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Commercial, Consumers & Communications Branch
Ministry of Business, Innovation & Employment
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Wellington

By email: societies@mbie.govt.nz

Submissions on the Exposure Draft of the Incorporated Societies Bill

The Institute of Directors (IoD) appreciates the opportunity to comment on the Exposure Draft of the Incorporated Societies Bill (draft Bill). The IoD is committed to raising governance standards in all areas of New Zealand business and society and we welcome the updating of the Incorporated Societies Act 1908 with a new, modern statute. Notwithstanding our comments here, the IoD may make further comment as the draft Bill progresses.

Summary

The IoD generally supports the draft Bill and the matters relating to officers of incorporated societies. However, we are concerned that small incorporated societies may be disproportionately burdened by compliance matters in the draft Bill. This may deter societies from operating as incorporated societies and people joining the leadership of societies. We encourage MBIE to consider whether the one-size-fits-all approach under the draft Bill is appropriate or whether there are alternative options that would better suit small societies.

Institute of Directors

The IoD is a non-partisan voluntary membership incorporated society. We represent a diverse membership of over 7,500 members drawn from NZX-listed companies, private companies, small to medium enterprises, public sector organisations, not-for-profits and charities. Many of our members serve in the leadership of incorporated societies.

We promote excellence in governance in order to create and add value to enterprises. Our chartered membership pathway aims to raise the bar for director professionalism in New Zealand, including through continuing professional development to support good corporate governance.

Incorporated societies in New Zealand

Incorporated societies are an integral part of New Zealand society. There are over 23,700 societies ranging from small lawn bowls clubs to New Zealand Rugby. They promote a broad range of community activities including sport, recreation, culture, education, health, social services, philanthropy, emergency relief, environmental protection, animal protection and religion. Approximately 35 per cent of incorporated societies are registered charities.

General comments

The IoD generally supports the draft Bill, its aim to improve governance structures and arrangements for incorporated societies in New Zealand and the following principles:

- societies are organisations with members who have the primary responsibility for holding the society to account.
- societies are private bodies that should be self-governing and free from inappropriate government interference.
- societies should not distribute profits or financial benefits to their members.

There are good reasons that high standards of governance should apply to incorporated societies as they often receive funds from members and third parties and may also receive tax concessions and donations. Many societies have considerable trust reposed in them warranting commensurate probity and accountability.

Key challenge

A key challenge of the reform will be to balance raising governance standards without deterring societies from continuing to operate or new societies incorporating in the future. It is also important that the reform does not deter people from getting involved in the leadership of societies.

We are concerned about small societies in particular. These societies and their officers (who are generally volunteers) may be disproportionately burdened by compliance matters in the draft Bill. For example, small societies may find it difficult to comply with increased financial reporting requirements and requirements relating to disputes procedures. In raising governance standards, it is important to bear in mind that small societies often have limited resources to operate and carry out their core purposes.

Existing small societies may feel that, bearing in mind their duties and responsibilities under the draft Bill, they have no option but to change their legal structure, or merge with other societies or, in some cases, cease operating all together. New societies in the future may choose to remain unincorporated or use a different structure. And this may impact on their funding options. In addition, it is already difficult for small societies to attract people to their leadership. The increased compliance for small societies and their officers may be a further disincentive for prospective leaders.

We encourage MBIE to consider whether the current one-size-fits-all approach under the draft Bill for societies is appropriate or whether there are alternative options that would suit small societies. What would constitute a small society would need to be defined, for example, a society having turnover under \$25,000.

Constitutions

The draft Bill requires every incorporated society to have a constitution. Minimum content must be included in constitutions and this is more than what is currently required under the 1908 Act. We support the requirement for societies to nominate a not-for-profit entity or a class or description of not-for-profit entities to which surplus assets should be distributed on liquidation or removal from the register. This reflects the principle that societies should not distribute profits or financial benefits to their members. Under the 1908 Act, societies can distribute assets to members when a society is wound up. Societies that are registered charities will already have a similar winding up provision and also provisions prohibiting the private pecuniary profit of members (which is also prohibited under the draft Bill).

MBIE plans to introduce standard constitutional provisions, rather than a model constitution. Societies can adopt or adapt these provisions. Given the diversity of societies, having standard provisions is a better option than trying to create a one-size-fits-all model constitution. This initiative

will also help societies focus on their governance arrangements and what they are doing as organisations.

We understand that the draft Bill is unlikely to be introduced into Parliament until 2017 and that there will be a four year transitional period (after Royal Assent) for societies to comply with the new regime. We expect that many small societies will need this time and structural support and guidance from the government and key NFP organisations in transitioning to the new incorporated societies' regime and going forward.

We expect that many large incorporated societies will be in a better position to transition than smaller societies and may not have to make many changes to their constitution. This is because similar issues were dealt with through the introduction of the Charities Act 2005. Societies that are charities will have to notify both the Registrar of incorporated societies and Charities Services of any amendments.

Society duties

There are a number of duties under the draft Bill relating to societies including duties to:

- notify the Registrar of amendments to the constitution
- maintain a register of members
- call an annual general meeting at least every 15 months
- hold, and keep minutes of, the annual general meeting
- register financial statements
- register an annual return
- have a current registered office

Many of these duties are already in the 1908 Act. It is important that societies are given clear guidance about new duties and duties that will change.

Committee requirements

Under the draft Bill, every society must have a committee of at least 3 members and societies must specify the number of members that must or may be on the committee in their constitution. Committees have a number of requirements spread throughout the draft Bill. These include keeping an interests register and accounting records and presenting certain information at each annual general meeting. It is not clear what the consequences are if committees do not comply with these matters. Committees will need to be informed about all of their responsibilities under the draft Bill.

Commentary on officers matters

The remainder of this submission focuses on matters concerning officers of incorporated societies. The IoD generally supports the matters listed in Part 3 Subpart 4 of the draft Bill entitled *Committee and officers*. Our comments focus on officers' duties and conflict of interests and we comment briefly on other matters.

Officers' duties

Officers' duties are central to good governance. They reflect the fiduciary nature of the obligations of officers and promote accountability. Currently officers' duties are set out in case law and not in the 1908 Act. They are generally not clearly understood by officers or easily accessible. The officers' duties set out in the draft Bill are broadly the same as directors' duties under the Companies Act 1993, with some modifications for societies. The inclusion of the duties may cause concern for some officers of small societies who may perceive their duties have increased. However, the draft Bill essentially codifies what the position would be at common law bringing all the duties into one place

and provides clarity. It will be important to communicate this to societies to help them transition to the new Act.

The draft Bill also provides that officers' duties are owed to societies (and not members as it is often mistakenly believed). We support this and note that this reflects the position at common law.

Conflict of interest disclosure rules

Conflict of interest disclosure rules are an essential part of any governance regime. The main purpose of having such rules is to provide a process to manage actual or potential conflicts and to ensure that decisions are made (and seen to be made) without bias and for the right reasons.

There are no conflict of interest provisions in the 1908 Act, although some societies have rules or processes to deal with conflicts. The draft Bill introduces conflicts of interest disclosure rules, primarily dealing with financial interests (and benefits).

The rules are drafted to capture both direct and indirect financial interests (an officer who is conflicted is referred to as being *interested* in a matter). There are specific exceptions including, for example, where an officer's interest is remote or insignificant. The draft Bill also provides that societies can include in their constitutions other circumstances where an officer may be interested. The main purpose of this provision is to provide for non-financial interests. We support societies having the discretion to deal with such matters as they see fit.

Officers who are *interested* have a duty to disclose the details and nature of the interest to the committee and in an interests register. Making a declaration in an interests register promotes transparency and is good governance.

As a consequence of being *interested* in a matter an officer:

- must not vote or take part in the decision of the committee relating to the matter; and
- must not sign any document relating to the entry into a transaction or the initiation of the matter; but
- may take part in any discussion of the committee relating to the matter and be present at the time of the decision of the committee (unless the committee decides otherwise).

These consequences are more restrictive than those for directors under the Companies Act but less restrictive for example than conflict provisions for those governing Crown Entities, local authorities and District Health Boards. It is generally considered good practice that a conflicted officer should not vote on a conflicted matter (irrespective of whether this is mandated in the relevant legislation) or sign a document relating to the entry of a transaction. However, the non-voting restriction may be a challenge for committees with only 3 members. It is important in the context of incorporated societies that a conflicted officer, who may be key to the functioning of the society and may have valuable information to contribute, is not prohibited from participating in the discussion relating to the relevant matter.

Other officers' matters

Other officers' matters include:

- **Officer definition:** The definition of *officer* is sufficiently wide to cover formal office holders and, for the purposes of certain clauses, those who control or exercise significant influence over the affairs of the society.

- **Qualifications of officers:** The list appears to capture most persons who should not be officers. However, MBIE may wish to consider whether a person subject to an enforceable undertaking not to act as a director should also be disqualified. This would also affect clause 45(1)(c) - when officers cease to hold office.
- **Contact officer:** The contact officer must be a committee member and someone who the Registrar can contact when needed. The contact officer does not have any additional duties and there are no offence provisions specific to the contact officer. Given that people frequently come and go in societies, it is useful to have a liaison between a society and the Registrar.
- **Offences:** We support the offence provisions that have been introduced to supplement the dishonestly provisions in the Crimes Act 1961. These provisions are important in protecting societies and the integrity of the regime.
- **Banning order:** We support the courts' wide powers to ban a person from being an officer or being concerned or taking part in the management of a society in any way. A person can be banned permanently in the most serious of cases.

We do not have any objections to our submission being published. We would welcome the opportunity to discuss this submission.

Yours sincerely

Withheld

Simon Arcus
Chief Executive