Submission to Consumer and Business Services on the Draft Amendments to the *Associations Incorporation Act*

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SACOSS is the peak body for the not-for-profit health and community services sector in South Australia, representing a range of charities and non-government bodies who support vulnerable and disadvantaged people in our state. While some of our member groups are registered as not-for-profit corporations under Commonwealth legislation, many are incorporated under the South Australian Associations Incorporation Act – as is SACOSS itself.

Our role as one of the key peak bodies representing associations incorporated under this Act necessitates a key interest in amendments to the Act. While we thank you for the opportunity to comment on the draft amendments, we are disappointed at the nature of the consultation. Given that, as the CBS summary notes say, the Act has not been subject to a comprehensive review since 1997, SACOSS believes that it would have been more appropriate to undertake a collaborative review, co-designed with key stakeholders.

A collaborative review could have begun with a mutual exploration of the purposes of a review, weaknesses or gaps in the current Act and the range of changes required. That would have allowed us a greater understanding of the drivers of change and what problems the government is trying to address, and we would also have been able to put forward possible issues or areas that we would like to see change. For instance, some consideration could be given to:

- whether social enterprises are able to be brought under this Act and if the provisions are suitable for such organisations;
- any necessary additions or changes to the s18 list of eligible purposes;
- complexities and barriers in winding up associations; or
- other visions for how associations regulation should happen, requiring overhaul of the Act.

Although SACOSS is not seeking action on the above items, the list represents conversations that various key stakeholders may have had if there was more time and consultation earlier in the review process.

Instead, we have just a few weeks to make comment on nearly 30 pages of provisions with limited explanation of their purpose. This is particularly problematic because, on our reading, some of the changes proposed significantly change the nature of regulation of associations, providing for greater powers for government and having potentially large ramifications for the autonomy of associations.

Accordingly, **SACOSS proposes that CBS organise a forum of stakeholders where the rationale for the review, the evidence of the need for change, and the proposed amendments can be presented and discussed**. Recently, SACOSS worked with peak bodies in other sectors (Volunteering SA&NT, the Conservation Council of SA, the Arts Industry Council of SA, and Sport SA) to develop funding guidelines and standardised contracts with the Department of Treasury and Finance. We believe that a forum with at least these groups, and potentially others, would be useful in advancing the review of the South Australian Associations Incorporation Act.

In this submission, SACOSS is presenting observations and highlighting perceived problems with specific clauses (with recommendations in italics). However, the limited time available, coinciding with both the state budget and the end of financial year, has hampered our capacity to obtain legal advice on the proposed changes, consult with our sector, and wholly develop our own position. Our observations should not be regarded as definitive or final positions. We accept that parts of our reading of the proposed clauses may be flawed, and with further explanation we may be more comfortable with certain propositions. Additionally, other issues not dealt with in this submission may arise on further investigation.

Notes on Specific Clauses

Clause 6 creates a new Section 8 in the Act which requires annual verification statement to be lodged along with a prescribed fee.

This is presumably to enable greater oversight of associations and to identify defunct organisations. While there may be a problem with defunct organisations, this is in part due to the existing fee requirement which creates a disincentive to deregister an organisation (it is just easier to allow the organisation to lapse). However, the proposal in these amendments is regulatory overreach and creates extra red tape and costs for all associations. The penalty of up to $5,000 also seems disproportionate to the offence and to other offences under the Act. For these reasons, *SACOSS advises that this approach is re-evaluated.*

Clause 7 substitutes new enforcement and compliance powers, far beyond the terms in the current act.

- S10(1)(a) is very broad, requiring anyone answer to any question for purpose of the Act and the production of any documents. Existing s10 only requires production of books and s11 only requires answers to questions about the books. *This scope of the proposed powers needs to be narrowed as it potentially goes beyond governance and financial accountability and could be used interfere with the legitimate activities of the association.*
- S10(2) gives power to summon anyone to a meeting at specified time and place, making non-compliance an offence. *This is a significant power in relation to individuals who may be very part-time volunteers in small organisations.*

- S10(5) gives officers protection against self-incrimination. This is an improvement on the current Act which explicitly overrules self-incrimination (s15). *SACOSS welcomes this change.*
- S11 gives new substantial powers of entry, search and seizure that are not in the existing Act. Any such action can only be for purpose of the Act but does not require reasonable belief of an offence to take such action. *In the absence of a stated rationale, this power seems too wide and should be restricted – at a minimum requiring a reasonable belief of a breach of the Act, but possibly more.*
- S13 gives power to the Commission to require actions by an association or its committee members to be taken where the Commission believes, on reasonable grounds, that there is breach of the Act or an association's constitution, or in prescribed circumstances. These prescribed circumstances include disputes between members interfering with the operation of the association, failure to lodge verification statements, or when it is in the public interest. At its highest, if the Commission believes it is in the public interest to order an association to do something, it can. *This substantially widens the Commission's power and significantly reduces the autonomy of associations. In the absence of any rationale and without further limitation, this change cannot be supported.*
- S13(6) – the wording is out of context with the Division stating a required number of members for an Association is the greater of 5 members, or 10% of the members. It is unclear what this means in this context. The 10% of members appears circular, but even if it belongs somewhere else (it is repeated later) its inclusion raises the question of whether an association requires members, something not currently required in the Act and which the amendments are not consistent on. *The clause should be clarified or deleted from this section.*

Clause 8 inserts a requirement into s18 that an association is not eligible for incorporation if it has less than 5 members. This is a significant change from the current Act which allows for associations that do not have members. There may be good reasons for different sorts of organisations not to have a members (e.g. they may be accountable to stakeholders in a different way). *The change requires some justification, and if there are abuses of the current rules, then the clause needs to be rewritten so as not to impact on legitimate organisations.*

Clause 12 inserts a new s23A(1a) to allow that regulations can prescribe minimum governance standards that will be implied in rules of all associations. It is not quite clear what "implied" means here: are they used in interpreting the constitution, or specific requirements as if they were in the associations' rules? Further, this may be problematic if these standards are too prescriptive, different or contradictory to ACNC governance standards, and may require organisations to amend their own constitutions if the regulations unilaterally change. *This is potentially a wide and ill-defined power, but might be better if it was clear that the rules were principles-based, or somehow more tightly defined. Perhaps the word "rules" could be replaced with "principles".*

Clause 13 inserts a new s23B which radically changes the role of the model rules. Currently they are a guide which can be adopted by an association. The new s23B gives them power – at least in relation to mandatory rules in the model rules, which under ss(4) apply to anything that is absent or the association's constitution, and overrule anything that is

inconsistent with the mandatory rules. There is a similar but different application in ss(6) for "replaceable rules" to apply where an association's rules don't address the issue covered, but for replaceable rules if the association's rules are inconsistent with the replaceable rules the association's rules prevail [s(7)].

The model rules currently serve a useful function as a guide and for adoption if appropriate, and are much better than the old-style model rules which were overly bureaucratic and inappropriate for small organisations. However, this approach represents only one possible model for organisation. To now give the Commission power to override the rules of an organisation is potentially a major imposition on civil society as it may limit the possibilities of more diverse structures or alternative ways to run an organisation. For instance, if the current model rule 6.3(b) re majority voting became a mandatory rule, consensus decision-making would be banned! This is unlikely, but the power is there and there is no guarantee or guidance on what will be "mandatory" rules.

Apart from anything else, this clause would require every association to seek legal advice as to whether their constitutional provisions are consistent with the mandatory rules – although ss(9) says that regulations may make transitional provisions to not apply this to existing organisations, but there is no guarantee of this.

SACOSS rejects the idea that regulations could or should be used to override associations' constitutions and the choices for organising models contained in those constitutions. However, we also acknowledge that some constitutions are deficient in some provisions and the model rules may provide a useful guide. In that sense, if the Commission is seeking to better support these deficient constitutions, the model provided by the "replaceable rules" is probably acceptable. If an association has made a choice by adopting a constitution with different rules, those rules prevail, but if there is a gap, the model rules apply – although care needs to be taken that the replaceable rules are not inconsistent with something in the constitution. For instance, an association may have no rule allowing proxy voting, but if a rule allowing proxies was a replaceable rule, it may still be inappropriate if the association's rule provide for consensus decision making.

SACOSS recommends that

- *s23B(2)(a), s23B(4) and any other reference to mandatory rules be deleted;*
- *in s23B(5) the words "provided that the replaceable rule is not inconsistent with other rules of the association" be added at the end of the sentence;*

Clause 13 also inserts a proposed new s23C giving the Commission power to unilaterally intervene to change rules of an association in various circumstances including if a proposed act, omission or resolution is contrary to interest of the association, or unfair to members. In the absence of a rationale for these changes, it is difficult to understand how a change in association rule would deal with some of the circumstances envisaged, especially without removing the autonomy of the association. For instance, if there was a resolution that offended s23C(3), how would rules be changed to prevent that resolution without it simply being the Commission interfering in the affairs of the association?

Theoretically, if an organisation did not have a Reconciliation Action Plan or an equal opportunity policy (an omission) the Commission could change the association's rules to require them to have one (so as not to prejudice members). Or if a peak body wanted to campaign for a government levy on its members to fund a charitable work, the Commission could possibly change the rules to preclude such advocacy because it was against the interests of the members as a whole. Additionally, if an organisation passed a resolution to hold a meeting at a venue which was not wheelchair accessible or to charge a high entry fee for an event, would the Commission ascertain if any members used a wheelchair or were on low incomes, and if so, change the rules of the association to require all meetings be wheelchair accessible or cost-free? Obviously, meetings and events should be accessible, but in all these examples the questions are (a) is it a matter for the constitution (as opposed to policy) of an association, and (b) an appropriate role for the Commission?

Similarly, as noted above, if the governance standards in the proposed s23A(1a) are contradictory to ACNC requirements, under the proposed s23C(2), the Commission could change the rules to fit SA governance standards – thus rending an organisation no longer eligible for charity status.

Again, all these are unlikely, but the power is created by the proposed amendments and is too wide. On the other hand, if an association had rules which were prejudicial, for instance, requiring that the chair was a man, or of a certain race, and the organisation was not willing to change those rules, then it may be appropriate for the Commission to intervene.

Further, in s23C(7), in changing the association's rules, the Commission does not have to comply with the requirements of the Act to change an association's rule changes (e.g. the requirement to hold an SGM to change the constitution). This is practical, but it also means that any such change could be done without consultation or agreement. s23(6) only requires notice after the change.

The extent and operability of the Commission's powers in relation to s23C needs to be re-thought, possibility limiting the powers to change rules only to instances where the actual rules of association were the problem.

Clause 15 inserts a requirement that a management committee consists of at least 3 members who are SA residents. This curtails different management options. As a matter of principle, the association should be able to decide how many people are best on its management committee. For instance, it may be that in a very small organisation, it is most efficient for one person to do all the management and let others get on with the mission-based activities. Further, this clause in effect means that the association requires members – which is not the case under the current Act. Finally, the requirement to be 18 years and over is discriminatory and may be problematic for youth groups, although SACOSS is unsure if it is a requirement of other laws.

This clause should be amended or deleted if the possibility of associations without members is maintained, and if the age limit is not mandated elsewhere.

Clause 19 changes rules around accounts to be kept, mostly practical and operationalising the ACNC review structure – *which is supported.* However, s35(4) allows commissioner to require accounts to be audited. This imposes additional cost on an association and effort on volunteers, and there is no requirement for reasonable cause to impose this requirement. Further, SACOSS notes that in South Australian government funding contracts with not-for-profit organisations, this issue was dealt with on the basis that if the government demands an extra audit (beyond the standard requirements), the government should pay for it. This is not clear in s(4a)(b) which is unclear/incomplete, but appears to leave remuneration to regulations. *The proposed s35(4) should be amended to require notice under the subsection to only be issued if the Commission has reasonable grounds to believe that there is financial malfeasance or a breach of the Act, and to require the Commission to pay for any such audit or review.*

Further, as noted above, the proposed s35(6) maintains existing line about "a prescribed association that has members", which is a formulation in the current Act, but seems contradictory in relation to clause 15's insertion of s29(1a). *The inconsistency needs to be addressed.*

Clause 22 adds a range of new clauses giving the Commission permission to call meetings. S39AAB and AAC gives the Commissioner power to call a general meeting or annual general meeting in certain circumstances including that "in the circumstances" there is a need to do so. This is very open-ended, and ss(4) gives the power to the Commissioner to determine the rules of the meeting. This could potentially over-ride the rules and culture of the association (e.g. consensus decision-making).

The proposed 39AAB(7) repeats the formulation of required number of members (5 or 10% of members) which we expect is a typo in its insertion earlier, but still makes no sense here unless it is intended to be a quorum for the meetings referred to in this section – although it does not say that. It again requires an association to have members, which is inconsistent with other parts of the Act. *This subsection needs to be either deleted or re-written as a quorum provision (if an association has members).*

Clause 26 inserts new clause requiring a register of members be kept. This is an extra requirement in the Act, but would be in most constitutions and organisations would do this as a matter of course. The bigger question is what information is required to be kept on the register. This is left to regulations, but could be oppressive if it is too detailed. *This clause should be amended, firstly to refer only to associations with members, and secondly to prescribe that the register is the name and contact details of members.*

Clause S28 amends the winding-up provisions, including removing the requirement of the consent of the Minister for the Commission to wind-up an association, and other changes make it easier to wind up an association which is no longer functioning. Most of these are sensible, but s41(7)(f) is a power to wind up if the Commission is of opinion that it is in the public interest. This could be open to political abuse, if for instance, a future Commissioner was of the view that a particular purpose was against the public interest. Should an anti-vaccination group, or a pro/anti-abortion group be allowed to incorporate? *The power of*

winding up in the proposed s41(7)(f) should be limited by a requirement that the opinion of the Commission take into account the purposes of the Act and eligibility for incorporation.

Clause 32 creates a new section allowing Commission to deregister organisations that are no longer eligible. There is a chance to oppose deregistration, but only in a 1 month window which is a very short time for committees of volunteers who may not meet regularly. *The proposed s43B(2) should be amended to provide a 3 month response time.*

Clause 34 requires the Commission to publish on its website a list of possibly defunct organisations, and can cancel their incorporation if they do not receive a response in a "prescribed period". The power to remove defunct organisations is not opposed, but it is not clear what the prescribed period is to respond and it will need to be longer than the 1 month proposed in the earlier clause. *Proposed s44AA(2) should be amended to add the words "of not less than 3 months" after the words "prescribed period".*

Clause 36 deals with information required to be disclosed re property of organisation that is being wound up, and extends current requirement of info for 5 previous years to 10 years. It is not clear why this change is needed, and it may be very difficult for many volunteer organisations. *The existing timing provisions should be retained.*

Clause 38 inserts new clause to allow for meetings to be done by phone or online. This is s*ensible and long overdue.*

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Thank you for your attention to this submission. If you would like further information on any issues raised above, please contact the report author, Dr Greg Ogle, Senior Policy and Research Analyst. He is contactable at greg@sacoss.org.au or by phone at 0409 096 519 (although please note he is on leave until 12 July 2021).