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Comment by Transparency International New Zealand (TINZ)

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TINZ is pleased to have the opportunity to comment on this Bill. We will focus on areas relevant to the TI global purpose – to hold power to account for the common good. Our submission is also informed by Recommendation 6 of our National Integrity System Assessment 2018 update:

*Civil society (non-government organisations and other associations) and the business sector also need to recognise the benefits to them and to society that flow from operating in a high integrity society and to play their part in strengthening integrity systems.*

In forming this submission, we sought feedback from our Board and Members with Delegated Authority. In particular two of our Board members and our CEO have contributed: Dr Gillian Greer, John Hall and Julie Haggie each have substantial experience working for or with NGOs including incorporated societies, peak bodies, industry bodies, charities and regulatory agencies.

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1. TINZ agrees that it is necessary for the 1908 Act to be replaced. The bill promises to promote high-quality governance and make the law of societies more accessible. In that respect the purposes of the Act are very clear.
2. TINZ suggests that the preamble to the Bill include Parliament's recognition of the importance of Incorporated Societies to the fabric of society: delivering services, enhancing the economy, wellbeing, culture and professional behaviour, contributing to the Living Standards Framework and the SDGs.
3. It is encouraging that the bill recognises that societies are primarily responsible to their members. As a corollary of this they should be governed by their members and promote the trust and confidence of its members. TINZ agrees that this is the correct view of a society.
4. TINZ supports the general requirement for increased transparency from Incorporated societies, and some of the checks and balances that this will require. We particularly support the requirement for organisations to maintain procedures for the settlement of disputes between members in a manner consistent with natural justice and for societies to have a method for resolving such disputes in such a manner. This appears to be practically sensible, although we disagree with the amount of detail required.
5. TINZ also supports the variety of measures designed to improve record keeping habits, but we think that proportionality of risk should underpin consideration of penalties.
6. TINZ fears that in some areas the Bill jumps ahead of practicality. Legislative change that affects communities should take a 'do no harm approach'. It should enable and support organised community activity and aspirations, not be a hindrance. Communities form organisations around

activities and aspirations – to provide services, cultural activities, sporting opportunities and multiple other community benefits. People become members of organisations because they support what they do, or because they want to be involved doing the mahi. TINZ absolutely supports improved governance behaviour. However, we do not think the case has been made that extensive and prescriptive requirements will engender or support positive behaviour change. We have some concerns that some of the prescriptive requirements will hinder community activity.

7. The relevant Cabinet Paper notes that the *advantage of becoming an incorporated society is that the society takes on a legal existence, meaning it can sign contracts, sue and be sued*. We are not clear whether research has been undertaken into why community groups have chosen to take on the incorporated society status. Our experience is that legal existence is used to:
  - a) Establish other legal arrangements for a group of people who have a common aim: such as a common bank account, to apply for funding and to manage finances to support the aim.
  - b) Enable the clarification of a common purpose.
8. We are somewhat concerned at the limitations of analysis on the problem definition for this bill, as noted in the [Regulatory Impact Statement](#)<sup>1</sup>. Considering the impact this Bill will have on many Incorporated Societies, we are disappointed not to see consideration of:
  - a) Current risk to and benefit for organisations (financial and social) relative to increased compliance requirements;
  - b) The impact on the community due to organisations not setting up as incorporated societies or losing their status because they are unable to meet the standards.
9. TINZ agrees with the increased clarity about societies not being used to provide pecuniary gain for members. A society's purpose should lie elsewhere. We also support the 'safe harbour' provisions relating to a set of lawful transactions between member and the Society. We assume that 21(4)(e) includes payment of Board Director fees where Directors are members of the Incorporated Society.
10. TINZ supports the reduction to a minimum number of ten members to hold Incorporated Society status. It is a reasonable limit. We trust that there would be a process of support from the Registrar before removal.
11. 26(1)(f) prescribes detail including 'procedures of the committee of the society'. Whilst we appreciate this is an effort to provide a 'model constitution' the level of prescription in the bill seems obsessively granular, disproportionate to the perceived risk and somewhat patriarchal for what are private organisations. The detail appears to be inconsistent with the overriding principle noted in the Regulatory Impact Statement:

*"Societies are private bodies that should be self-governing and largely free from unnecessary state interference. Societies value the flexibility that the current regime gives them to adapt their*

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<sup>1</sup> "The nature and rigor of the analysis is limited by the need to rely on subjective judgment about the size of the potential impacts. That reliance arises because of the difficulties in reliably quantifying how changes either individually or as a whole translate into improved sector efficiency and effectiveness. Attempting to quantify many of the benefits in dollar terms could amount to little more than guesswork that could overstate the amount by hundreds of percent or understate it by amounts considerably in excess of 50 percent. The largest individual constraint is the absence of aggregate information on the register of incorporated societies, either for all societies or particular subsets of societies. The register does not provide any aggregate information about societies' purposes, goals, activities, or size (using such metrics as annual revenue, annual expenditure, total surplus or deficit, total assets or human resources)." **Regulatory Impact Statement A New Act for Incorporated Societies: Government response to the Law Commission's report, MBIE 2014**

*operating environment to suit their purposes and their culture. That flexibility should be retained as much as possible.”*

12. We note that throughout clause 26 ‘Procedures’ are referred to in several instances. In NGOs, procedures are generally set by Executive Committee yet this section suggests that procedures must be included as part of the constitution. This would be untenable for many societies, so we assume it is not so. The wording could be clarified to be clearer that the constitution will give the Committee power to set these procedures, but not that the procedures must be detailed in the constitution.
13. Conflict of interest –TINZ is keen to see greater transparency and integrity including around interests and conflicts, but we think that clause 57 is far too prescriptive. If it becomes stuck in legal stone it will be unhelpful in supporting organisations to appreciate the contextual variations of interests, sometimes outside of family connections – friends, professional colleagues and the like, sometimes personal. A requirement to maintain, review and declare against an interest register is sufficient. If this detail is maintained then we suggest that 57(1)(b) should include a ‘sibling’. We also offer a scenario (relating to our earlier query on proportionality) that if this Bill is passed, a community environmental society that meets to put plants in holes and has family, friends or cultural members will have to maintain an interests register relating to the pool of funds used for tools. Is this meeting the purpose of the Bill?
14. Also of concern to TINZ is the detailed section on enforcement. Whilst it is good to have greater clarity for the legal and drafting professions, it will have to be seen how societies negotiate legal complexities. TINZ worries that these provisions may lead to increased litigation or compliance penalties that are disproportionate to risk. Along with several other NGO organisations, TINZ is concerned that the enforcement on small organisations, with only 10-20 members is bureaucratic overkill.
15. TINZ is concerned about the implications of officers’ duties (clauses 53-55) for small incorporated societies. These duties are modelled on those in the Companies Act 1990. Companies are given powers that can potentially compromise accountability for the purposes of incentivising investment, and are rightfully subject to increased officer duties. Societies, however, are the building blocks of organised democracy. Many societies are composed of relatively small numbers of people who come together to pursue a common cause that is not for financial gain. Societies attract many people including to representative leadership positions. These officers may not be financially adroit – nor should they be required to, depending on the level of risk that applies.
16. The Regulatory Impact Statement states that “The report from the Law Commission submissions and other Commission stakeholder engagement that there are widespread contraventions of officers’ duties, much of it due to ignorance of the law. Including a clear set of duties in the new IS Act will reduce the risks and provide a clear framework for resolving disputes in relation to alleged contraventions.” It seems that the reason for the high level of prescription and additional duties is the belief that there is widespread ignorance of governance duties and that this generates such a risk of failure (despite a lack of evidence or that) so it is better for the law to be very prescriptive than to leave the active governance to the committee or officers to manage or to focus on a risk based approach. We think there needs to be a balance between requiring private membership organisations to successfully govern their affairs and regulatory support to enable that to happen. We are not convinced that a clear case for this level of prescriptive requirements has been made.

17. TINZ also queries whether the complex legal questions that are involved in assessing the solvency test (set out in section 54) are rightly imposed on the officers of societies.
18. The promotion of good governance and the accessibility of the law are two of wider society's highest and most valuable ideals. They can and should be adhered to and implemented. However, this ought to be done in a way that is inclusive and empowering of those who lack financial, governance and administrative skill, staff and background. If Parliament wishes these new and detailed provisions to have empowering and not alienating effects, then it needs to prove that it has a plan to improve officer governance literacy. It should not take a harsh approach to enforcing this new bill on small entities which make a valuable contribution.
19. The requirement under clause 103 to manage a registered office raises the matter of the definition of registered office and also of the current nature of record keeping for many incorporated societies (small and medium) where essential records are maintained electronically. This may have been less the case when the Law Commission wrote its report. Many incorporated societies (small to medium) operate perfectly well in the cloud and do not have physical space. If officers are required to be named, then what is the problem being solved by clause 103?
20. TINZ is an example:
  - It has no physical office due to funding constraints, but it is a fully functioning organisation. Its infrastructure is largely remote, it holds a PO Box – is that the registered office?;
  - Its members and Directors are mostly based in New Zealand but have also lived overseas; their physical addresses are irrelevant to the proper operation of TINZ;
  - It uses a range of digital software to connect paid personnel and volunteer staff, and to run its functions including the maintenance of records, storage, membership lists, communications, financial management and security of data;
  - There are limited physically held records (held in plastic boxes in storage which would not be a registered office);
  - Should it be wound up it would seek for its electronic records to be archived.
21. **Register of Members.** We support the requirements for the maintenance of a register of members. However, Clause 73 is an issue if contact details implies home addresses. The law needs to be current. Digital residence is now normal. The clause should refer to relevant contact details (relevant to the work being done and the ability to communicate with members).
22. We are aware of concerns expressed by other NGOs that Incorporated Societies may be required to make their registers public. Incorporated societies are private, not public entities, and there may be good reasons for maintaining privacy of membership. We cannot see any specific clause that would force publication of member lists, and the society appears to have the ability to withhold information under clause 75, but organisations have interpreted it to be so, and so there should be clarification on this point.

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