

25 September 2013

Co-operative and Community Benefit Societies Bill

draft Recommendations of the Law Commission and the Scottish Law Commission

1. Section 1 of the 1965 Act: condition for registration as a community benefit society

Section 1(3) of the 1965 Act (as substituted by the 2010 Act) provides as follows:

“A society may be registered as a community benefit society only if it is shown to the satisfaction of the FCA that in view of the fact that the business of the society is being, or is intended to be, conducted for the benefit of the community, there are special reasons why the society should be registered under this Act rather than as a company under the Companies Acts.”

This wording derives from section 10(1) of the Prevention of Fraud (Investments) Act 1939.

The requirement to show “special reasons” why the society should be registered under the 1965 Act (or, before 1965, the 1893 Act), rather than as a company, has proved somewhat problematic.

The original regulator (the registrar of friendly societies) published guidance as to what would count as a “special reason”. The matters that were regarded as constituting special reasons were not matters applying only to community benefit societies, so it is not clear that the requirement for special reasons added much in practice.

The Financial Services Authority (now Financial Conduct Authority), on taking over the regulation of industrial and provident societies in December 2001, originally continued its predecessor’s practice.

On reviewing the position, the FSA decided to take the view - and act on the basis - that the fact that the society’s business is being, or is intended to be, conducted for the benefit of the community itself amounts to a “special reason” why the society should be registered under the 1965 Act.

This decision was based on the FSA’s interpretation of the intention behind section 10(1) of the 1939 Act, as gleaned from the speech made by the President of the Board of Trade when moving Second Reading of the Bill for that Act in the House of Commons (*Hansard 21 November 1938, vol. 134 col. 1382*).

Given the above, in practice there is now only one requirement, namely that the society’s business is being, or is intended to be, conducted for the benefit of the community.

There is merit in aligning the wording of the provision with this practice.

This alignment would bring the wording as regards community benefit societies in Great Britain into line with the wording as regards such societies in Northern Ireland. The corresponding provision of Northern Ireland legislation - section 1(2) of the Industrial and Provident Societies Act (Northern Ireland) 1969 - was amended by the Industrial and Provident Societies (Northern Ireland) Order 2006 (SI 2006/314) so as to contain only the requirement that the society's business is being, or is intended to be, conducted for the benefit of the community.

We recommend that the provision that reproduces section 1(3) of the 1965 Act should provide that a society may be registered as a community benefit society only if it is shown to the Financial Conduct Authority's satisfaction that the society's business is being, or is intended to be, conducted for the benefit of the community. [LCR 1]

Effect is given to this recommendation in clause 2 of the Bill.

2. Sections 5 and 5A of the 1965 Act: society's name and charitable status to be used

Section 5(6) of the 1965 Act provides that a society's name must be mentioned in the documentation and websites mentioned there.

Paragraphs (a) to (d) of section 5(6) describe in some detail various kinds of business documentation, whilst paragraph (e) applies to all of the society's "business correspondence and documentation that takes electronic form".

There are a number of reasons to harmonise the approach taken in section 5(6):

- the current structure and wording is unnecessarily complicated,
- there is no reason to distinguish between documents in electronic form and those in other forms,
- at present (for reasons unknown) the offence under section 5(7) of the 1965 Act does not apply to business letters (section 5(6)(b)), though it does apply to business correspondence in electronic form - this omission could be remedied when harmonising the overall approach.

The same issues arise on section 5A(1) of the 1965 Act (except those relating to the offence), which makes similar provision in relation to certain charitable societies' charitable status.

We recommend that:

- **the provision that reproduces section 5(6)(b), (d) and (e) of the 1965 Act should apply to all of a society's business correspondence and other business documentation (in any form),**
- **the provision that reproduces the offence under section 5(7)(b) of that Act should apply in relation to all of these documents (as well as in relation to notices, advertisements and other official publications),**
- **the provision that reproduces section 5A(1)(b), (d) and (e) of that Act should apply to all of a society's business correspondence and other business documentation (in any form) (and the provision that reproduces the offence under section 5A(5)(a) of that Act should have effect accordingly).**

[LCR 2]

Effect is given to this recommendation in clauses 11 and 12 of the Bill.

3. Section 39(6) to (10) of the 1965 Act: supply of annual return etc by placing on website

Section 39(6) to (10) of the 1965 Act provide that an annual return may, with a person's agreement, be given to a person by - in essence - placing the return on a website and informing the person that it is there.

The following documents must be supplied with a society's annual return:

- certain auditors' or other reports (see section 11(5) and (5A) of the 1968 Act),
- any group accounts (see section 13(7) of the 1968 Act).

Section 39(6) to (10) of the 1965 Act are applied in relation to group accounts (see section 13(8) of the 1968 Act) but are not applied in relation to the auditors' and other reports.

There does not seem to be any reason not to apply them to the reports (and there is every reason to apply them). Indeed, given that the reports must in almost all cases be supplied with the return, it is hard to see how - strictly speaking - societies can currently take advantage of section 39(6) to (10) of the 1965 Act.

We recommend that the provision that reproduces section 39(6) to (9) of the 1965 Act should apply in relation to the annual return and the documents that must be supplied with it, and that the provision that reproduces section 39(10) of that Act should apply in relation to the absence from the website of any such return or document. [LCR 3]

Effect is given to this recommendation in clause 89 of the Bill.

4. Section 39A(3) and (4) of the 1965 Act: year of account for societies registered on or before 7 January 2012

The definition in section 39A of the 1965 Act of a "year of account" for societies registered on or before 7 January 2012 is difficult to follow.

Subsection (2) gives the date when a year of account begins. This is unproblematic and, since the section now covers only existing societies, will always be the end of the previous year of account.

Subsection (3) gives the date when a year of account ends. It must be in the period 31 August to 31 January before the "appropriate date", and must be either –

- (a) the date of the last balance sheet published by the society in that period, or
- (b) if the last balance sheet published by the society falls either side of that period, 31 December in that period.

Subsection (4) defines the “appropriate date” as 31 March of “the year in which an annual return is required by section 39 to be sent to the FCA”. This appears circular, as section 39(1) requires an annual return to be given in respect of a “year of account”.

These provisions could be simplified by removing references to the appropriate date. The intention of section 39A must be that, for any year of account (following the previous one, which must end in the period 31 August to 31 January), the year end falls in the next period 31 August to 31 January.

We recommend that the provision that reproduces section 39A(3) and (4) of the 1965 Act should provide that - in respect of societies to which section 39A applies, and subject to the provision that reproduces section 39A(6) - the year of account ends –

- **in the period beginning with the 31 August following the beginning of the year of account and ending with the following 31 January, and**
- **either with the date of the last balance sheet published in that period or, if there is no balance sheet in that period, with 31 December. [LCR 4]**

Effect is given to this recommendation in clause 77 of the Bill.

5. Section 58(4) of the 1965 Act: offence of making false statutory declaration

Section 58(4) of the 1965 Act provides that, as regards the making of a statutory declaration required by that provision, “any person knowingly making a false or fraudulent declaration in the matter shall be guilty of a misdemeanour or, in Scotland, an offence.”

There are general offences for making false statutory declarations, namely:

- section 5 of the Perjury Act 1911 (for England and Wales),
- section 44(2) of the Criminal Law (Consolidation) (Scotland) Act 1995 (for Scotland).

These general offences are committed where a person knowingly and wilfully makes a statement in a statutory declaration that is false in a material particular.

It is difficult to see when the specific offence under section 58(4) of the 1965 Act would be used, given that the conduct covered by the general offences is essentially the same as that covered by the specific offence.

There does not therefore seem to be a reason to retain the specific offence.

We recommend that, in reproducing section 58(4) of the 1965 Act, the offence under that provision of making a false or fraudulent declaration is not reproduced. [LCR 5]

Effect is given to this recommendation (by omission) in clause 122 of the Bill.

6. Section 3A(10) and 9A(5) of the 1968 Act: persons ineligible for appointment

Section 3A(10) and 9A(5) of the 1968 Act apply section 8(1) of that Act (persons ineligible for appointment) in relation to the appointments mentioned in those provisions (appointment to produce certain accountant's reports).

They do not apply section 8(2) of that Act, which also makes certain persons ineligible for appointment.

There does not appear to be a reason not to apply section 8(2). It is assumed that section 8(2) was not applied on the basis that there was no need to apply it as the societies in question would not have, or be, subsidiaries.

It is likely to be the case that the societies do not have, and are not, subsidiaries, because the appointments are in respect of societies who have exercised the power in section 4A of that Act, and this power does not apply to societies which are, or have, subsidiaries (see section 4A(3)(c)).

However, there is a possibility of the society being or having a subsidiary because appointments under section 3A(5) or section 9A occur after a year of account in which the power under section 4A has been exercised (by which time the society may have acquired, or become, a subsidiary).

There is no reason for section 8(2) of the 1968 Act not to apply in relation to such appointments.

We recommend that the provision that reproduces sections 3A(10) and 9A(5) of the 1968 Act should provide that the provision that reproduces section 8(2) of that Act applies in relation to the appointments to which sections 3A(10) and 9A(5) apply. [LCR 6]

Effect is given to this recommendation in clause 91 of the Bill.

7. Definition of “enactment”

In the following provisions being consolidated, references to other statutory provisions are made in different ways, as follows:

- sections 19(2) and 72A(5) of the 1965 Act refer to an “enactment” without defining this term;
- sections 7E(4), 29B(1) and 29D(1) of the 1965 Act refer to an “enactment”, which is defined as including enactments comprised in Acts of the Scottish Parliament (“ASPs”) and subordinate legislation, whether made under an Act or ASP;
- section 255 of EA 2002 refers to an “enactment” without defining this term;
- section 2(1) of the 2002 Act refers to “statutory provisions”, which is defined as including the provisions of any instrument made under an Act;
- section 1(5) of the 2003 Act refers to an “enactment”, which is defined as including enactments comprised in ASPs and subordinate legislation, whether made under an Act or ASP.

In the absence of definition, the position as regards “enactment” is (as regards Scotland and Wales) as follows:

- Section 5 of, and Schedule 1 to, the Interpretation Act 1978 provide that, except where the contrary appears, “enactment” does not include an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.
- References in legislation to an “enactment” would (subject to any contrary intention) be regarded as covering Measures and Acts of the National Assembly for Wales. Whether they cover an instrument made under such a Measure or Act depends on the interpretation of the provision in question.

The above references to statutory provisions are, in general, intended to catch all relevant statute law. Although the likelihood is that little will turn on it, it seems sensible to clarify that this is the case, and to apply a common definition of “enactment” to these provisions.

We recommend that the provisions which reproduce the provisions mentioned above should apply in relation to enactments, defined as including:

- **subordinate legislation within the meaning of the Interpretation Act 1978,**
- **Acts of the Scottish Parliament and instruments made under them, and**
- **Measures and Acts of the National Assembly for Wales and instruments made under them.**

[LCR 7]

Effect is given to this recommendation in the definition of “enactment” in clause 149 of the Bill.

8. Extent: Channel Islands

The position under the enactments being consolidated as regards the Channel Islands is as follows (any reference to an Act is to the Act as originally enacted):

- 1965 Act: extends to the Channel Islands (s.78(2)), with power to modify by Order in Council (s.75);
- 1967 Act: does not extend to the Channel Islands
- 1968 Act: power by Order in Council to extend to any of the Channel Islands with or without modifications (s.22(1));
- 1975 Act: extends to the Channel Islands (s.3(5));
- 1978 Act: extends to the Channel Islands (c.3(4));
- EA 2002 s.255: does not extend to the Channel Islands (s.280(2));
- 2002 Act: power by Order in Council to extend Act or any instrument under it to any of the Channel Islands with or without modifications (s.3(1)); power to make transitional, incidental and supplementary provision (s.3(2));
- 2003 Act: same as 2002 Act (s.8);
- 2010 Act: same as 2002 Act (s.8(5)).

The usual modern practice, reflected in the 2002, 2003 and 2010 Acts, is to confer a power by Order in Council to extend any provision of an Act to any of the Channel Islands, with or

without modifications. This power may - as in the case of the 2002, 2003 and 2010 Acts - also cover instruments made under an Act.

As regards the extension of the Bill to the Channel Islands:

- there is no reason to take a different approach in relation to different provisions of the Bill,
- there is no reason not to adopt the usual modern practice referred to in the above paragraph.

We recommend that - rather than any consolidated provision extending directly to the Channel Islands - there should be a power by Order in Council to extend any consolidated provision (and any instrument made under a consolidated provision) to the Channel Islands, with or without modifications, and that there should be a power by such an Order in Council to make transitional, incidental and supplementary provision. [LCR 8]

Effect is given to this recommendation in clause 152 (and by omission in clause 153) of the Bill.

9. Provisions applying in relation to some but not all of the enactments being consolidated

There are a number of provisions of the 1965 Act that refer to that Act (or the provisions of that Act) or apply in relation to that Act (or its provisions).

At the time of the 1965 Act, these provisions would have applied in relation to all enactments relating to industrial and provident societies (as the 1965 Act consolidated all such enactments).

Over the years, many changes to the law on industrial and provident societies have occurred by amending the 1965 Act. Where this has been done, the provisions that relate to that Act (or to the provisions of that Act) will automatically apply.

The position is of course different where changes to industrial and provident societies law have been made otherwise than by amending the 1965 Act.

In such cases, some general provisions have been applied (for example, sections 70A and 72 of the 1965 Act are applied in relation to the 1967 Act by section 7(2) of that Act), but no systematic approach seems to have been taken on this issue.

So, for example:

- section 16(1)(c)(i) of the 1965 Act refers to a society that has violated any provision of that Act (rather than any provision of industrial and provident societies legislation);
- section 44(1A) of that Act refers to an electronic address notified for the purposes of receiving notices or documents under that Act (rather than notices or documents under any industrial and provident societies legislation);
- the general offences in section 61 of that Act apply in relation to matters connected with that Act (rather than to matters connected with any provision of industrial

and provident societies legislation, though see section 18 of the 1968 Act as regards contraventions of the provisions of that Act).

There does not appear to be a reason for general provisions, references to the 1965 Act or references to the provisions of that Act not to apply in relation to all consolidated enactments.

We accordingly recommend that provisions that currently apply in relation to the 1965 Act or provisions of that Act (or to that Act or its provisions and some but not all of the other enactments being consolidated) should apply in relation to the consolidation Bill (or all of its provisions). [LCR 9]

Effect is given to this recommendation in the following provisions of the Bill:

- clauses 5, 6, 8, 15, 16, 30, 122, 127, 130 to 132, 142 to 146 and 148,
- paragraph 3 of Schedule 3, and
- paragraphs 10 to 12 and 18 of Schedule 4.

10. Section 25(2) of the 1965 Act

Section 25(1) of the 1965 Act provides that on the death of a member whose property in the society does not exceed £5,000, the society may distribute the property to such persons as appear to be entitled by law to receive it without the need for probate or letters of administration (or, in Scotland, confirmation). This provision does not apply where there is a nomination under section 23 of that Act.

Section 25(2) provides that in the case of certain “illegitimate” members, the society’s committee must deal with his property as the Treasury may direct.

That provision has been repealed in Scotland.

There does not seem to be a reason to treat persons differently based on whether they are “legitimate”.

The Treasury have indicated that they would not give a direction under section 25(2).

We accordingly recommend that section 25(2) of the 1965 Act is not reproduced. [LCR 10] [E&W only]

Effect is given to this recommendation (by omission) in clause 40 of the Bill.

11. Section 69 of the 1965 Act

Section 69 of the 1965 Act provides that county court registrars are to be remunerated for their duties under the Act in such way as the Treasury may direct.

The reference to registrars is to be read as a reference to district judges by virtue of section 74(3)

of the Courts and Legal Services Act 1990.

The Act does not impose duties on registrars (or district judges) as such, though the county court has a few functions under the Act.

The Treasury would not give a direction under this section, and the remuneration of district judges does not depend on this provision.

We accordingly recommend that section 69 of the 1965 Act is not reproduced. [LCR 11] [E&W only]

Effect is given to this recommendation by omission.