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By email to UnincorporatedAssociations@lawreform.ie

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Re: Liability of Clubs, Societies and Unincorporated Associations

Dear Ms Coen,

I am writing following publication of the Law Reform Commission's Consultation Paper on Liability of Clubs, Societies and other Unincorporated Associations ("the **Consultation Paper**") and appreciate your patience in awaiting our views.

The Society welcomes and supports the Commission's work in the area and the complex issue of liability and legal consequences for non-profit clubs, societies and other unincorporated associations¹.

The below views have been formulated by our Business Law Committee, members of which will be glad to meet to further discuss these issues if that would assist your important work.

Introduction

We note the following models (as envisaged in the Consultation Paper) as possible approaches to reforming the law of unincorporated associations:

Model 1

Change the law to create "non-profit registered associations". Under this model, if an association is registered, it would become a legal entity separate from its members.

Model 2

Under this model, if an unincorporated association meets certain criteria, it would become a separate legal entity from its members, without a requirement for registration.

Model 3

This model envisages an unincorporated association retaining its current legal status (i.e. not a separate legal entity) but the law would be amended so that it becomes easier to make an unincorporated association liable in contract, tort and criminal law. We do not propose to comment on Model 3 further in this submission as we consider, on

¹ In the interest of transparency we note the non-profit status of the Law Society of Ireland and also the Law Club of Ireland which applies to the courts for alcohol licences.

balance, for the reasons detailed by the Commission in the Consultation Paper, Model 3 to be unsatisfactory.

Mindful of the complexity of the Commission's work in the area, the Society agrees that the current legal status of unincorporated associations is not satisfactory for the reasons outlined by the Commission in the Consultation Paper. This submission sets out our views in respect of the above models and confirms which one, we believe, should be adopted.

A new legal structure would provide much needed certainty for officers and members of unincorporated associations, as well as third parties who deal with those entities. It could promote protection for individuals and greater transparency.

The law of unincorporated associations rests in common law with little or no statutory intervention. The law in this area is not well understood and it may be of surprise, even to those involved in unincorporated associations, that no separate personality exists and that officers and committee members etc. hold primary legal responsibility for the liabilities of the entity.

In June 2021, there were 19,410 unincorporated associations in this jurisdiction. Given the important role of many in the non-for-profit sector (for example, in serving the needs of marginalised and disadvantaged groups, in advancing the public interest and social purposes), the law as it stands is not satisfactory.

Many organisations commence as unincorporated associations of individuals before selecting another legal structure as activities develop. We are particularly cognisant that a change in the law may create additional burdens for smaller unincorporated associations (and those that interact with them).

If too onerous, a requirement of registration could dissuade certain associations from engagement whereas having a default presumption may not provide sufficient legal certainty. We have borne this in mind when considering the Consultation Paper.

As your request for observations does not require us to deal with each question posed, we make some general observations following consultation with the Litigation and Human Rights Committees of the Society and then specific recommendations around how best to achieve the necessary reforms.

1. Conditions to be Satisfied

Unincorporated associations which satisfy certain statutory conditions should be accorded separate legal personality.

We agree with the observation (in Section 3 of Chapter 4 of the Consultation Paper) that unincorporated associations availing of the option to convert into companies limited by guarantee (CLGs) would help solve many of the legal problems identified in the Consultation Paper.

While some may consider this option costly, we take the view that the reforms should not create a disincentive to use of the CLG which provide the attractive benefit of limited liability for members. All unincorporated associations should be informed of the benefits of incorporation as a CLG and encouraged to incorporate as either a CLG or an Association with Legal Personality (as explained at section 4 below).

While we note that the vast majority of unincorporated associations are engaged in non-commercial, not for profit activity, some are established in pursuit of a single issue e.g. a commercial joint venture or a political campaign. Such activities should not fall within the scope of the reforms.

2. Model 1 V Model 2

In considering whether model 1 or 2 provides the best path to reform, we noted in relation to general partnerships (other than LLPs) that no registration is required before a partnership qualifies and benefits from the body of laws set out in the Partnership Act 1890.

In other words, once partners are engaged in a partnership (as defined), the requirements of the 1890 Act are met and its provisions automatically apply (per Model 2). However, partnerships are profit-making activities, operating in a commercial environment and managed in pursuit of a commercial mandate. Conversely, the majority of unincorporated associates are managed by volunteers and the sector is characterised by a general absence of formality.

In our view, Model 2 (whereby an association which satisfies prescribed criteria would automatically benefit from separate legal personality) should not be adopted. Further to the disadvantages of this model (as outlined in the Consultation Paper), we are concerned that the model lacks sufficient clarity, transparency and legal certainty as to whether an association qualifies and benefits from separate legal personality.

Further, third parties would have no means of independently ascertaining the status of the association and would have to undertake enquiries and due diligence in order to ascertain its legal status.

These significant disadvantages outweigh the obvious cost advantages of the informal methodology and attractiveness of Model 2.

While Model 1 involves the State incurring certain costs e.g. establishing and maintaining a public register and also cost for associations themselves having to register and maintain the registration, it offers a legal regime which is both transparent and certain. Once an association satisfies the requirements of registration and is duly registered, its officers, members and third parties benefit from the Registrar's validation exercise, which we recommend and presume would be carried out (similar to that which is carried out by the Companies Registration Office on the incorporation of a company).

It is vital that legislation to give effect to Model 1 would not create an unduly burdensome registration and maintenance regime, otherwise it risks replicating the CLG regime under the Companies Act 2014. As such, it should address only the minimal, essential requirements.

3. Other Jurisdictions

New South Wales (NSW)

The approach adopted in New South Wales provides a useful pathway for (Model 1) reform, being a common law jurisdiction, under which companies of various kinds can be incorporated with a similar degree of regulation as that provided by our Companies Act 2014.

In 1984, NSW enacted the [Associations Incorporation Act 1984](#) whereby an unincorporated association, formed for defined non-profit purposes and which files its constitution at the prescribed stage, automatically benefits from separate legal personality under the relevant legislation (which is relatively brief in nature and not unduly burdensome, given the benefits which accrue).

South Australia

This State's [Associations Incorporations Act 1985](#) (which, again, is concise and accessible) provides a system of registration for unincorporated associations which appears substantially similar to that of NSW.

Scotland

In 2009, the Scottish Law Reform Commission issued a [report](#) on unincorporated associations and (following a public consultation on a change to their law using models similar to Models 1 and 2 identified by the LRC), it recommended that:

- i. reform should not be conditional on a registration system; and
- ii. the benefits of separate legal personality should be available provided that an association satisfies certain requirements (per Model 2).

We note, however, that these recommendations were not implemented by the UK Government.

4. Specific Recommendations

Following its detailed consideration of the Consultation Paper, the Society makes the following recommendations:

i. Name/Registration/Identifier

Unincorporated associations with legal personality should be given the name "Association with Legal Personality" or "ALP" to distinguish same from associations without a separate legal personality and from CLGs.

Whether registration in a public register should be a requirement for treatment of an unincorporated association as a separate legal entity requires further consideration.

We have carefully considered the advantages and disadvantages of introducing a system of mandatory registration as a precondition to creating an ALP.

ii. Model Constitutions

Noting that both NSW and South Australia have issued model constitutions for associations seeking to avail of their registration systems, we consider it desirable to provide a statutory model constitutive/framework document for newly formed associations (with separate legal personality). By analogy, registered charities will already have a form approved by the Charities Regulator and a similar model constitutive/framework document for newly formed associations (with separate legal personality) would promote best practice and good governance.

iii. Conditions to be Satisfied

An unincorporated association should be treated as a legal entity separate from its members if it satisfies the following conditions:

- a) it has at least two members;
- b) it has adopted a constitutive/framework document or rules containing specified minimum provisions;
- c) its objects as set out in the constitutive document do not include making a profit for its members;
- d) it must have an official address in Ireland;

- e) its management must be carried on wholly or mainly in Ireland; and
- f) certain prescribed particulars of the unincorporated association are filed in a public registry, see below.

One of the conditions for attribution of separate legal personality should be that the unincorporated association has adopted a constitutive/framework document or rules which include the following matters:

- a) the name of the association;
- b) the purpose for which it exists (whether this must include certain legal objects needs consideration);
- c) the categories of and criteria for membership;
- d) procedures for election or appointment of those managing the body (including office-holders, if any);
- e) powers and duties of office-holders (if any);
- f) distribution of the assets of the body in the event of dissolution;
- g) procedure for amendment of the constitutive/framework document;
- h) procedure for meetings of the association; and
- i) maintenance of accounts.

If an ALP can only benefit from separate personality if registration occurs, the Registrar will have to be satisfied that the ALP's constitution/rules satisfy the above requirements.

If registration is the chosen route, an ALP must:

- a) provide the Registrar of ALPs, together with or prior to an application for registration with:
 - i. a copy of the ALP's constitution/framework/rules;
 - ii. details of the ALP's official address in Ireland;
 - iii. names and addresses of office holders;
- b) notify the Registrar of any change of any of the above particulars.
- c) be required to maintain the registration for the protection of the individuals involved and the public (for example, on an annual basis to confirm the registration and to otherwise update the register as changes occur).

Its accounts should also be filed or made available to a member or third party upon request.

iv On Assets and Ownership Provision

- a. The legislation should provide that, on registration, all property held for/beneficially owned by the association shall, by operation of law, become vested in the ALP, subject to any trusts/equities then existing.
- b. There should be a statutory default rule governing the distribution of an ALP's assets on dissolution.

- c. If the association is a charity, the default rule should be that the assets are distributed to a similar charity however, further consideration is needed in relation to non-charitable associations, where it may not always be appropriate that assets are distributed to the (then) members.
- d. All rights and liabilities of the association should automatically vest in the ALP on registration.
- e. Consideration should be given to the assets of a dormant ALP (and the circumstances where an ALP will be deemed to be dormant) and whether same should vest in the State (in the same way as assets of dissolved company do).
- f. The Registrar should have power to remove an ALP from the Register and the consequences of the loss of separate legal personality should be clear.

v *On Office Holders' Liability*

- a. An office-holder or member of an ALP should not incur personal contractual liability by reason only of acting as an office-holder or member.
- b. An ALP may incur liability to one of its members for loss or damage caused by the wrongful act or omission of another member while acting on behalf of the association. This would reverse the current position where an association cannot be liable to a member.
- c. Breach of the registration obligations would render the ALP, and any office-holder or other member managing its affairs with whose consent or connivance or as a consequence of whose neglect the offence was committed, liable to a fine. The question of whether the benefits available to an ALP should be removed requires consideration.

vi. *On the Execution of Documents by an ALP*

- a. The legislation should address the manner in which documents may be executed by an ALP and could do so as follows:

A document is signed on behalf of an ALP if it is signed on its behalf by an office-holder or, if it has no office-bearer, by either:

- *a person responsible for the management of the ALP; or*
 - *a person authorised to sign the document on behalf of the ALP.*
- b. Other requirements of the Conveyancing Law Reform Act 2009 (i.e. those relevant to the execution of documents by a body corporate) should apply *mutatis mutandis* to ALPs.

vii. *On the Status of an ALP*

- a. On registration, an ALP should become a body corporate with perpetual succession and with the capacity to sue and be sued in its own name.
- b. Service of legal proceedings on the official (Irish) office of an ALP should be sufficient.

viii *On Publicity Attaching to an ALP's Name and Address*

- a. An ALP must set out, in any document sent or published by it, its name and address in Ireland at which service of any document relating in any way to its activities will be effective.
- b. An ALP must keep the following at that address:
 - I. a copy of its constitutive/framework document;
 - II. a list of names of office-holders or, if it has none, persons responsible for its management;
 - III. a written record of the date of adoption of its constitutive/framework document (if adopted after the coming into force of new legislation); and
 - IV. financial statements (and be required to provide free copy of same on request made either in writing or electronically within 28 days of a request being made).

viii. *On Non-Compliance With Certain Obligations*

The Society recommends that, in the event of a failure to ensure compliance with an ALP's obligations regarding disclosure of its address or keeping/making available documents/information on request, the office-holders (or, if none, the persons responsible for its management) shall be liable concurrently with the ALP for any obligation undertaken on behalf of the ALP while the failure subsisted.

ix. *On the Objects Clause*

An ALP should be able to limit its objects (in which case provisions analogous provisions to sections 1182 and 1183 of the Companies Act 2014 would apply) so that, for example, the validity of an ALP's actions should not be called into question on the ground that there is a lack of capacity by reason of anything in its constitutive document.

x. *On Encouraging Registration – Potential Benefits*

- a. Statutory measures should encourage not-for-profit associations to incorporate as CLGs or ALPs, including for example:
 - i. An exemption from publication or applying to Court in the absence of an objection. (Currently, liquor licences can be obtained by unincorporated associations under the Registration of Clubs (Ireland) Act 1904. Clubs are required to apply to Court and publish applications every year)
 - ii. a stamp duty exemption for any transfers of immovable property and any other assets which attract a liability to stamp duty.
- b. Consideration should be given to encouraging unincorporated associations which are National Governing Bodies to require their member clubs to register as ALPs.

xi. *On Property Vesting in an ALP*

- a. Where a right in property is held in trust for the members of an association which acquires legal personality as an ALP, the property should automatically vest in the ALP.
- b. Where a right in property is held jointly by the members of an association which acquires legal personality as an ALP, the members may transfer the right to the ALP.

xii. On Employment

Any legislation introducing ALPs should contain:

- a) a statement to the effect that a change of employer will not be deemed to have occurred when an association acquires or loses legal personality; and
- b) confirmation that the acquisition or loss of separate legal personality does not break continuity of employment for the purposes of relevant employment law.

xiii. Administrative Actions in Planning Law

- a) We are conscious that companies and unincorporated associations are used as vehicles to legally challenge administrative actions by public bodies, particularly in the context of planning decisions. We note that Section 249(10)(c)(iii) of the Draft Planning and Development Bill 2022 proposes to curtail the *locus standi* of certain applicants to issue judicial review proceedings and only certain qualifying companies may have *locus standi*.
- b) It will be important to ensure that any proposed changes to the legal status of unincorporated associations would be reflected in any proposed changes to the planning regime.

xiv. Liability for Historical Claims

- a. Additional consideration should be given to how existing unincorporated associations can be pursued for historical claims (e.g. by mandating that a nominee or committee of nominees be appointed to accept service of proceedings or by the inclusion of a disclosure requirement in respect of the named members when an alleged event occurred).
- b. It is critical that entities which are the focus of the Consultation Paper are legally accountable for every valid claim and liability however, the current situation creates clear obstacles to access to justice and the vindication of victims' rights.
- c. With regard to historical claims against religious orders, we considered the Australian approach to the issue, which allowed for retrospective accountability for historical claims. While this may to be desirable, we consider it likely that defendants would challenge the retrospective element of any analogous Irish legislation.

Conclusion

I hope that these observations and recommendations will assist in your consideration of these issues and again, we would welcome the opportunity to engage further if that would be helpful.

Yours sincerely,



Mark Garrett
Director General