

28 July 2023

Corporate Governance and Intellectual Property Policy
Building, Resources and Markets
Ministry of Business, Innovation & Employment
Wellington

By email: societies@mbie.govt.nz

Re: Incorporated Societies Act 2022: Proposed regulations

1 Introduction

- 1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on MBIE’s exposure draft of the proposed Incorporated Societies Regulations 2023 (the **Draft Regulations**), which are to be finalised and issued under the Incorporated Societies Act 2022 (the **Act**) ahead of the scheduled October 2023 commencement of incorporations and re-registrations.
- 1.2 This submission has been prepared with the assistance of the Law Society’s Commercial and Business Law Committee.
- 1.3 The Law Society’s comments on the Draft Regulations are principally set out in the **attached** table. In addition to this, our covering submission addresses:
- (a) Issues that are relevant to multiple clauses;
 - (b) The proposed roll-over of current fees; and
 - (c) Issues with the Act that cannot be addressed through the Draft Regulations.

2 Issues that are relevant to multiple clauses

Physical address used by officer:¹

- 2.1 A number of the proposed regulations refer to the provision of a physical address “used by” an officer. It would be helpful for the regulations to clarify what this is intended to mean. For example, is this limited to the officer’s residential address, or could it be the society’s address, a work address or any other address used in any way by the officer.

Acceptable submission/filing methods:²

- 2.2 A number of the proposed regulations provide for online submission to be the default/mandatory method for various applications, notices, returns and other requirements, with use of any alternative submission/filing method (e.g. delivery, post,

¹ Clauses 5(d), 18(f), 24(b), 25(b) and (g), 41(b)(i) and 45(e)(i).

² Clauses 6, 10, 12, 17, 19, 20, 21, 29, 34, 38, 43, 46, 50 and 52.

email) being at the discretion of the Registrar if they consider it would be unreasonable to refuse to accept the submission/filing. In the Law Society's view, it would be more appropriate if the regulations provided that the Registrar *must* accept the use of an alternative submission/filing method if refusal to accept the submission/filing would be unreasonable.

3 Roll-over of current fees

- 3.1 The Law Society agrees with the proposed roll-over of current fees for incorporation of a society and restoration of a society pending completion of the system-wide funding review in relation to what fees/levies should be payable by all registered entities.

4 Issues with the Act that cannot be addressed through the Draft Regulations

- 4.1 The Law Society also notes the following issues in respect of the Act that are highlighted by the Draft Regulations, but which cannot be addressed through the Draft Regulations themselves.

"Officer" definition:

- 4.2 The "officer" definition in section 5 of the Act should be reviewed as soon as possible, for two reasons:
- (a) The breadth of the definition, and in particular the reference to any person occupying a position in a society that allows them to exercise significant influence over the society's management or administration, potentially covers a very wide range of non-governance, non-management positions, and its application is problematic (e.g., when identifying "proposed officers" under various clauses in the Draft Regulations). However, it does not appear to be possible to ameliorate this issue through the regulations themselves (e.g., an exclusion for 'employees' generally or for 'employees in non-management positions' would appear to be too broad to be permitted under section 5).
 - (b) The Law Society understands the definition of "officer" used in the Act was based on section 5 of the Charities Act 2005 (the **Charities Act**), but the latter has now been changed (with effect from October 2023) under the Charities Amendment Act 2023. The new Charities Act definition refers to any person occupying a position in an entity who is able to exercise significant influence over substantial decisions of the entity and a person who has powers conferred on them to make decisions that would otherwise fall on the entity's governing body.

Committee composition:

- 4.3 Section 45(3) of the Act requires a majority of a society's committee to be members, or representatives of body corporate members, unless the society is exempted from the requirement by regulation. In relation to that requirement:
- (a) The Law Society welcomes and supports the proposed transitional regulation exempting societies from this requirement for 5 years (clause 60) pending decisions being made on any permanent regulatory exemption(s).

- (b) The Law Society understands there are many societies (especially larger societies) that require or allow their committees to include a majority who are not members or representatives of body corporate members (e.g., because committee is intended to be predominantly skills-based) and are potentially affected by section 45(3). Ideally, there would be certainty regarding any permanent regulatory exemption(s) from section 45(3) within the next 6 to 12 months, especially for existing societies that are reviewing or will soon start to review their constitutions in preparation for compliance and re-registration under the Act.
- (c) The Law Society notes that, as an alternative to any permanent regulatory exemption(s), the requirement under section 45(3) could be revisited. As acknowledged under section 3 of the Act, societies are private bodies that should be self-governing in accordance with their constitutions, any bylaws and their own tikanga, kawa, culture and practice. The prescriptive requirement under section 45(3) relating to the composition of a society's committee would appear to cut across the acknowledged private and self-governing nature of societies.

AGM attendance:

- 4.4 Section 84 of the Act requires (at least implicitly) that all of a society's members must have the right to attend the society's AGMs – unless the society is a union or a society of a kind prescribed by regulation, in which case the society's constitution may provide that only delegates or other representatives of members (rather than all members) have the right to attend AGMs. In relation to section 84:
 - (a) The Law Society notes the proposed prescription of societies with 1000 or more members (clause 14) and welcomes and supports the proposed transitional regulation exempting existing societies from compliance with section 84 for 5 years (clause 61). The Law Society expects that there will be a number of societies with less than 1000 members that would otherwise be affected by section 84.
 - (b) The Law Society also notes that the section 84(4) reference to 'delegates or other representatives of members' has the potential to create confusion in relation to that section applying to societies that have corporate/entity/group members whose delegates/representatives can attend AGMs. Commentary or guidance on the Act and regulations should make it clear that section 84(4) and the proposed regulations (clauses 14 and 61) are not necessary or applicable in the case of societies with corporate/entity/group members where all such members have the right to attend AGMs via their respective delegates or representatives.

5 Conclusion

- 5.1 We would be happy to discuss this feedback further, if that would be helpful. Please feel free to contact me via the Law Society's Law Reform & Advocacy Advisor, Dan Moore (dan.moore@lawsociety.org.nz).

Nāku noa, nā

A handwritten signature in purple ink, appearing to read 'CSilk'.

Caroline Silk
Vice-President

Incorporated Societies Act 2022: Exposure Draft of Incorporated Societies Regulations 2023

DRAFT REGULATIONS CLAUSE REFERENCE	INCORPORATED SOCIETIES ACT 2022 SECTION REFERENCE	SUBJECT MATTER	COMMENTS / SUGGESTED CHANGES
Clause 5	Section 9	Application for incorporation: prescribed information	<p>Clause 5(e) and (f) should arguably allow for <i>a named officer or an authorised agent</i> acting on behalf of the applicants for incorporation to provide the required confirmations regarding the number of members and the society's constitution.</p> <p>The application could also request, if applicable, the society's registration number under the Charities Act (although in the ordinary course a society incorporating, rather than re-registering, under the Act would attain Charities Act registration after incorporation).</p>
Clause 8	Section 5(1), definition of "officer"	Exclusion of liquidators, receivers and statutory managers from being officers of a society	Refer to the Law Society's earlier comments regarding the problematic breadth of the "officer" definition in section 5 of the Act and recent amendment of the Charities Act definition on which this was based.
Clause 9	Section 47(3)(g)	Prescribed countries / states / territories for officer disqualification purposes	Clause 9 currently purports to 'prescribe' <i>any</i> country, state or territory outside New Zealand. That would not appear to be the type of 'prescription' contemplated under section 47(3)(g). If all overseas jurisdictions are to be covered, section 47(3)(g) should be amended to that effect.
Clause 13	Section 79(2)(d)	Additional content of membership register	If, as proposed, clause 13 is going to specify that a membership register under section 79 must include, if known, the details of former members, this should be time-limited. For example, the clause could provide for the register to include, if known, the names of those who were members at any time during the past 7 years or 10 years and the date of cessation of their memberships.
Clause 14	Section 84(4)	Delegate/representative attendance at AGMs	Clause 14 provides that, in addition to unions (as referred to in section 84(4)), a society that has 1,000 or more members may have a constitution that provides that the right to attend an AGM

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			<p>applies only to delegates or other representatives of members - rather than to all members.</p> <p>Officials' commentary or guidance on the Act and regulations should make it clear that section 84(4) and the proposed regulation in clause 14 is not necessary or applicable in the case of societies with non-individual (corporate/entity/group) members where all such members have the right to attend AGMs via their respective delegates or representatives.</p> <p>(Alternatively, the proposed regulation in clause 14 could potentially be extended to prescribe societies that have corporate/entity/group members for the purposes of section 84(4).)</p>
Clause 18	Section 109	Annual returns: prescribed information	<p>Clause 18 should arguably allow for <i>a named officer or an authorised agent</i> to provide the required confirmations regarding the number of members and the society's information on the register.</p> <p>The annual return should also include the society's registration number under the Act and, if applicable, its registration number under the Charities Act (which may not have been provided at the time a society incorporated under the Act).</p>
Clause 19	Section 111(3)	Notice of change of registered office	<p>Clause 19 refers to a society "vacating" its registered office. The regulation should instead refer to a society "changing" its registered office, to align with section 111. A society may change its registered office without actually vacating the premises previously used as its registered office.</p>
Clause 27	Section 233	Contents of register	<p>Clause 27 should arguably provide for the register to contain the former name(s) of a society (albeit that section 233(1)(g) of the Act provides that the register must contain notices of any change of name).</p> <p>For societies registered under the Incorporated Societies Act 1908 that re-register under the 2022 Act, it would seem appropriate for the contents of the register to include:</p> <ul style="list-style-type: none"> • The former name(s) of the society under the Incorporated Societies Act 1908. • In the event that the 1908 and 2022 Act identifiers (incorporation/registration numbers and/or NZBNs) differ, the former identifier(s) under the Incorporated Societies Act 1908.

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			<p>The above approach should arguably be extended to cover any entity previously registered under other legislation (e.g., a society incorporated as a board under the Charitable Trusts Act 1957) that becomes a society registered under the Act.</p> <p>For societies registered under the Charities Act, the register should also include the society's registration number under that legislation.</p>
Clause 28	Section 237	Search of register	<p>For societies registered under the 1908 Act that re-register under the 2022 Act, it would seem appropriate for the criteria for searching the 2022 register to include:</p> <ul style="list-style-type: none"> • The former name(s) of the society under the 1908 Act. • In the event that the 1908 and 2022 Act identifiers (incorporation/registration numbers and/or NZBNs) differ, the former identifier(s) under the 1908 Act. <p>Again, the above approach should arguably be extended to cover any entity previously registered under other legislation that becomes a society registered under the Act.</p> <p>For societies registered under the Charities Act, the criteria for searching the register should also include the society's registration number under that legislation.</p>
Clause 30	Section 177	Persons to be notified of intention to remove a society from the register	<p>While it is clear under section 177 of the Act that <i>all</i> of the prescribed persons must be notified, the proposed regulation would be clearer if provided for notice to be given "to <i>all</i> of the following persons".</p> <p>Note also that section 177 provides for the regulations to prescribe the manner of giving notice, but this is only done in the proposed regulations in relation to notice to the society (clause 30(b)) and notice to the public (clause 31).</p>
Clause 39	Section 192(c)	Amalgamation proposals: prescribed information	Clause 39(g) and (h) should arguably allow for <i>a named officer or an authorised agent</i> to provide the required confirmations regarding the number of members and the constitution.
Clause 41	Section 197(c)	Registration of	Clause 41(b)(ii) refers to a certificate "from" a person confirming that they are not disqualified from

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		amalgamation: prescribed information	<p>holding office.</p> <p>In contrast, section 9(e) of the Act simply refers to the provision of a certificate that a person is not so disqualified which appears to allow for 3rd party certification, and it would appropriate for that more flexible approach to be adopted in the regulations.</p>
Clause 45	Clause 5(3)(a) of Schedule 1	Applications for reregistration: prescribed information	<p>Clause 45(e)(ii) refers to a certificate “from” a person confirming that they are not disqualified from holding office. See comment re clause 41(b)(ii) above.</p> <p>Clause 45(f) and (g) should arguably allow for <i>a named officer or an authorised agent</i> to provide the required confirmations regarding the number of members and the constitution.</p> <p>Applications for reregistration should also include the society’s registration number <i>under the Incorporated Societies Act 1908 or Charitable Trusts Act 1957</i> (rather than the 2022 Act) and also, if applicable, its registration number under the Charities Act.</p>
Clause 49	Clause 3(b) of Schedule 3	Application for reregistration by specified entities: prescribed information	<p>Clause 49(f)(ii) refers to a certificate “from” a person confirming that they are not disqualified from holding office. See comment re clause 41(b)(ii) above.</p> <p>Clause 49(g) and (h) should arguably allow for <i>a named officer or an authorised agent</i> to provide the required confirmations regarding the number of members and the constitution.</p> <p>Applications for reregistration should also include the entity’s registration number (if any) <i>under legislation applicable to the entity</i> (rather than the Act) and also, if applicable, its registration number under the Charities Act.</p>

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Clauses 53 and 54 and Sch 2	Section 160	Penalties for infringement offences	<p>Section 160 of the Act and Schedule 2 of the Draft Regulations refer to the infringement offence payments as “fees”, whereas clause 54 refers to them as “penalties”.</p> <p>For GST purposes, the payments are in the nature of fines or penalties that would not be subject to GST, rather than fees or levies that would be subject to GST – see ss 5(6EC) and (6ED) of the Goods and Services Tax Act 1985 (in force from July 2023).</p> <p>The fine/penalty nature of the payments and the GST position should be made clear in the Draft Regulations, and in officials’ commentary or guidance on the Act and regulations.</p>
Clause 57	Section 255	Penalties for late delivery of documents or late notifications	<p>Section 255 of the Act and clause 57 of the Draft Regulations refer to “fees”, but in relation to late delivery/notification payments section 255(1)(b) refers to amounts payable “by way of penalty” and the heading to clause 57 refers to “penalties”.</p> <p>For GST purposes, the payments are in the nature of fines or penalties that would not be subject to GST, rather than fees or levies that would be subject to GST (see comments above regarding clauses 53 and 54, and Schedule 2) and the fine/penalty nature of the payments and the GST position should be made clear in the Draft Regulations, and in officials’ commentary or guidance on the Act and regulations.</p> <p>In light of the above comments, the Law Society suggests clause 57(3) should be deleted.</p>
Clause 60	Sections 45(3) and 256(4)	Transitional allowance for majority of committee to be made up of non-members, for a 5 year transitional period	<p>Refer to the Law Society’s earlier comments regarding section 45(3) of the Act and the need for either legislative amendment of that provision or permanent regulatory exemption(s).</p> <p>Clause 60 should be amended by modifying the requirement under paragraph (a) and deleting paragraph (b):</p> <ul style="list-style-type: none"> • The requirement under paragraph (a) should be modified so that clause 60 provides for a society to notify the Registrar that the society’s constitution does not require a majority of the society’s committee to be members or representatives of body corporate members. • The requirement under paragraph (b) is unnecessary, and it is not appropriate because the

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			constitution of a society that will not, or may not, comply with section 45(3) will not necessarily provide (and should not be required to provide) for a majority of the society's committee to not be members or representatives of body corporate members.
Clause 61	Sections 84 and 256	Transitional provision for re-registered societies to restrict AGM attendance to delegates / representatives for a 5-year transitional period	As noted in relation to clause 14, officials' commentary or guidance on the Act and regulations should make it clear that section 84(4) and the proposed regulation under clause 61 is not necessary or applicable in the case of societies with non-individual (corporate/entity/group) members where all such members have the right to attend AGMs via their respective delegates or representatives.