Queensland Law Society

Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
GPO Box 1785, Brisbane Qld 4001 | ABN 33 423 389 441
P 07 3842 5943 | F 07 3221 9329 | president@qls.com.au | qls.com.au
Office of the President

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Not-for-profit subordinate legislation review discussion paper
Office of Regulatory Policy
Department of Justice and Attorney-General
Locked Bag 180
City East QLD 4002

By email: [redacted]
Attention: Mr Dominic Tennison, Director, Office of Regulatory Policy, Liquor, Gaming and Fair Trading

Dear Mr Tennison

Response to consultation papers on proposed regulations and rules for incorporated associations – grievance procedure, disclosure of remuneration and reporting requirements and thresholds

Thank you for the opportunity to provide feedback on the consultation papers on proposed regulations and model rules for incorporated associations in Queensland.

The Queensland Law Society (**QLS**) appreciates being consulted on this important step in modernising the regulatory framework for incorporated associations. Thank you for the additional time to provide our response.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 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 response has been compiled by the QLS Not for Profit Law Committee, whose members have substantial expertise in this area.

Executive Summary:

Consultation Paper 1 - Grievance procedure

- QLS broadly welcomes the reforms proposed to introduce the requirement that an incorporated association include a grievance procedure either in its rules or in an associated document.

- We have identified some issues which should be clarified in relation to the proposed grievance procedure framework, including:
    - Confidentiality arrangements for mediations
    - Which party or parties bear the costs of mediation
    - Transitional arrangements for disputes which are commenced under one version of the model rules but which continue under a new version of the model rules

Consultation Paper 2 - Disclosure of remuneration

- QLS prefers the approach of reporting in the aggregate rather than an individualised basis, given the potential issues arising with respect to confidentiality and commercial-in-confidence information.
- QLS is also concerned about the potential administrative burden of individualised reporting requirements on incorporated associations.
- We have recommended aligning certain requirements with the relevant accounting standards and the Australian Charities and Not-for-profit Commission (ACNC) obligations for reporting key management personnel remuneration.
- This approach has the benefit of consistency but also ensures that incorporated associations in Queensland are not subjected to a higher standard of transparency than the largest charities operating in Australia. There is a risk that onerous disclosure requirements may discourage people from serving as voluntary committee members.

Consultation Paper 3 - Reporting requirements and thresholds

- QLS recommends a review threshold of $150,000 and an audit threshold of $500,000 (Option 1C).
- QLS also recommends that for an asset threshold, Option 2B is preferred (double the value of the revenue threshold). Alignment of the approach to the thresholds applying now in New South Wales and Northern Territory would be most appropriate.
- In the interests of proportionate measures, QLS recommends that an audit threshold apply. Audit requirements can be particularly challenging for small and start-up organisations and the cost of an audit can be a severe impost on small organisations, which may then need to fundraise to pay the audit fee.
- QLS recommends there should be no prescription for maintaining specific financial documents, given existing statutory obligations to retain records. This approach avoids and addresses the current archaic rules that have now been circumvented largely by digital record-keeping. If the arrangements for prescribing specific documents is retained, then certainly the list of prescribed documents requires adjustment so as to ensure that there is no future need for retaining hard copy documents.

Priority consultation paper 1: Grievance procedure

Issues arising with different versions of the model rules

The effect of section 47A(6) is that if an association's rules do not include an appropriate grievance procedure, which meets the requirements of the new section 47A, then the rules of the association are taken to include the provisions of the model rules providing for the grievance procedure.

This is different to the other model rules provisions, which only apply if the association specifically adopts the model rules.

The section also means that even if the association has previously registered its rules, then the grievance procedure rules will be implied even though the association's membership has previously adopted rules which do not include a grievance procedure.

The 'deeming' approach raises two queries:

1. If the model rules are changed over time, does the 'new' version of the rules automatically apply to an incorporated association?
    a. We expect that the intention was that an association would be required to observe any updated procedures over time.
    b. However, the current drafting does not refer to "the model rules in force from time to time."
    c. We recommend that the position be made clear either in the Act or in the regulation.
2. If the intention is that an association is expected to observe updated procedures from time to time, we suggest that some form of transitional process should be specified in the model rules when the grievance process is updated. The issue becomes relevant if a member starts a grievance process under one set of model rules, but then the rules change before the grievance is resolved. We outline the following circumstance for consideration:
    a. Association A was registered in 2019.
    b. Association A's rules do not have a grievance procedure, so the grievance procedure is implied when the new model rules commence (say 2023 sometime).
    c. A member commences a grievance process in February 2025.
    d. The grievance procedure rules change in March 2025 when the parties are only partway through the model rules grievance process.
    e. Do Association A's rules automatically get updated with the new rules, or do the old rules continue to apply because they were the rules implied into Association A's rules when the legislation commenced? And if so, which rules apply to the grievance underway?

Grievance procedure external to association's rules

The paper specifically seeks comments on "how the rules of an association may recognise grievance procedures that are contained in documents external to the rules."

QLS welcomes the recognition by government that many organisations already have and abide by a grievance process which has either been developed by the association or which applies to them due to their membership of a national or international alliance.

We suggest that some assistance be made available by the department to incorporated associations who are seeking assurance that an external grievance procedure would be acceptable for the purposes of section 47A. Many incorporated associations have limited resources and may not be able to afford formal legal advice on their procedures and so some capacity to seek the views of the department would be useful.

Referencing an external grievance procedure

If an association does have an external grievance procedure, we suggest that:

- It should be sufficient for the association's rules to refer to "*the grievance procedure policy / process approved by the association from time to time, which must comply with the Associations Incorporations Act 1981, and as notified to the membership*", or similar wording; and
- The department provide guidance on best practice for notifying and making available a grievance procedure or policy eg publication on an association's website or advising members that a copy is available from the association's secretary.

Exemptions from section 47A

To provide certainty to associations with external grievance procedures, we suggest that consideration be given to an administratively expedient process to exempt an association from strict compliance with section 47A where the procedures are broadly appropriate even though they do not strictly comply with the mandated procedure. This could be by way of an application to the chief executive, to ensure that there is oversight of the procedure and an independent 'check' that the procedure is sufficiently fair and balanced.

We recognise that this recommendation may require legislative amendment at a later date.

Additional criteria for external grievance procedure?

The paper seeks feedback on whether additional criteria should be applied to an external grievance procedure.

For example, in addition to the rules complying with 47A generally, should an additional criterion be that the association has an obligation to follow the external process because of the association's membership of a parent body?

QLS considers that such additional criterion should not be applied, given the intent of section 47A of the Act.

As outlined on page 5 of the paper, the purpose of section 47A is to provide "the necessary flexibility" for associations which vary in size, objects and means, whilst still ensuring that a process is fair. This is intended to be achieved by providing certain fundamental natural justice principles for the grievance procedure.

Our view is that if the external grievance procedure meets the criterion in section 47A, then it is not necessary to provide for additional criterion.

Mediations – confidentiality and costs

The paper and the draft model rules are both silent on whether mediations will be considered confidential and without prejudice, so that parties to the mediation are obliged to maintain the confidentiality of matters discussed at the mediation.

In our experience, a clear statement about confidentiality will encourage frank and open participation by the parties in the mediation process, which increases the likelihood of a successful outcome.

We provide the following examples from other statutory frameworks:

- *Farm Business Debt Mediation Act 2017* – section 38 – specifically outlines confidentiality obligations for mediations conducted under that framework.
- *Small Business Commissioner Act 2022* – section 32 – specifically provides that "Evidence of anything said in a mediation conference for a small business dispute is not admissible in a proceeding before a court or tribunal."

We recommend that a clear statement be made that a mediation is confidential and without prejudice.

We also recommend that the model rules incorporate a clear statement in relation to the costs of a mediation.

In our experience, the usual approach is that:

- each party bears their own costs of the mediation; and
- the costs of the mediator are borne equally by the parties unless otherwise agreed.

The parties are then free to negotiate a different outcome on costs, but by ensuring that this is the starting point, it removes a potential point of further dispute between the parties which might delay or prevent a mediation taking place.

Mediation – other issues for consideration

1. QLS queries whether mediation should be a compulsory part of the process where there is an uneven power imbalance between the parties. There may need to be exemptions allowed or discretion given to the mediator to avoid the mediation in the following circumstances:
    a. A clear power imbalance between the parties;

b. There is an intractable dispute and one or both parties can demonstrate this to the mediator;

c. There is some urgency involved which counteracts any benefit to a mediation;

d. Where the mediator determines that a mediation ought not be held given the nature of the dispute or the parties.

2. In the mediation process, if a person is invited to mediation and does not respond within a specific time or does not attend the mediation, then the mediation requirement is taken to have ended, to overcome section 72 of the Act. Otherwise, parties may seek to abuse this process to stymie the next step in the grievance process.

Interaction with disciplinary procedures

The paper raises the following question:

> Where a person attempts to initiate the grievance procedure, but the management committee is aware of grounds for disciplinary action, should the management committee be required to decide whether or not to act on those grounds within a certain timeframe?

Queensland University of Technology's Australian Centre for Philanthropy and Nonprofit Studies conducted a webinar on the consultation papers and posed this question as a poll for attendees. These were the results:

> **Question 1** - Where a person attempts to initiate the grievance procedure, but the management committee is aware of grounds for disciplinary action, should the management committee be required to decide whether or not to act on those grounds within a certain timeframe?

Answer	% of Votes
Yes	62%
No	0%
Not Sure	38%

> **Question 2** - What should the timeframe be [for deciding whether or not to act]?

Answer	% of Votes
Less than 14 business days	12%
14 business days	25%
28 business days	62%
More than 28 business days	0%

QLS does not express a view as to a recommended timeframe but provides this feedback by way of an indication of industry views.

Interaction of grievance procedure with urgent health and safety issue

It is conceivable that the proposal to prohibit the association from taking further disciplinary action once a member has initiated a grievance procedure (section 47A(5)) may hinder the association when decisive action is required for safety reasons.

For example, an incorporated association might have the object of child care in a small rural community. There are no employed staff, childcare being delivered by volunteers who must also be members of the association with appropriate Blue Card clearances. One member has their Blue Card revoked. The association wishes to immediately remove the person from membership and the ability to access the childcare facilities. Having to proceed through a mediation process and also being unable to take other disciplinary action while the grievance is progressed may not be timely or socially appropriate.

QLS recommends that this potentiality be addressed in the model rules, to ensure that there is a qualification that allows an association to act immediately in critical situations such as those involving health and safety issues.

Priority consultation paper 2: Disclosure of remuneration

Question 1 - Broadly, are there are any other things that might be considered remuneration or benefits that are not listed above?

The Consultation Paper sets out a sensible description of 'remuneration' (e.g. salary, wages, allowances, and commissions and rewards) and 'benefits' for the purposes of section 70D.

However, QLS considers there would be advantages in adopting definitions of remuneration that align with the relevant accounting standards as suggested in the submission by Chartered Accountants Australia and New Zealand (CA ANZ) and CPA Australia. This would create consistency between disclosure regimes, particularly the ACNC's reporting requirements in respect of related party transactions and key management personnel remuneration.

There are no additional items that we believe need to be added in this context.

Question 2 Are there considerations around any of the remuneration or particular benefits listed above (or other benefits) that should prevent their disclosure?

Depending on the nature of the arrangement between the relevant parties, there may be details that are commercial-in-confidence, covered under confidentiality provisions of an employment or other arrangement, or are otherwise confidential in nature. This may include (for example) salary, wages, allowances, termination and post-employment benefits, medical fees paid by the association, benefits from related-party transactions.

It would be unreasonable and not appropriate to require specific disclosure particularly in those instances.

Question 3 – Should disclosure of salary, wages, bonuses and allowances be on an aggregated basis or an individualised basis?

Any obligation to disclose salary, wages, bonuses, and allowances should only operate on an aggregate basis.

Question 4 – If aggregated, is there a view that bonuses and rewards should nevertheless be disclosed on an individualised basis given these are likely to be of significant interest to the association's members?

Reporting on an individualised basis will add an unnecessary administrative burden to associations. If members of associations have a 'significant interest' in particular bonuses or rewards, then this may be provided for in their governing rules after obtaining legal advice.

Question 5 – Are there any other options, or any other matters that should be taken into account when considering individualised or aggregated disclosure?

We note that the ACNC requires large charities and medium charities that prepare general purpose financial statements to report on remuneration paid to key management personnel on an aggregate basis. The ACNC does not require charities to report key management personnel remuneration where the charity only remunerates one key management person. This is a sensible approach to protecting confidentiality that should be adopted in Queensland.

QLS notes that any requirement to report individualised salary or benefits would create a more onerous reporting regime than applies to registered charities. QLS questions the policy rationale for requiring incorporated associations to meet higher standards of transparency than the largest charities operating in Australia. There is a risk that onerous disclosure requirements may discourage people from serving as voluntary committee members.

Question 6 – Do you support the reporting of benefits in the individualised manner referred to above? If not, what other options might be considered?

QLS does not support the reporting of benefits in the individualised manner on the basis that it would create a significant administrative burden to associations. Other options that might be considered could be in an aggregated estimate.

Question 7 – Should there be a disclosure threshold for benefits, and if so, what should it be?

QLS does not express a view in response to this question.

Question 8 – Is the proposed level of disclosure for related-party transactions appropriate?

Question 9 – Are there any other considerations that need to be taken into account? For example, could the value of such arrangements be considered commercial-in-confidence? If so, are there any circumstances where a related-party transaction could be disclosed without a dollar value, along with a declaration that the consideration paid by the association is equivalent fair market value for the service (or better than fair market value)?

Response to Questions 8 and 9 – related-party transactions

As is identified in the Discussion Paper, many not-for-profits operate via connections between or amongst the members and their networks. Transactions such as these may result in excellent value on the part of the association itself.

QLS supports the need for accountability and transparency to ensure that parties do not take advantage of the association. Any disclosure regime does, however give rise to a tension between the need for disclosure and the need to protect information which is private and/or confidential to other parties.

Such disclosures may not be without problems. For example:

- If a party is providing goods or services to an association at reduced rates, disclosure of such payment may also disclose the break-even point or other commercially sensitive information.
- If an association operates subject to government funding or in an area where tendering is used, such disclosures may prove detrimental should they be obtained by competitors. This could be particularly problematic for associations which operate within the NDIS context.
- There may be 'suppliers' who wish to remain anonymous. This is a tension which is unlikely to be avoided regardless of the scope of the disclosure regime which is adopted.

The Discussion Paper alludes to the possibility that these concerns could be alleviated by disclosing the nature of the transaction without reference to monetary amounts. For small associations where the risks associated with monetary disclosure are high, this may be appropriate. Conversely, it may also be problematic for particularly pessimistic or untrusting members (usually a minority) who are unable to make an assessment in dollar terms and presume the worst.

Another manner in which disclosures could be addressed is by disclosing the 'market value' of the goods or services provided noting, however, that they were provided at rates which were more favourable to the association.

Ultimately, to ensure greatest flexibility recourse will be had to concepts such as 'materiality'. This inevitably involves a judgement call on the part of the management committee of the association and about which even reasonable people may disagree.

We recognise that there is never going to be a perfect solution to the tension. At some point the advantages and public policy concerns will trump the private concerns of persons who do not wish for certain information to be disclosed (even for legitimate reasons).

At the very least, we submit that any disclosures regime should such that any association which is also a registered charity is not burdened with compliance costs associated with multiple disclosure regimes. Having requirements which are consistent with those required by the ACNC or under any relevant accounting standards may be one way in which this concern can be addressed.

Questions 10 -12

QLS does not express a view in response to these questions.

Question 13 - Could the statement or declaration that no remuneration or benefits were received be given verbally at the AGM (and recorded in the minutes) – at least for small associations?

A statement or declaration that no remuneration or benefits were received could be given verbally at the AGM (and recorded in the minutes).

Priority consultation paper 3: Reporting requirements and thresholds

In response to the questions posed, QLS recommends as follows:

Annual revenue and current asset thresholds

Question 1: taking into account the information above, which revenue thresholds are more appropriate?

Recommendation: Option 1C; namely, a review threshold of $150,000 and an audit threshold of $500,000.

Whilst QLS acknowledges the practical advantages of uniformity across States and with reporting thresholds now applying to ACNC registered charities, the different scrutiny regimes would suggest a more conservative threshold limit.

Question 2: if your preferred option is Option 1D or Option 1E, what information can you provide to assist in justifying the thresholds?

Answer: the question does not apply because QLS thinks there are good practical reasons why the ACNC thresholds should not be applied.

Question 3: which approach to asset thresholds is preferred?

Recommendation: Option 2B; namely, double the value of the revenue threshold.

QLS thinks that alignment of the approach to the thresholds applying now in New South Wales and Northern Territory would be most appropriate.

Reporting requirements under the *Collections Act 1966*

Question 4: should all entities who request funds from the public for charitable or community purposes in Queensland be subject to an audit requirement, or should an audit threshold apply?
Question 5: if an audit threshold should apply, what should the threshold be?

Recommendation: In the interests of proportionate measures, QLS recommends that an audit threshold apply.

Our committee members are aware of several incidents in recent years, from other jurisdictions, where organisations have been required to register because of an internet fundraising appeal.

Audit requirements can be particularly challenging for small and start-up organisations.

In our experience, the cost of an audit is rarely below $1,000, which can be a severe impost on small organisations. Our members are aware that associations often need to appeal to members for donations to pay the audit fee, which seems to be an unfair and unintended outcome of the audit requirement.

Financial documents that must be retained by incorporated associations and *Collections Act 1966* organisations

Question 6: is it necessary to prescribe specific financial documents that must be retained by incorporated associations and *Collections Act 1966* organisations, given the broad requirements for those entities to keep financial records that correctly record and explain transactions etc?

Recommendation: QLS recommends there should be no prescription given existing statutory obligations to retain records. This approach avoids and addresses the current archaic rules that have now been circumvented largely by digital record-keeping.

Question 7: does prescribing specific documents assist relevant entities to ensure compliance with the requirement to financial records that correctly record and explain transactions etc?

Recommendation: QLS does not think that prescription is wise and should be dispensed with.

Question 8: using the above as a starting point, do the lists of prescribed documents require any adjustments?

Recommendation: if the arrangements for prescribing specific documents is retained, then certainly the list of prescribed documents requires adjustment so as to ensure that there is no future need for retaining hard copy documents. This has regard to modern day practice of electronic record-keeping.

Question 9: Noting that the list of prescribed documents will apply to all incorporated associations and all *Collections Act 1966* entities, does any requirement create an unnecessary burden in terms of national harmonisation?

Recommendation: QLS thinks that any requirement will create an unnecessary burden in terms of national harmonisation and so should be dispensed with.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

[redacted]

Kara Thomson
President