

Associations Incorporation Regulation 2016

Regulatory Impact Statement: Submission of the NSW Council of Social Service (NCOSS)

28 July 2016

About NCOSS

The NSW Council of Social Service (NCOSS) works with and for people experiencing poverty and disadvantage to see positive change in our communities.

When rates of poverty and inequality are low, everyone in NSW benefits. With 80 years of knowledge and experience informing our vision, NCOSS is uniquely placed to bring together civil society to work with government and business to ensure communities in NSW are strong for everyone.

As the peak body for health and community services in NSW we support the sector to deliver innovative services that grow and evolve as needs and circumstances evolve.

Published July 2016.

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Introduction

NCOSS welcomes the review of the Associations Incorporation Regulation 2010. The rationale to review and where necessary remake the regulation is sound, as is the objective to ensure that:

The Act is designed to find a balance between freedom and flexibility for associations to establish themselves and to operate while ensuring there are sufficient safeguards in place to an appropriate level of governance. (Associations Incorporation Regulation 2016: Regulatory Impact Statement p7)

The review is an opportunity to consider the red tape reduction adopted by the ACT and South Australian Governments and follow their lead by transferring oversight of “charitable” associations to the Australian Charities and Not-for-profits Commission (ACNC). This would substantially reduce the workload of Fair Trading NSW’s Registry Services and would reduce costs and red tape for NSW charitable associations.

Much of the content of the review has been driven by the amendments to the *Associations Incorporation Act 2009* that will become law in September 2016. However this is also an opportunity to ensure that a reasonable person is able to comply with its requirements and not place either themselves or their organisations at risk.

Unless otherwise stated the clauses, schedules and the model constitution referred to in this submission relate to the proposed *Associations Incorporation Regulation 2016*.

Response to RIS questions

1. Are the procedures for electronic and postal voting set out in clause 13 and Schedule 3 fair and reasonable? If not, what procedures would be preferable and why?

The introduction of electronic voting is very welcome freeing incorporated associations to utilise current technology. The instructions as set out in clause 13 and Schedule 3 are clear and easy to follow.

2. Are the procedures for keeping of accounts and minutes of proceedings in clause 14 reasonable? If not, what procedures would be preferable and why?

The wording of clause 14 is clear. NCOSS however notes that a large percentage of Incorporated Associations in NSW are charitable organisations and are required to comply with ACNC requirements and as such hold accounts and minutes of proceedings for a period of not less than 7 years. To avoid confusion and reduce red tape, it would assist these organisations if the periods were consistent. NCOSS recommends that clause 14 *Keeping of accounts and minutes of proceedings* part (1) (b) be changed to a period of not less than seven years.

Recommendation:

- 1. Reword clause 14 *Keeping of accounts and minutes of proceedings* part (1) (b) and align the period of retention with ACNC requirements to a period of not less than 7 years.**

3. *Is the effect of clause 19 clear?*

Clause 19 is not clear and requires clarification.

Without having read clause 4 of Schedule 4 of the *Associations Incorporation Act 2009* or the information in the Regulatory Impact Statement, most organisations would have little understanding of its potential impact, particularly as it does not specifically reference the 1984 Act.

The clause would be clearer if both parts of clause 4 of Schedule 4 of the *Associations Incorporation Act 2009* were spelt out either within the clause or in notes attached to the clause and include a clear reference to the *Associations Incorporation Act 1984*. This would then provide the context that is needed to make sense of the alternative clause 47 *Financial year*.

Recommendation:

- 2. Redraft clause 19 *Transitional provision relating to financial year clause in model constitution* is clear to ensure its meaning is clear and include a reference to the 1984 Act.**
- 4. *Does the substitute provision for the financial year in the model constitution adequately address the issue for those associations registered under the former 1984 Act?***

With the changes noted above, the clause should adequately address the issue for those associations registered under the former 1984 Act.

However, detail within the proposed alternative clause 47 requires clarification. The alternative clause could be read to understand that financial years can be for a period up to 18 months, not just as part of a transition process but long term.

NCOSS recommends that the alternative clause 47 be redrafted to make it clear either that financial years can be up to 18 months or that a financial year can be up to 18 months but only as part of a transitional process.

Recommendation:

- 3. Redraft clause 19 *Transitional provision relating to financial year clause in model constitution* to spell out both parts of clause 4 of Schedule 4 of the *Associations Incorporation Act 2009* including a clear reference to the *Associations Incorporation Act 1984*.**
- 4. Redraft the alternative clause 47 in clause 19 *Transitional provision relating to financial year clause in model constitution* to either make it clear that financial years can either be up to 18 months or that this can only occur as part of a transitional process.**

5. Do the matters proposed in the model constitution properly address the requirements under Schedule 1 of the Act? If not, which matter(s) and why?

In general, what has been included does appear to address the requirements under Schedule 1 of the Act (please see response to Q6). However there are two clauses under *Schedule 1 of the Associations Incorporation Amendment (Review) Act 2016* that are not reflected in the model constitution.

a. [9] Section 25 Provisions of model constitutions apply if adopted or if matter not addressed

NCOSS acknowledges there is a similar clause in the current 2009 Act. However it is likely that many associations that use the model constitution would be unaware of these provisions. Whilst many of the 2016 amendments relate to processes (eg utilising electronic technology), others could lead to non-compliance with the Act (eg retention of minutes and financial records). NCOSS recommends that a clause be included in Part 1 *Preliminary* of the model constitution reflecting *Section 25* and all existing associations be informed of this clause before the new legislation is enacted.

Recommendation:

5. Draft a clause to be included in Part 1 *Preliminary* of the model constitution reflecting [9] *Section 25 of the Associations Incorporation Amendment (Review) Act 2016*.
6. Fair Trading NSW to contact all existing associations to inform all associations of the purpose and intent of [9] *Section 25 of the Associations Incorporation Amendment (Review) Act 2016* before the new legislation is enacted in September.

b. [12] Sections 30A and 30B Duties and liabilities of committee members

The model constitution specifically outlines the duties of the secretary (clause 16) and the treasurer (clause 17). There are also references to the duties of the Public Officer (clauses 1 (1)(b), 43 and 44(b)). However there is no statement similar to in Section 30A of the *Associations Incorporation Amendment (Review) Act 2016*:

It is the duty of each committee member to carry out his or her functions for the benefit, so far as practicable, of the association and with due care and diligence.

In clause 9 Members' liabilities the model constitution does refer to members' liabilities but only in terms of payment of costs, charges and expenses associated with winding up. It does not reflect the definition of member liabilities in Section 30B of the *Associations Incorporation Amendment (Review) Act 2016*:

A matter or thing done or omitted to be done by a committee member, or by a person acting under the direction of a committee member, does not, if the matter or thing was done or omitted to be done in good faith for the purpose of exercising the committee member's functions under this Act, subject the

committee member or person so acting personally to any action, liability, claim or demand.

As a large percentage of committee members of associations are unlikely to access governance training and may be unaware of these duties and their liability as stated in Sections 30A *Duty of committee members* and 30B *Personal liability of committee members*, NCOSS recommends that clauses reflecting Section 30 A and 30B be included in Part 3 *The committee* of the model constitution.

Recommendation:

- 7. Draft clauses to be inserted in Part 3 *The committee* of the model constitution reflecting [12] Section 30A and 30B of the *Associations Incorporation Amendment (Review) Act 2016*.**

6. Do you support the changes made to the model constitution? If not, explain which change you do not support and why?

The clauses supporting the use of electronic technology are very welcome. These include the use of electronic technology for receiving and accepting nominations, voting, storing minutes, the use of electronic signatures, holding meetings, including AGMs, serving notices and utilising electronic banking. These align governance and management of incorporated associations with current practice.

NCOSS also welcomes the inclusion of clause 41 *Association is non-profit*.

NCOSS recommends the following changes to the model constitution:

a. Clause 10 *Resolution of disputes*

As committee members on many boards are unlikely to have access to legal advice, it is recommended that part (3) be redrafted to not just refer to the *Commercial Arbitration Act 2010* but explain its relevance to the resolution of a dispute.

Recommendation:

- 8. Redraft part (3) of clause 10 *Resolution of disputes* to spell out the purpose of the reference to the *Commercial Arbitration Act 2010* in relation to the resolution of disputes.**

b. Clause 18 *Casual vacancies*

To provide clarity and ensure a correct interpretation, it is recommended that both parts (2) (c) and (2) (i) be redrafted to spell out the relevant parts of the *Corporations Act 2001*.

Recommendation:

- 9. Redraft part (2) (c) and (2) (i) of clause 18 *Casual vacancies* to spell out the relevant parts of the *Corporations Act 2001*.**

c. Clause 21 *Committee members may appoint other committee members*

It is not clear how this clause differs from clause 18 *Casual vacancies*. It is recommended that notes be inserted to explain the point(s) of difference.

Recommendation:

- 10. Redraft or attach notes to clauses 18 *Casual vacancies* and 21 *Committee members may appoint other committee members* to clarify how filling a casual vacancy differs from committee members appointing other members.**

d. Clause 27 *Special general meetings – calling of*

Part (3) (b) refers to the document being signed by members. To align with clause 16 *Secretary* part (4), NCOSS recommends that clause 27 be redrafted to enable requisitions of members for a special general meeting be able to be signed digitally.

Recommendation:

- 11. Redraft clause 27 *Special general meetings – calling of* to enable requisitions of members for a special general meeting to be signed digitally.**

e. Clause 28 *Notice*

In part (2) there is a reference to special resolutions. There is no link to clause 33 which provides additional information about special resolutions. To provide greater clarity NCOSS recommends that clause 28 specifically refer to clause 33.

Recommendation:

- 12. Redraft part (2) of clause 28 *Notice* to link to clause 33 *Special resolutions*.**

f. Clause 33 *Special resolutions*

Rather than reference clause 39 of the *Associations Incorporation Act 2009*, NCOSS recommends the requirements of the Act be explicitly stated. NCOSS also recommends that the purpose and definition of a special resolution be briefly outlined.

Recommendation:

- 13. Redraft clause 33 *Special resolutions* to explicitly state the requirements of clause 39 of the *Associations Incorporation Act 2009* and provide a succinct definition and the purpose of special resolutions.**

g. Clause 42 *Distribution of property on winding up of association*

NCOSS welcomes this clause but recommends that part (1) be changed to include any non-profit organisation with similar objects and not be restricted to associations.

Part (2) refers to property. Not all organisations would necessarily assume this also includes unexpended monies. NCOSS recommends that either the term “property” be changed to “assets” (as per Fair Trading NSW’s webpage on [Voluntary Cancellation](#)) or the clause be redrafted to include the phrase “unexpended monies” or similar.

Recommendation:

- 14. Redraft clause 42 *Distribution of property on winding up of association* part (1) to include any non-profit organisation with similar objects.**
- 15. Redraft clause 42 *Distribution of property on winding up of association* part (2) to either replace the term “property” with “assets” (as per Fair Trading NSW’s webpage on [Voluntary Cancellation](#)) or include the phrase “ and unexpended monies” or similar, after “property”.**

h. Clause 44 *Custody of books*

As it currently stands clause 44 precludes the capacity to store records in computing clouds. It is recommended that this be extended in line with the other changes enabling associations to utilise electronic technology.

Recommendation:

- 16. Redraft clause 44 *Custody of books* to enable associations’ capacity to utilise electronic technology to store records in computing clouds.**

7. *Are there any other circumstances in which a name should be declared unacceptable? If so, what are the circumstances and why?*

NCOSS agrees with the intent of the schedule and suggests no further changes.

8. *Are the voting procedures clearly expressed and easy to understand? If not, which procedure(s) is/are difficult to understand and explain how it can be improved?*

Please see response to Question 1.

9. *Is the method in which electronic voting may be conducted (email or accessing a voting website) sufficient? If not, what other electronic voting methods should also be permitted?*

NCOSS agrees with the intent of the schedule and suggests no further changes.

10. Are there other ways the voting procedures can be improved? If so, what are they?

NCOSS agrees with the intent of the schedule and suggests no further changes.

11. Are the new fees for applications to register an association or change its name (if the name has previously not been reserved) reasonable? If not, why?

On the surface the justification for the fees appears reasonable. However, many associations are also charitable organisations required to not only comply with the *Associations Incorporation Act 2009* but, along with other charitable organisations including companies limited by guarantee, charitable trusts, etc, are also required to comply with the *Australian Charities and Not-for-profits Commission Act 2012*. Oversight for organisations registered under the Corporations Act 2001 has been transferred from ASIC to the ACNC and these organisations are no longer required to pay fees for registration or lodgement of financial reports, etc. In general, these organisations are substantially larger in terms of size and income than charitable organisations registered as associations. They have far greater capacity to pay fees and charges but are not required to do so.

In this light, the proposed fees for registration appear unreasonable and unwarranted.

NCOSS recommends that oversight of charitable NSW associations be transferred to the ACNC. In doing so it would not only reduce their costs it would also reduce red tape in the form of unnecessary additional compliance.

Recommendation:

17. To reduce costs and red tape regulatory oversight of charitable NSW associations be transferred to the ACNC.

12. Are the other changes to the fee amounts appropriate? If not, which fee amounts are inappropriate and why?

The fee of \$5.00 per application for item 6 *Maximum fee for inspection by any member of an association of the book recording disclosure of interest by a committee member* (section 31 (3) of the Act) has not increased since 2010. Based on the argument used to support Fair Trading NSW's fee rises, this seems unreasonable. It neither reflects the work involved nor the costs. It is also sufficiently low to potentially invite vexatious applications.

NCOSS recommends that the fee be doubled to \$10.00 per application.

Recommendation:

18. To better reflect the cost of organising for the inspection of the Disclosure of Interest book, the fee attached to item 6 *Maximum fee for inspection by any member of an association of the book recording disclosure of interest by a committee member* be increased to \$10.00.

Other comments

1. **Clause 15 *Application for transfer registration declaration***

NCOSS welcomes the removal of the requirement to include in the registration application evidence that the association's funding bodies have been advised of the transfer. As the Regulatory Impact Statement notes, "*this is a matter for the association and funding bodies and is not relevant to the making of the transfer declaration*".

2. **Plain English drafting of model constitution**

Organisations that choose to incorporate under the Associations Incorporation Act 2009, as observed on the Fair Trading NSW website, are small non-commercial community groups. A large percentage is recreation or sporting groups. Most will have, at best, limited access to legal advice. Consequently it is important that the Act, s but most particularly the model constitution be drafted in plain English, avoid legal terms such as "natural person" and remove references to superseded technologies eg minute books and facsimile transmission.

NCOSS recommends that the model constitution be redrafted in plain English, removed references to superseded technologies and avoid legal terminology and phrasing to assist comprehension and avoid confusion.

Recommendation:

- 19. Redraft the model constitution in plain English, removed references to superseded technologies and avoid legal terminology and phrasing to assist comprehension and avoid confusion.**

Summary of Recommendations

1. Rephrase clause 14 *Keeping of accounts and minutes of proceedings* part (1) (b) and align the period of retention with ACNC requirements to a period of not less than 7 years.
2. Redraft clause 19 *Transitional provision relating to financial year clause in model constitution* is clear to ensure its meaning is clear and include a reference to the 1984 Act.
3. Redraft clause 19 *Transitional provision relating to financial year clause in model constitution* to spell out both parts of clause 4 of Schedule 4 of the *Associations Incorporation Act 2009* including a clear reference to the *Associations Incorporation Act 1984*.
4. Redraft the alternative clause 47 in clause 19 *Transitional provision relating to financial year clause in model constitution* to either make it clear that financial years can either be up to 18 months or that this can only occur as part of a transitional process.

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5. Draft a clause to be included in Part 1 *Preliminary* of the model constitution reflecting [9] *Section 25* of the *Associations Incorporation Amendment (Review) Act 2016*.
6. Fair Trading NSW to contact all existing associations to inform all associations of the purpose and intent of [9] *Section 25* of the *Associations Incorporation Amendment (Review) Act 2016* before the new legislation is enacted in September.
7. Draft clauses to be inserted in Part 3 *The committee* of the model constitution reflecting [12] *Section 30A and 30B* of the *Associations Incorporation Amendment (Review) Act 2016*.
8. Redraft part (3) of clause 10 *Resolution of disputes* to spell out the purpose of the reference to the *Commercial Arbitration Act 2010* in relation to the resolution of disputes.
9. Redraft part (2) (c) and (2) (i) of clause 18 *Casual vacancies* to spell out the relevant parts of the *Corporations Act 2001*.
10. Redraft or attach notes to clauses 18 *Casual vacancies* and 21 *Committee members may appoint other committee members* to clarify how filling a casual vacancy differs from committee members appointing other members.
11. Redraft clause 27 *Special general meetings – calling of* to enable requisitions of members for a special general meeting to be signed digitally.
12. Redraft part (2) of clause 28 *Notice* to link to clause 33 *Special resolutions*.
13. Redraft clause 33 *Special resolutions* to explicitly state the requirements of clause 39 of the *Associations Incorporation Act 2009* and provide a succinct definition and the purpose of special resolutions.
14. Redraft clause 42 *Distribution of property on winding up of association* part (1) to include any non-profit organisation with similar objects.
15. Redraft clause 42 *Distribution of property on winding up of association* part (2) to either replace the term “property” with “assets” (as per Fair Trading NSW’s webpage on [Voluntary Cancellation](#)) or include the phrase “ and unexpended monies” or similar, after “property”.
16. Redraft clause 44 *Custody of books* to enable associations’ capacity to utilise electronic technology to store records in computing clouds.
17. To reduce costs and red tape regulatory oversight of charitable NSW associations be transferred to the ACNC
18. To better reflect the cost of organising for the inspection of the Disclosure of Interest book, the fee attached to item 6 *Maximum fee for inspection by any member of an association of the book recording disclosure of interest by a committee member* be increased to \$10.00
19. Redraft the model constitution in plain English, removed references to superseded technologies and avoid legal terminology and phrasing to assist comprehension and avoid confusion.