



GUIDE TO THE INCORPORATED SOCIETIES ACT 2022

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PARRY FIELD LAWYERS

Guide to

THE INCORPORATED SOCIETIES ACT 2022



New Zealand has about 23,000 incorporated societies covering a broad range of activities and interests, from sporting clubs and hobbyists to community support organisations.

The legislation that defines the rights and responsibilities of those bodies and those who run them has recently undergone a long-overdue revision, resulting in the Incorporated Societies Act 2022 (the "new Act") which received Royal Assent in April.

Parry Field Lawyers have created this information booklet because every one of those 23,000 Incorporated Societies will need to take some action to meet the new provisions.

At the least, all will need to re-register, and almost certainly need to adopt a new constitution to be eligible for re-registration.

The changes may possibly be minor for some but will be more complex for others. For some, the new rules may be an opportunity to consider whether they continue as an Incorporated Society or whether a Charitable Trust structure, for example, would be more suitable.

Here you will find the information you need to empower you to proceed with confidence. Parry Field Lawyers have a long history of supporting community organisations and we would be happy to discuss your situation with you, especially when it comes to amending your society's constitution to meet the new requirements. You can contact us any time by email or phone. We have also conducted a number of online discussions on the new Act. Some very valuable questions and answers have come out of those sessions and these are included in an FAQ section at the back of this booklet.

NGĀ MIHI NUI STEVEN MOE

Partner, Member of Charities Services Sector Group, XRB Advisory Panel, EHF Fellow

PART 1 THE MAIN CHANGES

Brief History

Incorporated societies are a membership based legal structure. The incorporated society itself is a legal entity separate from its members, which allows the society to continue beyond its initial membership and makes the society liable for debts, for example. An incorporated society cannot exist for the financial gain of its members – it must exist for some other purpose.

The first New Zealand statute that provided for incorporated societies was the Unclassified Societies Registration Act 1895. This Act was only 18 sections long and allowed societies to become incorporated.

Twenty-three years later, Parliament introduced the Incorporated Societies Act 1908. Its 41 sections were barely changed over the next 114 years. In 2011 the Law Commission began its review of the old Act, focusing on modernising the old Act and giving more guidance to those running an incorporated society.

Membership

Membership is a key point of difference for incorporated societies compared to other legal forms. It is a source of strength, as a member-led organisation can draw on the enthusiasm of its member base.

Under *Section 74* of the new Act, a society must have at least 10 members to register as a society. This is a decrease from the 15 members required under the old Act (the Incorporated Societies Act 1908).

However, the old Act had no requirement for a continuous minimum membership; the new Act requires a minimum of 10 at all times, not just at registration. This will be something that societies need to keep an eye on – especially smaller ones.

A body corporate is still treated as being three members for the purpose of determining the number of members, as per **Section 14** of the new Act. Under *Section 75*, if a society has fewer than 10 members the Registrar may intervene and give the society six months to increase its membership, failing which the Registrar may apply to the High Court to put the society into liquidation or remove it from the register.

The new Act does not require a society to include the membership minimum in its constitution, but it may wish to do so because of the consequences of falling below 10 members.

Member Details

Both the old Act and the new Act provide that a society's constitution must set out how a person becomes and ceases to be a member of the society.

Under **Section 76**, a society's constitution must contain a requirement that a person consents to being a member of the society. Where a member is a body corporate, consent may be given in writing by a person acting under the body corporate's express or implied authority.

Under **Section 79**, a society must keep a register of its members which contains the following details for each member:

- Name;
- Last known name;
- Last known contact details (which at least includes a phone number, along with a physical or email address);
- The date on which they became a member; and
- Any other information prescribed by the regulations (if any).

The register must be updated as soon as practicable after the society becomes aware of the need for an update. The society's constitution must include its arrangements for keeping its register up to date.

Governance

COMMITTEE

The old Act only required a society to have officers. Under the new Act, a society must have a committee. The committee is responsible for managing the operation or affairs of the society and is defined in the Act as "the governing body of the society, however described (for example, a board)".

The society's constitution must stipulate the number of members that must or may be on the committee, and **Section 45** of the new Act sets a minimum of three. A majority must be members of the society, or representatives of bodies corporate that are members of the society.

FUNCTIONS AND POWERS

The society's constitution must also include the functions and powers of the committee. These are set out in *Section 46* of the new Act, which explains that the committee's function is to manage or directly supervise the operation and affairs of a society. The committee must therefore have all the powers necessary for managing, and for directing and supervising the management of, the operation and affairs of the society.

OFFICERS

Under the new Act, a member of the committee of a society is an officer, but an officer may also be:

- a natural person occupying a position that allows them to exercise significant influence over the management or administration of the society (such as a treasurer or chief executive): or
- any other natural person who is declared to be an officer by regulation.
- The society's constitution must include the requirements for the election and appointment of officers. Section 47 of the new Act requires that the officer:
- is a natural person;
- · has consented in writing to be an officer; and
- certifies they are not disqualified under Section 47(3) of the new Act.

There is a long list of disqualifications under section 47(3), but the list is largely similar to that in legislation regulating other legal entities. For example, it disqualifies those under 16 years of age or someone who is an undischarged bankrupt.

A society could include the qualifications of officers in its constitution alongside the procedure for their election or appointment, although the qualifications of officers could also be kept as a separate policy document.

REMOVAL OF OFFICERS

The new Act requires the society's constitution to include the grounds for an officer's removal from office. *Section 50* says that an officer may cease to be an officer if they are removed in accordance with the society's constitution, or if the officer:

- · resigns;
- becomes disqualified from being an officer under Section 47(3);
- dies; or
- otherwise vacates office in accordance with the society's constitution.

FURTHER REQUIREMENTS

The new Act requires the constitution to also include the following information:

- · the terms of office of the officers;
- how the chairperson (if any) will be elected or appointed and whether that person will have a casting vote if there is an equality of votes; and
- the quorum and procedure for committee meetings, including voting procedures.

The intention behind all of these new requirements is to improve governance for incorporated societies by setting out how they need to act.

OFFICERS' DUTIES

The new Act codifies some existing common law officers' duties. These duties are owed to the society, not its members, and are set out in *Sections 54-61* of the new Act.

In short, these include:

- duty to act in good faith and in the society's best interests;
- duty to exercise powers for a proper purpose;
- duty to comply with the new Act and the society's constitution;
- duty of care;
- duty not to create substantial risk of serious loss to creditors; and
- duty not to agree to the society incurring obligations that it cannot perform.

These last two were subject to some criticism in the final reading of the Bill, with some MPs arguing that they are more appropriate for commercial contexts where directors are well compensated. However, they have now been adopted here.

As a result of these new officers' duties and the wide definition of officer in the new Act, we suggest that incorporated societies have director and officer insurance.

CONTACT PERSON

Section 113 of the new Act introduces a new requirement for a society to have at least one (or up to three) contact persons at all times, available for the Registrar to contact if and when needed. Contact persons must be at least 18 years old and ordinarily resident in New Zealand (in accordance with Section 114 of the new Act).

How the contact person or persons will be elected or appointed must be set out in the society's constitution.

Financial Reporting

Part 3, Subpart 7 of the new Act sets out new accounting standards. Societies will need to prepare their financial statements in accordance with the standard that suits their size. For example, a small society may prepare their financial statement according to generally accepted accounting practice, a non-GAAP standard that applies for the purposes of section 102, or the requirements set out in section 104.

Under section 105 of the new Act, larger societies will need to have their financial statements audited.

Within six months of the balance date (which is the date specified in the constitution, adopted by the committee or 31 March), the society must:

- complete the society's financial statements for that balance date;
- date and sign those financial statements by or on behalf of the society by 2 members of the committee; and
- give copies of those financial statements to the Registrar for registration.

Meetings

The new Act expands on the old Act in setting out several requirements for general meetings in *Sections 84 to 93*. Meetings are important for an incorporated society – they are one of the key differences from other entities, so it makes sense that there are rules about them which had been lacking before.

TIMING OF ANNUAL GENERAL MEETINGS

The intervals between annual general meetings ("AGMs") must be set out in the society's constitution. Under *Section 84*, a society must call an AGM no later than 6 months after the society's balance date and no later than 15 months after the previous AGM. An exception may apply for the first AGM of a newly incorporated society, but this would not apply to an existing society re-registering under the new Act.

PROCEDURE AT AGMS

Unlike the old Act, the new Act is prescriptive and requires the constitution to provide for the information that must be presented at general meetings. As set out in **Section 86**, the required information is:

- an annual report on the operations and affairs of the society during the most recently completed accounting period;
- the society's financial statements for that period; notice by officers of conflict of interest disclosures under Section 63: and
- under **Section 84** of the new Act, minutes must be kept.

RESOLUTIONS IN LIEU

Under the new Act, a society's constitution should include whether and how resolutions may be passed in lieu of a general meeting. If allowed under the constitution, Sections 89 to 92 of the new Act will apply.

NOTIFICATION AND QUORUM

A society's constitution must provide for the manner and timing of calling general meetings, including notices of motion. It must also provide for a quorum and set out voting procedure for general meetings, including rules for proxies, and whether the quorum takes into account members voting by proxy, postal, or electronic means (if allowed).

Amendment Procedures

Section 30 of the new Act says a society may amend its constitution, in a manner provided by the constitution.

Every amendment must be in writing, approved at a general meeting by a resolution passed by the relevant majority (or by resolution passed in lieu of a meeting in accordance with section 89), and otherwise made in accordance with the society's constitution.

A 'relevant majority' means either a simple majority of the valid votes cast, or a higher majority if that is required by the constitution.

MINOR AMENDMENTS

Section 31 of the new Act sets out the procedure for minor amendments, such as amendments that have no more than a minor effect, correct errors or make similar technical alterations.

The committee must ensure written notice of the amendment is sent to every member in accordance with the society's constitution. It must include the text of the amendment and the member's right to object to it. If the committee does not receive an objection within 20 working days (or a longer period if specified in the constitution), the committee may make the amendment.

If an objection is received, then the committee may not make the amendment. This section 31 procedure must be set out in the society's constitution.

AMALGAMATION

The Law Commission noted in its report that the old Act had limited restructuring options, including no provision for amalgamation. In response to this, the new Act sets out a simplified version of the Companies Act 1993 amalgamation process in *Part 5, Subpart 2*. This should allow societies to join together, either into one of the societies or a new society.

Conflicts of Interest

The new Act requires an officer to disclose when they are interested in "a matter". A matter is defined in section 62(4) of the new Act as meaning a society's performance of its activities or exercise of its powers, or a transaction made or entered into, or proposed to be entered into, by the society.

Under Section 62 of the new Act, an officer is interested in a matter if they or one of their relatives may obtain financial benefit from it, or has a financial interest in a person to whom the matter relates, or if they are interested in the matter because the society's constitution says so.

However, an officer is not interested in a matter:

- · simply because they receive indemnity, insurance cover, remuneration, or other benefits authorised under the
- if the officer's interest is the same or substantially the same as the benefit or interest of all or most other members of the society due to their membership; or
- if the officer's interest is so remote or insignificant that it cannot reasonably be regarded as likely to influence the officer in carrying out their responsibilities under the Act or the society's constitution; or
- the officer's interest is of a kind that is specified in the society's constitution for the purposes of section 62(2)(d).

The starting point then is to work out if there is a conflict using those criteria. Not everything is a conflict.

DUTY OF DISCLOSURE

Under **Section 63** of the new Act, as soon as practicable after an officer becomes aware of their interest in a matter, the officer must disclose the details of the nature and extent of the interest (including monetary value if possible) to the committee, and record it on the interests register.

That register must contain all disclosures made under section 63. It is kept and maintained by the committee, and may be inspected by an officer at any reasonable time as set out in Section 73 of the new Act.

CONSEQUENCES OF AN OFFICER'S INTEREST

An officer with an interest in any matter cannot vote or take part in a decision of the committee relating to the matter, or sign any pertinent document, but if the committee allows it the officer may take part in discussion relating to the matter and be present when it makes a decision. If half or more of the officers are interested in the matter and therefore cannot vote, the committee must call a special general meeting to determine the matter under **Section 64(3)**.

The new Act covers a number of other procedures to be followed in case of a conflict of interest, including the committee's responsibility to inform members as soon as practicable if it becomes aware of a failure to comply with sections 63 or 64.

The new Act gives some flexibility, with some permissible amendments to the conflict of interest disclosure procedure. For example, under **Section 67** of the new Act, a society's constitution may negate, limit or modify any provisions of sections 63, 64, 65(1) and 73 as long as the changes still satisfy the conditions prescribed by the regulations (if any).

But some parts of the new Act cannot be altered by the society's constitution, including:

- **Section 65(2)-(3)**, which explains that any failure to comply with section 63 or 64 does not affect the validity of the new act, but this does not limit a person's right to apply for judicial review.
- Section 66, which says that regulations may require every member of the society to be notified or for notification to be made to the members as a group.
- Section 68(2)-(4), which says that a transaction cannot be avoided under section 68(1) where the society received fair value under it. Fair value is defined in Section 69 and the onus of proving fair value is set out in **Section 70**. Additionally, a transaction can only be avoided on the ground of the officer's interest, and a constitution cannot allow a transaction to be avoided in any circumstances other than those set out in the new Act.

- **Section 71**, which explains that if a third party has acquired property from a person other than the society for valuable consideration and without knowledge of the circumstances of the transaction under which the other person initially acquired the property from the society, the avoidance of a transaction will not affect the third party's title or interest to or in the property.
- **Section 72**, which reiterates that the conflict of interest procedure does not apply in relation to salary, wages or other payments paid to officers in accordance with section 24(1)(h), or an indemnity given or insurance provided in accordance with subpart 6.

Dispute Resolution

Unlike the old Act, the new Act requires, under sections 38 to 44, that the society's constitution includes dispute resolution procedures.

A society can develop its own dispute resolution procedures, so long as they are consistent with natural justice. (Section 39).

Clauses 2 to 8 of schedule 2 set out the disputes resolution procedures a society may decide to include. Should a society include the schedule 2 procedures, its dispute resolution procedures will be presumed to be consistent with natural justice according to section 41.

If a society's constitution does not contain dispute resolution procedures, under clause 6 of **schedule 1** the constitution will be treated as including those procedures set out in the Act.

Enforcement and Criminal Offences

Part 4 of the new Act sets out civil law enforcement provisions that explicitly state the orders a court may make, and who may apply for a court order. This could help, for example, a member of a society to apply to the court where they believe the society's constitution has been breached.

Subpart 6 of part 4 of the new Act sets out criminal offences. Infringement offences are less serious and include matters such as failing to notify the Registrar of amendments to the constitution. A society that commits an infringement procedure may be liable to a fine not exceeding \$3,000.

The new Act also sets out several serious offences, such as: making false statements; fraudulent use or destruction of property; falsification of register, records, or documents; operating fraudulently or dishonestly incurring debt; improperly using "Incorporated", "Inc", or "Manatōpū". These provisions supplement the dishonesty provisions in the Crimes Act 1961 and some of the offences could result in a fine of up to \$200,000 and/or a term of imprisonment of up to 5 years.

Name, Purposes and Winding Up

NAME

Similar to the old Act, the new Act requires the society's constitution to include its name. The Registrar must refuse to incorporate a society under a particular name if it doesn't meet requirements set out in *section 11*. These include:

- The name must not contravene legislation;
- The name cannot be identical or almost identical to the name of another society, company or body corporate;
- The last word or words of the name must be one or more of "Incorporated", "Inc", or "Manatōpū".

PURPOSES

Similar to the old Act, the new Act requires the society's constitution to include its purposes.

The Registrar must refuse to incorporate a society if its purposes include an unlawful purpose or the financial gain of any of its members.

WINDING UP

The new Act expands on the old Act, setting out particular requirements for the distribution of the society's property on liquidation.

The society's constitution must nominate a not-for-profit entity, or a class of not-for-profit entities, to which the society's net surplus assets should be distributed on liquidation or removal from the register. *Section 216* describes the procedure in more detail, such as where more than one entity has been nominated as the beneficiary.



PART 2 WHAT YOU SHOULD DO NOW

An incorporated society will continue to be subject to the old Act until it re-registers under the new Act. However, the Companies Office advises that as long as a society's constitution complies with the old Act, it can make changes to its constitution that reflect and include references to the new Act.

This means that your society can start to think now about what changes it will need to incorporate into its constitution. Parry Field Lawyers can help you with this, just as we have already helped many societies update their rules to reflect the new Act.

We encourage you to begin discussions with your society around the changes. It will take time to agree to the required changes for your society's constitution, and you may even find that a society is not the best legal vehicle for you (see Part III).

Re-registration Process

According to Companies Office guidance, regulations to support the new Act need to be developed before the re-registration process opens, probably on 5 October 2023. Societies would then have two and half years, to 5 April 2026 – the "transition date" - to re-register.

In order to re-register, the society's constitution must meet the requirement of the new Act and include the information set out in **section 26** of the new Act.

We can help you ensure your constitution is up to scratch before re-registering under the new Act, including ensuring your constitution provides for the changes set out above.

The *first schedule* to the new Act sets out the re-registration process.

An application must include or be accompanied by:

- The information prescribed by the regulations;
- The society's proposed name;
- At least one contact person's name and contact details;
- A copy of the society's proposed constitution; and
- The fee prescribed by the regulations.

'Regulations' mean the regulations as set out in the new Act. An existing society may amend its rules in accordance with *clause 9* or make a new constitution in accordance with *clause 10* to ensure they comply with the new Act's requirements.

There may be grounds for the Registrar to refuse to incorporate a society, including non-compliance of its name, purposes or constitution. However, the Registrar may still re-register the society on condition that the non-compliance is addressed within a reasonable time. If it is not, the society may be removed by the Registrar.

What Happens to Your Society After Re-registering?

Clause 11 of the new Act provides that a society will continue as the same legal entity after re-registration. Subject to rights or obligations imposed by the new Act or its new constitution, the property, rights and obligations of the existing society will not be affected, nor will any proceedings of the existing society.

The Consequences of Inaction

Where an existing society does not re-register and is still incorporated under the old Act, they will cease to exist at the transition date and be deemed to have been removed by the Registrar as per *clause 12*.

If this happens, its surplus assets will be distributed according to *part 5 subpart 5* of the new Act. However, the Registrar, or the court in prescribed circumstances, has the power to restore an existing society to the register under *section 185* or *section 188*. Note this cannot be done if six years has passed since the existing society ceased to exist. Clause 12(3) of schedule 1 sets out what happens where a society's application to re-register has not been fully determined by the transition date.

Registering a New Society

Until societies can register under the new Act, any wholly-new society will need to incorporate under the old Act then re-register when the new Act is in force. Therefore we recommend a new society drafts its constitution to comply with the new Act to make re-registering more straightforward. Companies Office has advised that as long as a society's constitution complies with the old Act, a society can make changes to its constitution that reflect and include references to the new Act.



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PART 3 WHICH MODEL IS RIGHT FOR YOU?

For those who are interested in pursuing a purpose or cause that benefits the community, the vehicle you use may be critical in ensuring your efforts are effective and that any assets you hold are protected.

At Parry Field Lawyers we believe that the advent of the Incorporated Societies Act 2022 is an opportune time for some incorporated societies to consider whether that sctructure remains the most appropriate model for their aims and activities.

For some groups, a charitable trust may be a more appropriate vehicle.

Incorporated Society

- Governed by the Incorporated Societies Act 1908, now being replaced by the Incorporated Societies Act 2022.
- Members can come and go without affecting the vehicle's identity.
- Minimum number of 15 members, or 10 under the new Act (body corporate members count as three individuals).
- Usually used by sports clubs, cultural groups, etc. that see benefit in wider involvement.
- ACCOUNTABILITY: officers are accountable to the members.
- ADMINISTRATION COSTS: annual financial statements must be filed and annual general meetings held.
- CONTROL: democratic control of the vehicle and its activities by its members. Inefficiency may result if majority of the members hinder the society's purposes. There are some stories of members ousting officers, but in our experience this would be very rare.

Charitable Trust

- Governed by the Charitable Trusts Act 1957 / Trust Act 2019.
- We recommend at least three trustees (or an odd number) to prevent conflict.
- ACCOUNTABILITY: individuals (a.k.a trustees) need to operate in accordance with the trust's deed or be held personally liable for breaching their duties as trustees.
- ADMINISTRATION COSTS: proper records required for activities undertaken, etc. Trustees must meet regularly to make decisions as required by the trust deed.
- CONTROL: decisions are made by a select few which may mean greater stability and efficiency.

Conflict between the trustees however could adversely affect the performance of the trust. As trustees appoint each other, the ability to change hands of controlling power may be difficult.

Various factors must be considered before committing to a vehicle. We generally find that a charitable trust is the most flexible of the two. However, it is important that you consider how your operations are likely to look like. Imagine the future. Will your vehicle advance or hinder your ability to effect your purpose?

Is the Incorporated Societies Model Right for Your Organisation?

By Steven Moe & Craig Fisher

The Incorporated Societies Act was first passed in 1908. After a reform process kicked off in 2011 and many years of delays, a new and updated Act has finally received Royal Assent. The changes focus on improving the governance framework and modernising the provisions that apply to this form of entity.

With about 23,000 entities registered as incorporated societies with the Companies Office, and an estimated 9,000 of those being registered charities with Charities Services, many groups will be affected.

Because there must be a minimum of 15 members of an incorporated society under the 1908 Act, a lot of people should be interested in this change. And yet how many of us can relate to the occasional difficulty in securing a quorum for the AGM? As with any requirement to revisit the foundation constitution of an organisation, which this new legislation will require, we think this is an excellent time to ask some bigger questions of incorporated societies. Some such fundamental questions might include:

- is there still a need for our organisation?
- is a membership organisation the most appropriate structure?
- should we merge or join another organisation to be more impactful? and
- should we be structured as we currently are? For example, should we have branches?

When we purchase a car we think about what we will use it for – convertible, or off road? In the same way, the 'legal vehicle' we use to achieve our purpose may need updating from time to time. This is the perfect time for incorporated societies to ask themselves questions about their legal structure.

Many are also nearly as old as the 1908 Act. The world and how we do things has moved on. So, is the incorporated society in question still fit for purpose to carry on successfully and sustainably into the future? With so many of these entities in existence, they clearly have a part to play, particularly for member-based groups like sports clubs.

However, the requirements introduced by the new Act provide the chance for such organisations to revisit their structures. This is because the new legislation will require every incorporated society to re-register and update its constitution as well as ensuring its officers meet the requirements to hold their positions.

If a group is going through that process, then it might also be timely to ask the bigger question at the same time: is this structure best? Operating in this area we have seen a trend in recent years of incorporated societies shifting to become charitable trusts. With officers who are elected, the member-based approach of an incorporated society tends to become far more political than a charitable trust structure. The president of an incorporated society might call to say there are rumblings of discontent from a small but vocal minority and they will let us know how the AGM goes.

The next week a new voice might be on the end of the line, saying he or she was the new president and the direction of the incorporated society has drastically changed. Elections can also be disputed, with a newly-elected set of officers unable to obtain the bank account information and logins from former officers who claim the election was not valid and they are, in fact, the ones still in charge.

While some incorporated societies are small, others have significant amounts in their accounts. Resolving such situations takes time, results in damaged relationships and is costly. Crucially, this activity and the energy it demands also detracts from the actual core business that the incorporated society was established to deliver.

It will be appropriate for most incorporated societies to simply continue on with revised constitutions but for some a switch to a charitable trust structure may be better. Charitable trusts often have a more stable governance board with less risk of politicisation or being taken over. If a group chose to go down this path, it could still keep its registered charity number and tax donee status, a fact that many are not aware of.

However, the new charitable trust that takes on the legacy of continuing the purpose of the incorporated society would be a new legal entity, meaning contracts, employees and insurance must be moved across before it is wound up. Organisations are established to deliver on a specified purpose. Their choice of legal entity can have considerable impact on their effectiveness and efficiency at doing this

Steven Moe is a partner at Parry Field Lawyers and Craig Fisher is a consultant with RSM and a member of the ADLS Council

Contact Us

This document is not a substitute for legal advice and you should consult your lawyer about your specific situation. Please feel free to contact us at Parry Field Lawyers.

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FREQUENTLY ASKED QUESTIONS

PART 4 **FREQUENTLY ASKED QUESTIONS**

We received dozens of questions while running video sessions about the changes introduced with the Incorporated Societies Act 2022. These may answer many of the questions you may have.

- Q01: I'm particularly interested to understand your thoughts/concerns about the operation of the new act in relation to Residents Societies arranging insurance for their properties.
- **A01:** In short, the new Act is silent on insurance it just talks about indemnity insurance and so forth for officers.
- Q02: Does the new Act also affect charitable trusts?
- A02: No, only incorporated societies. For charitable societies incorporated under the Charitable Trusts Act 1957, they may choose to either continue to be incorporated under the Charitable Trusts Act 1957 or re-register under the new Act, per section 261. When the Act comes into force, societies will no longer be able to incorporate under the Charitable Trust Act 1957.
- Q03: Is there a template "model constitution"?
- A03: Not yet. As Companies Office had a constitution builder under the old Act we suspect they will do the same with the new Act.
- Q04: Do you think (as part of the updating process) that the first step should actually be to determine what the best structure is?
- **A04:** Yes! As we discussed in our talk now is a great time to b. determine whether the incorporated society model is the right legal vehicle for your entity.
- **Q05:** If you are already registered, and are asserting compliance with the Incorporated Societies Act at today's date, would you say 1908 or 2022?
- **A05:** We are in an unusual limbo period, where the old Act is still in force but the new Act is coming into force in stages. So, as your society is already complying with the old Act, we recommend you also comply with the new Act.

- Q06: Do they have to be paying members or could they be life members?
- A06: Subpart 5 of Part 3 of the new Act sets out the law around members. It is up to the society whether their members are paying members, however under section 26(1)(d) a society's constitution must include "how a person ceases to be a member of the society". So, a society can have life members, but there will still need to be a way for a person to stop being a member of that society.
- **Q07:** Where do 'boards' fit? As different to a committee?
- A07: A "committee" is defined in section 5 of the new Act as meaning "in relation to a society, means the governing body of the society, however described (for example, a board)". So as long as a board is the governing body of the society, it has the same meaning as a committee.
- Q08: When drawing up the new rules/constitution by the committee, is it best to ask members to review this before finalising and registering the updated under the new Act i.e., do we need special meetings to pass this new constitution?
- **A08:** Clause 9 of schedule 1 of the new Act explains the procedure for societies amending their constitution to allow them to register under the new Act. The amendments must be:
- a. in writing; and
- - approved at a general meeting of the existing society by a majority vote of those members entitled to vote and voting on the question; or
 - approved in the manner prescribed by the regulations; and
- c. signed by at least two members of the society.

You will therefore need to call a general meeting to pass this new constitution according to these procedures.

- Q09: I've heard that there are higher personal liabilities Q13: In terms of the offences I tend to do a lot of this on officers of a society if e.g., a building we own burns down for example. Could you tell us a bit more about this?
- A09: The new Act has not radically changed liability it depends on the situation and the insurance cover that the society has in place. The new Act explicitly mentions an officer is liable where they act in contravention of a banning order that disqualifies the person from being an officer (see subpart 7 of part 4 of the new Act), and when a society is deregistered the liability of officers for any act or omission while the society was registered (section 183 of the new Act). Sections 54-61 of the new Act also sets out existing officers' duties - these were already enforced by the court but not written in legislation.
- Q10: When can we start an amalgamation? Is this part in effect before the regulations are released?
- **A10:** As the amalgamation procedures are in the new Act, our understanding is that you will need to be registered under the new Act before an amalgamation can begin. The amalgamation procedures are set out in subpart 2 of part 5 of the new Act.
- Q11: Will part of the re-registration of an incorporated society allow for an organisational name change?
- A11: As long as the society's rules allow for a name change, and the new name complies with the requirements set out in section 11 of the new Act, then a society will be able to change its name on re-registration.
- Q12: Can an Incorporated Society submit new rules now that do not comply with the new Act with a view to submit compliant rules in the future when it intends to re-register?
- A12: Yes up until clause 4 of schedule 1 of the new Act comes into force (Companies Office guidance sugggests this will be October 2023) a society can submit rules under the old Act, meaning those rules do not need to comply with the new Act. However, for the sake of efficiency, we suggest societies looking to update their rules do so in light of the new Act.

- sort of filing paperwork without discretion from the Board as it won't otherwise get done. In terms of the offences – should employees get specific instructions in writing from the Board when filing paperwork with the Registrar?
- A13: We suggest it is best practice to have the Board sign of on documents before they are filed with the Registrar.
- Q14: Can a charitable company be formed following a formal conventional company for the purpose of community housing or cooperative housing?
- **A14:** To become a charitable company, the company will need to adopt a constitution including a charitable purpose. We have written a helpful article on charitable purposes (which you can find here) and would be happy to discuss your structure with you.
- Q15: Would be interested in more detail on section 94 of the new Act - cannot indemnify officers. What about D&O liability insurance?
- A15: Section 94 of the new Act sets out that a society can only effect insurance for "an officer, a member, or an employee of the society for
 - a. liability for any act or omission in their capacity as an officer, a member, or an employee of that society; or
 - b. costs incurred by the officer, member, or employee of that society in defending or settling any claim or proceeding relating to that liability."

Section 97 of the new Act sets out the types of insurance permitted for certain liability or costs.

Section 98 of the new Act allows a society to effect insurance for an officer for liability for a failure to comply with their officers' duties or any other duty imposed on the officer in their capacity as an officer. However, the society's constitution must expressly authorise the insurance for officers. This means that a society can have D&O liability insurance, but only where it is expressly provided for in the society's constitution.

Thanks to Robert Clarke, Acting Principal Policy Advisor at MBIE for your input on questions 2,8,12,19 and 22. It is appreciated.

- Q16: The new Act is clear on what small societies need to do, and small societies are also clearly defined (less than \$50k in assets and expenses), but what about societies that don't meet the definition of a small society?
- A16: To provide the answer, we contacted the XRB (where Steven is on the XRB Advisory Panel) and received this response "I have jumped through the trail of definitions in legislation, provided below for your information:

End result, an incorporated society that is not small will be required to report using the following XRB NFP Standards from the first year-end (balance date) after which the Society re-registers under the new Act.

- Incorporated Societies with over \$30 million annual expenditure — Tier 1 NFP XRB Standards
- Incorporated Societies with over \$2 million annual expenditure — Tier 2 NFP XRB Standards
- Incorporated Societies with annual operating payments over \$140,000 — Tier 3 NFP XRB Standards
- Incorporated Societies with annual operating payments less than \$140,000 — Tier 4 NFP XRB Standards.

REPORTING REQUIREMENTS PER THE NEW ACT:

Generally accepted accounting practice (GAAP) is defined by the new Act as:

Section 5(1) of the FRA 2013 defines GAAP as having the meaning as defined in section 8 of the FRA 2013 Act.

Section 5(1) of the FRA 2013 defines financial reporting standards as:

Section 5(1) of the FRA 2013 defines the Board as the XRB

A non-GAAP is defined by the XRB as a Tier 4 Standard. The Tier 4 Standard can be applied by an incorporated society that is not a "specified NFP entity". A specified NFP entity is one that has operating payments less than \$140,000.

This assumes an incorporated society meets the XRB definition of a Public Benefit Entity (PBE).

PBE's are reporting entities whose primary objective is to provide goods or services for community or social benefit and where any equity has been provided with a view to supporting that primary objective rather than for a financial return to equity holders.

- It is assumed that the majority of incorporated societies will meet this definition. But if for any reason, a society cannot, they will be required to report in accordance with XRB's Tier 2 For-Profit Standards NZ IFRS with reduced disclosures."
- Q17: For financial statements does this mean that the charities services 4 tier system of reporting will still be used and then another set of financial statements per the new Act?
- A17: See the answer above.
- Q18: Will there be a model/sample rules published to guide societies in creating new rules?
- A18: Most likely as Companies Office had a constitution builder under the old Act we suspect they will do the same with the new Act.
- Q19: Do you have templates for dispute resolutions?
- A19: Not yet we are working alongside our litigation team to develop a well-rounded template for dispute resolutions. Societies can also use schedule 2 of the new Act as a template for dispute resolution clauses.
- Q20: Date became a member is this the historical date which may not be known?
- A20: Yes section 79 of the new Act says that the register must contain the date on which the person became a member. You could ask members what date they became a member, or ask them to approximate the date. The regulations have not come out yet, but they may include some more detail around this. Another option would be to say "member at re-registration date" or something similar.
- Q21: Is there any part of the Act about where the members need to reside (in NZ only)?
- A21: No the Act does not specify where members need to reside. However, the new Act says a society must have its registered office in New Zealand (section 110) and the society's contact person must ordinarily reside in New Zealand (section 114). The regulations have not come out yet, but they may include some more detail around this.

- **Q22:** What is the procedure to change to a charitable trust?
- Q22: As we discussed in the talk you are setting up a new entity, which means you would need to set up a charitable trust deed and get trustees. The new charitable trust will also need to get a new IRD number, transfer contracts and employees over to the new entity. Charities Services will let you keep your charities registration number and you will keep your tax status (as long as your rules are charitable) if you also update the IRD. We have helped several societies with this so feel free to reach out if you have any more questions.
- Q23: Is an incorporated society that has charitable status actually a charitable trust?
- **A23:** No, it is an incorporated society with charitable status.
- **Q24:** Do all registered charities need to also be an incorporated society?
- **A24:** No an incorporated society can choose to register as a charity.
- Q25: How do we define a member? We have an AGM every year and invite everyone on our email list. Different people turn up every year. Our constitution does not require members to be financial members by way of annual subs, donations are voluntary.
- A25: This depends on how your constitution defines a member. Under the new Act members will need to consent to becoming a member and the society will need to keep a register of members, which may make it clear who is an actual member of the society.
- Q26: Is Community Networks Aotearoa a good source of resources?
- A26: Yes Community Networks Aotearoa has some great governance resources, which you can find here. The first module on governance is free! They also are linking to our resources, and we had the CE Ros Rice share on a recent Impact Call here: https://www.parryfield.com/aotearoa-impact-sector-updates/

- **Q27:** Do you have any resources that discuss whether a charitable trust or an incorporated society is better?
- A27: Yes we have an article on Charitable Trusts vs Incorporated Societies: Which is best? Additionally, Steven Moe and Craig Fisher (from RSM) wrote an article for the Auckland District Law Society on this topic (See Part III)
- Q28: Do members have to be financial members?
- **A28:** No it is up to the society whether they are paying members.
- Q29: When will the regulations come out?
- **A29:** Companies Office has indicated the regulations will come out late next year. You can find out more on their 'law changes for incorporated societies' page.
- Q30: Is it a challenge to convert from an incorporated society to another entity e.g., a charitable trust?
- **A30:** It is a relatively straightforward process, with the key stages being the drafting of your new Trust Deed and moving everything from the Society to the Trust. We have done this many times and would be happy to support you at every step of this transition.
- Q31: Is it \$50,000 profit or turnover to be a small society under the new Act?
- **A31:** Section 103(2)(b) of the new Act explains a society is, in respect of an accounting period, a small society if, -
 - (i) in each of the 2 preceding accounting periods of the society, the total operating payments of the society are less than \$50,000; and
 - (ii) as at the balance date of each of the 2 preceding accounting periods, the total current assets of the society are less than \$50,000; and
 - (iii) at the balance date of the accounting period, the society is not an entity described in section LD 3(2) of the Income Tax Act 2007 (a donee organisation).

- Q32: Do we need to ask existing members whether they agree to being a member?
- A32: Section 76 of the new Act explains that a person must consent to become a member of a society, so we interpret this as meaning existing members do not need to consent. However, under section 79 of the new Act you will need to record the date on which each person became a member, so when asking current members for this date you could always check in to make sure they agree to being a member of the society.
- Q33: In regards to disputes resolution, does this refer to disputes within members/Committee members or within the wider delivery of the organisation (e.g., client complaints etc)?
- **A33:** Section 38 of the new Act explains it refers to internal disputes, which could be disputes between members, officers and the society.
- Q34: We've had the same seven members since inception we are non-compliant with the 10-member minimum and so what do we do?
- A34: To register under the new Act you will need 10 members, so you could ask friends and family whether they are interested in becoming members. Now would also be a great opportunity to consider whether a society structure is right for your entity please feel free to get in touch with us and we would be happy to talk this through with you.
- Q35: Presumably new regulations could impact how we might write up our constitutional changes?
- A35: Yes, they could. However, it is still worth considering now what changes you will need to make under the new Act and then considering the changes under regulation when they come out.
- Q36: Do members need to renew each year at AGM?
- **A36:** They don't need to under the new Act. However, your society's constitution may have specific requirements for membership renewal that you need to check.

- Q37: Members have to be natural persons? So, members cannot be other charities?
- **A37:** It is officers who need to be natural persons. Members can be natural persons or bodies corporate. So yes, another charity could be a member.
- Q38: Can the members of the Governance board be personally and financially liable?
- **A38:** The short answer is yes, they can, but shouldn't be if they keep to the straight and narrow. For example, the offences in section 154, section 155, section 156 and section 157 of the new Act apply directly to officers.
- Q39: Our incorporated society is also a registered charity. Currently any changes to our constitution and rules needs to be approved by Charities Services. How will this be handled when our new constitution is put together?
- A39: Companies Office hold your rules, so you will have to fill in a form and upload them there as part of the re-registration process. If you are a registered charity (not all incorporated societies are), you will need to upload your rules there as well.
- Q40: Is it appropriate for a person employed by the incorporated society to be part of the governance body? Would this be a conflict of interest under the new rules?
- A40: It would be possible for the person to be employed, but they shouldn't be the ones making a decision about their own employment. The key is that as long the person employed is declaring conflicts and are not the one making decisions, it will be fine. Your rules may say something about paying officers, too.
- Q41: What if an organisation thinks being an incorporated society is not for them, so look into being a charitable trust but do not meet the requirements of being a charitable trust?
- A41: Come and have a chat to us if you're a registered charity and a society then you will likely be able to meet the requirements under the charitable trust format. When it comes to structure, you want to adopt the tool that will have the maximum impact and cause the least amount of stress. You can also build membership into the charitable trust structure.

- Q42: Is there a distinction between a member of an incorporated society and a volunteer for an incorporated society?
- **A41:** They are different because a member is someone who consents to being a member. You may want to clarify with volunteers what they are allowed to say if there is an issue with some of them representing the society for example, in an agreement for volunteers.
- Q43: Can membership of incorporated societies be free, if the person consents to being a member?
- **A43:** Yes it is up to each society whether membership is free or paid.
- Q43: If you are a charitable trust then do you need to update your rules?
- A43: You do not need to update your rules under the new Act. However, it may be wise to review your trust deed because of changes to the law brought in by the Trusts Act 2019.
- Q44: Do you need a common seal under the new Act?
- **A44:** No under section 123 of the new Act a common seal is optional.
- Q45: The register of members that has to be kept, do you have to have a specific/exact start date or can you just say a year?
- A45: Our view is that putting an approximate year will be fine, particularly for people who have been members for a very long time. The regulations have not come out yet, but they may include some more detail around this. Another option would be to say "member at reregistration date" or something similar.
- Q46: If we adopt new rules, will this affect our charity registration status?
- **A46:** No it will not, because the new rules will mirror/be similar to your previous rules. The only way it would affect your registration is if you adopted new rules that did not advance charitable purposes.

- **Q47:** Do you include life members on the membership register? What about honorary members?
- A47: The new Act doesn't differentiate between different types of members, but only talks about members of the society. For example, the new Act defines a "member" in section 5 as meaning a member of the society. If, for example, your honorary members act more as patrons of the society or your life members hold more of a life membership award, then it may be worth removing the term "member" from the role to avoid confusion.
- Q48: Is the offences section just codifying what exists in current practice or is it adding new liability?
- A48: Offences under the old Act were the generic offences set out in the Crimes Act 1961. Rather than introducing brand new liability, the new Act has six serious offences that supplement the dishonesty provisions in the Crimes Act. These offences are set out in subpart 6 of the new Act and are more targeted towards societies than those in the Crimes Act.
- **Q49:** Can an incorporated society own a company?
- **A49:** Yes, as long as the society's rules allow for it.
- **Q50:** Can you explain the essential differences between an incorporated society and charitable trust?
- **A50:** One of the key differences is an incorporated society is more of a democracy it is a member based organisation. By contrast, in a charitable trust the trustees are not elected. However, you can build members into your charitable trust model. In Part III we talk about these differences in more detail. Charities services also has an article on incorporated societies and charitable trusts, which you can find **here**.

