

5 October 2011

Professor Geoff McLay
Law Commission
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Dear Professor McLay

Reforming the Incorporated Societies Act 1908 – Law Commission Issues Paper

Thank you for the opportunity to submit on the Law Commission Issues Paper on the Incorporated Societies Act.

I am writing on behalf of the New Zealand Organisation for Rare Disorders (NZORD), a Charitable Trust that provides collaborative networks and support to a range of rare disease groups in the health and disability sector. I am also involved in various other collaborative arrangements among NGOs in the health and disability sector, including being the chair of the Carers Alliance, an unincorporated association of 42 national NGOs in the health and disability sector with an interest in issues concerning family carers. I am not making this submission on behalf of any other body apart from NZORD, but my perspective on issues affecting NGOs and the voluntary sector are informed by my involvement with a large number of relevant organisations.

I think the Law Commission has made a strong case that the rules in the current Incorporated Societies Act are superficial and do little to create an operating environment that encourages high-quality performance and governance among NGOs. The Issues Paper quite correctly points to the fact that the Charitable Trusts Act provides a popular alternative for the incorporation of voluntary sector organisations. While charitable trusts are regarded by many in the sector as a much more efficient organisational form for NGOs, the legal problems you have identified in relation to incorporated societies may also be applicable in relation to charitable trusts, and it would be appropriate to consider both these forms in the same review.

The most important point I think the Law Commission needs to be fully aware of is that any revision of the legal framework for NGOs (whether they are incorporated societies, charitable trusts or unincorporated associations) has strategic implications for the delivery of social services in New Zealand, including by health and disability NGOs. Since the 1980s, the government in New Zealand has progressively withdrawn from direct service provision of a vast range of social and health services, and the gap has generally been filled by NGOs that have the legal form of incorporated societies or charitable trusts.

Many of these NGOs are funded through the Ministries of Health, Social Development, Justice, and Education, Te Puni Kokiri and the Department of Internal Affairs. Crown entities such as the ACC, Housing New Zealand and DHBs also have service delivery contracts with many NGOs.

What this means is that NGOs have effectively become service-delivery extensions of the public sector in New Zealand. The Crown literally spends billions of dollars a year on services provided through NGOs, and the quality of the performance of this sector is critical to the success of New Zealand society. The value of the kinds of small clubs and societies that the legislation envisages is far outweighed by the value and strategic importance to the community of NGO service delivery organisations. The legal forms and rules provided for the sector do not adequately recognise these differences, or the importance of NGOs to society as a whole.

The Law Commission Issues Paper creates a welcome opportunity to consider the appropriateness of the legal forms and rules under which this sector operates. However I would suggest that providing modern and tidy legislation is insufficient as an end in itself. The most important objectives are having legislation that addresses actual issues that affect the performance and efficiency of the NGO sector, and which encourages improved performance and capacity and best practice governance. I would like to think these objectives are achievable through this Law Commission project.

I hope the Law Commission is already consulting closely with the Office for the Community and Voluntary Sector, as well as the Crown organisations which tend to contract for social and health services provided by NGOs in their sectors.

Often the organisational structures or features of NGOs reflect the requirements of their funders. For example, the branch structures of many health NGOs reflect the localised funding through separate DHBs rather than any other regional distinctions. Sometimes funders require separate bodies to be established to receive particular funding.

Clearly one of the features of service delivery by NGOs is that they tend to be systemically underfunded, and there is little financial scope for capability building in the sector. The funders indirectly pay the compliance costs of the sector, so they will have views about the trade offs between compliance costs and accountability, and which compliance costs represent value for money, and which do not.

There is no point in developing legal rules in isolation from the requirements and expectations of government when so much of the value and strategic activity of the sector is funded by government. Thinking about the accountability for multi-million dollar service delivery contracts with IHC or Plunket, or the appropriate governance for Primary Health Organisations throughout the country, is much more relevant and important than thinking about the AGM for the local sports club, or the efficient management of very small groups for rare health or disability interests. However those small organisations also need an effective framework and good governance provision. Having the Law Commission encourage funders to think strategically about the sector would in itself be a useful contribution.

An observation I would make is that the membership concept which underpins the incorporated society model tends to be cumbersome and inefficient. Virtually every organisation in the community which has a membership base has been suffering from falling membership numbers. The appetite for participation and identification with particular groups seems to have reduced in New Zealand and other comparable societies. This seems to be the case for organisations as diverse as sports clubs, churches, scouting groups and political parties. An organisational form which is locked into a membership model seems to me to be backward looking, and risks becoming increasingly anachronistic in the future.

In the health and disability sector, the most important stakeholders are more likely to be recipients of services than traditional “members”. In my experience, the popularity of the charitable trust as a form of incorporated body is because it lacks the cumbersome membership aspects of the incorporated society. Of course there is a degree of artificiality in charitable trusts being an incorporated “board”, but it is generally regarded as a convenient legal form.

In principle, I think the proposal to distinguish between members' benefit and public benefit societies is an attractive idea. The charitable trust form already allows for this distinction in practice, but it is clearly not an optimal model. There is also an obvious opportunity to align the legal rules for public benefit societies with the role of the Charities Commission.

Conclusion

I think there is a real opportunity for the Law Commission to take a strategic approach to ensuring there is a fit for purpose legal framework for a modern and effective NGO sector. I suspect the issues – and the opportunities – may be more strategic for New Zealand society than the Law Commission might have expected.

The best idea in the Issues Paper is the most radical; a unified legal form for public benefit societies. The thinking for a new legal form for these sorts of organisations that is optimised for publicly funded service delivery on a not for profit basis is not developed in the Issues Paper, but it is the most forward thinking and potentially significant idea that is raised.

Yours sincerely,

John Forman
Executive Director