

30 June 2016

Commercial, Consumers & Communications Branch
Ministry of Business, Innovation & Employment
PO Box 1473
Wellington

By email: societies@mbie.govt.nz

Exposure Draft: Incorporated Societies Bill

Introduction

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Exposure Draft of the Incorporated Societies Bill (Exposure Draft) released by the Ministry of Business, Innovation & Employment (MBIE) in November 2015.
2. The Law Society supports the need for reform of the present law, and agrees with the general approach taken in the Exposure Draft of the Incorporated Societies Bill. The Law Society notes that lawyers advise incorporated societies in many capacities, as both paid and pro bono advisers, and have experience with the almost infinite variety of societies that enrich and serve our communities.
3. The Law Society considers the Exposure Draft strikes a workable balance between providing clear rules and guidance while still maintaining flexibility to adapt to fit the range of societies in existence. In particular, the Law Society supports the use of standard provisions which can be voluntarily adopted by societies and which act as a safe harbour for compliance.
4. However, the Law Society considers there are some proposals that require amendment, in particular:
 - a. **the process for amendment of the constitution** – the Law Society recommends a change to recognise that some societies may have imposed more stringent voting requirements for constitutional amendments and also an amendment to permit proxy voting;
 - b. **the definition of “committee”** – the Law Society recommends a change in the definition to incorporate the “management” role of the committee as described in clause 38 of the Exposure Draft;
 - c. **grievance and complaint procedures** – the Law Society suggests some minor amendments; and
 - d. **exemptions for small societies** – the Law Society recommends that small societies should be exempt from compliance with clause 71 (information requests) and clauses 83 and 85 (the requirement to prepare annual financial statements and annual returns).

Comments

Model constitution for societies or standard provisions

5. The Law Commission recommended that a model constitution for societies be provided in any new statute. This recommendation was not accepted by MBIE and has not been included in the Exposure

Draft. The Law Society agrees with this decision and the explanation for not creating a model constitution, as set out in the Ministry's Request for Submissions on the Exposure Draft Bill:

Clause 33 – Standard provisions for constitutions (see Annex 1)

50 LCR 51 states that the new Act should enable a model constitution to be made in regulations. LCRs 52-54 describe how to give effect to LCR 51. LCRs 55-56 envisage that the proposed model constitution will contribute to the process of reregistering existing societies under the new Act.

51 Clauses 33 to 35 of the Bill are broadly consistent with the intent of LCRs 51-56. However the following modifications have been made:

- A. They are called "standard provisions for a constitution", not "a model constitution".
- B. The Bill provides for the use of the standard provisions matter-by-matter, rather than as a package.
- C. The standard provisions will be issued by the responsible Minister on the recommendation of the Registrar, not through regulations.

Difference A: "standard provisions", not "model constitution"

52 There are two reasons for using "standard provisions" rather than "model constitution".

53 First, "model constitution" promises more than we think can be delivered. It implies that it is possible to produce a one-size-fits-all best practice constitution that fits well with every society's needs. Our view is that this goal is unachievable because the sector is so diverse. We consider that the best that can be hoped for are basic provisions that address matters which are common to all societies and are satisfactory enough for any society to get by with.

54 Second, it cannot be a complete constitution. The society's purposes, the number of officers and the titles given to each position, and the rules relating to disposal of surplus assets are inevitably specific to the individual society.

6. The Law Society supports the use of "standard provisions" provided these are optional (as currently provided in clause 33) and societies may freely adopt other provisions that comply with clause 24. Clause 34(1) provides societies with a useful safe harbour if they adopt the standard provisions, as any standard provision relating to matters within clause 24(1)(c) – (m) is deemed to comply with clause 24(1).
7. The Law Society notes that "standard provisions" are intended to be supplemented by "practical guidance material on the Registrar's website". This guidance is likely to be necessary, as redrafting a constitution will be a challenge for many societies which are under-resourced. In particular, societies would need to ensure that: (a) if the society adopts a standard provision, it amends any pre-existing provisions in the constitution which conflict with the standard provision; and (b) that once the Act comes into force, nothing in the society's constitution runs contrary to clause 24(1)(c) – (m). This is not a task which all societies will be equipped to do. Umbrella organisations in the not for profit sector could assist by developing model constitutions consistent with clause 24 that could be adopted by each smaller society. Despite these difficulties, re-drafting the constitution to ensure compliance with the Act will be a one-off task which should result in greater clarity for societies regarding governance and management.
8. In summary, this approach strikes a good balance between providing clear rules which can be adopted (with the advantage of the safe harbour) while allowing societies to adopt other provisions which meet the differing needs of the diverse range of societies in New Zealand.

Effect of the constitution

9. Clause 50, which states that "an officer should not act, or agree to the society acting, in a manner that contravenes this Act or the constitution of the society", should also be incorporated within clause 26, so that it is clear (under the one heading) that officers (including committee members) who may or may not be society members must not act in a manner that contravenes the constitution of the society.

Society may amend constitution

10. Clause 27(2)(b) states that an amendment to a constitution must be “approved at a general meeting by a majority vote of members participating and voting.” There are two issues with this provision:
 - a. Some societies have a higher threshold of votes required to alter their constitution than a simple majority (for example, a two-thirds or 75% majority). This clause should take the same approach as the Companies Act and permit a higher majority threshold if stated in the constitution.
 - b. It is often necessary for voting to be carried out by proxy. This is not currently expressly permitted in clause 27. The Law Society recommends that the clause be amended as follows: “approved at a general meeting of the society by a majority vote of those members present in person or by proxy and voting, or such higher percentage as may be specified in the society’s constitution.”

Management of a society

11. The current definition of the “committee” does not refer to the management role of the committee. Clause 5(1) of the Exposure Draft defines “committee” as “the governing body of the society however described”. However, clause 38(1) refers to the “operations and affairs of a society” being “*managed by, or under the direction or supervision of the committee*” (emphasis added). Under clause 38(2), the committee has all the powers necessary “*for managing, and for directing and supervising the management of, the operation and affairs of the society*” (emphasis added). The Law Society recommends including the “management” role in the definition of “committee” to mirror clause 38.
12. In smaller societies the committee usually both governs and manages the society between AGMs. However, in some larger societies (e.g. those operating at a national level), there may be a “council” (comprising representatives from regions or areas) and also a “board” or “committee.” Those two bodies usually share (or are responsible for different) governance and management functions. However, the Law Society considers that the definition of “committee” is flexible enough to comprise a two-tiered committee.

Disputes, grievances and complaints

13. The Law Society is in favour of the Bill providing for the resolution of societal disputes and disciplinary issues. The Law Society recommends some minor changes to the wording of clause 24(1)(j) to reflect the fact that a dispute regarding “misconduct or discipline of members” may not arise as a result of a “complaint” but may be instituted by the society itself. It recommends adding the underlined wording below:
 - (j) procedures for resolving disputes between members (in their capacity as members) and between members and the society, including procedures for investigating and dealing with—
 - (i) the grievances of members relating to their rights and interests as members; and
 - (ii) disciplinary action commenced by the society against a member or complaints concerning the misconduct or discipline of members;
14. It also might be useful, in some circumstances, for parties to engage in mediation as part of the dispute resolution process. Mediation is not included as a step in Schedule 2 to the Exposure Draft. However, Schedule 2 merely sets out minimum requirements. Societies and members are still able to enter into mediation voluntarily if that would be useful in the circumstances.

Smaller community societies

15. The Law Society has received some feedback that some of the proposed reforms would be unduly burdensome on small societies. That concern was also reflected in paragraphs 1.30 –1.31 of the Law Commission’s Report 129:

1.30 A key message we received from consultation was that reforms should not overburden incorporated societies. Well-meaning regulation should be looked at critically. Moreover, it was emphasised to us that one of the key challenges facing the not-for-profit sector in New Zealand is being able to attract people into volunteering their time to run, or be involved in, societies. Imposing too many additional obligations on civic-minded people might risk those people retreating from those organisations.

1.31 We have taken this concern seriously in developing the reforms in this report. We have asked ourselves repeatedly whether a particular reform or recommendation would unnecessarily interfere with what are essentially private organisations, run by people in their private capacities. While, for instance, this report does recommend clarification and setting out of the obligations of committee members and other officers, we have been mindful always of whether our recommendations are imposing an extra burden and whether that extra burden can be justified. In some areas we have decided that such extra burdens could not be justified. Where remedies are necessary we have preferred to rely on civil remedies rather than the criminal law. Where we have recognised obligations, we have tried to emphasise that those obligations should take account of the ability of those charged with fulfilling them and in determining how those obligations might be fulfilled.

16. The Law Society submits that the obligation under clause 71 (to provide information to members) may be too burdensome for smaller societies which are under-resourced and often find it difficult to obtain volunteers for the committee. Increased administrative duties (such as clause 71) are likely to discourage volunteers from participating. This seemingly basic obligation can turn into a substantial one if there are disgruntled members who request information. This can divert attention from the society’s main purpose. Although there is an exception for frivolous and vexatious requests, the need to meet and consider any request for information and to determine if it is frivolous and vexatious would still be a burden on these small societies.
17. The Law Society considers that smaller societies will also find it difficult to comply with the requirement to file annual financial statements (clause 83) and an annual return to the Registrar (clause 85). The requirement to prepare financial statements under the Companies Act only applies to large companies, companies that are public entities, and large overseas companies.¹ Every other company with ten or more shareholders which does not fall within the previous categories under the Companies Act may opt out of the obligation to prepare financial statements.
18. The Law Society recommends that small societies with fewer than a certain number of members (e.g. 40 members) and/or with an income or turnover of less than a particular amount (e.g. \$50,000) per annum might be exempted from preparing annual financial statements and an annual return.
19. The Registrar may need to undertake spot checks to ascertain whether this exemption is being abused. However, this administrative burden will be balanced by the fact that the Registrar would not need to take receipt of the annual returns of each of these small societies.

Other specific drafting issues

20. There are some specific drafting issues relating to a number of clauses in the Exposure Draft of the Bill which are discussed in the **attached** table.

¹ Section 200 of the Companies Act.

If further information or discussion would assist, please do not hesitate to contact the Law Society's Law Reform Manager, Vicky Stanbridge (vicky.stanbridge@lawsociety.org.nz **Withheld** in the first instance.

Yours faithfully

Withheld

Kathryn Beck
President

Encl (1)

| Clause No. | Subject | Issue | Recommended Change |
|--------------------|--|--|---|
| 5 | Definition of “committee” | The current definition of “committee” does not refer to the committee’s role in management (only governance). | Amend the definition to state “a committee means a body of the society which has responsibility for governance and the management of the society, however described”. |
| 15(2), 128 and 142 | Society is Body Corporate | <p>It is not entirely clear if “removal from the register” means the removed society is no longer an incorporated society and no longer a body corporate. This has been an issue with the current Act. The heading in Subpart 1 of Part 5 of the Exposure Draft is “Removal from register”, however, clause 128 does not expressly state the consequences of removal (it merely states how a removal occurs).</p> <p>Restoration under clause 142 results in a society being treated as having continued to exist “as if it had not been removed from the register”. This suggests that the society had (while removed) ceased to exist.</p> | <p>Amend clause 128 as follows:</p> <p>“A society is removed from the register, and is no longer an incorporated society under this Act and no longer a body corporate, when a notice signed by the Registrar stating that the society is removed from the register is registered under this Act.”</p> |
| 24(1)(j) | Constitution – procedures for resolving disputes | The description currently does not make it clear that a procedure involving the “misconduct or discipline of members” may be instituted by the society itself rather than on the receipt of a “complaint”. | <p>Amend clause 24(1)(j) as follows:</p> <p>“procedures for resolving disputes between members (in their capacity as members) and between members and the society, including procedures for investigating and dealing with—</p> <p>(i) the grievances of members relating to their rights and interests as members; and</p> |

| Clause No. | Subject | Issue | Recommended Change |
|------------|-------------------------|---|--|
| | | | (ii) disciplinary action commenced by the society against a member or complaints concerning the misconduct or discipline of members; and ...” |
| 24(3) | Special General Meeting | <p>The clause states “the arrangements and requirements under subsection (1)(l) must include arrangements and requirements for special general meetings under s 58(3)”. However, subsection (1)(l) relates to the alteration of the constitution. The reference should instead be to subsection (1)(k) regarding arrangements for general meetings.</p> <p>In addition, clause 58(3) deals with special general meetings required when more than 50% of the members of the committee are prevented from voting because they are “interested in a matter”. The Law Society notes that there are other circumstances where a special general meeting may be required.</p> | Delete the reference to sub-clause “(1)(l)” and replace with sub-clause “(1)(k)”. Delete the reference to section 58(3). |
| 25 | Bylaws | <p>The term “bylaw” is outdated and increasingly societies refer to rules, regulations or policies. However, the term “bylaw” is used in Clauses 25, 94, 95, 98, and Schedule 3, Part 1.</p> <p>Also, Schedule 3, Part 1 refers to the exclusion of bylaws from the Bylaws Act by stating “(but does not include a bylaw of a society within the meaning of the Incorporated Societies Act 2016).” However, there is no definition of “bylaw” in the Exposure Draft.</p> | The term “bylaw” should be defined to include bylaws, regulations, subsidiary rules and policies, or other such mandatory requirements formally adopted by a general meeting or by the committee of a society. |

| Clause No. | Subject | Issue | Recommended Change |
|------------|--------------------------------|---|---|
| 26 | Effect of the constitution | <p>Clause 50 (which states that “an officer should not act, or agree to the society acting, in a manner that contravenes this Act or the constitution of the society”) should also be incorporated within clause 26, so that it is clear (under the one heading) that officers (including committee members) who may or may not be society members must not act in a manner that contravenes the constitution of the society.</p> | <p>Retain clause 50 as currently drafted and amend clause 26 to include the following wording:</p> <p>“(2) The constitution of a society is binding, in accordance with its terms, as between– (a) the society and each member; and (b) each member.</p> <p>(3) Subsection (2) is subject to the rest of the Act.</p> <p>(4) An officer also has the responsibilities set out in clause 50 in relation to the constitution.”</p> |
| 27(2)(b) | Society may amend constitution | <p>The clause states that amendments to the constitution may be made at a general meeting by a majority vote of members participating and voting. However, some societies have a higher voting threshold required to alter their constitution. For example, two-thirds or 75% majority. This higher percentage should be permissible.</p> <p>The Law Society also recommends that the clause be amended to make it clear that voting by proxy is permissible.</p> | <p>Amend wording as follows:</p> <p>“approved at a general meeting of the society by a majority vote of those members present in person or by proxy and voting, or such higher percentage as may be specified in the society’s constitution.”</p> |
| 27(2)(c) | | <p>The signing of the amended constitution can be done by any 3 members. However, the clause does not specify if the three members need to be members who were present at the meeting where the constitution was amended. The Law Society recommends that this should be a requirement to ensure that the members signing the amendment know what amendments were made at the meeting and that the correct amendments are signed.</p> | <p>Amend sub-clause (2)(c) as follows:</p> <p>“signed by at least 3 members of the society who were present at the general meeting where the amendments were approved”</p> |

| Clause No. | Subject | Issue | Recommended Change |
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| 34 | Standard provisions safeguard | The Law Society supports the use of standard provisions which are deemed to be in compliance with the Act. | No change. |
| 45 | Officer ceasing to hold office | Sub-clauses (2) and (3) set out a process for resignation from office. Some societies have additional requirements, (such as giving a certain period of prior notice). Sub-clause 45(1) refers to the society's constitution for "vacating" office, however, sub-clauses (2) and (3) do not. | Amend sub-clauses (2) and (3) to allow a society to have additional procedures for resignations from office. |
| 71 | Information for members | The Law Society supports this clause except that the Law Society submits that small societies should not be required to comply with this obligation. | Amend clause 71 to provide an exemption for small societies. Add a definition of "small society" based on the number of members or maximum turnover. |

| Clause No. | Subject | Issue | Recommended Change |
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| 81 | Balance date | Sub-clause (2) states the balance date is 31 March or a date the committee adopts. However, most society constitutions specify the balance date. | Amend sub-clause (2) as follows “the balance date of a society (other than a charitable entity) is the close of: (a) The date specified in the constitution; or, (b) If it is not specified in the constitution, then a date specified by the committee; or, (c) If not specified by the committee, then 31 March.” |
| 83/85 | Annual Financial Statements and Annual Return | As noted above, the Law Society suggests that consideration be given to exempting small societies from compliance with this requirement. | Amend to provide an exemption for small societies. Add a definition of “small society” based on the number of members or maximum turnover. |
| 144-145 | Amalgamation | The content of the “proposal” to amalgamate is not defined, and as a minimum the proposed new constitution should be required by statute to be included. | Define “proposal” to include the proposed constitution of the new society and any other prescribed information. |
| 146(3) | Approval of Amalgamation | The voting process does not provide for a higher percentage of voting required in the amalgamating societies’ constitutions. | Amend sub-clause (3)(a) as follows: “by resolution in accordance with section 168”. |
| 152 | Effect of Certificate | This clause states that the amalgamated society takes on “all” the assets and liabilities of the pre-amalgamated societies, but it may be that it is agreed in the proposal that some are not taken into the new entity (for instance, some might be transferred to another entity). This sub-clause should refer to the proposal in terms of those assets and liabilities which are agreed to be taken into the new entity. | Amend clause 152(d) and (e) so that it refers to the property (as per sub-clause (d) and the liabilities (as per sub-clause (e)) as set out in the “proposal”. |

| Clause No. | Subject | Issue | Recommended Change |
|------------|----------------------|--|---|
| 170 | Register | <p>Given the number of incorporated societies that are charitable entities and the similarity in reporting requirements, consideration should be given at some point to having a joint register for all not-for-profit entities registered under this Act, Charities Act, Charitable Trusts Act and possibly other Acts.</p> <p>This would also enable the supporting material and resources for not for profit entities to be located on one website, which would be helpful for all societies.</p> | |
| 172 | Contents of register | It is suggested that the name of the contact officer should be separately listed in the register. | Amend sub-clause (1) by adding “the name and the contact details of the Contact Officer”. |