.67 and Add.1, Available from [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf)

<sup>16</sup> Ibid., Articles 3,4, 5,18, 20, 23 (self-determination) and 10, 11, 19, 28, 29 32 (consent and partnership). Available from [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf)

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## Evaluation of agencies' consultation processes

27. The Law Council is also concerned about the suitability of the process proposed in the Draft Code for evaluating agencies' consultation processes.

28. The Draft Code states that:

*Each Commonwealth agency has appointed a Compact Advocate, at the Deputy Secretary level, to implement the National Compact in their agency and support an open and positive relationship with the NFP sector. Compact Advocates should engage regularly with the Office for the Not-for-Profit Sector regarding the implementation of the National Compact and Code(s), with a particular emphasis on the implementation measures and complaints received. Agencies should note the number and breadth of these summaries in their departmental Annual Report.<sup>17</sup>*

29. One of the Law Council's Constituent Bodies, the QLS, has suggested that it may be more appropriate for the Australian National Audit Office (ANAO) to undertake any evaluation of agencies' consultation processes.

30. One of the main purposes of the ANAO is to "provide the Parliament with an independent assessment of selected areas of public administration, and assurance about public sector financial reporting, administration, and accountability...by conducting performance audits, financial statement audits, and assurance reviews."<sup>18</sup> The QLS notes that it was the National Audit Office in the United Kingdom which conducted an independent review of its National Compact in 2012.

31. The QLS considers that the Draft Code would be better evaluated by the ANAO to ensure that: there are no conflicts of interest; consultation has been impartial and based on objective determinations; the NFP sector's views and concerns have been adequately listened to and considered; and the Code has been complied with.

32. Issues that the UK National Audit Office considered, which could also be considered by the ANAO if it was given a similar role with respect to the Code, include:<sup>19</sup>

- The degree to which departments had systems in place to manage and direct their implementation of the Compact;
- The degree to which the Cabinet Office centrally managed and directed the implementation of the Compact; and
- The numbers of alleged complaints received about the Compact from civil society organisations.

33. The Office for the Not-for-Profit Sector may wish to consider this suggestion when finalising the Code.

34. The Law Council hopes that these comments are of assistance and looks forward to the release of the final version of the Code.

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<sup>17</sup> Op.cit., Draft Code, p.12.

<sup>18</sup> See <http://www.anao.gov.au/About-Us>

<sup>19</sup> UK National Audit Office, *Central Government's Implementation of the National Compact*, January 2012, p.27. Available from [http://www.nao.org.uk/wp-content/uploads/2012/01/National\\_Compact.pdf](http://www.nao.org.uk/wp-content/uploads/2012/01/National_Compact.pdf)

## Examples of time periods for consultations by Government Departments

Legislation/Consultation	Department	Announced	Submissions due	Comments
Proposals Paper - Taxation Relief to support the implementation of Stronger Super	Treasury	15 May 2012	6 June 2012	22 days
Review of the National Partnership Agreement on Legal Assistance Services	Attorney-General's Department	27 July 2012	17 August 2012	21 days
National Disability Insurance Scheme Rules	Department of Families, Housing, Community Services and Indigenous Affairs	5 March 2013	23 March 2013	18 days
Issues Paper - New reporting matters under the Workplace Gender Equality Act 2012	Department of Families, Housing, Community Services and Indigenous Affairs	21 December 2013	29 January 2013	Consultation conducted over Christmas/New Year period
Acquisitions and disposals of certain assets by SMSFs and related parties	Treasury	21 December 2013	16 January 2013	Consultation conducted over Christmas/New Year period

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## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Joe Catanzariti, President
- Mr Michael Colbran QC, President-Elect
- Mr Duncan McConnel, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Ms Leanne Topfer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.