

Submission by Rural Women New Zealand
Regarding Law Commission Issues Paper:
“Reforming the Incorporated Societies Act 1908”

31 October 2011

Introduction

Rural Women New Zealand (RWNZ) represents the interests of rural families in New Zealand. It speaks for the 600,000 New Zealanders and over 200,000 households in rural communities, only 14% of whom are farming families on economic units. The other 86% of households include teachers, mechanics, mums, dads, students, grandparents, health and home care workers, seasonal workers, plumbers, administrators, truck drivers, vets, life-stylers and all the other vocations that make up rural communities.

Rural Women New Zealand is an incorporated society with over 3,000 members – operating through branches alongside a Wellington-based national office. Several of these branches are set up as incorporated societies (who report to the national office). In addition, Rural Women New Zealand 100% owns a charitable company – Access Homehealth.

Aside from the Incorporated Societies Act itself, our organisation comes under the Finance Act and the Charities Act. We follow IRS reporting rules.

In General

A Difficult Balancing Act

We welcome the discussion paper on reforming incorporated societies. There seems to be general consensus that some sort of reformation of the Act is well and truly needed. In many ways it is outmoded and uncertain, and this can lead to practical difficulties, and often, costs to societies if things go wrong.

Yet, there is also a need, we believe, for a careful balance. Its very vagueness and endurance since 1908 has given rise to a plethora of models for approaching the structure and operations of incorporated societies. And this is not all bad. Rural Women New Zealand believes that this “looseness” gives societies a certain freedom

of action and ability to construct something “out of the box” when it comes to responding to issues.

After all, incorporated societies are independent, community-driven organisations, set up to express and act on community aspirations and needs. As such, they need to include a wide range of sizes and activities, be flexible, and encourage community action and resilience, rather than being bureaucratic and overly concerned with compliance issues. And they need to evolve alongside the evolving needs and aspirations of their members.

We were pleased to see the issues paper itself acknowledging this:

“The paper seeks community views as to where the appropriate balance lies between modern notions of corporate accountability and governance on the one hand, and the flexibility and ease that many community groups have enjoyed under the 1908 Act on the other. There is a trade-off between seeking greater accountability and governance controls, and creating unnecessary compliance costs for community groups.”

Size Does Matter

Because of its size and because it already operates, for instance, a charitable company, Rural Women New Zealand already operates under a rigorous set of rules & regulations when it comes to things like financial reporting requirements. Likewise, current governance arrangements do reflect the organisation’s nationwide responsibilities and wide range of activities (although we certainly acknowledge that our own system is not perfect, and good ideas coming from this review will be gratefully accepted).

But, we do think many of the ideas in this paper will bring a degree of much needed certainty to many, smaller organisations. The idea of having model rules that act as templates is an excellent one, as it makes those setting up a new society consider issues they may have otherwise been unaware of.

Having an almost “paint-by-numbers” approach will make it easier for smaller societies to do what they are there for: helping their members and the communities they live in.

Other General Thoughts

- We believe that societies should provide an enabling environment for fostering strong civil Society and communities. The Act needs to set out a framework to be self managing, while providing guidance about external assistance when internal systems break down.
- Incorporated societies are not companies, and responsibilities and processes need to be thought about differently. Recommendations to establish model rules, to specify responsibilities of officers and require a means of resolving conflict were generally supported, but should be based on the purpose and member-driven nature of community generated organisations, rather than using the Companies Act as too strict a model.

- There needs to be more external support available to incorporated societies. By their nature there will be movement of people through an incorporated society, which can generate change and conflict, with little external advice available when there are difficulties.

Chapter 1: Introduction

Do you agree that a review of the legal structure for incorporation of non-profits, and the requirements on those running such societies, would be a useful step in strengthening the non-profit centre?

Incorporated societies need to reflect the realities of Society as it exists today. Rural Women New Zealand isn't sure if a "club" structure with members entirely meets today's needs (so, for instance, to meet some of the aspirations of our organisation, Rural Women New Zealand 100% owns a charitable home health company). It would be good, we think, to have a supporting structure that both is community-driven and lends itself to professional levels of management, if needed.

So, we do support a review of the legal structure for the incorporation of non-profits. Partly, this is to help reduce confusion between different forms of legal structure. Also, we believe that increased clarity would make it easier for organisations that are considering incorporation to choose a structure that suits their particular purpose, rather than being based on factors such as it being perceived to be quicker and simpler to, for instance, registering as a Charitable Trust.

Is the current limitation of liability sufficient?

The current Act is not clear enough about liability of members and officers. We think the issues paper hits the nail on the head when it says *"Any duties on those who run incorporated societies on behalf of their members come from either the society's rules, or from rather ill-defined judge-made obligations in common law or equity. For example, there is nothing in the Act to prevent committee members from acting in their own self-interest without first disclosing it to their fellow committee members. Nor is there a procedure in the Act to resolve disputes between societies and their members (nor any requirement that they have their own dispute resolution mechanism). Such procedures might enable disputes to be resolved without disrupting the work of the society, and prevent the need to resort to court."*

Do you agree that there should only be one statute for the incorporation of not-for-profits in New Zealand? If not, why not?

Generally, Rural Women believes that it would be preferable and simpler to have one statute that could allow for different forms – say, an incorporated society, or a trust, or a company that may be registered for profit. But, this would require more clarity around

the differences, say, between a society and a trust – aside from anything else, this clarity would protect the necessary differences between the various forms.

A unified statute for Charitable Trusts and Incorporated societies could strengthen the non profit sector as a whole, but it would be important for the different forms to be clearly articulated so that decisions about which to use are based on clear understanding of the needs of the organisation, rather than superficial reasons such as number of members easily signed up, or speed of the process.

Do you think that for some purposes it might be advisable to divide societies between members' benefit and public benefit societies? If so, in what circumstances?

Rural Women thinks this is not an easy question to ask. While there are societies where the separation between public and member benefit is clear, the gamut of activities undertaken by societies means the reality is often a continuum rather than a distinct line separating member benefit and public benefit organisations.

We can see benefits in doing “the hard yards” to separate public and member benefits. Certain issues would be easier to resolve. Yet, the counterargument is strong – that any such distinction would be artificial and the current “blurry” continuum actually gives societies a freedom of action as well as lending itself to being community driven.

We think it's important to come back to the core principal that societies exist to serve the aspirations and needs of their particular communities of interest. So, where the separation is clear is clear then by all mean divide societies along those lines. Where it's not the blurry reality needs to acknowledged, even if it's going to make some of the practicalities a bit more difficult.

We do have one note of caution. Even though it may be currently easy to call an existing society either member- or public-benefit, that situation could change quite quickly. Any existing defections need to be easily adapted or changed if the situation demands.

5. & 6. Should Agricultural and Pastoral Societies and Industrial and Provident Societies be incorporated under the new statute?

We have no experience or opinion on these questions, but on the face of it, would seem to be sensible if its practical.

Chapter Two: The Constitution of Societies

Do the New South Wales' requirements for matters that must be dealt with by a constitution offer a good starting point for New Zealand legislation? Have you any other suggestions about other types of rules that might be required?

Rural Women New Zealand believes that, generally, having a constitution with written requirements is good – the minimal and non-existent rules in the Incorporated Societies Act and Charitable trust Act, respectively, means that many important requirements are often not thought about by those writing a constitution from scratch.

However:

- any requirements should not be overly prescriptive, to allow for the huge variety of size and complexity of these organisations, and the fact that they will evolve over time;
- requirements should be simple for organisations to incorporate and be constructive (rather than simply choosing the fastest); and
- a strong focus needs to be kept on fostering strong civil society and communities.

Along with some other organisations who have commented on this issues paper, Rural Women New Zealand also thinks it important that the overall objective of the society be as clearly articulated as possible. This clear articulation a society's broad objective then leads to more effective and clear articulation of things like goals and objectives etc.

We generally support a set of model rules to provide a simple and general set of rules, and think it could assist in quality management, consistency and save time for new organisations.

We support provisions about meetings procedures and managing disputes, as the latter, in particular, is one that can cause many unnecessary problems if such provisions are not in place. Likewise, a clear process for decision-making is very sensible.

Australian jurisdictions provide for model rules that an incorporated association is deemed to have accepted unless it expressly decides to derogate from a rule by providing its own version. Do you agree that New Zealand should adopt this approach?

The Law Commission view is that NZ should have a generic code of rules that could act as a default mechanism for those organisations that choose not to have their specific rules or their own variants on that generic code. One lawyer¹ has commented:

¹ Mark von Dadelszen, partner, Bannister & von Dadelszen (2011): "NZ Lawyer Online" (vol. 165) 29 July, 2011

“Having seen some truly appalling sets of rules, I would like to think that having a basic set of coherent rules upon which to base amateur efforts might avoid some of the problems that flow from many badly prepared constitutions.”

Rural Women New Zealand basically agrees with the Law Commission’s stance, with the proviso that any rules should be a guideline only, because individual circumstances will vary for each society, and societies need some freedom of action if they are to effectively do what they were set out to do.

How the rules are implemented will be important. The necessity for an education process is almost inevitable we think. So, we favour resources and tools (online and other types of support) that can help societies build their own model rules (should they desire to), and some kind of Q&A factsheet that explains the implications of adopting (or not adopting) particular rules.

If there is to be a division between members’ benefit and public benefit societies, should there be different generic codes of rules?

See our comments on Q.4. If the division between the two (members and public benefit) is clear then generic rules for each type would probably work. However, given the continuum that exists in reality, then having more than one set of rules to choose from may be even more confusing and complicated. Perhaps the rules need to have a clear set of guiding principles for these situations rather than detailed rules *per se*.

If model rules are implemented, when a rule has been superseded by a new rule, should the society to be deemed to be governed by the new rule as opposed to the old one?

As there are so many incorporated societies in existence this is probably a good idea, otherwise there would be little impact of new legislation – given a natural tendency towards inertia.

Whereas in New South Wales, rules are merely required that govern discipline, the Victorian legislation explicitly sets out certain natural justice aspects (for example, the disciplinary procedure is handled by an unbiased decision maker). Do you agree that the Victorian approach is the preferable one for New Zealand? If not, why not?

Rural Women New Zealand supports the comments made in the submission by Social Development Partners :”Natural justice is a concept that has been gaining in understanding in other legislation, and is widely supported for reasons of wanting to see fairness in our institutions and processes. Given the conflict in incorporated societies can involve strong personalities, and be very difficult for many groups to

manage it is probably desirable that rules of natural justice, as in the Victorian legislation, are laid out.”

How should the requirement be phrased?

As simply as possible.

Should a society require a minimum number of members, to be incorporated? If yes, what is the minimum number of members you consider would be appropriate? The current number is 15. Australian statutes require five.

We have no strong view on specific minimum numbers, except to note that in a time where it is becoming increasingly important for the not-for-profit sector to work together collaboratively, a proliferation of tiny societies of a few people makes collaboration that much harder.

Do you have views on whether it might be advantageous to require societies to form governance committees, or appoint any particular type of officer?

Rural Women New Zealand has seen two broad answers to this question. One argument is that rather than the focus being on the *structure* of governance committees per se, the *means* of governance needs to be clearly articulated. Proponents of this school of thought also noted that while officers need to be identifiable, the secretary and treasurer are no longer relevant in any organisations.

Another school of thought says that as long a society is governed on democratic principles why should the State require it to be governed by the committee rather than by all the members at a general meeting?

Rural Women wonders if organisational size is important. Below a certain size, having a template would be useful (to make it easy for running a small society), but (somewhat paradoxically) the need for a committee may actually be less. So, in this situation a “horses for courses” approach may be appropriate. Having good online resources and some kind of template/guideline may also be of real benefit.

Above a certain size (or perhaps above a certain income), however, the story changes. For an organisation like ours (with over 3000 members, and having several legal entities coming under its wing), as well as having national responsibilities, then having formally set out clear governance rules is absolutely vital. However, we are not really sure where the cut-off lies.

Overall, we suggest that given the diversity of incorporated societies in existence there needs to be flexibility in the form of governance.

Is it appropriate to move towards a name regime similar to that in the Companies Act?

A streamlined process for approval of names, related to the Companies Act process, seems preferable. Especially if it gave indication of the *degree* of protection afforded to the name (given the current Act only prevents registration of *identical* names).

Does your experience suggest that there is a greater role for a regulator of this sector, beyond the role currently played by the Charities Commission, or the Registrar of Incorporated Societies? If so, what should that role be?

One lawyer has commented: *“Over the years, I have advised on numerous issues where the lack of any external authority to resolve disputes has caused stressful, destructive, and expensive problems. The Registrar has extremely limited powers and High Court litigation is costly and takes far too long. Innovative solutions are required – suggest them to the Commission!”*

Other not-for-profit organisations see the usefulness of someone external to go to. It’s noted where an external agency could be of particular use is *“to resolve grievance, and seek support/mediation services in many situations when there is dissatisfaction by members about the conduct of the Committee or officers, and they feel they have little voice in the process.”*

But, whether one actually needs a new regulator (with the additional costs that would inevitably impose) is more of a moot point. Other not-for-profits have made the point that societies that receive Government funds are already subject to considerable audits and monitoring which includes the robustness of organisational structures and policies (in addition to the existing powers of the Registrar of Incorporated societies and Charities Commission).

Rural Women New Zealand, on balance, is not totally convinced we need an entirely new regulator for the sector, although we can see the benefits of being able to consult with some kind of external organisation that may be able to head off potentially destructive disputes before they enter the Court process.

One suggestion that has been made is that the Ombudsman could be a good choice for an independent agency that organisations could turn to. This would have funding implications, but at least it’s an independent agency already in existence.

Is a general variation power justified? Who would appropriately exercise it and what safeguards ought to prevent its misuse?

We have no experience of this issue.

Chapter Three: Good Governance

Do you agree that the new Act should provide a ‘code’ of duties that committee members must observe in their decisions?

In general, Rural Women New Zealand thinks that some kind of code of duties would be a very useful thing (many commentators have noted that the lack of a set of guiding principles to help shape committee behavior is the single, most glaring omission within the current Act).

The problem of committees becoming laws unto themselves, acting dictatorially, and becoming a clique remote from many members is common. But, it needs to be acknowledged that these problems are not just due to a failure of the legislation. Rather, other factors such as member apathy, lack of understanding of good governance practice, and failures of accountability and transparency, can also come into play.

Realistically, therefore, it is not possible to legislate for good behavior. However, we think that some form of code might be useful, especially if it is combined with some improved dispute resolution procedures.

Rural Women New Zealand believes that the company director’s obligations, as set out in sections 131-137 of the Companies Act 1993, could be a useful guideline for such a code.

This is important for national organisations like Rural Women New Zealand, with people from our branches making up the national governing body (the national Council), with some degree of control over allocation of funds to local activities. In this situation, a clear understanding of Councilors’ responsibility or duties to the organisation at the national level, rather than just as a representative of their particular area, is very important.

If so, what duties ought to be included in the code?

The concept of best interest of the organisation as a whole is of primary importance and should be stated clearly. This will encourage clarifying of conflicts of duties and interests for organisations managing multi level relationships between branch and national structures where such policy is necessary.

Other important elements are:

- the ethics around governance;

- not using position for personal advantage;
- maintaining an active mandate from members, needing to consult;
- transparency of actions within governing bodies;
- making sure members are well informed; and
- decision making on behalf of members.

In what respects might the Companies Act obligations need to be altered if included in a new Incorporated Societies Act?

The main point for us is that notion of conflict of interest also needs to apply to non-financial aspects. In a small community-based society, non-financial conflicts of interest can be as potentially destructive as financial conflicts of interest.

We also think that the concept of exercising reasonable care is a useful one.

However, as we have stated previously, societies are not companies, they need to reflect community aspirations, and they need to be flexible and responsive to evolving conditions. Therefore, these obligations should be set out in a way that does not stifle innovation and development.

Our preliminary view is that some minimum standards of conflict of interest rules ought to be part of the new statutory regime, as they are in the Companies Act. Do you agree?

We generally agree – but not limited to financial conflict of interest.

Do you agree that there should be a requirement for the disclosure of financial interests? Do you agree there should be a further requirement to disclose other material personal interest?

Rural Women New Zealand believes that disclosure is useful for both forms of interest.

What should be the consequences of a disclosure of either financial or other material personal interest? The Companies Act requires disclosure only, but there are other options: recusal from voting, or recusal from the meeting. Which do you consider appropriate, and why? Should there be different types of consequences, depending on whether the matter disclosed is financial, or other material personal interest?

We do not see that it is practical to legislate for more than disclosure, as circumstances and sizes of organisations vary so significantly. Larger organisations can set policies and practices as they identify appropriate for their organisation. But, we think it's important there be resources available that flag this issue for consideration (perhaps within a set of model rules, for instance).

The experience and knowledge around a Committee table provides valuable information for the activities of the organisation. Having draconian set rules about recusal from either voting or the meeting might actually end up limiting access to that valuable experience and information from other committee members.

What are your views on the criminalisation of failure to disclose a conflict of interest? Might civil penalties be preferable, for failures under the Act that do not amount to deliberate dishonesty?

We do not have sufficient experience to comment – but are very aware that it is difficult to bring either civil or criminal procedures. Rather, we think that emphasis should be on having clear duties and processes in place at the outset, as a way of helping avoid awkward situations (again, this could be something within model rules?).

Does there need to be a general prohibition on the “dishonest use of position”?

Not sure.

Would it be useful to allow courts to consider banning individuals from being committee members of incorporated societies in the same way as individuals can be barred from being directors?

It is often valuable to have people who have “checkered” pasts on incorporated society committees. For instance, having an ex-addict committee member within an organisation devoted to reducing the problem of drug addiction. You don't want to close the doors on the potentially valuable contribution that such people can make to an organisation.

On the other hand, a court ban on someone who has a track record of financial misdealing could well be very appropriate.

Perhaps it's only something that can be clearly judged on a case-by-case basis, and something that Courts could use for persistent offenders.

Would enabling the registrar to take actions on behalf of the society to recover compensation or seek an account of profits be appropriate?

Providing an independent body to seek to recover compensation could be valuable in some circumstances. It could also be a function of an external agency.

Does there need to be greater rigour than currently, around requirements for auditing and appropriate accounting standards? If not, why not? Do you agree that the new Act should provide for the imposition of audit and accounting standards by regulations that might be varied in accordance with the size of the society, and how ought that size to be judged?

Rural Women New Zealand is an incorporated society that 100% owns a charitable company. We are also a registered charity. As you imagine, our obligations around auditing and accounting are already quite stringent. So, in some ways, we already have to do more than a reformed act would set in place.

Nevertheless, we see the value in having a common set of standards, with built-in variability to take into account the diversity of society structures that currently exist. Variability in relation to membership size might be useful. But, instead of member numbers, the 'size' that could be particularly important is that which relates to financial size of the organisation (for instance, a small society - in terms of members- may have considerable financial resources, and vice-versa).

We also see value in having a common set of standards, within one piece of legislation, as opposed to being spread over several Acts.

Chapter 4: The Legal Dealings of an Incorporated Society

Should the new Act grant incorporated societies the powers and privileges of a natural person, in the same way as is done in the Companies Act?

Incorporated societies are not companies – and will vary widely in their size and activities.

Many incorporated societies lay out powers in their rules, such as operating bank accounts, making investment, purchasing property, taking on mortgages etc. To allow for the variety of incorporated societies, we see it is probably preferable to require organisations to specify appropriate powers in their rules, rather than automatically have powers and privileges of a natural person.

Do you agree that the new statute should limit the ultra vires doctrine, and if so, how? Which model is preferred, the Companies Act one, or the New South Wales one?

We have no experience of this.

Chapter 5: Resolving Disputes between Members and Their Societies

Do you agree that the Victorian model should be adopted, which gives wide powers to the court to make orders, plus the ability to decline to make an order on the grounds that the application was trivial, or the matter could have been more reasonably resolved in other ways?

Rural Women New Zealand believes it is important to seek ways to prevent disputes in the first place. A clear conflict resolution process should be a part of any society's rules. Model rules could provide the guideline of process to manage internal conflict.

If this is not sufficient, there needs to be a process to assist in their resolution, and mediation needs to be available. This is currently offered by some Community Law Centres, and requires a nationally available service. Perhaps some kind of Ombudsman role would be a useful as a final step before any court action is taken.

Do you agree that the Act should provide for disciplinary procedures to be kept separate from those designed to resolve disputes between members, with members being prevented from taking a grievance procedure until any disciplinary procedures have been concluded?

Yes; disciplinary procedures need to be kept separate for dispute processes (as the issue paper notes, having both processes happening simultaneously is "tortuous"), and any grievance procedure should be completed prior to disciplinary process.

Should there be any limits on the type of cases with which a court can deal? If so, what types, and why?

It's possible that some issues might be better dealt with via, say, the Maori Land Court. Whatever the case, courts should be seen as the last resort.

Should the new legislation include provision for derivative actions by society members, similar to section 165 of the Companies Act?

We have no experience and limited understanding of this issue.

Do you agree that a general remedial power should be given to the court to do what is “just and equitable”?

Given the wide range of incorporated societies, we see this as a useful and sensible move. It also ties in with the notion of natural justice.

Have the current provisions about branches created any problems, and how might the provisions be altered to avoid those problems?

Is there still a need for branch societies?

Rural Women’s perspective is a consequence of the many and varied reasons that individuals become members of our organisation. Some members are there to make friends and socialise, while others are there to become involved and “make a difference.” Some prefer to remain individuals, other prefer to become a member of a local group.

Rural Women New Zealand has had a branch structure since 1925, and it has served us well. But, we are evolving. Our branches are made up of local groups, and we are seeing that the way these groups are structured and work are becoming increasingly varied (some for example, are quite informal, others work in a more structured, formal way). We have also seen a rise in individual members (people who wish to be a part of the organisation but do not see the need or feel the desire to be part of a larger group). Somehow, Rural Women has to appeal to these diverse constituencies if it is to remain meaningful and relevant.

So, for us, terminology (whether or not groups are called “branches” or not, for instance) is less important than the ability to keep people informed and involved, so that when necessary, we can come together to speak with a national voice. In other words, communication is key.

We feel that as long as we know, internally, what we are about and what we are there for, and that we have ways of communicating this effectively to all the different groupings of people who make up the organisation, then we don’t see that structural changes are needed. What is important is that members understand this structure and how it works. It is also important that this structure is adaptable enough to evolve and change with the aspirations of our members.

For example, it is vital that local organisations reflecting local aspirations, but that they can still come together to exert a national presence. Tensions sometimes happen, but with careful management (and with internal systems/regulations etc. in place), these tensions can become a force for ensuring the whole organisation continues to evolve and remain relevant, and continue meeting its goals and mission.

Chapter 6: The Liquidation and Dissolution of Societies

Have you experienced problems with the liquidation or dissolution provisions?

We have not had any issues in this area.

In what ways can the procedure for liquidation and dissolution be improved?

As noted above, it could well be useful to be able to access the expertise of an independent body to investigate and act in interests of a society in such situations.

In particular, should the double meeting requirement for members' liquidation be altered?

Rural Women New Zealand concurs with other submissions that have noted that while this seems a rather unwieldy procedure, it does provide a "cooling down" period, and give better provision for communication with all members if there have been problems.

What are your views on the division of incorporated societies into two types, requiring them to register for either members benefit or public benefit? If this is not supported, how should the distribution of assets on dissolution be dealt with? Should it never be permitted?

See response to Question 4 – given the continuum between public and private interests that is the reality for many societies, this is something that would be difficult to legislate for. But, it would be a good idea for a constitution to contain rules for distributing assets.

Should there be a provision for mergers of societies?

Yes.

Chapter 7: Transitional Issues

What are your views on workable transitional arrangements? Do you support the Companies Act approach, which enabled re-registration of existing

companies, and provided that those that did not would be deemed to have done so? Should there be a longer transitional period relating to the adoption of model rules?

We support process similar to Companies Act, otherwise new provisions would have little impact (perhaps because of inertia on the part of societies). This would require a 3–5 year transition period, as recently managed by the Charities Act for registration as a charity.

How can we minimise the costs for societies in the transitional period?

Resources would need to be dedicated to the implementation of new legislation, providing an educational campaign and advisory support for changes. Online processes alone would not be enough – a variety of communications and support would be necessary, with seminars and advisory service to provide templates and assistance.

Community Law Centres could be funded for role of advisory support and assistance with changes, as this would be an appropriate way of resourcing the non profit sector as part of instituting changes within it.

Yours sincerely

Liz Evans	Marie Appleton	Pam Thomlinson	Noeline Holt
National President	National Finance Chairman	National Councillor	Executive Officer
Rural Women NZ	Rural Women NZ	Rural Women NZ	Rural Women NZ