



COVERSHEET

Minister	Hon Dr David Clark	Portfolio	Commerce and Consumer Affairs
Title of Cabinet paper	Amendment and introduction of the Incorporated Societies Bill	Date to be published	28 April 2021

List of documents that have been proactively released

Date	Title	Author
10 March 2021	Amendment and introduction of the Incorporated Societies Bill	Office of the Minister of Commerce and Consumer Affairs
10 March 2021	DEV-21-MIN-0018	Cabinet Office - Cabinet Economic Development Committee

Information redacted

YES

Any information redacted in this document is redacted in accordance with MBIE's policy on Proactive Release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Some information has been withheld for the reason of Confidential advice to Government.

In Confidence

Office of the Minister of Commerce and Consumer Affairs

Chair, Economic Development Committee

Amendment and introduction of the Incorporated Societies Bill

Proposal

- 1 This paper concerns the Incorporated Societies Bill designed to replace the Incorporated Societies Act 1908 (1908 Act).
- 2 The paper seeks approval for:
 - 2.1 certain amendments to the draft Incorporated Societies Bill; and
 - 2.2 the introduction of the finalised Incorporated Societies Bill, attached as an annex to this paper.

Executive Summary

Context

- 3 The Incorporated Societies Act 1908 is over a hundred years old and no longer fit for purpose. For example, with the Act providing no guidance on dispute resolution, society members are often forced to litigate internal matters through the High Court.
- 4 In 2014, the government accepted a Law Commission recommendation to replace the statute but, as yet, no Bill has been introduced. This delay is leaving societies in a difficult position, as plans to update their constitutions must be postponed until they know what their long-term legal requirements will be.
- 5 In this context, in May 2019, Cabinet invited the Minister of Commerce and Consumer Affairs to report back to Cabinet with the final text of an Incorporated Societies Bill, with a view to its introduction to the House [DEV-19-MIN-0101 refers].
- 6 This paper represents that report-back and, due to a small number of additional policy issues that arose during drafting, it also includes some additional policy proposals.

Policy proposals

- 7 I am seeking Cabinet's agreement to two policy proposals.
- 8 First, I am seeking Cabinet approval to rescind the earlier Cabinet decision to exempt associations with levies under the Commodity Levies Act 1990 from the rule that a person must consent to society membership [paragraph 6.2 of DEV-19-MIN-0101 refers]. I am proposing this change because there is no conflict of laws between that Act and the draft Bill, which is what the exemption was designed to resolve. More precisely, there is no requirement for levy payers to join levy associations under the Commodity Levies Act. Therefore requiring levy payers to

consent to society membership would not impact on the ability of those societies to identify their levy payers.

- 9 Second, I am also seeking Cabinet approval to create a mechanism to allow entities which have been incorporated under other Acts (such as Girl Guides and the New Zealand Library Association) to convert into incorporated societies. This is intended to address the difficulties which some of these entities have with being trapped in older statutes which are not regularly maintained and which do not provide a mechanism for those organisations to move to a more modern governance structure. I do not intend that entities should be able to be compelled to become incorporated societies. Rather, this is intended as an enabling provision to allow entities to resolve problems resulting from the statute they have been incorporated under no longer being fit for purpose.

Approval to introduce Bill

- 10 I am seeking Cabinet approval to introduce the Incorporated Societies Bill, as attached in the annex to this paper.
- 11 I intend to introduce the Bill early in 2021. The Bill should be passed by 2022.

Issues likely to be raised during the passage of the Bill

- 12 The Bill as a whole is unlikely to be contentious. There is widespread support for a new, modernised statute. However, it appears that there will be split views on the following aspects of the Bill, to which Cabinet has already agreed [DEV-19-MIN-0101 refers]:

12.1 **Financial reporting** – The Bill provides for all incorporated societies to prepare and lodge annual financial statements. Most will be required to prepare those statements in accordance with accounting standards issued by the External Reporting Board (XRB). Very small societies will be required to prepare financial statements, but they will not be required to comply with the recognition and measurement rules and the disclosure requirements in the XRB's standards. It is likely that some submitters will support this approach. However, others will state that all societies should be required to prepare in accordance with the XRB's standards.

12.2 **The transition for incorporated societies registered under the 1908 Act** – The Bill provides that societies already on the register must actively request re-registration under the new Act, and confirm that they have achieved compliance with the requirements of the new statute (such as amending their constitution to include dispute resolution provisions). The alternative approach is to automatically re-register all existing societies. This is a finely balanced decision. On the one hand automatic re-registration minimises compliance for society officers. However, it is also likely, under the automatic re-registration approach, that a significant number of societies would be re-registered even though their constitutions will not fully comply with the minimum requirements under the new Act.

- 13 I consider that these aspects of the Bill remain appropriate.

- 14 Finally, it is possible that some incorporated societies will express concern about the risk of the Bill increasing the regulatory burden on their officers, particularly those who act as volunteers. However the Bill seeks not to increase regulatory burdens but to codify obligations which already exist in case law and is, in this sense, designed to make it easier for society officers to know what their obligations are.

Context

- 15 In 2010, the then Minister of Justice asked the Law Commission to undertake a review of the 1908 Act. The Law Commission subsequently recommended in its final report of 2013 that the 1908 Act be replaced with a modern statute.
- 16 The Government responded to the Law Commission report in February 2014 [EGI Min 14 2/3 refers]. Subsequent consultation on an exposure draft of the Bill in 2015-16 indicated widespread agreement amongst stakeholders that the replacement of the Act is necessary and desirable.
- 17 In May 2019, Cabinet agreed to a number of policy proposals amending the draft Bill, and invited the Minister of Commerce and Consumer Affairs to:
- 17.1 issue drafting instructions to the Parliamentary Counsel Office to amend the draft Bill; and
 - 17.2 report back to Cabinet with the final text of the draft Bill, with a view to its introduction to the House [DEV-19-MIN-0101 refers].
- 18 This Cabinet paper is that report back.
- 19 I am submitting this paper through the Cabinet Business Committee as a small number of additional policy issues arose during drafting of the amendments to the Bill.

Policy issues

Levy associations

- 20 The Incorporated Societies Bill states that a person must consent to being a member of a society. This provision is important because the Bill (and existing incorporated societies law) imposes obligations on members, for example to comply with the society's constitution and bylaws. It is incompatible with human rights legislation to impose this type of obligation on individuals without their informed consent.
- 21 In its May 2019 decision, Cabinet agreed that the draft Bill should ensure that "subject to compliance with the New Zealand Bill of Rights Act 1990, associations with levies under the Commodity Levies Act 1990 will be exempted from the rule that a person must consent to society membership (clause 67)".
- 22 This decision was based on concerns that there was a conflict of law between the Commodity Levies Act and the informed membership consent provision in the Incorporated Societies Bill. However, further analysis has shown that there is no conflict, because there is no requirement for levy payers to join levy associations. While levy associations collect levies for the specific commodity to which they relate, those that contentiously object to paying their levies to the association are able to

pay their levies indirectly to their associations via the Government. And while levy associations also raised concerns with officials about their ability to identify, correspond with, and report to their existing levy payers (in order to obtain consent), these concerns can be addressed under provisions in the Commodity Levies Act 1990 which allow levy associations to obtain the necessary information with levy payments.

- 23 For this reason, I propose that Cabinet rescind its decision to exempt associations with levies under the Commodity Levies Act 1990 from the rule that a person must consent to society membership.

Conversion of other entities into incorporated societies

- 24 Officials have identified that there are a number of private organisations, other than A&P societies, incorporated under older pieces of legislation who could benefit from becoming incorporated societies. These pieces of legislation – some of which are public Acts and some private Acts – set out the governance and other requirements which apply to those entities. While those pieces of legislation may have been fit for purpose when they were first enacted, many of them have become out of date. By way of example the New Zealand Library Association Act 1939 provides in its section 8 that “[t]he Association shall not be wound up except by leave of the Governor-General in Council”.
- 25 I propose creating a mechanism, through the Incorporated Societies Bill, to allow entities incorporated under Acts named by Order in Council to convert into incorporated societies. This conversion process would be subject to any conditions prescribed by regulation. By way of example, the responsible Minister might need to be satisfied that conversion into an incorporated society is ‘not inconsistent’ with the intended purpose or object of the relevant Act, and might need to have consulted with the relevant entity and others who may be significantly affected.
- 26 This approach will allow those entities to choose whether or not they want to take advantage of the improved governance requirements included in the Incorporated Societies Bill – including the ability to change their own rules without the need for reference back to Parliament.

Agricultural & Pastoral Societies

- 27 The Government’s 2014 response to the Law Commission report agreed to 101 of the Law Commission’s 102 recommendations in full or in principle. The exception related to the recommendation for the new statute to provide an easy and efficient mechanism specific to Agricultural and Pastoral societies (A&P societies), enabling them to transfer registration voluntarily from the Agricultural and Pastoral Societies Act 1908 (A&P Act) to incorporate under the new Incorporated Societies Act. The Government response to the Law Commission report stated:

“The Government has decided to reserve judgment on this matter until after it has had the opportunity to consider feedback on the Exposure Draft. A decision will then be made about whether to implement [the A&P Society] recommendation [...], 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.”

- 28 Consultation on the Bill included the option of transferring the registration of A&P societies to the Incorporated Societies Bill and repealing the A&P Act. This was based on the idea that the A&P Societies Act has similar problems to the Incorporated Societies Act 1908: it is outdated, incomplete and inconsistent with modern governance principles and practices.
- 29 There was strong opposition to this proposal. The submission made by the Royal Agricultural Society on behalf of its 96 A&P society members stated that all its members wished to remain firmly under the A&P Act. The Minister of Agriculture is responsible for the A&P Act.

Funding

- 30 In its May 2019 decision, Cabinet noted that the capital investment and operational expenditure associated with the reforms were likely to be as follows:
- 30.1 for the enhancement of the incorporated societies register to meet requirements of the new Bill, \$0.850 million in capital investment; and
 - 30.2 for the education campaign to accompany the reforms, \$1.747 million in operational expenditure spread over years 0 to 6.
- 31 The capital investment will be met within MBIE's capital pool.
- 32 The operating expenditure, for the educational campaign and associated depreciation and capital charge expense, will require an increase to the relevant appropriation, which will be funded from third party fees. The Bill allows for the costs incurred by the Registrar for the Incorporated Societies register to be recovered from fees paid by third parties.

Impact analysis

- 33 A regulatory impact statement (RIS) accompanied the Cabinet paper considered by Cabinet in February 2014 [EGI Min (14) 2/3 dated 19 February 2014 refers]. That Cabinet paper stated that the General Manager, Strategic Policy, MBIE, and the MBIE Impact Analysis Review Panel had reviewed the statement and concluded that "the information and analysis summarised in the RIS meets the criteria necessary for ministers to fairly compare the available policy options and take informed decisions on the proposals in the paper".
- 34 A supplementary RIS was prepared to accompany the Cabinet paper from May 2019 [DEV-19-MIN-0101 refers]. It related to the financial reporting and transitional issues referred to earlier in this paper.
- 35 MBIE's Regulatory Impact Analysis Review Panel reviewed the supplementary RIS prepared by MBIE. The Panel considered that the information and analysis summarised in the RIS could be more concise but met the criteria necessary for Ministers to fairly compare the available policy options and take informed decisions on the proposals in this paper (at paragraphs 12.1 and 12.2).
- 36 Other amendments to the draft Bill received an exemption from the Regulatory Impact Requirements. The Regulatory Quality Team at the Treasury agreed that no formal Regulatory Impact Assessment was required for these other proposals, since

they are expected to have only minor impacts on businesses, individuals or not-for-profit entities.

Compliance

- 37 The Bill complies with:
- 37.1 the principles of the Treaty of Waitangi;
 - 37.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;
 - 37.3 disclosure statement requirements and a copy of that statement is attached to this paper;
 - 37.4 the principles and guidelines set out in the Privacy Act 1993; and
 - 37.5 relevant international standards and obligations,
- 38 In respect of the mechanism for repealing redundant statutes when the private organisations they establish voluntarily convert into incorporated societies, Chapter 15 of the LAC Guidelines on the Process and Content of Legislation states that “[l]egislation should empower secondary legislation to amend or override an Act only if there is a strong need or benefit to do so, the empowering provision is as limited as possible to achieve the objective, and the safeguards reflect the significance of the power.” The concern with provisions of this type relates to the fact that they enable the Executive to override Parliament, and this is seen as creating a risk of undermining the separation of powers.
- 39 However, Chapter 15 goes on to provide that “such clauses come in various types and, although each must be carefully considered, they do not all raise the same level of constitutional concern.” I do not consider that a mechanism enabling legislation which has become redundant to be easily repealed rises to the level of creating a constitutional concern.

Consultation

- 40 The following government departments have been consulted: the Ministry of Justice, the Ministry for Primary Industries, the Inland Revenue Department, the Department of Internal Affairs, the Treasury, the Ministry of Education and the Department of Prime Minister and Cabinet (Policy Advisory Group). MBIE policy officials also consulted with the Companies Office (which maintains the incorporated societies register), Charities Services (which is the regulator of the charities sector), the External Reporting Board (which sets financial reporting standards), and the Office of the Privacy Commissioner.
- 41 A public consultation process was undertaken on an exposure version of the draft Bill in 2015-2016. 116 written submissions were received. Officials also undertook targeted consultation between May and July 2018 with a number of iwi, the main trade unions, and lawyers who specialise in incorporated societies law.

- 42 The Ministry for the Environment has been consulted and confirms that the climate implications of the policy assessment (CIPA) requirements do not apply to this proposal as the threshold for significance is not met.

Binding on the Crown

- 43 Clause 7 states that the Incorporated Societies Bill will bind the Crown.

Allocation of decision making powers

- 44 The Bill provides that the Governor-General may, by Order in Council, make wide ranging regulations for the purposes of the Bill including prescribing:
- 44.1 information that must be included or provided for the purposes of the Bill;
 - 44.2 procedures, requirements, and other matters, for the register of incorporated societies;
 - 44.3 the infringement fee for each infringement offence, which must not exceed \$1,000;
 - 44.4 requirements for the financial statements of small societies;
 - 44.5 for the purposes of any provision of this Act that requires a thing to be done in a manner prescribed by the regulations, the manner in which the thing must be done;
 - 44.6 the manner for serving documents on a society and when the documents are treated as received;
 - 44.7 how information may or must be given to, provided to, or served on any person under the Bill and other matters relating to that procedure; and
 - 44.8 specifying the entities that are able to convert into incorporated societies, by reference to their establishing statute.

Associated regulations

- 45 Regulations will need to be made within 18 months of the Act coming into force to allow:
- 45.1 new societies to register under the Act; and
 - 45.2 existing societies to re-register under the Act.
- 46 Those regulations will need to address the following matters:
- 46.1 the way in which applications for incorporation will need to be made;
 - 46.2 procedures, requirements, and other matters for the register of incorporated societies;
 - 46.3 setting the various fees payable by societies;

46.4 transitional and savings provisions to facilitate an orderly transition between the 1908 Act and the new Act; and

46.5 the level of the infringement fee payable for breaches of the Act.

Other instruments

47 The draft Bill does not include provision to make other instruments that are deemed to be legislative instruments or disallowable instruments (or both).

Definition of Minister/department

48 The draft Bill contains a definition of Minister and a definition of Ministry.

Commencement of legislation

49 The Bill will commence in three stages. The regulation-making provisions will come into force on the day after the Bill receives Royal assent.

50 There will then be a period of 18 months to make the necessary regulations to allow new societies to register under the new Act, and for existing societies to begin transitioning to the new Act.

51 Once those regulations come into force:

51.1 new societies will no longer be able to register under the 1908 Act;

51.2 existing societies will have 30 months (two and a half years), or until December 2025 (whichever is later), to apply for registration under the new Act. During that period existing societies will continue to operate under the 1908 Act. At the end of that period any societies which have not re-registered will automatically be de-registered and wound up. The Registrar of Incorporated Societies will have a residual power to restore any society which has failed to re-register during the 30-month transition period.

Parliamentary stages

52 I intend to introduce the Bill early in 2021. The Bill should be passed by 2022.

53 I will propose that the Bill be referred to the Economic Development, Science and Innovation Committee for consideration for a period of six months.

Proactive Release

54 I propose to release this paper proactively on the MBIE website within 30 business days, subject to minor potential redactions.

Recommendations

The Minister of Commerce and Consumer Affairs recommends that the Committee:

- 1 **note** that, in May 2019, Cabinet invited the Minister of Commerce and Consumer Affairs to report back to Cabinet with the final text of a draft Incorporated Societies Bill, with a view to its introduction to the House [DEV-19-MIN-0101 refers];

Policy proposals

- 2 **agree** to rescind Cabinet's decision [paragraph 6.2 of DEV-19-MIN-0101 refers] to exempt associations with levies under the Commodity Levies Act 1990 from the rule that a person must consent to society membership;
- 3 **agree** that the Incorporated Societies Bill should include provisions enabling entities incorporated under other Acts, named by Order in Council, to convert into incorporated societies;
- 4 **agree** that the conversion of an entity into an incorporated society should be subject to conditions prescribed by regulation, made on the recommendation of the Minister for the time being responsible for the Incorporated Societies Act;

Approval to introduce Bill

Confidential advice to Government

- 6 **note** that the Incorporated Societies Bill will put in place a modern framework of basic legal, governance and accountability obligations for incorporated societies and those that run them;
- 7 **approve** the Incorporated Societies Bill for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives;
- 8 **agree** that the Government propose that the Incorporated Societies Bill be:
 - 8.1 referred to the Economic Development, Science and Innovation Select Committee; and

Confidential advice to Government

Authorised for lodgement

Hon Dr David Clark

Minister of Commerce and Consumer Affairs

Annex 1: Disclosure Statement for the Incorporated Societies Bill

Annex 2: Proposed version of the Incorporated Societies Bill