

Auckland District Law Society's Submissions on the Incorporated Societies Bill ("Bill")

Submissions by ADLS

The ADLS Property Law Committee ("the Committee") welcomes the opportunity to make these submissions on the Incorporated Societies Bill ("Bill").

Introduction

1. Due to the length of time since the enactment of The Incorporated Societies Act 1908 ("Act") and the Incorporated Societies Regulations 1979 ("Regulations") there is strong support for the purpose of the Bill to put in place a "modern framework of basic legal, governance, and accountability obligations for incorporated societies and those who run them" particularly after the Law Commissions recommendations some eight years ago. Unfortunately priority was not been given to the Exposure Draft of the Bill in 2016, so it is good to see action being taken now.

2. The Auckland District Law Society (ADLS) is a representative organisation for all New Zealand lawyers is supportive of the Bill which will simplify and clarify matters for the various community-based organisations which supply so much to the sporting, cultural, environmental, spiritual and political fabric of New Zealand. Many of our members are involved either as officers of societies as part of their pro-bono contributions or providing advice.

3. We note the scale and size of Societies ranges from a handful of volunteers with no real governance experience to big complex and professionally run organisations such as the Automobile Association and Southern Cross. There needs to be a balance between making these organisations simple and easy to run as well as providing governance guidance and making provision for dealing with disputes.

4. It is important that the timing of implementation gives smaller community run organisations the time to take the steps to comply with implementation proposals, and reregister which is currently 25 December 2025, which is currently a good amount of time, but will still given past observations of compliance in similar sectors will require education, support and focus to meet that date.

Incorporation of a Society

5. Clause 8 we support the reduction of number of members from 15 to 10, as currently some societies have some "dummy" members to meet the numbers requirements.

Capacity

6. We support that in clause 19 the protection for people dealing with Societies being able to assume that their decisions are compliant, unless due to a special position they have knowledge otherwise, and that again under clause 20 a Society cannot try to undermine a contractual arrangement due to non-compliance unless the third party knew or should have known of the issue.

Financial Gain

7. We support the specific prohibition of financial gain by members under Subpart 2. It is important that Societies are administered for the benefit of Members and for the purposes contained in their objects, rather than for individual members' finance gain.

8. In terms of officers' liability if the failure took place with the officer's authority, permission or consent does there need to be more guidance as to what constitutes authority, permission or consent? Does the officer have to take a positive step in this to provide authority or permission, or is failing to raise concerns or taking steps to try to stop tantamount to permission or consent? What if there is a resolution at a general meeting authorising the matter – how then is the liability of officers assessed? Clause 24 is useful in clarifying when a Society does not have a financial gain purpose, however, does there need to be more clarity over entities which may be associated with a member eg if a member has a company, and procures the Society to procure services from the Company.

Constitution

9. We support the requirement for a constitution and the minimum content to be included in the Constitution under clause 26. It is also helpful to require the nomination of 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.

10. Setting out the manner for amendment of the Constitution under clause 30 is also helpful, as well as the powers of the Court to amend under clause 35.

11. We encourage the proposed development of constitution building tools for organisations by MBIE, as having model one size fits all constitutions will be difficult.

Disputes

12. Clause 38 refers to the constitution procedures for disputes as set out in clause 26(1)(j) with a requirement that these must be consistent with the rules of natural justice as defined in the Bill. These must be fair, efficient and effective procedures to deal with internal disputes, including complaints about the misconduct or discipline of members, and grievances brought by members about rights or interests as members. The constitution may also provide for arbitration. We do query whether smaller organisations without governance training and experience will be able to administer natural justice effectively and this might be better delivered by a specialist Tribunal.

Committee and Officers

13. Clause 40 requires every society to have a committee comprising of 3 or more officers who under clause 31 manage, or direct or supervise the society. Clause 42 sets out how a person may be disqualified from being an officer such as being an undischarged bankrupt, or being prohibited from being a company director, with the Registrar being able to waive disqualifying factors under clause 43.

14. Officers are defined as being members of the committee or occupying a position in the society that allows them to exercise significant influence over the management or administration of the Society eg CEO or Treasurer, and any class declared by any regulations.

15. These officers have various officers' duties which are now stipulated and are central to good governance. These are essentially the codification what are already common law obligations so should not impose additional liability but actually clarify existing obligations.

- Act in good faith and in the best interest of the Society – clause 49
- Exercise power for a proper purpose – clause 50
- Comply with the Bill and the Society's constitution – Clause 51
- Have a Duty of care – clause 52
- Not to act in a way that would create substantial risk of serious loss to creditors – clause 53
- Not to agree to obligations unless they believe the Society can perform them – clause 54

16. Clause 56 sets out that duties are owed to the Society rather than to members personally which is correct.

Conflicts of Interest

17. The Act was silent on conflicts of interest and similar duties are now imposed on society officers to those set out in the Companies Act with the requirements to disclose an interest to the committee and enter them in a conflicts register under clause 58 and the consequences under clause 59 are that a conflicted person cannot vote or sign the related document. They may however take part in the decision and be present at the time of the decision (unless the committee decides otherwise). If more than 50% of the Committee are interested to decision needs to be determined at a special general meeting. An interests register is to be kept and must be available for inspection under clause 67. We support their inclusion as they are essential to any governance regime and enable organisations to manage actual or potential conflicts and provide transparency in decision making.

18. Failure to disclose an interest can lead to the avoidance of transactions, unless the society has received fair value under clause 62

Consent to be a Member

19. Many Incorporated Societies deemed membership through having clubs as its members and deeming those club members to be members of those societies and there are many societies which do not obtain the consent of individuals, they consider to be members and to which they may provide services. Clause 70 requires members to consent to become a member. However, for common property owning Society subdivisions (as referred to below at 34), members are compelled to be members by encumbrances, rather than becoming members by choice.

20. Members have no right to property, and there is no liability by members other than any unpaid membership fee or other liability under the constitution which we support.

21. Members may request information under clause 74. There are grounds for refusing requests under clause 75. A Court can order the provision of information under clause 77.

Meetings

22. It is good to see that the provision for audio link, audio-visual link or other electronic communication has now been provided (especially useful during covid times), although not all members may have access to the necessary technology eg some elderly without the use of technology. We also note there is no governance as to how to ensure proper voting at electronic

meetings, and whether voters are actual members voting remotely. Guidance could be provided for in the constitution building tool. It can be quite complex administering voting particularly in blended meetings, and there is the potential for vote stacking and so on.

One Size Fits All Approach and Onerous Accounting and Reporting Requirements

23. We query whether the predominantly one size fits all approach is appropriate, as smaller societies have limited resources and skills. For smaller Societies, less might be more appropriate to have suit smaller societies. We query whether the expertise to hold adequate inhouse dispute resolution procedures will be able to be implemented adequately and whether it might be more appropriate to give them access to another existing disputes resolution body, such as the Disputes Tribunal.

24. Increased financial reporting obligations will create a burden on smaller organisations, often with busy members with limited time to contribute. The Bill imposes on incorporated societies virtually identical financial reporting burdens on incorporated societies as apply to registered charities, even though these may be virtually private membership associations with virtually no tax concessions. We support clause 97 giving minimum requirements for financial statements for small societies and only requiring audited accounts for societies with assets of \$60 million or more and revenues of \$30 million or more per annum. These sections are quite opaque for organisations to ascertain their liability with a lot of references to other statues rather than clearly stating the different obligations, and the different size and turnover impacts. The blanket accounting standards are too onerous on all other than the very smallest organisations.

25. Having a contact person (up to 3) under clause 105 is useful.

Enforcement

26. The Bill's provision that a society, member or a former member may apply to a court for orders to enforce the constitution or in relation to officers' duties, as well as the Registrar to apply to the court for orders to enforce the constitution if its in the society's interest and public interest is clarifying. We note however for the Registrar to be able to take these steps, they will need to be adequately resourced, and currently the Registrar would not have the resources to take action in most cases.

27. Granting the Registrar the power to remove the society from the register if 1 or more of its officers have failed in a persistent or serious way to comply with duties goes too far – the officers should be removed or banned rather than the Society face being de-registered because of an action of an officer.

Offences

28. The offences section clearly sets out actions which are prohibited and consequences of those actions which should act as a deterrent to malfeasance, but the Registrar will need to be resourced to prosecute these matters.

Specialist Tribunal

29. We would support the establishment of a specialist tribunal to hear disputes and as a first port of call for appealing decisions of the Registrar (although we do support being able to currently appeal to the District Court rather than the High Court under s240 an improvement). Access to justice is important, and a Tribunal would allow oral hearings. This could before charities as well as societies and could have concurrent jurisdiction with the High Court.

Sharing Information on Registered Charities and Harmonisation

30. Clause 242 does not go far enough to allow shared information with incorporated societies that are charities to enable a one-stop shop when dealing with regulatory accounts filing etc. There is a double up of filing constitutions and accounts with both entities. There should be a joint format for submission and harmonisation of filing deadlines under the two regimes – filing at one should constitute filing at both.

31. It also seems incongruous that the officer disqualifying characteristics are tougher for Societies than the are for Charities. These should be the same.

General Matters

32. Clause 11 requiring a registrar to refuse use of a name if it is similar to a company name should be softened to enable it to be allowed if the company consents.

33. It would be useful to reserve a proposed name, just as companies can under s22 of the Companies Act 1993.

Incorporated Societies as a mechanism of Common Ownership of Property

34. The Bill has been developed for volunteer member groups, however this is a particular type of society which needs some particular consideration in terms of its communal property impacts. Over recent years we have seen many developers use Incorporated Societies as a mechanism of land control for larger areas of land eg Hobsonville Point, Gulf Harbour, Lighter Quay with owners of land within areas compelled to become members to enable control of larger areas of land. Then there are further subdivisions within these larger tracts of land, fee simple, leasehold, and unit title, and sometimes smaller societies. Also in general suburban areas developers are seeking for terrace house developments to subdivide these as fee simple developments, with or without party wall easements, with the incorporate society owning areas such as access lots, recreation areas, water retention tanks, rather than choosing to develop them as unit title developments. Some are developed in stages with hundreds and thousands of members. As private incorporated societies there is not much visibility. An encumbrance is registered on all titles requiring landowners to be members of the incorporated society.

35. For some developments of large areas of land this is a mechanism of having some control over the large tract of land. Smaller terraced house societies seem to be driven partly by Councils pushing back against ownership of roading water and wastewater systems vesting in Council because of the resultant ongoing financial responsibility to maintain as well as the marketing benefit of the properties being promoted as fee simple with a perceived greater value and savings of not having to pay body corporate levies. While incorporated society levies will still need to be paid they are often cheaper as there are no requirements for long term maintenance plans etc, as incorporated societies don't have the same governance and compliance requirements. There does not seem much concern or oversight of some issues of public policy concern, which are not addressed in the legislation.

36. The Developer will often seek to entrench their position in the society and continue to control it after sell down¹, putting restrictions on what can be done without their agreement, such as requiring a position on a committee, whether some rules may be changed without their agreement, requiring the developer to be part of a committee quorum, exempting unsold land from levies (meaning the early purchasers of land in the complex may carry an unfair portion of Society costs), entry into agreements which may financially benefit the developer or its associates, or may have been sold for gain, and then the Society is delivered the legacy arrangement with it already in place.

¹ *Common Property Ownership and Incorporated Societies* Joanna Pidgeon, ADLS Property Law Conference, 20 February 2020

37. On 27 January 2021 the Insurance Council issued a press release to caution home buyers to be wary of insurance pitfalls for multi-unit buildings to check that they can adequately insure their property as if a unit is attached to other units and does not have a body corporate structure in place, in the perceived interests of affordability many insurers may not provide insurance because of complexities that can arise at claim time if not all units are insured or if they have different levels of cover from different insurers, or if there are gaps in the cover of shared spaces, common property or common services. This issue was highlighted during the Canterbury earthquakes with the complexity of dealing with various insurers. There is no such requirement for incorporated societies to ensure that owners of land within incorporated societies have joint or even the same insurer to ensure that claims can be handled simply and efficiently. While some lawyers when setting up the structure may have the foresight to require this in the constitution and rules of the society

38. The Unit Titles Act 2010 (“UTA”) has various protections for owners (the equivalent of members) from possible abuses such as s139 setting out the original owner’s obligations in relation to service contracts and s140 Compensation for, or termination of, service contract if that contract is harsh or unconscionable. Minority owners have the right to apply for relief, under s210 where resolutions may be unjust or inequitable for the minority by an application to the Tenancy Tribunal if within that jurisdiction. Prejudiced Members may make an application to a Court to challenge decisions and actions under clause 133 of the Bill, however this is more costly than from accessing a Tribunal. Unit Title owners have access to the Tenancy Tribunal for low-cost relief, as well as the courts is a huge benefit.

39. Unlike for bodies corporate there is no provision for disclosure for purchasers buying into incorporated society run developments to find out about possible necessary repairs, disputes or litigation. There is no requirement for a long-term maintenance plan. If there is a need for complex wide repair they do not have the mechanism of a scheme under s74 of the UTA to assist with carrying out repairs across the development. Each unit will have an obligation to carry out their own repair, which might result in some only doing a patch repair, rather than a proper repair, which could stigmatise other properly repaired units in a complex. Could poorly run incorporated societies administering communal property assets be a new ticking time bomb?

40. Either these issues need to be addressed in the Bill, or in the proposed amendments to the UTA.

Implementation of the Bill

41. No doubt many of our members will be involved in assisting Societies with ensuring they are compliant should they decide to re-register, but it cannot be underestimated even with the long lead in and if there are education programs and checklists that many societies will assume that they are compliant. Many societies will be seeking pro bono assistance of lawyers to assist with compliance, or only be able to pay moderate fees. Not many lawyers are specialists in this area.

42. Even with the long lead in we would suggest a back-stop provision allowing societies within say 6 months of the drop-dead date to allow the Registrar the discretion to re-register societies as there may well not be the capacity to respond to last minute requests for assistance.

Regulations

42. There is an extensive list of matters to be dealt with under regulations, and it is important that vigilance is kept ensuring that there are not unnecessary increases in compliance costs and obligations through these. Essentially societies should be largely autonomous, accountable to their members with a good governance framework now set up. We anticipate that the proposed regulations will be circulated for consultation prior to adoption.

Conclusion

This Bill will provide clarity and good governance to an area where there has been a lack of attention to the legislation for well over a century. There is general consensus in the industry on most of the governance issues, but a concern over some of the compliance costs for small societies with little resource, particularly in relation to financial reporting and requiring them to have internal dispute procedures which comply with natural justice. We would be better served to have a specialist Tribunal. We would also like to see some streamlining of compliance between the charities and the societies sector.

Thank you for the opportunity to make our submissions. **ADLS would like the opportunity to make oral submissions to the Select Committee.** The ADLS Property Law Committee acknowledges the contributions to this submission by its following committee member:

- Joanna Pidgeon

If you have any questions or queries please contact the Professional Services Manager, Melissa Fini, by email: melissa.fini@adls.org.nz or DDI: 09 306 5744.

Yours faithfully,



Committee Secretary
ADLS Property Law Committee

