justice connect
Not-for-profit Law

Melbourne Office
PO Box 16013
Melbourne VIC 8007
DX 128 Melbourne
Tel +61 3 8636 4400
Fax +61 3 8636 4455

Sydney Office
GPO Box 863
Sydney NSW 2001
DX 78 Sydney
Tel +61 2 9114 1793
Fax +61 2 9114 1792

Not-for-profit Law supports amendments to the *Associations Incorporation Reform Act 2012* and urges further changes to clarify and simplify the Act

2 May 2014

Not-for-profit Law (**NFP Law**) (previously PilchConnect) is a program of Justice Connect (previously the Public Interest Law Clearinghouse or PILCH). NFP Law provides free/low-cost legal help to not-for-profit community organisations in Victoria and New South Wales. Many of the groups we assist are small, volunteer-based Victorian incorporated associations. For more information see www.justiceconnect.org.au/nfplaw.

Not-for-profit Law supports the proposed amendments to the *Associations Incorporation Reform Act 2012* (Vic) (**AIR Act**) in the *Consumer Affairs Legislation Amendment Bill 2014* (**the Bill**) and congratulates the Victorian Government on its commitment to monitor the new regime created by the Act and address issues arising.

In particular we welcome the following changes:

- inserting a restriction on initiating a disciplinary procedure where a grievance procedure is currently on foot regarding the same matter
- clarifying that where a tier two incorporated association undertakes a full audit of their financial statements in accordance with their rules, this will satisfy the requirements that a less onerous 'review' be undertaken, however **we recommend that this provision extend to tier two incorporation associations that have undertaken a full audit for reasons other than a requirement in their rules (for example, a funding agreement that requires a full audit be undertaken)**, and
- a legal requirement that the Secretary of an incorporated association notify the registrar of a change of their address.

While we are in favour of the proposed amendments, there are a number of issues of concern in the AIR Act regime that are not addressed in the Bill. These issues are outlined below. We urge the Government to consider addressing these as part of the Bill to ensure a comprehensive reform response and to avoid ongoing confusion and unnecessary complexity for Victorian incorporated associations.

Further recommended amendments to the AIR Act

Introduce a statutory right for members to call general meeting

The AIR Act provides in section 78(2)(b) that a committee member can be removed from office by special resolution of members. However, the AIR Act does not afford a statutory right to members to call a general meeting where such a resolution could be passed. Therefore, section 78(2)(b) is redundant for associations that do not have a right for members to call general meetings included in their rules.

Include reasonableness requirements around members' requests to access relevant documents

We have had several queries from incorporated associations about their members' rights to inspect documents and records of the association. There is a lack of clarity around the mechanism required for inspection, in particular timing and reasonableness requirements for inspection of some classes of documents by members. The result is that members can vexatiously request to inspect documents, and this is a significant burden particularly for volunteer-run incorporated associations.

We note that the AIR Act contains a procedure for allowing access to the association's rules, general meeting minutes and members register (sections 53 and 59). However, Schedule 1 requires that rules provide for members to have

access to "relevant documents" of an association (defined far more broadly that minutes and rules) and the Act does not include a procedure to regulate this access.

Amend provisions on access to personal information on members registers to ensure appropriate exemptions and a mechanism for 'bulk' restrictions

Through our work advising small-to-medium community organisations, we are aware that some incorporated associations maintain inaccurate members registers, or include information on their members register that is not required to be kept (and in some circumstances may breach privacy laws through its inclusion). For example, some sporting clubs automatically include every sporting participant on their register as a member where no membership application has been made by the participants, and we have encountered health organisations that include details of health issues or disabilities of members (or their families) on their register.

We also note that there are many examples of incorporated associations where the fact of membership itself reveals sensitive information about members. For example, members of addiction or disability support groups would be revealed to have that disability or addiction through inspection of the members register.

We support the inclusion of section 59 in the AIR Act that enables a member to apply to have access to their personal information on the members register restricted, however we recommend that section 59 contemplate a 'bulk' system of restricting access to the details of members on the register where membership of a group by its nature could reveal personal or sensitive information about that member.

We also recommend that Consumer Affairs Victoria (**CAV**) undertake an education program targeted at small associations regarding the requirements to keep a register of members, those who are considered by law to be members of the association, and information that is not appropriate to be included on a members register.

Deemed application of model rules regarding appointment and removal of Secretary (formerly Public Officer)

Currently, many associations that have not updated their rules since the introduction of the AIR Act do not have a rule for the appointment or removal of the Secretary under the AIR Act (formerly known as the 'Public Officer'), as required by Schedule 1 to the AIR Act. Commonly, associations' rules drafted under the *Association Incorporation Act 1981* provided for a Secretary on the committee who does not perform the Public Officer functions, with the Public Officer role external to the committee and not contemplated by the rules. For these associations, since 26 November 2012, the new model rules about the appointment and removal of the Secretary are read into their rules. Significantly, the new model rules provide that the Secretary is part of the association's committee.

This means that for an association whose own rules do not provide for the appointment and removal of the Public Officer/Secretary, on 26 November 2012, through the reading in of the model rules to their rules, their former Public Officer was re-named Secretary and also elevated to a position on the association's committee. Many organisations already have a Secretary on their committee under their own rules, and the deemed elevation of the Public Officer/Secretary role to the committee creates ambiguity as to the status of the existing 'Secretary' on the committee and means that groups may, confusingly, have two Secretaries on their committee.

We recommend that the reading in of the new model rules to an association's own rules, such that a Public Officer not previously sitting on a committee becomes a Secretary and is elevated to sit on the committee, should be explicitly delayed to allow groups to update their rules and appropriately manage this issue.

Ensure consistency in grievance and disciplinary procedures under the AIR Act and model rules

The AIR Act contains both a disciplinary procedure and a grievance procedure (sections 54 and 55 of the Act). Both procedures require that the outcome of the dispute or grievance is "determined by an un-biased decision-maker". We note that the disciplinary procedure and grievance procedure contained in the model rules do not provide for such a reaching of an outcome by an unbiased decision-maker (the disciplinary procedure culminates in a disciplinary appeal meeting of members, and the grievance procedure's final step is mediation). This is inconsistent with the requirements set out in the AIR Act. Such inconsistency is confusing for groups who use the model rules with reference to the Act, and for groups writing their own rules who look to the model rules for examples of disciplinary and grievance procedures compliant with the Act.

Simplify provisions in relation to ending an association's incorporation

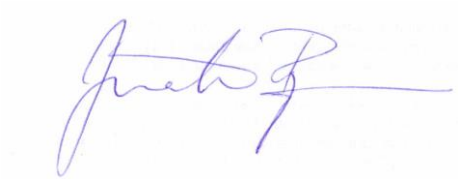
The incorporated associations regime was intended to be 'a simple and inexpensive means of incorporation for non-profit associations of widely varying kinds' (Chief Justice's Law Reform Committee Report 1980). With this objective in mind, it is imperative that the AIR Act can be easily understood and applied by non-lawyers (ie. by members of the public involved in associations), without requiring the assistance of a lawyer.

The cancellation, winding-up and administrative provisions of the AIR Act are neither simple nor inexpensive to apply, in particular:

- voluntary cancellation for small groups is only available where the applicant (the AIR Act contemplates a wide range of potential applicants, including former members) can declare that the association: has gross assets of less than $10 000; has no outstanding debts or liabilities; has paid all fees and penalties applying to it under the *Associations Incorporation Reform Act 2012*; is not a party to any legal proceedings; and in the case of an application by a member or former member of the association, that the association is not in operation; and has and/or will dispose of remaining assets in accordance with the rules of the association. This declaration would be difficult for most applicants to make without legal advice and investigation into the affairs of the association;
- the application of certain sections of the *Corporations Act* by reference and without inclusion of their text in the AIR Act. It is likely that legal assistance would be required to understand and apply the winding up and administration provisions of the AIR Act, and the relevant applied *Corporations Act* provisions; and
- statutory management is only available to organisations on application by the Registrar (CAV). A regime with other avenues for appointment of a statutory manager, such as on application by a group of members or the committee of an association could result in greater assistance being provided to struggling incorporated associations.

The perverse outcome of the overly complex cancellation/winding-up/administration regime in the AIR Act is that many incorporated associations that have reached the end of their life do not formally cancel or wind-up. These non-operational groups simply stop operating, but remain registered with CAV. These groups likely contribute to the high number of associations that do not submit annual statements to CAV each year. To have a cancellation/winding-up/administration system in place that is so rarely used is not in the interests of the Regulator (who then administers groups that no longer operate), nor in the interests of the creditors that the provisions are intended to protect.

For further information or queries, please contact Juanita Pope or Kate Fazio using the details provided below.



Juanita Pope

Director, Not-for-profit Law

juanita.pope@justiceconnect.org.au

0407 716 882

Kate Fazio

Manager, Not-for-profit Law

Kate.fazio@justiceconnect.org.au

0438 442 784