

MARIA CLARKE LAWYERS

Submission on *Consultation on regulations for the Incorporated Societies Act 2022*

Your name and organisation

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Responses to questions

Part 2 of the discussion document: section 254

Matter	Question
<p><i>Prescribing information that must be included or provided</i></p>	<p>Do you have any comments on MBIE’s proposals regarding regulations under section 254(1)(a)?</p>
<p>1</p>	<p>Section 9(a) - It is not clear whether or not the “proposed constitution” (which accompanies the application) must have been approved by the members in accordance with section 30 prior to the application. Its states that the application must have such approval but not the constitution. Presumably the intention is for both documents to be approved.</p> <p>Section 33(2) – It is recommended that the information accompanying the amendment, and amended constitution, should also include the date and type of meeting at which the amendment was made (e.g. an Annual General Meeting or Special General Meeting).</p> <p>Section 33(2) – It would be helpful to clarify if the amended constitution has to show (e.g. by underline or otherwise mark-up) the amendments that were made.</p> <p>Section 79(2)(d) – It is recommended the register also include the date the member ceased to be a member, consistent with section 26(1)(d). Consideration might also be given to the Register recording the nature of the member’s consent (see Other Comments at the end of this submission).</p> <p>Section 109(2) - For the information in the annual return, it is recommended that instead of requiring the physical addresses of the society’s officers, that email addresses be required. This is to reduce the potential invasion of privacy which could occur at an officer’s physical address (assuming it would be made public). Also an email is a more contemporary method for contacting an officer. It is also recommended this email be stated to be a “current” email address for both the contact officer and the society’s officers.</p> <p>Section 109(2) – It is recommended that in the certification in the annual return, that the date of the AGM should be included.</p> <p>Section 109(2) – It is recommended that the annual return also contain a reference to any amendments to the Constitution made during the accounting period, for example by referencing the rule number/s amended and a description of the changes made.</p> <p>Section 192(c) – It is recommended that the date/s on which the members of each amalgamating society consented to the amalgamation and approved the proposed constitution should be included. It should also state that a “majority of the members” of each of the amalgamating societies must have approved the proposed constitution (as well as approved the application). In addition, the date on which the proposed amalgamation is to take effect should be stated in the application. The same information including certification needed for an application for a new society should apply to an amalgamated society.</p> <p>Section 193(a) and (b) – it is recommended that the date on which the amalgamation takes effect, should be included in the information sent to members and secured creditors.</p> <p>Agree with all other proposals.</p>

	<i>Prescribing the manner in which things must be done</i>	Do you have any comments on MBIE's proposals regarding regulations under section 254(1)(b)?
2		<p>Section 9(a),(f),(g) – Agree that online should be the default method for filing, however it should not require Registrar's discretion (presumably based on an application process) to allow other means. Post, facsimile and other methods should be offered for those who do not have or have difficulty in using online services including scanning. Perhaps you could impose a nominal fee for postal applications to discourage posting and to cover the extra time required by MBIE to process them.</p> <p>Section 109(1) – I agree with all the proposals. In particular, I support including a date by which annual returns are due into the regulations.</p> <p>Section 117(1) – It is recommended that the application to change a society name should include a certification by an officer that the name change has been made in accordance with the constitution, or if the constitution is silent, then by a majority of the members of the society. A name change is equivalent to changes to the constitution so should be approved by the members, unless the constitution permits otherwise.</p> <p>Section 185(1) + (2) – I support prescribing who can apply for a society to be restored and would suggest adding at least 10 members (the same number as required for an application for a society). It is not clear who, on behalf of the society, could make the application and I would suggest that an officer can do so but only if approved by a majority of the members. I do not consider a creditor should have the power to restore a society, as creditors are not the members of the society.</p> <p>Section 177 (2)(b) - I recommend that, in addition to the list proposed, the notice of intention to remove a society from the register should also be given to the contact officer (who in turn should have the obligation to notify all the members of the society) and all the officers.</p> <p>Section 186(2) – I see no reason why the list of persons to whom notice of intention to remove a society from the register should not be the same for notice of restoration of a society.</p>
3	<i>Authorising the Registrar to determine the manner in which things must be done</i>	Do you agree with MBIE's proposal that no regulations should be made at this stage under section 254(1)(c)?
4	<i>Declaring persons to be, or not to be, officers</i>	Do you agree with MBIE's proposal that no regulations should be made at this stage under section 254(1)(d)?
5	<i>Prescribing circumstances related to independent committee members</i>	Do you have any comments on MBIE's proposals regarding regulations under section 254(1)(e)?

	<p>I support having the carve out to allow independent committee members as this is good governance practice. While I do not see any specific reason for allowing national and regional sports organisations (many societies who provide services are required to look after the welfare of their members/participants including under the Health and Safety at Work Act), I do not object to both categories of societies having this exception.</p> <p>For the second category (other societies with operations above a specified threshold) I support a financial threshold. While a financial threshold is not the only factor that might justify having independent members, it is one which can be determined objectively. Other factors which might be considered would require more subjective approach. For this reason, I support <u>one threshold</u> (to keep it simple).</p> <p>I consider the carve out should apply to any society with operating expenses in excess of \$1.1 million for two years straight (aligned with the audit threshold in the Charities Act 2005: specified in section 42D of the Charities Act 2005).</p> <p>However, care needs to be taken in the application of the time period where a society's operating expenses fall below the \$1.1M threshold for two years. In my view the society, in this case, should not be required to lose its right to have independent committee members immediately and should be given a grace period to either reach the threshold again or allow the independent members to continue their terms of office and for the society to make changes to its constitution/ appoint a committee member who is not independent member. That period could say be two years, with the effect that they would have independent member/s for 4 years.</p>	
6	<p><i>Prescribing jurisdictions whose officer disqualifications we will recognise</i></p>	<p>Do you have any comments on MBIE's proposals regarding regulations under section 254(1)(f)?</p>
	<p>The voluntary nature of most incorporated societies (compared to companies) means it is often easier to become an officer and may include people from overseas. I cannot understand why this should be restricted to Australia, other than the practical ability of MBIE to check the Australian registers. It seems to be saying that that someone who is banned elsewhere is de facto evidence that they <u>are</u> still a fit and proper person to hold this role in New Zealand!</p>	
7	<p><i>Prescribing the types of changes in officer information that must be notified</i></p>	<p>Do you have any comments on MBIE's proposals regarding regulations under section 254(1)(g)?</p>
	<p>I agree with the proposals.</p>	
8	<p><i>Regulating constitutional provisions on conflicts of interest</i></p>	<p>Do you agree with MBIE's proposal that no regulations should be made at this stage under section 254(1)(h)?</p>

	<p>As section 67 enables a society to effectively contract out of the conflict of interest provisions in the Act (by allowing no consequences for a conflict of interest) , I recommend there must be some ability for the Registrar to prevent this from occurring. For example, the regulations could state that negating, limiting or waiving the consequences of a conflict, cannot include waiving the right to disclose the conflict or publishing it in the annual return. Transparency is the best sunlight for conflicts.</p>	
9	<p><i>Prescribing societies that can restrict general meeting attendance to delegates</i></p>	<p>Do you have any suggestions regarding regulations that should be made under section 254(1)(i)?</p>
	<p>I do not support this proposal. The right for a member to attend general meetings is at the heart of a being an incorporated society. This right is important to allow members a voice, a vote and to ensure accountability of the committee. There are many online mechanisms available for societies which have significant numbers of members to participate in meetings using technology and their constitutions can be amended to permit this. If a society has difficulty getting members to its AGM in person, it should consider another type of legal entity without members or make their AGMs more interesting to attract them to attend.</p> <p>I would also prefer to see the right for all societies to hold their general meetings online in the Act or in regulations rather than this right being subject to a provision in the society's constitutions, as a way to address this issue.</p>	
10	<p><i>Defining the term 'total current assets'</i></p>	<p>Do you have any comments on MBIE's proposals regarding regulations under section 254(1)(j)?</p>
	<p>The XRB is the entity responsible for setting accounting standards in New Zealand so in my view its definition of current assets should be used.</p>	
11	<p><i>Prescribing additional requirements for the financial statements of small societies</i></p>	<p>Do you agree with MBIE's proposal that no regulations should be made at this stage under section 254(1)(k)?</p>
	<p>I agree with this proposal.</p>	
12	<p><i>Determining the class of society that must have its financial statements audited</i></p>	<p>Do you have any comments on MBIE's proposals regarding regulations under section 254(1)(l)? For example, do you agree that focusing on the proportion of societies that should be captured is appropriate?</p>
	<p>I agree with this proposal and appreciated the analysis.</p>	
13	<p><i>Setting infringement fees</i></p>	<p>Do you have any comments on MBIE's proposals regarding regulations under section 254(1)(m)?</p>

	<p>I would support higher infringement fees of \$1000, \$500 and \$200 (for the 3 categories of infringements you have identified) to ensure there is a greater deterrent. Otherwise there is no reason to have any infringement fees. As a minimum I would support \$1000 for the three infringement offences: failure to call an annual general meeting; failure to properly hold an annual general meeting; and failure to register financial statements, because these are the most serious. The Registrar has the discretion whether or not to impose an infringement fee so that discretion can be applied to assess the reasons for the infringement, such as financial constraints.</p>	
14	<p><i>Prescribing the information to be included in infringement and reminder notices</i></p>	<p>Do you have any comments on MBIE's proposals regarding regulations under section 254(1)(n)?</p>
	<p>I agree with the proposals.</p>	
15	<p><i>Removal and restoration of societies from the register</i></p>	<p>Do you have any comments on MBIE's proposals regarding regulations under section 254(1)(o)?</p>
	<p>No objection to these proposals.</p>	
16	<p><i>Prescribing certain matters relating to surplus assets</i></p>	<p>Do you have any comments on MBIE's proposals regarding regulations under section 254(1)(p)?</p>
	<p>No objection to these proposals.</p>	
17	<p><i>Prescribing procedural requirements for surplus asset 'resolutions'</i></p>	<p>Do you agree with MBIE's proposal that no regulations should be made at this stage under section 254(1)(q)?</p>
	<p>No objection to these proposals.</p>	
18	<p><i>Prescribing how documents must be served on a society</i></p>	<p>Do you have any comments on MBIE's proposals regarding regulations under section 254(1)(r)?</p>
	<p>No objection to these proposals.</p>	
19	<p><i>Prescribing how documents must be served on a person</i></p>	<p>Do you have any comments on MBIE's proposals regarding regulations under section 254(1)(s)?</p>
	<p>No objection to these proposals.</p>	

20	<i>Prescribing matters relating to the incorporated societies register</i>	Do you have any comments on MBIE's proposals regarding regulations under section 254(1)(t)?
	No objection to these proposals.	
21	<i>Specifying matters concerning conversion into an incorporated society</i>	Do you have any comments on MBIE's proposals regarding regulations under section 254(1)(u), (v) or (w)?
	No objection to these proposals.	

Part 3 of the discussion document: section 254

	Matter	Question
22	<i>Setting fees for the performance of functions or the exercise of powers</i>	Do you have any suggestions on regulations that should be made under section 255(1)(a)?
	As a general principle, I support a reasonable fee being required for processing applications etc. which aligns with other registers. However, please see my comment below regarding re-registration under the new Act (which should <u>not</u> require a fee).	
23	<i>Setting late fees</i>	Do you have any comments on MBIE's proposals regarding regulations under section 255(1)(b)?
	I agree with the proposals.	
24	<i>Setting other fees</i>	Do you agree with MBIE's proposal that no regulations should be made at this stage under section 255(1)(c)?
	Agree.	

Part 4 of the discussion document: section 254

	Matter	Question
25	<i>Providing that certain rules apply</i>	Do you agree with MBIE's proposal that no regulations should be made at this stage under section 256(1)(a)?
	No objection to these proposals.	

26	<i>Providing that certain legislative rules do not apply</i>	Do you agree with MBIE's proposal that no regulations should be made at this stage under section 256(1)(b)?
I agree with the proposals.		
27	<i>Prescribing matters for the purposes of Part 1 of Schedule 1</i>	Do you have any comments on MBIE's proposals regarding regulations under section 256(1)(c)?
<p>I do not support a fee being payable to accompany reregistration/conversion applications. It is important to make it easy for all societies to re-register under the 2022 Act but having a fee creates another barrier. The cost to the Companies Office of processing registrations is a one off costs which the Govt. should bear as an implementation cost. In any event, not having to manage fees will also reduce the time needed by the Companies Office to process the re-registration applications.</p> <p>I agree with the other proposals.</p>		

Other comments

I have received many questions from clients regarding the manner in which consent to become a member must be obtained under section 76(1). The Law Commission Paper envisaged that “expressed consent” was needed however this is not stated in the Act. It leaves it open to be interpreted widely including that verbal and implied consent may be sufficient. (I note section 76(2) makes it clear that consent for members which are organisations must be in writing).

It would be helpful to have greater clarity on this in the regulations, if possible, but s76(1) itself does not refer to anything to be prescribed in the regulations. One option would be to add to “Other information that the register must contain” (in section 70(2)(d), the requirement to have a record of every members’ consent on the register (or their parent/guardian in the case of members under 18 years of age). This could be used as a mechanism to make it clear that the consent must be in writing (which should be defined to include an online mechanism, such as a tick to agree in a form, or by email).