

2 January 2019

To the Committee Secretary
Education, Employment and Small
Business Committee
Parliament House
George Street
Brisbane Qld 4000

By email to: eesbc@parliament.qld.gov.au

Dear Colleagues,

Associations Incorporation & Other Legislation Amendment Bill 2019

Background to this Submission

This submission is provided to the Education, Employment and Small Business Committee in response to the current review seeking comment about the *Associations Incorporation and Other Legislation Amendment Bill 2019* (the **Bill**).

We note that the *Explanatory Notes* to the Bill acknowledge that there are 22,660¹ incorporated associations in Queensland, and given the number of people involved with (and served by) each association, the impact of the incorporated associations legislation is significant and needs to be very carefully designed.

Caxton Legal Centre Inc. (**Caxton**) welcomes the opportunity to contribute to this review, although we do note that the tight time-frame for responding to the review by the 9th of January (so close to the Christmas vacation period) has meant that our response is quite limited and does not address drafting considerations.

Our experience with incorporated associations and other non-profit associations

For over four decades, Caxton has provided free legal advice and relevant social work services to the community and has participated in public discourse, community education and law reform activities regarding key areas of law affecting our clients. We note that the majority of our clients are typically marginalised or disadvantaged in some way, especially in economic terms.

¹ Queensland Government (2019). *Explanatory Notes*. Retrieved on 19.12.19 from <https://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2019/5619T2124.pdf> and <file:///D:/Law%20Reform/Incorporated%20Associations%20Review%202019/Darth%20notes%20in%20parliament.pdf>

As Queensland's largest generalist free legal service, the responsible governance of other incorporated associations and non-profit organisations serving the community has been a recurring theme in our work. We regularly advise individual community organisations, their management committees and boards, their members, their employees, their service users and other sponsoring associations. The relevant organisations we have assisted has included: incorporated associations, unincorporated groups, companies limited by guarantee, organisations established under Letters Patent, and other profit-share collectives and cooperatives.

The types of organisations most likely to access help from legal services such as Caxton include: health services, neighbourhood and community centres, community hall associations, ethnic community support services, arts organisations, community child care services, housing services, crisis/support services, disability support groups, environmental groups, and small unfunded sporting groups. We note that services from all over Queensland have contacted us for advice over the years and we are committed to supporting other community-based organisations in the non-profit sector on an ongoing basis.

Over the years we have provided training to many committees and boards, particularly in relation to governance, record-keeping, privacy laws, and risk management.

Indeed, for many years, Caxton was the publisher of the well-known *Incorporated Associations Manual*, edited by Professor Myles McGregor-Lowndes from the *Centre for Philanthropy and Non-Profit Studies* at QUT. Accordingly, Caxton is well known within the non-profit sector as a place where organisations can seek legal advice. The advice needs we have encountered have been broad and we have been consulted about governance issues, employment laws and bullying, aspects of contract and tort law, privacy and confidentiality, defamation, the denial of natural justice and other membership disputes. We note that membership and governance disputes are often extremely stressful and upsetting for the parties concerned, especially when they involve long-term volunteers of the organisations, and some of these clients have also been referred to our in-house social workers for assistance.

In our 2011 submission to a previous government review of the law affecting incorporated associations, we wrote:

Some of the key issues which are raised with us concern various failures by management committees to abide by their Associations' Rules or to comply with their other legal obligations – especially reporting, record maintenance and meeting obligations. Disputes about procedural fairness, membership entitlements, membership terminations and defamation regularly arise. Employment policies and remuneration entitlements are often raised as complex issues. Concerns about the appropriate use of assets, the payment of honorariums, insurance coverage and liability are common. The process by which organisations can obtain charitable status is raised from time to time – as are certain accounting concerns. Questions about winding-up, the transfer of assets, compliance and

deregistration come up periodically. The inability of associations to fill vacant executive positions appears to cause particular difficulty on a regular basis.²

It is pleasing to note that the number of requests made to us for governance assistance appears to have reduced somewhat over the last year or so and it may be that the amount of preventative information being circulated by the Australian Charities and Not-for-profits Commission (the **ACNC**) is having a positive effect in this regard. That said, when organisations from the non-profit sector do approach us for assistance, the problems tend to be quite complex or unusual and significant time and special expertise is required to provide the necessary advice.

We acknowledge that the State Government is committed to supporting the work of these incorporated associations and assisting them to operate more effectively. The amendments contained in the bill seem to clearly reflect this commitment. Overall, we regard most of the recommended reforms as being very positive reforms. We do have some specific concerns, which are set out below.

Key issues and our response to the proposed amendments

1. Reduction in red tape and modernisation of the relevant legislative framework and introduction of an 'objects clause'

Caxton endorses all steps taken to help reduce 'red tape' and to modernise the relevant legislative framework. We endorse the introduction of an 'objects clause' in the *Associations Incorporation Act 1981 (Qld)* (the **Act**).

2. Technology

Caxton approves of the amendments allowing for participation in general meetings through the use of communications technology without organisations needing to amend their rules to provide for this. We believe that such use of technology to facilitate participation in incorporated associations has growing importance in an increasingly digital and diverse world. This amendment is likely to be particularly useful for associations operating in country areas.

3. Discontinuation of the use of an association's seal

We have certainly encountered cases where new committees on small and less supported organisations have found it very difficult to locate an associations' seal. Clearly this is very problematic. That said, given the use of new technologies in terms of how associations now commonly 'do business', we consider that the use of the seal, arguably, is largely becoming redundant. We support this change providing that incorporated associations are no longer required to use the association's common seal (noting that provision has been made so that associations wanting to continue to use the seal can do so).

² Caxton Legal Centre Inc. (2011). *Submission on the Review of the Associations Incorporation Act*. [Caxton Legal Centre Inc. South Brisbane. 2011] (p.4).

That said, it is still very important for associations to have secure authorisation and signing controls in place. We note that in their major report on fraud in the not-for-profit sector, Howard and Best (2010) note that “[i]nternal controls (40%) and tip offs (31%) were the most effective ways of discovering fraud”.³ They also note that having appropriate authorisation and signatory controls is particularly important in this regard.

4. *Single ‘report once’ reporting via the ACNC*

When the ACNC was established with a view to limiting the number of times that registered charities and not-for-profits would have to engage in relevant financial and governance reporting, this was generally welcomed across the sector. We agree that it is far preferable that quality reports are available at a ‘one-stop-shop’ where, for example, funding bodies can check to see what an organisation’s funding and structure looks like, rather than requiring organisations to write multiple reports to multiple funders, etc.

Of course, not all incorporated associations have charitable status, so some are only reporting to the Office of Fair Trading (the **OFT**), while charitable organisations, such as Caxton, are reporting to both the ACNC and the OFT. It has been our experience that the dual reporting in this context is not unduly onerous. Furthermore, at the state level, Queensland’s OFT has always, in our experience, done a good job of regulating Queensland’s associations and we see no problem in the OFT and the ACNC continuing to operate individually, though collaboratively.

Nevertheless, we support the amendment “providing the Queensland government with the ability to exempt, by regulation, certain classes of association from the financial reporting obligations of the Associations Incorporation Act... (thus removing) the requirement for ACNC registered incorporated associations to submit financial statements to the Office of Fair Trading.”⁴ The proposed amendments to the *Collections Act 1966 (Qld)* and the *Collections Regulation 2008 (Qld)* which will “remove the duplicated reporting requirement to the benefit of an estimated 3,200 charities and community purpose organisations”⁵ is also a positive change.

5. *The Collections Act 1966 (Qld) and fundraising for community purpose groups*

We agree that fundraising for community purpose groups still does need to be suitably regulated to ensure that frauds are not perpetrated on the community. We have noticed an increasing number of people seeking to raise money, in effect, for charitable and community purposes, via crowdfunding-type arrangements and clearer regulation in this arena is required.

6. *Information sharing between the ACNC and OFT*

³ Howard, A. & Best, P. (2010). *BDO Not-for-profit Fraud Survey 2010*. Sydney, NSW: BDO Australia Ltd. Retrieved on 19.12.19 from https://eprints.usq.edu.au/18580/1/Howard_Best_PV.pdf, page 40

⁴ D’Ath, Y. (2019). *Introduction to the Associations Incorporation and Other Legislation Amendment Bill*. Retrieved on 19.12.19 from <https://www.parliament.qld.gov.au/documents/tableOffice/BillMaterial/191126/Associations.pdf> p.3764.

⁵ IBID.

We agree that arrangements enhancing information sharing between the ACNC and the OFT would be beneficial.

7. Discretion for less financial paperwork involving one-off payments/excesses

We agree that where an organisation is going to receive a one-off over-the-threshold amount of funding or insurance repayment, this should not act as an automatic trigger requiring them to have to be audited by the OFT under a higher tier of reporting as required in Part 6 Division 2 of the Act. It is important to keep financial reporting at a manageable and affordable level for incorporated associations, especially ones normally categorised as Level 1 or 2 organisations. The process proposed that will “provide the chief executive with the discretion to allow the association to report under a lower reporting tier in these special and unusual circumstances, if requested to do so by the association”⁶ will be of benefit.

8. Reducing administration obligations and the red tape associated with winding up

The winding up of an incorporated association is usually stressful and challenging for the officers charged with progressing the matter. When an organisation has failed, it can be particularly difficult to garner the necessary person-power to work through the required steps and negotiations with the relevant regulatory bodies and courts. Anything that makes the procedure more straightforward is, in our opinion, going to be beneficial. Though winding-up is not raised by our particular clients very often, we have observed that associations needing advice on point face great difficulty obtaining (and paying for) the legal and accounting advice they need. This can be particularly difficult for a small association with a depleted volunteer management committee.

9. A formalised process for the appointment of a voluntary administrator

We strongly support this amendment, applying Part 5.3A of the *Corporations Act 2001 (Cth)* to provide associations with a formalised process to appoint a voluntary administrator in appropriate circumstances. This is a positive change because it will mean organisations are able to avoid having to make an application to the Supreme Court of Queensland, where processes are complex and daunting, and often outside the experience (or beyond the capabilities) of everyday management committee members.

Some might argue that rather than simplifying these processes, organisations need to have committee/executive members on hand with strong corporate skills. Indeed, in recent years there appears to have been a significant amount of promotion at the high end of the sector urging boards/committees to engage in more specific succession planning and to recruit committee members with special skills in accounting, law, human resources, marketing, and so on. Of course, there is a place for this and we regularly encounter small associations eager to take such action as part of improving their governance practices. However, a balance is required. The over-professionalisation of the not-for-profit sector can come at the cost of the volunteer energies and vision that have actually created and sustained very valuable organisations for considerable periods of time. Furthermore, in

⁶ IBID.

rural or remote areas, small associations often have difficulty finding committee members, yet non-profit groups are vital in these small communities.

While grass-roots organisations typically aim for quality governance, there are times when complex legal processes will put a real strain on an organisation. Actions taken to reduce the complexities faced by committees are, in our view, welcome.

10. Introduction of a simplified cancellation process

Similarly, we support the introduction of a more straightforward process by which an association's incorporation can be cancelled. The voluntary cancellation process is rightly only available when the association has no outstanding debts/liabilities/penalty/fee payments due and is not a party to any legal proceedings. By avoiding a formal liquidation process, associations will be able to cease operation more easily.

11. Reduction in the exclusion period from 10 to 5 years for criminal convictions affecting a person's eligibility to sit on a management committee.

We support this reduction and see that it is likely to have particular value for organisations operating in rural and remote areas where it may be more difficult to recruit members for a management committee. That said, we also refer to the findings in the *BDO Not-for-profit Fraud Survey 2010*⁷ report, which ought to be kept in mind. We note that the role of treasurer is one that requires particular consideration if someone has been convicted of an offence involving dishonesty. In this context, perhaps the longer exclusion period is still warranted in relation to the role of treasurer.

12. Improved clarity around governance for committees & minimum standards

We applaud amendments improving transparency in committee operations and highlighting fiduciary obligations applicable to committees. The proposed amendments are positive ones and reflect what we believe is already generally understood within the community sector to be required as part of good governance.

The requirement for appropriate interest/conflict disclosures to be made at each committee meeting and at each AGM is appropriate and we endorse provision being made by regulation showing the particular format required for this.

We do have some concerns about the presumptions and fines proposed. In principle, the presumptions are useful and will also help committee members to understand proper processes. However, the amendments contain significant increases in terms of the potential fines that may apply to management committee members where a breach occurs (with several involving 60 penalty unit fines). As we have noted earlier, many associations are wholly dependent upon the generosity and energies of volunteers. We have noticed whilst providing governance training that many committee members seem fearful even about the relatively modest current fines contained in the Act. If the penalty clauses increase

⁷ Howard, A. & Best, P. (2010). *BDO Not-for-profit Fraud Survey 2010*. Sydney, NSW: BDO Australia Ltd. Retrieved on 19.12.19 from https://eprints.usq.edu.au/18580/1/Howard_Best_PV.pdf

dramatically, we have concerns that it will be more difficult for associations to recruit committee members, especially in rural and remote areas.

13. New grievances procedure required

The requirement for all incorporated associations to be required to have a grievance procedure (or failing this being required to use the new one that is being included in the model rules) is good. We strongly support mediation being part of this process and consider that the use of the model rules as a fall-back option is eminently sensible. The introduction of this extra step to ensure that parties attempt dispute resolution internally before seeking adjudication through the court system is an overdue reform. The inclusion of the principles applicable in the mediation process is particularly useful.

14. Improved investigation powers for the OFT

We agree that the OFT Inspectors should have reasonable powers to investigate associations and we also agree that inspectors should not have access to criminal history reports. Some aspects of a person's criminal history would have no bearing on their suitability to engage as a committee member and unnecessary access to such confidential private information needs to be strictly controlled.

15. Replacement process for use of the model rules at any time

As we have already made clear, it is important for associations to be able to operate without undue formality and red tape. The amendment providing a simple mechanism for an established association to be able to adopt the model rules and replace an association's constitution/rules at any time does seem to be apt.

Conclusion

We are happy to discuss any aspect of this submission. If we can be of any further assistance to the Committee, please contact Cybele Koning by telephone on 0732146333 or by email to caxton@caxton.org.au.

Yours faithfully

Caxton Legal Centre Inc.



Bridget Burton
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