

INDEPENDENT STATE OF PAPUA NEW GUINEA.



Explanatory Memorandum

Proposed Legislation to repeal and replace the

Associations Incorporation Act 1966

June 2019

1.0 BACKGROUND

The Investment Promotion Authority (IPA) has undertaken a review of the *Associations Incorporation Act 1966* (“the Act”). The Act has remained unchanged since its passage and is simply outdated. IPA has noted significant deficiencies in attempting to implement the Act and has received numerous reports of inappropriate behavior by various associations. IPA believes that a modern legislative framework can help address these problems by giving more direction to associations on internal governance matters and on providing more transparency around each association’s finances. Additionally, this review is being driven in part by deficiencies with the Associations Act noted in the 2011 “Mutual Evaluation Report” (MER) prepared by the Asia/Pacific Group on Anti-Money Laundering. In response to the MER, the Government of Papua New Guinea has endorsed a “National Anti-Money Laundering and Counter Terrorist Financing Strategic Plan 2017-2022” (NSP) which contains a section that addresses AML issues related to Associations. The NSP states that Government will:

Conduct review of *Associations Incorporation Act* ... to ensure proper registration of Non-Profit Organisations (NPOs), enable information with respect to NPOs to be made available to investigative authorities with a view to ensure:

1. NPOs are not misused by terrorist organisations posing as legitimate entities;

2. NPOs are not used to exploit legitimate entities as conduits for [Terrorist Financing], including for the purpose of escaping asset-freezing measures, and
3. NPOs are not used to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organisations.¹

A review of the Act is timely on other grounds as well. IPA has witnessed numerous examples of poor governance and how the lack of good law has made it difficult for many associations to thrive. Further, Gender equality and the economic empowerment of women has become a focus of government policy in PNG. The PNG government acceded to the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) in 1995 reporting on the fulfilment of its obligations in 2009. This attests to the PNG government's commitment to strengthen gender equality in the country including in the context of law reform. The Medium-Term Development Plan 2018-2020 (MTDP3) reiterates the need to empower women by increasing their access to economic opportunities.²

Although there is current no data on the number of women involved in associations, there are several women's associations engaged in a range of business and charitable activities.³ It is evident that women have been active participants in horticulture, agriculture, fisheries and forestry, and that these entities can successfully operate as associations.⁴ One such example is the Central Province Women in Agriculture Association Inc, established in 2015, spanning five districts with more than 5000 members.

Against this background, IPA has sought public comment on proposed changes that will both address local concerns with the Act while also bringing the law into compliance with international anti-money laundering (AML) mandates.

To facilitate the consultation process, IPA distributed a "Consultation Memorandum Seeking Stakeholder Input to Proposed Amendments to the Associations Act 1966" in June 2018. This Consultation Memorandum invited comments to be submitted to IPA by August 31, 2018. Further, IPA held four separate forums in July and August in Port Moresby, Lae, Kokopo, and Goroka, in which the public was invited to participate and provide comments. These events were well attended by various stakeholders. Additional written submissions were also received by IPA in the weeks thereafter. It is

¹ See Recommendations 23 and 24, page 33-34 of the NSP. June 2017 version

² PNG Government, Medium Term Development Plan III 2018-2022, p 27
(http://www.planning.gov.pg/images/dnpm/pdf/latest_pub/MTDP%20III%20Vol1-%20Web-compressed.pdf)

³ Examples include Crater Mountain Women in Mining Association Inc, Porgera District Women's Association Incorporated, Papua New Guinea Women and Children's Rights Centre Inc, Kamagl Women in Agriculture Association Inc.

⁴ See CEDAW reports 2010, p 35 <https://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW.C.PNG.Q.3.Add.1.pdf>

fair to say that all commentators recognized serious deficiencies in the existing *Associations Incorporation Act 1966*, and the vast majority of comments were very supportive of bringing more formality, structure, governance and transparency to associations through new legislation.

IPA is now pleased to present proposed legislation for further public consultation. The proposed legislation is informed by the comments received by the public during the prior consultation phase, by AML concerns noted above, and by IPA's own experiences in administering the *Associations Incorporation Act 1966*. This Explanatory Memorandum provides a detailed account of the most important sections within the proposed legislation and should be reviewed together with the actual text of the proposed legislation. Further, public version of the Consultation Report which was a result of the consultation is also available for review.

The remainder of this Consultation Memorandum provides a narrative overview of the proposed legislation. There is no question but that the proposed legislation contemplates significant, fundamental changes in the way associations are formed, governed, and interact with the world. The IPA welcomes such discussions and will view all stakeholder input with the sensitivity and respect it deserves.

IPA invites written submissions on the proposed legislation from all interested parties. ***All comments should be submitted to IPA at the following email address:*** associationreform@ipa.gov.pg. The deadline for written comments is 5pm Monday 2 September, 2019. IPA will also be conducting a series of workshops to present the proposed legislation to the public. Details will be publicized.

The consultation process resulting in this proposed legislation has been a joint effort led by the Investment Promotion Authority, with support from the Pacific Private Sector Development Initiative, an Asian Development Bank technical assistance program, undertaken in partnership with the Government of Australia and the New Zealand Government.

2.0 NARRATIVE OVERVIEW OF MAJOR CHANGES.

The updates currently under consideration for a proposed new Associations Incorporation Act are set out in a rough chronological order, starting with the formation process and concluding with how associations close their doors when their operations cease.

2.1 Process to become an association

The current Act requires that a Notice of Intent to Incorporate (Notice of Intent) first be presented to the Registrar and, if in order, then newspaper publication of the intent is required. Members of the public have the right to object to the proposed formation. If no objections are made, then the applicant has

several more months to return to complete the full application. If objections are lodged, then first the Registrar and ultimately the courts must decide if the incorporation should be allowed.

This basic process is retained in the proposed legislation. However, the proposed legislation calls for more information to be furnished at the time the Notice of Intent is filed than is required today. Currently the public is not fully informed on the particulars of an association at the application stage so as to be able to make a fully informed decision on whether to object to the association's incorporation. Therefore, such things as the objectives of the association, its membership qualifications, the address of the principal place of business of the association, and the names of the initial committee members and the public officer(s) would all be included in the Notice of Intent under the proposed legislation. The proposed rules would also be included in the Notice of Intent.

IPA is mindful of the costs to publish a Notice of Intent in the national newspapers. Therefore, the proposed legislation seeks to leverage the online registry administered by IPA. All the information in the new Notice of Intent will be published to IPA's registry website, including all images of paper documents filed with the Registrar. This means that the totality of the Notice of Intent to Incorporate will be viewable by the public for free. Therefore, there will be no need for the association to pay to set out all the details in the newspaper publication. Instead, the newspaper publication will only need to set out enough of the notice of intent to incorporate so that people can determine if they need to do further research, and the newspaper publication will specifically point the public to the IPA website. This user-friendly approach will save young associations several hundred kina in publication costs at start-up and will bring much improvement to the formation process.

2.2 Subtypes of associations and other organizational issues

2.2.1 Subtypes

The current Act takes a one-size-fits-all approach to associations: there are no subtypes. The proposed legislation provides for two subtypes: "public service associations" and "mutual benefit associations." A public service association is one that undertakes charitable work for the greater good of society. These typically raise donations and then do good works for the community at large, like providing health services for the poor or running a playground. A mutual benefit association is formed for the benefit of its own members. These are usually trade groups, chambers of commerce, or could relate to several incorporated land groups that come together to form an umbrella association to further the interests of the individual ILGs.

There are three main distinctions made in the proposed legislation on how these subtypes are treated:

- 1) Upon dissolution, a public service association can only disburse assets to another public service association. The reason for this rule is that otherwise it is possible that donations received from the public could wind up in private hands rather than going to the charitable works for which they were intended. There is no such limitation for mutual benefit associations as these are usually self-funded via membership dues.
- 2) Member benefit associations are given the ability to opt out of certain reporting requirements, under the theory that their members have greater ability to monitor the activities of their association.
- 3) The proposed legislation sets out a process by which members of a public service association can be expelled. The proposed legislation strikes a balance between allowing the association to remove troublesome members but also to protect individuals by giving them the right to appeal and be heard. These rules could also apply to mutual benefit associations, but mutual benefit associations (and churches) are permitted to craft their own rules around expulsions if they do not want to engage in this statutory process.

2.2.2 Members and memberships

The current Act does not directly define “members.” Instead, Schedule 1 to the proposed legislation says that the qualifications for membership are to be set out in the rule. The proposed legislation takes a different approach. It defines “members” in a more precise manner:

“member” means a person (or persons) whose name is entered on the member register of an association or incorporated association, or who has the right to vote for the election of committee members, or who satisfies the qualifications for membership set forth in the rules of the association or incorporated association, but a person is not a member merely by virtue of being a committee member or other officer or employee of the association or incorporated association.”

IPA believes this definition offers more certainty around which persons are members, which should help in resolving disputes over whether a given person is a member or not. On a related note, the proposed legislation includes a new concept, “memberships.” A membership is defined as:

“**membership**” means the rights and any obligations of a member or, in the case of a membership jointly held by two or more persons, all such members, pursuant to an incorporated association’s rules and this Act.

This term recognizes the current fact that some associations allow for what are commonly called “family memberships.” This approach also helps establish better gender equality in associations by acknowledging that often husbands and wives jointly hold a membership and that both parties have equal standing with regard to that membership. With regard to voting rights, the default position for the

rules will be that each member has one vote, however, any association will be able to indicate that each “membership” has one vote regardless of how many people are associated with this membership. This two-prong approach should assist women in asserting their proper membership rights while still preserving the flexibility for individual associations to establish voting procedures for their own legitimate reasons.

2.2.3 Essential elements of an incorporated association

Section 6 of the proposed legislation sets out required elements for all incorporated associations. These include a new residency requirement under which at least one committee member and one public office must “be ordinarily” resident in PNG. This is consistent with Section 128 of the PNG Companies Act which requires at least one director of a PNG company to be a resident of PNG.

2.2.4 Types of groups that should be eligible to become associations

The original intent of the Associations Act was to allow a means by which charitable and religious groups could incorporate. In recent years two types of groups have registered as associations that do not seem to fit within this original intent: incorporated land groups and political parties.

The proposed legislation contains a provision that would stop the practice of dual registration. It is unclear why this occurred in the first instance and there is no legal reason for it to continue.⁵ Note that there is a specific provision which would allow several ILGs (or other incorporated entities) from coming together as members in an association.

2.2.5 Clarifying the proper grounds for an objection to the formation of the association

It has been IPA’s experience that the current law does not provide sufficient grounds for objections to be raised to the incorporation of a particular association. The proposed legislation expands the grounds for lodging an objection to the incorporation of an association to include such things as a proposed committee member has a criminal conviction or that none of the committee members are ordinarily resident in PNG.

2.3 Governance and transparency

Stakeholder comments confirmed what IPA has known for some time: the current Associations Act is very weak on matters concerning internal governance and transparency. The proposed legislation addresses these shortcomings in four main ways: i) imposing statutory duties upon committee members

⁵ IPA is aware of Section 28(c) of the *Organic Law on the Integrity of Political Parties and Candidates 2003* which requires a political party to register as an association. IPA is also aware that the Organic Law may be amended to do away with this requirement. IPA will continue to monitor this situation to make sure there is no conflict between these laws.

that are similar to those placed upon directors of companies; ii) clarifying the responsibilities and duties of public officers; and iii) requiring all associations to maintain accounting records which are to be made available for inspection by the members; and iv) for larger associations, or for those that receive either significant donations from the public or government grants, requiring them to prepare audited financial statements. These are all discussed below.

2.3.1 Rights and responsibilities of committee members

Conceptually, the committee of an association is roughly equivalent to a board of directors of a company. The proposed legislation follows this thinking and imposes certain duties upon committee members just as are imposed upon directors of a company, including such things as: imposing a duty of loyalty upon committee members, defining and addressing conflicts of interest, and imposing liability for the intentional misuse of funds.

However, IPA recognizes that many committee members for charitable associations serve on a volunteer basis without pay and thus should have a robust defense to liability so as to encourage people to serve. Therefore, a provision (Section 41) has been placed in the proposed legislation to afford protection for these volunteers.

2.3.2 Composition of committees: seeking equality

It has been widely noted that entrenched social norms limit women's participation in leadership positions including in the governance of associations.⁶ This point is recognised in the Medium-Term Development Plan III 2018-2022 which states that that despite being a majority, PNG women continue to struggle for inclusion in decision-making processes. Therefore, the MTDP III recommends establishing targets and measures to increase the number of women in leadership/management and decision-making.⁷

One possibility to increase the participation of women is to have proportional representation based on the sex of the members. The way this would work is that if an association has 30% women members, then 30% of the committee would be women. The IPA absolutely acknowledges the benefit of creating an inclusive framework in the regulation of associations. However, IPA does not consider it appropriate to mandate targets or quotas for women's representation on a committee in the law itself. Instead, IPA seeks ways to encourage an increase in the participation of women through a range of strategies,

⁶ For example, in meetings with coffee associations it was stated that although women play an important role in growing, harvesting and bagging coffee beans, they are rarely involved in the governance level of the association. Information from interviews with Kindeng Coffee Growers Association.

⁷ PNG Government, Medium Term Development Plan III 2018-2022, page 38.

including: i) recognising joint memberships to increase pathways of participation in governance (which has been included in the proposed legislation); ii) actively increasing awareness and promoting inclusive participation by women; iii) issuing guidelines and other information aimed at promoting best practices for fair participation; and iv) leveraging technology via the online register to collect and report on gender data to help inform policy development.

IPA has included an innovative concept in the proposed legislation to address the issue of increasing female participation without mandating quotas. Under this proposed text, a majority of the members of the association would be empowered to establish a formal sub-committee which would have proportional gender-based representation of the members. This subcommittee would then be allowed to provide the committee with written recommendations to consider. The committee would then either accept or reject the recommendations, but all rejections would have to be in writing, thus bringing transparency to the process. This original approach to governance has been included in Section 37 of the proposed legislation.

2.3.3 Public Officer

The current Act does not do a good job of defining the duties and powers of the public officer, and most of what a public officer does today has arisen as “common practice” and not as a matter of law. The proposed legislation therefore provides clarification on the proper duties of the public officer, making clear they have a duty of loyalty to their association. Basically, the public officer will have a duty to act in good faith and to disclose any conflicts of interest to the association. Additionally, the proposed legislation makes clear that the public officer is empowered to enter contracts on behalf of the association but only if this power is specifically given to them by the committee and registered via a filing in the registry. This way the public will be informed as to who has signature authority for each association, eliminating a cause of confusion in the community.

2.3.4 Shadow committee members

IPA has received anecdotal information that sometime associations are controlled by persons who are not officially recognized as committee members. These persons find it useful to remain hidden, a situation that can only raise suspicions about the activities of their association or its financial dealings. For this reason, such arrangements are strongly frowned upon by international AML mandates.

The proposed legislation seeks to address this problem. First, it sets out a definition for “shadow committee member as follows:

“shadow committee member” is a person who, despite not being registered or formally appointed as a committee member—

(a) acts in the role of a committee member; or

(b) is a person in accordance with whose directions or instructions a committee member is required or is accustomed to act; or

(c) who otherwise exercises control over committee member powers.

The proposed legislation then extends all the duties, responsibilities and potential liabilities that a regular committee member has to any shadow committee members. See Section 49. The names of shadow committee members must also be disclosed to the Registrar, bringing transparency to the governance of the entity.

2.3.5 Accounting records

The current Associations Act provides an adequate framework under which smaller, traditionally charitable or religious organizations may operate. However, the use of the association form has changed over the years so as to be used for organizations that handle very large sums of money with little or no accountability to their own members. The proposed legislation contains provisions that increase financial transparency in favor of the members and impose additional reporting requirements on associations that either receive significant donations from the public or take in government grants. Please see Section 74 of the proposed legislation which requires all associations to maintain basic accounting records, and Section 75 which provides further details around what is required. Each association is to make these accounting records available to its members as part of an annual report which is to be maintained at the association's principle place of business.

2.3.6 Audited financial statements

Many commentators expressed concern about the financial dealings of associations. IPA took this sentiment on board, but also recognizes that the vast majority of associations: i) are not engaged in illicit activities, and ii) are too small to be able to afford an auditor. IPA also believes that a more nuanced approach is needed rather than simply saying "the biggest associations must report. Therefore, the proposed legislation contains language requiring that only certain targeted associations must have prepared audited financial statements. Section 80⁸⁸ provides three instances where an association would be required to have audited financials:

⁸⁸ The actual text of Section 80(1) in the proposed legislation reads:

(1) An incorporated association that, in any accounting period—

- (a) has an annual gross revenue in an amount greater than the annual gross revenue amount threshold established by regulations; or
- (a) receives grants in any amount; or

- 1) if an association has total gross revenues in excess of an amount established by regulations. Such “annual gross revenue amount” would be set at a high level so that only the biggest associations would be captured by this test;
- 2) where an association receives significant donations from the public. The “annual donation amount” would also have a high threshold amount established by regulation so that only those associations that receive significant donations would qualify under this test; or
- 3) Where an association receives a PNG Government grant of any size then audited financials would be required. The thinking here is that if taxpayer money is flowing to the association then there should be accountability on how it is being spent.

IPA believes this formulation will best serve PNG by specifically targeting only those associations for which there is ample justification to require more detailed financial statements.

2.3.7 Annual Report for the members

Under Section 76 of the proposed legislation each association is required to prepare an annual report and make it available for the members for inspection. Section 78 of the proposed legislation then sets out the basic information required to be in annual report, including a summary of the activities of the association over the past year and a few specific data points, such as: the total remuneration paid to committee members, total amount of donations and member dues received, and any employees that are paid in excess of a high-level “employee threshold amount” that will be set in the regulations.

To give associations flexibility and so as not to overburden smaller ones with few members, an association need not prepare an annual report if all the members agree that it is not necessary, and the rules of a mutual benefit association may also provide that no annual report is necessary.

2.3.8 Annual General Meeting

The proposed legislation specifically requires all associations to hold an annual general meeting. See Section 68. However, to give flexibility to the smaller associations, if all members agree then a meeting need not be held that year. Further, the rules of a mutual benefit association may provide that no annual meeting is required given that this subtype will have a select group of members from the start. Further flexibility is given by a provision that states if 75% of the members “sign or assent to” any proposal then a meeting need not be held.

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- (b) receives donations from the public that exceed the annual donations amount threshold established by the regulations;
—must prepare financial statements in accordance with Section 81.

To protect minority views, Section 69 states that special meetings may be called upon request of 1/3 of the committee members or 1/3 of the membership at large. The court is also empowered to force a meeting upon motion by various parties, including the Registrar.

2.3.9 Annual Return required of all associations

The proposed legislation requires all incorporated associations (and overseas associations) to file an annual return with the Registrar. There are two primary benefits to requiring an annual filing. The first is to provide the registry with accurate information as to which associations are active and which ones have ceased to exist. The second reason to collect certain information about each active association is to ensure that data held in the registry is accurate. Just as with companies, the failure to file an annual return can result in the association being struck off the registry.

A secondary benefit to an annual return is that it allows the Registrar to collect statistics regarding activities in the NGO sector. Thus, IPA anticipates designing the annual return form such that meaningful aggregated statistics can be compiled into aggregated reports showing such things as how many associations are engaged in agricultural related activities in a given province. These statistics can then help inform Government policies to assist the NGO sector.

2.4 Overseas associations

The current Act does not contain provisions allowing for the registration of foreign entities that operate for charitable or religious purposes in PNG. This proposed legislation corrects this oversight and requires overseas associations to comply with a new regulatory regime that will help ensure they are pursuing appropriate activities within PNG. All overseas NGOs that currently registered as overseas companies will be required to re-register under the associations act as overseas associations. The failure to do so will result in their registration being struck from the company register.

2.5 Enhanced Registrar powers

The current Act does not set out the broad grant of authority in favor of the Registrar that is expected in a modern corporate setting. For example, the Registrar has broad grants of authority to administer the PNG *Companies Act 1997*. The lack of this authority in the current Act has hindered the ability of the Registrar to regulate associations that have gone astray from their mission. Therefore, grants of authority similar to those in the Companies Act have been included in the proposed legislation.

2.6 Transition: re-registration

There must be a way to smoothly transition from the existing law to the new one. This is complicated by the fact that the proposed legislation contemplates additional data points to be submitted

to the Registrar for each association, most pointedly the names of the committee members. IPA believes the most efficient way to handle this transition is to require all incorporated associations to re-register under the new law, as set out in Section 169. The re-registration form will collect all information that would be required of a new association that is incorporated under the new law. That way the register will hold identical information on existing and new incorporated associations.

In order to assist incorporated associations in this task, under the proposed legislation all incorporated associations will have one year from the date of commencement of the new Act to re-register. The re-registration will take the place of filing an annual return in that first year: there is no sense in making incorporated associations file twice. Further, re-registration will be free. The failure to re-register in the first year will result in the incorporated association being struck off the register. However, the incorporated association is given an additional two years within which it can reinstate its registration by submitting the proper filings to the Registrar, together with a late fee.

The re-registration requirement applies to overseas NGOs that may have registered as overseas companies under the existing legal framework. The failure of an overseas NGO to re-register under the new Associations Act would cause it to be struck off the companies register and to in effect be operating illegally in PNG.

CONCLUSION.

All the changes noted above were discussed during the consultation process and the great majority of commentators agreed with all changes to the current Act that are captured in the proposed legislation. IPA now seeks further stakeholder input concerning the actual text of the proposed legislation and welcomes all comments.

