Inquiry into volunteering in Queensland

Submission No:	457
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Submitter Comments:	

Local Government, Small Business and Customer Service Committee,
Queensland Parliament
George Street Brisbane 4000

Dear committee,

Re: Inquiry into Volunteering in Queensland

Thank you for the opportunity to provide a submission in relation to volunteering Queensland. One of the more significant reasons for a decline in volunteering is a fear of personal liability. This fear is particularly relevant for volunteers serving through unincorporated associations. My submission is a relatively simple one directed to this concern. I focus then, only on Terms of Reference ('ToR') 1 and 8.

My submission in relation to Tor 1 is that the Queensland Parliament should enact legislation like the *Revised Uniform Unincorporated Nonprofit Association Act* (RUUNAA) that has been adopted in many states in the USA. My reasons for this submission are set out in an article published in the *Companies and Securities Law Journal* (2020) 37 C&SLJ 279 attached as annexure A. If the legislation suggested follows the opt-in model from the USA there is, I submit, little disadvantage and significant benefit. Two benefits of the enactment of RUUNAA-like legislation are:

1. greater protection for volunteers; and,
2. a more just legislative framework than is presently available for victims of abuse.

In relation to ToR 8 the attached article might be useful as a comprehensive overview of the Australian academic literature touching on volunteer liability in unincorporated associations to the date of publication. It might also assist in explaining why so much volunteering occurs through unincorporated associations.

I may be contacted through my office, [redacted], on [redacted] or by mail to [redacted].

[redacted]
Matthew Turnour
28 February 2025

Should Australians Have a Revised Uniform Unincorporated Nonprofit Associations Act?

Dr Matthew Turnour*

This article argues that revelations of the extent of sexual and other abuse occurring within unincorporated associations, coupled with the challenges facing both plaintiff victims and management committee (or equivalent) defendants, obliges Australian Governments to consider enacting legislation akin to the Revised Uniform Unincorporated Nonprofit Association Act (RUUNAA) adopted in many jurisdictions of the United States. The challenges facing Australian plaintiffs and defendants caused by the lack of legal recognition of unincorporated associations are common to Commonwealth countries. The article further considers both foreseeable advantages and challenges that arise if RUUNAA-like legislation was introduced into Australia.

INTRODUCTION

Foundational and Now Pressing Issues

This article argues Australian parliaments should take steps to enable unincorporated associations to be legally recognised. Put differently, it argues for reform of the law so as to reverse the common law position denying legal status to unincorporated associations. It suggests that Australian parliaments begin by considering model legislation enacted in various jurisdictions of the United States known as the *Revised Uniform Unincorporated Nonprofit Association Act* (*RUUNAA*).[1] A Scottish proposal that relied substantively on *RUUNAA* should also inform the deliberations.[2] The article argues that both unincorporated associations themselves and those dealing with them, particularly victims of abuse committed by persons involved in unincorporated associations, would be served by legislation reversing the common law jurisprudence. The *RUUNAA* allows for an opting out, and while that will not be appealing to all Australians, it is suggested that Australia follow *RUUNAA* in this regard also.

The problems caused by the common law not recognising unincorporated associations as legal entities are longstanding, but the issue has come into the spotlight more recently in Australia. Now is an appropriate time for Australian parliaments to legislate. The *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-government Organisations Report* (*Betrayal of Trust Report*) summarised the reason in the following way: "there is a perception that unincorporated religious organisations (in particular the Catholic Church) have been structured deliberately to make themselves effectively immune from suit."[3] The Report continues by acknowledging that the unincorporated structure coupled with the property trust was not designed to avoid liability but rather to overcome property holding difficulties.[4] This proposed reform provides a way of addressing these problems by enabling unincorporated associations to hold property and to sue and be sued.

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[1] Uniform Law Commission, *Unincorporated Nonprofit Association Act* (2008) <https://www.uniformlaws.org/committees/community-home?communitykey=40227d3a-8b5d-47c2-8cd0-b0ec12da97f9&tab=groupdetails>.

[2] See Draft Unincorporated Associations (Scotland) Bill being Appendix A to Scottish Law Commission, *Report on Unincorporated Associations*, Report No 217 (2009) 62 <http://www.scotlawcom.gov.uk/files/3312/7989/7412/rep217.pdf>.

[3] Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-government Organisations* (2013) Vol 2, 534.

[4] Family and Community Development Committee, Parliament of Victoria, n 3, 534.

The genesis of the current public debate in Australia is the 2007 case of *Trustees of The Roman Catholic Church v Ellis*.[5] In that case, it was not contested that Mr Ellis was sexually abused by a then deceased Roman Catholic priest. As the Roman Catholic Church is an unincorporated association Mr Ellis was unable to identify a Roman Catholic legal entity as a proper defendant and, as the Full Court of New South Wales explained, the proceedings were "doomed to fail".[6]

Justice for abuse victims is a subject engaging the attention of State and Federal parliaments in Australia.[7] The Royal Commission into Institutional Responses to Child Sexual Abuse reported in December 2017, and it reported that much abuse occurred within unincorporated associations like the Roman Catholic Church.[8] The question of recognition of unincorporated associations will, therefore, need to be considered. This article argues that Australia should follow the recommendation of Scotland for recognition of unincorporated associations following the *RUUNAA* model.

An Overview of the Article

The article begins by looking briefly at the unincorporated association sector in Australia to give some indication of the number of people affected. A discussion of the consideration in Australia of *RUUNAA* to date follows. The problems caused by lack of recognition of unincorporated associations are then explored in some detail before turning to the law governing unincorporated associations internationally. That leads to a detailed discussion of *RUUNAA* as the model, enacted, statutory precedent. Challenges that can be foreseen if *RUUNAA*-like legislation were to be introduced into Australia are then discussed before a summary of options for exploration is offered. The article concludes that reforming the law of unincorporated associations by statutory reversal of the common law jurisprudence in Australia is desirable. The article discusses some of the challenges given the federal nature of the Australian polity, and the interface of the proposed legislation with the Australian Charities and Not-for-profits Commission (ACNC). It recommends that if *RUUNAA*-like legislation is enacted, the opt-out model adopted in those United States jurisdictions that have enacted the legislation, should be adopted.

Australians Involvement in Unincorporated Associations

The vast majority of Australians participate in unincorporated associations so any improvement to the law governing unincorporated associations is likely to have a significant impact on millions of Australians. The estimated resident population of Australia was reported to be 25.18 million as at 31 December 2018.[9] It is estimated that this population participates in approximately 600,000 not-for-profit (NFP) organisations of some form or another, the vast majority of which are unincorporated associations.[10] This figure is presumably higher now, given the increase in population size since this estimate was given.[11] The residual regime is, then, the experience of the majority of associations in Australia.[12]

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[5] *Trustees of The Roman Catholic Church v Ellis* (2007) 70 NSWLR 565; [2007] NSWCA 117.

[6] *Trustees of The Roman Catholic Church v Ellis* (2007) 70 NSWLR 565, 569; [2007] NSWCA 117.

[7] See, eg, *Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2014* (NSW); *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic); *Justice and Community Safety Legislation Amendment Act 2016 (No 2)* (ACT); *Limitation of Actions (Child Sexual Abuse) and Other Legislation Amendment Act 2016* (Qld); *Limitation Amendment (Child Abuse) Act 2017* (NT); *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW); *Limitation of Actions (Child Abuse) Amendment Act 2018* (SA); *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* (WA).

[8] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017) Vol 2, 12, 110–111; Vol 16 (book 1) 13, 16.

[9] Australian Bureau of Statistics, *3101.0 – Australian Demographic Statistics, December Quarter 2018* (20 June 2019) <https://www.abs.gov.au/ausstats/abs@.nsf/0/D56C4A3E41586764CA2581A70015893E?Opendocument>.

[10] Australian Government, Productivity Commission, *Contribution of the Not-for-profit Sector*, Research Report (2010).

[11] Australia's population increased by approximately 3.25 million since the report of the Productivity Commission was published. See Australian Bureau of Statistics, *3101.0 – Australian Demographic Statistics, December Quarter 2009* (28 September 2010) <https://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/95D50E396E5AECFCCA2577AC00155848?opendocument>.

[12] The meaning of "residual regime" is considered in the following section.

When and Why Australian Associations Take an Unincorporated Form

Myles McGregor-Lowndes and Francis Hannah have observed the unincorporated association population "is made up of large unincorporated associations with thousands of members usually having a holding company or corporate trustee holding property for the purposes of the unincorporated association or quite small non-profit organisations with little in between".[13] This parallels the US experience where, once "a non-profit that reaches a significant size or level of property ownership typically [it] incorporates".[14] Robert Flannigan described the law of associations as "a residual regime".[15] Citing a court that was citing an academic, he observed that this form of association "usually results from sheer ignorance of the possible degree of personal liability of its members".[16] Where the unincorporated form is not taken through ignorance he observed that it can be the result of a cost-benefit analysis.[17] This means that those large associations that choose not to incorporate usually have good reason for not doing so. There are two main reasons beyond ignorance. For the small organisations, the regulatory regime is too burdensome. For the large (particularly religious) organisations it is the challenges of accommodating the (religious) governance structures within the confines of incorporations legislation.

Consideration Given to RUUNAA in Australia

A review of the literature in Australia on statutory reversal of the common law through *RUUNAA*-like legislation shows that little attention has been given to it. The only academic inquiry in Australia that has considered the possibility of recognition of unincorporated associations is that mentioned above undertaken by McGregor-Lowndes and Hannah of Queensland University of Technology,[18] and also by McGregor-Lowndes in an earlier paper in 2001.[19] After an extensive survey that included reviewing the relevant laws in New Zealand, the United Kingdom, Europe, Canada and the United States the learned authors suggested:

> that a suitably capped jurisdiction based on the [1996 predecessor to the *RUUNAA*] could be the model for legislative provision that could attract current small unincorporated associations and small incorporated associations, with an appropriate balance between facilitation and regulation.[20]

They clearly see the scheme as only for small organisations through the use of the cap but do not explore why large organisations should be excluded. The inference is because a different "balance between facilitation and regulation" may be required.

The Productivity Commission research report into the contribution of the not-for-profit sector expressly inquired into unincorporated associations and raised recognition of unincorporated associations in its draft report. In the final report, it did not carry the issue forward nor mention the recognition model set out in *RUUNAA* or the Scottish Law Commission Report.[21]

The *Betrayal of Trust Report* seems to have not considered the possibility of recognising unincorporated associations even though it focused directly on the challenges considered here. It begins Ch 26 identifying

[13] Myles McGregor-Lowndes and Frances Hannah, "Unincorporated Associations as Entities: A Matter of Balance between Regulation and Facilitation?" (2010) 28(3) C&SLJ 197, 203.

[14] Evelyn Brody, "U.S. Nonprofit Law Reform: The Role of Private Organizations" (2012) 41(4) *Nonprofit and Voluntary Sector Quarterly* 535, 541.

[15] Robert Flannigan, "Contractual Responsibility in Non-profit Associations" (1998) 18 *Oxford Journal of Legal Studies* 631, 633, citing *Carl Rove & Co v Thornburgh*, 39 F 3d 1273, 1294 (1994).

[16] Flannigan, n 15, 634; see also Elizabeth S Miller, "Cox v Thee Evergreen Church: Liability Issues of the Unincorporated Association, Is It Time for the Legislature to Step In?" (1994) 46 *Baylor Law Review* 231, 234.

[17] Flannigan, n 15, 633.

[18] McGregor-Lowndes and Hannah, n 13.

[19] Myles McGregor-Lowndes, "Reforming Queensland's Incorporation Associations Legislation" (Working Paper No PONC102, Queensland University of Technology, May 2001).

[20] McGregor-Lowndes and Hannah, n 13, 221.

[21] Australian Government, Productivity Commission, n 10, xxvi; Australian Government, Productivity Commission, *Contribution of the Not-for-Profit Sector*, Draft Research Report (2009) 6.2.

the legal barriers to claims by victims against non-government institutions.[22] The first key finding listed was that victims can find it difficult to identify "an entity to sue because of the legal structures of some non-government organisations".[23] It discussed US legislation but not *RUUNAA*.[24]

An advanced Google search for the exact phrase "Revised Uniform Unincorporated Nonprofit Association Act" limiting the region to "Australia" conducted on 10 July 2019 found the only citation within Australia to reference this legislation to be in a PhD.[25] A similar search for its predecessor the "Uniform Unincorporated Nonprofit Association Act" (*UUNAA*), thus a search with "revised" removed, produced seven results none of which carried the discussion further.[26]

Any serious consideration of statutory reform of unincorporated association law in Australia would be expected, as was the case in New Zealand,[27] to take some cognisance of *RUUNAA* and the Scottish proposal but it seems it has been largely overlooked.[28]

Problems with the Unincorporated Form

There are a significant number of problems associated with the unincorporated association form. The Scottish Law Commission in its 2009 review set out a summary which is useful for the present purposes. It identified the following difficulties as arising from the absence of legal personality for unincorporated associations:

- The extent of liability of association members, and of association officials, under contracts with third parties, including staff, is uncertain;
- An association cannot contract with any of its own members, resulting in legal analysis which many would regard as unduly sophisticated;
- The extent of liability of association members, and of association officials, under the law of delict is uncertain;
- An association cannot be liable in delict to any of its own members, even in circumstances where an incorporated body would be held vicariously liable for the fault of a director or employee;
- Title to heritable property must be held in the name of individuals [as trustees for the members of the association] who may cease to be members of the association's governing body, or of the association itself;
- The practice by which an unincorporated association sues or is sued varies according to whether the action is being brought in the Court of Session or the sheriff court.[29]

This list distils in an Australian context problems in two general interrelated categories; both mentioned at the outset in the *Betrayal of Trust Report.* The first is a property vesting problem. The unincorporated

[22] Family and Community Development Committee, Parliament of Victoria, n 3, 527.

[23] Family and Community Development Committee, Parliament of Victoria, n 3, 527.

[24] Family and Community Development Committee, Parliament of Victoria, n 3, 531, fn 45, 533–535.

[25] Matthew Dwight Turnour, *Beyond Charity: Outlines of a Jurisprudence for Civil Society* (PhD Thesis, Queensland University of Technology, 2010).

[26] The three most relevant were the Australian Law Reform Commission, *Reform Roundup* which cited the intent of California to adopt the US model legislation (see <http://www.austlii.edu.au/au/journals/ALRCRefJl/2004/42.pdf>), a working paper by McGregor-Lowndes (see n 19) and the QUT website, which simply identified the existence of the legislation and gave a brief summary.

[27] New Zealand Law Commission, *A New Act for Incorporated Societies*, Report No R129 (2013) 38.

[28] The most detailed discussion of *RUUNAA* and its predecessor *UUNAA* is by Elizabeth S Miller, "Doctoring the Law of Nonprofit Associations with a Band-aid or Body Cast: A Look at the 1996 and 2008 Uniform Unincorporated Nonprofit Association Acts" (2012) 38(2) *William Mitchell Law Review* 852. For broader discussion of issues see Kenya JH Smith, "Charitable Choices: The Need for a Uniform Nonprofit Limited Liability Company Act (UNLLCA)" (2016) 49 *University of Michigan Journal of Law Reform* 405, 420, 428–430, 437, 444; Miller, n 16; Evelyn Brody, "Governing the Nonprofit Organization: Accommodating Autonomy in Organizational Law" (2008) 46 *Canadian Business Law Journal* 343; Brody, n 14; Oonagh B Breen, "European Non-profit Oversight: The Case for Regulating from the Outside In" (2016) 9(3) *Chicago-Kent Law Review* 991; Robert F Saskatoon, "The Liability Structure of Nonprofit Associations: Tort and Fiduciary Liability Assignments" (1998) 77 *Canadian Bar Review* 73; Flannigan, n 15.

[29] Scottish Law Commission, *Discussion Paper on Unincorporated Associations*, Discussion Paper No 140 (2008) [7.1].

structure coupled with the property trust used by religious institutions, predominantly but not exclusively, is a workaround designed to overcome property holding difficulties caused by the common law not recognising unincorporated associations.[30] The second is a liability problem. Not only can a victim not sue the unincorporated association but participants in an unincorporated association are exposed to personal liability – they could be sued personally for action undertaken on behalf of an unincorporated association.[31]

The precise criteria for imposing vicarious liability for sexual abuse are still in the course of refinement by judicial decision, as Lord Phillips has explained.[32] Further, as was held by Gageler and Gordon JJ in the leading Australian case of *Prince Alfred College Inc v ADC*, the law "must and will develop in accordance with ordinary common law methods". The diversity of facts that give rise to cases means the "Court cannot and does not mark out the exact boundaries of any principle of vicarious liability".[33]

In practical terms, this means that both persons involved in unincorporated associations across the common law world and plaintiffs suing such associations, are subject to the vague, slow, expensive and sometimes uncertain development of the common law.

RUUNAA-like legislation could provide a solution in an increasingly difficult liability landscape. This is because the vagaries and vulnerabilities associated with this are even more troubling in Australia, following the passage of legislation removing the time limits in which claims can be made.[34]

It is not contested that victims should have a proper defendant to sue and an unincorporated association such as a church may, in some cases, be the proper defendant. But what protections should be available to volunteer leaders? With legislation extending the time limits for commencement of actions and with current committee members being personally liable this means that a volunteer committee member of an unincorporated association may be taking on personal liability for an incident arising decades earlier of which the new committee member may not have any awareness. Those taking leadership of an unincorporated association and possibly acquiring liability as a result of legislative action for events preceding their appointment should also arguably have appropriate defences to liability which they presently do not have. As the Scottish Law Commission Report noted, volunteer and staff liability for breaches of contract and torts, in fact any form of delict, is uncertain.[35] The position is arguably becoming more, rather than less, uncertain, at least in Australia.

To overcome the difficulty for victims, the *Betrayal of Trust Report* made two recommendations:

> That the Victorian Government consider:
>
> - Requiring non-government organisations to be incorporated and adequately insured where it funds them or provides them with tax exemptions and/or other entitlement.
> - Working with the Australian Government to require religious and other non-government organisations that engage with children to adopt incorporated legal structures.[36]

That Report considered the *Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2014* (NSW) which was introduced in the New South Wales Parliament in 2014,[37] but ultimately

[30] Family and Community Development Committee, Parliament of Victoria, n 3, 534.

[31] Family and Community Development Committee, Parliament of Victoria, n 3, 530–531.

[32] *Various Claimants v Institute of the Brothers of the Christian Schools* [2013] 2 AC 1, [30] (with whom Lady Hale, Lord Kerr, Lord Wilson and Lord Carnwath agree), [85]; [2012] UKSC 56.

[33] *Prince Alfred College Inc v ADC* (2016) 258 CLR 134, 172; [2016] HCA 37.

[34] See, eg, *Limitation of Actions Act 1974* (Qld) ss 11A, 48, inserted by the *Limitation of Actions (Child Sexual Abuse) and Other Legislation Amendment Act 2016* (Qld). For a recent case discussing the impact of the amendments, see *TRG v Board of Trustees of the Brisbane Grammar School* [2019] QSC 157.

[35] Scottish Law Commission, n 29, [7.1].

[36] Family and Community Development Committee, Parliament of Victoria, n 3, 527.

[37] Note that Notice of Motion was made in 2011. At the time of consideration in the report, the Bill was titled the *Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2011* (NSW). It was not formally introduced into Parliament until 2014, and was thus named to reflect the year.

lapsed in 2014 and did not become law.[38] It summarised the effect of this legislation in the following way:

> This proposed legislation sought to amend the relevant Catholic property trust statute in order to:
>
> - deem the Trustees liable as if they were the relevant party against whom a case is brought
> - ensure that the funds and property held in trust are available to satisfy any compensation awarded by a court.[39]

The *Betrayal of Trust Report* expressed the view that these proposals were "not far-reaching enough".[40] Specific amendment to particular religious trust issues would not resolve the broader issue, the Report stated, which is a problem of establishing the legal identity of unincorporated associations.[41] As mentioned, the Report had regard to the situation in the United States but there was not any reference to *RUUNAA*.[42]

The Victorian Government's response to the *Betrayal of Trust Report* was "in principle" support of the suggestions in relation to the incorporation of entities but it is noteworthy that the response was accompanied by the comment that the Government was "currently considering options to achieve the objectives of this recommendation".[43] The critical phrase is the objective be achieved, not that the recommendations be adopted. It is not incorporation but the establishment of appropriate defendants that is in issue. The solution the Victorian Government sought was for plaintiffs to be able to access the assets of religious unincorporated associations in appropriate cases.

Recognition of Unincorporated Associations

A relatively simple solution to the problems identified is recognition by statute of unincorporated associations. That is the approach adopted in many places around the world. In the first part of this section, the position in various jurisdictions internationally is discussed.

The United States, Canada and Mexico – Model Legislation

Evelyn Brody, referring to the situation in the United States, observed that since 1987 the nonprofit sector has "exploded" as have "the level and number of sophisticated legal issues needing to be addressed".[44] She noted also, though, that "[u]nincorporated nonprofit associations, despite their numbers, are subject to relatively primitive law".[45] The challenge faced was how to address this. In the United States, law reform often begins outside of government and one of the leading bodies in carrying forward that process is the Uniform Law Commission also known as the National Conference of Commissioners on Uniform State Laws. In 1996 it published the *Uniform Unincorporated Nonprofit Association Act* (*UUNAA*) and revised this in 2008 with contributions from counterparts in Canada and Mexico. It published that draft legislation as *RUUNAA* on 25 February 2009 with technical and stylistic amendments being made in

[38] Parliament of New South Wales, "Bills" <https://www.parliament.nsw.gov.au/bills/Pages/Profiles/roman-catholic-church-trust-property-amendment-j.aspx>.

[39] Family and Community Development Committee, Parliament of Victoria, n 3, 534–535.

[40] Family and Community Development Committee, Parliament of Victoria, n 3, 535.

[41] Family and Community Development Committee, Parliament of Victoria, n 3, 535.

[42] For a discussion of the situation in the United States, see Family and Community Development Committee, Parliament of Victoria, n 3, fnn 28, 45, citing Australian Lawyers Alliance submission, and observing that this has "resulted in a small number of very high settlements and a large number of cases determined by court judgement".

[43] Victorian Government, *Response to the Report of the Family and Community Development Committee Inquiry into the Handling of Child Abuse by Religious and Other Non-government Organisations "Betrayal of Trust"* (8 May 2014) 9 <https://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Government_Response_to_the_FCDC_Inquiry_into_the_Handling_of_Child_Abuse_by_Religious_and_Other_Non-Government_Organisations.pdf>. This response is dynamic and ongoing. See also Victoria Government, *A Victorian Redress Scheme for Institutional Child Abuse*, Public Consultation Paper (2015) <https://www.childabuseroyalcommission.gov.au/sites/default/files/VIC.3001.001.0001.pdf>.

[44] Brody, n 14, 545.

[45] Brody, n 14, 541.

2011. *RUUNAA* is a relatively short piece of legislation, comprising only 16 pages. Its central function is reversal of the common law position in relation to recognition of unincorporated associations. The *RUUNAA* has been legislated in the following jurisdictions so far: Arkansas, District of Columbia, Iowa, Kentucky, Nevada and Pennsylvania. South Carolina has also introduced a Bill to see *RUUNAA* passed into law.[46] This has since passed the Senate.[47] Two of these States had previously passed the predecessor *UUNAA* prior to legislating *RUUNAA*.[48] Prior to the *RUUNAA*, the *UUNAA* was adopted by at least 13 States.[49]

The Unincorporated Associations Recognised as Legal Entities under Model Legislation

The effect of *UUNAA* and subsequently *RUUNAA* is to automatically give to an unincorporated association legal recognition. There is not any need for registration of any kind. To determine if *RUUNAA* applies to an entity, the first and most important question is whether or not the entity falls within the definition of "unincorporated nonprofit association" within the meaning of *RUUNAA*. Section 2(11) of the *RUUNAA* provides the following definition:

> (11) Unincorporated nonprofit association" means an unincorporated organization, consisting of [two] or more members joined by mutual consent pursuant to an agreement that is oral, in a record, or implied from conduct, for one or more common, nonprofit purposes that is not:
>
> (A) a trust;
> (B) a marriage, domestic partnership, common law relationship, civil union, or other domestic living arrangement;
> (C) an organization that is formed under any other statute that governs the organization and operation of unincorporated associations;
> (D) joint tenancy, tenancy in common, or tenancy by the entireties even if the co-owners share use of the property for a nonprofit purpose; or
> (E) an agreement in a record that expressly provides that the relationship between the parties does not create an unincorporated nonprofit association.

The definition is, then, quite broad and there is an evident intent to expand the scope as far as is reasonably practicable wherever there is mutual consent to pursue a purpose that is not an excluded purpose.[50]

Legal Implications of Recognition under the Model Legislation

Once an unincorporated association falls within the scope of the definition, four significant implications flow immediately by operation of s 5 which provides:

> (a) An unincorporated nonprofit association is a legal entity distinct from its members and managers.
> (b) An unincorporated nonprofit association has perpetual duration unless the governing principles otherwise specify.
> (c) An unincorporated nonprofit association has the same powers as an individual to do all things necessary or convenient to carry on its purposes.
> (d) An unincorporated nonprofit association may engage in profit-making activities but profits from any activities must be used or set aside for the association's nonprofit purposes.

It is these four characteristics that provide the legal status which underpins the reversal of the common law position. To flesh this out in greater detail, *RUUNAA* provides at s 6 for ownership and transfer of property in the following way:

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[46] Uniform Law Commission, n 1.

[47] South Caroline General Assembly, South Carolina Legislature, *Status Information* (22 February 2019) <https://www.scstatehouse.gov/sess123_2019-2020/bills/260.htm>.

[48] Arkansas and District of Columbia.

[49] Uniform Law Commission, *Unincorporated Nonprofit Association Act (1992)* <https://www.uniformlaws.org/committees/community-home?CommunityKey=cbc066de-ba1d-4eb1-a6e2-9b6f45be9a98>; Miller, n 28, 853.

[50] Uniform Law Commission, *Unincorporated Nonprofit Association Act (2008) with Prefatory Note and Comments*, 5–6 <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=4e8cc4f9-7441-4fa8-9f24-ecfe883b64d8&forceDialog=0>.

(a) An unincorporated nonprofit association may acquire, hold, encumber, or transfer in its name an estate or interest in real or personal property.
(b) An unincorporated nonprofit association may be a legatee, a devisee, or a beneficiary of a trust or contract.

Liability Including for Contract and Tort for Recognised Unincorporated Associations

Legal liability including protection of individuals is addressed between ss 8 and 15 with the principal operative provisions being ss 8, 9 and 10.

Section 8 which addresses liability is in the following terms:

(a) A debt, obligation, or other liability of an unincorporated nonprofit association, whether arising in contract, tort, or otherwise:
  (1) is solely the debt, obligation, or other liability of the association; and
  (2) does not become a debt, obligation, or other liability of a member or manager solely because the member acts as a member or the manager acts as a manager.
(b) A person's status as a member or a manager of an unincorporated nonprofit association does not prevent or restrict law other than this [act] from imposing liability on the person or the association because of the person's conduct.

Clarifying the implications of this further, s 9 provides that:

(a) An unincorporated nonprofit association may sue or be sued in its own name.
(b) A member or manager may assert a claim the member or manager has against the unincorporated nonprofit association. An association may assert a claim it has against a member or manager.

Section 10 makes it clear that:

> A judgment or order against an unincorporated nonprofit association by itself is not a judgment or order against a member or manager.

Put simply, this means that a party that obtains a judgment against an unincorporated association is able to levy execution against that association and its assets but not against the assets of a member or manager unless there is some basis for liability against the member or manager themselves, independent of the liability of the unincorporated association. In s 8 of the *RUUNAA* the reference to "solely" is intended to ensure that a member or manager "is not vicariously liable for the liabilities of the nonprofit [unincorporated] association" but remains personally liable for their own tortious acts or breach of contract.[51]

It is noteworthy that s 2(11)(E) of the *RUUNAA* amounts to an opt-out provision as the parties may record that the arrangement "does not create an unincorporated nonprofit association".

Miller closes her paper on "Doctoring the Law of Nonprofit Associations" in the United States with the following observation:

> A statutory band-aid like *UUNAA* may prove perfectly adequate in a jurisdiction whose courts are otherwise reaching sensible results under agency, fiduciary, and other common law principles as the cases arise. The body-cast approach of *RUUNAA* might merely prove to prevent the courts from properly treating areas that are constrained by an ill-fitting cast. On the other hand, a jurisdiction might well determine that the common law of the jurisdiction is in need of much more than a band-aid, and that a more comprehensive and definite set of rules in the nature of those set forth in *RUUNAA* best serves the jurisdiction.[52]

England and Common Law Recognition

English common law recognised unincorporated associations but does not do so now. There was common law recognition of unincorporated associations before the Tudors. Kindred groups, village communities, trade guilds and monastic orders[53] all enjoyed recognition at common law until an awareness developed

[51] Uniform Law Commission, n 50, 19.

[52] Miller, n 28, 899.

[53] KL Fletcher, *The Law Relating to Non-profit Associations in Australia and New Zealand* (Law Book Co Ltd, 1986) 7–9.

of the threat of associations to the sovereign.[54] It was Henry VIII who prohibited associations without royal consent.[55] Thus the difficulty of recognising unincorporated associations continues to the present day but it is noteworthy that they did not arise in the English context until the late 14th or early 15th century.[56]

Scottish Attempts at Recognition

Scotland has attempted amelioration of the problem by recognition of unincorporated associations but has been thwarted by limitations on its constitutional powers. The Scottish Law Commission undertook a report on unincorporated associations which it delivered in November 2009.[57] It recommended amendment to the law so as to reverse the current common law position.[58] That Report acknowledged "the very considerable assistance" derived from *RUUNAA*.[59] It annexed draft legislation which required certain registration conditions to be met to take advantage of the legislation. In addition to the *RUUNAA* option of automatic recognition it also considered both "opt in" and "opt out" alternatives. It recommended that unincorporated associations should be allowed to opt out of the legislative regime.[60] The Scottish Government responded positively to this recommendation in March 2010 but lacked the power to legislate because that power was reserved to the Parliament of the United Kingdom. The United Kingdom's Government, in response to the proposal, acknowledged the "wide support for taking forward the broad principles" and that it was "committed to taking them forward in a Bill in due course".[61] It concluded stating that the "intention is to proceed with this work, as time allows, with the aim of bringing forward a Bill for a future session of the UK Parliament".[62] Introducing the UK Consultation on the Response on 17 April 2012, The Secretary of State for Scotland, Michael Moore, stated: "… it is hoped [a Bill] will come before Parliament within its current term".[63] To date a Bill to give effect to the legislation proposed has not been introduced into the UK Parliament although the challenges of both property holding and liability surrounding unincorporated associations have been before the Parliament in the context of other legislation.[64]

European Jurisdictions Recognise Unincorporated Associations

Unincorporated associations are recognised in European jurisdictions. The *German Civil Code* provides for the recognition of unincorporated associations upon registration. It states: "An association whose object is not commercial business operations acquires legal personality by entry in the register

[54] Fletcher, n 53, 3; Arthur Jacobson, "The Private Use of Public Authority: Sovereignty and Associations in the Common Law" (1980) 29 *Buffalo Law Review* 599.

[55] *Chantries Act 1531*, 23 Hen VIII c 10, cited in Fletcher, n 53, 11. Fletcher notes that it was not repealed until 1960.

[56] Fletcher, n 53, 7.

[57] Scottish Law Commission, n 2.

[58] Scottish Law Commission, n 2, 13.

[59] Scottish Law Commission, n 2, 13.

[60] See Draft Unincorporated Associations (Scotland) Bill being Annexure A to Scottish Law Commission, n 2, 63.

[61] Scotland Office, *Reforming the Law on Scottish Unincorporated Associations and Criminal Liability of Scottish Partnerships: The Government's Response to Consultation* (17 April 2012) 25 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69171/Consultation-Response-Partnerships-Bill.pdf>.

[62] Scotland Office, n 61, 25.

[63] United Kingdom, *Parliamentary Debates*, House of Commons (Written Ministerial Statements), 17 April 2012, Vol 543, col 20WS (Michael Moore).

[64] See *NHS (Charitable Trusts Etc) Act 2016* (UK) c 10. In debate regarding that Bill which proposed to assist unincorporated associations, Baroness Barker observed: "If they belong to a charity that is an unincorporated association, noble Lords may know that special holding trustees have to be appointed to hold property in trust. So it is quite right today that in trying to bring about the best of business and to free charities up to pursue what they do in the most effective way, we should begin to make the sorts of changes that are in the Bill." See <http://www.publications.parliament.uk/pa/ld201516/ldhansrd/text/160226-0001.htm>.

of associations of the competent local court."[65] Articles 52 and 60 of the *Swiss Civil Code* provide for recognition of unincorporated associations by either registration or a statement of intent by the unincorporated association to be so recognised, depending upon the nature of the entity.[66] According to McGregor-Lowndes and Hannah, the laws of Greece and Luxembourg are to similar effect. They also note that the laws of Portugal provide for legal status following appropriate publication.[67] The laws of France and Italy similarly provide for legal personality by registration.[68] At least one jurisdiction, Poland, compels registration of unincorporated associations according to McGregor-Lowndes and Hannah.[69] Attempts to increase the regulation of these associations at a European Union level "from the outside in" through the enactment of a European Foundation Statute has been unsuccessful. The reasons include state sovereignty and tax issues.[70]

South Africa Recognises Unincorporated Associations

South Africa has imported through Dutch law the Roman law concept of a "Universitas".[71]

> An universitas personarum in Roman-Dutch law is a legal fiction, an aggregation of individuals forming a persona or entity, having the capacity of acquiring rights and incurring obligations to a great extent as a human being. An universitas is distinguished from a mere association of individuals by the fact that it is an entity distinct from the individuals forming it, that its capacity to acquire rights or incur obligations is distinct from that of its members, which are acquired or incurred for the body as a whole, and not for the individual members.[72]

Australian Recognition of Unincorporated Associations under Commonwealth Laws

The Commonwealth already recognises unincorporated associations for tax purposes. Unincorporated associations are also recognised for registration with the ACNC. This recognition is achieved by quite a simple process. In both cases, unincorporated associations fall within the definition of an "entity" within the scope of operation of the relevant legislation.[73]

What about New Zealand?

In concluding this section the New Zealand response should be mentioned. New Zealand reviewed this area of law in 2013 and considered recognition of unincorporated associations. It rejected the idea on the

[65] *Civil Code 2002* (Germany) s 21.

[66] *Civil Code 1907* (Switzerland).

[67] McGregor-Lowndes and Hannah, n 13, 211, citing *Civil Code* (Greece) Arts 78 ff, Law of 21 April 1928 on Non-Profit Associations and Foundations (Luxembourg) and *Civil Code* (Portugal) Art 168.

[68] Discussed in Scottish Law Commission, n 29, [4.7], citing Loi du 1er juillet 1901 relative au contrat d'association [Law of 1 July 1901 on the association contract] (France) JO, 2 July 1901, Art 9 and *Civil Code* (Italy) Art 12.

[69] McGregor-Lowndes and Hannah, n 13, 211, citing Law of 21 April 1928 on Non-profit Associations and Foundations (Luxembourg).

[70] Breen, n 28, 998–1002.

[71] Constantine Ntsanyu Nana, "Corporate Criminal Liability in South Africa: The Need to Look beyond Vicarious Liability" (2011) 55(1) *Journal of African Law* 86, 87; H Hahlo, *South African Company Law through the Cases* (Juta, 3rd ed, 1977) 4.

[72] *Twelve Apostle Church in Christ v Twelve Apostle Church in Christ* [2010] ZAKZPHC 5, [7], citing *Webb & Co Ltd v Northern Rifles* 1908 TS 462, 464. Moreover, South Africa's *Acts Interpretation Act 1957* (South Africa) Pt 1 s 2 "person" includes "(a) any divisional council, municipal council, village management board, or like authority; (b) any company incorporated or registered as such under any law; (c) *any body of persons corporate or unincorporate*;".

[73] *Income Tax Assessment Act 1997* (Cth) s 960-100; *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 205-5 both of which are in identical terms and state, so far as is relevant: "(1) **Entity means** any of the following: … (d) any other unincorporated association or body of persons; … Note: The term **entity** is used in a number of different but related senses. It covers all kinds of legal person. It also covers groups of legal persons, and other things, that in practice are treated as having a separate identity in the same way as a legal person does." For discussion of the implications of this for unincorporated associations see *Miscellaneous Taxation Ruling*, MT 2006/1, [26]–[28], [89]–[91].

basis "that in view of the relative ease of incorporation through the Incorporated Societies Act in New Zealand another regime was not needed to deal with societies that do not incorporate".[74]

IMPLEMENTATION CHALLENGES

Practical Challenges Given the Australian Federal System of Government

Recalling the delays in the UK enactment of the Scottish proposal for *RUUNAA*-type legislation, the limited take-up of the model legislation in the United States, and challenges with the passage and survival of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth), some difficulties may be anticipated in achieving the enactment of legislation recognising unincorporated associations in Australia.

State Recognition

The States have the residual jurisdiction and there is not an express constitutional power that gives the Commonwealth Parliament power to recognise unincorporated associations. This means that the first and most obvious place for recognition of unincorporated associations is under State legislative regimes. That is what has happened in the United States where a similar federal arrangement exists. The States already regulate incorporated associations and it would be a logical extension of that legislative environment to recognise unincorporated associations. This could be done either as an extension to the present legislation that enables the incorporation of associations or it could be by way of separate legislation. *RUUNAA* is an example of separate legislation.

A National Scheme Based on Referral of Powers

The Victorian *Betrayal of Trust Report* stated that a national framework was required to address issues raised by the Royal Commission into Institutional Responses to Child Sexual Abuse.[75]

If a national framework is to be considered, the model national framework in Australia is that under which the Australian Securities and Investments Commission (ASIC) operates. ASIC operates under a co-operative scheme. The Commonwealth has power to make laws with respect to certain corporations but the Commonwealth "does not have any legislative power specifically to regulate the not-for-profit (NFP) sector" particularly unincorporated associations.[76] Section 51(xxxvii) of the *Commonwealth Constitution* authorises the Commonwealth Parliament to legislate with respect to matters referred to it by any State. The States have referred not only the power to make laws with respect to corporations, but also laws with respect to a large number of diverse fields including de facto relationships, terrorism, industrial relations and consumer credit.

One possibility is for States to explore the referral of recognition of unincorporated associations to the Commonwealth.

Recognition for Commonwealth Purposes without Referral of State Powers

The Commonwealth could act without referral of powers to recognise unincorporated associations for Commonwealth purposes (only). To do this it may have to carefully consider the constitutional issue if registration is not purely voluntary.[77] If the Commonwealth is to have any agency involved then the ACNC was established as a national commission for the charities and not-for-profits sector. It is the

[74] New Zealand Law Commission, n 27, 38.

[75] Family and Community Development Committee, Parliament of Victoria, n 3, 535.

[76] Revised Explanatory Memorandum, *Australian Charities and Not-for-profits Bill 2012* (Cth) [2.2].

[77] Evidence to Standing Committee on Economics, House of Representatives, Canberra, 27 July 2012, 15, 23–24 (Ms Eve Brown and Prof Anne O'Connell). Evidence of Professor Ann O'Connell was that she had "real problems" with the constitutional basis of the legislation and suspected that "the first time the ACNC tries to remove a trustee there will be a challenge". Others expressed similar concerns: see Ms Eve Brown Senior Policy Manager, Trustees, Financial Services Council at 14–20 and the author of this article at 24–25.

logical agency to be involved in this. Some unincorporated associations are charities and are already registered with the ACNC. The ACNC is intended as a Commission not just for charities but also for other "not-for-profits". The ACNC may be able to recognise unincorporated associations that opt in – albeit for constitutionally limited purposes. Given that it is compliance costs that keep most micro unincorporated associations from incorporating, for registration to be attractive, it might be possible to limit compliance obligations to something very primitive.

OPTIONS FOR EXPLORATION

For both unincorporated associations and those people who have been victims of abuse within such associations, the best option would seem to be for a national framework to be established, as the *Betrayal of Trust Report* recommended. A national rather than State-based response would provide consistency in situations crossing State boundaries where State law might not be harmonious. The best way for this to be achieved is for a co-operative scheme to be established by the Commonwealth under a referral of powers pursuant to s 51(xxxvii) of the *Constitution*. At present, unincorporated associations are not registered at a State level, so arguably the States would be giving up little, if anything, by granting the power to the Commonwealth to recognise unincorporated associations as part of a co-operative scheme. Furthermore, provided registration was entirely voluntary such that unincorporated associations could choose to remain unincorporated, States would not be depriving their citizens of any rights by the formation of a national co-operative scheme.

Until that scheme is fully operational the next best option would be for States to individually pass legislation recognising unincorporated associations and for the ACNC to provide a voluntary recognition scheme for limited liability for federal purposes.

As to the scope and extent of the reform; it is recommended that *RUUNAA* and the Scottish proposal be taken as a starting point. Whatever view is preferred, there seems to be need for the tailoring of the legislation to Australia's federal system of government and possibly the role of the ACNC.

CONCLUSION

This article has set out a summary of why unincorporated associations in Australia should be recognised as legal entities and how this could be achieved. It has argued that it is in the best interests of victims, committee members and the organisations themselves. It has been argued that the common law position should be reversed by adoption of legislation similar to *RUUNAA*, with an option for unincorporated associations to opt out of the recognition should they wish. The legislative reform would have limited adverse impact – if it simply recognises unincorporated associations – provided this recognition was not burdened with additional compliance obligations. Both unincorporated associations themselves and victims of abuse committed by persons involved in unincorporated associations would be served by the enactment of such legislation.