

Government response to the Law Commission's report
A New Act for Incorporated Societies

Presented to the House of Representatives
28 February 2014

Introduction

1. This Government response has been prepared under Cabinet Office Circular CO (09) 1.

Background

2. The Incorporated Societies Act is an important statute because the sector is very diverse and every New Zealander is affected by incorporated societies either directly or indirectly. It is essential that the governance and accountability legal frameworks under which incorporated societies operate fully meet contemporary societal needs and be future-proofed to the extent possible.
3. As stated by the Commission in the foreword to its report, the Incorporated Societies Act 1908 has been a success story. However, the Act is now out of date and deficient in a number of important respects. As the terms of reference for this review note, lawyers are often asked for advice on whether to set an incorporated society up, how to set one up, how to register it and what to include in the documents. The incompleteness of the 1908 Act means that difficult questions frequently arise around the governance and administration of such organisations and the resolution of their internal disputes. For these reasons, the terms of reference asked the Law Commission to take a first principles look at the Act.

The Law Commission report

4. The report recommends a new Incorporated Societies Act to replace the 1908 Act. Although the Commission has recommended a new Act, the report emphasises that the fundamentals of incorporated societies should remain unchanged, in particular:
 - societies are organisations run by their own members
 - societies should not distribute profits or financial benefits to members
 - societies are essentially private, and should be self-governing and remain free from unnecessary state interference.
5. In identifying the key areas for reform, the report notes that the 1908 Act lacks guidance about the obligations of those running societies and about how disputes within societies should be dealt with. The report also notes that the 1908 Act is silent on the duties and responsibilities of committee members and others taking on responsibilities in incorporated societies. There are no express procedures for managing conflicts of interest, and the Act's total silence on what to do about disputes with or between members means societies are too often disrupted by disputes that they have no effective method for resolving.
6. These gaps and other issues are comprehensively addressed in the report's 102 recommendations. The key sets of recommendations are:
 - to replace the 1908 Act with a new Act
 - to set out a set of basic duties for committee members. The proposed officers' duties are similar to company directors' duties, modified where necessary
 - to provide a procedure for dealing with financial conflicts of interest
 - to require each society to include disputes procedures in their constitution
 - to provide for a model constitution which a society may adopt instead of drafting its own constitution
 - to provide a transition period of no less than four years.

Overview of the Government's response

7. The Government:
 - a. agrees that the fundamentals of incorporated societies should remain unchanged
 - b. agrees with the key recommendations as summarised above
 - c. is satisfied that the package of recommendations provides a sound basis for a new Act
 - d. considers that Appendix A of the Commission's report provides a sound basis for regulations that would be made under the new Act prescribing the matters that would be mandatory for the rules of every society's constitution to address.
8. The Government has decided that exposure drafts (ED's) of the proposed Bill and model constitution will be released for public comment before the Bill is introduced into the House. Issuing ED's will have the following benefits:
 - It will provide stakeholders with the opportunity to better understand the practical implications of the Bill and model constitution taken as a whole.
 - It will provide the opportunity for minor issues to be resolved before the Bill is introduced into Parliament. This will provide the opportunity to free up select committee time to focus on the major issues.
 - It should lead to higher quality legislation.

The Government's response on specific issues

9. The Government's responses on the recommendations are discussed below in the following ways:
 - In some cases the response states whether or not the Government agrees with a recommendation. This approach is used mainly in relation to recommendations that are expressed in broad policy terms.
 - In all other cases but one, the response states whether the Government broadly agrees with a recommendation or agrees that the provisions in the ED will be modelled on the Law Commission's proposals. This approach is used mainly in relation to recommendations that include detailed descriptions of the proposed law changes. The purpose of the "broad agreement" approach is to recognise that changes may need to be made to some of the detail as issues become evident during the drafting process. Broad agreement could either mean that the provisions will be drafted exactly in accordance with the Commission's recommendation or that there may be some modifications.
 - For one recommendation (recommendation 3 relating to agricultural and pastoral societies), the Government has decided to wait until after the ED process before making a decision.

Chapter 1: Origins justifications and principles (Recommendation 1)

10. The Government agrees the 1908 Act should be replaced by a new Act.

Chapter 2: The non-profit sector: legal structures and status (Recommendations 2-3)

11. The Government agrees that charitable societies should no longer be able to incorporate under the Charitable Trusts Act 1957 and that those currently incorporated under that Act should transition to become societies under the new Act (recommendation 2). The Government will ensure that any changes in the new Incorporated Societies Act are aligned with any changes that may occur as a result of the Law Commission's work on

stage 2 of its review of trusts, intended to deal with charitable trusts and the Charitable Trusts Act 1957.

12. Recommendation 3 proposes a simple mechanism for agricultural and pastoral societies to voluntarily transfer registration from the Agricultural and Pastoral Societies Act 1908 to the new Incorporated Societies Act. The Government has decided to reserve judgment on this matter until after it has had the opportunity to consider feedback on the ED. A decision will then be made about whether to implement recommendation 3, transfer the registration of A&P Act entities to the new IS Act, or make changes that will align the A&P Act with the new IS Act.

Chapter 3: What kinds of society can be registered under the Act (Recommendation 4)

13. The Government agrees that the new Act should prohibit societies operating for the monetary gain of members. The provisions in the ED will be drafted broadly in accordance with recommendation 4.

Chapter 4: Establishment and registration of societies (Recommendations 5-12)

14. The Government agrees or broadly agrees with all the recommendations in chapter 4.

Specifically:

- a. the ED will provide for reducing the minimum number of members of a society from 15 to 10 (recommendation 5) and include provisions which will require societies to continue to at least have the minimum number (recommendation 6)
- b. there should be rules on society names modelled on s 22 of the Companies Act 1993 (recommendation 7)
- c. the ED will include changes in relation to branches as outlined in recommendations 8-12.

Chapter 5: The legal dealings of an incorporated society (Recommendations 13-18)

15. The Government agrees or broadly agrees with all of the recommendations in chapter 5.

The ED will include:

- a. Limitation of liability provisions based on recommendations 13-14, including provisions relating to indemnification modelled on s 97 of the Companies Act
- b. Provisions stating that a society has full capacity to carry on or undertake any business or activity, or do any act or enter any transaction, modelled on s 16 of the Companies Act (recommendation 15)
- c. *Ultra vires*-related provisions as outlined in recommendations 16-18.

Chapter 6: Committees, officers, duties and arrangements for running societies (Recommendations 19-45)

16. The Government agrees or broadly agrees that:

- a. the ED will provide that every society must have a committee of at least three members which has responsibility for the affairs of the society (recommendation 19)
- b. the ED will include committee composition, role and function provisions modelled on recommendation 20
- c. officers' duties shall be stated in the new Act in general terms (recommendation 27)
- d. the ED will include officers' duties provisions modelled on recommendations 28-29

- e. the ED will include other officers' duties-related provisions modelled on recommendations 30-33
 - f. the ED will include conflict of interest provisions modelled on recommendations 34-42
 - g. the ED will include financial reporting provisions modelled on recommendations 43-44
 - h. there will be a power for an annual return form to be prescribed by regulations (recommendation 45).
17. In relation to recommendations 21-26, the Government agrees that:
- a. every society should have a statutory officer at all times (recommendation 21) and that the officer should be a member of the society's committee (recommendation 22)
 - b. there should be statutory officer qualification and disqualification provisions modelled on recommendations 23 to 25
 - c. there should be a provision relating to not invalidating the statutory officer's actions due to appointment defects and related reasons modelled on recommendation 26
18. The provisions in the ED will make it clear that the statutory officer role is limited to being a contact point, particularly for the Registrar in relation to compliance matters. It will not mean that the statutory officer will be required to carry out all the society's statutory compliance obligations or have any additional exposure to liability. Consistent with the Companies Act, every person charged with governance will be accountable for discharging all governance responsibilities.

Chapter 7: Constitutions (Recommendations 46-65)

19. The Government agrees or agrees in principle with 18 of the 20 recommendations in chapter 7. Further advice will be obtained before decisions are made on the other two recommendations. The ED will include constitution-related provisions broadly in accordance with recommendations 46-57, which relate to:
- a. a model constitution
 - b. mandatory requirements for every constitution (also see Appendix A of the Commission's report)
 - c. optional rules for constitutions
 - d. amending a constitution
 - e. transitional issues relating to changing constitutions.
20. More specifically, the Government agrees with recommendation 51 that the new Act should enable a model constitution to be made in regulations. A decision will be made at a later date whether the model constitution will be included in regulations or appear on the Registrar's website.
21. The Government agrees that:
- a. the new Act should require every society to have a registered office and maintain a register of members (recommendations 58-61)
 - b. the new Act should not require every society to have a common seal.
22. The ED will include provisions relating to general meetings broadly consistent with recommendations 63 and 65.
23. Advice will be sought before deciding whether there is a need to have express provisions:
- a. permitting the use of a common seal (recommendation 62)

- b. permitting the use of modern technology for the purposes of conducting general meetings (recommendation 64).

Chapter 8: Complaints and grievances (Recommendations 66-75)

24. The Government agrees or agrees in principle that:

- a. the new Act should require all societies to include procedures in their constitutions for dealing with internal disputes (recommendation 66)
- b. the new Act should provide societies with the flexibility to have disputes procedures that meet their needs, subject to a requirement that those procedures comply with the rules of natural justice (recommendation 67)
- c. the ED will include other disputes-related provisions broadly consistent with recommendations 69-72 and 74-75

25. Advice will be sought before deciding whether it is necessary to include an express provision to permit societies to include appeal rights in their dispute procedures (recommendation 73).

Chapter 9: Civil enforcement (Recommendations 76-85)

26. The Government agrees or broadly agrees that:

- a. the new Act should provide for a society, member or former member to apply to a court for orders to enforce the constitution of a society (recommendation 76)
- b. the new Act should provide for a society to apply for court orders for redress from breaches of officers' duties (recommendation 80)
- c. the Government agrees that the new Act should provide for a society to apply for court orders to restore any money wrongly paid to a member (recommendation 85)
- d. the ED will include provisions relating to the private civil enforcement of statutory duties that are broadly consistent with recommendations 81, 83 and 85
- e. the ED will include a remedy for oppressive conduct that is broadly consistent with recommendation 84.

27. The Government agrees that the Registrar of Incorporated Societies should have last-resort civil enforcement powers to enforce a society's constitution (recommendations 77-79) and in relation to serious breaches of officers' duties (recommendation 82). The Government will obtain further advice as to the best way of framing these provisions.

Chapter 10: Criminal sanctions and the powers of the Registrar (Recommendations 86-89)

28. The Government:

- a. has decided that the ED will include offence provisions that are broadly consistent with the proposals in recommendation 86. The Government will obtain further advice before deciding whether the ED will include an offence for a person dishonestly using their position to obtain an advantage or cause loss. These matters may be fully covered by existing offence provisions in Part 10 of the Crimes Act 1961 and the Secret Commissions Act 1910.
- b. agrees the new Act should include powers for the court to impose governance and officer banning orders on persons convicted of offences under the new Act (recommendation 87). Consideration will also be given to broadening the disqualification powers to recognise banning decisions made under other Acts (e.g. the Companies Act) and under similar legislation in other countries.

- c. has decided that the ED will include infringement offence provisions covering administrative obligations broadly consistent with recommendation 88.
29. The Government agrees that certain powers contained in the Corporations (Investigation and Management) Act 1989 should apply to incorporated societies (recommendation 89). Paragraph 10.74 of the Commission's report states that the relevant provisions should be repeated in the new Incorporated Societies Act. The Government will obtain further advice before deciding whether to give effect to the recommendation as proposed by the Commission or by some other means.

Chapter 11: Terminations, restructures and rescues (Recommendations 90-102)

30. The Government agrees with all the recommendations in chapter 11. Specifically:
- a. the Government agrees that new Act should include a new statutory power for the Registrar to remove a society from the registrar on request, consistent with s 318(1)(d) and (2) of the Companies Act (recommendation 90)
 - b. the Government agrees that the new Act should replace the existing provisions for revocation of dissolution with procedures for restoration to the register modelled on ss 328-330 of the Companies Act (recommendations 91-92)
 - c. the ED will include other provisions relating to dissolutions broadly consistent with recommendations 93-95
 - d. the Government agrees that the new Act will include provisions to facilitate amalgamations and mergers of societies (recommendation 96)
 - e. the ED will include provisions on mergers and amalgamations broadly consistent with the features listed within recommendation 96
 - f. the Government agrees that the new Act should provide for societies to be placed in voluntary administration (recommendation 97). Advice will be sought before decisions are made about whether this should be given effect to by way of reference to Part 15A of the Companies Act or some other means.
 - g. the Government agrees with recommendation 98 listing who will have the power to place a society into administration.
 - h. the ED will include provisions related to distributions broadly consistent with recommendations 99-101.
 - i. the ED will retain the substance of the provisions of division of surplus assets on winding up in s 27(3)-(7) of the 1908 Act (recommendation 102).

Appendix A: Rules that must be included in constitutions

31. The Government has decided that the draft model constitution will be broadly consistent with the rules that the Commission has recommended should be mandatory for every constitution as set out in Appendix A of the Commission's report.

Links to the Charities Act

32. Some issues are likely to arise during the drafting process relating to links between the new Act and the Charities Act 2005. For example it will be necessary to consider:
- a. including provisions for the Registrar of Incorporated Societies and the Registrar of the Charities Register to provide each other with certain information, such as decisions to deregister an entity.
 - b. whether differences between the Commission's proposed definition of officer in recommendation 30 and the definition in section 4 of the Charities Act are an issue.

Sector education

33. The proposed reforms are significant because they will clarify and modernise the law, fill gaps in the law, and change some legal rights, duties and obligations. It is clear that the reforms can only be successfully implemented if the not-for-profit sector has a good understanding of them. The Government has concluded that sector education will be an integral part of the implementation programme. For example, seminars will be held while the draft Bill and Regulations are being exposed for public comment. Practical guidance material will be prepared before the new Act comes into force.
34. The relevant government agencies will work with relevant not-for-profit sector umbrella organisations to develop a sector education package.

Conclusions

35. The Government welcomes the Law Commission's report *A New Act for Incorporated Societies* tabled in the House of Representatives on 21 August 2013. The Government has concluded that there is a need to reform incorporated societies legislation in accordance with all the Commission's key recommendations and largely in accordance with the detailed recommendations.
36. The next steps will be to draft a Bill and model constitution in accordance with this response, and expose them for comments. The Government will subsequently introduce a Bill into Parliament.
37. The Government is also mindful of the need to minimise compliance costs. Therefore, it has authorised the Minister of Commerce to approve any appropriate changes consistent with the Government's compliance cost goals.