

# Social benefit bonds – getting started

In developing a proposal for a social benefit bond (SBB), there are a number of legal and tax aspects that are helpful to consider early on so that your proposal can be effectively structured and implemented. This factsheet highlights some key points to help make sure your proposal is on the right track.

It also outlines a suite of sample standard form documents that can be used at the relevant stage for future SBBs with the NSW Government:

Stage of transaction	Relevant documents	Status
Proposal	Request for proposal	In development
Development	Joint development agreement	Available
Implementation	Implementation deed	Available
	Information memorandum (outline)	Available
	Terms and conditions of the bonds	Available
	Deed poll	Available
	Purchase agreement	Available
	Trust deed	Available
	Management deed	Available
	Drafting guidelines for a services subcontract	Available
	Direct agreement	Available
	Security deeds (including first security deed, second security deed, and priority and co-ordination deed)	Available

The Office of Social Impact Investment is providing samples of these documents to help make the drafting of legal documents more efficient and to reduce costs when developing and implementing transactions. They are based on our experience with social benefit bonds. Where indicated, a Creative Commons Licence has been granted in relation to the copyright in a document. The terms of this Creative Commons licence are in accordance with the relevant copyright notice specified for that document. Please refer to the relevant document.

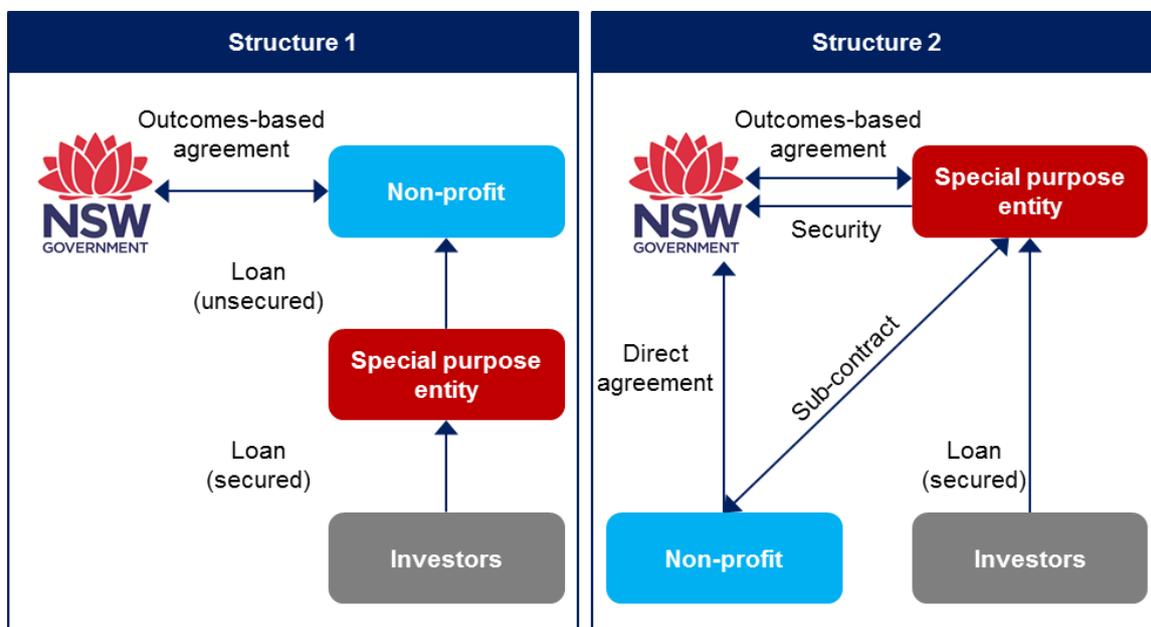
All sample documents are available on the [Social Impact Investment Knowledge Hub](#).

## 1. Legal arrangements between parties to NSW's SBBs

The NSW SBBs involved legal arrangements between:

- a NSW Government department (**department**),
- non-profit service providers and private sector participants (**proponent**, which can be a single participant or a group of participants acting together)
- private 'wholesale' investors (**investors**), who invested in the SBBs and will receive a return on their investment (as interest and the repayment of their invested amount) depending on the success of the project.

The structures of the NSW Government's first SBBs are shown below. However, other structures are also possible and will be considered if proposed.



In Structure 1, the department contracts directly with the proponent (a non-profit, in this case) through an outcomes-based agreement to deliver a service. The proponent issues the SBBs to investors (i.e. the 'loan' described above) directly or through a special purpose entity, an additional legal vehicle.

In Structure 2, the department contracts with a special purpose entity, also through an outcomes-based agreement, which issues the SBBs and engages the proponent via a sub-contract to perform the outsourced services.

For particular funding models, the NSW Government may require a first ranking security (i.e. a security that has priority over other security interests that may be granted) to be provided in relation to certain payment obligations. For example, where under the outcomes-based agreement there are substantial prepayments by the department, or there may be substantial repayments upon default by the proponent, and where investors are offered security over any assets as a commercial term of the SBBs. However, security will not be required by the NSW Government in all cases.

## 2. Sample standard form documents

The Office of Social Impact Investment is making available a suite of sample standard form documents that can be used when developing and implementing SBBs. Many of the documents to be made available are described in the table below.

Table 1. Suite of standard form documents for SBBs

Document	What it does?	Who are the parties?	Which structure?
<b>Deed of Implementation Agreement</b>  (or Implementation Deed)	<p>Sets out the contractual arrangements with the relevant department for the provision of services and the issue of the SBBs. It will be prepared by the NSW Crown Solicitor's Office (<b>CSO</b>).</p> <p>The Operations Manual to be negotiated by the proponent and the department will eventually form part of this document. Schedule 4 of the Implementation Deed sets out what matters will be included in the Operations Manual. The Operations Manual will be developed alongside the Implementation Deed, but must be completed prior to the commencement of the services. It will be jointly prepared by the proponent and the department.</p>	The proponent and the relevant department	1 & 2
<b>Information Memorandum</b>	<p>An offering document provided to potential investors.</p> <p>It describes the proponent, the proposed services, and the terms and conditions of the SBBs. It will be prepared by the proponent.</p>	The proponent	1 & 2
<b>Deed Poll</b>	Creates the proponent's legal 'promise' to investors to perform its obligations under the SBBs. It will be prepared by the proponent.	The proponent	1 & 2

Document	What it does?	Who are the parties?	Which structure?
<i>If you are developing a transaction which involves a special purpose entity...</i>			
<b>Trust Deed</b>	Creates a charitable trust, which can act as a special purpose entity and assume the role of the proponent in each of the documents described above. It will be prepared by the proponent.	The proponent, a settlor and a trustee	2, optional for 1
<b>Services Subcontract</b>	An agreement that provides for how the proposed services will be provided by the proponent. It will be prepared by the proponent and used when the implementation agreement is between the department and the special purpose entity. Drafting guidelines for this document will be provided.	The proponent and the special purpose entity	2 only
<b>Direct Agreement</b>	Creates direct legal arrangements between the proponent and the department. This is required for any transaction structure where the implementation agreement is between the department and the special purpose entity. It will be prepared by the CSO.	The proponent and the relevant department	2 only
<i>If you are developing a transaction which involves a funding model where the NSW Government will need to take security...</i>			
<b>Security Deeds</b>	<p>Sets out arrangements for first ranking security to be provided by the proponent to the department. It will be prepared by the proponent.</p> <p>You may also consider whether second ranking security may be a commercial requirement of the investors. In this case, arrangements for the ranking of each security will be set out in a Priority and Co-ordination Deed.</p>	The proponent and the relevant department (and/or a third-party security trustee for the investors, as required)	Optional for 1 & 2

The suite also includes:

- a Purchase Agreement (which can be used with the initial offer and sale of the bonds)
- a Management Deed, for transactions where a special purpose entity created under a Trust Deed is to be used, which provides the arrangements for how the special purpose entity is to be managed.

While the intention is to use the sample Implementation Deed and Direct Agreement as the basis for preparing the actual documents for each transaction, they may not be suitable in all circumstances.

The NSW Government reserves the right to amend or to depart from these sample documents to:

- address the specifics of any particular SBB arrangement
- address the current market practice and conditions
- protect the interests of the relevant department, agency or other State body, and the State, as otherwise necessary.

### 3. Some key considerations

The following highlights some key matters to consider when developing a proposal for a SBB. This list can provide a starting point for discussions with your legal, tax and other professional advisers. However, there may be other matters that you will need to consider throughout the proposal, delivery and measurement process.

- **Are the proposed services legally able to be performed by a third-party?**

You will need to consider whether each aspect of the services proposed to be performed under your proposal is able to be 'outsourced' by the NSW Government. Keep in mind that, even if allowed, the NSW Government may still owe a non-delegable duty to ensure that third-parties take reasonable care when performing particular services that form part of the proposal. A strong proposal may contemplate how these responsibilities will be properly discharged by the proponent.

- **Is the information needed to measure the social outcomes of your project legally available?**

In designing the measurement framework for your proposal, you should consider whether the data and information required will be available, or whether privacy and other laws or confidentiality issues will prevent it being obtained and used. See clauses 32 to 35 of the Implementation Deed for the standard provisions relating to these matters. See also [Principles for social impact investment proposals to the NSW Government](#) for more on measuring outcomes.

- **Do you have all the licences you need?**

Proponents are responsible for obtaining and maintaining all authorisations and licences required to provide the proposed services.

Be mindful that there are a few activities relating to the launch and performance of a SBB transaction that may require proponents to hold an Australian financial services licence (or AFSL) (or to qualify for an exemption from needing to hold an AFSL).

- **Who are the target investors and are there requirements to offer bonds to them?**

You should consider whether there are any specific disclosure requirements and AFSL issues for offering the SBBs to particular target investors. The standard documents are prepared for offers to 'wholesale' investors generally. However, additional requirements may apply for offers to particular kinds of investors.

- **If you are using a new special purpose entity, have you done everything required to get it up and running?**

Once the special purpose entity is established, you will need to attend to all necessary registrations, such as:

- applying for an Australian Business Number (ABN)
- registering for GST
- registering with the Australian Charities and Not-for-profits Commission (ACNC) for charitable trusts or other charitable entities.

- **Do you understand each of the obligations and liabilities to be assumed as part of the transaction?**

Your board of directors may wish to understand your position as proponent and their personal liability as officers regarding obligations and liabilities that are assumed under the legal documents (e.g. see clause 18 of the Implementation Deed) and also for misstatements made in the offering materials.

- **Have you thought about insurances?**

You should speak with your broker about the insurances that you are likely to need for the services you propose to provide. For particular arrangements, the NSW Government will need to be named as a beneficiary on the policy. See clause 19 and Part 10 of Schedule 1 of the Implementation Deed for an indication of what will be required.

- **What tax rules will apply to any payments made by the NSW Government and the funding provided by the investors?**

You should fully understand the tax implications for payments and receipts made under the legal documents and in connection with the offering and performance of the bonds.

It may also be possible for the conditions of the bonds to provide tax incentives for bond investors (e.g. where they donate principal or interest on the bonds).

All such options and requirements should be discussed with your tax advisers.

- **Will stamp or mortgage duties be payable?**

The potential stamp and mortgage duty position should be understood, particularly where your transaction involves a grant of security. Liability for such duties and taxes can be substantial.

- **What conditions precedent are you likely to need to satisfy after the Implementation Deed has been signed?**

You should carefully consider whether there are particular matters that you can resolve early on as part of your proposal, or otherwise at the time that the Implementation Deed is signed, to reduce the number of conditions that need to be satisfied to activate all obligations under the Implementation Deed (and make them 'unconditional'). This is because if you are late to fulfil any of these conditions after signing, and the condition is not waived by Government, it is

possible for the Implementation Deed and your project to be terminated. See clause 3 of the Implementation Deed for the standard provisions relating to these matters.

Your legal advisers will need to deliver legal opinions to the NSW Government. Example forms are included in Schedule 6 of the Implementation Deed (although, these forms do not limit the opinions that may be required for a particular transaction).

- **If your proposal involves a third-party trustee or agent, have you taken their interests into account?**

If you are using a special purpose entity and are to engage a third-party to act as a trustee or agent, you should ensure that they are comfortable with the obligations, liabilities and limitations set out in the suite of standard documents (e.g. see clause 38 of the Implementation Deed).

If the bonds are to be traded through the local bond clearing system (the Austraclear System), your organisation may need to engage an agent to help create the bonds and make payments on the bonds in the system. You would likely need to enter into a formal agreement with the agent for these services, which will be in the agent's standard form and should be able to be provided on request.

**This document does not provide legal, tax or other professional advice and should not be relied on –** you should seek your own professional advice. It is for information only and does not take into account the objectives, circumstances or particular requirements of any person, organisation, project or transaction.