

EXECUTIVE SUMMARY

1. This Consultation Paper forms part of the Commission's Fifth Programme of Law Reform.¹ This project examines the law on civil and criminal liability as it applies to clubs, societies and other unincorporated associations. Many voluntary non-profit associations, clubs, societies and other groups that gather in pursuit of shared religious, sporting or other recreational interests are unincorporated associations. Such associations do not have a legal existence separate and distinct from their members: the association is simply the collection of members.
2. Many clubs, societies, associations and religious orders see no benefit in incorporating as a company. They rely on voluntarism and wish to avoid the costs and bureaucracy of more formal legal structures to organise their affairs. However, this has a number of important legal consequences. It means that:
 - (a) members can be exposed to personal liability for the wrongdoing of other members, in which they played no active part.
 - (b) members of unincorporated clubs, societies and associations who are injured cannot sue their own association, as doing so is treated by the law as suing oneself.
 - (c) suing unincorporated associations can be very difficult, as unincorporated associations cannot sue or be sued in their own name, rather individual members at the time of the relevant wrongdoing have to be identified.

¹ Law Reform Commission, *Report: Fifth Programme of Law Reform* (LRC 120-2019), Project 12.

- (d) because unincorporated associations have no legal identity of their own, they require trusts to be established, through which property is held for the benefit of the association. This may mean that assets held by an unincorporated association are beyond the reach of litigants and regulators.
3. In this Consultation Paper, the Law Reform Commission highlights an existing means of achieving legal protection from individual liability: the company limited by guarantee (CLG). It also proposes a number of possible reforms to try to make the law on liability of unincorporated associations clearer, fairer and more enforceable.

Background and Context

4. This project was partly prompted by the 2017 decision of the Supreme Court in *Hickey v McGowan*.² In that case, the plaintiff alleged that he had been sexually abused between 1969 and 1972 by a member of an unincorporated body called the Marist Order of Religious Brothers. The Supreme Court held that while the plaintiff was entitled to seek and obtain judgment against individuals who were members of the Order between 1969 and 1972 on the grounds of their vicarious liability as a group, he could not obtain judgment against the Order itself.
5. In simple terms, the judgment in *Hickey v McGowan* means that unincorporated associations cannot be held liable for wrongful acts committed by their representatives while acting on behalf of the unincorporated association. Liability potentially falls upon the individual personally responsible and, depending on the circumstances, on the other members, who may be found to be vicariously liable.

² [2017] IESC 6, [2017] 2 IR 196.

6. Even determining who is or was a member at a particular time can be difficult, and that is one of many barriers that face persons who wish to deal with or litigate against unincorporated associations.
7. The most striking feature of the law in relation to unincorporated associations is that it is unclear. That lack of clarity has consequences in every area of legal activity in which an unincorporated association might be involved:
 - (a) **Contract law:** unincorporated associations cannot be a party to a contract. Contracts will usually be concluded either by trustees or by club officers or other members who enter contracts on behalf of clubs rather than entering contracts in their own names. This may be unsatisfactory for members of unincorporated associations who enter into contracts on behalf of the association; equally it is unsatisfactory for third parties trying to contract with unincorporated associations because it is often unclear who is liable for breaches of contract. While suppliers and contractors may believe that they are contracting with a club, that is not the legal reality.
 - (b) **Statutory compliance:** legislation often purports to apply to unincorporated associations, but it does not specify how in practical terms laws designed for individuals and corporate entities apply to an association that is the sum of its members and has no separate legal existence. Further, legislation does not specify exactly how an unincorporated association is to be held liable - whether liability is imposed on the unincorporated association, on all the members of the unincorporated association, or the person responsible.
 - (c) **Ownership of property:** unincorporated associations cannot own property. Instead, legal title to property must be held by a trustee for and on behalf of an unincorporated association, or in the name of individual members or office-holders of an unincorporated association who act as trustees for and on behalf of an

unincorporated association. This may pose difficulties in accessing association funds and assets to meet liabilities.

- (d) **Criminal and regulatory enforcement:** little consideration has been given to adapting criminal and regulatory law to expressly include unincorporated bodies and to set out how fines will be met. It may be desirable to provide for criminal responsibility for associations as distinct from their members in certain circumstances, for example in health and safety law. Rules relating to criminal procedure are also under-developed in relation to unincorporated associations.

Law Reform Objectives

- 8. The Commission has set out a number of key objectives of law reform in this area:
 - (a) The objective of bringing clarity to the law on unincorporated associations
 - (b) The objective of protecting the interests of third parties dealing with unincorporated associations
 - (c) The objective of providing that the assets of an unincorporated association are available to meet its responsibilities
 - (d) The objective of providing that unincorporated associations can be sued in their own names
 - (e) The objective of clarifying the law on personal liability of members
 - (f) The objective of clarifying the applicability of existing legislation to unincorporated associations
 - (g) The objective of ensuring that existing legislation is enforceable in respect of unincorporated associations

- (h) The objective of removing the impediment to suing a club of which you are a member
- (i) The objective of minimising regulatory burdens.

An Existing Solution: The Company Limited by Guarantee (CLG)

- 9. The Commission has emphasised that the company limited by guarantee (CLG), provided for by the Companies Act 2014, is an existing mechanism that can be used to protect members of unincorporated associations and the third parties that deal with them. A CLG does not have share capital. It gives the protection of limited liability and the advantages of separate legal personality, which means that bodies organised as CLGs can own assets without the use of trustees, can enter contracts and can sue or be sued without the exposure of individual members to personal liability.
- 10. For smaller, more casual unincorporated bodies involved in low-risk activities, incorporation is often seen as unnecessary and a drain on resources. However, for larger bodies that own assets, enter contracts and operate with employees or volunteers similar to employees, the CLG is an available and sensible solution to many of the problems of unincorporation.

Law Reform Proposals

- 11. However, the Commission acknowledges that there are costs and regulatory burdens associated with incorporation as a CLG. The Commission has therefore given consideration to other means of achieving protection for both members and third parties dealing with unincorporated associations for groups that may wish not to incorporate. The Commission has presented three broad models for law reform:

Model 1: Legislate to create a “non-profit registered association”, by which separate legal personality could be gained by registration;

Model 2: Confer separate legal personality on unincorporated associations that fulfil specified criteria; and

Model 3: Do not confer separate legal personality, but specify how unincorporated associations are to be held liable in contract, tort and for offences, with a series of focused reforms that do not alter the legal status of unincorporated bodies.

12. Regardless of the legal form that a club, association or other unincorporated body takes, the use of trusts to hold funds and assets can put those funds and assets beyond the reach of litigants.
13. This is problematic from the perspectives of both members and third parties. In the Supreme Court case of *Hickey v McGowan*, O’Donnell J noted the need for reform, saying that if a defendant succeeded in having a judgment awarded in their favour against members of an unincorporated association:

“... the judgments are individual and whether or not such judgments will be met by insurance, or from assets which may be held for the benefit of the order more generally, may depend on the terms of the insurance, and indeed the terms upon which such assets are held, and perhaps the willingness and ability, of the order to make funds available to satisfy any judgment against an individual. Whether this is a desirable position as a matter of law and whether further changes should or could be made, is a matter which might usefully be considered by those charged with law reform.”³

14. While trust property held for the general purposes of the unincorporated association could be accessed by trustees for such

³ [2017] IESC 6 at para 57, [2017] 2 IR 196 at para 58.

purposes including liabilities, charitable trusts may be out of the reach of the trustees without statutory intervention.

15. In Australia this issue arose in the case of *Trustees of the Roman Catholic Church v Ellis and Anor*,⁴ where the New South Wales Court of Appeal found that an unincorporated association (the Church in this case) cannot sue or be sued because it does not have a legal existence or personality. The Court also held that the fact that the trustees held property for and on behalf of “the Church”, did not mean that trust property could be used to meet all legal claims associated with Church activities. This became known as the “Ellis defence”.
16. Following recommendations made by a Royal Commission into Institutional Responses to Child Sexual Abuse, and to address what was perceived to be an injustice, legislation was introduced in a number of Australian jurisdictions to compel the nomination of an appropriate defendant in such cases, addressing difficulties with vicarious liability, and to provide that liabilities could be met from trust assets.

Outline of this Consultation Paper

In **Chapter 1**, the Commission gives an overview of unincorporated associations and comparable bodies.

In **Chapter 2**, the Commission examines the issue of the civil liability of unincorporated associations.

In **Chapter 3**, the Commission examines legal and practical issues concerning the purported attribution of criminal liability on unincorporated associations in respect of certain offences.

In **Chapter 4**, the Commission looks at the approaches adopted in other jurisdictions and identifies potential law reform options to remedy the issues presented by the lack of clarity concerning the extent of civil and

⁴ [2007] NSWCA 117, (2007) 70 New South Wales Law Reports 565.

criminal liability of unincorporated associations in Ireland, including possible reform of the law relating to trusts.

This Consultation Paper differs slightly from the format of other Consultation Papers published by the Commission, in that questions are not asked at the conclusion of every chapter. This is because the various issues – civil, criminal and regulatory – are interconnected, as are the potential solutions. Accordingly, proposals for reform are considered comprehensively in the final chapter, which sets out a variety of approaches adopted in other jurisdictions before asking what approaches should be adopted in Ireland.

Consultees need not answer all questions and are also invited to add any additional comments they consider relevant.

Submissions can be sent in either of the following ways:

(a) You can email your submission—in whichever format is most convenient to you—to the Commission at UnincorporatedAssociations@lawreform.ie.

or

(b) You can post your submission to:

Law Reform Commission,
Styne House,
Upper Hatch Street,
Dublin 2,
Ireland.

We would like to receive submissions on this Consultation Paper no later than close of business on Wednesday **15 March 2023** if possible.

