

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
1	<i>Prescribing information that must be included or provided</i>	Do you have any comments on MBIE's proposals regarding regulations under section 254(1)(a)?
		<p>Section 9(a) – we agree that there should be a physical address for service, being a place where legal documents can be served, but in this age of the internet, is it necessary for the registered office also to be a physical address? A similar issue arises with respect to amalgamation proposals (section 192(c)), and conversion of entities into incorporated societies (schedule 3, clause 3(b))</p> <p>Section 9(a) – in terms of collection of officers' personal information, what privacy protections will be put in place?</p> <p>Section 109(2) – the proposal is that the annual return should contain a certification that "the membership figure included in the annual return is accurate" – presumably, in addition to certifying that the figure is accurate, the regulations would also require the annual return to include the membership figure? What membership figure would this be – would it be the number of members at the end of the latest financial year (as was previously suggested in the 2015 consultation document)?</p>
2	<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)?

Section 9(g) – it is proposed that applications for incorporation must be made online through the internet site designated by the Registrar, except with the leave of the Registrar given in their absolute discretion. We acknowledge that it is easier to process these things electronically. But not everyone has equal digital access. In addition, our experience under the Charities Act is that the obligation to notify Charities Services is widely observed in the breach. Everything should be done to make the notification process as simple and easy for societies as possible - societies should have the option of proceeding in paper form without having to request leave from the Registrar. Similar arguments apply in respect of the proposed process for applying for a waiver from disqualifying factors (section 48) – in fact, the argument applies even more acutely here, as this is likely to be a sensitive area, and one which may not be well suited to a digital process.

With respect to section 111(3), at page 15 of the consultation document, the following comment is made: “A related issue is when the change in registered office should take effect. Section 187(3) of the Companies Act 1993 provides that, for companies that provide notice to the Registrar of Companies that their registered office is changing, “[t]he change in the registered office takes effect on the date stated in the notice” provided that that date cannot be “earlier than 5 working days after the notice is registered”...Subject to confirming that there is a regulation-making power that allows the Governor-General to do so, we propose that the Minister recommend the making of regulations that have the same effect for incorporated societies”. However, section 111(4) of the Incorporated Societies Act 2022 already provides that a change to a society’s registered office takes effect on a date stated in the notice, being a date that is at least 5 working days after the notice is registered. On that basis, it would appear that further regulation is not necessary in that regard?

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)?
	No comments	
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)?

	<p>We have no difficulty with no regulations being made at this stage to include or exclude classes of persons from being “officers” of an incorporated society. However, we have a strong view that the definition of “officer” in both the Incorporated Societies Act 2022 and the Charities Act 2005 should be amended to make it clear that only members of the governing body are “officers”: the proposal to include those exercising “significant influence” was originally inserted into the Charities Act to cater for Churches that do not have a governing body as such, but are governed by synods of hundreds of people. The reference to those exercising significant influence was intended to limit the number of people required to certify that they are qualified to be an officer of a registered charity in such circumstances to the executive committee of the synod, or similar body. This amendment was inserted by supplementary order paper in 2004/2005 and rushed into the legislation under urgency without any meaningful consultation. The definition was then subsequently amended by Statutes Amendment Bill to remove the limitation to those societies that do not have a governing body, so that all persons exercising significant influence of a registered charity structured as a society or association were deemed to be officers. The Charities Amendment Bill, currently before Parliament, proposes to amend the definition further so that all persons exercising significant influence over a registered charity, however structured, are deemed to be officers. This creates a very blurry line that conflates the distinction between governance and management and will be unworkable in practice. We strongly recommend that the definition of officer in the Incorporated Societies Act is limited to members of the committee only.</p>				
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7	<i>Prescribing the types of changes in officer information that must be notified</i>	Do you have any comments on MBIE's proposals regarding regulations under section 254(1)(g)?
	No comments	
8	<i>Regulating constitutional provisions on conflicts of interest</i>	Do you agree with MBIE's proposal that no regulations should be made at this stage under section 254(1)(h)?
	We have no comments on this proposal, other than to query whether trade unions advocating for the collective interests of the union's members may have difficulty with no specific regulation in this regard	
9	<i>Prescribing societies that can restrict general meeting attendance to delegates</i>	Do you have any suggestions regarding regulations that should be made under section 254(1)(i)?
	It is not clear that a threshold approach will capture the issue – beyond unions, it may be more a "type of society" issue than necessarily a size issue. Many umbrella societies with members who are themselves incorporated societies (or other types of entities, eg charitable trusts) operate a delegate voting system. It is important that they are able to continue to do so.	
10	<i>Defining the term 'total current assets'</i>	Do you have any comments on MBIE's proposals regarding regulations under section 254(1)(j)?
	I do have concerns about defining current assets by reference to a society's "expectation". More fundamentally, I think it is problematic to create a "small society" exception altogether: the External Reporting Board ("XRB") have considerably simplified the standards for small entities and I understand that further work is underway in this area. I would prefer to see all societies required to prepare financial reporting to XRB standards, with size catered for by the tiered system already developed by XRB. Creating exceptions adds rather than reduces complexity and also creates a risk of exploitation	

11	<i>Prescribing additional requirements for the financial statements of small societies</i>	Do you agree with MBIE's proposal that no regulations should be made at this stage under section 254(1)(k)?
	Service performance reporting is very helpful as are the requirements to disclose related party transactions in the financial statements. However, fundamentally, small societies should be required to use XRB standards in my view.	
12	<i>Determining the class of society that must have its financial statements audited</i>	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?
	No comment, other than to say a \$3m threshold seems reasonable	
13	<i>Setting infringement fees</i>	Do you have any comments on MBIE's proposals regarding regulations under section 254(1)(m)?
	<p>\$500 seems too high. \$200 would be sufficient deterrence, in my view.</p> <p>It may be relevant to note that, under the Charities Act, the penalty for failure to notify changes or failure to file an annual return is currently set at \$100 and \$200 respectively: Charities Act section 58, and Charities (Fees and Other Matters) Regulations 2006 (SR 2006/301) reg 9. However, to date no such penalty has ever been imposed, despite widespread non-compliance.</p>	
14	<i>Prescribing the information to be included in infringement and reminder notices</i>	Do you have any comments on MBIE's proposals regarding regulations under section 254(1)(n)?
	No comments	
15	<i>Removal and restoration of societies from the register</i>	Do you have any comments on MBIE's proposals regarding regulations under section 254(1)(o)?
	No comments	

16	<i>Prescribing certain matters relating to surplus assets</i>	Do you have any comments on MBIE's proposals regarding regulations under section 254(1)(p)?
No comments		
17	<i>Prescribing procedural requirements for surplus asset 'resolutions'</i>	Do you agree with MBIE's proposal that no regulations should be made at this stage under section 254(1)(q)?
No comments		
18	<i>Prescribing how documents must be served on a society</i>	<p>Do you have any comments on MBIE's proposals regarding regulations under section 254(1)(r)?</p> <p>Section 165 was changed by SOP to provide that an infringement notice can be served by delivering it to an officer or employee (rather than to the contact person). While delivery on an officer or employee might be acceptable for an infringement notice, we do not think societies should be able to be served documents in a legal proceeding by delivery to an "officer" of the society. The definition of "officer" is very wide, extending to any person in a position that allows them to exercise "significant influence" over management or administration. It will not always be clear when such a definition is met, which could therefore lead to unhelpful arguments as to whether a document has been properly served. It may also be problematic for legal documents to be served on a contact person, whose role is to merely provide a point of contact, meaning they may therefore be reasonably junior within the society and may not appreciate the significance of the document they have been given (which presumably explains why section 160 was amended to remove reference to the contact person). Legal documents should only be able to be served by being left at or posted to the society's address for service, or otherwise in accordance with an agreement made with the society (which should be in writing) or in accordance with any directions by the court. Non-legal proceeding documents (section 125(2)) should be able to be served by physical or postal delivery to the society's address for service (not by fax or telephone) or in accordance with an agreement made with the society (which again should be in writing and which agreement might include the ability to serve by email in any specific case).</p> <p>Please can we delete the references to faxes – does anyone use these now?</p>
19	<i>Prescribing how documents must be served on a person</i>	Do you have any comments on MBIE's proposals regarding regulations under section 254(1)(s)?

	<p>Service should be able to be effected by delivery to the society's address for service, but not its registered office (which should not be required to be a physical address as discussed above).</p> <p>Again, please can we delete the references to faxes</p>	
	<p><i>Prescribing matters relating to the incorporated societies register</i></p>	<p>Do you have any comments on MBIE's proposals regarding regulations under section 254(1)(t)?</p>
20	<p>With respect to section 133(1)(i), the consultation document says "see section 2.2.1 above". However, while section 2.2.1 addresses section 79, and the information that each society's register of members must contain, it does not address section 133, and the information that is required to be contained on the register of incorporated societies itself. What (if any) regulations does MBIE propose for section 133(1)(i)?</p> <p>With respect to section 237(e), should the register be able to be searched by reference to a contact person? Compare clause 176 of the exposure draft bill, which allowed searches by reference to an officer, but at that time the contact person was required to be an "officer". The requirement for a contact person to be an "officer" has been removed – does this require a consequential amendment to section 237 (or otherwise, a reference in the regulations?)</p>	
21	<p><i>Specifying matters concerning conversion into an incorporated society</i></p>	<p>Do you have any comments on MBIE's proposals regarding regulations under section 254(1)(u), (v) or (w)?</p>
	<p>No comments</p>	

Part 3 of the discussion document: section 254

	Matter	Question
22	<p><i>Setting fees for the performance of functions or the exercise of powers</i></p>	<p>Do you have any suggestions on regulations that should be made under section 255(1)(a)?</p>

	<p>In 2019, I was awarded the New Zealand Law Foundation International Research Fellowship, to undertake research into the question “What does a world-leading framework of charities law look like”. The final report from the Fellowship, Focus on purpose, was released in April 2022 making 70 recommendations for charities law reform in Aotearoa New Zealand, following 2 years of dedicated research, building on more than 2 decades of specialist legal practice in this area. As part of the research, we reviewed all of the submissions that were made to the Department of Internal Affairs’ review of the Charities Act. Imposing a fee for charitable registration was strongly opposed as inappropriate and counterproductive by a large number of submitters, as set out in box 8.6 of the <i>Focus on purpose</i> report. Similar arguments would apply to incorporated societies, which are also not-for-profit entities by definition: the framework should encourage people to come together in groups as that contributes significantly to social cohesion and social capital; it should not put fee barriers in the way of that. We strongly oppose the imposition of a fee under section 9(f), and also under section 197(d) or clause 3(f) of schedule 3.</p>	
	<i>Setting late fees</i>	Do you have any comments on MBIE’s proposals regarding regulations under section 255(1)(b)?
23	<p>It is already an infringement offence under section 160 to fail to comply with most of these duties. Imposition of a late fee as well would be double jeopardy. The Registrar’s costs in administering the regime should be covered by the state. On that basis, we recommend all of these proposed late fees be deleted apart from sections 107 (which relates to auditors) and 180 (which relates to specified applications to a court).</p>	
	<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)?
24	No comments	

Part 4 of the discussion document: section 254

	Matter	Question
	<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)?
25	No comments	
	<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)?
26	No comments	

<p><i>Prescribing matters for the purposes of Part 1 of Schedule 1</i></p>	<p>Do you have any comments on MBIE's proposals regarding regulations under section 256(1)(c)?</p>
<p>27</p>	<p>We are strongly against a fee for reregistration (schedule 1, clause 5(3)(e)). A fee of \$50 in particular is likely to act as a barrier to people reregistering, when we should be encouraging people to come together in groups. Incorporated societies are not-for-profit organisations and, as the consultation document notes, many are in a fragile financial position. Administration of the regime should be funded by the state. It is an important contribution to the type of society we want to live in.</p> <p>With respect to schedule 1, clause 5(3)(f), we are concerned that some incorporated societies will not be able to undertake this process online. A paper-based option should be available at the society's choice, without having to make a separate application to the Registrar</p> <p>We also oppose late fees under clause 9(5) of schedule 1. Societies are democratic organisations, and democratic processes can be inherently time-consuming and messy. Imposing a late fee would be unreasonable. Carrot would work better than stick in this area, in our view.</p>

Other comments

<p>No other comments</p>
