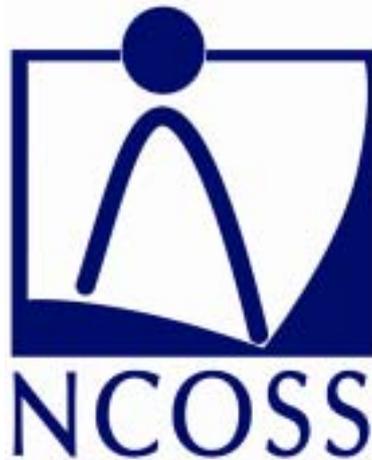


**Submission on the Exposure Draft
Associations Incorporation Bill 2008**



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About NCOSS

The Council of Social Service of NSW (NCOSS) is an independent non-government organisation (NGO) and the peak body for the non-government human services sector in NSW.

NCOSS has a vision of a society where there is social and economic equity, based on cooperation, participation, sustainability and respect. NCOSS works with its members on behalf of disadvantaged people and communities towards achieving social justice in New South Wales.

Established in 1935, NCOSS is part of a national network of Councils of Social Service, which operate in each State and Territory and at the national level.

NCOSS membership is composed of community organisations and interested individuals. Through current membership forums, NCOSS represents more than 7,000 community organisations and over 100,000 consumers and individuals. Member organisations are diverse; including unfunded self-help groups, children's services, registered training authorities, emergency relief agencies, chronic illness and community care organisations, family support agencies, housing and homeless services, mental health, alcohol and other drug organisations, local indigenous community organisations, church groups, peak organisations and a range of population-specific consumer advocacy agencies.

Sector Development at NCOSS

The NCOSS Sector Development Unit works to comprehensively support the sector to effectively operationalise its social justice objectives and values. We aim to proactively enable and resource the development of a high quality and effective community sector through industry services, advocacy, research and policy development.

The major goals of the Sector Development Unit are to:

1: Support and resource the ongoing development of a high quality and effective community sector.

2: Positively influence key government policies that impact on the sustainability, capacity and vitality of the community sector.

Given our direct role in improving the sustainability and vitality of the non government human services sector, NCOSS has a significant investment in the proposed amendments contained in the Associations Incorporation Bill 2008. Of the 37,000 registered associations in New South Wales, approximately 6,400 are part of our sector. An effective and supportive regulatory framework is essential to these organisations; one that is aligned to

the needs of contemporary NGOs and the critical role of most of them in delivering essential services on behalf of Governments and promoting social inclusion at the community, regional and state levels.

NCOSS, along with several other key stakeholders, provided a submission to the Review of the Incorporated Associations Act 1984 in 2003. As the recommendations from this review, which have presumably informed the proposed amendments, have not been made public, the rationales for some of the changes remain unclear.

NCOSS recommends that the recommendations from the review in 2003 be made publicly available.

The following comments are designed to inform the proposed amendments and recommend areas for further consideration:

1. Powers to change a name and name reservation.

As this amendment aims to prevent misrepresentation in instances where the name suggests a link with the Crown, is similar or the same as another association or includes offensive words and includes a right to appeal to the Administrative Decision Tribunal, this proposed change seems reasonable.

2. Residency requirements on Management Committee

The new provision that the committee includes least three members who are over 18 and resident in Australia is considered a responsible change. However as the current Act requires that the public officer is resident in Australia and the Bill also proposes to conflate the role of public officer and secretary (see below), it appears inconsistent that the Bill does not include the same residency requirement of the proposed new and expanded role of secretary.

3. Statutory duties of Management Committee

There is a need for greater definitional clarity; while there is a list of definitions in the preliminary section (Part 1) it would benefit from simpler language. The proposed amendment imposes *statutory duties of care, diligence, honesty and disclosure of interest on members of the management committee* and enables Commissioner for Fair Trading to take action where the duties and requirements are breached. (Clauses 29 – 33). While this change is intended to promote ethical standards, an objective that NCOSS fully supports, it is questionable whether this is the role of the Office of Fair Trading, at least to the extent detailed in the proposed amendment.

In addition NCOSS has concerns about the Office of Fair Tradings capacity (in terms of resources) to monitor and administer in this area. Apart from those with specific legal training, it is also likely that some of these terms, e.g. 'diligence', will be understood and interpreted in a variety of ways.

Consequently what constitutes both a breach and best practice may require further consideration.

NCOSS recommends that a comprehensive education program, particularly aimed at small NGOs, should be undertaken if and before such a change is enacted.

The substantially increased penalty regime for failure to comply, including additional criminal sanctions and jail terms, is unacceptable. It also appears that penalties under these clauses can be imposed by the Director General without the matter going to court, in a similar manner to a parking ticket. In addition there is no requirement to demonstrate that harm, loss or damage has actually occurred as a result of these transgressions, simply which a breach occurred. (e.g. Clause 33 – Negligence).

It should be noted that in those situations where there has been a breach but no loss or damage, committees already have the option of removal and the membership has the right not to re-elect. In the case of serious breaches, there are already existing remedies available under the *Crimes Act*.

The management committees of community services that will be affected by the proposed changes are comprised of voluntary members, the vast majority of whom make a substantial contribution their communities well being. These proposed changes to the statutory duties of these committees, and the punitive penalty system that underpins it, is very likely to seriously discourage current and future citizen participation in community management committees. An 'extra level of criminalization to regulate the behavior of community volunteers- especially if their behaviour does not result in any actual loss or harm'¹ is not only unwarranted, it is likely to be harmful.

There are also specific concerns regarding '*an act done by a former committee member purporting to act as a committee member*' (clause 27). According to this clause if a former member of a committee purports to still be a member of that committee and enters into a contract with a third party, then the 'act is valid', which translates that the liability rests with the committee. In this instance the former member of the committee, who has acted in a fraudulent manner, should be liable for his/her acts.

NCOSS recommends that Clause 27- (5) be deleted.

4. Meetings

The provision to hold a meeting at two or more venues using current technology is a positive change and likely to be of particular benefit in rural locations and to those committees with rural and regional members.

In relation to the provision for voting on resolutions by postal vote it should be noted it is already an option for associations to include this in their rules and

¹ Submission to the Review of Associations Incorporation Act, (2008). Wheeler. G.

fairly common practice. The decision to adopt a postal voting should remain optional.

5. Secretary/Public Officer

The proposed conflation of the roles of public officer and secretary via the deletion of the role of public officer and the flow-on expansion role for secretary is problematic. Consultations with NCOSS members indicate that it is very common for these positions to perform separate roles and this is stipulated in their constitutions. If the proposed expanded role of secretary must be included in an association's constitution, this will require changes and associated costs, which many NGOs do not support.

In addition there is likely to be considerable confusion regarding the method of filling vacancies; under the current Act (1984) the public officer is appointed by the committee and the Bill enables the position of secretary to be appointed by the committee or elected by members. Given this situation the requirement to elect a new secretary within 28 days (or incur a penalty) is considered unreasonable; should the association be either required by its current rules to elect the Secretary, then this time frame is insufficient. If the proposed conflation of secretary and public officer proceeds, then many associations may be unclear about the method of replacing the secretary; that is election or appointment.

Feedback from NCOSS members has also raised concerns about combining the roles of secretary and public officer. The combination of the secretary and public officer roles is not common practice in the human services NGO sector. Many small NGOS already experience difficulty filling the role of secretary; consequently adding the additional functions of the public officer to this position is likely to exacerbate the current difficulties of attracting a suitable person to fill the role.

NCOSS has also been advised by its members that many NGOs appoint the manager/CEO as public officer while the role of secretary must be held by a member of the committee. As an employee (i.e. manager) cannot be the secretary, the proposal to combine the role of public officer and secretary will translate as more work for the secretary and less flexibility for the organisation in its allocation of tasks. NCOSS sees little benefit from the proposal to conflate these two positions.

NCOSS recommends further consultation on this issue and a reassessment of the perceived benefits of deleting the role of public officer.

6. Financial reporting requirements

The current provision allows associations to hold their annual general meeting (AGM) within 6 months of the end of their financial year and lodge their annual return within one month of the AGM. It appears that one for the proposed changes is to reduce the period between the end of the financial year and the AGM to 5 months. There are also significantly increased penalties attached. NCOSS does not support this change and questions the rationale and perceived benefits.

While the proposed two tier reporting system that distinguishes between small and medium associations is a positive step, it is noted that the penalties for non compliance with financial reporting requirements have more than doubled. As with most of the proposed penalties in the Bill, NCOSS regards this increase as excessive.

It is recommended that the definition of 'small' is clear and consistent with that of the major funding agencies; for example one major NSW funding agency defines small as an NGO with less than \$1 million turnover per annum. This threshold should also be reviewed annually.

NCOSS recommends that the period of time for associations to hold their AGM remain at 6 months from the end of their financial year and that the definition of 'small' is rendered consistent with other NSW Government agencies.

7. Common Seal

The proposed removal of the requirement to have a common seal is a positive step and one NCOSS would encourage other government agencies to follow suite and delete this requirement from funding agreements.

Related Issues

A. Amendment already enacted (Associations Incorporation Amendment – (Cancellation of Incorporation) Act 2007

NCOSS is aware that the provisions regarding involuntary cancellation of an association's registration commenced in October 2007 and would like to take this opportunity to raise our concerns.

Grounds for involuntary cancellation include the committee not having at least 3 members over 18 years of age and resident in Australia; not holding an AGM or submitting a return or failure to comply with a direction to change its name. As at least one of these grounds (the first) is currently a proposed amendment for public comment, NCOSS assumes that no association has had, or will have, its incorporation cancelled on preemptive grounds.

It is also noted that the amendment does not take account of recommendations submitted by NCOSS in June 2007 (please find attached). These included

- Retention of the requirement for the Director General to publish a notice of cancellation in a newspaper and not only the gazette, which few members of the general public are aware of or read. NCOSS also recommended that the notice be delivered to the organisation concerned and located on the Office of Fair Trading website.

- Maintaining the timeframe for associations to respond to notices at two months rather than the reduction to 28 days.

As other amendments are now being considered, it may perhaps be timely to revisit the above amendment.

B. Changes in the philosophy and focus of the Associations Incorporation Act.

NCOSS shares the concerns expressed by Mr. G Wheeler in his submission to the Office of Fair Trading; these include;

- The removal of the Minister's power to direct an association to become incorporated under the *Corporations Act* or the *Cooperatives Act*.
- The removal of the restriction on trading by Associations.
- The shift to now regulate large associations.

This apparent reorientation of the Act to accommodate large commercial associations is of significant concern to NCOSS and its members. When first introduced in 1985, the Act was explicitly intended to provide 'a cheap and simple alternative to incorporation as a company limited by guarantee'. This need still exists, particularly for small to medium sized non-profit associations and the larger trading associations are sufficiently served in their requirements by the *Corporations Act*.

In our opinion the move to accommodate larger associations introduces two tensions into the Act; firstly it is likely that over time the Act will effectively replicate the system already available under the *Corporations Act* and secondly, such an accommodation will skew the intention of the Act away from the needs of small associations.

The Act already encompasses a very broad range of types of associations, including small sporting groups and funded community service NGOs. In our view stretching the Act to also meet the requirements of large trading associations would be likely to over bureaucratize the legislation for smaller associations and duplicate a system that already exists for the large associations.

Indeed NCOSS would suggest that the Act would benefit from making clearer distinctions between the needs and accountability requirements of its existing base, rather than seeking to extend its application to larger associations.

C. Compliance and the Growth in Penalties.

At the same time as many of the proposed amendments seek to impose tighter timeframes and accountability on associations, there is a

corresponding substantial increase in both new and increased penalties. NCOSS appreciates the current difficulties with levels of non-compliance by some incorporated associations and that in some instances penalties are warranted. However the penalty regime proposed in the Act is excessive and unlikely to achieve the desired outcomes.

The Victorian Governments recently released plan for strengthening community organisations in that state² includes strategies for 'reducing the regularly burden' on NGOs, which includes reform of the Associations Incorporation Act (1981). This builds on the review of not-for-profit regulation undertaken in 2007³. The review took the broad view of Government regulation, contractual and accountability requirements placed on NGOs by the Victorian Government. It also focused on ways to reduce the regulatory burden while maintaining appropriate levels of accountability and transparency.

NCOSS encourages the Office of Fair Trading to adopt a similar approach, one that locates the amendments in the Bill within the broader context of the overall compliance regime that forms a critical part of the relationship between the New South Government and the human services NGO sector. Such an approach has the potential to reduce duplication, clarify intersections and definitions and reduce the transaction costs for both Government and the NGO sector.

NCOSS recommends that the Office of Fair Trading consider less punitive approaches than increased penalties, including education and awareness programs. To maximise compliance, it is also recommended that any new legislation is not so onerous that it unlikely to be met by many associations. It is also suggested that this re- assessment is undertaken within the context of a 'whole of Government' consideration of the existing regulatory framework and its impact on the NGO sector.

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² The Victorian Governments Action Plan: Strengthening Community Organisations; Victorian Government, April 2008.

³ Review of Not-for-Profit Regulation, Final Report Victorian Government, 2007.

