

14 December 2017

Our ref WD: NFP

Justice Policy Team
Department of Justice
Locked Bag 5111
Parramatta NSW 2124

By email: [REDACTED]

Dear Policy Team

Consultation Paper – NSW Government consultation in relation to the civil litigation recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse

The Queensland Law Society (QLS) is the peak professional body for the State's legal practitioners. We represent and promote nearly 12,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide.

QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This correspondence has been prepared with the assistance of the QLS Not for Profit Law Committee, whose members have substantial expertise in the not-for-profit and charities sector. Our policy committees and working groups are the engine rooms for the Society's policy and advocacy to government.

QLS is aware that the New South Wales Department of Justice has recently conducted consultation on its "*Consultation Paper - NSW Government consultation in relation to the civil litigation recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.*"

QLS has also been considering the recommendations of the Royal Commission addressing this issue, particularly in relation to the position of unincorporated associations and the potential liability of office bearers.

As many of these issues affect more than one jurisdiction, the Committee anticipates that the following comments may be helpful for your review, given the work it has already undertaken in this regard and the issues identified in your Consultation Paper.

QLS considers that it is timely to initiate a detailed debate on reform of the law relating to unincorporated associations, particularly with respect to the legal recognition of unincorporated associations.

Consultation Paper – NSW Government consultation in relation to the civil litigation recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse

Some of the issues relevant to unincorporated associations, including identifying a proper defendant and the availability of assets to meet damages awards, have been raised in your Consultation Paper.

These issues have also been addressed in the Queensland Government's "*Issues Paper: The civil litigation recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse: Redress and Civil Litigation Report - understanding the Queensland context*", released in August 2016.

It is the view of QLS that recognition of unincorporated associations by formal legislation, reversing the common law jurisprudence, may provide the best legal environment for victims, organisations and committee members in the identification of the proper defendant and the availability of assets to meet damages awards.

QLS considers that the discussion of this issue should include consideration of the Revised Uniform Unincorporated Association Act adopted in a number of United States jurisdictions and recommended for adoption by Scotland as a model for Australian jurisdictions.

Enclosed for your information is a pre-publication version of a paper which has been drafted by the Chair of the QLS Not for Profit Law Committee, Dr Matthew Turnour. This paper considers these issues in further detail.

Please treat the enclosed paper as confidential. However, I confirm that this letter may be published.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Acting Principal Policy Solicitor, Wendy Devine on [REDACTED]

[REDACTED]
Yours faithfully

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Christine Smyth
President

On unincorporated association: Should Australia do what Scotland could not?

by

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Abstract

This paper 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 of America. The challenges facing Australian plaintiffs and defendants caused by the lack of legal recognition of unincorporated associations are common to commonwealth countries. Scotland sought enactment of RUUNAA-like legislation in 2009 but being constitutionally incompetent referred the matter to the UK parliament which has not yet enacted such a law. The paper further considers both foreseeable advantages and challenges that arise if RUUNAA-like legislation was introduced into Australia. The paper concludes that Australia should do what Scotland could not and recognise unincorporated associations as legal entities by legislation.

Key Words

Unincorporated Association; church; volunteer liability; *Revised Uniform Unincorporated Nonprofit Association Act*; RUUNAA;

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Introduction

Context

The Scottish Parliament received a recommendation from its Law Reform Commission in 2009 that it enact legislation reversing the common law jurisprudence on unincorporated associations and instead recognise unincorporated associations as legal entities. That recommendation was accompanied by draft legislation which, in its preparation, had regard to model legislation adopted in a number of states of the United States of America.¹ The Scottish Parliament was unable to enact the legislation because power to deal with that subject matter was reserved to the Parliament of the United Kingdom. The proposal was referred to the Secretary of State for Scotland who announced in 2012 an intention to introduce a Bill into the Parliament of the United Kingdom to give effect to the recommendation.² Such a Bill is yet to be introduced into that Parliament.

In Australia, the common law jurisprudence remains the law and so an unincorporated association has no juridical identity independent of its members in that country.³ The consequence of this is that persons injured in the context of activities conducted within an unincorporated association, persons purporting to contract with an unincorporated association and others, such as persons defamed by unincorporated associations, can find it difficult to identify a proper defendant if there is a contest over liability or damages.⁴

How these concerns are addressed is a matter now troubling all Commonwealth nations. M H Ogilvie writing in this journal in 2004 observed that the 'oldest common law jurisdictions in the world today, Australia, Canada, England, Ireland, New Zealand and the United States are all grappling with an upsurge of cases of sexual, physical and psychological abuse in their caring facilities'.⁵ His paper, which was an exploration of the issues of vicarious liability and charitable immunity, was a plea that in addressing these concerns that the 'very foundations of the legal system' not be dismissed lightly.⁶ The significance of these issues has waxed not waned since 2004. So while this paper focuses on development of the law in Australia the issues are

¹ See Draft Unincorporated Associations (Scotland) Bill being Annexure A to Scottish Law Commission (2009) *Report on Unincorporated Associations* at 63 Scottish Law Commission, *Report on Unincorporated Associations* (Scot Law Com No 217, 2009).

² HC Deb 12 April 2012, vol 543 col 19WS.

³ Trustees of The Roman Catholic Church v Ellis & Anor [2007] NSWCA 117, 47 (Mason P); *Anglican Development Fund Diocese of Bathurst v Palmer* [2015] NSWSC 1856; Neil Foster, 'The Bathurst Diocese Decision in Australia and its Implications for the Civil Liability of Churches' (2017) ECC LJ 14, 25; Royal commission; Productivity Commission, 'Contribution of the Not-for-Profit Sector' (Research Report, Canberra, 2010) 117; 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* (November 2013); Myles McGregor-Lowndes and Frances M. Hannah 'Unincorporated associations as entities: a matter of balance between regulation and facilitation?' (2010) 28(3) Company and Securities Law Journal, 197.

⁴ Neil Foster, 'The Bathurst Diocese Decision in Australia and its Implications for the Civil Liability of Churches' (2017) ECC LJ 14, 25; Smith, Peter. (2016) The Problem of the Non-justiciability of Religious Defamations *Ecclesiastical Law Journal* 18(1), 36; 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* (November 2013).

⁵ M. H. Ogilvie, 'Vicarious Liability and Charitable Immunity in Canadian Sexual Torts Law' (2004) 4 OUCLJ 167, 196.

⁶ M. H. Ogilvie, 'Vicarious Liability and Charitable Immunity in Canadian Sexual Torts Law' (2004) 4 OUCLJ 167, 196.

international and the paper draws from, and seeks to contribute to, the discourse in all Commonwealth jurisdictions.

Introducing the foundational and now pressing issues

This paper argues Australia should take steps to enable unincorporated associations to be legally recognised. Put differently, it argues for reform of the law to reverse the common law position denying legal status to unincorporated associations. It argues that there should be a statutory presumption that unincorporated associations are recognised similar to the way that business partnerships are recognised with unincorporated associations able to opt out of recognition. It suggests that Australia begins by considering model legislation enacted in various jurisdictions of the United States known as the *Revised Uniform Unincorporated Nonprofit Association Act* ('RUUNAA')⁷ and a Scottish proposal that relied substantively on RUUNAA. It 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 but tailored to Australia's unique circumstances.

Although the problems caused by the common law not recognising unincorporated associations as legal entities are longstanding, as the issue has come into the spotlight more recently in Australia, now is an appropriate time for Australia to consider this issue.

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'.⁸ 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.⁹ This proposed reform provides a way of addressing these problems by enabling unincorporated associations to hold property and to sue and be sued.

The genesis of the current public debate in Australia is the 2007 case of *Trustees of The Roman Catholic Church v Ellis & Anor*.¹⁰ 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'.¹¹

Justice for abuse victims is a subject engaging the attention of state and federal parliaments in Australia.¹² *The Royal Commission into Institutional Responses to Child Sexual Abuse* is due to report in December 2017 and is expected to find that much abuse occurred within unincorporated associations like the Roman Catholic Church. The question of recognition of unincorporated

⁷ Uniform Law Commission *Unincorporated Non-profit Association Act* (2008) (3 July 2011) <[http://uniformlaws.org/Act.aspx?title=Unincorporated Non-profit Association Act \(2008\)](http://uniformlaws.org/Act.aspx?title=Unincorporated%20Non-profit%20Association%20Act%20(2008))>.

⁸ 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* (November 2013).

⁹ 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* (November 2013).

¹⁰ *Trustees of The Roman Catholic Church v Ellis & Anor* [2007] NSWCA 117.

¹¹ *Trustees of The Roman Catholic Church v Ellis & Anor* [2007] NSWCA 117, [9].

¹² *Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill* (2011) NSW.

associations will, therefore, need to be considered. This paper argues that Australia should follow the recommendation of Scotland for recognition of unincorporated associations following the RUUNAA model.

An overview of the paper

The paper 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 as a potential statutory option to challenges raised 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 existing, 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. That leads, it is argued, to a normative conclusion that reforming the law of unincorporated associations by statutory reversal of the common law jurisprudence in Australia is desirable.

Australians in unincorporated associations

The vast majority of Australians participate in unincorporated associations. Any improvement to the law governing unincorporated associations is, therefore, likely to have a significant impact on millions of Australians. The population of Australia is reported to be 23.78 million as at 30 June 2015.¹³ It is estimated that this population participates in approximately 600,000 not-for-profit organisations of some form or another, the vast majority of which are unincorporated associations.¹⁴ It is unknown exactly how many unincorporated associations there are in Australia but the Productivity Commission in 2010 estimated that the 'majority, some 440 000, are small unincorporated organisations (such as neighbourhood tennis, babysitting, or card clubs)'.¹⁵ Data from the Australian Charities and Not-for-profits Commission supports the finding that smaller charities are likely to take the unincorporated form.¹⁶ In addition to these micro organisations are religious denominations which also usually take unincorporated form. Each week an estimated 1.8 million people attend Australia's approximately 13,000 churches most of which are unincorporated.¹⁷ Beyond weekly attenders, the total numbers of participants in organised religion through unincorporated associations is difficult to estimate but the 2010 General Social Survey reported that '15% of men and 22% of women aged 18 years and over' said they 'had actively participated in a religious or spiritual group'.¹⁸

¹³ Australian Bureau of Statistics (18 August 2016) 3235.0 - Population by Age and Sex, Regions of Australia, 2015 at <http://abs.gov.au/ausstats/abs@.nsf/Latestproducts/3235.0Main%20Features102015?opendocument&tabname=Summary&prodno=3235.0&issue=2015&num=&view=>.

¹⁴ Productivity Commission 2010, Contribution of the Not-for-Profit Sector, Research Report, Canberra 117.

¹⁵ Australian Bureau of Statistics (18 August 2016) 3235.0 - Population by Age and Sex, Regions of Australia, 2015 at <http://abs.gov.au/ausstats/abs@.nsf/Latestproducts/3235.0Main%20Features102015?opendocument&tabname=Summary&prodno=3235.0&issue=2015&num=&view=>.

¹⁶ Australian Charities and Not-for-Profits Commission, *Australian Charities Report* (December 2015) <http://www.csi.edu.au/media/Australian_Charity_Report_2015_Web_ND8DU2P.pdf>.

¹⁷ McCrindle Research (Thursday, March 28, 2013) *Church Attendance in Australia* <http://www.mccrindle.com.au/the-mccrindle-blog/church-attendance-in-australia-infographic>.

¹⁸ Australian Bureau of Statistics (20 November 2013) 4102.0 - *Australian Social Trends*, Nov 2013 <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4102.0Main+Features30Nov+2013>.

Examples of unincorporated associations in common law countries

Readers might be surprised by the names that do not exist as a matter of law. The House of Lords famously observed 'the Church of England is not itself a legal entity'.¹⁹ Elizabeth Miller in her analysis of RUUNAA and UUNAA points out that the progenitor of that legislation, the Uniform Law Commission, 'continues to be organized as an unincorporated nonprofit association' and that the Association of American Law Schools and the American Bar Association were not incorporated until 1972 and 1992, respectively.²⁰ In the United States, the National Collegiate Athletic Association 'consisting of approximately 960 public and private universities and Colleges' is an unincorporated association.²¹ One of Australia's major political parties, the Australian Labor Party, provided the dispute litigated in one of the leading decisions on unincorporated associations in Australia.²² The variety and extent of the organisations taking the unincorporated form is surprising.

When and why Australians 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'.²³ This parallels the US experience where, once 'a non-profit that reaches a significant size or level of property ownership typically [it] incorporates'.²⁴ Robert Flannigan described the law of associations as 'a residual regime'.²⁵ 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'.²⁶ Where the unincorporated form is not taken through ignorance he observed that it can be the result of a cost-benefit analysis.²⁷ 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.

¹⁹ 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*. (November 2013).

²⁰ 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, 855 note 16.

²¹ Joshua Lee and Jamie McFarlin, 'A European Solution to America's Basketball Problem: Reforming Amateur Basketball in the United States' (2015) 6 Harvard Journal of Sports and Entertainment Law 95, 106.

²² *Cameron v Hogan* [1934] HCA 24; (1934) 51 CLR 358.

²³ Myles McGregor-Lowndes & Frances M. Hannah, 'Unincorporated Associations as Entities: A matter of Balance between Regulation and Facilitation?' (2010) 28(3), Company and Securities Law Journal 197, 203.

²⁴ ; Evelyn Brody, 'U.S. Nonprofit Law Reform: The Role of Private Organizations' (2012) 41(4) Nonprofit and Voluntary Sector Quarterly 535, 541.

²⁵ Robert Flannigan, 'Contractual Responsibility in Non-profit Associations' (1998) 18 Oxford Journal of Legal Studies 631, 633 citing *Carl Rove & Company v Thornburgh* 39 F 3d 1273, 1294.

²⁶ Robert Flannigan, 'Contractual Responsibility in Non-profit Associations' (1998) 18 Oxford Journal of Legal Studies 631, 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.

²⁷ Robert Flannigan, 'Contractual Responsibility in Non-profit Associations' (1998) 18 Oxford Journal of Legal Studies 631, 633.

Consideration given to legal recognition of unincorporated associations 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 enquiry in Australia that has considered the possibility of recognition of unincorporated associations is that mentioned above undertaken by McGregor-Lowndes and Hannah of QUT.²⁸ 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.²⁹

The *Productivity Commission Research Report into the Contribution of the Not-For-Profit Sector* expressly enquired into unincorporated associations and raised recognition of unincorporated 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.³⁰

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 chapter 26 identifying the legal barriers to claims by victims against non-government institutions.³¹ 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'.³² It discussed US legislation but not RUUNAA.

An advanced Google search for the exact phrase 'Revised Uniform Unincorporated Nonprofit Association Act' limiting the region to 'Australia' conducted on 9 October 2016 found the only citation within Australia to reference this legislation to be in a PhD.³³ 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.³⁴

Any serious consideration of statutory reform of unincorporated association law in Australia would be expected, as was the case in New Zealand,³⁵ to take some cognizance of RUUNAA and the Scottish proposal but it seems it has been largely overlooked.³⁶

²⁸ Myles McGregor-Lowndes & Frances M. Hannah, 'Unincorporated Associations as Entities: A matter of Balance between Regulation and Facilitation?' (2010) 28(3), *Company and Securities Law Journal*, 197.

²⁹ Myles McGregor-Lowndes & Frances M. Hannah, 'Unincorporated Associations as Entities: A matter of Balance between Regulation and Facilitation?' (2010) 28(3), *Company and Securities Law Journal* 197, 221.

³⁰ Productivity Commission (2010) *Contribution of the Not-for-Profit Sector, Research Report*, Canberra xxvi and Productivity Commission Draft Report, 'Contribution of the Not-for-Profit Sector (October 2009), section 6.2.

³¹ 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* (November 2013), 527.

³² 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* (November 2013), xxxix.

³³ Matthew Dwight Turnour, 'Beyond charity: outlines of a jurisprudence for civil society.' (PhD thesis, Queensland University of Technology, 2010).

³⁴ The two most relevant were the Australian Law Reform Commission *Reform Roundup* which cited the intent of California to adopt the US model legislation see: <http://www4.falm.info/au/journals/ALRCRefJl/2004/42.pdf>, and the QUT website which simply identified the existence of the legislation and gave a brief summary.

³⁵ New Zealand Law Commission, *A New Act for Incorporated Societies* (NZLC R129, 2013) at 38.

³⁶ The most detailed discussion of RUUNAA and its predecessor UUNAA is 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 J H Smith, 'Charitable Choices: The Need for a Uniform Nonprofit Limited Liability Company Act (UNLLCA)' (2016) 49

Problems with the unincorporated form

A list of problems

There are a significant number of problems associated with the unincorporated association form. The Scottish Law Commission in the review which it undertook in 2009 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.³⁷

This list distills in an Australian context to problems in two general inter-related categories; both mentioned at the outset in the *Betrayal of Trust Report*. The first is a property holding problem. The unincorporated 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.³⁸ 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 the unincorporated association.

University of Michigan Journal of Law Reform 405, 420, 428-430, 437 and 444; 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; Evelyn Brody, 'Governing the Nonprofit Organization: Accommodating Autonomy in Organizational Law' (2008) 46 Canadian Business Law Journal 343; Evelyn Brody, 'U.S. Nonprofit Law Reform: The Role of Private Organizations' (2012) 41(4) Nonprofit and Voluntary Sector Quarterly 535; 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 The Canadian Bar Review 73; Robert Flannigan, 'Contractual Responsibility in Non-profit Associations' (1998) 18 Oxford Journal of Legal Studies 631.

³⁷ Scottish Law Commission, *Discussion Paper on Unincorporated Associations* (Scot Law Com DP No 140, 2008) para 7.1.

³⁸ 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* (November 2013).

The property problem

Property cannot be held by an unincorporated association because only a recognised legal entity can hold property.³⁹ Because unincorporated associations are not recognised by the common law, they cannot hold property.

The unwillingness of the law in Australia to recognise unincorporated associations is becoming increasingly problematic. As the *Bathurst Diocese* case illustrates, it is problematic for lenders to unincorporated associations.⁴⁰ It is also problematic for growing religious congregations, particularly in the autonomous Protestant and charismatic traditions such as the Australian Christian Churches, Baptist, and Churches of Christ denominations. This is because the model of a major denomination providing the governance, management, legal, tax and administrative infrastructure for congregations of less than 200 people, shepherded by one clergy, is giving way to fewer larger congregations which take greater responsibility for all aspects of the congregation's life. These larger regional churches frequently conduct their own child care, welfare services, educational and other service activities in a way that is administratively independent of the denomination. Frequently, though, these large congregations are contained within the denominational structures with the denominational legal entity holding the property for the large congregation. This creates challenges because the contractual arrangements, particularly borrowings, are frequently more than that with which the denomination might be comfortable. Conversely, from the congregation's perspective, they require denominational approval for many, if not most, of the major decisions which, in their opinion, are realistically only decisions for their congregation. Obtaining denominational approvals can take time, involves considerable cost in professional time and is generally unproductive. A solution is increasingly required that enables congregations to hold their own property without reference to the denomination's separate legal entity.

The liability problem

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.⁴¹ Further, the application of these criteria to unincorporated associations brings with it particular challenges.⁴² In overruling the Court of Appeal (Civil Division) in which 'Hughes LJ reached [the conclusion that]... the extent to which the brothers were under the control of the [relevant unincorporated defendant] ... was insufficient to give rise to vicarious liability', Lord Phillips stated; 'I can appreciate Hughes LJ's difficulty in accepting that a De La Salle brother in Australia could be vicariously liable for the sexual assault by a brother at St William's [in Middlesbrough, England]'. Discussing the challenges for plaintiffs he noted in that case 'The choice of defendants suggests that the claimants may well have been in doubt as to whom they should sue, as they have adopted something of a scatter gun approach. Of the 35 defendants on the pleadings, the action has proceeded against 13'.⁴³

³⁹ *Anglican Development Fund Diocese of Bathurst v Palmer* [2015] NSWSC 1856, (2015) 336 ALR 372, [22]ff.

⁴⁰ *Anglican Development Fund Diocese of Bathurst v Palmer* [2015] NSWSC 1856, (2015) 336 ALR 372.

⁴¹ *The Catholic Child Welfare Society and others (Appellants) v Various Claimants (FC)* [2012] UKSC 56 [30] (with whom Lady Hale, Lord Kerr, Lord Wilson and Lord Carnwath agree) [85].

⁴² Foster, Neil. (2017) *T Bathurst Diocese Decision of Australia and its Implications for the Civil Liability of Churches* *Ecclesiastical Law Journal* 19(1), 14; Smith, Peter. (2016) *The Problem of the Non-justiciability of Religious Defamations* *Ecclesiastical Law Journal* 18(1), 36.

⁴³ *The Catholic Child Welfare Society and others (Appellants) v Various Claimants (FC)* [2012] UKSC 56 [30] (with whom Lady Hale, Lord Kerr, Lord Wilson and Lord Carnwath agree) [85].

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.

The vagaries and vulnerabilities associated with this are even more troubling in Australia, following the passage of legislation extending the time in which claims can be made.⁴⁴ The moral argument that on balance active members 'who participate in controlling the affairs of the association' should 'be held responsible as principals for contractual obligations'⁴⁵ has conceptual appeal. As does the recent legal expression of this idea by Hammerschlag J: 'If theories of risk or loss distribution have a place in this context, then it seems preferable to let the risk or loss rest on those who might have prevented but failed to prevent the transaction rather than on those who, in all good faith, supplied goods or services in the expectation of payment or reward'.⁴⁶ 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. Moral arguments and 'theories of risk and loss distribution' seem harder to sustain when the liability arises many years after the incident and because of an 'ameliorating' statute. 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. Persons involved in voluntary associations, particularly those taking over leadership later and possibly acquiring liability as a result of legislative action should also 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 uncertain⁴⁷ and the position is arguably becoming more rather than less uncertain, at least in Australia. In a circumstance of rapidly declining voluntary participation in Australian society this need to protect volunteers should be a factor informing the discussion.⁴⁸ As there is legislation in some states directed to protecting volunteers from liability, from a particular point in time which may post-date the liability event, the interaction of that legislation with these issues will also need to be borne in mind.⁴⁹

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

⁴⁴ E.g. *Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Act 2016 (Qld)*.

⁴⁵ Robert F Saskatoon, 'The Liability Structure of Nonprofit Associations: Tort and Fiduciary Liability Assignments' (1998) 77 *The Canadian Bar Review* 73, 75 and 103-104.

⁴⁶ *Anglican Development Fund Diocese of Bathurst v Palmer* [2015] NSWSC 1856, (2015) 336 ALR 372, [222].

⁴⁷ Scottish Law Commission, *Discussion Paper on Unincorporated Associations* (Scot Law Com DP No 140, 2008) para 7.1.

⁴⁸ A Leigh, *Disconnected* (University of New South Wales Press Ltd, Sydney Australia 2010) 12; Australian Bureau of Statistics data on volunteering shows a considerable decline in volunteering in the period 2010 to 2014 with male volunteering falling from 34% to 28.6% and for female volunteering falling from 38.1% to 33%. Australian Bureau of Statistics (2015) *Volunteering* See:

<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4125.0main+features440Aug%202015> accessed 18 October 2016.

⁴⁹ *Civil Liability Act 2003* (Qld) ss39-42; *Civil Liability Act 2002* (NSW) ss61-64; *Personal Injuries (Liabilities and Damages) Act 2006* (NT) s 7; *Civil Liabilities Act 2002* (TAS) s 47; *Volunteers Protection Act 2001* (SA) s 4; *Wrongs Act 1958* (VIC) ss 37, 38; *Volunteers and Food and Other Donors (Protection from Liability) Act 2002* (WA) s 6

organisations that engage with children to adopt incorporated legal structures.⁵⁰

That report considered the *Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2011* which was introduced in the New South Wales Parliament in 2011 but did not become law. It summarised the effect of that 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.⁵¹

Its view on these proposals was that the approach was 'not far-reaching enough'. 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.⁵² As mentioned, the Report had regard to the situation in the United States but there was not any reference to RUUNAA.⁵³

The Victorian Government response to the *Betrayal of Trust Report* was 'in principle' support to 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'.⁵⁴ 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 seeks is for plaintiffs to be able to access the assets of religious unincorporated associations in appropriate cases.

Achieving a national scheme will have challenges and careful scrutiny may be expected. There is a case for following an established international precedent, when the comments of David Bradbury the Minister initially responsible for the passage of the *Australian Charities and Not-for-profits Act*, in relation to the passage of that legislation are recalled. He commented to the effect that he had dealt with many pieces of legislation in his time but that that legislation for the not-for-profit sector was 'the most scrutinised piece of legislation' for which he had ever 'had

⁵⁰ 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* (November 2013), 527.

⁵¹ 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* (November 2013).

⁵² 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* (November 2013), 535.

⁵³ See for a discussion of the situation in the USA 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* (November 2013) footnote 28 and footnote 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'.

⁵⁴ 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'* (14 May 2014), 9

http://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 for example: Victoria Government (2015) *A Victorian redress scheme for institutional child abuse - public consultation paper* at <http://www.justice.vic.gov.au/home/safer+communities/protecting+children+and+families/a+victorian+redress+scheme+for+institutional+child+abuse+public+consultation+paper>.

responsibility'.⁵⁵ This scrutiny is likely to be compounded by the presence of church/state relations issues and the extent to which the state can deprive a religious organisation of its choice of governance structures as '[r]eligious entities present the issue of autonomy most clearly'.⁵⁶ There may also be Commonwealth Constitutional issues to navigate.⁵⁷

International 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 then in the later part of the section is a detailed discussion of RUUNAA.

Recognition of unincorporated associations in the United Kingdom

Recognition of unincorporated associations was the situation in England and may be the situation in at least some parts of the United Kingdom, notably Scotland, in the future. There was common law recognition of unincorporated associations before the Tudors. Kindred groups, village communities, trade guilds and monastic orders⁵⁸ all enjoyed recognition at common law until an awareness developed of the threat of associations to the sovereign.⁵⁹ It was Henry VIII who prohibited associations without royal consent.⁶⁰ Thus the difficulty of recognising unincorporated associations did not arise in the English common law, which was adopted by Australia, Canada and the United States, until the late fourteenth or early fifteenth century.⁶¹

The Scottish Law Commission undertook a report on unincorporated associations which it delivered in November 2009.⁶² It recommended amendment to the law so as to reverse the current common law position.⁶³ That Report acknowledged 'the very considerable assistance' derived from RUUNAA.⁶⁴ It annexed draft legislation which required certain registration conditions to be met to take advantage of the legislation. It also considered both 'opt in' and 'opt out'

⁵⁵ David Bradbury, 'The NFP Sector Reforms: Moving Towards Smarter Regulation' (Speech delivered at the Thomson Reuters Not-for-profit Law & Regulation Conference, Sydney Harbour Marriott, 17 October 2012) <<http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=speeches/2012/011.htm&min=djba&DocType=>>.

⁵⁶ Evelyn Brody, 'Governing the Nonprofit Organization: Accommodating Autonomy in Organizational Law' (2008) 46 Canadian Business Law Journal 343, 358.

⁵⁷ *Australian Constitution* s.116

⁵⁸ K L Fletcher, *The Law Relating to Non-Profit Associations in Australia and New Zealand* (The Law Book Company Limited Sydney 1986) 7-9.

⁵⁹ K L Fletcher, *The Law Relating to Non-Profit Associations in Australia and New Zealand* (The Law Book Company Limited Sydney 1986) 3; Arthur Jacobson, 'The Private Use of Public Authority: Sovereignty and Associations in the Common Law' (1980) 29 Buffalo Law Review 600.

⁶⁰ *Chantries Act 1531* 23 Hen VIII c 10; cited K L Fletcher, *The Law Relating to Non-Profit Associations in Australia and New Zealand* (The Law Book Company Limited Sydney 1986) 11; Fletcher notes that it was not repealed until 1960.

⁶¹ K L Fletcher, *The Law Relating to Non-Profit Associations in Australia and New Zealand* (The Law Book Company Limited Sydney 1986) 7.

⁶² Scottish Law Commission, *Discussion Paper on Unincorporated Associations* (Scot Law Com DP No 140, 2008).

⁶³ Scottish Law Commission, *Discussion Paper on Unincorporated Associations* (Scot Law Com DP No 140, 2008).

⁶⁴ Scottish Law Commission, *Discussion Paper on Unincorporated Associations* (Scot Law Com DP No 140, 2008), 13.

alternatives as well as the RUUNAA option of automatic recognition. It recommended that unincorporated associations should be allowed to opt out of the legislative regime.⁶⁵ 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 Government, in response to the proposal, acknowledged the 'wide support for taking forward the broad principles ... and the [Scottish] Government [being] committed to taking them forward in a Bill in due course'.⁶⁶ 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'.⁶⁷ 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'.⁶⁸ In the more than four years since that statement, 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.⁶⁹

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 of associations of the competent local court'.⁷⁰ The Swiss Civil Code Articles 52 and 60 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.⁷¹ 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.⁷² The laws of France and Italy similarly provide for legal

⁶⁵ See Draft *Unincorporated Associations (Scotland) Bill* 1(g) being Annexure A to Scottish Law Commission, *Report on Unincorporated Associations* (Scot Law Com No 217, 2009) page 63
<http://www.scotlawcom.gov.uk/files/3312/7989/7412/rep217.pdf>.

⁶⁶ Scotland Office *Post-consultation report for the consultation paper, Reforming the Law on Scottish Unincorporated Associations and Criminal Liability of Scottish Partnerships* (17 April 2012).
<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69171/Consultation-Response-Partnerships-Bill.pdf> 25.

⁶⁷ Scotland Office *Post-consultation report for the consultation paper, Reforming the Law on Scottish Unincorporated Associations and Criminal Liability of Scottish Partnerships* (17 April 2012).
<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69171/Consultation-Response-Partnerships-Bill.pdf>.

⁶⁸ Michael Moore *Statement on Scottish Law Reform* Column (12 April 2012) UK Parliament
<<http://www.publications.parliament.uk/pa/cm201212/cmhansrd/cm120417/wmstext/120417m0001.htm>>.

⁶⁹ See NHS (Charitable Trusts Etc) HC Bill (2016) 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>

⁷⁰ *Civil Code* 2002 (Germany)

⁷¹ *Civil Code* 1907 (Switzerland)

⁷² Myles McGregor-Lowndes and Frances M. Hannah 'Unincorporated associations as entities: a matter of balance between regulation and facilitation?' (2010) 28(3) *Company and Securities Law Journal*, 197, 211 citing *Greek Civil Code* Arts 78 ff, *Luxembourg Laws of 21 April 1928 On Non-Profit Associations and Foundations* and *Portuguese Civil Code* Art 168

personality by registration.⁷³ At least one jurisdiction, Poland, compels registration of unincorporated associations according to McGregor-Lowndes and Hannah.⁷⁴ 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 issues⁷⁵ - issues that may well be relevant in Australia in any attempt to create a national scheme.

South Africa

South Africa has imported through Dutch law the Roman law concept of a 'Universitas'.⁷⁶ As the court explained in *Webb & Co Ltd v Northern Rifles, Hobson & Sons v Northern Rifles*:⁷⁷

*"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."*⁷⁸

As the Scottish Law Commission noted, this amounts to a way of recognising voluntary unincorporated associations.⁷⁹ The conditions for such recognition are that the constitution of such an association must specify that:

- the organisation will continue to exist despite changes in its membership; and
- the assets and liabilities of the organisation will be held separately from those of its members.

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'.⁸⁰ She points out also, though, that '[u]nincorporated nonprofit associations, despite their numbers, are subject to relatively primitive law'.⁸¹ The challenge faced was how to address this. In the United States, law reform often begins outside of government and one of the leading

⁷³ Discussed in Scottish Law Commission, *Discussion Paper on Unincorporated Associations* (Scot Law Com No 140 2008) at [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

⁷⁴ Myles McGregor-Lowndes and Frances M. Hannah 'Unincorporated associations as entities: a matter of balance between regulation and facilitation?' (2010) 28(3) *Company and Securities Law Journal*, 197, 211 citing Law of 21 April 1928 on non-profit associations and foundations.

⁷⁵ Oonagh B Breen, 'European Non-Profit Oversight: The Case for Regulating from the Outside in' (2016) 9(3) *Chicago-Kent Law Review* 991, 998-1002.

⁷⁶ Ntsanyu Nana, 'Corporate Criminal Liability in South Africa: the need to look beyond Vicarious Liability' (2011) *JAL* 86, 87; H Hahlo *South African Company Law Through the Cases* (3rd ed, 1977, Juta) at 4.

⁷⁷ 1908 TS 462.

⁷⁸ 1908 TS 462, 464-465; Moreover South Africa's *Acts Interpretation Act* 1957, Part 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;"

⁷⁹ Discussed in Scottish Law Commission (December 2008) *Discussion Paper on Unincorporated Associations* at [4.17] <http://www.scotlawcom.gov.uk/files/8412/7877/4124/dp140.pdf>

⁸⁰ ; Evelyn Brody, 'U.S. Nonprofit Law Reform: The Role of Private Organizations' (2012) 41(4) *Nonprofit and Voluntary Sector Quarterly* 535, 545.

⁸¹ ; Evelyn Brody, 'U.S. Nonprofit Law Reform: The Role of Private Organizations' (2012) 41(4) *Nonprofit and Voluntary Sector Quarterly* 535, 541.

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 2011. It is a relatively short piece of legislation, comprising only 16 pages. Its central function is reversal of the common law position in relation to unincorporated associations. It has been legislated in the following jurisdictions so far: Arizona, District of Columbia, Iowa, Kentucky, Nevada and Pennsylvania. In South Carolina, a Bill to see RUUNAA passed into law was introduced in 2016.⁸²

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. RUUNAA s.2 (8) provides the following definition:

(8) "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.⁸³

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 section 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.

⁸² Uniform Law Commission *Unincorporated Nonprofit Association Act* (2008) (3 July 2011)

<[http://uniformlaws.org/Act.aspx?title=Unincorporated Nonprofit Association Act \(2008\)](http://uniformlaws.org/Act.aspx?title=Unincorporated%20Nonprofit%20Association%20Act%20(2008))>.

⁸³ RUUNAA With Prefatory Notes and Comments 4 available at

http://www.uniformlaws.org/shared/docs/unincorporated%20nonprofit%20association/UUNAA_Final_2014_20154aug19.pdf

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 section 6 for ownership and transfer of property in the following way:

- (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 sections 8 and 15 with the principal operative provisions being sections 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, section 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 judgement 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 RUUNAA s. 8 the reference to 'solely' is intended to ensure that a member or manager 'is not vicariously liable for the liabilities of the unincorporated association but remains personally liable for their own tortious acts or breach of contract'.⁸⁴

It is noteworthy that RUUNAA s. 2(8)(E) 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 USA 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

⁸⁴ RUUNAA With Prefatory Notes and Comments 14.

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.⁸⁵

These observations can usefully inform the debate in Australia.

Australian recognition of unincorporated associations under specific Commonwealth laws

The Commonwealth already recognises unincorporated associations for tax and registration with the Australian Charities and Not-for-profits Commission (ACNC). This is achieved by quite a simple process. In both cases, unincorporated associations are simply listed in the definition of an 'entity' within the scope of operation of the relevant legislation.⁸⁶

Implications of recognition in Australia of unincorporated associations

Introduction

Significant disadvantages for unincorporated associations and injustice for victims have been identified as attending the failure to recognise unincorporated associations in Australia. Why then should Australia not legislate to recognise unincorporated associations? In this section, some advantages and disadvantages are discussed before a more general discussion of practical problems surrounding how the legislation might be enacted given the Australian federal system of government.

Advantages

With almost two-thirds of the not for profits in Australia being unincorporated associations and with millions of Australians participating weekly in unincorporated associations, any reform of the law to recognise unincorporated associations may well have wide, positive impact. Further, reform of the law by adopting RUUNAA-like legislation would have limited adverse impact, if the legislation simply recognised unincorporated associations and this recognition was not burdened with additional compliance obligations.

The micro unincorporated associations would remain untrammelled by compliance. The large religious unincorporated associations would be able to maintain their unique governance and

⁸⁵ 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, 899.

⁸⁶ *Income Tax Assessment Act 1997* s.996-100 and *Australian Charities and Not-for-profits Commission Act 2012* 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 MIT 2006/1 paras 26-28.

constitutional structures. All would be able to enter into contracts, hold property, sue and be sued without the need for a separate property holding body.

If the unincorporated association itself can be sued, the risk of personal liability for volunteers and staff is reduced. Reducing the risk of personal liability for volunteers and staff in unincorporated associations is likely to make civic participation easier, or at least less risky.

Victims would be assisted by simpler access to justice by legal recognition of defendants. With thousands of Australians being victims of wrongs done under the cloak of unincorporated associations, amendment to the law at this time to facilitate justice should be a priority. Whilst many of the institutions in which abuse occurred were state government organisations, many others were churches or ministries of churches that are unincorporated associations. Granting those unincorporated institutions legal recognition, or the capacity for legal recognition, would be a relatively simple way to facilitate access to compensation for victims. This is particularly so where the institutions were willing to have judicial determination of liability and damages but were unable, or reluctant, to change their constitution or governance.

If recognition was not compulsory, the arrangements would be a win-win because only those organisations that wish to take advantage of registration would do so. An opt in or opt out would seem to be less contentious and arguably more easily accepted.

In concluding this section the New Zealand response should be mentioned. The conclusion of the New Zealand review that considered this option rejected it on the 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'.⁸⁷ It should be evident from the discussion so far that whilst this response is understandable it is not an answer to the challenges raised nor does it recognise the breadth of organisations that chose to adopt the unincorporated form. The advantages to the citizens involved in those organisations and those with whom they deal would be significant if legal recognition is granted by statute.

Disadvantages and foreseeable problems

That is not to say that the legal recognition of unincorporated associations will come without difficulties. In this subsection, challenges that can be envisaged are raised dealing first with those that can be foreseen with property holdings. That leads to a discussion of problems foreseeable regarding liability. Practical challenges arising with implementation given Australia's federal system of government are considered in the final subsection.

Difficulties that can be foreseen with the property problem solution

Most of the large unincorporated associations that are churches have complex governance arrangements with one or more constitutions creating such things as Synods, councils, presbyteries, congregations, hospitals, schools, welfare ministries, childcare and aged care services; even sporting clubs. Is there one unincorporated association to be recognised or many? If many, then how many? The requirements of goods and services tax registration in Australia has led to a proliferation of registrations of unincorporated tax entities within the meaning of the *Income Tax Assessment Act 1997* (Cth) s. 960-100 that are not legal entities but rather sub-entities recognised for tax purposes of larger unincorporated associations. For example, congregations belonging to a major religious denomination may be registered as tax 'entities'.

⁸⁷ New Zealand Law Commission, *A New Act for Incorporated Societies* (NZLC R129, 2013) at 38.

They are not legal entities but rather part of a very large unincorporated association. They are intricately bound into the denomination as a whole. To what extent could, or should, that GST registration be taken as a guide?

Challenges arise in relation to asset apportionment as soon as recognising sub-entities within a large unincorporated association is considered. Take a major religious denomination that is an unincorporated association, such as the Anglican, Catholic or Uniting churches and consider the possibility that Synods, councils, presbyteries, congregations, hospitals, schools, welfare ministries, childcare and aged care services and sporting clubs within those denominations might be separately recognised. What assets will be allocated to which unincorporated association? These can become very difficult issues to resolve. Take even a relatively simple situation such as a sub-entity which is largely autonomous such as a hospital. It may already have its own particular constituent documents and its own governance structure led by a board overseeing a Chief Executive Officer. It may report separately including its financial position. Superficially it might seem relatively straightforward to register such an entity as an unincorporated association. Consider, though, allocation of assets and the balance sheet. What assets on the balance sheet can, and should, remain on the balance sheet of the hospital and what assets could, or should, be transferred to the balance sheet of another expression of the denomination? Many, if not most, of the assets may have been provided in the first instance by the denomination and subsequently augmented by donations and testamentary dispositions. If there were borrowings in relation to the acquisition of assets, usually the church will have provided the security. The denominational brand is likely to be a, if not the, reason for the donations that were received, and the testamentary dispositions made. What if any assets of the hospital should remain on its balance sheet? Should all the land and underlying assets be transferred leaving only the going concern that is the hospital on the hospital's balance sheets? How will that affect security offered to support borrowings of the hospital?

Similar challenges can be identified for autonomously structured religious denominations such as the Australian Christian Churches, Baptists and Churches of Christ. These denominations similarly frequently have one property holding body, often on trust terms (express or implied), for many congregations and welfare agencies. What assets held by the property holding body for the denomination are held on behalf of local congregations or welfare ministries and what is the nature of that holding? Are all of the assets held pursuant to one large charitable trust for the advancement of the religion of that particular denomination according to its tenets? Are there express or implied multiple trusts preferable to particular property or local churches and if so, what is the nature of the beneficial interest? Is it a charitable trust or something akin to a private trust for an unincorporated charitable entity? What, if any, rights do an unincorporated congregation or welfare ministry have to demand the transfer of assets to it? These issues are likely, in some, if not many cases, to be contestable if not actually contested. It might be that the organic law of the religious denomination has processes for resolving all of these issues, but it is also possible that it might not.

There are likely to be significant property challenges to be addressed by large unincorporated associations if there is to be legal recognition of unincorporated associations in Australia. These challenges are best addressed by allowing adequate time for adjustment to any change to the law and by allowing for an opt in or opt out option.

Difficulties that can be foreseen with the liability problem

Where assets are located will become a critical issue for potential claimants against unincorporated associations. To build on the discussion raised above, if the lion's share of assets are quarantined in say the welfare arm of the church, and the claims made are substantive but against the parish or congregational arm of the church, it is possible that the victims will be left without adequate assets against which to levy claims for compensation. Put differently, it might be possible for an unincorporated association to endeavour to quarantine risk by registering an unincorporated association where child sexual offences took place, and put few or limited assets in that unincorporated association so as to contain the quantum of damages to which victims may have access, if liability is established.

Allowing unincorporated associations that had identified disadvantages the opportunity to opt out, arguably reduces the risk of rejection of the legislation but it increases the risk that victims of wrongs might be left without a proper defendant against which a judgment could be exercised. There is, therefore, a weighing to be undertaken of the benefits and detriment of allowing for opt-in or opt-out. Both RUUNAA and the Scottish model allow for opt out. Anti-avoidance drafting would ostensibly be very difficult. It would therefore arguably seem to be prudent in Australia to adopt an opt-out model and review the impact of this at a future date. The vast majority of unincorporated associations, including the major religious denominations against which claims of abuse have been made, may well not opt out. It may also be very difficult to manipulate asset movement, particularly where the asset is land. Further, in the case of religious unincorporated associations, they are member based and accountable to that membership. It might have been possible to conceal sexual offences against children, but it will be much more difficult to conceal from the estimated 1.8 million people who attend Australia's approximately 13,000 churches⁸⁸ and the wider public, in the current environment, the transfer of the land from which say a hospital is conducted or at which a congregation worships. Added to this is the pressure that if a way of providing justice to victims is not found, the recommendation in *The Betrayal of Trust Report* is that religious bodies be compelled to incorporate. This threat of being forced into a state or federally incorporated form might also act as an inducement to religious bodies not to opt out as it preserves their organic law and governance structures.

Thought will also need to be given to the timing of recognition, especially in a context when causes of action are arising out of liability events many decades ago. Perhaps this may be solved by recognition being effective from the time of the formation of the unincorporated association.

Practical challenges given the Australian federal system of government

Recalling the delays in the UK enactment of the Scottish proposal, the limited take-up of the model legislation in the United States, difficulties with the passage of foundation legislation in a federal system in Europe, and the level of scrutiny of the ACNC Act, some challenges 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 US where a similar federal

⁸⁸ McCrindle Research (Thursday, March 28, 2013) *Church Attendance in Australia* <http://www.mccrindle.com.au/the-mccrindle-blog/church-attendance-in-australia-infographic>.

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.⁸⁹

If a national framework is to be considered, the model national framework in Australia is that under which the Australian Securities and Investment Commission ('ASIC') operates. ASIC operates under a cooperative scheme. The Commonwealth has power to make laws with respect to certain corporations but the powers are inadequate for a comprehensive regime. The Commonwealth Constitution s. 51 (xxxvii) 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 to explore the referral of powers to the Commonwealth by the states of power to recognise unincorporated associations.

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.⁹⁰ 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 and is the 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 would have to be clear that registration was to generate the benefits of RUUNAA only and would not require unincorporated associations to comply with the full suite of ACNC obligations.

Bringing unincorporated associations into the registration fold through an opt-in arrangement may be of benefit to those concerned about supervision. Supervision can occur without additional obligations or submission to powers. One of the concerns raised by a US author was the lack of supervision of unincorporated associations.⁹¹ Granting legal status by permitting registration with the ACNC of all unincorporated associations would be one way of beginning to address this concern because at least then, these unincorporated associations would be identified by a federal

⁸⁹ 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*. (November 2013).535

⁹⁰ Evidence to Standing Committee on Economics, House of Representatives, 27 July 2012, 15, 23-4. 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 14-25 and the author of this article at 24-25.

⁹¹ Kenya J H Smith (2016) 'Charitable Choices: The Need for a Uniform Nonprofit Limited Liability Company Act' 49 U. Mich. J. L. Reform 405, 2015-2016 429-430, 437-438 and 443.

government agency. Registration would be voluntary, and on an opt-in basis, but the unincorporated association would have to register to gain the benefits. What registration would do would be to bring at least some of the unincorporated associations that are not required to register with the ACNC within the supervisory oversight of the ACNC. The compliance obligations and powers would not apply to them but the ACNC might be in a position to help the unincorporated associations be more compliant, particularly with self-assessing tax entitlements if they wished assistance. If they were noncompliant and did not wish assistance then the ACNC may be able to provide to the Australian Taxation Office relevant information.

Options for exploration

For both unincorporated associations and victims, the best option would seem to be a national framework to be established as the *Betrayal of Trust Report* recommended. The best way for this to be achieved is for a cooperative scheme to be established by the Commonwealth under a referral of powers pursuant to the Constitution s. 51 (xxxvii). At present, unincorporated associations are not registered, or registrable 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 cooperative 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 cooperative scheme.

Until that scheme is fully operationalised 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.

On the question of timing, there is now some urgency. *The Institutional Responses to Child Sexual Abuse* is due to report in December 2017. It would benefit the community nationally if the option of recognition of unincorporated associations were amongst the options available.

The Attorney-General for Queensland is presently undertaking 'a review of the not-for-profit legislation in her portfolio'.⁹² Including consultation on this issue in the anticipated discussion paper would be a logical and relatively simple first step for that state to take.⁹³ If there are reasons, perhaps unique to Queensland, or more generally Australia, as to why such legislation should not be enacted, they should be identified then. For example, in Queensland, there is legislation directed to protecting volunteers from liability. The interaction of that legislation with these issues will also need to be borne in mind.⁹⁴

As to the scope and extent of the reform; I have recommended that RUUNAA and the Scottish proposal be taken as a starting point. Miller has pointed out in a US context that if a person holds a view that the common law is reasonably satisfactory then legislation such as UUNAA may be sufficient. Whatever view is preferred there is a need for the tailoring of the legislation to Australia's federal system of government and possibly the role of the ACNC.

⁹² Yvette D'th, *Report to the Legislative Assembly under section 56A of the Statutory Instruments Act 1992* (October 2016) <http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2016/5516T1760.pdf>

⁹³ Yvette D'th *Report to the Legislative Assembly under section 56A of the Statutory Instruments Act 1992* (October 2016) <http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2016/5516T1760.pdf>

⁹⁴ *Civil Liability Act (2003)* (Qld) Division 2 Subdivision 3—Volunteers

Conclusion

This paper 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.

In Australia, a cooperative scheme, with voluntary recognition unless the unincorporated association elected to opt out, would be the best way to introduce the legislation. There is some urgency in Australia now to provide victims of abuse with the right to sue unincorporated associations and for volunteer committee members to be protected. The issues driving the need for reform are not limited to Australia but affect other common law jurisdictions. The answer to the question posed in the title may, therefore, be of interest throughout the common law world.

The question proposed in the title is to be answered in the affirmative: Australia should do what Scotland could not and recognise unincorporated associations as legal entities by legislation.